RONALD A. SORRI, Complainant

v.

L&M TECHNOLOGIES INC. AND SANDIA NATIONAL LABORATORIES, Respondents.

OHA Case No. LWA-0001

FINAL DECISION AND ORDER

On December 16, 1993, the Office of Hearings and Appeals issued the Initial Agency Decision in *Sorri v. Sandia National Laboratories and L&M Technologies Inc.*, a complaint of reprisal under Part 708, title 10, Code of Federal Regulations, "DOE Contractor Employee Protection Program" (Part 708). By agreement dated June 7, 1994, the Complainant, Sandia National Laboratories, and L&M Technologies Inc. have agreed, through their counsels, to the dismissal of L&M Technologies Inc. as a party to this proceeding. As the Secretary's designee for the purpose of reviewing an Initial Agency Decision, pursuant to section 708.11, title 10, Code of Federal Regulations, I have approved the dismissal of L&M Technologies Inc. as a party to this proceeding, and hereby affirm the elements of relief ordered by the Office of Hearings and Appeals.

ORDER

For the reasons stated above, I hereby order the following:

(1) L&M Technologies Inc. is dismissed as a party to this proceeding.

(2) Sandia National Laboratories shall assume full responsibility and liability for the following awards:

a. Sandia National Laboratories shall pay to Ronald Sorri the amount of $5,517.41 in back pay and expenses, based upon the amounts set forth in the Initial Agency Decision (plus interest accrued from December 31, 1993, to the date of payment).

b. Sandia National Laboratories shall pay attorney fees, witness fees, and other costs and expenses incurred by or on behalf of Sorri, to be determined by the Office of Hearings and Appeals as reasonable in bringing this complaint under Part 708.

c. The attorney for Sorri shall submit to the Office of Hearings and Appeals a full accounting within 30 days of the issuance of this Order.

(3) The Manager, Albuquerque Operations Office, shall assure that Sandia National Laboratories implements this Order immediately.

Dated: August 25, 1994

William H. White

Deputy Secretary

DAVID RAMIREZ, Complainant

v.

BROOKHAVEN NATIONAL LABORATORY, Respondent.

OHA Case No.LWA-0002, LWX-0013

FINAL DECISION AND ORDER

This is an appeal by respondent Brookhaven National Laboratory ("BNL"), of the Initial Agency Decision by an Office of Hearings and Appeals Hearing Officer who found, following two days of hearings, that complainant David Ramirez, an electrician formerly employed by a subcontractor of BNL, had established that his safety disclosures were a contributing factor in BNL's decision to lay him off on March 20, 1992. The Hearing Officer further found that BNL failed to satisfy its burden under the DOE regulations of proving "by clear and convincing evidence" that the challenged personnel action would have occurred even absent the claimant's protected activities. See 10 C.F.R. 708.9(d).

1. On appeal, BNL challenges the Hearing Officer's finding that safety disclosures were a contributing factor in BNL's decision to lay off the complainant. However, it is well established that this type of finding of fact will be overturned only if it is clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *See, e.g., Amadeo v. Zant*, 486 U.S. 214, 223 (1988), quoting Federal Rule of Civil Procedure 52(a). Measured against this standard, my review of the matter discloses no basis for overturning OHA's fact-based determinations.

2. Aside from challenging OHA's factual findings, BNL asserts that the Hearing Officer erred in ruling in a Supplemental Order that the complainant's award not be decreased by the $17,700 he received in unemployment compensation. In this respect, the Hearing Officer's decision is consistent with the majority view in similar employment contexts that damage awards will not be reduced because of such payments. *See, e.g., NLRB v. Gullet Gin Co.*, 340 U.S. 361 (1951); *Gaworski v. Commercial Finance Corp.*, 17 F.3d 1104, 1112-1114 (8th Cir. 1994).

Accordingly, the Initial Agency Decision and Supplemental Order are affirmed and hereby adopted as the Final Agency Decision in this case.

Dated: December 2, 1994

William H. White

Deputy Secretary

MEHTA, Complainant

v.

UNIVERSITIES RESEARCH ASSOCIATION, Respondent.

OHA Case No.LWA-0003, LWZ-0023

FINAL DECISION AND ORDER

This is an appeal by respondent Universities Research Association ("URA"), from the Initial Agency Decision by the Office of Hearings and Appeals ("OHA") finding that the complainant, Dr. Naresh C. Mehta, a scientist formerly employed by URA, had established that his disclosures of mismanagement were a contributing factor in URA's December 16, 1992, decision to terminate his employment. The Initial Agency Decision also reaffirmed OHA's previous denial of URA's motion to dismiss based on lack of jurisdiction under 10 C.F.R. Part 708.

1. On appeal, URA requests reconsideration of its motion to dismiss on jurisdictional grounds. URA contends that applying DOE's "whistleblower" regulation at 10 C.F.R. Part 708 to Dr. Mehta's complaint constitutes an erroneous retroactive application of an administrative regulation, since URA's contract was not modified to include a provision requiring compliance with the regulation until March 31, 1993. OHA found that there was no retroactivity issue because the alleged acts of reprisal occurred after April 2, 1992, the effective date of the regulation, and URA's contract was subsequently modified to require compliance with the regulation. See 10 C.F.R. §708.2(a).

Based on my review of the regulatory language, I conclude that OHA's interpretation is incorrect, and that the regulation should not be interpreted as applying retroactively to complaints involving alleged acts of reprisal that stem from disclosures, participations or refusals that do not concern health or safety where such alleged acts occur after the effective date of the regulation but before the underlying contract is amended to require compliance with Part 708. Non-retroactive application is consistent with the distinction drawn in Section 708.2(a) between health or safety complaints and "other" complaints, such as those involving waste, fraud, and mismanagement, and with the different approaches that the regulation takes in defining its applicability to health or safety and "other" complaints. Non-retroactive application also is necessary to harmonize Section 708.2(a) with the broader regulatory structure. See Section 708.6(d) (time limit for filing complaint).

Retroactive application of a regulation should not be inferred in the absence of express language to such effect. *See, e.g., Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1497-1501 (1994); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). The presumption against retroactivity is especially compelling where, as here, a contract must be modified in order to make a regulation applicable. *See Lockheed Aircraft Corp. v. United States*, 426 F.2d 322, 327-328 (Ct. Cl. 1970); McBride and Wachtel, 1 Government Contracts, §4.100[3] (1984).

Accordingly, I conclude that 10 C.F.R. Part 708 does not apply to complaints involving alleged acts of reprisal where such acts occur prior to the adoption or amendment of a contract requiring compliance with Part 708 and do not stem from health or safety disclosures, participations or refusals.

2. URA argues that the allegations raised by the complainant are not cognizable under 10 C.F.R. Part 708, since the alleged acts of reprisal and the filing of the complaint occurred prior to the effective date of URA's contract modification. My review of the record establishes that the alleged acts of reprisal occurred prior to March 31, 1993, the effective date of the amendment to URA's contract which required compliance with Part 708. Further, although URA placed the complainant on an extended leave of absence

subsequent to his termination, the last "retaliatory" act occurred when the complainant was issued the December 16, 1992, letter advising of URA's decision to proceed with his termination. Since there is no evidence of further acts of reprisal subsequent to the effective date of URA's contract modification that might support a finding of a "continuing violation," the regulation is not applicable to this complaint. *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250, 256-258 (1980); *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 134-137 (5th Cir. 1992).

3. URA also challenges OHA's determination that the parties' agreement to attempt to resolve this complaint through mediation estopped URA from challenging the applicability of the "whistleblower" regulation. Based on my review of the agreement, I have determined that the language of the agreement cannot fairly be read as a waiver of URA's right to assert jurisdictional defenses.

4. Although my conclusions on the jurisdictional issues make it unnecessary to reach the merits of this dispute, and the merits are not relevant to my conclusions on the jurisdictional issues, some comments on the merits are appropriate both to provide guidance for subsequent decisions of OHA and to communicate to the disappointed litigant the nature of legitimate competing interests. The Initial Agency Decision dated March 17, 1994, grants reinstatement to Dr. Mehta, a scientist employed by a DOE contractor, based on a finding that his complaints that procedures governing his access to a computer should be changed constituted protected disclosures of mismanagement under the "whistleblower" regulation. The decision concludes that these complaints contributed to his dismissal despite URA's contention that the dismissal was based on Dr. Mehta's performance and the relevance of his work. However, OHA's decision does not address whether any of the particular changes in procedures for access to the computer would have materially improved the utilization of the computer for its intended purposes, and such a determination could best be made with the assistance of experts and an opinion formed on the basis of expert testimony.

This illustrates the difficult distinctions needed in order to focus the remedy on appropriate cases of retaliation for exposures of fraud, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to employees or public health or safety. Undeniably, there is a degree to which differences of

opinion concerning the conduct of operations might legitimately contribute to the dismissal of an employee, particularly in combination with deficiencies in other elements of an employee's performance. However, this observation should not be construed as a conclusion based on a review of the record; rather, it simply points out that the Hearing Officer's analysis in this regard is inadequate. Equating a particular type of disagreement to "mismanagement" as contemplated by the "whistleblower" regulation demands a careful balancing lest the term encompass all disagreements between a contractor and its employees. While a conclusion with respect to the merits of a particular claim of mismanagement may not be required in all cases, there must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, at the same time granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork.

5. Finally, the Hearing Officer conducting the appeal is to be commended on the prompt decision on the complaint. This contrasts painfully with the time taken for disposition of the instant appeal. In a December 14, 1994, letter, Dr. Mehta reminded the Secretary of Energy that justice delayed can be justice denied. However, Dr. Mehta should understand that the "whistleblower" regulation is of relatively recent origin, and that DOE has a [sic] been a pioneer in attempting to establish protection for contractor employees that make specified types of disclosures. This appeal involved an important and difficult legal issue, and the issuance of this Final Decision and Order required a thorough legal analysis of this matter, which was completed within the last five weeks. For the reasons set forth above, the Initial Agency Decision is hereby reversed and the complaint is dismissed. This decision is the Final Agency Decision and Order in this case.

Dated: March 20, 1995

William H. White

Deputy Secretary

FRANCIS M. O'LAUGHLIN, Complainant

v.

BOEING PETROLEUM SERVICES, INC., Respondent.

OHA Case No.LWA-0005

FINAL DECISION AND ORDER

This is an appeal by complainant Francis O'Laughlin of the Initial Agency Decision by an Office of Hearings and Appeals ("OHA") Hearing Officer who found, following two days of hearings, that the complainant had not satisfied his burden of establishing by a preponderance of the evidence that he made protected safety disclosures to respondent Boeing Petroleum Services, Inc., a contractor of the Department of Energy's Strategic Petroleum Reserve, as required by 10 C.F.R. Part 708.

On appeal, the complainant challenges the Hearing Officer's finding that he had not met his burden of showing that he had made protected health or safety disclosures. The Hearing Officer found the disclosures cited by complainant represented intangible concerns regarding a proposed reorganization of Boeing Petroleum Services rather than evidencing any substantial and specific danger

to health and safety under 10 C.F.R. 708.5(a)(1)(ii). In assessing the complainant's allegations, the Hearing Officer correctly stated the applicable legal standard set forth in 10 C.F.R. 708.5. The complainant's challenge to OHA's decision, therefore, turns on the Hearing Officer's factual determinations, which are subject to being overturned only if they can be deemed to be clearly erroneous. *See, e.g., Pullman Standard v. Swint*, 456 U.S. 273 (1982); *Amadeo v. Zant*, 486 U.S. 214, 223 (1988), quoting Federal Rule of Civil Procedure 52(a). Measured against this standard, my review of this matter discloses no basis for overturning OHA's fact-based determinations as "clearly erroneous."

For the reasons set forth above, the Initial Agency Decision is affirmed and hereby adopted as the Final Agency Decision in this case.

Dated: January 31, 1995

William H. White

Deputy Secretary

HELEN GAIDINE OGLESBEE, Complainant

v.

WESTINGHOUSE HANFORD COMPANY, Respondent.

OHA Case No.LWA-0006

FINAL DECISION AND ORDER

This is an appeal by complainant Helen Gaidine Oglesbee of an Initial Agency Decision by an Office of Hearings and Appeals ("OHA") Hearing Officer. Following two days of hearings, the Hearing Officer found that the complainant had not established a claim that she suffered unlawful reprisal in response to her making of protected health and safety disclosures.

The Hearing Officer first held that the complainant had failed to meet her burden of establishing that certain of the communications she made to her employer, Westinghouse Hanford Company ("WHC"), the management and operating contractor at the Department of Energy's Hanford site in Richland, Washington, were protected health and safety disclosures. Second, in those instances in which the Hearing Officer found that protected disclosures had been made, the Hearing Officer held that WHC had shown by clear and convincing evidence that the challenged personnel action would have been taken even absent her disclosures. Finally, the Hearing Officer found that the contractor's withdrawal of certain eprimands from the complainant's personnel files had rendered her remaining claims concerning those matters moot and unredressable.

On appeal, the complainant challenges the Hearing Officer's rejection of her claims based on findings that the evidence failed to support her allegations that she made protected health or safety disclosures. The complainant similarly challenges the Hearing Officer's determination that WHC established by clear and convincing evidence that the challenged personnel actions were unrelated to protected disclosures.

It is well settled that factual findings of these types are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *Compare, Pullman Standard v. Swint*, 456 U.S. 273 (1982), with *Amadeo v. Zant*, 486 U.S. 214, 223 (1988), quoting Federal Rule of Civil Procedure 52(a). Measured against this standard, my review of this matter discloses no basis for overturning OHA's fact-based determinations as "clearly erroneous."

With respect to the complainant's challenge to the Hearing Officer's finding of mootness regarding the letters of reprimand that were removed from the complainant's file, OHA's decision is consistent with analogous federal employment law precedents. *See*, *e.g.*, *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Frazier v. MSPB*, 672 F.2d 150 (D.C. Cir. 1982).

For the reasons set forth above, the Initial Agency Decision is affirmed and hereby adopted as the Final Agency Decision in this case.

Dated: April 14, 1995

William H. White

Deputy Secretary

UNITED STATES DEPARTMENT OF ENERGY

C. LAWRENCE CORNETT,)

)

Complainant,)

)

v.) OHA Case No. VWA-0007

) VWA-0008

MARIA ELENA TORAÑO ASSOCIATES, INC.)

)

Respondent.)

FINAL AGENCY DECISION

This is a request for review by Maria Elena Torano Associates, Inc. ("META"), a DOE contractor responsible for reviewing and revising the agency's waste management programmatic environmental impact statement ("PEIS"), of the Initial Agency Decision of the Office of Hearings and Appeals ("OHA") finding that Complainant C. Lawrence Cornett established that he had made protected health and safety disclosures under 10 C.F.R. Part 708 and that these disclosures were a contributing factor in his termination and finding further that META had not demonstrated that he would have been terminated absent the disclosures. R. 5064.

On review, META's primary legal argument is that Part 708 is inapplicable because META's employees did not perform work at DOE facilities. This argument was properly rejected by OCEP and OHA. META is a covered "contractor" under Part 708 "only with respect to work performed on-site at a DOE-owned or-leased facility. * * *. [W]ork will not be considered ?on-site' when pursuant to the contract it is the only work performed within the boundaries of a * * * [DOE] facility, and it is ancillary to the primary purpose of the contract (e.g., on-site delivery of goods produced off-site)." 10 C.F.R. § 708.4.(1) META argues that the "primary" purpose of the contract was "the scoping, drafting and production of the report" and that on-site "collection of data is simply what was needed in anticipation of or as preparation for accomplishing what was the primary purpose of the contract" (META reply brief at 4). However, the hearing officer concluded that "site visits made by META employees accomplished important mission-related purposes," serving to "establish personal relationships * * * to facilitate the transfer of needed data for analysis, to discover what data was available and to bring back data from the sites," and thus are not merely ancillary to the primary purpose of the contract. R. 3297. This fact-bound conclusion is consistent with the remedial purpose and text of Part 708 and with the regulatory preambles accompanying its proposal and adoption, and therefore should be sustained.

META also suggests that Part 708's coverage for contracts other than management and operating contracts extends "only with respect to work performed on-site at a DOE-owned or-leased facility (emphasis added) and that this limitation means that the complaint must also be about the on-site work. According to META's reasoning, since Cornett's disclosures had nothing to do with establishing on-site relationships or collecting on-site data, META was not a covered "contractor" with respect to those disclosures (META reply brief at 6).

However, this argument suffers from two fundamental flaws. First, it is unlikely, in light of the remedial purpose of the provisions, that the regulatory authors would have, in effect, required a whistleblower to run the on-site gauntlet twice -- that the contractor must do more than merely ancillary on-site work and that the disclosure must be about on-site work. There is nothing in either of the logical places, the description of the Part's "scope" (§ 708.2) and of a covered "disclosure" (§ 708.5), suggesting such a double hurdle, and the regulatory preamble further undercuts META's argument. For example, the preamble summary simply states that the rules are "applicable to employees of DOE contractors and subcontractors performing work directly related to the activities of the DOE at DOE-owned or-leased sites," but says nothing about the rules being applicable only to disclosures about such work. 57 Fed. Reg. 7533 (March 3, 1992). More reasonably, therefore, we think that the "contractor," "employee," and "on-site work" definitions should be read to establish a single requirement that a contractor perform some on-site work that is not merely "ancillary" to the primary purpose of the contract.

Even if META's construction of the terms were correct, however, a second problem with META's argument is that the hearing officer concluded, as a matter of fact, that Cornett's disclosures did relate to establishing on-site relationships and collecting on-site data. According to OHA's specific finding, Cornett was discharged at least in part because management perceived his efforts to communicate with on-site personnel at Argonne and Oak Ridge as having produced bad relationships there. As is made clear in the preamble to the proposed new amendments to Part 708 (see note 1, supra), the basic purpose of Part 708 was to remove an employee's disincentive to bring to DOE's attention matters occurring at DOE site that DOE would want to correct. Cornett's disclosures, as the hearing officer found and as the example in the preamble to the proposed new rules illustrates, were of just that ilk.

META also argues that Cornett's disclosures were not covered by Part 708 because they only reflected his opinions about data already available to the public. Such an argument has no basis in the regulatory language or purpose, and the hearing officer properly rejected it. The PEIS largely constituted a collection of expert opinions about waste management, and the thrust of Cornett's disclosures was that some of the PEIS methodology would materially mislead its target audience and the public about the magnitude of waste disposal health risks. Whether Cornett was correct or not -- which is not the issue here -- his professional opinion to that effect, so long as it was both reasonable and in good faith, plainly is the sort of disclosure meant to be protected by the regulations, and was well within the regulatory description of "[a] substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5.

META also challenges the hearing officer's factfinding on the fundamental issue of why Cornett was discharged. META acknowledges that OHA's decision may be overturned only if shown to be "clearly erroneous." META argues that OHA committed clear error by overlooking key facts (META reply brief at 11-12). However, nothing listed by META was overlooked by OHA, but rather was simply rejected.

Concerning whether Cornett would have been discharged absent his protected disclosures, OHA found META's position and the project manager's testimony unpersuasive. First, OHA found that the "evasiveness and contradictions" the hearing officer perceived in the project manager's testimony and other statements and documentary evidence in the record weighed against META's claim that Cornett's allegedly bad relationship with Argonne and Oak Ridge personnel was factor in his termination. To the extent Cornett "annoyed" such personnel, OHA found this factor to be "inextricably intertwined with his protected disclosures" and not a valid basis for his dismissal. R. 5057. It therefore was not clear error for OHA (and OCEP) to conclude that absent reprisal Cornett would not have been discharged before the end of the risk assessment aspect of the project.

The only question that determination left, and it does require some inferences from the record to answer it, was when Cornett's work would have come to an end anyway. Based on the evidence before it concerning how long others with similar skills worked on the relevant tasks, OHA concluded that Cornett's employment would have extended to December, 1995 but for the retaliatory discharge. R. 5060-62. It was not clearly erroneous for OHA to draw this conclusion from the work histories before it.

META further argues that OCEP's delay in processing Cornett's claim prejudiced META.(2) However, it makes no more sense to hold OCEP's delay against Cornett than to hold a court's delay against a plaintiff. In any case, given the number of witnesses to be interviewed and the extensiveness of the record to be reviewed, the delay does not appear unreasonable. Moreover, the prejudice claimed by META is not very compelling.

META quotes preamble language concerning time limitations for filing a claim in support of its claim of prejudice, urging that by the time OCEP's interviews were conducted, memories were no longer fresh (META request for review at 3-4). However, the purpose of claims limitations periods is to give a respondent timely notice of the claim against him. There is no question that META received timely notice of the claim against it, and, having received that notice, it could and should have protected itself by promptly investigating the facts concerning the claim.

META also complains about the delay on another basis, that a timely finding in Cornett's favor would have permitted reinstatement without much obligation for back-pay without the benefit of Cornett's services (META request for review at 3, 5). The irony of this argument is that, according to META's original position on back-pay, it should only have run until January, 1995, anyway, so that even if the regulatory timing requirements had been adhered to by OCEP, OHA's decision would not have come soon enough for reinstatement to be appropriate (see META's request for review at 3 & n.1). In any case, as Cornett points out (Complainant's brief in opposition at 11-12), if META wanted the benefit of his services, the simple solution would have been to reinstate him voluntarily.

Finally, META argues that it should be relieved of some or all responsibility for Cornett's discharge since it was just following DOE's "direct and explicit orders * * * to reduce its work force" (META reply brief at 10). Aside from the fact that the hearing officer did not fully credit the evidence that DOE had "ordered" a reduction (See R. 5058 & n. 22), it is immaterial to the question whether META terminated Cornett's employment in reprisal for protected disclosures. There is certainly no evidence whatsoever that DOE ordered a retaliatory firing.

In sum, there is no basis for overturning the Initial Agency Decision, and that decision is hereby adopted as the Final Agency Decision in this case.

Date: March 23, 1998 /s/ Elizabeth A. Moler

Deputy Secretary

(1)1/ As originally formulated in the notice of proposed rulemaking, the rule elaborated on this definition, excluding "contractors whose on-site performance is ancillary to delivery or furnishing of goods or services normally found at commercial facilities where those goods or services are not directly related to the mission of the facility -- for example, food services, vending machines, etc." 55 Fed. Reg. 9326, 9329 (March 13, 1990). Proposed changes to the rule recently published in the Federal Register would eliminate the on-site requirement and "instead cover employees of contractors performing work directly related to the operation of programs and activities at DOE-owned or-leased sites, even if the contractor is located, or the work is performed, off-site. An example would be involved in the preparation of environmental impact statements related to programs and activities on DOE-owned and-leased sites." 63 Fed. Reg. 374. (Jan. 5, 1998).

(2)2/ According to a response to a comment in the preamble to the proposed changes to Part 708, "[t]he original rule contained time frame for complaint processing that were not realistic, and therefore led to dissatisfaction with the process. One primary goal of the proposed rule is to streamline, and therefore speed up, the complaint process. The proposed rule therefore has more realistic time frames, and in some cases, processing time frames have been removed where they cannot be estimated." 63 Fed. Reg. 374, 378. Under the proposed rule, for example, if the Deputy Inspector General for Inspections does not issue a report within 240 days, the complainant may request a hearing. Id. at 384.

DANIEL HOLSINGER, Complainant

v.

K-RAY SECURITY, INC., Respondent.

OHA Case No. LWA-0005, LWA-0009

DECISION REVERSING AND REMANDING INITIAL AGENCY DECISION

This is a request for review by K-Ray Security, Inc., from the Initial Agency Decision by the Office of Hearings and Appeals ("OHA"), finding that reinstatement of Mr. Holsinger as a security guard is a necessary and appropriate action to effect full relief for a retaliatory termination made by the previous security contractor, Watkins Security Agency, Inc., ("WSA"). Based upon my review of the regulatory language, the relevant case law, and the entire record, I conclude that OHA's decision is incorrect.

Mr. Holsinger filed a complaint with the Office of Contractor Employee Protection ("OCEP") on October 7, 1994. R. 103-106. He alleged that he had made protected disclosures when he told his captain that another employee was removing items in five-gallon buckets covered with rags, and that it may have been DOE property. Mr. Holsinger also alleged that he contacted DOE's contracting officer to report the possible thefts. In addition, on August 31, 1994, complainant sent an anonymous letter to DOE reporting the alleged thefts, and alleging that WSA management had not responded to his earlier allegations. The reprisals alleged by Mr. Holsinger included a one-day suspension on September 2, 1994, his prospective rescheduling to the midnight guard shift on September 19, 1994, a three-day suspension on September 19, 1994, and another three-day suspension on September 29, 1994, which resulted in Mr. Holsinger's termination effective October 2, 1994, under WSA's "three-strike" policy. R. 855.

Two of Mr. Holsinger's suspensions were for excessive personal use of the telephone. R. 857-858. OCEP found insufficient evidence to support his reprisal claims concerning these incidents and concluded that the suspensions were justified. R. 022, 033, 858. Although OCEP expressed "concern" that the complainant's allegations of reprisal primarily involve "matters that are normally dealt with as minor workplace concerns (e.g. telephone calls, coffee drinking restrictions)," and further noted that there is "significant evidence in the record indicating that Mr. Holsinger engaged in activities that might have justified the termination of his employment" (R. 035), OCEP ultimately concluded that a reprisal for a protected act had occurred, finding that complainant's anonymous letter "contributed to the actions leading to [his] September 20, 1994 suspension * * * for failure to follow instructions." R. 034.

Mr. Holsinger's complaint sought back pay and benefits and reinstatement from WSA. R. 105. However, while his complaint was pending, K-Ray took over the security function at METC. R. 011. OCEP proposed that WSA pay Holsinger back pay and benefits and that K-Ray reinstate him based on its assessment that, absent the termination, Holsinger would have been hired automatically by K-Ray. R. 035.

Following the issuance of OCEP's investigatory report, complainant, WSA, and K-Ray all requested a hearing before OHA pursuant to 10 C.F.R. 708.9(a). Prior to the hearing, WSA and Mr. Holsinger entered a settlement agreement which satisfied the proposed requirement that WSA pay Mr. Holsinger back pay and benefits. Consequently, WSA was dismissed as a party. R. 859.

In the OHA proceedings, K-Ray did not challenge the factual findings that Mr. Holsinger had made protected disclosures, or that WSA had violated 10 C.F.R. Part 708, since "it was not in a position to either agree or disagree with the analysis, because it had no involvement nor knowledge of any such activities or actions." R. 859. Accordingly, on the basis of the OCEP investigation, OHA affirmed OCEP's finding that Mr. Holsinger's anonymous letter of August 31, 1994, constituted a protected disclosure and that a

violation of Part 708 occurred when WSA suspended Mr. Holsinger for three days on September 19, 1994, and terminated him on October 2, 1994. R. 867.

While not addressing the complainant's underlying dispute with WSA, K-Ray objected to OCEP's proposal that K-Ray be required to reinstate the complainant. K-Ray argued that such a remedy would create an unwarranted hardship on K-Ray and require it to terminate an existing employee. R. 859. However, OHA found that reinstatement of Mr. Holsinger was necessary to restore him to the position he would have occupied absent the acts of reprisal by WSA. R. 872. OHA reasoned that Mr. Holsinger would have been hired by K-Ray, since all thirteen of the other WSA security personnel were hired by K-Ray when it assumed the contract in June 1995.

Reinstatement is an equitable remedy, and we agree with OHA that reinstatement, even by a successor employer, may be ordered if the circumstances warrant it. With any equitable remedy, however, an adjudicator "must draw on the ?qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" *Teamsters v. United States*, 431 U.S. 324, 375 (1977) [quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944)]. "Especially when * * * an equitable remedy threatens to impinge upon the expectations of innocent parties, the [adjudicator] must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable.'" *Ibid. [quoting Lemon v. Kurtzman*, 411 U.S. 192, 200-201 (1973) (plurality opinion of Burger, C.J.)].

In this case, however, OHA failed to conduct a full assessment of the equities. It is undisputed that K-Ray was not the security contractor at the time the alleged retaliatory acts occurred; nor is K-Ray alleged to have committed any violation of Part 708. Instead, OHA's order requiring K-Ray to reinstate the complainant is predicated on a simple finding that "reinstatement is necessary and appropriate because it is reasonable to conclude that Holsinger would have been hired by K-Ray along with all of the other WSA security personnel at METC if he had been an employee of WSA at the time K-Ray hired its security personnel." R. 871-872.

OHA overlooked the undisputed record evidence showing the substantial hardship reinstatement would cause the contractor and innocent third parties. DOE's contracting officer testified without contradiction that under the fixed price contract complainant's reinstatement would require the discharge of one of the twelve security personnel currently on K-Ray's staff. R. 752. This testimony was confirmed by the fact that, following the resignation of one part-time guard (*i.e.*, the original thirteenth employee) after K-Ray's assumption of the contract, DOE's contracting officer advised K-Ray that, due to budget concerns, DOE would not permit the contractor to hire a replacement employee. R. 746-747. K-Ray's president provided additional uncontradicted testimony that complainant's reinstatement would require the company to lay off an existing employee. R. 759. Not only was this evidence uncontradicted in the record, but it was specifically credited by the complainant's own acknowledgment that his reinstatement would require the discharge of another employee. R. 785.

The uncontradicted record on this point is especially significant given OHA's own prior recognition that reinstatement is a "disfavored remedy" when it would "require the displacement of an innocent employee." *Boeing Petroleum Services, Inc.*, 24 DOE ¶87,501 at p. 89,007, citing *Edwards v. Department of Corrections*, 615 F. Supp. 804, 811 (M.D. Ala. 1985). In the instant case, OHA provided no explanation for the Hearing Officer's decision to disregard OHA's precedent. Nor did OHA explain on what basis it could ignore the undisputed record showing that existing employees would be adversely impacted by the complainant's reinstatement. Accordingly, I conclude that OHA's order requiring K-Ray to reinstate the complainant fails properly to consider the equities. Therefore, OHA's decision is reversed and this matter remanded with instructions to OHA to conduct a full assessment of the equities, consistent with the evidence of record.(1)

Dated: December 17, 1996

Charles B. Curtis

Deputy Secretary

(1) Because K-Ray did not address the merits of complainant's dispute with WSA, OHA's findings of reprisal were based solely on its review of the OCEP investigation. As noted, OCEP expressed "concerns" about the substance of the issues presented and the fact that the complainant's conduct may well have justified his termination. Under the circumstances, former Deputy Secretary White's caution that the whistleblower regulations must not be read to "encompass all disagreements between a contractor and its employees" seems particularly apt. *Mehta v. Universities Research Assoc.*, OHA Case No. LWA-0003, LWZ-0023 (1995), slip op. at 6. Thus, although OHA has been prevented from reviewing the merits of the underlying dispute between the complainant and WSA due to the settlement in this case, in weighing the equities of a reinstatement remedy on remand OHA should consider, in addition to the matters described above, that "there must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, * * * granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork." *Ibid.*

HOWARD W. SPALETTA, Complainant

v.

EG&G IDAHO, INC., Respondent.

OHA Case No. LWA-0010

FINAL DECISION AND ORDER

This is an appeal by complainant Howard W. Spaletta from the Initial Agency Decision by the Office of Hearings and Appeals ("OHA") finding that the complainant, an engineer formerly employed by EG&G Idaho, Inc. (EG&G), previously the DOE's management and operating contractor at the Idaho National Engineering Laboratory (INEL), had established by a preponderance of the evidence that he suffered reprisal as a result of his protected safety disclosures, and ordering back pay and other remedial actions. However, OHA declined to grant the complainant certain further relief that he sought, and rejected his claim that his acceptance of an offer of early retirement constituted a constructive termination.

1. As a preliminary matter, the timeliness of the complainant's appeal must be addressed. 10 C.F.R. § 708.10(c)(2) provides that the Initial Agency Decision "shall become the final decision of DOE unless, within five calendar days of its receipt, a written request is filed with the Director [of the Office of Contractor Employee Protection] for review by the Secretary or designee." In the instant case, the complainant received the Initial Agency Decision by certified mail on January 12, 1995. The letter transmitting the Initial Agency Decision advised both parties of the five day appeal period.

The complainant's request for review was sent to the Director by facsimile on January 26, 1995. The request did not address the complainant's failure to submit his request for review within the time required by the regulation, and the complainant failed to respond to this issue in his reply to the respondent's brief. Absent a showing of good cause for late filing of the complainant's request for review, the request must be dismissed as untimely.

2. Notwithstanding the fact that the complainant's request for review was untimely, I have nevertheless reviewed the portions of the record relevant to the two issues raised by the complainant on appeal. The first concerns OHA's denial of the complainant's request that a November 1987 final report of EG&G's Weld Evaluation Project regarding the Tennessee Valley Authority's Watts Bar Lake Nuclear Power Plant be formally withdrawn. The Initial Agency Decision concluded that such relief was beyond the scope of the "whistleblower" regulation.

The "whistleblower" regulation provides that, based on a determination that a DOE contractor violated the prohibitions against reprisal contained in subsection 708.5, specific individual relief, including reinstatement and back pay, may be provided to the complainant. See 10 C.F.R. §§ 708.10(c) and 708.11(c). The regulation is designed to protect employees from adverse actions taken in reprisal for protected disclosures, not to provide corrective action with respect to the underlying substance of such disclosures. Therefore, the Hearing Officer correctly determined that the relief requested by the complainant was outside the scope of relief provided by the "whistleblower" regulation.

Second, the complainant challenges OHA's determination that he failed to establish that he was constructively discharged by his employer. OHA rejected this claim, finding that the complainant failed to submit this claim until relatively late in the proceeding, and then submitted no evidence in support of the claim.

The complainant's challenge to OHA's factual determination that he voluntarily accepted early retirement

should be overturned only if that determination was "clearly erroneous." See, e.g., Pullman Standard v. Swint, 456 U.S. 273 (1982); Amadeo v. Zant, 486 U.S. 214, 223 (1988), quoting Federal Rule of Civil Procedure 52(a). Measured against this standard, my review of the record shows no basis for overturning OHA's finding that the complainant was not constructively discharged from his employment with EG&G.

For the reasons set forth above, the Initial Agency Decision is hereby affirmed and adopted as the Final Agency Decision in this case. The Office of Hearings and Appeals is directed to issue a Supplemental Order specifying the amount of damages to be awarded to the complainant.

Dated: June 28, 1995

William H. White

Deputy Secretary

United States Department of Energy

Ronny J. Escamilla v. Systems Engineering & Management Associates, Inc.;

Case No. **VWA-0012**

Final Decision and Order Issued by the Deputy Secretary of Energy

Issued April 18, 1997

This is an appeal by complainant Ronny J. Escamilla from the Initial Agency Decision by the Office of Hearings and Appeals ("OHA") finding that the complainant, a computer scientist formerly employed by Systems Engineering & Management, Inc. ("SEMA"), a subcontractor of EG&G Rocky Flats, Inc., the Department of Energy ("DOE") management and operating contractor at its Rocky Flats facility, had failed to establish by a preponderance of the evidence that his employment was terminated in retaliation for alleged disclosures of waste and mismanagement. OHA found further that, while the complainant's communication to SEMA management that he had filed a complaint pursuant to 10 C.F.R. Part 708 constituted a protected disclosure, SEMA had proven, by clear and convincing evidence, that it would have terminated complainant despite such disclosure.

On appeal, the complainant challenges OHA's determination that he failed to meet his burden of establishing that he made protected disclosures of waste and mismanagement, and that such disclosures contributed to his termination. Further, the complainant asserts that he made safety disclosures to SEMA that were not considered by the OHA Hearing Officer.

1. On appeal, OHA's factual determinations are to be overturned only if they are "clearly erroneous." See, e.g., Oglesbee v. Westinghouse Hanford Company, 25 DOE ¶87,501, 89,001 (April 14, 1995); O'Laughlin v. Boeing Petroleum Services, Inc., 24 DOE ¶ 87,513, 89,064 (January 31, 1995). Measured against this standard, my review of the record shows no basis for overturning OHA's finding that the complainant's disagreements with SEMA management regarding the computer system did not rise to the level of protected disclosures of waste or mismanagement under Part 708. See Mehta v. Universities Ass'n, 24 DOE ¶ 87,514 (1995). Further, the record clearly supports OHA's determination that SEMA met its burden of establishing, by clear and convincing evidence, that it would have terminated complainant's employment based upon poor performance irrespective of his filing of a Part 708 complaint.
2. With respect to the complainant's assertion that he made safety disclosures to SEMA management that were not considered by the OHA Hearing Officer, the record well supports the Hearing Officer's decision to discredit the complainant's testimony that he raised concerns regarding the safety of the computer system with SEMA management.

For the reasons set forth above, the Initial Agency Decision is hereby affirmed and adopted as the Final Agency Decision in this case.

Charles B. Curtis
Deputy Secretary
Issued: April 18, 1997

Barry Stutts, Complainant v. Am-Pro Protective Agency, Inc., Respondent, OHA Case No. VWA-0015

DECISION DENYING REVIEW OF INITIAL AGENCY DECISION

This is a request for review by Complainant Barry Stutts, from the Initial Agency Decision by the Office of Hearings and Appeals ("OHA"), finding that reinstatement of Mr. Stutts as a security guard is a necessary and appropriate action to effect full relief for a retaliatory termination made by the previous security contractor at Forrestal and Germantown, Am-Pro Protective Agency, Inc. Based upon my review of the regulatory language, the relevant case law, and the entire record, I conclude that this request should be denied.

In his complaint filed with the Office of Contractor Employee Protection ("OCEP"), Mr. Stutts alleged that he had made protected disclosures when he and another officer (who did not file a complaint) reported two supervisors, including his own, for not writing an incident report concerning a top secret safe Complainant and his fellow officer had found open and that Am-Pro thereafter engaged in retaliatory actions against them culminating in Stutt's discharge. Am-Pro did not dispute that Stutts made a protected disclosure, but rather urged that he and his co-worker would have been discharged in any case for other reasons. OCEP concluded that Complainant's discharge had been in reprisal for his protected disclosure, and Am-Pro requested a hearing before OHA.

After a hearing, OHA concluded, in a fact-bound analysis involving credibility assessments, that Complainant had shown that his discharge was at least partially in reprisal for his protected disclosure and that Am-Pro had not shown that Complainant would have been discharged in the absence of the disclosures. lAD at pp. 7-17. However, although OHA awarded reinstatement and back pay, it postponed decision on the amount of back pay to permit briefing on whether other earnings should be subtracted and other expenses should be added to Complainant's entitlement. ld.at 17-19.

In the meantime, Am-Pro filed a bankruptcy petition and sought relief under the automatic stay provisions of the Bankruptcy Code. Although OHA was in doubt whether the automatic stay provisions applied to forbid issuance of its decision. OHA's decision (signed on June 13, 1997) was not issued until September 30, 1997. See Memorandum of September 30, 1997, from Janet N. Freimuth to Sandra L. Schneider and lAD at 1-2. By then, Am-Pro was dissolved, the bankruptcy case was dismissed, and a new contractor was providing security services at Forrestal and Germantown. Thus, Complainant is seeking to have the relief he was awarded charged against the successor contractor. This issue was not examined by OHA. However, in light of the time that has passed since OHA's decision and in the interest of concluding this matter, I have proceeded to .review his request.

As recognized in the recent decision of Holsinger v. K-Ray Security. Inc., 26 DOE ¶ 87,506 (l996)(decision of Deputy Secretary), reinstatement is provided for by the regulations in order to remedy a violation of Part 708. 10 C.F.R. 708.10 (c) /1 expressly provides:

> The initial agency decision may include an award of reinstatement, transfer, preference, back pay, and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses * **

See also 10 C.F.R. 708.11(c) ("Relief ordered * * * may include reinstatement"). However, it is important to remember that, unlike the Department of Labor, the Department of Energy ("DOE") has no statutory regulatory power with respect to contractor employees engaging in "whistleblowing." Rather, Part 708 is premised entirely upon the contractual relationships between DOE and its contractors.

Reinstatement is an equitable remedy, and, as with any equitable remedy, an adjudicator "must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and

reconciliation between the public interest and private needs as well as between competing private claims." Teamsters v. United States, 431 U.S. 324, 375 (1977) [quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944)]. "Especially when * * * an equitable remedy threatens to impinge upon the expectations of innocent parties, the [adjudicator] must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable." Ibid. [quoting Lemon v. Kurtzman, 411 U.S. 192, 200-201 (I973)(plurality opinion of Burger, C.J.)].

Based upon these principles, it was determined in Boeing Petroleum Services. Inc., 24 DOE ¶87,501 at p. 89,007 (1994), that reinstatement generally is not "an appropriate remedy under Part 708 where * * * there is a new M&O contractor that has no connection with the firm actually employing the complainant or the circumstances surrounding the discharge of the complainant, and the retention of employees by the new contractor is not directly influenced by the former contractor but merely a condition of assuming the M&O contract." Rather, the normal rule is that a wrongfully discharged contractor employee is not entitled to relief for the period after the contract under which he is employed is terminated. Id. at p. 89,006-89,007, citing Holley v. Northrop Worldwide Aircraft Services. Inc., 835 F.2d 1375 (11th Cir. 1988), and Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992). These principles were recently re-affirmed in Holsinger v. K-Ray Security. Inc., 26 DOE ¶ 87,506 (1996)(decision of Deputy Secretary).

In this case, moreover, the problem of providing relief to Stutts is compounded, since, unlike the complainants in Boeing and Holsinger above, Stutts is seeking not merely to impose the reinstatement obligation, but also the back pay obligation on the successor contractor. Although Stutts is apparently unable to collect back pay from Am-Pro in light of its bankruptcy and dissolution, that does not justify imposing the back pay liability on Am-Pro's innocent successor.

Accordingly, the request for review is denied.

T. J. Glauthier

Deputy Secretary

Issued: January 19 2000

/1 DOE recently issued an Interim Final Rule amending Part 708 which became effective April 14, 1999. 64 Fed. Reg. 12,862 (March 15, 1999). Relief available is now outlined in 10 C.F.R. 708.36 in the Interim Final Rule. 64 Fed. Reg. 12862, 12875 (March 15, 1999). The decision in this case is unaffected by the changes in the Interim Final Rule.

Thomas T. Tiller v. Wackenhut Services, Inc.; Washington, D.C. Case No. VWA-0018

Final Decision and Order Issued by the Deputy Secretary of Energy

Issued February 2, 1999

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

This is a request for review by complainant Thomas T. Tiller of an Initial Agency Decision, issued by the Office of Hearings and Appeals (OHA), denying the two reprisal complaints that he filed pursuant to 10 C.F.R. Part 708, the regulation establishing the DOE Contractor Employee Protection Program. Mr. Tiller was employed by Wackenhut Services, Inc. (Wackenhut), a DOE contractor that provides paramilitary security support services at DOE's Savannah River Site in Aiken, South Carolina.

Background

In 1992, Mr. Tiller became Labor Relations Manager for Wackenhut at DOE's Savannah River Site. In that position, he served as a member of the management team that negotiated contracts with Wackenhut's guard union. In August 1993, Mr. Tiller encountered financial difficulties, and asked the local representative of the guard union for a loan of $900. The union representative's wife advanced the $900 loan to Mr. Tiller interest-free, and Mr. Tiller's wife repaid the loan two weeks later. Initial Agency Decision at 3.

Before asking for the loan, Mr. Tiller had executed a Conflict of Interest Statement for Wackenhut, in which he certified that neither he, nor any immediate family member, had engaged, directly or indirectly, in any activity which created a conflict of interest; that he had read Wackenhut's Conflict of Interest Policy; and that he would immediately disclose any situation in the future that may possibly be interpreted as involving a Conflict of Interest. Among the examples cited in the Conflict of Interest Policy as activities constituting a conflict of interest is a loan to or from any person or organization having any dealing with the Company. Initial Agency Decision at 2-3.

Senior Wackenhut managers first learned of Mr. Tiller's loan in October 1993, during contract negotiations between Wackenhut and the guard union. When two of Mr. Tiller's fellow members on the contract negotiating team confronted him about the loan on or about October 12, 1993, he confirmed that he had solicited and accepted the loan. Shortly thereafter, Wackenhut management removed Mr. Tiller from the negotiating team; orally advised him that he had compromised his position and damaged his credibility; and responded affirmatively when Mr. Tiller asked whether he could be terminated for accepting the loan. Initial Agency Decision at 3.

Mr. Tiller asked why Wackenhut would punish him so harshly, when XXXXXXXXXX- who was Wackenhut's XXXXXXXXX at the Savannah River Site -had done something worse without any apparent adverse repercussion. Specifically, Mr. Tiller alleged that XXXXXXX had accepted stolen telephone wire, and free installation of that wire in his house, from the same union representative who had loaned the $900 to Mr. Tiller. Initial Agency Decision at 3; Exhibit 9 [OHA Administrative Record (A.R.) Vol. I, at 129-54].

After Mr. Tiller's admission that he had accepted the $900 loan, some Wackenhut managers argued that his employment should be terminated, which was an action sanctioned by Wackenhut's Conflict of Interest Policy. However, one Wackenhut manager persuaded the others that Mr. Tiller should be given a second chance with another division of the company. That manager was XXXXXXXXXX., who was at that time

Wackenhut's XXXXXXXXXXXXXXXX at the Savannah River Site and XXXXXXXXXX. Initial Agency Decision at 4; Transcript (Tr.) at 192+n-94 [A.R. Vol. III, at 1198 - 1200].

Accordingly, in a memorandum dated October 25, 1993, Wackenhut informed Mr. Tiller that he was being removed from his position as Labor Relations Manager because he had violated Wackenhut's Conflict of Interest Policy; that Wackenhut would offer him placement in the position of Personnel Security Supervisor, which had a salary less than that of the position from which he was being removed; that if Mr. Tiller accepted the new position, he would retain his higher salary for a period of one year, after which it would be adjusted downward; and that if he chose to decline the company's offer of reassignment, his employment would be terminated immediately. Mr. Tiller accepted the offer in writing. Initial Agency Decision at 4.

On August 31, 1994, ten months after accepting his reassignment to his new position, Mr. Tiller filed his first reprisal complaint. He alleged that Wackenhut demoted him from Labor Relations Manager to Personnel Security Supervisor in retaliation for his disclosing that XXXXXXX had accepted stolen telephone wire and free installation of that wire from the local union representative. On April 18, 1996, Mr. Tiller filed his second reprisal complaint, in which he alleged that Wackenhut initiated several adverse personnel actions against him in retaliation for filing his first complaint.Initial Agency Decision at 5 - 6.

The Office of Inspector General (OIG) conducted an extensive investigation of Mr. Tiller's two complaints, and issued a Report of Inquiry and Proposed Disposition (Report) on September 30, 1997. A.R. Vol. I, at 3 - 61. With respect to his first complaint, the Report concluded that Mr. Tiller had proven by a preponderance of the evidence that he had made a protected disclosure concerning XXXXXXXXXX's alleged receipt of telephone wire and its installation, but that he had failed to prove that his protected disclosure was a contributing factor to his demotion. Rather, the Report found that Mr. Tiller's solicitation and acceptance of the loan from the union representative were the reasons for his demotion. With respect to his second complaint, the Report concluded that Mr. Tiller had proven by a preponderance of the evidence that he had participated in a protected activity by filing his first reprisal complaint, but that he had failed to prove that his first complaint was a contributing factor to any of the alleged adverse actions taken against him. The Report therefore recommended that his request for relief be denied. Report at 58 - 59.

After his receipt of the Report, Mr. Tiller requested a hearing before OHA, pursuant to 10 C.F.R. 708.9(a). On February 24 and 25, 1998, OHA convened a 22-hour hearing in Aiken, South Carolina, at which the testimony of 33 witnesses was presented. Mr. Tiller, who was represented by counsel, and Wackenhut each submitted pre-hearing and post-hearing briefs. On May 21, 1998, OHA issued an Initial Agency Decision in which it denied Mr. Tiller's request for relief.

Subsection 708.10(c)(1) provides, in pertinent part, as follows:

If the initial agency decision contains a determination that the complaint is without merit, it shall also include a notice stating that the decision shall become the final decision of DOE denying the complaint unless, *within five calendar days of its receipt*, a written request is filed with the Director for review by the Secretary or designee. (emphasis added)

In compliance with that subsection, the Initial Agency Decision that was issued to Mr. Tiller included the following notice:

This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, *within five days of its receipt*, a written request for review of this Decision by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments, Office of the Inspector General, Department of Energy. (emphasis added)

Initial Agency Decision at 19.

On May 26, 1998, the Acting Deputy Inspector General for Inspections mailed a copy of the Initial Agency Decision to Samuel Cruse, who is counsel for Mr. Tiller, by certified mail. Attachment 2. The return receipt indicates that Mr. Cruse received the Initial Agency Decision, but the date of delivery written on the receipt is not clearly legible. Attachment 4. However, it is clear that Mr. Cruse received the Initial Agency Decision no later than June 6, 1998, because that is the date he typed on his one-page request for review of that decision. Attachment 3. DOE received his request for review on June 15, 1998. Attachment 3. In that letter, Mr. Cruse merely stated that because he "was involved in a long hard trial and due to the short time given, the complainant was not notified of this decision in the time frame required," and asked DOE to accept his letter as his request for review. Mr. Cruse's letter contained no objections or arguments concerning the merits of the Initial Agency Decision.

Mr. Tiller himself sent DOE a separate two-page letter, dated June 14, 1998, in which he made two specific objections to the Initial Agency Decision. First, he complained that during the OIG's investigation, XXXXXXXXXX was never formally interviewed. XXXXXXXXX was a former XXXXXXXXXXXXXXXX at Wackenhut, and had been Mr. Tiller's XXXXXXX. Mr. Tiller admitted that XXXXXXXX later testified during the OHA hearing, but Mr. Tiller accused OHA of failing to consider XXXXXXXXXX's testimony that XXXXXXXXXXXX had knowledge of XXXXXXXXXXs alleged conflict of interest.

Second, Mr. Tiller accused XXXXXXXX of misrepresenting the truth when he testified that he had no notice of the Part 708 disclosure prior to the time indicated in his sworn statement. XXXXXXXX was XXXXXXXXXXXX, and had preceded XXXXXXX as Wackenhut's XXXXXXXXXXXXX at the Savannah River Site.

Mr. Tiller enclosed two documents with his letter. His first enclosure was a copy of Mr. Cruse's one-page request for review, dated June 6, 1998 and described above. His second enclosure was a copy of a five-page section, entitled "Hearing," from a post-hearing brief that Mr. Cruse had first filed on his behalf with OHA on March 12, 1998. That post-hearing brief was part of the record which OHA reviewed before issuing its Initial Agency Decision. See A.R. Vol. V, at 1750, 1754 - 58.

Analysis

Subsection 708.9(d) sets forth the parties' respective evidentiary burdens in an OHA proceeding under Part 708:

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

Concerning Mr. Tiller's first complaint, OHA found in its Initial Agency Decision that Mr. Tiller had established that his allegation regarding XXXXXXXX's conduct was a protected agency disclosure. In making that finding, OHA stated that whether Mr. Tiller's beliefs were factually accurate is irrelevant for purposes of Part 708; rather, the focus is on whether Mr. Tiller had a "good faith belief" that XXXXXX's conduct violated a law, rule, or regulation. OHA noted that the suggestion of Mr. Tiller's gullibility only serves to reinforce the view that he earnestly believed the information he conveyed concerning XXXXXX. Initial Agency Decision at 7- 9.

OHA also found that Mr. Tiller had established a prima facie case that his protected disclosure on or about October 12, 1993 was a contributing factor to his demotion and reassignment on October 25, 1993, solely because, as a matter of law, the temporal proximity between his protected disclosure and his demotion and reassignment was sufficient to establish a prima facie case. OHA stated that although there is conflicting testimony as to how many Wackenhut senior officials knew of Mr. Tiller's disclosure, it is clear that at

least one of them -XXXXXXXXX - had actual knowledge of Mr. Tiller's disclosure. XXXXXXXX was the XXXXXXXX to whom Mr. Tiller made his disclosure around October 12, 1993. He was also the same manager who persuaded the others to reassign Mr. Tiller instead of firing him. Initial Agency Decision at 9; Tr. at 17 - 77, 190 - 94 [A.R. Vol. III, at 1182 - 83, 1196 - 200].

Pursuant to subsection 708.9(d), the burden then shifted to Wackenhut to prove by clear and convincing evidence that it would have demoted and reassigned Mr. Tiller absent his protected disclosure. OHA found that Wackenhut had met its burden. Immediately after Mr. Tiller admitted that he had solicited and accepted the loan from the union representative, but *before* he made his protected disclosure, a Wackenhut manager told Mr. Tiller that he could be terminated for having solicited and accepted the loan. Initial Agency Decision at 10; Report at 17. Wackenhut would have been justified in terminating him for violating the company's Conflict of Interest Policy; instead, it reassigned him to the only other position that was available at the time. OHA found that there is absolutely nothing in the record to suggest that Wackenhut reassigned Mr. Tiller in retaliation for his protected disclosure, and denied his first complaint. Initial Agency Decision at 9 - 10, 18.

Concerning Mr. Tiller's second complaint, OHA found that Mr. Tiller had demonstrated by a preponderance of the evidence that he participated in a protected activity when he filed his first complaint, and that his first complaint was a contributing factor to several adverse personnel actions against him because of "temporal proximity," but that Wackenhut had proven by clear and convincing evidence that it had independent justification for those adverse personnel actions+m-including "overwhelming evidence that Tiller's performance in the Personnel Security Program was deficient in many respects" (Initial Agency Decision at 14) - and that it would have taken those personnel actions even if Mr. Tiller had not filed his first complaint. OHA therefore denied his second complaint. Initial Agency Decision at 11 - 18.

In Mr. Tiller's letter dated June 14, 1998, which we will consider as a request for review, both of his specific objections concern an issue that OHA decided in his favor: whether Wackenhut officials - specifically, XXXXXXXX and XXXXXX- had knowledge of his protected disclosure concerning XXXXXXXXX's alleged conflict of interest. Mr. Tiller correctly noted that there was conflicting testimony on that issue. However, OHA ultimately decided the issue in Mr. Tiller's favor:

While there is conflicting testimony in the record as to how many Wackenhut senior officials knew of Tiller's protected disclosure, it is clear that at least one Wackenhut manager had actual knowledge of Tiller's disclosure. That manager is the one to whom Tiller made the disclosure around October 12, 1993, and is the same manager who persuaded others at Wackenhut to reassign Tiller instead of firing him.

Based on the foregoing, I find Tiller has established a prima facie case that his protected disclosure was a contributing factor to his demotion and reassignment.

Initial Agency Decision at 9. XXXXXXXX is the Wackenhut manager to whom OHA refers. *See* Tr. at 176 - 77, 190 - 94 [A.R. Vol. III, at 1182 - 83, 1196 - 200], *cited in* Initial Agency Decision at 3 - 4. As explained above, the reason that OHA denied Mr. Tiller's first complaint was *not* that it found that Wackenhut officials lacked knowledge of Mr. Tiller's disclosure concerning XXXXXXXXX's alleged conflict of interest, but rather that OHA found that Wackenhut had proven by clear and convincing evidence that it would have demoted and reassigned Mr. Tiller absent his disclosure, because of Mr. Tiller's own admitted conflict of interest.

Because the two specific objections in Mr. Tiller's request for review concern an issue that OHA decided in his favor, those objections do not constitute a basis for reversing OHA's Initial Agency Decision.

Mr. Tiller also made the general objection, without any reference to the record, that the entire investigation has taken over four years and that DOE has allowed Wackenhut "to utilize every effort to single out the issues which I brought to your attention." Request for review at 1. In fact, the record indicates that OHA conducted the proceedings in accordance with the applicable regulations in subsection 708.9. Pursuant to those regulations, OHA allowed Mr. Tiller and his counsel, as well as Wackenhut, the opportunity to

address the issues which the other party brought to OHA's attention.

Of the two enclosures to Mr. Tiller's request for review, the first is a copy of his counsel's request for review, which contains no objections or arguments concerning the merits of the Initial Agency Decision, and therefore does not present any basis for reversing that decision. The second enclosure is merely a re-submission of five pages from a post-hearing brief that Mr. Tiller had first submitted to OHA before it issued its Initial Agency Decision, and that OHA had already reviewed before it issued that decision. *See* Initial Agency Decision at 2, 7; A.R. Vol. V, at 1750, 1754 - 58.

Factual findings by OHA will be reversed only upon a showing that they are clearly erroneous, giving due regard to OHA as the trier of fact to judge the credibility of witnesses. *Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,501, 89,001 (Apr. 14, 1995); *O'Laughlin v. Boeing Petroleum Services, Inc.*, 24 DOE ¶ 87,513, 89,064 (Jan. 31, 1995). Mr. Tiller has failed to present any evidence that OHA's findings on the issues he first raised in his post-hearing brief are clearly erroneous.

Finally, we note that Mr. Tiller's and Mr. Cruse's requests for review were both untimely. Subsection 708.10(c)(1) required a request for review to be filed within five calendar days of receipt of the Initial Agency Decision. Mr. Cruse, as Mr. Tiller's counsel, received the decision no later than June 6, 1998, the date he typed on his request for review. Mr. Cruse's request for review was filed on June 15, 1998; Mr. Tiller's request for review was dated June 14, 1998. Therefore, Mr. Cruse's request for review was not filed within the time required, and Mr. Tiller's request for review was not even dated within the time required for it to be filed.(1)

For the foregoing reasons, the dismissal of Mr. Tiller's two complaints is affirmed.

Ernest J. Moniz

Deputy Secretary

(1)The content of Mr. Cruse's request for review indicates that he probably received the Initial Agency Decision on some date earlier than June 6, 1998, the date he typed on his request. He admitted in his request that he had failed to notify his client, Mr. Tiller, within the time required. Because that time *i began *r to run on the date of Mr. Cruse's receipt, Mr. Cruse's admission indicates that before the date he typed on his request, he had received the decision and the required time period had passed. In that event, Mr. Cruse's request, as well as Mr. Tiller's request, would have been even more untimely. However, even if all doubts are resolved in Mr. Cruse's favor, and it is assumed that he received the decision on the latest possible date of June 6, 1998, his request and Mr. Tiller's request were still untimely, as explained above.

Fouad Abdo v. Bechtel Savannah River, Inc. (Case No. SR--94--0002)

Final Decision and Order Issued by the Deputy Secretary

Issued June 28, 1995

This is an appeal by complainant Fouad Abdo of adecision by the Office of contractor Employee Protection (OCEP) dismissing his complaint based on lack of jurisdiction under 10 C.F.R. Part 708. Mr. Abdo filed a complaint with OCEP alleging that his employment with Bechtel Savannah River, Inc. (BSRI), a Department of Energy management and operating contractor, was terminated in retaliation for his allegations of fraud, mismanagement, gross waste of funds, and abuse of authority by his supervisors.

On appeal, Mr. Abdo takes issue with OCEP's decision dismissing his complaint for lack of jurisdiction. However, 10 C.F.R. Part 708 does not apply to complaints involving alleged acts of reprisal where such acts occur prior to the adoption or amendment of a contract requiring compliance with Part 708 and, as in the instant case, the alleged reprisal does not stem from health or safety disclosures, participation or refusals. See 10 C.F.R. Sec. 708.2(e); see also Final Decision and Order in *Mehta v. Universities Research Association* (OHA Case No. LWA--0003, March 20, 1995). The alleged acts of reprisal raised in the complaint here occurred prior to the April 6, 1994, effective date of the amendment to BSRI's contract requiring compliance with Part 708. Therefore, OCEP correctly determined that it lacked jurisdiction over the allegations raised in Mr. Abdo's complaint.

For the reasons set forth above, OCEP's decision to dismiss this complaint for lack of jurisdiction is hereby affirmed.

William H. White

Deputy Secretary

Issued: June 28, 1995

Edna R. Blier v. Oak Ridge Associated Universities (Case No. OR--94--0001)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued August 13, 1996

This is an appeal by complainant Edna R. Blier of an Initial Agency Decision by the Office of Contractor Employee Protection ("OCEP"). In the Initial Agency Decision, OCEP concluded that complainant made disclosures protected under Part 708. However, OCEP found that she had failed to establish that her complaints contributed to any alleged retaliatory action against her by the respondent and that, by a preponderance of the evidence, her disclosures did not contribute to the alleged retaliatory actions.

On appeal, OCEP's factual determinations are subject to being reversed only if they are clearly erroneous. Compare Pullman Standard v. Swint, 456 U.S. 273 (1982), with Amadeo v. Zant, 486 U.S. 214, 223 (1988), quoting Fed. R. Civ. P. 52(a). A review of the record and the materials submitted in support of the appeal confirms that complainant has failed to demonstrate that any protected disclosures resulted in prohibited reprisals being taken against her and that OCEP's contrary findings are "clearly erroneous."

Complainant appeals from OCEP's refusal to suspend her case pursuant to Section 708.6(a) after the proposed decision and order were issued and until her state EEO proceedings were concluded. However, OCEP correctly denied her request, since this regulatory provision is only applicable to duplicative "whistleblower" proceedings under state or other applicable law. See "Criteria and Procedures for DOE Contractor Employee Protection Program," 57 Fed. Reg: 7533, 7538 (Mar. 3, 1992).

Accordingly, there is no basis for overturning the Initial Agency Decision, and that decision is hereby adopted as the Final Agency Decision in this case.

Charles B. Curtis

Deputy Secretary

Issued Augsut 13, 1996

Eric T. Boettcher v. Southeastern Universities Research Association (Case No. OR--94--0002)

Final Decision and Order issued by the Deputy Secretary of Energy

Issued February 1, 1996

This is an appeal by complainant Eric T. Boettcher from the Initial Agency Decision by the Office of Contractor Employee Protection ("OCEP") finding that the complainant, an employee of Southeastern Universities Research Association ("SURA"), the Department of Energy ("DOE") contractor at the Continuous Electron Beam Facility, had established by a preponderance of the evidence that his protected disclosures contributed to several retaliatory actions, and ordering SURA to take certain remedial actions and reimburse complainant for reasonable costs incurred in processing his complaint. However, OCEP also found that the complainant had failed to establish that certain other actions taken by SURA constituted reprisal. The complainant filed a timely request for review on July 14, 1995.

1. As a preliminary matter, this appeal does not challenge the findings and conclusions contained in the Initial Agency Decision. Instead, the appeal describes the complainant's concerns regarding the substance of his protected disclosures and his criticisms of the scope and operation of the provisions of Part 708. In his appeal, the complainant requests that his concerns be addressed and that various corrective measures be taken.

The "whistleblower" regulation provides that, based on a determination that a DOE contractor violated the prohibitions against reprisal contained in subsection 708.5, specific individual relief, including reinstatement and back pay, may be provided to the complainant. See

10 C.F.R. Secs. 708.10(c) and 708.11(c). The regulation is designed to protect employees from adverse actions taken in reprisal for protected disclosures, not to provide corrective action with respect to the underlying substance of such disclosures. Because the complainant does not appeal any of OCEP's finding and conclusions concerning his specific complaint, the relief requested by the complainant is determined to be outside the scope of relief provided by the regulation.

2. Notwithstanding the fact that the complainant's appeal seeks relief that is outside the scope of the regulation, I have reviewed his specific concerns relating to the OCEP program. In this regard, I note that several areas of concern raised by complainant's appeal have been raised previously by a public interest group, and that the Office of Contractor Employee Protection has indicated its commitment to improving the efficiency of its case-load processing.

As part of DOE's ongoing efforts to improve and more effectively administer the OCEP program, on October 17, 1994, the Department announced five new whistleblower initiatives, for which public comment was invited. See Office of Contractor Employee Protection; Availability of New Whistleblower Initiatives, 59 Fed. Reg. 59,769 (November 18, 1994). On August 4, 1995, the Secretary approved the following: (1) an enhanced Department of Energy Concerned Employees Program; (2) measures to ensure that whistleblowers are not retaliated against by misuse of the security clearance procedures; (3) limitations on the payment of contractor litigation costs in whistleblower cases; (4) enhanced use of alternative dispute resolution; and (5) a comprehensive implementation study to be conducted by an independent organization relating to the review of old cases. These new initiatives also will enhance the effectiveness of DOE's whistleblower protection program.

Complainant's appeal makes a number of suggestions concerning additional enhancements that he believes would improve the Part 708 process. While these suggestions do not provide a basis for altering the Initial Agency Decision in this case, the Department appreciates such feedback from those who have participated in the Part 708 process. As the above-described initiatives reflect, DOE is committed to making

appropriate improvements in its whistleblower protection program when warranted.

3. For the reasons set forth above, the Initial Agency Decision is hereby affirmed and adopted as the Final Agency Decision in this case.

Charles B. Curtis

Deputy Secretary

Issued February 1, 1996

Stephen Earl Bowman v. Johnson Controls World Services, Inc. and University of California (Case No. AL--94--0001)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued June 20, 1996

This is an appeal by complainant Stephen Earl Bowman of a decision by the Office of Contractor Employee Protection (OCEP) dismissing his complaint based on lack of jurisdiction under 10 C.F.R. Part 708. Mr. Bowman filed a complaint with OCEP alleging that he was forced to resign his position with Johnson Controls World Services, Inc., a subcontractor of the University of California, the Department of Energy's management and operating contractor at the Los Alamos National Laboratory, in retaliation for his disclosures of alleged fraudulent conduct by his supervisor.

On appeal, Mr. Bowman takes issue with OCEP's decision dismissing his complaint for lack of jurisdiction. However, 10 C.F.R. Part 708 does not apply to complaints involving alleged acts of reprisal where such acts occur prior to the adoption or amendment of a contract requiring compliance with Part 708 and, as in the instant case, the alleged reprisal does not stem from health or safety disclosures, participations or refusals. See 10 C.F.R. Sec. 708.2(a); see also Final Decision and Order in Mehta v. Universities Research Association (OHA Case No. LWA-0003, March 20, 1995). The alleged acts of reprisal raised in the complaint here occurred prior to the September 23, 1994, effective date of the amendment to the University of California's contract requiring compliance with Part 708 and amendment of its subcontracts to require such compliance. Therefore, OCEP correctly determined that it lacks jurisdiction over the allegations raised in Mr. Bowman's complaint.

For the reasons set forth above, OCEP's decision to dismiss this complaint for lack of jurisdiction is hereby affirmed.

Charles B. Curtis

Deputy Secretary

Issued: June 20, 1996

Harry Calvin Burkholder v. Battelle Pacific Northwest Laboratory (Case No. RL--96--0002)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued September 9, 1998

This is a request for review by complainant Harry Calvin Burkholder of a decision by the Office of Inspector General (OIG) dismissing his reprisal complaint.

On January 22, 1996, Mr. Burkholder, a former employee of Battelle Pacific Northwest Laboratories, the Department of Energy (DOE) contractor

at the Pacific Northwest National Laboratory (PNNL), initiated a complaint with DOE's Richland Operations Office. The complaint alleged that he was removed from his position as Manager of the Waste Treatment Technology Department in January 1994 and involuntarily terminated effective July 31, 1995, in retaliation for alleged disclosures of racial and sexual discrimination, unfair labor practices, and the coverup of safety and security issues.

On March 18, 1998, OIG issued a summary dismissal of Mr. Burkholder's complaint pursuant to 10 C.F.R. Secs. 708.6(a) and 708.8(a)(4) because he filed a complaint on November 6, 1996, in the Superior Court, Benton County, Washington, in which he alleged, inter alia, that he was "terminated in violation of public policy, both as a whistleblower and as a result of testifying truthfully under oath."

Subsection 708.6(a) of the DOE Contractor Employee Protection Regulation, 10 C.F.R. Part 708, provides, in pertinent part, that:

[a]n employee who believes that he or she has been discriminated against in violation of this part, and who has not, with respect to the same facts, pursued a remedy available under State or other applicable law, may file a complaint with DOE. ... For purposes of this part, a complaint shall be deemed to have been pursued under State or other applicable law if the employee had, pursuant to proceedings established or mandated by State or other applicable law, at any time prior to, or concurrently with, the filing of a complaint with DOE, or at any time during the processing of a complaint filed with DOE, filed or submitted any complaint, action, grievance, or other pleading with respect to that same matter. (Emphasis supplied.)

This section provides further that the 60 day limitations period set forth in subsection 708.6(d) for filing a complaint "shall be suspended upon the filing of a complaint pursuant to State or other applicable law, and [such filing] shall not bar the employee from reinstituting or filing a complaint with DOE if the matter cannot be resolved under State or other applicable law due to a lack of jurisdiction."

Subsection 708.8(a)(4) of the regulation provides for dismissal of a complaint where it is determined that "[t]he complainant has pursued a remedy available under State or other applicable law...."

On appeal, complainant's attorney takes issue with OIG's dismissal of his complaint based on his filing of a State court complaint regarding the same facts, claiming that "[t]here remains some question concerning whether Mr. Burkholder will be able to effect the remedy requested in this administrative complaint in the underlying lawsuit against Battelle."

Whatever basis complainant's attorney had for initiating an action in state court, the fact remains that, subsequent to filing his initial complaint with OIG, the complainant filed a complaint in State court with respect to the same facts. This being the case, OIG correctly dismissed his complaint pursuant to 10 C.F.R. Sec. 708.8(a)(4).

Therefore, this complaint is being dismissed on purely procedural grounds, based on the fact that complainant has chosen to pursue his complaint in State court. However, no judgment is being made as to the underlying merits of complainant's case. If complainant's allegations cannot be resolved in the State court proceeding he has initiated "due to a lack of jurisdiction," he may reinstitute a Part 708 complaint in accordance with the terms of subsection 708.6(d). /1

For the foregoing reasons, the dismissal of the complaint is affirmed.

Elizabeth A. Moler

Deputy Secretary

Issued September 9, 1998

/1However, we note that complainant's initial OIG complaint appears to have been untimely. 10 C.F.R. Sec. 708.6(d) provides that a complaint "must be filed within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later." In this case, the complaint indicates that complainant's involuntary termination occurred on July 31, 1995, and that his OIG complaint was not filed until January 22, 1996, almost six months later. Accordingly, if complainant at some future time seeks to reinstitute his complaint in accordance with the terms of subsection 708.6(d), OIG will have to address whether the apparent untimeliness of the initial complaint precludes Part 708 relief.

We further note that the timeliness of complainant's appeal is questionable. Under 10 C.F.R. Sec. 708.8(c), a request for review must be filed within five days of receipt of OIG's decision. Here, a request for review of the March 18, 1998, decision was not mailed until April 13, 1998. In that request for review, complainant's counsel states that the March 18 OIG decision was not received by complainant until April 7. Given our disposition of this matter, it is unnecessary to examine the questions thus raised. However, this seems an apt occasion for reminding participants in the Part 708 process and their counsel of the importance of complying with the deadlines therein.

Mark R. Craven v. Computer Sciences Corp. (Case No. NV--93--0004)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued February 21, 1996

This is an appeal by complainant Mark R. Craven of an Initial Agency Decision by the Office of Contractor Employee Protection ("OCEP"). In the Initial Agency Decision, OCEP assumed for purposes of its analysis that complainant may have communicated concerns involving alleged health and safety issues. However, OCEP found that he had failed to establish that his complaints contributed to any alleged retaliatory action against him by the respondent. Further, OCEP found that the contractor had shown by clear and convincing evidence that it would have taken the same adverse actions against complainant irrespective of whether or not he made any protected disclosures under Part 708.

On appeal, OCEP's factual determinations are subject to being reversed only if they are clearly erroneous. Compare Pullman Standard v. Swint, 456 U.S. 273 (1982), with Amadeo v. Zant, 486 U.S. 214, 223 (1988), quoting Fed. R. Civ. P. 52(a). A review of the record and the materials submitted in support of the appeal confirms that complainant has failed to demonstrate that any protected disclosures resulted in prohibited reprisals being taken against him and that OCEP's contrary findings are "clearly erroneous." Accordingly, there is no basis for overturning the Initial Agency Decision, and that decision is hereby adopted as the Final Agency Decision in this case.

Charles B. Curtis

Deputy Secretary

Issued February 21, 1996

Kenneth B. Dobreuenaski v. Associated Universities, Inc. (Case No. CH--95--0002)

Final Decision and Order issued by the Deputy Secretary of Energy

Issued April 18, 1997

This is a request for review by complainant Kenneth B. Dobreuenaski of a Summary Dismissal, dated September 6, 1996, by the Office of Contractor Employee Protection ("OCEP"). In the Summary Dismissal, OCEP found that Mr. Dobreuenaski's complaint, involving alleged "constructive discharge" on February 26, 1996, in reprisal for protected health and safety disclosures, was "essentially based on the same facts" as one he filed with the Wage and Hour Division of the Department of Labor on July 18, 1996. Accordingly, OCEP concluded that the complaint "must be dismissed" under 10 C.F.R. Sec. 708.6(a) (Request for Review, Attachment 1).

The complaint filed with the Labor Department was resolved against Complainant on the merits on September 13, 1996, on the basis that the actions complained of were not discriminatory or retaliatory (Request for Review, Attachment 5). According to OCEP's memorandum of September 30, 1996, Complainant "has informed OCEP that he has appealed DOL's findings, and requested an evidentiary hearing."

Section 708.6(a) deprives the OCEP of jurisdiction over a claim if the complainant pursues a remedy "under State or other applicable law * * * at any time during the processing of a complaint * * * concerning the same matter." The regulatory preamble to the final rule explains that it is

not the DOE's intention to give employees a forum in which to relitigate complaints that have been resolved after investigation and a full evidentiary hearing. Therefore, a new Sec. 708.6(a) has been added to require that in those circumstances when redress is available under State or other applicable law, the employee must make an exclusive election of remedies.

57 Fed. Reg. 7538 (Mar. 3, 1992). Thus DOE's intention not to give complainants a second forum for litigation after a resolution on the merits is clear, and OCEP was clearly correct in dismissing the complaint.

In sum, there is no basis for overturning the Summary Dismissal, and that dismissal is hereby adopted as the Final Agency Decision in this case.

Charles B. Curtis

Deputy Secretary

Issued April 18, 1997

Therese A. Quintana-Doolittle v. Westinghouse Electric Co. (Case No. AL--98--0004)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued October 4, 1999

This is a request for review by complainant Therese A. Quintana-Doolittle of a decision by the Office of Inspector General (OIG) dismissing the reprisal complaint that she filed pursuant to 10 C.F.R. Part 708, the regulation establishing the DOE Contractor Employee Protection Program.

On September 16, 1998, Ms. Quintana-Doolittle filed her complaint against her employer, Westinghouse Electric Co. (Westinghouse), which is a DOE subcontractor at DOE's Los Alamos National Laboratory. In her complaint, Ms. Quintana-Doolittle alleged that her resignation from Westinghouse, after accepting a position with the Department of Health of the State of New Mexico, constituted a constructive discharge in retaliation for protected disclosures. Complaint at 19. She sought, as a remedy, the reimbursement of 83.5 hours of sick leave, lost pay, and the removal of a former co-worker from his position of authority. Id. at 20.

Ms. Quintana-Doolittle provided additional information on November 14, 1998, in response to a request from the OIG.

On December 9, 1998, the OIG issued a summary dismissal of Ms. Quintana-Doolittle's reprisal complaint, pursuant to 10 C.F.R. Sec. 708.8(a)(2), on the ground that her complaint violated the requirement in Sec. 708.6(d) that a reprisal complaint "must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later." The OIG found that Ms. Quintana-Doolittle asserted in her complaint that she resigned from Westinghouse effective July 10, 1998, and her complaint was dated September 16, 1998, more than 60 days after her resignation. Her complaint was dated 68 days after her resignation.

On December 24, 1998, Ms. Quintana-Doolittle filed a request for review by the Deputy Secretary. She alleges that on September 8, 1998---the 60thday after the effective date of her resignation---she sought legal advice from a person who incorrectly told her that she had 90 days to file her complaint, and who provided her with a page from DOE's Notice of Proposed Rulemaking to amend Part 708, published on January 5, 1998, in which DOE's proposed amendments included the proposed increase from 60 days to 90 days in the time limit for filing a complaint. 63 Fed. Reg. 374, 382 (Jan. 5, 1998). Request for review at 1. She also alleges that on September 9, 1998---the 61st day after the effective date of her resignation---she spoke with a person in the DOE Albuquerque Operations Office, who suggested that she go forward with the complaint and mailed to her the form for the complaint and information about the Part 708 regulations. Id. She admits that more than 60 days passed between her departure from Westinghouse on July 10, 1998 and filing her complaint on September 16, 1998, but she states that she filed her complaint within 60 "working days" of her departure. Id.

Ms. Quintana-Doolittle's arguments in her request for review fail to demonstrate that the OIG was incorrect in determining that her complaint violated Sec. 708.6(d), and in therefore dismissing it pursuant to Sec. 708.8(a)(2).

The 60-day limitations period for filing a reprisal complaint is a requirement included within the regulation establishing the DOE Contractor Employee Protection Program, in Sec. 708.6, which contains the requirements for filing a complaint. Contrary to the legal advice that she received, the 60-day deadline was applicable at the time of her filing on September 16, 1998, because DOE's Jan. 5, 1998 Notice of Proposed Rulemaking, by its express terms, only proposed amendments to Part 708; it did not amend the

regulation. *i See, e.g.*r, 63 *i Fed. Reg. *r at 374, 375, 380. /1

Contrary to the argument in her request for review, the 60-day limitations period in Sec. 708.6(d) describes the limitations period as "within 60 days," not "within 60 working days." Indeed, Ms. Quintana-Doolittle does not even allege in her request for review that she had a good faith belief, at the time she filed her complaint, that the "60 day" limitations period referred to 60 working days. Such an interpretation would have been contrary to DOE regulations, which provide that Saturdays, Sundays, and federal legal holidays shall be excluded from the computation of time when the period of time allowed or prescribed is 7 days or less. 10 C.F.R. Secs. 205.5(a)(2), 1003.5(a)(2).

Moreover, Ms. Quintana-Doolittle has failed to show good cause for exceeding the 60-day limitations period. She admits in her request for review that she did not even seek the legal advice that she allegedly received until the final day of the 60-day limitations period, and that she did not contact the DOE Albuquerque Operations Office for advice until *i after *r the 60-day limitations period had expired. Request for review at 1.

In addition, Ms. Quintana-Doolittle has admitted that she knew before July 10, 1998---the effective date of her resignation---of the alleged discriminatory acts that are the basis of her complaint. In her complaint, she alleged that the first act of retaliation against her occurred on January 14, 1998. Complaint at 8. She next stated that she was subjected to retaliation, "Fostered and Condoned by Westinghouse," on April 22, 1998 (id. at 12), when she was transferred from her position in Human Resources to a less desirable position (id. at 13). She asserted "Retaliation confirmed" on April 29, 1998. Id.

Even if it is assumed, arguendo, that the latest date mentioned in the preceding paragraph---April 29, 1998, when Ms. Quintana-Doolittle confirmed the retaliation against her---was the date on which she first learned of the alleged discriminatory acts that are the basis of her complaint, the limitations period would have run for 140 days before she filed her reprisal complaint on September 16, 1998. That period would have exceeded both the applicable 60-day limitations period in Sec. 708.6(d), and the 90-day limitations period which was adopted in DOE's Mar. 15, 1999 interim final rule for prospective application, but which does not apply to the filing of the instant complaint, as explained above.

For the foregoing reasons, the dismissal of the complaint is affirmed.

T. J. Glauthier

Deputy Secretary

Issued October 4, 1999

/1 On March 15, 1999, DOE published an interim final rule amending Part 708, effective April 14, 1999. 64 Fed. Reg. 12862 (Mar. 15,1999). Although that amended rule includes a new provision (in Sec. 708.14) which increases the time limit for filing a complaint to 90 days, that rule also includes a new provision (in Sec. 708.8) which explicitly states that the revised procedures "apply prospectively in any complaint proceeding pending on the effective date of this part." 64 Fed. Reg. at 12871 (emphasis added). Because the revised procedures do not apply retroactively in pending proceedings, they do not apply to the time limit for filing Ms. Quintana-Doolittle's complaint, which was filed on September 16, 1998, nearly seven months before the effective date of the interim final rule.

Patsy R. Fox v. Southeastern Universities Research Association (Case No. OR--94--0007)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued August 13, 1996

This is an appeal by complainant Patsy R. Fox from a decision by the Office of Contractor Employee Protection (OCEP) dismissing her complaint based on lack of jurisdiction under 10 C.F.R. Part 708. Ms. Fox, a former employee of Southeastern Universities Research Association (SURA), the Department of Energy (DOE) management and operating (M&O) contractor at the Continuous Electron Beam Accelerator Facility (CEBAF), filed a complaint with OCEP alleging that she was issued a negative performance appraisal and placed on probation in retaliation for a grievance she filed concerning her immediate supervisor. On appeal, the complainant takes issue with OCEP's decision dismissing her complaint for lack of jurisdiction.

The scope of the Department's regulatory authority with respect to contractor employee reprisal complaints such as Ms. Fox's is found at 10 C.F.R. Sec. 708.2(b), which provides, in pertinent part:

[t]his part is applicable to employees (defined in Sec. 708.4) of contractors (defined in Sec. 708.4) performing work on-site at DOE-owned or leased facilities ... (emphasis supplied).

The record here establishes that the complainant was not employed at a DOE owned or leased facility, and that her employment with SURA was not pursuant to DOE's M&O contract with SURA. Since the facility at which the complainant was employed is not a "DOE-owned or leased facility," the whistleblower regulation does not extend to Ms. Fox's employment with SURA.

For the reasons set forth above, OCEP's decision to dismiss this complaint for lack of jurisdiction is hereby affirmed.

Charles B. Curtis

Deputy Secretary

Issued August 13, 1996

Sara Galpin v. EG&G Science Support Corporation and EG&G Technical Support Services (Case No. OR--95--0001)

Final Decision and Order Issued by the Deputy Secretary of Energy

Issued February 21, 1996

This is an appeal by complainant Sara Galpin of a decision by the Office of Contractor Employee Protection (OCEP) dismissing her complaint based on lack of jurisdiction under 10 C.F.R. Part 708. Ms. Galpin filed a complaint with OCEP alleging that her employment pursuant to a temporary employment requisition between EG&G Technical Support Services and EG&G Science Support Corporation, a subcontractor of Universities Research Association (URA), the Department of Energy (DOE) management and operating contractor at the Superconducting Super Collider (SSC) site, was terminated effective October 21, 1994, in retaliation for disclosures of fraudulent activity.

On June 28, 1995, OCEP dismissed Ms. Galpin's complaint for lack of jurisdiction under 10 C.F.R. Part 708, noting that the regulation does not apply to complaints involving alleged acts of reprisal where such acts occur prior to the adoption or amendment of a contract requiring compliance with Part 708, and the alleged acts of reprisal do not stem from health and safety disclosures, participations, or refusals. Referring to its letter of May 24, 1995, which advised Mr. Galpin that her employment with EG&G was governed by employment letters between EG&G Technical Support Services and EG&G Science Support Corporation, OCEP noted that those letters did not include provisions making Part 708 applicable to her employment. Therefore, OCEP dismissed the complaint based on lack of jurisdiction.

On appeal, the complainant argues that the clause requiring compliance with the "whistleblower" regulation is mandatory and should be "read into the subcontracts," citing G. L. Christian and Associates v. United States, 312 F.2d 418, 160 Ct. Cl. 1, reh. denied, 320 F.2d 345, 160 Cl. Ct. 58, cert. denied, 375 U.S. 954 (1963). Under Christian, a court may insert a clause into a government contract by operation of law if that clause is required under applicable federal administrative regulations.

1. As a threshold matter, the applicability of Christian to the subject matter must be addressed. Contrary to the complainant's suggestion, Christian did not address "the application of

the required clause doctrine to subcontractors." In fact, no court has addressed specifically the application of Christian to a government subcontract where a clause required by federal regulation is not incorporated in a subcontract, and the case

law regarding application of Christian to subcontractors is inconclusive. While none of the authorities I have reviewed conclusively state that *i Christian *r is inapplicable to subcontractors as a fundamental legal precept, the authorities evince a reluctance to impose upon contractors by operation of law obligations not specifically contained in the express provisions of the subcontract. *i See Dowty Decoto v. Department of Navy*r, 883 F.2d 774 (9th Cir. 1989); *i see also United States of

America v. Interstate Landscaping Company, Inc.*r, 1994 U.S. App. LEXIS 24419, *16 (6th Cir. 1994); *i Cylinder Laboratories, Inc. v. Maecorp, Inc.*r, 1990 U.S. Dist. LEXIS 9216, *9 (W.D. Mich. 1990); *i K. L. Conwell Corporation*r, EBCA No. 399--10--87, 88--2 BCA (CCH Para. 20,712) (1988); *i Palmetto Enterprises, Inc.*r, 79--1 BCA (CCH Para. 13,736) (1979). *p0r 2. Even assuming that *i Christian *r is applicable generally to subcontractors, application of *i Christian *r to the facts presented here is problematic. *i Christian *r involved a regulatory provision that was in effect at the time that the contract at issue was executed. *i Christian*r, 320 F.2d 345, 350. *p0r The subject "whistleblower" regulation and the implementing amendment to the Department of Energy Acquisition Regulations (DEAR) do not address specifically the application of the regulation to existing subcontracts. The DEAR amendment

instructed DOE contracting officers to insert a Whistleblower Protection for Contractor Employees clause in existing M&O contracts. The clause itself required the contractor to "insert or have inserted the substance of this clause ... in subcontracts, at all tiers..." 48 C.F.R. 970.5204--59(b). *p0r In the instant case, the "whistleblower" regulation and the DEAR amendment were promulgated subsequent to execution of the first tier subcontract between URA and EG&G Science Support Corporation. Further, there was no extension or renegotiation of the subcontract during the period at issue in this complaint. *p0r Further, the complainant was a temporary employee of a DOE second tier contractor. The terms and conditions of her employment were governed by various employment letters and "Requisition for Temporary Personnel" requests between EG&G Science Support Corporation, a DOE first tier subcontractor, and EG&G Technical Support Services, a second tier contractor. The initial "Requisition for Temporary Personnel" between EG&G Science Support Corporation and EG&G Technical

Support Services authorizing the complainant's temporary employment was executed March 20, 1993, prior to the date URA's M&O contract was modified. *p0r Accordingly, since the alleged retaliatory action involved in Ms. Galpin's complaint does not involve health or safety matters, the applicable jurisdictional provision of the "whistleblower" regulation requires that the underlying procurement contract contain a clause requiring compliance with Part 708 at the time the alleged reprisal actions occur in order for the regulation to be applicable. Since the EG&G Technical Support Services second tier subcontract did not contain a clause requiring compliance with the "whistleblower" regulation at the time Ms. Galpin's employment was terminated, I conclude that OCEP lacked jurisdiction over the complaint. *p0r For the reasons set forth above, OCEP's decision to dismiss this complaint for lack of jurisdiction is hereby affirmed. *sig Signature: Charles B. Curtis *nl Deputy Secretary *h1

Pamela Griffin v. Westinghouse Savannah River Company (Case No. SR--95--0005)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued June 20, 1996

This is an appeal by complainant Pamela Griffin of a decision by the Office of Contractor Employee Protection (OCEP) dismissing her complaint based on lack of jurisdiction under 10 C.F.R. Part 708. Ms. Griffin filed a complaint with OCEP alleging that she was subjected to various discriminatory acts, culminating in the termination of her employment on March 15, 1995 by Westinghouse Savannah River Company, the Department of Energy (DOE) management and operating contractor at the Savannah River Site.

1. On appeal, Ms. Griffin requests reconsideration of OCEP's dismissal of her complaint for lack of jurisdiction due to untimeliness. Ms. Griffin's complaint was filed on November 17, 1995, more than eight months following the final alleged discriminatory act, which occurred on March 15, 1995. 10 C.F.R. 708.6(d) states that a complaint "must be filed within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later". Since Ms. Griffin's complaint was filed more than 60 days after the termination of her employment, OCEP determined correctly that it lacked jurisdiction over the allegations raised in her complaint.

2. Ms. Griffin also alleges on appeal that there is a "continuing violation" which confers jurisdiction over her complaint. In order to allege a continuing violation, the complainant must establish that further acts of reprisal occurred subsequent to her termination. See Mehta v. University Research Association (OHA Case No. 0003, March 20, 1995). In this case, however, the complainant does not allege any discriminatory actions by Westinghouse Savannah River Company in the 60 day period prior to the filing of her complaint with OCEP. Rather, Ms. Griffin's complaint itself underscores the fact that the final discrete discriminatory act occurred when she was terminated on March 15, 1995. Therefore, the complainant has failed to establish a continuing violation that would confer jurisdiction over her complaint.

For the reasons set forth above, OCEP's decision to dismiss this complaint for lack of jurisdiction is hereby affirmed.

Charles B. Curtis

Deputy Secretary

Issued June 20, 1996

David K. Hackett v. Martin Marietta Energy Systems, Inc. (Case No. OR--93--0001)

Final Decision and Order issued by the Deputy Secretary of Energy

Issued April 24, 1996

This is an appeal by complainant David K. Hackett of a decision by the Office of Contractor Employee Protection (OCEP) dismissing his complaint based on lack of jurisdiction under 10 C.F.R. Part 708. Mr. Hackett filed a complaint with OCEP alleging that his personal service contract with Martin Marietta Energy Systems (MMES) 1/, the Department of Energy (DOE) management and operating contractor at Oak Ridge National Laboratory (ORNL), was not renewed in retaliation for his allegations of tax and labor law violations by MMES.

1. On appeal, Mr. Hackett takes issue with OCEP's decision dismissing his complaint for lack of jurisdiction. However, 10 C.F.R. Part 708 does not apply to complaints involving alleged acts of reprisal (for other than health or safety disclosures) where such acts occur prior to the adoption or amendment of a contract. requiring compliance with Part 708. See 10 C.F.R. Sec. 708.1(a); see also Final Decision and Order in Mehta v. Universities Research Association (OHA Case No. LWA-0003, March 20, 1995). The alleged acts of reprisal raised in the complaint here occurred prior to the March 31, 1993, effective date of the modification of MMES' contract requiring compliance with Part 708. Therefore, OCEP correctly determined that it lacks jurisdiction over the allegations raised in Mr. Hackett's complaint.

2. The complainant asserts further that OCEP has jurisdiction because his complaint involves health and safety issues. However, the complainant failed to timely raise such allegations before OCEP when the subject complaint was filed. OCEP's file reflects that these allegations were first raised in connection with complainant's judicial action alleging wrongful discharge, which was filed more than a year after the alleged act of reprisal. Pursuant to 10 C.F.R. Sec. 708(c) and (d), to invoke the protections of the Department's "whistleblower" regulation, a complaint must be filed within 60 days after the alleged discriminatory act occurred, and must "set[] forth specifically the nature of ... the disclosure ... giving rise to such act." Thus, complainant's health and safety allegations were not timely raised. Moreover, pursuant to 10 C.F.R. Sec. 708.8(a)(4), OCEP does not process allegations for which the complainant "has pursued a remedy available under state or other applicable law."

3. Lastly, the complainant argues on appeal that jurisdiction exists based on "continuing retaliation" in the form of "employment blackballing." However, neither the appeal nor the complaint file contain any specific allegations of retaliatory actions that occurred subsequent to the March 31, 1993, modification of MMES' contract to require compliance with Part 708. For the reasons set forth above, OCEP's decision todismiss this complaint for lack of jurisdiction is hereby affirmed.

Charles B. Curtis

Deputy Secretary

Issued: April 24, 1996

1/ The corporation is currently named Lockheed Martin Energy Systems.

Daniel Holsinger, Complainant, v. K-Ray Security, Inc., Respondent OHA Case Nos. VWC-0001 and VWC-0002

DECISION AFFIRMING AGENCY DECISION AS MODIFIED

Issued: January 19, 2000

This is a request for review by K-Ray Security, Inc., the current security operations contractor at DOE's Federal Energy Technology Center ("FETC"), of the Decision of the Office of Hearings and Appeals ("OHA") on remand from the Deputy Secretary adhering, after an additional evidentiary hearing and an assessment of the equities, to its earlier finding that reinstatement of Complainant Holsinger as a security guard is a necessary and appropriate action to effect full relief, even though it was the prior security contractor, Watkins Security Agency, Inc., ("WSA") that was found to have committed the act of reprisal prohibited under 10 C.F.R. *§708.5.* /1

On October 7, 1994, Mr. Holsinger filed a complaint with the Office of Contractor Employee Protection ("OCEP") alleging that he had made protected disclosures about the possible theft of government property by another member of the security force and that those disclosures led to suspensions and termination of his employment. R. 00 1-002. After an investigation, OCEP issued a report concluding that Holsinger's dismissal had been at least in part in reprisal for his protected disclosures. Mr. Holsinger's complaint sought back pay and benefits and reinstatement from WSA, but, while the complaint was pending, K-Ray took over the security function at FETC. OCEP proposed that WSA pay Holsinger back pay and benefits and that K-Ray reinstate him based on its assessment that, absent the termination, Holsinger would have been hired automatically by K-Ray .R.003.

Following the issuance of OCEP's investigatory report and recommendations, complainant, WSA, and K-Ray all requested a hearing before OHA. Prior to the hearing, WSA and Mr. Holsinger entered a settlement agreement which satisfied the proposed requirement that WSA pay Mr. Holsinger back pay and benefits. Consequently, WSA was dismissed as a party. R.003. K-Ray did not challenge the conclusions that Part 708 had been violated by WSA, but objected to OCEP's proposal that K-Ray be required to reinstate the complainant. K-Ray argued that such a remedy would create an unwarranted hardship on K-Ray and require it to terminate an existing employee. R.003-004. Agreeing with OCEP, however, OHA found that reinstatement of Mr. Holsinger was necessary to restore him to the position he would have occupied absent the acts of reprisal by WSA, since all thirteen of the other WSA security personnel were hired by K-Ray when it assumed the contract in June 1995. R.004.

K-Ray appealed OHA's decision to the Deputy Secretary. The Deputy Secretary concluded that OHA had overlooked uncontradicted testimony that reinstatement of Mr. Holsinger would require discharge of another K-Ray security officer, and that under OHA's own precedent, reinstatement is disfavored when it causes displacement of an innocent employee. Accordingly, the Deputy Secretary remanded the case for a full assessment of the equities involved in reinstatement. R. 005-007.

On remand, OHA conducted an evidentiary hearing, where the testimony of eleven witnesses was presented. Mr. Holsinger, now employed full-time as a security guard at the University of West Virginia and part-time with the police department of Kingwood, West Virginia, testified that he did not want to put anyone else out of work at K-Ray. He indicated that he would accept part- time employment on an as-needed basis up to one or two nights a week, so long as he was treated like "everyone else" in the part-time roster. R. 590-59 1, 598-599, 613,723-724. OHA accordingly analyzed K-Ray's claims of hardship against Mr. Holsinger's diminished request for relief, and determined that they were without merit. R. 724-726.

First, OHA concluded that K-Ray's position that reinstatement of Mr. Holsinger would necessarily be at

the expense of other employees was not supported by the record. Since there was no requirement in the contract about the number of employees K-Ray could use, it was clear that reinstatement merely on an as-needed basis could not require termination of another employee. R.726. The remaining question, however, was the extent to which any part-time hours given Mr. Holsinger would necessarily be at the expense of other employees. In a fact-bound analysis, OHA reviewed both the testimony and the company's work schedules for one calendar quarter. From this evidence, OHA concluded that the amount of normal re-scheduling and the hours generally available to part-time employees were sufficient to ensure that no regular hours of other part-time guards would need to be changed to accommodate Mr. Holsinger. Furthermore, OHA concluded that reasonable expectations of irregular part-time hours available to other guards would not be impaired and that, to the extent two recently hired part-time guards might sometimes get fewer hours as a result of Mr. Holsinger's availability, it should not overcome the important interest in protecting a whistleblower. R. 726-727, 729. Additionally, OHA concluded from the testimony of six other guards that there was little danger that reinstatement ofMr. Holsinger would cause morale problems. R. 727-729.

Second, OHA analyzed the extent to which reinstating Mr. Holsinger would impose unfair additional financial burdens on K-Ray. OHA concluded that the additional financial burden would most likely be minimal and, if not, would be subject to adjustment by DOE under the contract in furtherance of the goals of Part 708. R. 730-733.

Third, OHA analyzed K-Ray's claim that the burden of accommodating Mr. Holsinger's schedule would be excessive. Noting that it was premised on providing Mr. Holsinger the midnight shift regularly two nights a week, OHA determined that it would not impose that burden on K-Ray but would instead require offering him two shifts per week, but would only require utilizing Mr. Holsinger the equivalent of one shift per week. R.733-734.

Finally, in accord with the Deputy Secretary's suggestion (R. 007 n. 1) that some assessment should be made whether Mr. Holsinger's disclosures were of the kind the regulation was designed to protect, OHA concluded that Mr. Holsinger's report of possible theft of DOE property was well within the rule's scope, but that his complaint that management did not do anything about the report did not necessarily fall within the rule's protection, since it might have reflected a mere disagreement concerning the magnitude of the problem. R. 735-736. Accordingly, OHA ordered that K-Ray reinstate Mr. Holsinger as a part-time security guard on an as-needed basis, that Mr. Holsinger provide K-Ray monthly with a schedule of his available shifts, that K-Ray offer him a minimum of two shifts per week consistent with his schedule filling in for other employees on leave, and that K-Ray actually utilize him a minimum of one shift per week. R.736. K-Ray filed a timely appeal of OHA's decision on remand.

As was spelled out in the earlier decision of the Deputy Secretary in this case, reinstatement may be appropriate in order to remedy a violation of Part 708. 10 C.F.R. 708.10 (c) /2 provides:

> The initial agency decision may include an award of reinstatement, transfer, preference, back pay, and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses *** ****.

See also 10 C.F.R. 708.11(c) ("Relief ordered *** * *** may include reinstatement").

Reinstatement is an equitable remedy, and with any equitable remedy, however, an adjudicator "must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims'." Teamsters v. United States, 431 U.S. 324,375 (1977) [quoting Hecht Co. v. Bowles, 321 U.S. 321,329-330(1944)]. "Especially when *** * *** an equitable remedy threatens to impinge upon the expectations of innocent parties, the [adjudicator] must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is

fair, and what is workable.'" Ibid.[quoting Lemon v. Kurtzman, 411 U.S. 192,200-201 (1973)(plurality opinion of Burger, C.J.)].

As OHA noted in Boeing Petroleum Services. Inc., 24 DOE ¶87,501 at p. 89,007 (1994), reinstatement generally is not "an appropriate remedy under Part 708 where *** * *** there is a new M&O contractor that has no connection with the firm actually employing the complainant or the circumstances surrounding the discharge of the complainant, and the retention of employees by the new contractor is not directly influenced by the former contractor but merely a condition of assuming the M&O contract." Rather, the normal rule is that a wrongfully discharged contractor employee is not entitled to relief for the period after the contract under which he is employed is terminated. Id. at pp. 89,006-89,007, citing Holley v. Northrop Worldwide Aircraft Services. Inc., 835 F.2d 1375 (11th Cir. 1988), and Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992). Additionally, as the Deputy Secretary noted in the previous appeal in this case, OHA has pointed out that reinstatement is a "disfavored remedy" when it would "require the displacement of an innocent employee." Boeing Petroleum Services. Inc., 24 DOE ¶87,501 at p. 89,007, citing Edwards v. Department of Corrections, 615 F. Supp. 804, 811 (M.D. Ala. 1985).

At the hearing on remand, the issue on which the remand was ordered all but evaporated. The threat of displacement of another K-Ray employee was eliminated by Mr. Holsinger's reduced request for reinstatement merely for "as needed" shifts not to exceed two per week. K-Ray's contract administrator, Diane Lewis, testified that the part-time guards are not guaranteed any hours when they are hired. R. 676. Another of K-Ray's witnesses, Captain Munz, admitted that K-Ray's two part-time hires since K-Ray had taken over the contract had been told only that K-Ray "would probably give" them two or three days a week. R. 581-583. Accordingly, it is difficult to see how giving Mr. Holsinger one day a week would disrupt even the expectations of the other part-time guards, and OHA's conclusion that it would not do so is not clearly erroneous and should be sustained. It is well settled that OHA's factual determinations are subject to being reversed on appeal only if they are clearly erroneous. Oglesby v. Westinghouse Hanford Company, 25 DOE ¶ 87,501 (1995).

Regarding the other issues raised by K-Ray, OHA's determinations seem unexceptionable. As OHA noted, there was some testimony to the effect that reinstating Mr. Holsinger might cause morale problems among his co-workers, but the weight of the testimony seemed to the contrary, and it was not clearly erroneous for OHA to conclude that "on balance, the record as a whole does not support this view." R. 727. Concerning the expense of reinstating Mr. Holsinger, OHA correctly noted that K-Ray's claim in this respect was "based on several unsupported assumptions" (R. 730) (e.g. that every time Mr. Holsinger worked there would be a lower-paid newer employee not working overtime available), and I cannot find fault with OHA's painstaking analysis of the record. R. 730-733. Additionally, the record adduced at the hearing supports OHA's conclusion that any likely potential additional expense incurred as a result of reinstating Mr. Holsinger can be accommodated under the contract. R. 733. Finally, regarding K-Ray's alleged scheduling difficulties, Mr. Holsinger's diminished request and the relief ordered by OHA all but eliminated the issue, since relief is premised on Mr. Holsinger filling in on an as-needed basis, and the record supports OHA's conclusion that one shift a week will be available. Although OHA did not make anything of it, it seems to me to undermine K-Ray's arguments in this regard that since Mr. Holsinger was terminated, there have been five or six new part-time hires in the security force. R. 510-51 1. Mr. Holsinger has asked to be treated the same as these other part-time guards, and K- Ray's claims of hardship appear exaggerated under the present circumstances.

I am concerned at the extent to which OHA seems to have put the burden on the innocent contractor to show why it should not be required to reinstate the employee, and that this approach is not entirely consistent with the above-referenced precedent. Nevertheless, the result reached appears consistent with the Deputy Secretary's earlier decision, in accordance with law, and not clearly erroneous in its premises.

I am also concerned at the extent to which the remedy crafted by OHA, to minimize the impact on other part-time employees, intrudes into management of the contractor in a way that may be difficult to enforce. Accordingly, I conclude that OHA's decision on remand should be modified as follows. K-Ray shall

provide the relief ordered by OHA. When a position becomes available for which Mr. Holsinger is qualified and is comparable to the seniority level of his previous job with WSA, K-Ray shall offer that position to Mr. Holsinger and hire him if he accepts it. That offer will terminate K-Ray's obligation to employ Mr. Holsinger on a part-time basis as ordered by OHA.

T. J. Glauthier

Deputy Secretary

Issued: January 19, 2000

/1 DOE recently issued an Interim Final Rule amending Part 708 which became effective April 14, 1999. 64 Fed. Reg. 12,862 (March *15,* 1999). The decision in this case is unaffected by the changes in the Interim Final Rule. The numbering of the whistleblower provisions has changed, however, and this is noted in footnotes.

/2 This provision has been slightly reworded in 10 C.F.R. 708.36 in the Interim Final Rule. 64 Fed. Reg. 12862, 12875 (March 15, 1999).

Susan W. Hyer v. Battelle Pacific Northwest Laboratories (Case No. RL--98--0003)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued April 7, 1999

This is a request for review by complainant Susan W. Hyer of a decision by the Office of Inspector General (OIG) dismissing the reprisal complaint that she filed pursuant to 10 C.F.R. Part 708, the regulation establishing the DOE Contractor Employee Protection Program.

On September 17, 1998, Ms. Hyer filed her complaint against her employer, Battelle Pacific Northwest Laboratories (Battelle), which is the DOE management and operating contractor at DOE's Pacific Northwest National Laboratory. In her complaint, Ms. Hyer alleged that on April 14, 1995, she had raised concerns with Battelle regarding technical problems with software and a procurement document. She further alleged that as a result of those disclosures, she was subjected to retaliatory actions and, in approximately the summer of 1995, left her employment with Battelle. She also alleged that as a result of the retaliation against her, her husband also left his employment with Battelle at approximately the same time and obtained employment elsewhere.

On October 13, 1998, the OIG issued a summary dismissal of Ms. Hyer's reprisal complaint, pursuant to 10 C.F.R. Sec. 708.8(a)(2), on the ground that her complaint violated the requirement in Sec. 708.6(d) that a reprisal complaint "must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later." The OIG found that if, as she alleged, she was constructively discharged in the summer of 1995 because of her protected activity, she would have been aware of that discriminatory act at the time of its occurrence, and she therefore should have filed a reprisal complaint at that time, within 60 days after her constructive discharge in 1995, instead of delaying for approximately three years until September 1998.

5

The OIG also found that even assuming, arguendo, that Ms. Hyer's failure to file a reprisal complaint in 199 is mitigated by her alleged mistaken belief that she had an active complaint pending until she was informed otherwise by a January 30, 1998 letter from DOE's Richland Operations Office, her complaint still violated Sec. 708.6(d). Granting that assumption, she should have filed her complaint within 60 days of her receipt of the January 30, 1998 letter. Instead, she delayed until September 17, 1998, approximately seven months later.

Finally, the OIG found that the fact that Ms. Hyer's counsel, after receiving the January 30, 1998 letter, pursued settlement with Battelle until May 1998 is not a mitigating factor; and that even assuming, arguendo, that the 60-day filing limit tolled until May 1998, her complaint was still not timely filed as required by Sec. 708.6(d).

On October 27, 1998, Ms. Hyer filed a request for review by the Deputy Secretary. On November 5, 1998, Battelle submitted comments in response to the request for review. Ms. Hyer replied to Battelle's comments on November 16, 1998.

Ms. Hyer's arguments in her request for review and her November 16, 1998 reply fail to demonstrate that the OIG was incorrect in determining that her complaint violated Sec. 708.6(d), and in therefore dismissing it pursuant to Sec. 708.8(a)(2).

The 60-day limitations period for filing a reprisal complaint is a requirement included within the regulation establishing the DOE Contractor Employee Protection Program in Sec. 708.6, which contains

the requirements for filing a complaint. Ms. Hyer argues that her delay in filing her complaint for approximately three years after she left her employment in 1995 was justified by "incorrect information provided to Ms. Hyer and her counsel for over 2 1;2 years about the status of her complaint and an investigation which was not, in fact, being carried out." Request for review at 2. However, the "complaint" to which Ms. Hyer refers in the above-quoted sentence was, in fact, not a reprisal complaint filed pursuant to 10 C.F.R. Part 708, but rather an "employee concern" that Ms. Hyer submitted to the Employee Concerns Office at DOE's Richland Operations Office. DOE explained this to Ms. Hyer's counsel in a January 30, 1998 letter from Carolyn E. Reeploeg, Assistant Chief Counsel in DOE's Richland Operations Office. DOE also noted in that letter that Ms. Julie Goeckner of DOE's Richland Operations Office had advised Ms. Hyer in June 1995 that Ms. Hyer could file a complaint pursuant to Part 708:

In June 1995, Ms. Goeckner informed Ms. Hyer of her right to file under Part 708, explained the process, and the associated time frames. If Ms. Hyer had elected to file under Part 708, further processing of her complaint, including a formal investigation, would have been conducted by DOE Headquarters staff from the Office of Inspector General (OIG).

January 30, 1998 letter at 1. Yet Ms. Hyer waited for over three years after she was informed of the Part 708 time frames in June 1995 before filing her Part 708 complaint in September 1998.

Moreover, Ms. Hyer has failed to show good cause for exceeding the 60-day limitations period. Even if Ms. Hyer is given the benefit of every doubt, and it is assumed, arguendo, that all of the facts alleged by her are true and should be considered mitigating factors, her complaint still failed to satisfy the 60-day filing requirement. Indeed, her complaint would not even have satisfied the expanded time period provided for in DOE's recent amendment of Part 708.Section 708.14 increases the time limit for filing a complaint from 60 days to 90 days. 64 Fed. Reg. 12862, 12872 (March 15, 1999)

First, assuming that because of misunderstanding of DOE procedures, the limitations period should be tolled until Ms. Hyer received the January 30, 1998 letter in which DOE explained that she had not yet filed a reprisal complaint, then the limitations period would have begun to run sometime in February 1998, when she received that letter. However, she did not file her complaint until approximately seven months later, in September 1998. /1

Second, assuming that the limitations period should also be tolled because of discussions between counsel for Ms. Hyer and Battelle concerning possible settlement of their dispute, then the limitations period would have been tolled for that reason only from March 10, 1998 through May 27, 1998. Section 708.6(d) provides that in cases where the employee has attempted resolution through "internal company grievance procedures" as set forth in Part 708,

the 60-day period for filing a complaint shall be tolled during such resolution period and shall not again begin to run until the day following termination

of such dispute-resolution efforts.

In her reprisal complaint, Ms. Hyer stated that Battelle counsel proposed voluntary mediation by letter dated March 10, 1998; that by letter dated April 1, 1998, her counsel accepted that proposal; and that by letter dated May 6, 1998, Battelle counsel took the position that mediation would not be worth the investment to Battelle, and made a settlement offer that Ms. Hyer considered inadequate. Complaint at 2, and letters attached thereto. In the May 6, 1998 letter, Battelle counsel stated that his settlement offer would expire within 20 days of the date of that offer. May 6, 1998 letter at 3--4. The offer therefore expired on May 26, 1998; and the date on which the limitations period would have resumed running would have been May 27, 1998, "the day following termination of such dispute-resolution efforts" according to the terms of Sec. 708.6(d). However, Ms. Hyer did not file her reprisal complaint until September 17, 1998, which is 113 days after May27, 1998.

In addition, before the limitations period would have been tolled by the March 10, 1998 letter in which

Battelle counsel proposed mediation, the limitations period would have run from the date in February 1998 when Ms. Hyer received the January 30, 1998 letter from DOE, until March 10, 1998, or for approximately 30 days.

Therefore, granting every assumption in Ms. Hyer's favor, the limitations period would have run for approximately 143 days before she filed her reprisal complaint. That total of 143 days is the sum of the approximately 30 days before the limitations period was tolled on March 10, 1998, and the 113 days after the limitations period resumed running on May 27, 1998 until she filed her complaint on September 17, 1998. Thus, granting every assumption in her favor, her complaint nevertheless would have failed to satisfy either the 60-day filing requirement in Sec. 708.6(d), or the proposed 90-day filing requirement in DOE's Notice of Proposed Rulemaking to amend Part 708. /2

For the foregoing reasons, the dismissal of the complaint is affirmed.

T. J. Glauthier

Deputy Secretary

Issued April 7, 1999

/1 In Ms. Hyer's request for review at 1--2, her counsel incorrectly alleges that the OIG in its summary dismissal "took the position that the letter of January 30, 1998, from Ms. Reeploeg to me put Ms. Hyer and me on notice that a formal complaint should have been filed in February, 1998" and "virtually immediately after my receipt of that letter in order to be timely." On the contrary, the OIG in its summary dismissal expressly stated that "granting that assumption, the complaint should have [been] filed within 60 days of ... your receipt of the January 30, 1998 letter;" and "assuming that the time limit for filing tolled until sometime in February 1998, the complaint was untimely filed." Summary dismissal at 2. The summary dismissal thus made it clear that February 1998 was the month when the time limit for filing ceased to be tolled, i.e., when the time limit began to run; and that the complaint should have been filed within 60 days after the date in February 1998 when Ms. Hyer received the January 30, 1998 letter.

/2 In Ms. Hyer's request for review at 2, and in her November 16, 1998 reply at 1, her counsel incorrectly alleges that DOE's Notice of Proposed Rulemaking, in its proposed Sec. 708.6(e), provides for a 120-day period to file after the exhaustion of any internal grievance procedures. (Section 708.14(b) in the Interim Final Rule, which has extended the period to 150 days, 64 Fed. Reg. 12862, 12872 (March 15, 1999). That allegation is disproved by the express terms of the section in the Interim Final Rule, whose pertinent provision is the following:

The period for filing a complaint does not include time spent attempting to resolve the dispute through an internal company grievance-arbitration procedure. The time period for filing stops running on the day the internal grievance is filed and begins to run again on the earlier of :

(1) The day after such dispute resolution efforts end; or

(2) 150 days after the internal grievance was filed if a final decision on the grievance has not been issued. (emphasis added):

64 Fed. Reg. at 12872. In the Notice of the Interim Final Rule, under the heading "Summary of Changes," DOE described the above-quoted provision of the interim final rule in the following language

: [T]he interim final rule permits individuals to file a complaint under Part 708 if they have not received a response on a grievance relating to the complaint within 150 days of filing of the grievance. (emphasis added)

64 Fed. Reg. at 12864. Thus, both the plain language of the section, and DOE's summary of the changes in

that section, demonstrate that the 150-day period would apply only "where a final decision on the grievance has not been issued" within 150 days after the filing of that grievance, at which time the 90-day limitations period begins to run again so that individuals may file a reprisal complaint despite the fact that dispute resolution efforts have not terminated. Therefore, contrary to the allegation by Ms. Hyer's counsel, the 150-day period is *i not *r a new limitations period that begins to run after the exhaustion of internal grievance procedures. Indeed, the provision would apply only in cases where internal grievance procedures have *i not *r been exhausted within 150 days, unlike the instant case. In addition, Ms. Hyer's counsel fails to recognize that the above-quoted provision from the Sec. 708.14 specifies that the time period begins to run on "the earlier of" the date dispute resolution ends or 150 days after internal grievance was filed if a final decision has not been issued; therefore, in cases in which it applied, would cause the limitations period to resume running earlier, not later, than it would otherwise.

Richard P. Johnson v. Regents of the University of California (Case No. AL--98--0002)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued February 7, 1999

This is a request for review by complainant Richard P. Johnson of a decision by the Office of Inspector General (OIG) dismissing the reprisal complaint that he filed pursuant to 10 C.F.R. Part 708, the regulation establishing the DOE Contractor Employee Protection Program

On November 13, 1997, Mr. Johnson filed his complaint against his employer, the Regents of the University of California (the University), which is the DOE management and operating contractor at DOE's Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico. On August 5, 1998, Mr. Johnson submitted additional information in response to requests from the OIG.

In his complaint and in his August 5, 1998 submission, Mr. Johnson contended that the University terminated his employment on September 19, 1997, because he had disclosed that the requirement that LANL workers commute to and from work posed an unnecessary hazard to workers and was less safe than telecommuting; and because he had refused to participate in the allegedly unsafe activity of commuting to and from an office at LANL to perform work that he could do from the safety of his own home by telecommuting. In response to requests from the OIG, Mr. Johnson also submitted copies of an e-mail message dated July 22, 1997, in which his immediate supervisor provided him with advance notice that based on the end of Mr. Johnson's assignment in Richland, Washington, his employment would be terminated if he continued to insist on telecommuting instead of working full time in Los Alamos; and an e-mail message dated September 10, 1997, in which LANL management informed him that it had determined that his employment would be terminated because of his refusal to report to work at a LANL on-site office.

On August 7, 1998, the OIG issued a summary dismissal of Mr. Johnson's reprisal complaint, pursuant to 10 C.F.R. Sec. 708.8(a)(3). The OIG determined that his complaint is without merit, because his disclosure to LANL management regarding the possible dangers of commuting, and his refusal to commute, did not satisfy the criteria set forth in Sec. 708.5(a).

On August 26, 1998, Mr. Johnson filed a timely request for review by the Deputy Secretary. In his request for review, Mr. Johnson made general arguments in favor of the safety of telecommuting.

Section 708.5 of Part 708 sets forth DOE's prohibitions against reprisals for certain employee disclosures and for refusals to participate in certain activities. Specifically, subsection 708.5(a)(1) prohibits a DOE contractor from retaliating against an employee because the employee has disclosed "information that the employee in good faith believes evidences ... (ii) A substantial and specific anger to employees or public health or safety...." In addition, Subsection 708.5(a)(3) prohibits retaliation against an employee because the employee has

Refused to participate in an activity, policy, or practice when---

(i) Such participation---

...

(B) Causes the employee to have a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation, and the activity, policy, or practice causing the employee's apprehension of such injury---

(1) Is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety resulting from participation in the activity, policy, or practice; and

(2) The employee is not required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities...."

Mr. Johnson's general arguments in his request for review in favor of the safety of telecommuting fail to demonstrate that the OIG was incorrect in determining that his complaint is without merit, and in therefore dismissing it pursuant to Sec. 708.8(a)(3). His disclosure to LANL management concerning the possible dangers of commuting was speculative and did not relate to a "substantial and specific danger to employees or public health and safety," as required by Sec. 708.5(a)(1). Moreover, his refusal to commute was not based on "a reasonable apprehension of serious injury" to himself, other employees, or the public, and a reasonable person would not conclude that commuting would result in "a bona fide danger of an accident, injury, or serious impairment of health or safety," as required by Sec. 708.5(a)(3).

For the foregoing reasons, the dismissal of the complaint is affirmed.

Ernest J. Moniz

Acting Deputy Secretary

Issued February 7, 1999

George O. Kensley v. Diamond Back Services, Inc. (Case No. AL--95--0009)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued February 2, 1999

This is a request for review by complainant George O. Kensley of an Initial Agency Decision, issued by the Office of Inspector General (OIG), denying his complaint of reprisal.

On October 10, 1995, Mr. Kensley filed a complaint with DOE's Albuquerque Operations Office pursuant to 10 C.F.R. Part 708, the regulation establishing the DOE Contractor Employee Protection Program. Mr. Kensley alleged in his complaint that his employer, Diamond Back Services, Inc. (DBS), had taken retaliatory actions against him as a result of his disclosures to DBS and to Rust Geotech, Inc. (Rust) regarding possible fraud and violations of law at DBS. DBS had entered into a subcontract with Rust, which was the management and operating contractor at DOE's Grand Junction Projects Office. In his complaint and subsequent correspondence with the OIG, Mr. Kensley alleged that he was transferred from an office position to a labor crew at DBS, and that his employment at DBS was terminated, because he had reported to officials at DBS and Rust that the DBS Project Superintendent had engaged in possible illegal or fraudulent activities.

After conducting an investigation, the OIG issued a Report of Inquiry and Recommendations (Report) on Mr. Kensley's complaint on April 13, 1998. The Report found that Mr. Kensley was hired as a temporary laborer with DBS, and was subsequently assigned to administrative work in the project office while maintaining his status as a laborer. On the day after he was advised

that he was being transferred back to his laborer position, he left the job site and never returned to work. Report at 2--3. The Report noted that "resignations are presumed to be voluntary actions which are outside the scope of Part 708." Report at 5. While the presumption that a resignation is voluntary may be rebutted by evidence which shows that it was the result of duress or coercion, i.e., a constructive discharge, in this case, after reviewing the evidence, the OIG found that Mr. Kensley's employment was not terminated by DBS, and that he resigned from his employment and was not subjected to a constructive discharge. Report at 4--6. The OIG therefore recommended that his request for relief be denied. Report at 6. /1

Subsection 708.9(a) provides that within 15 days of receipt of the Report, a party may request a hearing on the complaint before the Office of Hearings and Appeals (OHA). Subsection 708.10(a) provides that if a hearing is not requested, the OIG (formerly the Director, Office of Contractor Employee Protection) shall issue an Initial Agency Decision based upon the record. The Report, which was served upon both parties, explicitly informed them of their right to request a hearing in the following language:

Pursuant to 708.9(a), either party may file a written request for a hearing on the complaint with the Office of Hearings and Appeals (OHA) within fifteen days from receipt of this recommendation. If a hearing is requested, OHA shall issue the initial agency decision. Pursuant to 708.10(a), if neither party files a request for a hearing, the Office of Assessments, Office of Inspector General, will issue the initial agency decision within 30 days.

Report at 6.

Neither party requested a hearing. Accordingly, the OIG issued an Initial Agency Decision on June 8, 1998. The Initial Agency Decision found that Mr. Kensley resigned him employment under circumstances that did not constitute a constructive discharge, and denied his request for relief

Subsection 708.10(c)(1) provides, in pertinent part, as follows:

If the initial agency decision contains a determination that the complaint is without merit, it shall also include a notice stating that the decision shall become the final decision of DOE denying the complaint unless, within five calendar days of its receipt, a written request is filed with the Director for review by the Secretary or designee. (emphasis added)

In compliance with that subsection, the Initial Agency Decision that was issued to Mr. Kensley included the following notice:

In accordance with 708.10(c)(1), either party may file a written request for a review of this decision by the Deputy Secretary, who is the Secretary's designee for these purposes, within five calendar days from receipt of this Initial Agency Decision. A request for review should be addressed to the Acting Deputy Inspector General for Inspections and a copy of the request must be served on the other party by certified mail. If a review is requested, the record will be transmitted to the Deputy Secretary. If neither party files a request for a review, the Initial Agency Decision shall become the Final Agency Decision. (emphasis added)

Initial Agency Decision at 1--2.

Mr. Kensley received the Initial Agency Decision on June 16, 1998. DOE received his request for review on July 2, 1998---16 days after his receipt of the Initial Agency Decision. Mr. Kensley did not date his one-page request for review.

In his request for review, Mr. Kensley's sole argument is that the OIG during its investigation should have contacted additional persons who would have testified in his behalf. However, after the OIG issued its Report, Mr. Kensley failed to take advantage of the opportunity provided by subsection 708.9(a) to request a hearing before OHA at which additional persons could have testified in his behalf. As explained above, the Report informed him that he could request a hearing before OHA within 15 days from his receipt of the Report, and that if a hearing were requested, OHA would issue the Initial Agency Decision. Mr. Kensley never requested such a hearing. If he had requested a hearing, it would normally have been held at or near the appropriate DOE field organization; the OHA Hearing Officer could have arranged for the issuance of subpoenas for persons to attend the hearing as witnesses on behalf of Mr. Kensley; and those witnesses would have testified under oath or affirmation and been subject to cross-examination. 10 C.F.R. 708.9(b), (e), (f). By failing to request a hearing pursuant to subsection 708.9(a) at which persons could have testified in his behalf, Mr. Kensley waived the objection that he now raises for the first time in his request for review.

Furthermore, the OIG interviewed Mr. Kensley himself during its investigation, and his own admissions during that interview support the OIG's finding that his employment was not terminated by DBS. As explained in the Report, Mr. Kensley admitted during that interview that he never received any documentation indicating that he was terminated, that he was never informed by anyone at DBS that he was terminated, and that he never made any attempt to find out from anyone at DBS whether he had been terminated. Report at 4. The Report concluded that the circumstances surrounding the cessation of his employment as reported by Mr. Kensley himself and by former DBS office manager, XXXXX---with whom Mr. Kensley spoke after he stopped working for DBS, and who was also interviewed by the OIG---establish that his employment was not terminated by DBS and that he resigned. Id. at 5.

Finally, we note that Mr. Kensley's request for review of the Initial Agency Decision was untimely. As explained above, his undated request for review was filed 16 days after his receipt of the decision, although subsection 708.10(c)(1) required it to be filed within five calendar days of receipt.

For the foregoing reasons, the dismissal of the complaint is affirmed.

Ernest J. Moniz

Acting Deputy Secretary

Issued February 2, 1999

/1 The Report emphasized that Mr. Kensley was hired as a laborer, and was at all times officially a laborer with DBS. Report at 5. Therefore, the fact that he was transferred to his official position, and was assigned to perform the tasks of his official position, did not, in and of itself, constitute a reprisal. Moreover, because he resigned from DBS on the morning that his transfer became effective, there was no opportunity for a work situation to develop that might have constituted a reprisal.

Judy Kibbe v. Lockheed Martin Energy Research Corp. (Complaint No. OR--97--0001)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued February 7, 1999

This is a request for review by Complainant Judy Kibbe, a former employee of a DOE contractor, Lockheed Martin Energy Research Corporation, which manages the Oak Ridge National Laboratory, of the summary dismissal of her complaint. The Acting Deputy Inspector General dismissed her complaint on the basis that it "is frivolous or on its face without merit and there is good cause not to process the complaint." In her request for review, the Complainant reiterates her complaint that a company rule was violated when a "positive discipline" concerning her job performance was placed in her personnel file without her knowledge, that once she discovered it, she informed a vice-president of the employer of the violation, and that she was laid off less than six months later in reprisal for the disclosure. She argues that her disclosure meets the regulatory test of "evidenc[ing] unsafe, unlawful, fraudulent, or wasteful practices," and that the summary dismissal erroneously applied a different standard that the disclosure must be "of concern to DOE and the public interest."

The complainant also responds to a notice by the case analyst in the Office of Inspections that her request for review by the Deputy Secretary was untimely since it was not received within five days of the decision's receipt by counsel for Complainant. The Complainant points out that the request for review was mailed within 24 hours after her counsel received the summary dismissal and argues that to equate "filed" with actual receipt is unreasonable, not required by the language of the rule, and at odds with comparable interpretations of the Federal Rules of Civil Procedure.

As an initial matter, I must determine whether the Complainant's request for review was timely filed. 10 C.F.R. Sec. 708.10(c) provides that the initial agency decision shall become the final decision of DOE "unless, within five calendar days of its receipt, a written request is filed with the [Acting Deputy Inspector General] for review * * *." Here, the record indicates that Complainant's counsel received the summary dismissal on Monday, May 11, 1998. Complainant's request for review, dated May 12, 1998, and postmarked May 13, 1998, was received by the Acting Assistant Inspector General on Monday, May 18, 1998.

In this case, the fifth calendar day following receipt was a Saturday, and the request for review was received on the first business day following this weekend period. Under both the Federal Rules of Civil Procedure and DOE procedural rules in other contexts, the last day of a period that is a Saturday, Sunday, or legal holiday is not included in computing the deadline. See Fed. R. Civ. P. 6(a); 10 C.F.R. Secs. 205.5(a), 1003.5(a). While Part 708 is silent on this point, I believe that the ordinary rule concerning computation of the deadline should be applied in this case. Accordingly, I conclude that the request for review was timely filed. /1

Turning to the Acting Deputy Inspector General's dismissal of the subject complaint, Part 708 provides at 10 C.F.R. Sec. 708.8(a) that a complaint shall proceed to investigation unless it has been settled, is untimely, is "frivolous or on its face without merit," is being pursued under other applicable law, or "for other good cause shown * * *." The regulations explicitly protect disclosures regarding a "violation of law, rule, or regulation" and disclosures evidencing "[f]raud, mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. Sec. 708.5(a)(i), (iii). The Acting Deputy Inspector General's dismissal assumes "that the Complainant's supervisor did violate a company 'rule' by failing to follow employee notification guidance set forth in the contractor's 'Management Control Procedure' pertaining to employee discipline * * *." Dismissal at 2. However, the Acting Deputy Inspector General concluded that the disclosure related to the Complainant's "individual, personal interests, and did not involve a matter of concern to DOE and the public interest."Ibid.

In the circumstances here presented, the Acting Deputy Inspector General correctly determined that further processing of the complaint was not warranted. As former Deputy Secretary White explained, protecting disclosures of alleged ""'mismanagement' as contemplated by the 'whistleblower' regulation demands a careful balancing lest the term encompass all disagreements between a contractor and its employees." More specifically, "there must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect * * *." *Mehta v. Universities Research Ass'n, 24 DOE Para. 87,514 at p. 89,065 (1995). Here, the alleged disclosure involved solely an internal personnel matter relating to counseling and discipline of the contractor employee based on her job performance and did not involve any nexus to DOE or the public. Accordingly, former Deputy Secretary White's admonition concerning the appropriate scope of Part 708 is especially apt.

Therefore, my review of the record reveals no basis for overturning the summary dismissal, and it is hereby affirmed.

Ernest J. Moniz

Acting Deputy Secretary

Issued February 7, 1999

/1 My resolution of this issue makes it unnecessary to reach the question whether the request for review should be considered timely filed if it is mailed, but not received, within the five-day limit.

Scott H. Lebow v. Coleman Research Corporation and Lockheed Martin Idaho Technologies Company (Case No. ID--95--0001)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued September 28, 1999

This is a request for review by complainant Scott H. Lebow of a decision by the Office of Inspector General (OIG) dismissing his complaint of reprisal.

On August 18, 1995, Mr. Lebow, a former employee of Coleman Research Corporation (CRC), a subcontractor of Lockheed Martin Idaho Technologies Company (LMITCO), the Department of Energy (DOE) contractor at the Idaho National Environmental and Engineering Laboratory (INEEL), initiated a complaint pursuant to 10 C.F.R. 708 with DOE's Idaho Operations Office. The complaint alleged that he was subjected to reprisal by CRC and LMITCO in retaliation for his alleged disclosures regarding waste, fraud, abuse, or mismanagement; safety and health issues; and possible violations of laws, rules, or regulations.

On February 13, 1996, Mr. Lebow filed suit in the United States District Court for the District of Idaho, pursuant to the False Claims Act (FCA), 31 U.S.C. Sec. 3729 et seq The FCA complaint included an allegation that the complainant was retaliated against for making protected disclosures, in violation of 31 U.S.C. Sec. 3730(h). /1

On January 16, 1998, OIG issued a summary dismissal of Mr. Lebow's complaint pursuant to 10 C.F.R. Sec. 708.8(a)(4), based on a determination that complainant's Part 708 complaint and his FCA complaint "both involve the same set of facts and allegations, and, consequently, that they constitute the 'same matter.'"

On January 30, 1998, the complainant filed a timely request for review.

At the time this complaint was filed, subsection 708.6(a) of the DOE Contractor Employee Protection Regulation, 10 C.F.R. Part 708, provided, in pertinent part, that:

[a]n employee who believes that he or she has been discriminated against in violation of this part, and who has not, with respect to the same facts, pursued a remedy available under State or other applicable law, may file a complaint with DOE .... For purposes of this part, a complaint shall be deemed to have been pursued under State or other applicable law if the employee had, pursuant to proceedings established or mandated by State or other applicable law, at any time prior to, or concurrently with, the filing of a complaint with DOE, *i or at any time during the processing of a complaint filed with DOE*r, filed or submitted any complaint, action, grievance, or other pleading with respect to that same matter. (Emphasis supplied.) /2

This section provided further that the 60 day limitations period set forth in subsection 708.6(d) for filing a complaint.

shall be suspended upon the filing of a complaint pursuant to State or other applicable law, and [such filing] shall not bar the employee from reinstituting or filing a complaint with DOE if the matter cannot be resolved under State or other applicable law due to a lack of jurisdiction. /3

Subsection 708.8(a)(4) of the regulation provided for dismissal of a complaint where it is determined that "[t]he complainant has pursued a remedy available under State or other applicable law ...." /4

On appeal, the complainant does not dispute the fact that he filed an FCA complaint in the District Court

regarding the same facts in his Part 708 complaint. Although complainant alleges that the dismissal of his complaint by OIG "is based on a misinterpretation and misapplication of the provisions of 10 C.F.R. Sec. 708.6(a)," complainant does not explain how subsection 708.6(a) has been "misinterpret[ed] and misappli[ed]"; rather, his argument is that, for reasons of "policy," subsection 708.6(a) /5 should not be applied at all. The undisputed fact is that, subsequent to filing his initial complaint with OIG, the complainant filed a FCA complaint in the District Court with respect to the same facts. /6 This being the case, OIG correctly dismissed his complaint pursuant to the clear mandate of 10 C.F.R. Sec. 708.8(a)(4). /7

For the reasons set forth above, OIG's summary dismissal of this complaint is hereby affirmed.

T. J. Glauthier

Deputy Secretary

Issued September 28, 1999

/1 Although the complaint was initially filed under seal, the Department of Justice declined to intervene in the lawsuit and the seal was subsequently lifted by the court.

/2 Effective April 14, 1999, DOE issued an Interim Final Rule amending Part 708. 64 Fed. Reg. 12,862 (March 15, 1999). Subsection 708.15(d) of the Interim Final Rule contains a similar provision providing for dismissal of a Part 708 complaint where a complainant subsequently files a complaint "under State or other applicable law."

/3 This tolling provision is essentially preserved in subsection 708.14 of the Interim Final Rule.

/4 An identical provision appears in subsection 708.17(c)(3) of the Interim Final Rule.

/5 A similar provision is contained in subsection 708.15(d) of the Interim Final Rule, as noted above.

/6 Information obtained from the Office of Chief Counsel, Idaho Operations Office, indicates that complainant is still actively pursuing his District Court complaint.

/7 Subsection 708.17(c)(3) of the Interim Final Rule.

Jeffrey R. Leist v. Fernald Environmental Restoration Management Corporation (Case No. OH--96--0001)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued October 31, 1996

This is an appeal by complainant Jeffrey R. Leist from a decision by the Office of Contractor Employee Protection (OCEP) dismissing his complaint based on lack of jurisdiction under 10 C.F.R. Part 708. Mr. Leist filed a complaint with OCEP alleging fraudulent and discriminatory labor practices in connection with a Voluntary Reduction in Force (VRIF) program of his former employer, Fernald Environmental Restoration Management Corporation (FERMCO), the Department of Energy (DOE) contractor at its Fernald facility. On appeal, Mr. Leist takes issue with OCEP's decision dismissing his complaint for lack of jurisdiction.

1. In this case, it is undisputed that the complainant voluntarily resigned his employment. The complaint focuses on the complainant's allegation that FERMCO improperly denied his application for VRIF benefits, and that FERMCO mismanaged the VRIF program. OCEP found that these assertions did not set forth a specific allegation of whistleblower reprisal.

10 C.F.R. Sec. 708.5(a) prohibits a DOE contractor from taking a discriminatory action against an employee in retaliation for the disclosure of information relative to health and safety; a violation of any law, rule, or regulation; fraud, mismanagement, gross waste of funds, or abuse of authority; and other specified matters. My review of the record reveals that the complainant's allegations regarding the administration of the VRIF program were first raised after his voluntary resignation and notification that he was not entitled to these benefits. Further, the complainant does not claim that any mismanagement of the VRIF program in general, or FERMCO's denial of VRIF benefits to him in particular, was in retaliation for any protected disclosures. Accordingly, Mr. Leist's complaint fails to raise allegations within the jurisdiction of 10 C.F.R. Part 708.

2. In his appeal letter, Mr. Leist argues that FERMCO's denial of his right to review and/or appeal of the denial of his VRIF benefits was in reprisal for having challenged the denial of his VRIF benefits. However, it should be noted that this allegation was not raised in Mr. Leist's complaint; rather, his complaint alleged that there was no established VRIF appeals process, an allegation that formed part of Mr. Leist's assertions that VRIF was managed improperly.

3. Further, a review of the record establishes that Mr. Leist's alleged appeal occurred in a meeting with the former FERMCO president on March 16, 1995 (not March 16, 1996, as the complainant's appeal letter erroneously states). Subsection 708.6(d) of the regulation provides that a complaint must be filed "within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later." Since Mr. Leist's initial complaint was filed April 4, 1996, more than a year later, any possible claim of reprisal is untimely.

For the reasons set forth above, OCEP's decision to dismiss this complaint for lack of jurisdiction is hereby affirmed.

Charles B. Curtis

Deputy Secretary

Issued October 31, 1996

Keith Loomis v. General Electric Company

Final Decision and Order Issued by the Deputy Secretary of Energy

Issued May 4, 1995

This is an appeal by complainant Keith Loomis from a decision by the Office of Contractor Employee Protection (OCEP) dismissing his complaint based on lack of jurisdiction under 10 C.F.R. Part 708. Mr. Loomis filed a complaint with OCEP alleging he was terminated from employment with the General Electric Company's Machinery Apparatus Operation in Schenectady, New York, a former contractor to DOE's

Schenectady Naval Reactors Office (SNR), due to his development of cancer and in retaliation for disclosures alleging safety concerns and mismanagement. On appeal, Mr. Loomis takes issue with OCEP's decision dismissing his complaint for lack of jurisdiction.

Under 10 C.F.R. Part 708, a complaint must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the discriminatory act, whichever is later. Furthermore, with respect to allegations of reprisal relating to disclosures that do not involve health or safety matters, the regulation is applicable only to acts of reprisal occurring after April 2, 1992, the effective date of the "whistleblower" regulation. See 10 C.F.R. Secs. 708.2(a) and 708.6(d).

The alleged acts of reprisal raised in the complaint here occurred several years prior to the effective date of the regulation (April 2, 1992) and the filing of the complaint (July 25, 1994). Therefore, OCEP lacks jurisdiction over the allegations raised in Mr. Loomis's complaint.

For the reasons set forth above, OCEP's decision to dismiss this complaint for lack of jurisdiction is hereby affirmed.

William H. White

Deputy Secretary

Issued: May 4, 1999

Albert Loos v. Fernald Environmental Restoration Management Corporation (Complaint No. OH--97--0001)

Final Decision and Order issued by the Deputy Secretary of Energy

Issued March 3, 1998

This is an appeal by complainant Albert Loos of a decision by the Office of Inspector General (OIG) dismissing his complaint as untimely. On February 3, 1997, Mr. Loos, a former employee of Fernald Environmental Restoration Management Corporation (FERMCO) and Westinghouse Environmental Management Company of Ohio (WEMCO), the current and former Department of Energy (DOE) prime contractors at its Fernald, Ohio site, initiated a complaint with OIG's Office of Inspections. Mr. Loos alleged that, in retaliation for several health or safety disclosures, he was subjected to various retaliatory acts, culminating in his "forced retirement" in March 1996.

10 C.F.R. 708.6(d) requires that a complaint "must be filed within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later." Since Mr. Loos's complaint was filed more than 60 days after his retirement, OIG dismissed the complaint because it was not timely filed.

On appeal, the complainant's attorney attempts to argue that the complainant's contacts with DOE and FERMCO officials shortly after his retirement equate with timely filing of his reprisal complaint with OIG. However, those contacts related to DOE's investigation of complainant's prior safety allegations. These contacts fell far short of showing even an attempt to raise a timely complaint of reprisal that might be within the scope of the Part 708 regulations.

Accordingly, because complainant did not file his OIG reprisal complaint until February 1997, almost a year after his retirement, and he has provided no justification to excuse his failure to file a timely Part 708 complaint, complainant has failed to show any basis for overturning the dismissal of his complaint as untimely. See, e.g., Jeffrey R. Leist v. Fernald Environmental Restoration Management Corporation, Case No. OH--96--0001 (October 31, 1996) (affirming dismissal of complaint filed more than a year after last alleged retaliatory action); Pamela Griffin v. Westinghouse Savannah River Company, Case No. SR--95--0005 (June 20, 1996) (affirming dismissal of complaint filed more then eight months after last alleged discriminatory action).

For the reasons set forth above, OIG's decision to dismiss this complaint is hereby affirmed.

Elizabeth A. Moler

Deputy Secretary

Issued March 3, 1998

Gilberto R. Lopez v. Los Alamos National Laboratory (Case No. AL--95--0001)

Final Decision and Order issued by the Deputy Secretary of Energy

Issued September 15, 1995

This is an appeal by complainant Gilberto R. Lopez of a decision by the Office of Contractor Employee Protection (OCEP) dismissing his complaint based on lack of jurisdiction under 10 C.F.R. Part 708. Mr. Lopez filed a complaint with OCEP alleging that his employment with Los Alamos National Laboratory (LANL), a Department of Energy management and operating contractor, was terminated in retaliation for his allegations of fraud, mismanagement, gross waste of funds, and abuse of authority by his supervisors.

On appeal, Mr. Lopez takes issue with OCEP's decision dismissing his complaint for lack of jurisdiction. However, 10 C.F.R. Part 708 does not apply to complaints involving alleged acts of reprisal where such acts occur prior to the adoption or amendment of a contract requiring compliance with

Part 708 and, as in the instant case, the alleged reprisal does not stem from health or safety disclosures, participation or refusals. See 10 C.F.R. Sec. 708.2(a); see also Final Decision and Order in Mehta v. Universities Research Association (OHA Case No. LWA--0003, March 20, 1995). The alleged act of reprisal raised in the complaint here occurred prior to the September 23, 1994, effective date of the amendment to LANL's contract requiring compliance with Part 708. Therefore, OCEP correctly determined that it lacked jurisdiction over the allegations raised in Mr. Lopez's complaint.

The allegations raised by Mr. Lopez's complaint nonetheless appear colorable and, in view of their seriousness, warrant further investigation. Accordingly, this complaint will be referred to the Inspector General.

For the reasons set forth above, OCEP's decision to dismiss this complaint for lack of jurisdiction is hereby affirmed. However, this matter will be referred to the Inspector General for further investigation.

Charles B. Curtis

Deputy Secretary

Issued September 15, 1995

Mark H. McCormack v. Westinghouse Savannah River Company (Case No. SR--98--0003)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued February 7, 1999

This is a request for review by complainant Mark H. McCormack of a decision by the Office of Inspector General (OIG) dismissing the reprisal complaint that he filed pursuant to 10 C.F.R. Part 708, the regulation establishing the DOE Contractor Employee Protection Program. Mr. McCormack filed his complaint against Westinghouse Savannah River Company (WSRC), the DOE management and operating contractor at DOE's Savannah River Site in Aiken, South Carolina. Mr. McCormack has never been an employee of WSRC. He was an employee of National Environmental Services Corporation (NESC), a DOE subcontractor at the Savannah River Site, until he resigned in March 1996.

Background

On May 21, 1998, Mr. McCormack filed his reprisal complaint. He alleged in his complaint that he became an employee of NESC in October 1995; that as a "Site Safety Officer" at NESC he reported certain safety concerns to NESC and WSRC, which both resisted his recommendations of safety controls; that he believed that the lack of safety controls and safety concerns by NESC and WSRC required that he resign; and that therefore his resignation from NESC in March 1996 constituted a constructive discharge. Complaint at 1--2.

He further alleged that in December 1997, he was not selected for a position as an "ALARA Planner" at BAT Associates, another DOE subcontractor at the Savannah River Site, because WSRC employees provided negative job references in retaliation for his earlier reporting of safety concerns when he had been an employee of NESC. Complaint at 2; e-mail message, dated "7/13/98 1:40 PM," from Mark McCormack to Jerome Yurow of OIG, at 1--2.

He also alleged that when he first learned the reasons for his rejection in January 1998, his wife, Carol McCormack, presented a written complaint to Joseph Buggy, Executive Vice President of WSRC, because she had a personal relationship with Mr. Buggy as a result of their work together on the United Way of Aiken County, South Carolina; and that Mr. Buggy rejected the complaint on March 26, 1998. Complaint at 2; e-mail message, dated "7/13/98 1:40 PM," from Mark McCormack to Jerome Yurow of OIG, at 2--3.

The relief that Mr. McCormack requests in his complaint is that DOE enter an order requiring that he be awarded the position of ALARA Planner at BAT Associates, together with back pay and reasonable attorney's fees and costs. Complaint at 3.

Thus, Mr. McCormack in his complaint has alleged two separate discriminatory actions by two separate contractors: (1) that NESC constructively discharged him in March 1996; and (2) that WSRC employees provided negative job references concerning him in December 1997. However, he requests relief for only the latter alleged action by WSRC, not the former by NESC.

Mr. McCormack's counsel, Richard E. Miley, initially sent an outline of Mr. McCormack's reprisal complaint to Michael L. Wamsted, Senior Counsel for WSRC, by letter dated May 6, 1998. By letter dated May 14, 1998, Mr. Wamsted responded that because Mr. McCormack was at no time an employee of WSRC, he cannot maintain a Part 708 action against WSRC.

On August 6, 1998, the OIG issued a summary dismissal of Mr. McCormack's reprisal complaint, pursuant to 10 C.F.R. Sec. 708.8(a)(2) and (5). The grounds for the summary dismissal are that Mr. McCormack is ineligible to file a Part 708 complaint because he is not an "employee" as defined by Secs. 708.2(b) and 708.4; and that his complaint was not timely filed as required by Sec. 708.6(d).

On August 13, 1998, Mr. McCormack filed a timely request for review. By letter dated August 26, 1998, WSRC responded to Mr. McCormack's request for review.

Analysis

Subsection 708.2(b) provides that Part 708 is applicable to employees of contractors as defined in Sec. 708.4. The latter subsection defines an "employee" as "any person(s) employed by a contractor, and any person(s) previously employed by a contractor if such prior employee's complaint alleges that employment was terminated in violation of Sec. 708.5." Subsection 708.4 also defines a "contractor" to include, among other entities, a party to a Management and Operating Contract or to subcontracts under such a contract.

Subsection 708.6(d) provides for a 60-day limitations period for filing a reprisal complaint with DOE:

A complaint filed pursuant to paragraph (a) of this section must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later. In cases where the employee has attempted resolution through internal company grievance procedures as set forth in paragraph (c) of this section, the 60-day period for filing a complaint shall be tolled during such resolution period and shall not again begin to run until the day following termination of such dispute-resolution efforts.

The OIG was correct in concluding that Mr. McCormack is not an "employee" of the respondent WSRC, as defined by Secs. 708.2(b) and 708.4, and is therefore not eligible to file his complaint. Mr. McCormack has never been employed by WSRC. He was previously employed by NESC, but he resigned from NESC in March 1996 and now alleges, in his May 1998 complaint, that his resignation from NESC constituted a constructive discharge. Pursuant to the definitions of "employee" and "contractor" in Sec. 708.4, Mr. McCormack would have been eligible to file a Part 708 complaint against his former subcontractor employer NESC if he had filed it within 60 days after his alleged constructive discharge by NESC occurred in March 1996, as required by Sec. 708.6(d). However, by failing to file a Part 708 complaint until May 1998, Mr. McCormack exceeded the 60-day limitations period by approximately two years.

Mr. McCormack contends that he is an employee within the meaning of the phrase in Sec. 708.4 which includes "any person(s) previously employed by a contractor if such prior employee's complaint alleges that employment was terminated in violation of Sec. 708.5," because he alleged in his May 1998 complaint against WSRC, which has never employed him, that he was terminated by another contractor---his former employer NESC---in violation of Sec. 708.5. Request for review at 1--4, 8--10. That argument fails for two reasons.

First, as explained supra, his allegation that he was terminated in March 1996 by NESC is barred by the limitations period in Sec. 708.6(d). Mr. McCormack has failed to show good cause for his exceeding that 60-day deadline by two full years. /1 Because that untimely allegation is barred, it cannot serve as the basis for his complying with the definition of "employee" in Sec. 708.4.

Second, even if Mr. McCormack's allegation against his former employer NESC were not time-barred, he would still not be entitled to file his separate allegation against WSRC, because WSRC has never been his employer. The alleged discriminatory actions that are the subject of Part 708 are those taken by complainants' employers or former employers, not by other contractors or subcontractors that have never been their employers. In Mr. McCormack's complaint, only the first of the two alleged discriminatory actions was taken by his former employer: his alleged constructive discharge by NESC in March 1996, for which he does not even request relief in his complaint. In contrast, the second of the two discriminatory actions alleged in his complaint was taken by a contractor that has never employed him: the negative job references allegedly provided by employees of WSRC in December 1997. That is the only alleged discriminatory action for which he seeks relief in his complaint, and Part 708 does not apply to such an alleged action by a contractor that has never employed the complainant. /2

The language of the regulations makes it clear that Part 708 applies to alleged discriminatory actions taken by employers of complainants (including their former employers under the definition in Sec. 708.4). This is consistent with the purpose of the DOE Contractor Employee Protection Program. In describing the purpose of Part 708, Sec. 708.1 states the following:

This part establishes procedures for timely and effective processing of complaints by employees of contractors performing work at sites owned or leased by the Department of Energy (DOE), concerning alleged discriminatory actions taken by their employers.... (emphasis added)

Similarly, Sec. 708.3 provides as follows:

It is the policy of DOE that employees of contractors at DOE facilities should be able to provide information to DOE, to Congress, or to their contractors concerning violations of law, danger to health and safety, or matters involving mismanagement, gross waste of funds, or abuse of authority, to participate in proceedings conducted before Congress or pursuant to this part, and to refuse to engage in illegal or dangerous activities without fear of employer reprisal. (emphasis added)

In the present case, the only alleged discriminatory action for which Mr. McCormack seeks relief---negative job references provided by employees of WSRC---was not taken by his employer or former employer, and is not an employer reprisal contrary to the provisions of Part 708.

Furthermore, the regulatory history of Part 708 confirms that the regulations only apply to discrimination and reprisals taken by complainants' employers (including their former employers). In adopting the final rule, DOE stated the following:

This rule establishes criteria and procedures for the investigation, hearing, and review of allegations from DOE contractor employees of *i employer reprisal *r resulting from (1) employee disclosure of information to the DOE, to members of Congress, or to the contractor, (2) employee participation in proceedings before Congress or pursuant to this rule, or (3) employee refusal to engage in illegal or dangerous activities, when such disclosure, participation, or refusal pertains to employer practices which the employee believes to be unsafe, to violate laws, rules, or regulations, or to involve fraud, mismanagement, waste, or abuse. (emphasis added)

57 Fed. Reg. 7533, 7533 (Mar. 3, 1992).

[E]mployees of DOE contractors are encouraged to come forward with information that in good faith they believe evidences unsafe, unlawful, fraudulent, or wasteful practices. Employees providing such

information are entitled to protection from consequent discrimination by their employers with respect to compensation, terms, conditions, or privileges of employment.

Currently, there are certain statutory proscriptions against employer reprisal. (emphases added)

Id., quoted in request for review at 8--9.

Section 708.5 lists the types of activities for which employees are to be protected from employer reprisal. (emphasis added)

Id. at 7534.

Mr. McCormack is incorrect in alleging that the Supreme Court's decision in Robinson v. Shell Oil Co., 519 U.S. 337 (1997), supports his argument that he may file a Part 708 complaint against a contractor that has never been his employer. Request for review at 3--4. In Robinson, Shell Oil Co. fired an employee who shortly thereafter filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Shell had discharged him because of his race. While that charge was pending, the former

Shell employee applied for a job with another company, which contacted Shell for an employment reference. The former Shell employee then charged that Shell provided a negative reference in retaliation for his having filed his first EEOC charge against Shell. He filed his second charge against Shell under Sec. 704(a) of Title VII of the Civil Rights Act of 1964, which makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" who have either availed themselves of Title VII's protections or assisted others in so doing. 519 U.S. at 339--40.

The issue before the Court was whether the term "employees," as used in Sec. 704(a) of Title VII, includes former employees, such that the former Shell employee could bring suit against Shell for Shell's negative job references. After examining the language and purpose of that particular statute, the Court concluded that the term "employees" includes former employees within its coverage. 519 U.S. at 346.

A different issue is in dispute in the present case: whether a former employee of one contractor (NESC) can file a Part 708 complaint against another contractor (WSRC) that is neither his employer nor his former employer, but whose employees allegedly provided negative job references concerning him. That was not an issue in Robinson, because in that case it was the former employer Shell that allegedly provided negative job references concerning its former employee. The former Shell employee did not file a charge against a company that never employed him. That is what Mr. McCormack has done in the present case. The Supreme Court noted this distinction in the context of Title VII when it stated that the "phrase 'his employees' could include 'his' former employees, but still exclude persons who have never worked for the particular employer being charged with retaliation." 519 U.S. at 344.

Mr. McCormack also argues that DOE "should follow the Supreme Court's broad construction of the term 'employee' to include applicants, such as Complainant." Request for review at 4. However, the Supreme Court in Robinson did not construe the term "employee" in Title VII to include applicants. On the contrary, the terms of Sec. 704(a) of Title VII, as quoted supra, expressly make that section applicable to "employees or applicants for employment." Congress thus included "applicants for employment" in Sec. 704(a) as persons distinct from "employees." In contrast, Sec. 708.2(b) of Part 708 makes that part applicable to "employees," but it does not mention "applicants for employment," nor does any other provision of Part 708.

Finally, we note that even assuming arguendo that Mr. McCormack had been eligible to file a Part 708 complaint regarding the fact that he was not hired by BAT Associates in December 1997, that complaint would not have been timely filed. Pursuant to Sec. 708.6(d), his complaint would have been required to be filed within 60 days after he first learned the reasons for his rejection in January 1998. He should therefore have filed his complaint sometime before the end of March 1998. Instead, he did not file it until May 21, 1998. /3 He has alleged that his wife's correspondence with her United Way co-worker, XXXXX of WSRC, constituted an attempted resolution through the "internal company grievance procedures" of WSRC, and therefore tolled the 60-day limitations period pursuant to Sec. 708.6(d). Request for review at 4--7. However, the "internal company grievance procedures" set forth in Sec. 708.6(c) and (d) apply to the employees (including former employees) of that company, not to Mr. McCormack, who is neither an employee nor a former employee of WSRC.

The regulatory history of Part 708 confirms that the internal company grievance procedures that toll a complainant's limitations period apply to that company's own "internal" employees, not to external employees of other contractors:

The DOE believes that contractors should have the managerial discretion to deal with employee disciplinary matters as they deem appropriate, and that contractors with effective employee protection programs should have the opportunity to address and resolve complaints of reprisal internally. The DOE recognizes, however, that in certain instances company procedures are not a substitute for Federal administrative procedures. Accordingly, the DOE believes that Sec. 708.6(c) appropriately requires that internal company procedures be utilized when available, and that the rule as a whole does not excessively encroach upon the contractor's right to exercise managerial discretion.

57 Fed. Reg. at 7538.

Moreover, Mr. McCormack has failed to present any evidence that WSRC ever misled him or his wife by incorrectly stating that his wife's correspondence with XXXXX constituted an "internal company grievance procedure" that would toll the period of limitations pursuant to Sec. 708.6(d).

For the foregoing reasons, the dismissal of the complaint is affirmed.

Ernest J. Moniz

Acting Deputy Secretary

Issued February 7, 1999

/1 As the OIG correctly found in its dismissal, if Mr. McCormack had been constructively discharged by NESC in March 1996 because of his protected activity, as he alleges, he would have been aware of that discriminatory act at the time of its occurrence, and therefore the 60-day limitations period would have begun to run in March 1996. This finding is supported by the allegation in his complaint that his resignation from NESC constituted a constructive discharge because he believed that the lack of safety controls and safety concerns by NESC and WSRC required that he resign. Complaint at 2. If that belief compelled him to resign in March 1996, as he alleges, then he would have known at that time that his resignation was involuntary and a constructive discharge.

/2 For the same reason, Part 708 does not apply to the specific relief that Mr. McCormack requests---that DOE enter an order requiring that he be awarded the position of ALARA Planner at BAT Associates---because BAT Associates, like WSRC, has never employed the complainant.

/3 Although Mr. McCormack alleged, in his request for review at 5--6, that he discovered for the first time on March 26, 1998 that WSRC employees had made false statements concerning him, that allegation is contradicted by his statement in his complaint that "Complainant first learned of his rejection and the retaliatory reasons for his rejection in January of 1998" (Complaint at 2); by his wife's assertion in her letter to XXXXX of WSRC, dated January 28, 1998, that "misinformation" and "references" had kept him from consideration for the job of ALARA Planner at BAT Associates (Exhibit A to request for review, at 1, 3); and by his own statement in his request for review that "Complainant had no reason in 1996 or later to suspect that WSRC had undertaken to discriminate against him or to black-ball him until December, 1997, when he learned for the first time that WSRC managers had directed that his resume be 'pulled' from consideration because of his 1996 safety complaints" (request for review at 6 (emphasis added)).

Mr. McCormick is also incorrect in his claim that the alleged "[c]ontinuing nature of WSRC's black-listing" extends the limitations period indefinitely. Request for review at 5--6. Even if WSRC employees have not withdrawn the negative job references that he first discovered in January 1998, that would not extend the 60-day limitations period. Under the terms of Sec. 708.6(d), that period began to run when he "knew, or reasonably should have known," of the alleged negative job references, in January 1998.

Thomas McManus v. EG&G Energy Measurements, Inc. (Case No. NV--96--0001)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued September 9, 1998

This is a request for review by complainant Thomas McManus of a decision by the Office of Inspector General (OIG) dismissing his complaint of reprisal.

On January 29, 1997, Mr. McManus, a former employee of EG&G Energy Measurements, Inc. (EG&G), the former Department of Energy (DOE) contractor at the Nevada Test Site (NTS), initiated a complaint with DOE's Nevada Operations Office. The complaint alleged that he was not hired by the successor contractor to EG&G in retaliation for his prior disclosures of waste, fraud, abuse, or mismanagement, and health and safety issues, by EG&G and Reynolds Electrical and Engineering Company (REECo), another DOE contractor.

In March 1997, OIG initiated inquiry into Mr. McManus's reprisal complaint. During the course of that review OIG learned that, on December 15, 1997, Mr. McManus filed a lawsuit in the District Court, Clark County, Nevada, against EG&G, REECo, and others, which included allegations of reprisal similar to those made in his OIG complaint. On April 15, 1998, OIG issued a Summary Dismissal of Mr. McManus's complaint pursuant to 10 C.F.R. Sec. 708.8(a)(4) based on a determination that complainant had pursued a State court remedy involving "the same set of facts and allegations."

Subsection 708.6(a) of the DOE Contractor Employee Protection Regulation, 10 C.F.R. Part 708, provides, in pertinent part, that:

[a]n employee who believes that he or she has been discriminated against in violation of this part, and who has not, with respect to the same facts, pursued a remedy available under State or other applicable law, may file a complaint with DOE. ... For purposes of this part, a complaint shall be deemed to have been pursued under State or other applicable law if the employee had, pursuant to proceedings established or mandated by State or other applicable law, at any time prior to, or concurrently with, the filing of a complaint with DOE, or at any time during the processing of a complaint filed with DOE, filed or submitted any complaint, action, grievance, or other pleading with respect to that same matter. (Emphasis supplied.)

This section provides further that the 60-day limitations period set forth in subsection 708.6(d) for filing a complaint "shall be suspended upon the filing of a complaint pursuant to State or other applicable law, and [such filing] shall not bar the employee from reinstituting or filing a complaint with DOE if the matter cannot be resolved under State or other applicable law due to a lack of jurisdiction."

Subsection 708.8(a)(4) of the regulation provides for dismissal of a complaint where it is determined that "[t]he complainant has pursued a remedy available under State or other applicable law...."

On appeal, complainant's attorney takes issue with OIG's dismissal of his complaint based on his filing of a State court complaint regarding the same facts, claiming that the State court action was initiated "for the purpose of preserving any state causes statute of limitations that Mr. McManus may have had."

Whatever basis complainant's attorney had for initiating an action in state court, the fact remains that, subsequent to filing his initial complaint with OIG, the complainant filed a complaint in State court with respect to the same facts. This being the case, OIG correctly dismissed his complaint pursuant to 10 C.F.R. Sec. 708.8(a)(4).

Therefore, this complaint is being dismissed on purely procedural grounds, based on the fact that

complainant has chosen to pursue his complaint in State court. However, no judgment is being made as to the underlying merits of complainant's case. If complainant's allegations cannot be resolved in the State court proceeding he has initiated "due to a lack of jurisdiction," he may reinstitute a Part 708 complaint in accordance with the terms of subsection 708.6(d).

For the foregoing reasons, the dismissal of the complaint is affirmed.

Elizabeth A. Moler

Deputy Secretary

Issued September 9, 1998

Neil A. Mock v. Coleman Research Corporation and Lockheed Martin Idaho Technologies Company (Case No. ID--95--0002)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued September 28, 1999

This is a request for review by complainant Neil A. Mock of a decision by the Office of Inspector General (OIG) dismissing his complaint of reprisal.

On August 18, 1995, Mr. Mock, a former employee of Coleman Research Corporation (CRC), a subcontractor of Lockheed Martin Idaho Technologies Company (LMITCO), the Department of Energy (DOE) contractor at the Idaho National Environmental and Engineering Laboratory (INEEL), initiated a complaint pursuant to 10 C.F.R. 708 with DOE's Idaho Operations Office. The complaint alleged that he was subjected to reprisal by CRC and LMITCO in retaliation for his alleged disclosures regarding waste, fraud, abuse, or mismanagement; safety and health issues; and possible violations of laws, rules, or regulations.

On February 13, 1996, Mr. Mock filed suit in the United States District Court for the District of Idaho, pursuant to the False Claims Act (FCA), 31 U.S.C. Sec. 3729 et seq. The FCA complaint included an allegation that the complainant was retaliated against for making protected disclosures, in violation of 31 U.S.C. Sec. 3730(h). /1

On January 16, 1998, OIG issued a summary dismissal of Mr. Mock's complaint pursuant to 10 C.F.R. Sec. 708.8(a)(4), based on a determination that complainant's Part 708 complaint and his FCA complaint "both involve the same set of facts and allegations, and, consequently, that they constitute the 'same matter.'"

On January 30, 1998, the complainant filed a timely request for review.

At the time this complaint was filed, subsection 708.6(a) of the DOE Contractor Employee Protection Regulation, 10 C.F.R. Part 708, provided, in pertinent part, that:

[a]n employee who believes that he or she has been discriminated against in violation of this part, and who has not, with respect to the same facts, pursued a remedy available under State or other applicable law, may file a complaint with DOE .... For purposes of this part, a complaint shall be deemed to have been pursued under State or other applicable law if the employee had, pursuant to proceedings established or mandated by State or other applicable law, at any time prior to, or concurrently with, the filing of a complaint with DOE, or at any time during the processing of a complaint filed with DOE, filed or submitted any complaint, action, grievance, or other pleading with respect to that same matter. (Emphasis supplied.) /2

This section provided further that the 60 day limitations period set forth in subsection 708.6(d) for filing a complaint

shall be suspended upon the filing of a complaint pursuant to State or other applicable law, and [such filing] shall not bar the employee from reinstituting or filing a complaint with DOE if the matter cannot be resolved under State or other applicable law due to a lack of jurisdiction. /3

Subsection 708.8(a)(4) of the regulation provided for dismissal of a complaint where it is determined that "[t]he complainant has pursued a remedy available under State or other applicable law ...." /4

On appeal, the complainant does not dispute the fact that he filed an FCA complaint in the District Court

regarding the same facts in his Part 708 complaint. Although complainant alleges that the dismissal of his complaint by OIG "is based on a misinterpretation and misapplication of the provisions of 10 C.F.R. Sec. 708.6(a)," complainant does not explain how subsection 708.6(a) has been "misinterpret[ed] and misappli[ed]"; rather, his argument is that, for reasons of policy," subsection 708.6(a) /5 should not be applied at all. The undisputed fact is that, subsequent to filing his initial complaint with OIG, the complainant filed a FCA complaint in the District Court with respect to the same facts. /6 This being the case, OIG correctly dismissed his complaint pursuant to the clear mandate of 10 C.F.R. Sec. 708.8(a)(4). /7

For the reasons set forth above, OIG's summary dismissal of this complaint is hereby affirmed.

T. J. Glauthier

Deputy Secretary

Issued September 28, 1999

/1 Although the complaint was initially filed under seal, the Department of Justice declined to intervene in the lawsuit and the seal was subsequently lifted by the court.

/2 Effective April 14, 1999, DOE issued an Interim Final Rule amending Part 708. 64 Fed. Reg. 12,862 (March 15, 1999). Subsection 708.15(d) of the Interim Final Rule contains a similar provision providing for dismissal of a Part 708 complaint where a complainant subsequently files a complaint "under State or other applicable law."

/3 This tolling provision is essentially preserved in subsection 708.14 of the Interim Final Rule.

/4 An identical provision appears in subsection 708.17(c)(3) of the Interim Final Rule.

/5 A similar provision is contained in subsection 708.15(d) of the Interim Final Rule, as noted above.

/6 Information obtained from the Office of Chief Counsel, Idaho Operations Office, indicates that complainant is still actively pursuing his District Court complaint.

/7 Subsection 708.17(c)(3) of the Interim Final Rule.

Arthur F. Murfin v. EG&G Rocky Flats, Inc. (Case No.

RF--94--0002)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued February 7, 1999

This is a request for review by Complainant Arthur F. Murfin of the Initial Agency Decision ("IAD") of the Acting Deputy Inspector General for Inspections concluding that "a preponderance of the available evidence did not support the Complainant's allegations that his protected disclosures contributed to * * * alleged retaliatory acts, or that the actions were part of a pattern of retaliation which continued beyond the effective date of Part 708." Attach. 1 at p. 25. Mr. Murfin served as the "lock and tagout manager" for Building 460 of Respondent EG&G Rocky Flats, Inc., DOE's former M & O contractor for Rocky Flats, until he was separated in a reduction in force effective March 24, 1995.

On February 16, 1994, Mr. Murfin filed a complaint with the Office of Contractor Employee Protection ("OCEP") alleging that he had made protected disclosures starting in 1987 about the possible misuse of government funds in Respondent's Future Systems division and that those disclosures led to various adverse actions in reprisal for these disclosures. Attach. 1 at p. 3, exh. 1, 5 at p.1. Thereafter, Mr. Murfin twice expanded his complaint to include additional allegations of reprisal culminating in his discharge in a reduction in force on March 13, 1995, and in interviews he belatedly added an allegation that he had also made health and safety disclosures concerning safe oxygen levels in machining operations in 1988. /1 Exh. 2, 3, 5 at p.2, 16 at p.1.

After an extensive on-site investigation by OCEP, the Deputy Inspector General for Inspections ("DIG"), to whom OCEP's function was transfered effective October 1, 1996, issued a twenty-five-page report and proposed order. In that report, DIG analyzed Mr. Murfin's charges one by one.

1. Alleged Protected Disclosures

First, DIG concluded that a preponderance of the evidence supported Complainant's allegations that he had engaged in protected activity late in 1987 by providing information to a congressional investigation concerning wrongful fabrication of personal items at possible government expense in Respondent's "Future Systems" department. Attach. 1 at pp. 4--6, 10, 15, exh. 19--21. Second, although DIG noted the "absence of specific and detailed information regarding the content of these communications," it accepted for purposes of the analysis that early in 1988 after he was transferred out of the Future Systems department, Mr. Murfin had "raised safety concerns" concerning use of "flow meters" and oxygen levels in "machining boxes" and that he had refused to conduct machining operations with improper oxygen levels. Attach. 1 at 4, 11--12. Third, DIG found that Complainant had provided information to Respondent's General Counsel in September of 1992 in response to a discovery request concerning "prior operation" of the Future Systems department, DIG noted that it was "unclear" whether any protected disclosure was involved, but it did consider this evidence to see if the alleged retaliatory actions taken were related to his response to this request for information. Attach. 1 at pp. 9, 12, exh. 23--24. Finally, Complainant characterized his filing of the instant complaint as a protected disclosure, and DIG agreed. Attach. 1 at pp. 9, 13.

2. Alleged Acts in Reprisal for Protected Activity

DIG categorized Complainant's allegations of reprisal into six areas, which are discussed separately, as follows.

a. *Complainant's allegation that his transfer out of the Future Systems department in February, 1988, was*

retaliatory. DIG concluded that, since his transfer took place before both the alleged health and safety disclosures and the contractual adoption of Part 708, it was not subject to Part 708's coverage. Attach. 1 at p. 13. Nevertheless, DIG concluded, as part of its analysis whether a pattern of retaliation had been shown, that the evidence did not demonstrate a retaliatory motive for the transfer. Id. at pp. 4--5, 13.

b. *Complainant's allegation that he received poor performance evaluations in 1988, 1989, and 1990*. DIG concluded that these allegations are outside Part 708's scope, but in evaluating whether they might form part of a pattern o freprisal, DIG again found that a "retaliatory animus" was not shown. Id. at 5--8, 13.

c. *Complainant's charge that he was denied selection to several positions to which he applied.* While some of the selections took place before Part 708 was applicable, DIG analyzed this issue for a possible pattern of reprisal and concluded that no retaliatory motive was shown. Id.. at 14. With respect to six positions applied for in 1994 after Part 708's adoption, however, DIG noted that Mr. Murfin had offered no specific evidence of retaliatory motive, that all six vacancies ended up being cancelled, and that Mr. Murfin admitted that he did not meet the minimal educational requirements. Accordingly, DIG concluded that "a preponderance of the available evidence does not indicate that the Complainant was denied selection for any of the six positions in retaliation for his disclosures." Ibid. With respect to the other position Mr. Murfin may have applied for, it too had a "minimum educational requirement" that he did not satisfy. Id. *at 14--15.

d. Complainant's allegation that he had been denied promotions and salary increases. Complainant pointed to the unexplained insertion on August 24, 1990, in his personnel file of DOE's response (exh. 21) to Congressman Skagg's letter (exh. 20) requesting DOE to look into Mr. Murfin's allegations of reprisal as probative of a retaliatory basis for his employment history. Attach. 1 at pp. 5--8, 15. Complainant's primary argument, however, was that another employee with his same title and duties was paid more for the same job. Id. at 15. Reviewing the evidence produced by Respondent, DIG concluded that "there were substantial differences in their duties and responsibilities." DIG also noted that complainant has, since mid-1988, received salary enhancements and no evidence was presented that indicated that complainant was entitled to a specific promotion for which he was denied. Thus, the evidence did not indicate Mr. Murfin had been denied a promotion or salary increase in reprisal for protected activity. Id. at 15--17.

e. *Complainant's suggestion that he was denied appropriate training on two occasions in June, 1994, and February,1995.* Attach. 1 at pp. 17--18. Although DIG opined that "a denial of training, in itself, is not an adverse action" cognizable under Part 708, it nevertheless analyzed the evidence and concluded that the 1994 training was canceled for "valid business reasons" and that Mr. Murfin acknowledged that he was allowed to take the course later, in early 1995, further negating any possible inference of retaliatory motive. Id. at 18. With respect to the 1995 training denial, Complainant's supervisor indicated that the course was unnecessary for Complainant's job, and that Mr. Murfin "would, from time to time, schedule himself for week-long courses without informing his supervisor" and that the supervisor normally canceled those "that did not pertain to the Complainant's duties." Id. at 19. Mr. Murfin's primary argument that the cancellation was retaliatory was that the employee referenced in the paragraph above with the same job title as Complainant was allowed to take the course. Id. at 18--19. In the absence of any "specific and supporting evidence" supporting Mr. Murfin's charges, DIG accepted Respondent's explanation and concluded that the course cancellation was not in reprisal for protected disclosures. Id. at 19.

f. *Complainant's allegation that his termination in a reduction in force ("RIF") effective March 24, 1995, was the culmination of Respondent's retaliatory activities.* Despite having found no persuasive evidence in support of Mr. Murfin's other allegations of retaliation, DIG analyzed this charge in detail. Attach. 1 at pp. 19-24. DIG reviewed Respondent's policy entitled "Layoff of Salaried Employees," which provided that management should consider "demonstrated performance," "versatility and ability in applying pertinent skills and experience to the immediate and foreseeable business requirements of the organization," and, other factors being "relatively equal," the employee's length of service. Id. at 20. Complainant's second-level supervisor explained his reasons for believing that Mr. Murfin should be a RIF candidate, and, among other things, he indicated that Mr. Murfin "required more direction and more supervision than other

employees" and that the most "critical" areas of future need were "environmental and safety concerns," rather than Complainant's area of "building support." Attach. 1 at p. 20, exh. 10. Other management officials were interviewed and provided similar explanations. Attach. 1 at pp. 20--23. DIG found that it was "unable to substantiate" that Complainant's disclosures contributed in any way to his selection for the RIF and that Respondent had "provided valid business reasons" for selecting Mr. Murfin. Id. at 23--24. Accordingly, DIG concluded that Complainant's allegation that his separation in a RIF was retaliatory "was not supported by a preponderance of the available evidence." Id. at 24.

On January 3, 1997, DIG issued the report and proposed order concluding that "no claim of reprisal covered under Part 708 was supported by a preponderance of available evidence" and ordering that Complainant's claim be denied. Attach. 1 at p. 25. By letter of January 21, 1997, Mr. Murfin requested a hearing on his complaint before the Office of Hearings and Appeals. Attach. 2. By letter received on January 16, 1998, however, Mr. Murfin withdrew his request for a hearing. Attach. 3.

In a letter dated February 14, 1998, Complainant detailed his objections to the report and proposed order. Attach. 4. DIG issued the Initial Agency Decision ("IAD") adopting the report and proposed order and responding to Mr. Murfin's claims of error on February 20, 1998. Attach. 5. In particular, DIG addressed the timeliness of the Complaint and the question whether there was any reason to extend the 60-day filing deadline with respect to the allegations impacted by it, concluding that, since all the untimely allegations were investigated with reference to whether they might demonstrate a pattern of reprisal and found not to show any such pattern, there was no reason to extend the deadline. IAD at 1--2. /2 Additionally, DIG addressed Complainant's allegations of factual error, concluding that he had "not presented any argument or information warranting any alteration of the conclusions" reached. Id. at 3.

By letter of April 1, 1998, Complainant makes several arguments in support of his appeal. Attach. 8. First, Mr. Murfin renews his argument that the sixty-day limitation period should not apply. Attach. 8 at p. 1. Second, Complainant reminds us that he was advised by letter of June 27, 1994, /3 that DOE was considering setting up an alternative remedial process for complaints that were not covered by Part 708 and requests that his Complaint be so processed. Ibid. Third, Mr. Murfin indicates that he was misled in a telephone conversation with OCEP to think that old problems were covered. /4 Id. at 2. Finally, Complainant suggests that his case is "quite similar" to that of Ronald Sorri, and should have the same result. Ibid.

As the Report adopted by the IAD noted (attach. 1 at p. 3), under the regulations, the Complainant has the burden of establishing the elements of his claim by a preponderance of the evidence, including that reprisal was at least a contributing factor in the adverse employment action complained of. 10 C.F.R. Sec. 708.9(d). Despite a full investigation of allegations stretching back to 1987, OCEP and DIG were unable to find any concrete support for Complainant's suspicions that any of the claimed adverse actions were motivated by reprisal and further concluded that they were adequately explained by Respondent in terms of business needs of the company. Having withdrawn his request for a hearing at which he would have been entitled to present witnesses and other evidence in support of his claims (see 10 C.F.R. Sec. 708.9), Mr. Murfin is precluded from challenging any of the findings in the IAD. Ronald Sorri, 23 DOE ¶ 87,503 at p. 89,007 (1993). Moreover, even if Complainant had properly challenged those findings, it is well settled that the factual determinations set forth in the Initial Agency Decision are subject to being reversed on appeal only if they are clearly erroneous. Ogelsbee v. Westinghouse Hanford Company, 25 DOE ¶ 87,501 (1995).

With respect to Mr. Murfin's particular arguments on appeal, they are unavailing. Regarding the 60-day deadline, the argument is academic. As DIG pointed out, all of the Complainant's allegations were investigated, against the possibility that, even if they were outside the coverage of Part 708 or outside the 60-day limit, they might tend to show a pattern of reprisal for protected activity that was within the coverage and time limits of the regulations. However, not a single allegation of reprisal was found to be supported by evidence adequate to sustain Mr. Murfin's burden, so that the timeliness of the complaint and the allegations is simply immaterial. Similarly irrelevant, given the painstaking review already given each

of Complainant's allegations on their merits, is Complainant's request for an

alternative remedial process. Such a process would serve no useful purpose in view of DIG's review of complainant's allegations and conclusions that the available evidence was inadequate to support them. Finally, Complainant's citation to the case of Ronald Sorri, 23 DOE ¶ 87,503 (1993), is inapposite, since the fact-bound determination in that case is that Mr. Sorri's evidence adequately established a pattern of reprisal culminating in his termination within a period of less than two years. Id. at pp. 89,006--89,008. Unlike the complainant in that case, Mr. Murfin simply failed to produce evidence supporting his allegations.

In sum, DIG went to extraordinary efforts to give the Complainant the benefit of the doubt regarding his suspicions. Despite the fact that many of his allegations were plainly untimely, it investigated all of them, and properly dismissed them based on the absence of supporting evidence.

Accordingly, my review of the record reveals no basis for overturning the Initial Agency Decision, and it is hereby affirmed.

Ernest J. Moniz

Acting Deputy Secretary

Issued February 7, 1999

/1 As noted in the IAD at p. 3, Part 708 does not apply to complaints involving acts of reprisal committed before contractual adoption of Part 708 unless they "stem from health or safety disclosures, participations or refusals." Mehta v. Universities Research Assoc., OHA Case No. LWA--0003, LWZ--0023 (1995). In this case, Respondent's contract was amended to incorporate part 708 effective April 2, 1992. Attach. 1 at p. 2. However, when Complainant was interviewed on May 11, 1994, and June 20-21, 1995, he also alleged having made health and safety disclosures concerning safe oxygen levels in machining operations in 1988. Exh. 5 at p.2, 16 at p.1.

/2 Although it does not affect the reasoning of the IAD, there is an apparent typographical error in the IAD to the effect that the Complaint was filed in February, 199 3, as opposed to February, 199 4, as appears from the record. Attach. 5 at p.2.

/3 Exh. 4.

/4 See exh. 2.

Complaint of George E. Parris, Ph.D. (Complaint No. HQ97--0006)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued October 15, 1998

his is a request for review by Complainant George E. Parris, Ph.D. of a decision of the Office of Inspector General ("OIG") summarily dismissing his complaint under 10 C.F.R. Part 708. OIG determined that the complaint should be dismissed because it: (1) was outside the scope of 10 C.F.R. Part 708, since the complaint was directed at DOE, not Complainant's employer; (2) failed to allege any specific acts of reprisal covered under the regulation; and (3) was untimely filed. As explained below, I conclude that OIG correctly dismissed the subject complaint and its decision should be affirmed.

Complainant Parris is a former employee of a Department of Energy ("DOE") contractor that provided services in connection with the agency's waste management programmatic environmental impact statement ("PEIS"). In his complaint, Parris complained about DOE's decision to terminate his employer's contract. Parris further complained about negative references to him and his work on behalf of Berger Associates, in connection with the Department's processing of the Part 708 complaint of an employee of another contractor working on the PEIS. On April 24, 1997, OIG dismissed these claims finding that because "Part 708 coverage is limited to covered contractor employers and does not extend to DOE or DOE officials, the alleged acts of retaliation do not fall within the coverage of Part 708." Further, OIG's review of the complaint did not identify any alleged facts forming the basis for a reprisal complaint under Part 708. OIG explained that,

[d]ecisions within the legitimate discretion of DOE officials to reduce funding for a project * * * do not constitute acts of retaliation that are prohibited under Part 708. Part 708 primarily was intended and designed to protect against adverse personnel actions taken in reprisal for protected activities by individuals, much like the protections applied to federal employees by the U.S. Merit Systems Protection Board and U.S. Office of Special Counsel.

OIG also noted that Part 708 generally requires that reprisal complaints be filed within 60 days after the discriminatory act occurred. See 10 C.F.R. 708.6(d) (complaint "must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later"). Here, the alleged acts of reprisal occurred in 1994 but the complaint was not filed under March 21, 1997. While Parris asserted that he did not learn of the alleged acts of reprisal until he obtained possession of relevant documents after November 27, 1996, OIG found that the filing of the complaint "far exceeds the 60-day period of any cited act of reprisal (i.e. the termination of your work under the specific project)." Further, OIG stated that the complaint was filed more than 60 days after Parris learned of information regarding the Part 708 complaint of the other contractor employee cited as a basis for Parris's complaint.

While Complainant asserted that he filed an "interim" Part 708 complaint in a letter to DOE dated January 14, 1997, OIG found that "a review of that letter does not indicate any reference to your intent to file a Part 708 reprisal complaint." Finally, OIG held that the 60-day period was not tolled while Complainant considered other causes of action or possible forms of relief.

In a brief dated March 21, 1997, Complainan argues that rules applying to "DOE contractors reprising against their employees" also "would logically apply to DOE reprisal against employees of contractors," since that result is "consistent with rules against reprisals by DOE managers against DOE employees." Brief at 2--3. However, this argument ignores that Part 708 is specifically limited to covered contractor employees and nowhere extends to DOE or DOE officials. See 10 C.F.R. 708.2(b) ("[t]his part is applicable to employees (defined in Sec.708.4) of contractors (defined in Sec. 708.4) * * *"); 10 C.F.R.

708.4 (defining "contractor" as "a seller of good or services who is a party to a procurement contract").

For this reason, Complainant's citations to Department of Labor authorities /1 providing that "covered employers" may be held liable in other statutory contexts to the employees of a separate covered employer are simply inapposite since Part 708 does not apply to DOE. Further, as OIG correctly held, Part 708 was designed to protect contractor employees from adverse personnel actions and plainly does not encompass "[d]ecisions within the legitimate discretion of DOE officials to reduce or stop funding for a project, as described in [Parris's] complaint * * *." *

With respect to OIG's dismissal of his complaint on the basis of timeliness, Complainant provides no explanation for waiting until 1997 to file a complaint addressing alleged reprisal that occurred in 1994. Parris complains that OIG failed to give "any consideration to tolling of the time periods involved" but fails to provide any explanation whatsoever supporting such tolling. As OIG correctly pointed out, the fact that Complainant may have considered other causes of action or possible forums for relief is insufficient to toll the filing period.

Parris complains that the summary dismissal unfairly charges him with knowledge of the allegations concerning a separate agency Part 708 proceeding based upon OIG's finding that Parris was interviewed in that proceeding. However, the fact that Parris states that he does not recall those interviews fails to refute OIG's correct determination that they, in fact, occurred. See Record, Complaint of C. Lawrence Cornett, Case Nos. VWA--0007, VWA--0008 at 252--253, 389.

Accordingly, the record reveals no basis for overturning the summary dismissal, and that decision is hereby affirmed.

Elizabeth A. Moler

Deputy Secretary

Issued October 15, 1998

/1See *i Stephens v. NASA*r, 94--TSC--5 (A.R.B. Feb. 13, 1997); *i Freels v. Lockheed Martin Energy Systems, Inc.*r, 95--CAA--2 (A.R.B. Dec. 4, 1996).:

Donald R. Patterson v. University of Chicago (Case No. CH--96--0003)

Final Decision and Order issued by the Deputy Secretary of Energy

Issued March 3, 1998

This is a request for review by complainant Donald R. Patterson of a decision by the Office of Inspector General (OIG) dismissing his complaint of reprisal.

On August 14, 1996, Mr. Patterson, a former employee of the University of Chicago, the Department of Energy (DOE) contractor at Argonne National Laboratory, initiated a complaint under 10 C.F.R. Part 708 with DOE's Chicago Operations Office (CH). The complaint alleged that he was terminated from his employment on July 9, 1996, in retaliation for ongoing safety disclosures dating from February 1994. Mr. Patterson's complaint was forwarded to OIG for review, and in the course of that review OIG learned that, on October 29, 1996, Mr. Patterson filed a lawsuit in the Circuit Court of Cook County, Illinois, against the University of Chicago in which he similarly alleged that he was terminated in retaliation for his alleged safety disclosures. On August 4, 1997, OIG issued a Summary Dismissal of Mr. Patterson's complaint pursuant to 10 C.F.R. Sec. 708.8(a)(4) based on a determination that complainant had "pursued a remedy available under State or other applicable law."

Subsection 708.6(a) of the DOE Contractor Employee Protection Regulation, 10 C.F.R. Part 708, provides, in pertinent part, that:

[a]n employee who believes that he or she has been discriminated against in violation of this part, and who has not, with respect to the same facts, pursued a remedy available under State or other applicable law, may file a complaint with DOE. ... For purposes of this part, a complaint shall be deemed to have been pursued under State or other applicable law if the employee had, pursuant to proceedings established or mandated by State or other applicable law, at any time prior to, or concurrently with, the filing of a complaint with DOE, or at any time during the processing of a complaint filed with DOE, filed or submitted any complaint, action, grievance, or other pleading with respect to that same matter. (Emphasis supplied.)

This section provides further that the 60 days limitations period set forth in subsection 708.6(d) for filing a complaint "shall be suspended upon the filing of a complaint pursuant to State or other applicable law, and [such filing] shall not bar the employee from reinstituting or filing a complaint with DOE if the matter cannot be resolved under State or other applicable law due to a lack of jurisdiction."/1

Subsection 708.8(a)(4) of the regulation provides for dismissal of a complaint where it is determined that "[t]he complainant has pursued a remedy available under State or other applicable law. ..."

On appeal, the complainant does not take issue with OIG's dismissal of his complaint based on his filing of a State court complaint regarding the same facts, but instead alleges that OIG failed to process his complaint in a timely fashion.

Whatever the merits of complainant's allegations concerning the speed with which his complaint was processed, the fact remains that, subsequent to filing his initial complaint with DOE, the complainant filed a complaint in State court with respect to the same facts. This being the case, OIG correctly dismissed his complaint pursuant to 10 C.F.R. Sec. 708.8(a)(4).

Elizabeth A. Moler

Deputy Secretary

Issued March 3, 1998

/1 As of this time, Mr. Patterson's state court lawsuit is still in progress.

Rudolph Reyes v. Sandia Corporation (Case No. NV--96--0001)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued September 9, 1998

This is a request for review by complainant Rudolph Reyes of a decision by the Office of Inspector General (OIG) dismissing his complaint of reprisal.

On August 21, 1995, Mr. Reyes, an employee of GTE Customer Networks (GTE), a subcontractor of Sandia Corporation (Sandia), the Department of Energy (DOE) contractor at Sandia National Laboratories (SNL), initiated a complaint with DOE's Albuquerque Operations Office. The complaint alleged that he was reprised against by certain Sandia employees for making disclosures regarding possible, waste, fraud, abuse, or mismanagement. /1

On March 9, 1998, complainant filed a complaint in the United States District for the District of New Mexico in which he alleged, inter alia, that Sandia National Laboratories discriminated against him regarding the terms and conditions of his employment in retaliation for his alleged protected disclosures.

On April 15, 1998, OIG issued a Summary Dismissal of Mr. Reyes' reprisal complaint pursuant to 10 C.F.R. Sec. 708.8(a)(4) because complainant's District Court complaint involved "the same set of facts and allegations." (Attachment 1.)

On April 24, 1998, complainant's attorney filed a timely request for review by the Deputy Secretary.

Subsection 708.6(a) of the DOE Contractor Employee Protection Regulation, 10 C.F.R. Part 708, provides, in pertinent part, that:

[a]n employee who believes that he or she has been discriminated against in violation of this part, and who has not, with respect to the same facts, pursued a remedy available under State or other applicable law, may file a complaint with DOE. ... For purposes of this part, a complaint shall be deemed to have been pursued under State or other applicable law if the employee had, pursuant to proceedings established or mandated by State or other applicable law, at any time prior to, or concurrently with, the filing of a complaint with DOE, or at any time during the processing of a complaint filed with DOE, filed or submitted any complaint, action, grievance, or other pleading with respect to that same matter. (Emphasis supplied.)

This section provides further that the 60 day limitations period set forth in subsection 708.6(d) for filing a complaint "shall be suspended upon the filing of a complaint pursuant to State or other applicable law, and [such filing] shall not bar the employee from reinstituting or filing a complaint with DOE if the matter cannot be resolved under State or other applicable law due to a lack of jurisdiction."

Subsection 708.8(a)(4) of the regulation provides for dismissal of a complaint where it is determined that "[t]he complainant has pursued a remedy available under State or other applicable law...."

On appeal, complainant's attorney does not dispute that complainant filed a District Court complaint regarding the same set of facts and allegations contained in his Part 708 complaint.

My review of the record substantiates that, subsequent to filing his initial Part 708 complaint with OIG, the complainant filed a District Court complaint regarding the same facts. This being the case, OIG correctly dismissed his complaint pursuant to 10 C.F.R. Sec. 708.8(a)(4).

Therefore, this complaint is being dismissed on purely procedural grounds, based on the fact that

complainant has chosen to pursue his complaint in District Court. However, no judgment is being made as to the underlying merits of complainant's case. If complainant's allegations cannot be resolved in the District Court proceeding he has initiated "due to a lack of jurisdiction," he may reinstitute a Part 708 complaint in accordance with the terms of subsection 708.6(d).

For the foregoing reasons, the dismissal of the complaint is affirmed.

Elizabeth A. Moler

Deputy Secretary

Issued September 9, 1998

/1 Mr. Reyes' OIG complaint also contained allegations of reprisal by his employer, GTE. However, since the contract between Sandia and GTE did not incorporate the provisions of 10 C.F.R. Part 708 and GTE would not voluntarily consent to application of the regulation, Mr. Reyes was advised previously by OIG that it did not have jurisdiction with respect to those allegations. The instant request for review focuses solely on Mr. Reyes' allegations regarding Sandia.

Linda L. Roberts v. Battelle Memorial Institute (Case No. OH--95--0001)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued June 20, 1996

This is an appeal by complainant Linda L. Robertsfrom a decision by the Office of Contractor Employee Protection (OCEP) dismissing her complaint based on lack of jurisdiction under 10 C.F.R. Part 708. Ms. Roberts filed a complaint with OCEP alleging she was terminated from her employment with Battelle Memorial Institute (Battelle), the Department of Energy contractor at the Battelle Columbus Decommission Project (BCDP), in retaliation for her disclosures of health and safety concerns, mismanagement, and abuse of authority. On appeal, Ms. Roberts takes issue with OCEP's decision dismissing her complaint for lack of jurisdiction.

The scope of the Department's regulatory authority with respect to contractor employee reprisal complaints such as Ms. Roberts's is found at 10 C.F.R. Sec. 708.2(a), which provides, in pertinent part:

[t]his part is applicable to complaints of reprisal filed after the effective date of this part that stem from disclosures, participation, or refusals involving health and safety matters, if the underlying procurement contract described in Sec. 708.4 contains a clause requiring compliance with all applicable safety and health regulations and requirements of DOE. For all other complaints, this part is applicable to acts of reprisal occurring after the effective date of this part if the underlying procurement contract described in Sec. 708.4 contains a clause requiring compliance with this part.

The definition of "contractor" contained in Sec. 708.4 extends to "[o]ther types of procurement contracts; but this part shall apply to such contracts only with respect to work performed on-site at a DOE-owned or leased facility" (Emphasis supplied.)

Since the BCDP is not a "DOE-owned or leased facility," the whistleblower regulation does not apply to the contract between DOE and Battelle. Further, the record reflects that at the time Ms. Roberts filed her complaint, the contract between DOE and Battelle did not contain a clause requiring compliance with all applicable safety and health regulations and requirements of DOE, since the NRC exercises safety and health oversight at the facility. Therefore, OCEP lacks jurisdiction over the allegations raised in Ms. Roberts's complaint.

For the reasons set forth above, OCEP's decision to dismiss this complaint for lack of jurisdiction is hereby affirmed.

Charles B. Curtis

Deputy Secretary

Issued June 20, 1996

Steven R. Samonsky v. Westinghouse Savannah River Co. (Case No. SR--95--0001)

Final Decision and Order issued by the Deputy Secretary of Energy

Issued March 27, 1997

This is a request for review by complainant Steven R. Samonsky of a Summary Dismissal by the Office of Contractor Employee Protection ("OCEP"). In the Summary Dismissal, OCEP found that Mr. Samonsky's complaint, involving alleged retaliatory delay in processing his requests for release of rights relating to several inventions, 1/ was not within the coverage of Part 708, since the issues it raised were unrelated to adverse personnel actions or discriminatory personnel practices. Additionally, OCEP concluded that any delay had become moot, since all the requests had been processed, and there was no longer any effective relief available. Finally, OCEP also concluded that complainant's first alleged disclosure, objecting to his being required to sign an intellectual property agreement, was not sufficiently specific to be a protected disclosure of a possible violation of "law, rule, or regulation" within the meaning of Part 708, and that his second alleged disclosure, an invention proposal concerning the disposal of nuclear waste, was not timely raised in his complaint. Request for Review, Attachment 1.

OCEP's findings that Complainant's first alleged disclosure was not specific enough to qualify as a protected disclosure and that his second was not timely raised appear correct. Complainant's putative first disclosure, an employee concerns report form dated May 25, 1994 (Request for Review, Attachment 8), speaks in terms of it being unfair and possibly unethical to require Complainant to sign the intellectual property agreement and reflects his erroneous opinion that the agreement required him to give up patent rights to his own private inventions. As such, the complaint fails to allege a disclosure relating to health and safety, mismanagement, or a violation of law as required by 10 C.F.R. Sec. 708.5(a)(1). Under the circumstances, former Deputy Secretary White's caution that the whistleblower regulations must not be read to "encompass all disagreements between a contractor and its employees" seems again apt. Mehta v. Universities Research Assoc., OHA Case No. LWA-0003, LWZ--0023 (1995), slip op. at 6.

Regarding the timeliness of Complainant's second putative disclosure, an assertion that WSRC had not properly lined a nuclear waste burial pit that was made in Complainant's invention proposal titled "Monitoring Process for Contaminated Soil," Complainant's suggestion that "it should have been apparent to OCEP" from the outset that he was also complaining that the alleged retaliatory delay related to that disclosure is not supported in the record./2 Complainant's assertion in this regard is contradicted by the statement in his initial complaint that "illegally holding my personal property is the reason for my original complaint" (Request for Review, Attachment 3).

The subject complaint arose out of a dispute concerning intellectual property rights that has since been resolved. It is unnecessary to decide whether a dispute like this falls within the coverage of Part 708, since, for the foregoing reasons, there is no basis for overturning the Summary Dismissal. That dismissal is hereby adopted as the Final Agency Decision in this case.

Charles B. Curtis

Deputy Secretary

Issued March 27, 1997

1/ Complainant suggested that it was unreasonable to take any more than ten days to two weeks to process his requests, and that in no event should it have taken more than three months. Request for Review, Attachment 3. There was explanation from the contractor that the time was reasonable under the circumstances and that every effort was made to accommodate the Complainant. Id, Attachment 1 at p. 5.

OCEP made no finding regarding whether the delay was reasonable, but did note, without relying on the conclusion as a basis for its decision, that it found no evidence that the delay was retaliatory. Ibid.:

2/ Indeed, DOE's chief patent counsel in his letter of May 15, 1995, explaining that the invention was the government's property, expressed "sincere appreciation for [Complainant's] constructive efforts in attempting to solve these important DOE problems" and recommended him to the contractor "for consideration under [its] Inventors' Award Program" (Request for Review, Attachment 8, 4th page).

Matthew J. Sollender v. Battelle Pacific Northwest Laboratories (Case No. RL--98--0004)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued February 25, 1999

This is a request for review by complainant Matthew J. Sollender of a decision by the Office of Inspector General (OIG) dismissing the reprisal that he filed pursuant to 10 C.F.R. Part 708, the regulation establishing the DOE Contractor Employee Protection Program.

On September 10, 1998, Mr. Sollender filed his complaint against his employer, Battelle Pacific Northwest Laboratories (Battelle), which is the DOE management and operating contractor at DOE's Pacific Northwest National Laboratory. In his complaint, Mr. Sollender alleged that his employment had been terminated on November 4, 1997, in retaliation for his raising of safety concerns.

On October 15, 1998, the OIG issued a summary dismissal of Mr. Sollender's reprisal complaint, pursuant to 10 C.F.R. Sec. 708.8(a)(2). The OIG found that he had filed his complaint more than ten months after the termination of his employment, and approximately seven months after the DOE Richland Operations Office had provided him with specific information regarding the requirements of the Part 708 process. The OIG therefore concluded that his complaint violated the requirement in Sec. 708.6(d) that a reprisal complaint "must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later."

On October 27, 1998, Mr. Sollender filed a request for review by the Deputy Secretary.

Mr. Sollender's arguments in his request for review fail to demonstrate that the OIG was incorrect in determining that his complaint violated Sec. 708.6(d), and in therefore dismissing it pursuant to Sec. 708.8(a)(2). The 60-day limitations period for filing a reprisal complaint is not merely the time "normally given in these cases," as Mr. Sollender contends in his request for review. Rather, that limitations period is a requirement included within the regulation establishing the DOE Contractor Employee Protection Program, in Sec. 708.6, which contains the requirements for filing a complaint. Mr. Sollender's filing of his complaint more than ten months after the termination of his employment would not even satisfy the expanded time period proposed in DOE's Notice of Proposed Rulemaking to amend Part 708. In that Notice, DOE proposed to amend Sec. 708.6 to increase the time limit for filing a complaint from 60 days to 90 days. 63 Fed.Reg. 374, 382 (Jan. 5, 1998).

Moreover, Mr. Sollender has failed to show good cause for his exceeding the 60-day limitations period by more than eight months. Although he asserts in his request for review that his submittal was "within the time frame supplied by DOE staff," he has failed to identify that time frame or the DOE staff who allegedly supplied him with that time frame. In fact, Mr. Sollender was informed of the Part 708 process for filing a complaint in a February 13, 1998 letter from Jennifer L. Sands, Manager of the Employee Concerns Program at DOE's Richland Operations Office:

Enclosed is the information package for filing a complaint under 10 CFR Part 708. As I discussed with you on February 12, 1998, there are time frames associated with filing a complaint under 10 CFR 708. Should you wish to pursue this matter further, this office is available to assist you in transmitting the package to the Office of Inspections, U.S. Department of Energy (DOE), Headquarters (HQ).

Yet Mr. Sollender delayed approximately seven months after that letter before he filed his complaint under Part 708, which was specifically referenced in that letter and which explicitly sets forth the 60-day limitations period in Sec. 708.6(d).

Although Mr. Sollender alleges in his request for review that his complaint "was reluctantly filed on the last date possible because of verification by DOE, WDOE, and EPA of violations covered in my report to those agencies," he has failed to identify or otherwise describe any alleged "verification" by those three agencies. Indeed, in his complaint, he did not even mention any verification by those agencies. Regardless of any such verification, if Mr. Sollender was terminated on November 4, 1997 for raising safety concerns, as he alleged in his complaint, then he would have been aware of that discriminatory act at the time of its occurrence, and therefore the 60-day limitations period would have begun to run on November 4, 1997.

For the foregoing reasons, the dismissal of the complaint is affirmed.

Ernest J. Moniz

Deputy Secretary

Issued February 25, 1999

John Burke Truher v. Stanford Linear Accelerator Center (Case Nos. SF--92--0002 and OAK--93--0001)

Final Agency Decision issued by the Deputy Secretary of Energy

Issued September 12, 1995

This is an appeal by complainant John Burke Truher of an Initial Agency Decision by the Office of Contractor Employee Protection ("OCEP"). In the Initial Agency Decision, OCEP found that, while complainant had communicated concerns involving various alleged health, safety, and management issues, he had failed to show that his complaints contributed to any alleged retaliatory action against him by the respondent.

On appeal, OCEP's factual determinations are subject to reversal only if they are "clearly erroneous." Compare, Pullman Standard v. Swint, 456 U.S. 273 (1982), with Amadeo v. Zant, 486 U.S. 214, 223 (1988), quoting Federal Rule of Civil Procedure 52(a). A review of the record and the materials submitted in support of the appeal confirms that the complainant has failed to demonstrate that any protected disclosures resulted in prohibited reprisals being taken against him and that OCEP's contrary findings are "clearly erroneous." Accordingly, there is no basis for overturning the Initial Agency Decision and that decision is hereby adopted as the Final Agency Decision in this case.

Charles B. Curtis

Deputy Secretary

Issued: September 12, 1995

UNITED STATES DEPARTMENT OF ENERGY

	)
STEVEN A. WALLACE,	)
	)
Complainant,	)
	)
V.	) CaseNo.OR-98-0004
	)
LOCKHEED MARTIN ENERGY	)
SYSTEMS, INC.,	)
	)
Respondent.	)
	)

FINAL DECISION AND ORDER

This is a request for review by complainant Steven A. Wallace of a decision by the Office of Inspector General (OIG) dismissing the reprisal complaint that he filed pursuant to 10 C.F.R. Part 708, the regulation establishing the DOE Contractor Employee Protection Program.

On January 28, 1998, Mr. Wallace filed his complaint against his employer, Lockheed Martin Energy Systems, Inc. (Lockheed), which is the DOE management and operating contractor at doe's Y-12 plant in Oak Ridge, Tennessee. In his complaint, Mr. Wallace alleged that on or about May 29, 1995, he disclosed to Keith Kitzke, a member of Lockheed management, that a co-worker, Zane Bell, had suggested that Mr. Wallace hire someone to kill another co-worker, Chris Pickett. Mr. Bell made that comment after Mr. Wallace had told him of a problem that Mr. Wallace had with his working relationship with Mr. Pickett. Mr. Wallace also alleged in his complaint that negative personnel actions were taken against him as a result of that disclosure.

Mr. Wallace provided additional information by letters dated May 4 and May 8, 1998. Most of that information consists of copies of numerous interoffice memoranda and electronic mail messages that Mr. Wallace sent and received concerning his workplace disagreements of various kinds with various co-workers.

On October 1, 1998, the OIG issued a summary dismissal of Mr. Wallace's reprisal complaint. The OIG found that Lockheed management agreed with Mr. Wallace that Mr. Bell's comment was inappropriate, but management believed that Mr. Bell routinely made such comments in an inappropriate "joking" manner, and it did not regard his comment as a serious suggestion that Mr. Wallace kill someone. Mr. Bell was counseled about the comment, apologized to Mr. Wallace, and has not subsequently made such comments.

The OIG also found that after Mr. Bell made his inappropriate comment, Mr. Wallace told Lockheed management that he could no longer tolerate occupying an office next to Mr. Bell and requested that Mr. Bell be moved to another office. Instead, management offered Mr. Wallace the opportunity to move to another office. Mr. Wallace accepted that offer. He subsequently requested to move back to his old office, but his request was denied because someone else had moved into that office.

The OIG concluded that Mr. Bell's comment to Mr. Wallace was inappropriate in the workplace, and that it was appropriate for Mr. Wallace to report that comment. However, it also concluded that the comment cannot reasonably be interpreted as a serious suggestion to commit a violation of the law by hiring someone to kill a co-worker. The OIG noted that Part 708 was not intended to provide a forum for every workplace dispute, and dismissed the complaint pursuant to 10 C.F.R. §§ 708.8(a)(3) and (5).

On October 6, 1998, Mr. Wallace filed a request for review by the Deputy Secretary. On October 22, 1998, Lockheed filed a response. On January 16, 1999, Mr. Wallace submitted additional information.

Mr. Wallace's arguments in his request for review and additional submissions fail to demonstrate that the OIG was incorrect in dismissing his complaint.

Contrary to Mr. Wallace's allegations in his request for review at 3, the OIG did not conclude that Mr. Bell's comments were "excusable," or that Mr. Wallace's disclosure of those comments was "not reasonable." On the contrary, the OIG concluded that Mr. Bell's comment was inappropriate, and that Mr. Wallace's disclosure was appropriate. Summary dismissal at 3. However, the OIG also correctly concluded that Mr. Bell's comment cannot reasonably be interpreted as a serious suggestion to commit a violation of law. Id. Indeed, Mr. Wallace does not argue in his request for review that Mr. Bell's inappropriate comment was a serious suggestion that Mr. Wallace hire someone to kill Mr. Pickett. Instead, Mr. Wallace argues that "even assuming Bell's inciting comments to Mr. Wallace were said 'in jest', given the zero tolerance nature of the Contractor's policy, said comments do not carry the minor import ascribed to them by your dismissal." Id. at 2-3. However, as explained supra, the OIG did not conclude that Mr. Bell's comment was of minor import.[1]

Although Mr. Wallace alleges that the OIG was incorrect in finding that Mr. Bell was counseled and apologized to Mr. Wallace (request for review at 1-2), Mr. Wallace presents no evidence to support those allegations. Indeed, evidence submitted by Mr. Wallace himself supports both of those findings by the OIG. In his May 4, 1998 submission to the OIG, Mr. Wallace included a copy of an interoffice memorandum, dated July 29, 1996, from Lockheed Ethics Director Barbara Ashdown to Mr. Wallace, which includes the following language:

> As far as the remark made by Zane Bell to you, you told me yourself that he apologized for the comment and you thought that you had resolved this with him. In addition when I talked with Keith [Kitzke], he agreed that any remarks along those lines were wrong and he also talked with Bell. He agreed that such remarks would not be tolerated and would not occur

again.

The OIG's findings are further supported by another interoffice memorandum that Mr. Wallace included in his same submission to the OIG. That memorandum, dated August 21, 1996, was sent from Stacey Landers of Lockheed to Mr. Wallace, and transmitted a memorandum to the file from Barbara Ashdown which she had written after attending a meeting with Mr. Wallace and Mr. Kitzke and which includes the following language:

> At the time of [Bell's] remarks Kitzke went to Bell, told him the remarks were inappropriate and should stop. Bell subsequently apologized to Wallace. Both Kitzke and Wallace agree that Bell has not made these type of remarks since.

Mr. Wallace did not dispute those facts in any of the internal correspondence that he himself authored and included in his submissions to the OIG.[2]

On the contrary, Mr. Wallace admits in his request for review that Mr. Bell once approached him at work and said to him, "My religion requires me to ask you, have I offended you?"

> Mr. Wallace, knowing that Bell is Jewish, responded, "Zane, if I took your son and tattooed a number on his arm, it wouldn't be as bad as what you did to me." Bell made light of Mr. Wallace's comment and shortly thereafter invited Wallace to his son's bar mitzvah ceremony.

Request for review at 1-2. The above-quoted statement indicates that Mr. Wallace himself engaged in the same kind of inappropriate, and offensive, attempt at verbal "humor" that Mr. Bell had engaged in earlier by making the comment that Mr. Wallace disclosed to Lockheed management. However, the fact that Mr. Bell responded to Mr. Wallace's offensive comment about Mr. Bell's son in a friendly, non-confrontational manner - by inviting Mr. Wallace to attend his son's bar mitzvah - suggests that Mr. Bell was offering an apology for his own offensive comment to Mr. Wallace. In addition, it is undisputed that Mr. Bell has not subsequently made offensive comments.

In previous decisions by Deputy Secretaries of Energy, it has been held that Part 708 must be interpreted in a manner that grants "appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork," and must not be read to "encompass all disagreements between a contractor and its employees." Daniel Holsinger v. K-Rav Security. Inc.., 26 DOE Par. 87,506 at 89,019 n.l (1996); Naresh C. Mehta v. Universities Research Association, 24 DOE Par. 87,514 at 89, 065 (1995). Lockheed was exercising those "traditional management prerogatives needed to conduct an organization through teamwork" when it responded to Mr. Bell's offensive comment to Mr. Wallace by telling Mr. Bell that his remarks should stop - thereby successfully putting an end to Mr. Bell's practice of making such remarks - and by allowing Mr. Wallace to move to another office. Part 708 was not intended to provide a forum for resolving every such dispute over offensive remarks exchanged between co-workers, especially where, as in the instant case, the dispute can be more effectively resolved through counseling and allowing an employee to move to a new office.

Moreover, in another decision by the Deputy Secretary of Energy, it has been held that a disclosure must be "both reasonable and in good faith" in order to be "the sort of disclosure meant to be protected by the regulations" in Part 708. C. Lawrence Comett v. Maria Elena Torano Associates. Inc.., 27 DOE ^ 87,502 at 89,017 (1998) (emphasis added). As explained above, it is not reasonable to interpret Mr. Bell's comment, however inappropriate and offensive, as a serious suggestion that Mr. Wallace commit a violation of law by hiring someone to kill Mr. Pickett, and Mr. Wallace does not argue otherwise in his request for review.[3]

Furthermore, the additional information that Mr. Wallace has submitted into the record does not support his allegation that negative personnel actions were taken against him as a result of his disclosure of Mr. Bell's comment. On the contrary, the bulk of the internal correspondence that he submitted to the OIG on May 4 and May 8, 1998, concerns workplace disputes with Lockheed management that were often of a technical nature, and had no connection to his disclosure.

For example, in his May 8, 1998 submission, he included an electronic mail message, dated "Tue, 18 Nov 1997 10:28:37," from John Kolb of Lawrence Liver-more National Laboratory (LLNL) to Bob Riepe of Lockheed, in which Mr. Kolb made numerous complaints about Mr. Wallace's working relationship with LLNL "as Y12 liaison for ESP project LL-24." Mr. Kolb wrote that "Mr. Wallace's email messages to us frequently seemed to dwell on neutron imaging and source technologies which had no tangible relevance to our project plan;" that on another issue, "Steve never got back to us concerning his findings," and that "[o]ur communications with Steve had become somewhat intermittent by the end ofFY97 when we received email from Steve telling us of his recent activities" and "[w]e did not request ANY of this and, to the best of our knowledge, these activities have absolutely nothing to do with LL-24." Mr. Kolb concluded his message with the following plea:

> We very much regret having to write a memo such as this. However, our working relationship with Y-12 on this project is not what it should be - not what it MUST be - if we are to succeed in this effort[.] As a potential testbed and eventual customer for neutron imaging technology, we believe it to be essential for us to have an effective, positive working relationship with Y-12 on this task. Thus, we'd appreciate your assistance in helping us to resolve this matter in a helpful manner.

The above-quoted complaint, which originated from outside of Lockheed, fully supports Lockheed's statement in Mr. Wallace's performance review, submitted by Mr. Wallace to the OIG on January 16, 1999, that "[rjesponsibility for the x-ray and neutron tomography tasks were transferred to another PI [principal investigator] early in the year because the LLNL partners said that the relationship with Steve had deteriorated to the point that they did not believe they could effectively work with Steve."

In summary. Part 708 was not intended to provide a forum for resolving disputes over offensive remarks of this kind exchanged between co-workers; the evidence indicates that Lockheed responded to Mr. Wallace's disclosure of Mr. Bell's remark by talking with Mr. Bell and persuading him to stop making such remarks; and there is no evidence in the record to support Mr. Wallace's allegation that negative personnel actions were taken against him as a result of his disclosure of Mr. Bell's remark.

For the foregoing reasons, the dismissal of the complaint is affirmed.

T J Glauthier Deputy
Secretary

Issued: January 19, 2000

[1] Mr. Wallace attached to his request for review a copy of Lockheed Management Control Instruction LR-501INS, entitled "Workplace Violence," approved on April 3, 1998; and a copy of an October 17, 1997 internal DOE memorandum which distributed for comment a draft of DOE Guide 340.1, entitled "Guide to Preventing Acts of Aggression, Threatening Behavior, and Violence in the Workplace." However, neither of those two documents was approved and in effect at the time that Mr. Bell made his comment and Mr. Wallace disclosed that comment in May 1995. The Lockheed Management Control Instruction was not approved until nearly three years later, on April 3, 1998. DOE Guide 340.1 was not even distributed in

draft form for comment until over two years later, on October 17, 1997, and it still has not been approved. More importantly, the OIG's dismissal of Mr. Wallace's complaint does not in any way contradict the policies against workplace violence reflected in those documents; the OIG did not conclude that Mr. Bell's comment and Mr. Wallace's disclosure were of minor or insignificant import.

[2] Copies of the two above-quoted memoranda were also included in Lockheed's October 22, 1998 response to Mr. Wallace's request for review, after Mr. Wallace originally submitted them into the record on May 4, 1998.

[3] The interim final rule amending Part 708, published on March 15, 1999 (64 Fed. Reg. 12862), explicitly requires, in § 708.5(a) of the amended rule, that employees' protected disclosures involve information that they "reasonably and in good faith believe" is true. Id. at 12863, 12871 (emphasis added). The Preamble to the interim final rule states that the "reasonableness" criterion is consistent with the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989), and many state statutes which afford protection to both public and private sector employees against retaliation for whistleblowing activities. Id. at 12863.

Section 708.8 of the amended rule provides that the "procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part." Id. at 12871. The Preamble also states the following regarding the applicability of the revised procedures to pending cases:

> We have added a new section (§ 708.8) to the interim final rule to explicitly state that the revised procedures shall apply in any complaint proceeding pending at the informal resolution stage, the investigative stage or the hearing stage on the effective date of this rule. Appeals currently pending before the Secretary's designee, the Deputy Secretary, will be decided by the Deputy Secretary (rather than be transferred to the OHA Director). It is well established in the law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. [Citations omitted] DOE will apply the revised procedures to pending cases consistent with the case law.

Id. at 12865.

In the instant case, it is not necessary for DOE to decide whether to apply the explicit "reasonableness" requirement in the amended § 708.5(a). Even assuming, arguendo, that the amended provision does not apply to the instant case, it is nevertheless clear that even before the interim final rule was published, the Deputy Secretary had held that a protected disclosure must be "both reasonable and in good faith." C. Lawrence Comett v. Maria Elena Torano Associates, 27 DOE at 89,017. More importantly. Part 708 was not intended to provide a forum for resolving this kind of dispute over offensive remarks between co-workers, as explained above.

Anthony J. Wiggins, Complainant, v. Foster Wheeler Environmental Corporation, Respondent (Case No. SR099-00011)

Final Agency Decision Issued by the Deputy Secretary of Energy

Issued January 19, 2000

This is an appeal by complainant Anthony J. Wiggins from a summary dismissal of his reprisal complaint by the Office of Inspector General (OIG). Mr. Wiggins filed a complaint with OIG alleging that his October 3, 1997, termination from employment with Foster Wheeler Environmental Corporation (FWEC) was in retaliation for his protected disclosures. OIG's summary dismissal was based on the fact that complainant's initial Part 708 complaint was untimely.

In this case, the record establishes that complainant filed a Part 708 complaint more than one year after his resignation. Although complainant alleged at the time of filing his November 13, 1998, complaint that his initial Part 708 complaint was filed "on or about" November 3, 1997, OIG's investigation found no evidence that complainant filed a complaint during that time frame. With regard to complainant's allegation that his employment was terminated in retaliation for contacting the OIG hotline, OIG's investigation of the complaint disclosed that complainant did not contact the OIG hotline until approximately three weeks after his employment was terminated. Therefore, OIG noted in its summary dismissal that "it does not appear that the termination of your employment could have been the result of your communication to the hotline."

By letter dated December 17, 1998, Mr. Wiggins filed a timely request for review of OIG's dismissal determination.

The OIG dismissed the case on the basis of 10 C.F.R. § 708.6(d), which provided that a complaint must be filed "within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later." /1 Here, a review of the record establishes that the complainant filed his complaint more than one year after the termination of his employment. /2 Despite complainant's assertion that he initiated his complaint "on or about" November 5, 1997, neither OIG nor SROO personnel located any record of such a complaint.

While Mr. Wiggins takes issue with OIG's determination that his complaint was untimely, he provides no support for his generalized assertion that the untimely filing of his complaint was due to "incorrect and misleading information" provided by OIG and SROO. And, while Mr. Wiggins further asserts that his attorney can attest to his filing within the 60 day time period, he has provided no documentation to support this contention. Instead, as OIG pointed out in dismissing Mr. Wiggins' complaint, neither OIG nor DOE's Savannah River Operations Office were able to corroborate the filing of such an earlier complaint. Absent documentation (such as an affidavit) from his attorney or other evidence in support of his assertion that his complaint was initiated in November 1997, complainant has failed to meet his burden of establishing timely filing of his Part 708 complaint.

Accordingly, complainant has failed to support his claim that he initiated a complaint prior to November 13, 1998, more than one year after his October 3, 1997, termination. Under these circumstances, complainant has not demonstrated any error in OIG's decision to dismiss his complaint as untimely. /3

For the reasons set forth above, OIG's summary dismissal of this complaint is hereby affirmed.

T. J. Glauthier

Deputy Secretary

Issued: January 19, 2000

/1 DOE issued an Interim Final Rule amending the whistleblower regulations, which became effective on April 14, 1999, that increases the time limit for filing a complaint from 60 to 90 days. 64 Fed. Reg. 12,862 (March 15, 1999).

/2 I thus note that Mr. Wiggins' complaint would not even have satisfied the expanded time period set forth in DOE's Interim Final Rule amending Part 708.

/3 Further, the complainant indicates that he was employed by FWEC at the Three Rivers Landfill. Since this is not a "DOE-owned or -leased facility," as defined in 10 C.F.R. *§* 708.4 (and retained in subsection 708.2 of the Interim Final Rule), it appears that complainant was not employed by a contractor subject to Part 708, which would provide an independent basis for dismissal of this complaint.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFETY & ECOLOGY CORPORATION,

Petitioner,

v.

U.S. DEPARTMENT OF ENERGY, SPENCER ABRAHAM, in his official capacity as Secretary of Energy, U.S. Department of Energy, and SUE GOSSETT

Respondents.

Civil Action No. 03-0747 (JDB)

MEMORANDUM OPINION

Petitioner Safety & Ecology Corporation ("SECC") seeks judicial review of a final agency action under 5 U.S.C. § 702 of the Administrative Procedures Act ("APA"). The final agency decision, issued by the Office of Hearing and Appeals ("OHA") of the Department of Energy ("DOE"), found that SECC terminated Susan Rice Gossett ("Gossett") in retaliation for protected safety disclosures made pursuant to 10 C.F.R § 708 et seq. SECC argues that the OHA decision should be reversed because it violates statutory provisions, is arbitrary and capricious, constitutes an unwarranted exercise of discretion, is not supported by substantial evidence, and is otherwise contrary to law. Presently before this Court are cross motions for summary judgment from SECC and from respondents, DOE and Gossett. For the reasons that follow, the Court will deny petitioner's motion for summary judgment and grant respondents' motions.

BACKGROUND

A. Department of Labor Regulations

DOE's Contractor Employee Protection Program (a.k.a. "Whistleblower Program") created procedures for the investigation, hearing, and review of allegations of reprisal against DOE contractor employees. See 57 Fed. Reg. 7533 (March 3, 1992). The regulations governing the Whistleblower Program are set forth in 10 C.F.R. § 708 et seq., and apply to employees of a company that has a contract with DOE and performs work directly related to activities at a DOE-owned or leased site. See 10 C.F.R. § 708.2. An employee may file a complaint alleging retaliation as a result of:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at the DOE site, [the] employer, or any higher tier contractor, information that [the employee] reasonably believes reveals --
>
> (1) A substantial violation of a law, rule or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if [the employee] believe[s] participation would --
>
> (1) Constitute a violation of federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to [the employee], other employees, or members of the public.

10 C.F.R. § 708.5 (collectively referred to as "protected disclosures").

If an employee believes he or she is a victim of retaliation, the employee must file a complaint. See 10 C.F.R. § 708.10. After filing a complaint, the employee then pursues the matter through an informal resolution mechanism. See 10 C.F.R. § 708.11-.20. If the matter cannot be resolved informally, the employee may request that the matter be referred to DOE's

Office of Hearing and Appeals ("OHA") for either a hearing, or a hearing preceded by an investigation. See 10 C.F.R. § 708.21(a). In the case of an investigation, OHA appoints an investigator who issues a Report of Investigation ("ROI"). See 10 C.F.R. § 708.22-23.

After the ROI is issued, a hearing is conducted by a Hearing Officer appointed by OHA. See 10 C.F.R. § 708.24. In a section 708 hearing, the parties have the right to be represented by counsel, testimony is given under oath, there is cross-examination of witnesses, the formal rules of evidence do not apply strictly but serve as guidelines, and the proceedings are transcribed by a court reporter. See 10 C.F.R. § 708.28(a). The Hearing Officer also has the power to allow discovery, issue subpoenas, rule on evidentiary objections, dismiss claims, and accept briefings. See 10 C.F.R. § 708.28(b).

In a provision central to this case, the regulations specify what the parties to the proceedings must prove:

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

10 C.F.R. § 708.29.

After the hearing, the Hearing Officer issues an Initial Agency Decision ("IAD"), which determines findings of facts, conclusions, an order and, if a finding of retaliation is made, the appropriate relief. See 10 C.F.R. § 708.30. A dissatisfied party can appeal the Hearing Officer's IAD to the OHA Director. See 10 C.F.R. § 708.32. The OHA Director will issue a decision

based upon the record that includes findings of fact, conclusions, and an order. See 10 C.F.R. § 708.34(b)(1). The decision of the OHA Director constitutes the final agency decision, unless a party seeks Secretarial review. See 10 C.F.R. § 708.34(d).

B. Factual Background[1]

SECC is an environmental, safety, and health company that provides various support services, to include radiological control, remediation and demolition, to governmental and private business entities. Petitioner's Statement of Undisputed Material Facts ("Pet.'s Statement") ¶ 1. SECC, through a contract with Bechtel Jacobs Company, LLC, provides radiological control services for the DOE facility in Portsmouth, Ohio. Id. ¶ 2.

SECC hired Gossett as a junior radiation control technician ("RCT") at DOE's Portsmouth site in March of 1999. Id. ¶ 3. An RCT monitors radiation contamination levels at DOE sites in order to protect the workforce and the environment from exposure to ionizing radiation. Pet.'s Statement ¶ 4. Subsequently, SECC promoted Gossett to the position of senior RCT in June of 2000. Respondent DOE's Statement of Material Facts Not in Dispute ("Resp. DOE's Statement") ¶ 1.

While Gossett was employed at SECC's Portsmouth site, she made numerous protected disclosures, as defined under 10 C.F.R. § 708.5(a). Id. ¶ 2. These disclosures included an expression of concern to a Congressman and DOE Assistant Secretary, as well as several "Work

---

[1]Under Local Civil Rule 56.1, the party moving for summary judgment must attach to its motion a statement of undisputed material facts and the parties opposing the motion must respond with a statement of disputed material facts. In this case, all parties have filed a motion for summary judgment. Therefore, the Court has received statements of material facts from each party, as well as appropriate responses to those statements. This Factual Background section reflects the uncontested facts drawn from the parties' submissions.

Stop Problem Reports." Id. During the investigation following Gossett's complaint, the ROI concluded that Gossett made at least two protected disclosures, as defined under 10 C.F.R. § 708.5. Id. ¶ 3. These were a November 15, 2000, Condition Report and meeting with SECC officials concerning bulging and leaking drums and an October 19, 2000, presentation to DOE officials in Washington, DC, during which she discussed health and safety violations. Id. SECC does not contest the finding of protected disclosures. See Pet.'s Response to Resp. U.S. DOE's Statement of Material Facts Not in Dispute.

To ensure that RCTs possess the appropriate training and skill to perform their safety functions, DOE's RCT handbook requires a two-year cycle of continuing training, which includes a re-qualification examination at the conclusion of the retraining period. Resp. DOE's Statement ¶5. The re-qualification exam required by DOE consists of 100 questions, and DOE guidelines require RCTs to score an 80 to pass the exam. Id. ¶ 5.

Gossett took her first re-qualification exam on December 22, 2000. Id. ¶ 8. She failed the exam, scoring a 74. Id. On January 8, 2001, Gossett again took and failed the re-qualification exam, scoring a 73. Id. ¶ 9. Finally, on January 19, 2001, Gossett took her third re-qualification exam. Resp. DOE's Statement ¶ 7. Again Gossett failed, scoring a 74 out of 100. Id. Within hours of failing her third exam, Gossett's employment with SECC was terminated. Id. ¶ 8.

C. Procedural Background

On January 23, 2001, Gossett filed a complaint under DOE's Whistleblower Protection regulations with the DOE Oak Ridge Operations Office. Administrative Record ("R.") 7214. The complaint alleged that SECC used Gossett's failure to pass three re-qualification exams as a pretext for terminating her in retaliation for engaging in "whistleblowing activities," i.e., the

making of disclosures protected by 10 C.F.R. § 708.5. R. 7215-16.

Gossett requested that her complaint be referred to DOE's OHA for investigation and hearing. R. 7214. After the issuance of a ROI, Gossett requested and received a hearing on her complaint that was conducted from October 23-25, 2001. R. 7215. The Hearing Officer received evidence from Gossett and SECC, as well as post-hearing briefing from each party. Id. On May 8, 2002, the Hearing Officer issued an IAD. R. 7213-7232.

The IAD found that Gossett made numerous protected disclosures and that these disclosures were a contributing factor in her termination from SECC. R. 7217. The Hearing Officer noted that the close temporal proximity between Gossett's protected disclosures and her termination, coupled with a pattern of hostility from SECC towards Gossett, was sufficient to show that the protected disclosures were a contributing factor to Gossett's termination. Id. The Hearing Officer also found that SECC failed to meet its burden of showing by clear and convincing evidence that it would have terminated Gossett in the absence of her protected disclosures. R. 7219-28. In particular, because Gossett was the first employee fired under the "three-strike" policy, which required the termination of an RCT who failed a re-qualification exam three times, the Hearing Officer was not convinced that this policy was in place prior to Gossett's termination. Id.

SECC appealed the Hearing Officer's decision to the OHA Director, raising many of the same issues SECC now presents to this Court. R. 7193. OHA affirmed the IAD. R. 7200. In particular, OHA found that the temporal proximity between the protected disclosures and Gossett's termination was sufficient for the inference that the disclosures were a contributing factor to her termination. R. 7195. OHA also upheld the IAD's finding that SECC did not

establish by clear and convincing evidence that Gossett would have been terminated in the absence of her protected disclosures. R.7196-99.

The exact nature and importance of the decision by OHA is hotly contested between the parties, and this issue is highly relevant to this Court's review. The dispute over the OHA decision centers on the finding that Gossett satisfied her preponderance of the evidence burden. SECC argues that OHA found that Gossett met her burden by the use of the temporal proximity inference alone, and in doing so disregarded, as this Court should also, the IAD's finding of a pattern of hostility towards Gossett. Respondents counter that because OHA did not explicitly reject the pattern of hostility finding in the IAD, this Court should also consider IAD's finding of a pattern of hostility when evaluating SECC's challenges to the OHA decision.

Both parties concede that the OHA Director's decision is the final agency action that vests this Court with authority for judicial review, absent an appeal within 30 days to the Secretary. 10 C.F.R. § 708.34(d) ("The appeal decision issued by the OHA Director is the final agency decision unless a party files a petition for Secretarial review by the 30th day after receiving the appeal decision."). As such, this Court must treat the OHA decision as the final agency action for review, and will review only those findings and conclusions contained therein. See 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ... is entitled to judicial review ").

In determining the findings of OHA, we turn to the text of the decision itself. Addressing whether Gossett met her burden of showing a contributing factor, OHA stated that "[o]nce the temporal proximity showing has been made, the finding of the pattern of hostility is not necessary to the overall conclusion that the complainant has made the contributing factor showing. The

conclusions in the IAD regarding the pattern of hostility are dictum in this case." [emphasis added]. R. 7195. OHA went on to say that "[t]he temporal proximity of the termination and Gossett's protected activities is ample evidence to sustain Gossett's burden of proof of contributing factor under Section 708.29." R. 7195-96. From the text of the decision, then, it is clear that the final agency decision of OHA found that Gossett had met her burden of showing a contributing factor solely through the temporal proximity inference, and it is that finding that this Court must review.

STANDARD OF REVIEW

This case is before the Court on cross-motions for summary judgment. Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In this case, however, as is true generally for judicial review of agency action, the Court's review is limited to the administrative record. See Camp v. Pitts, 411 U.S. 138, 142 (1973). Petitioner challenges a final agency action, under 5 U.S.C. § 702, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." In reviewing an agency action, this Court is governed by the "arbitrary and capricious" standard set out in the APA, 5 U.S.C. § 706(2)(A). This is a highly deferential standard of review, which presumes that agency action is valid. See, e.g., Kisser v. Cisneros, 14 F.3d 615, 618 (D.C. Cir. 1994). The "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The Court may reverse only if the

agency's decision is not supported by substantial evidence, or the agency made a clear error in judgment. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971). "The key to the arbitrary and capricious standard is its requirement of reasoned decision-making: we will uphold the [agency's] decision if, but only if, we can discern a reasoned path from the facts and considerations before the [agency] to the decision it reached." Neighborhood TV Co. v. FCC, 742 F.2d 629, 639 (D.C. Cir. 1984). Furthermore, courts must defer to an agency's interpretation of its own regulations unless it is plainly wrong. General Carbon Co. v. OSHRC, 860 F.2d 479, 483 (D.C. Cir. 1998).

ANALYSIS

The petitioner challenges OHA's decision that SECC terminated Gossett because of her protected disclosures. SECC raises three arguments for setting aside the OHA decision. First, SECC argues that the burden-shifting scheme utilized by DOE is improper as a matter of law under the APA. In support of this argument, SECC argues that the DOE whistleblower regulations should be governed by the APA formal adjudication procedures. Second, SECC argues that Gossett's use of the temporal proximity inference to meet her burden of proof is inconsistent with the DOE regulations. Third, SECC argues that the OHA findings were arbitrary, capricious and not supported by substantial evidence. The Court considers each SECC argument in turn and finds none compelling.

A. Burden-Shifting Scheme

SECC challenges DOE's burden-shifting scheme generally as a violation of Section 7(c) of the APA, 5 U.S.C. § 556(d). The respondents counter that the DOE whistleblower protection regulations are informal adjudications not governed by Section 7(c), which pertains only to formal

adjudications. As discussed above, the DOE regulations specify that an employee must establish by a preponderance of the evidence that her protected disclosure under 10 C.F.R. § 708.5 was a contributing factor to the adverse personnel action. See 10 C.F.R. § 708.29. Once the employee does so, the burden is shifted to the contractor to show by clear and convincing evidence that the adverse personnel action would have occurred in the absence of the protected disclosure. Id. Here, OHA found that Gossett satisfied her contributing factor requirement by establishing close temporal proximity between the protected disclosures and her termination.

In arguing that the burden-shifting scheme utilized by DOE is a violation of the APA, SECC makes two assertions -- first, that the procedure used by DOE in its whistleblower protection regulations is a formal adjudication under the APA, and second, that therefore the burden-shifting scheme used by DOE violates Section 7(c) of the APA, which states: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Petitioner cites OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), which struck down the Department of Labor "true doubt rule" as a violation of the APA. Under that rule, if the evidence was evenly balanced the benefit claimant would win. See Greenwich Collieries, 512 U.S. at 269. The Supreme Court found the "true doubt rule" violated Section 7(c) of the APA. Id. at 280. According to SECC, both the actual shifting of the burden and the imposition of a higher standard of proof on the contractor -- clear and convincing as compared to preponderance -- violate Section 7(c) of the APA.

Respondents never reach SECC's Section 7(c) argument because they contend that Section 7(c) does not apply to the DOE regulations. Specifically, respondents contend that the procedures for a formal adjudication, provided in 5 U.S.C §§ 554, 556-57, do not apply to the whistleblower

protection regulations. The threshold question is thus whether a proceeding under the DOE whistleblower protection regulations is a formal adjudication under the APA. DOE has never applied the procedures found in 5 U.S.C §§ 554, 556-57 to their whistleblower protection regulations. SECC contends that the statutory authority for DOE's regulations mandates application of the APA, and alternatively, that Supreme Court precedent and principles of due process require DOE to conduct a formal adjudication in the whistleblower setting. This Court concludes that the APA formal adjudication procedures do not apply to proceedings under DOE's whistleblower protection regulations, and therefore that Section 7(c) of the APA does not apply.

According to 5 U.S.C. § 554(a), the trial proceedings for a formal adjudication, set out in 5 U.S.C. §§ 556-57, are required only when an "adjudication is required by statute to be determined on the record after opportunity for agency hearing." It is not entirely clear what is necessary to trigger the formal adjudication requirements of sections 556 and 57, but the prevailing view is that there must be some statutory language directing the agency to hold a hearing on the record. See American Trucking Ass'n v. United States, 344 U.S. 298, 319-29 (1953); Western Res., Inc. v. Surface Transp. Bd., 109 F.3d 782, 793 (D.C. Cir. 1997); Chemical Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1482 (D.C. Cir. 1989). If an agency adjudication is not governed by the formal procedural requirements of sections 556-57, the only APA procedural requirements that apply are those in section 555, which does not include the Section 7(c) burden-shifting prohibition.

An examination of the authorizing statutes for 10 C.F.R. § 708 et seq. reveals that there is no express statutory mandate for DOE to conduct a hearing on the record sufficient to trigger the formal procedures of sections 556-57. DOE regulations were issued pursuant to broad statutory authority granted by the Atomic Energy Act of 1954 (42 U.S.C. § 2201), the Energy

Reorganization Act of 1974 (42 U.S.C. § 5814, 5815), and the Department of Energy Organization Act (42 U.S.C. §§ 7251, 7254, 7255, 7256). See 57 Fed. Reg. 7533, 7535 (March 3, 1992). There is nothing in the language of these statutes that directs DOE to hold hearings on the record for whistleblower retaliation claims. SECC also points to 42 U.S.C. § 2231, a provision of the Atomic Energy Act, which requires all agency action taken pursuant to Chapter 23 (Atomic Energy) to be governed by the APA. However, that statute merely states the broad principle that "[t]he provisions of subchapter II of chapter 5, and chapter 7, of Title 5 [the APA] shall apply to all agency action taken under this chapter." 42 U.S.C. § 2231. That is a far cry from mandating DOE to conduct a hearing on the record.

Therefore, although 42 U.S.C. § 2231 refers generally to the application of the APA to agency action, it is not the specific statutory language needed to trigger the formal adjudication requirements of 5 U.S.C. §§ 556-57. Furthermore, it is not so much that the APA applies at all to DOE's whistleblower protection regulations, but rather whether the formal adjudication requirements apply.[2] SECC has failed to direct the Court to statutory language that mandates that DOE whistleblower protection proceedings be conducted through a formal adjudication.

SECC's second argument for the application of the APA formal adjudication procedures is that because OHA imposed money damages, due process requires a formal adjudication. SECC contends that due process mandates a hearing prior to any deprivation. This argument is not persuasive. As stated above, the APA formal adjudication procedures are triggered when there is specific statutory language requiring a hearing on the record. Moreover, due process does not

---

[2]SECC's claim is not that the APA applies to 10 C.F.R. § 708 proceedings, but rather that the APA formal adjudication requirements, including the burden-shifting provision of Section 7(c), apply to the DOE whistleblower protection regulations.

require the full panoply of formal trial proceedings; rather, the Mathews v. Eldridge, 424 U.S. 319, 335 (1976), test only mandates that some process be given tantamount to the interests at stake. The whistleblower protection regulations provide sufficient procedural protections, listed in 10 C.F.R. § 708.28, to comport with any constitutional requirements. Therefore, due process does not provide a basis to mandate the application of the full formal adjudication procedures of the APA in this setting.

SECC's reliance on Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), to argue that any due process interest in agency proceedings triggers full formal adjudication process is misplaced. Subsequent decisions leave no doubt that the APA formal adjudication process is only triggered by a specific statutory requirement. See, e.g., PBGC v. LTV Corp., 496 U.S. 633, 653-55 (1990); Chemical Waste Mgmt., 873 F.2d at 1482. Likewise, Greenwich Collieries is of little aid to SECC because there the Supreme Court concluded that Section 7(c) applied to the adjudications involved, which were formal adjudications under the governing statute, whereas here there is not the requisite statutory language to trigger full formal adjudication, and the proceedings thus remain informal adjudications.

For these reasons, the APA procedures for formal adjudication do not apply to the DOE whistleblower protection regulations. As a result, SECC's argument that the DOE regulations violate Section 7(c) of the APA need not be reached. The burden-shifting regime incorporated by DOE in 10 C.F.R. § 708.29 does not violate the APA.

B. Temporal Proximity Inference

SECC also challenges the temporal proximity inference used by Gossett to meet her burden. Specifically, SECC argues that the decision by OHA that temporal proximity alone is

sufficient to show that a protected disclosure was a contributing factor under 10 C.F.R. § 708.29, without also establishing a retaliatory motive, is inconsistent with the language of § 708.29 and undermines the goals of the DOE regulations. Respondents counter that DOE's interpretation of its own regulations is owed deference, and that the use of a temporal proximity presumption is consistent with other statutory and regulatory whistleblower schemes.

The Supreme Court has stated that the job of the courts "is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); see also United States v. Mead Corp., 533 U.S. 218, 227 (2001) (an agency's interpretation of its own regulation is entitled to substantial deference). Since originally promulgating the section 708 regulations, DOE has consistently permitted an employee to meet the contributing factor burden through evidence that the adverse personnel action taken against the employee occurred in close temporal proximity to the employee's protected disclosures. See Ronald A. Sorri v. Sandia Nat. Lab., LWA-0001 (June 9, 1993); Janet Westbrook, 28 DOE ¶ 87,021, Case No. VBA-0089 (2002) (holding that if the employee can show a close temporal proximity between the protected disclosures and adverse personnel action, along with actual or constructive knowledge by the employer of the disclosures, the employee can satisfy the contributing factor burden).[3] That reasonable interpretation is

[3]In its opinion in this case, OHA appears to indicate that temporal proximity, even without the terminating officials's knowledge of the employee's protected activity, is sufficient to establish a contributing factor. See R. 7195. That would be inconsistent with both DOE's past application of the temporal proximity inference and the DOE regulations themselves. Here, the terminating official's knowledge was never the issue, but if it were, then an employee would need

entitled to deference from this Court because it is not inconsistent with the language of section 708.29 or otherwise plainly wrong.

SECC argues that the temporal proximity presumption undermines the retaliatory motive concept imbedded in the regulations and undermines the regulatory goal of ensuring the safety of DOE facilities. However, this argument fails sufficiently to appreciate the purpose of the temporal proximity presumption, as well as its widespread use in other statutory and regulatory whistleblower protection schemes. The presumption is used to infer retaliation on the part of the employer. R. 7196. This is consistent with the goal of the regulations, which is to promote the safety of DOE facilities by encouraging and protecting whistleblowers. See 64 Fed. Reg. 12862 (March 15, 1999).

Moreover, the temporal proximity presumption is consistent with both the Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e)(1) ("WPA"), and Department of Labor ("DOL") regulations, 29 C.F.R. § 24.5(b)(3), authorized by the Energy Reorganization Act of 1974, 42 U.S.C. § 585. In the both the WPA statute and the DOL regulations, a temporal proximity presumption is explicitly mentioned as a method by which an employee can satisfy the burden of establishing that a disclosure was a contributing factor in the adverse personnel action. See 5 U.S.C. § 1221(e)(1); 29 C.F.R. § 24.5(b)(3). Although the details of the WPA, the DOL regulations and the DOE whistleblower protection regulations vary, they all share the same goal -- to ensure that employees and government officials are protected against retaliation as a result of "whistleblowing activities." Given the deference this Court must show to an agency's reasonable interpretation of its own regulations, as well as the legitimate justification for a temporal

---

to show both temporal proximity and knowledge to satisfy the regulatory burden.

proximity inference, also reflected in the WPA and in the DOL regulations, DOE's use of the temporal proximity presumption is not inconsistent with the language or purpose of 10 C.F.R. § 708.29.

C. OHA's Findings Are Supported by Substantial Evidence

Finally, SECC raises two challenges to the findings in the OHA decision. SECC argues that the findings (1) that Gossett satisfied her burden of establishing by a preponderance of the evidence that her protected disclosures were a contributing factor to her termination, and (2) that SECC failed to meet its burden to show by clear and convincing evidence that Gossett would have been terminated absent the disclosures should both be overturned as arbitrary and capricious and not supported by substantial evidence.

As stated above, the legal standard for judicial review of an agency action is deferential. A final agency decision will be set aside only if it is arbitrary, capricious or not supported by substantial evidence. 5 U.S.C. § 706. An agency decision is arbitrary and capricious if the agency fails to articulate a rational connection between the facts found and the decision made. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43; Bowman Transp. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974). This Court will not substitute its judgment for that of the agency so long as a rational basis for the decision has been provided. See Sloan v. Dep't of Housing and Urban Dev., 231 F.3d 10, 15 (D.C. Cir. 2000). This standard of review applies to both of the challenged OHA findings.

i. Finding that Gossett Satisfied Contributing Factor Burden

SECC first argues that Gossett failed to meet her burden of showing by a preponderance of the evidence that her disclosures were a contributing factor in her termination. On this issue,

SECC argues that the finding of a pattern of hostility in the IAD was not supported by evidence in the record. However, the OHA decision on this issue rested solely on the close temporal proximity between Gossett's protected disclosures and termination. The finding in the IAD of a pattern of hostility was not relied upon by OHA and hence is not part of this Court's review of the OHA decision regarding whether Gossett satisfied her "contributing factor" burden.

Examining OHA's finding of temporal proximity, it is uncontested that Gossett made two protected disclosures in October and November of 2000. See Resp. DOE's Statement ¶ 3. Furthermore, it is uncontested that Gossett was terminated in January 2001. OHA found that the roughly two month period between Gossett's last disclosure and her termination was sufficiently narrow to permit the application of the temporal proximity presumption. Although a period of years would strain credibility, two months is sufficiently close to permit a rational inference that the disclosures were a contributing factor in the termination. SECC presented no evidence in the record to challenge OHA's finding that two months was sufficiently close in time to support the temporal proximity inference. Therefore, this Court finds that OHA's decision that Gossett met her burden of showing that the protected disclosures were a contributing factor in her termination was not arbitrary or capricious and, moreover, was supported by evidence in the record.

ii. Finding that SECC Failed to Meet Its Burden

SECC's final challenge is that OHA incorrectly found that SECC failed to meet its burden to show by clear and convincing evidence that it would have terminated Gossett even in the absence of her disclosures. Respondents, not surprisingly, dispute this assertion, and argue that OHA's decision is supported by substantial evidence. OHA found that SECC failed to establish that its "three-strike" policy, which required an RCT to be terminated for failing three re-

qualification exams, was in existence at the time of Gossett's termination or was consistently applied. R. 7197-7199.

OHA's decision focused on the following factual determinations: (1) SECC did not have a written policy pertaining to the "three strike" rule; (2) SECC failed to present any direct evidence that RCTs were aware of the existence of the three-strike rule; and (3) SECC had never previously terminated a RCT for failing the re-qualification exam three times. See R. 7197-99. None of these factual determinations made by OHA is really challenged by SECC. See Pet. Response to Resp.'s Statements at 1, 5.

Furthermore, the hearing officer was able to hear the testimony of the SECC officials who testified to the existence of the three-strike policy. The hearing officer made certain credibility assessments with respect to these witnesses and found that their statements reflected inconsistencies as to the application and existence of the three-strike policy. R. 7221-7225. On this basis, the IAD found, and OHA agreed on appeal, that SECC failed to establish that the three-strike policy was in effect at the time of Gossett's termination. As a result, OHA concluded that SECC failed to establish by clear and convincing evidence that it would have terminated Gossett in the absence of her disclosures.

Again, this analysis is governed by the deferential arbitrary and capricious standard, and the question for this Court is whether OHA's decision is rational and supported by substantial evidence. Although it is not certain that the IAD and OHA made the correct judgment on this question, under the guidance set forth through the arbitrary and capricious standard, this Court is not to substitute its own judgment for that of the agency decisionmakers. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. Rather, this Court must assess whether the agency has made a

"rational connection" between the facts and its decision. See Neighborhood TV Co., 742 F.2d at 639. Therefore, applying this deferential standard, there is sufficient evidence in the record to support the decision by OHA. In particular, OHA made several factual findings, cited above, which are uncontested by SECC. The evidence in the record certainly shows a rational connection between OHA's conclusion that SECC did not establish the existence of the three-strike policy at the time of Gossett's termination and the facts highlighted by OHA. Therefore, this Court will not overturn the decision of OHA that SECC failed to meet its burden.

CONCLUSION

For the reasons stated above, this Court finds that OHA's decision that Gossett's termination from SECC was at least in part due to retaliation for her whistleblowing activities was consistent with the APA and its own regulations, and was supported by substantial evidence in the record. The Court will therefore grant respondents' motion for summary judgment and deny petitioner's corresponding motion. A separate order will be issued with this memorandum opinion.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Dated: October 15, 2004

Copies to:

Steven H. Trent
Baker, Donelson, Bearman & Caldwell
207 Mockingbird Lane
Johnson City, TN 37602
(432) 928-0181

James McBride

Baker, Donelson, Bearman & Caldwell
555 11th Street, N.W.
6th Floor
Washington, DC 20004
(202) 508-3400
E-mail: jmcbride@bakerdonelson.com

Anne Marie Stolee
Baker, Donelson, Bearman & Caldwell
555 11th Street, N.W.
6th Floor
Washington, DC 20004
(202) 508-3400

Anita Barondes
Seyfarth Shaw
815 Connecticut Avenue, Northwest
Suite 500
Washington, D.C. 20006-4042
(202) 828-5322
(202) 828-5393 (fax)
E-mail: abarondes@seyfarth.com
Counsel for plaintiff

Peter D. Blumberg
United States Attorneys Office
Judiciary Center Building
555 4th Street, N.W.
10th Floor
Washington, DC 20530
(202) 514-7157
(202) 514-8780 (fax)
E-mail: peter.blumberg@usdoj.gov

Counsel for defendants U.S. Dep't of Energy and Spencer Abraham

Vincent J. Colatriano
Cooper & Kirk, PLLC
1500 K Street, N.W.
Suite 200
Washington, DC 20005
(202) 220-9600
(202) 220-9601 (fax)
E-mail: vcolatriano@cooperkirk.com

Counsel for defendant Susan Rice Gossett

Case No. LWA-0001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Ronald Sorri

Date of Filing: June 9, 1993

Case Number: LWA-0001

This Decision involves a whistleblower complaint filed by Ronald Sorri (Sorri) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. Sorri charged that reprisals were taken against him after he raised safety concerns with Sandia National Laboratories, DOE, and Congressman Leon Panetta. The alleged reprisals included removing him from his job as a maintenance technician in Sandia's Microelectronics Development Laboratory; giving him lowered performance ratings; reassigning him to a job as a technical writer; and finally, firing him. DOE's Office of Contractor Employee Protection (OCEP) investigated the complaint and found that the first three actions were reprisals for Sorri's disclosure of safety concerns. However, OCEP concluded that Sorri's termination did not constitute a reprisal. Neither Sandia, nor Sorri's employer, L&M Technologies, Inc., a Sandia subcontractor, requested a hearing to challenge OCEP's findings. Sorri requested a hearing before the Office of Hearings and Appeals (OHA) under ' 708.9(a), maintaining that his termination was also a reprisal for his safety disclosures. The hearing in this case was held on October 26 and 27, 1993, in Albuquerque, New Mexico.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE Contractor Employee Protection Program became effective on April 2, 1992. 57 Fed. Reg. 7533 (March 3, 1992). Its purpose is to encourage contractor employees at DOE's government-owned, contractor-operated (GOCO) facilities to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers. 10 C.F.R. Part 708.

Before Part 708 was promulgated in 1992, contractor employee protection at DOE's GOCO facilities was governed by DOE Order 5483.1A ("Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities"). However, no formal procedures existed under Order 5483.1A. The new regulations were adopted to improve the process of resolving complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary or her designee.

B. Facts

The following summary (and the chronology in the Appendix to this Decision) is based primarily on the investigation conducted by OCEP. Except as specifically noted below, the facts in this case are uncontroverted. From March 1990 until March 1992, Sorri was employed as a Senior Maintenance Technician by L&M Technologies (L&M), a subcontractor to Sandia National Laboratories (Sandia). Sorri

was assigned to Sandia's Microelectronics Development Laboratory (MDL), which was engaged in the production of semiconductors. His job was to maintain the ion implanters, which are machines used in the manufacture of semiconductors. Sorri's tenure at the MDL was unremarkable until he raised a number of safety concerns to L&M and Sandia management officials.

In August 1990, Sorri verbally raised concerns to his MDL operational supervisor, Mike Nicholas, about the possible release of lethal gases that could result from overpressurized gas cylinders positioned inside the Varian 300 XP ion implanter. Sorri was uncomfortable with the gas cylinder pressures being too high, in excess of 400 pounds per square inch (psi). The gas in the cylinders was under a pressure of 800 psi. Nicholas told Sorri that industry allows for pressures over 400 psi, but agreed that after the gas in the cylinders was depleted, they would be replaced with cylinders specifically set at 400 psi. In mid-December 1990, Sorri wrote a memorandum to Nicholas in which he further detailed his concerns about the pressures in the gas cylinders. After a meeting between Sorri and several management officials representing both L&M and Sandia, an agreement was reached that new 400 psi cylinders would be ordered to replace the old cylinders.

On January 3, 1991, Sorri filed a safety complaint with the Sandia Safety Office after being told by the MDL purchasing office that the 400 psi cylinders had not yet been ordered. As a result, a meeting was held on January 18, 1991 with Sorri, Nicholas, and his L&M administrative supervisor, John Doyle, to discuss the safety concerns and to formulate a plan to resolve them. Subsequently, there were a number of meetings attended by Sorri and various L&M and Sandia management officials, including Doug Weaver, the Sandia MDL Facility Manager, Ron Jones, Sandia MDL Division Supervisor, and Fil Martinez, L&M Contract Manager, to discuss Sorri's concerns. The outcome of these meetings was an agreement that Sorri's concerns about cylinder pressure would be remedied by ordering new 400 psi cylinders to replace the old ones. On January 25, 1991, a meeting was called at Sorri's request, in which he raised fears that reprisals would be taken against him for raising safety concerns.

In February 1991, Sorri was directed to vent some gas cylinders in order to reduce the cylinder pressures. He believed that using this procedure to vent arsine gas, a toxic substance, was dangerous and that this action was contrary to the plan to resolve his safety concerns previously agreed upon during the January 1991 meetings. Therefore, on February 14, 1991, Sorri filed a formal safety complaint with the DOE. According to the uncontested findings of the OCEP investigation, L&M and Sandia immediately took several reprisals against Sorri.

The first of these reprisals occurred on February 15, 1991. After L&M and Sandia management officials learned that Sorri had filed the safety complaint, he was told to remove personal items from his desk, his employee badge was taken from him, and then he was physically escorted out of the MDL. Sorri was placed in the L&M headquarters office building, where he was directed to write up his safety concerns about the ion implant area in more detail and submit them to Fil Martinez on February 25, 1991. Sorri was later placed on administrative leave with pay for approximately five weeks and was told to stay off the L&M and Sandia premises.

The second reprisal, according to OCEP's investigation, occurred in March 1991, when Sorri was informed that he would be reassigned to work for Bill Lucy, Sandia Safety Supervisor, as a safety technician at the MDL. Sorri complained that he had no training as a safety technician and that this reassignment was a reprisal for his disclosure of safety problems. Within a few days, his old job title was restored, but he was assigned full time to writing maintenance procedures for the ion implanters. Sorri was a technician who worked with his hands, not a technical writer, and this job was difficult for him. During the next several months while Sorri had this new assignment, Nicholas and Jones complained that Sorri made errors and took too long to write the maintenance procedures.

The third reprisal found to exist by OCEP occurred when Sorri received a lowered performance evaluation for the period ending July 1, 1991. Sorri's rating was lower than his previous rating, and it was also lower than the average performance rating of other L&M employees for that period. As a result of this lower

rating, Sorri received a salary enhancement lower than the amount which he would have received had he been given a rating at a level consistent with his previous performance evaluations.

In September 1991, Harry Weaver replaced Doug Weaver (no relation) as the Sandia MDL Facility Manager. According to Harry Weaver, the primary mission of the MDL was supposed to change from production of semiconductors to research and development. He claimed that as a result of the change in focus, the MDL needed employees with a wider range of experience so that they would have more flexibility to handle different task assignments.

In January 1992, Sandia sent L&M a Request for Quotation (RFQ) for a modification to L&M's contract with Sandia. According to its terms, the RFQ made one principal change: it reduced the number of "tasking areas," i.e. job descriptions, from approximately 100 that were very specific to three that were very general. In February 1992, L&M informed its MDL employees that it had received this RFQ and requested that they submit resumes based on their current jobs for transmittal to Sandia. At the time, Sorri believed the resumes were going to be used to group technicians into the three new tasking areas. No one at L&M was told that the resumes would be used to determine who would retain their jobs at the MDL, and who would be laid off.

Whether Sorri's termination was the final act of reprisal against him is the main issue addressed in the hearing and this Decision. The facts surrounding the termination are not in dispute. Sandia evaluated the resumes submitted by the L&M employees in response to the RFQ. Harry Weaver developed the criteria which were used to score the resumes while Jones did the actual resume scoring. Out of 100 possible points in Weaver's rating scheme, the "cross training" element was the most heavily weighted, at 30 percent of the total. Weaver claims that the emphasis was placed on cross training because employees with more diverse skills were needed for the changeover from a production-oriented MDL to one which was more oriented towards research and development. Sorri received 28 points out of 100, the lowest score of all L&M employees in his tasking area, scoring zero points in the critical cross training element. After the ratings had been completed, Weaver decided that the minimum acceptable score for Sorri's task group would be 40 points. Employees who had scores below 40 were either to be fired, or conditionally retained and given additional training. Sorri was not conditionally retained or offered additional training. On March 2, 1992, Weaver wrote a memo to his superior, Paul Peercy, which stated (in an attachment) that Sorri was to be terminated. Sandia informed L&M that it had no position in the MDL for Sorri, and on March 13, 1992, Sorri was fired by L&M president Antonio Montoya.

Sorri wrote letters expressing his concerns about the reprisals taken against him to Congressman Leon Panetta on two occasions, in March and November 1991. On December 3, 1991, Sorri also made a written safety complaint to Sandia about the mid-current ion implanter. In January 1992, Sorri's November 1991 letter to Panetta was forwarded by Bruce Twining, Manager of DOE's Albuquerque Field Office, to Sandia president Al Narath, who was asked to comment on Sorri's allegations. On February 12, 1992, before the L&M resumes had even been submitted, and more than two weeks before Weaver notified his superior that Sorri would not be retained, Narath wrote to Twining that Sorri would not be returned to his job in ion implant because the MDL's "new operation mode does not call for maintenance to support production." Narath denied that Sorri had been the victim of reprisals.

C. Procedural History of the Case

On July 23, 1992, Sorri filed a complaint with the DOE Albuquerque Field Office under Part 708. After an unsuccessful attempt to reach an informal resolution, Sorri's complaint was forwarded on September 29, 1992 to OCEP to institute a formal investigation. OCEP conducted an on-site investigation of Sorri's allegations of reprisal and issued a Report of Investigation and a Proposed Disposition on April 30, 1993. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that Sorri had made protected disclosures and that removal of Sorri from his job as an ion implant maintenance technician in the MDL, his reassignment to the job of writing maintenance procedures, and his downgraded performance evaluations, were all reprisals for his protected disclosures. However, the

Proposed Disposition also concluded that Sorri's termination had not been a reprisal, but was justified by the change in mission at the MDL from production to research and development. OCEP proposed that Sorri be awarded $639.20 for salary enhancements lost as a result of his downgraded performance evaluation, plus attorney's fees.

On May 14, 1993, Sorri submitted his request for a hearing pursuant to ' 708.9 to OCEP. On June 9, 1993, OCEP transmitted that request, together with the complaint file, to the OHA. The OHA Director appointed a Hearing Officer, who promptly, on June 16, 1993, established a prehearing briefing schedule under ' 708.9(b).

On August 11, 1993, Sandia filed a Motion to Dismiss the proceeding. Sandia asserted that the requirement in ' 708.6(d) that a complaint be filed within 60 days after an alleged reprisal occurred, or within 60 days after the complainant "knew or reasonably should have known" of it, is jurisdictional in nature. According to Sandia, DOE may not accept any whistleblower complaint where that time limit is exceeded. Sandia stated that even if the 60 days were counted from the effective date of Part 708 on April 2, 1992, Sorri's complaint, filed on July 23, 1992, was still untimely. L&M filed a similar Motion to Dismiss on August 17, 1993.

On August 20, 1993, the Motions to Dismiss were denied. See Sandia National Laboratories, 23 DOE & 82,502 (1993) (Sandia). The Hearing Officer concluded that the acceptance of Sorri's complaint was a reasonable exercise of discretionary authority under Part 708 by the OCEP Director. Citing the preamble to Part 708, the decision found that there was no evidence that the policy considerations underlying the 60-day time limit had been contravened by the acceptance of Sorri's complaint. The decision also noted that neither Sandia nor L&M had even suggested that it had been prejudiced by the brief delay between Sorri's termination and the filing of his complaint under Part 708. Id. *

On September 24 and 27, 1993, two Motions for Discovery were filed by Sorri and L&M, respectively. I found that both discovery requests were reasonable and granted the Motions in a decision issued on October 15, 1993. In addition to ruling on the discovery requests, the decision established procedures for the submission of exhibits before the hearing, and set the order of witnesses. Ronald A. Sorri; L&M Technologies, Inc., 23 DOE & 84,002 (1993).

As a practical matter, a hearing before OHA under Part 708 is equivalent to an appeal from the conclusions reached by OCEP in the Report of Investigation and Proposed Disposition. This Decision addresses the two issues covered at the hearing: (1) whether Sorri's termination was a retaliatory action which would not have occurred absent his disclosure of safety concerns; and (2) the amount of attorney's fees Sorri is entitled to recover in connection with processing his complaint. By not requesting a hearing themselves, Sandia and L&M have waived their rights to challenge any other findings in the Proposed Disposition.

The Part 708 regulations do not specify what is to be included in the record for purposes of a DOE contractor employee whistleblower protection proceeding. To resolve this ambiguity, I defined the "record" in this proceeding to include OCEP's complaint file, all papers filed by the parties with the OHA, all interlocutory decisions and orders and letter rulings issued by the OHA on procedural matters, the transcript of hearing testimony, and any exhibits submitted by the parties at the hearing. Transcript of October 26-27, 1993 Hearing (hereinafter cited as "Tr."), Vol. I at 6.

II. Analysis

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under ' 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. ' 708.9(d). The parties in this case have stipulated to the fact that there were disclosures by Sorri protected

under ' 708.5. See Tr., Vol. I at 20, 21. Thus, in order to meet his burden, Sorri must prove by a preponderance of the evidence, i.e. that it is more probable than not, that his protected activity was a "contributing factor" in his termination. See McCormick on Evidence ' 339 at 439 (4th ed. 1992) ("The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof . . . that the existence of the contested fact is more probable than its nonexistence.").

Although this is the first case to come before an OHA Hearing Officer under Part 708, similar standards of proof have been applied by the federal courts and administrative agencies to whistleblower complaints filed under ' 210 of the Energy Reorganization Act of 1974 and the Whistleblower Protection Act of 1989. For example, in Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993), a DEA employee's complaints of mismanagement prompted an investigation, and the agency decided on the basis of the investigation that the complainant should be reassigned to another city. In that case, the court found direct evidence that the whistleblower's complaint had been a contributing factor to his reassignment. Id.

In most cases, however, it is impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Thus, the complainant must meet his burden of proof through circumstantial evidence. A protected disclosure has been found to be a "contributing factor" in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." McDaid v. Dep't of Hous. and Urban Dev., 90 FMSR & 5551 (1990) (McDaid). See Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989).

In its post-hearing brief, Sandia argues that Sorri must prove that there was a "causal connection" between his protected activity and his termination, and that "it would be entirely illogical to presume that the disconnected events [in this case] rise to the level of causative nexus." Post-Hearing Brief of Sandia at 5, 7. As authority for its position, Sandia relies on McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991), a retaliatory discharge case decided under Title VII of the Civil Rights Act of 1964. However, the "contributing factor" standard which governs the complainant's burden in this whistleblower case under Part 708 is different from the burden of proof imposed on the plaintiff in McNairn and the other Title VII cases cited by Sandia.

Congress made the meaning of this standard clear when it adopted the "contributing factor" test in the 1989 Whistleblower Protection Act (WPA). Prior to the enactment of the WPA, the courts had interpreted federal whistleblower law "as requiring the whistleblower to carry a considerable burden of proof in order to establish his case. The whistleblower was required to establish, inter alia, that the disclosure constituted a 'significant' or 'motivating' factor in the agency's decision to take the personnel action." Marano, at 1140 (footnote omitted). One of the purposes of the WPA was to reduce this "excessively heavy burden imposed on the employee" and thus make it "easier for an individual . . . to prove that a whistleblower reprisal has taken place." 135 Cong. Rec S2780, S2784 (daily ed. Mar. 16, 1989) (statement of Sen. Levin). In explaining the "contributing factor" standard, the House and Senate floor managers of the legislation stated:

One of the many possible ways to show that the whistleblowing was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.

135 Cong. Rec. H749 (daily ed. Mar. 21, 1989). After the enactment of the WPA, this same standard was adopted by Congress in 1992 when it amended the whistleblower provisions in ' 210 of the Energy Reorganization Act in the Energy Policy Act of 1992, Pub. L. No. 102-486, Title XXIX, ' 2902, 106 Stat. 3123-24 (1992). The DOE adopted the same standard when it issued the Part 708 regulations. See 57 Fed. Reg. 7533 at 7538 (March 3, 1992) (Preamble to Part 708).

I therefore reject Sandia's argument that a more stringent burden of proof be required of complainants

under Part 708 than that which DOE clearly intended by adopting the "contributing factor" standard. Next, I consider whether Sorri has met his burden of proving by a preponderance of the evidence that his protected conduct was a contributing factor in the decision by Sandia and L&M to terminate his employment.

During the period August 1990 through December 1991, Sorri made a number of disclosures which are protected under ' 708.5. In August 1990, Sorri verbally raised safety concerns to his MDL operations supervisor, Mike Nicholas, and again made those concerns known in a memorandum to Nicholas in December 1990. On January 3 and December 3, 1991, Sorri filed safety complaints with Sandia, and on February 14, 1991, Sorri filed a formal safety complaint with the DOE. Finally, Sorri wrote letters disclosing his concerns to Congressman Leon Panetta in March and November 1991.

Neither Sandia nor L&M disputes that it had actual knowledge of Sorri's disclosures prior to his termination. Sorri's initial disclosures prompted several meetings in December 1990 and January 1991 attended by the supervisors and managers of both contractors (John Doyle and Fil Martinez of L&M; Doug Weaver, Dale Blankenship, Ron Jones, and Bill Lucy of Sandia). See Report of Investigation at 6. The record also shows that Sandia and L&M took the first of several reprisals immediately after Sorri's February 14, 1991 complaint to the DOE. See Proposed Disposition at 6. In addition, Sorri's November 26, 1991 letter to Congressman Panetta prompted a response from the president of Sandia, and Sorri's December 3, 1991 health and safety complaint was filed directly with Sandia. See Hearing Exhibit (Ex.) 106; Tr., Vol. II at 91. L&M's evaluation of Sorri's performance for the last six months of 1991, which was given on March 27, 1992, states that Sorri was pursuing "trivial issues to the highest levels of Sandia management," and confirms L&M's awareness of Sorri's continuing complaints. See Hearing Ex.104.

The record indicates that the decision had been reached to terminate Sorri by March 2, 1992, when Harry Weaver wrote a memo advising his superior at Sandia, Paul Peercy, of this fact. See Hearing Exs. 106, 123, 137. This was less than three months after Sorri filed his December 3, 1991 safety complaint with Sandia, and little more than a month after the president of Sandia learned of Sorri's November 26, 1991 letter to Congressman Panetta. See Hearing Ex. 106. This short time period between Sorri's latest disclosures and his termination leads us to conclude that the disclosures were a contributing factor in Sorri's termination. This conclusion is further supported by the fact that the termination was only the last in a series of adverse actions taken against Sorri, each of which followed closely on the heels of Sorri's disclosures of safety problems. The present record easily satisfies the complainant's burden under Part 708 of proving by a preponderance of the evidence that his protected conduct was a contributing factor in his termination. As noted in McDaid, supra, at 1023, the Merit System Protection Board (MSPB) reviewed the legislative history of the 1989 Whistleblower Protection Act, and held that this requirement is satisfied by circumstantial evidence showing that there was a protected disclosure followed by an adverse personnel action which occurred reasonably close in time. Id., quoting S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988). For the reasons explained below, I find that the record is sufficient to shift the burden under ' 708.9(d) to Sandia and L&M to prove by clear and convincing evidence that they would have taken the same action absent Sorri's protected disclosures.

It is unquestioned that Sandia was aware of Sorri's disclosures and that its managers participated in the reprisals that were taken against Sorri after his safety complaints to DOE and Congressman Panetta. Sandia supervisory employees participated in the decisions to remove Sorri from the MDL one day after his complaint to DOE, and to reassign him to the job of writing maintenance specifications for the ion implanters. These same Sandia personnel also furnished information used by L&M's MDL contract manager Fil Martinez to prepare Sorri's performance evaluations. Thereafter, Harry Weaver and Ron Jones of Sandia were the principal actors in the resume rating process and the decision to terminate Sorri from the MDL without offering an opportunity for conditional retention and cross training. Finally, Sandia president Narath's February 12, 1992 letter to Bruce Twining of DOE's Albuquerque Office strongly suggests that the prime contractor had decided to get rid of Sorri well before the resume rating process was even carried out. For a whistleblower case where circumstantial evidence is normally expected, the Narath letter (Hearing Ex.106) is a virtual "smoking gun," because it supports Sorri's claim that the resume rating

process was a sham. For these reasons, I conclude that the complainant has met his burden of showing by a preponderance of the evidence that his protected conduct was a contributing factor in Sandia's decision to terminate him.

L&M maintains that it should have been dismissed from the case without being required to submit any exculpatory evidence under ' 708.9(d) because Sandia alone was responsible for Sorri's termination. Tr., Vol. II at 6, 7. I disagree. Despite L&M's limited discretion under its contract with Sandia, L&M retained administrative supervision over Sorri, and L&M principals Montoya and Jim Martinez exercised that authority when they made the ultimate decision to fire him. Tr., Vol. I at 104. Moreover, Sorri's termination was not an isolated event, but merely the end of a chain of reprisals in which Sandia's and L&M's actions were inextricably intertwined. From the time of Sorri's initial disclosures, L&M management willingly participated in decisions which were part of this pattern of reprisal, including the removal of Sorri from the MDL one day after he filed a safety complaint with DOE, and his later reassignment as a technical writer responsible for drafting maintenance procedures for the ion implanters. See Report of Investigation at 7-8. In addition, L&M Contract Manager Fil Martinez was responsible for Sorri's July 1, 1991 performance evaluation, which OCEP found was lowered as "a result of his whistleblowing activities," as well as his final March 27, 1992 evaluation, which was even lower than the previous one. See Report of Investigation at 11; Hearing Ex. 104. I therefore find that the complainant has met his burden of showing by a preponderance of the evidence that his protected disclosures were a contributing factor in L&M's decision to fire him. I turn now to a consideration of whether the contractors have met their respective burdens of proof under Part 708.

C. The Contractors' Burden

Part 708 provides that, once the complainant has met his burden of proof under ' 708.9(d), "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure...." 10 C.F.R. ' 708.9(d). The standard of proof by "clear and convincing evidence" is more stringent than the "preponderance of the evidence" standard applied to complainants under Part 708, but not as high as the "beyond a reasonable doubt" standard used in criminal cases. See McCormick on Evidence, ' 340 at 442. It has been described as that evidence sufficient to persuade a trier of fact that the truth of a contested fact is "highly probable." Id. For the reasons set forth below, I have concluded that neither contractor has met this burden.

Before he filed his safety complaints with Sandia and DOE, Sorri was a highly rated employee who received an above average performance evaluation for the period ending July 1, 1990. According to this evaluation, Sorri had "no problems" in the area of "Judgement and Stability," and in the category of "Cooperation," Sorri was characterized as "very good, no problem, gets along well, a team player." In "Versatility," Sorri was rated as "very experienced on job, goes beyond job description." Sorri received ratings of 4.5 out of 5 points in each of these categories. One year later--after his disclosures--Sorri's average score in these three areas had plummeted to 2.5 out of 5, with supervisor's comments such as "ability to function in a team environment need to be improved," "has resisted efforts to be utilized outside of implant," and "sound judgement, tact lacking." OCEP Complaint File, Book I, Item 11.

Sandia's defense rests on the assertion that Sorri was terminated because the mission of the MDL shifted from production to research and development, and his skills were not suited to the new environment. According to Sandia, the shift in mission was reflected in the January 12, 1992 RFQ, and the implementation of the new job descriptions proposed in the RFQ resulted in Sorri's dismissal. The OCEP investigation accepted Sandia's justification for firing Sorri, without probing any further. However, the testimony and demeanor of the witnesses at the hearing and the additional documentary evidence added to the record since the OCEP investigation has undercut Sandia's position. The present record leads to the inescapable conclusion that the contractors have failed to show by clear and convincing evidence that Sorri would have been fired if he were not a whistleblower.

A cloud of suspicion hangs over the entire process that was used to justify Sorri's termination. First, there

is no mention in the January 1992 RFQ of a change in mission at the MDL, or any statement in the RFQ that it was issued to implement this change. Tr., Vol II at 48. Sandia submitted no evidence at all about the actual impact in the workplace of the purported change in mission. By contrast, Sorri testified that the ion implanters in the MDL would still need intensive maintenance regardless of whether they were used in a normal production cycle. Tr., Vol II at 83-4. Second, while the RFQ proposed to reduce the number of job descriptions at the MDL, there is no indication in the document that this was to result in the termination of any employees. Harry Weaver, who played a major role in the process, testified that "[t]he idea was not to layoff people, okay, the idea was to change the way we did business. . . . I certainly had no instructions from anybody at Sandia that I had to change the number of people or who was working out there." Tr., Vol. I at 222. Weaver did not recall when it was decided that the resumes submitted in response to the RFQ would be used as the basis for layoff decisions. Id. at 195. He testified that when the RFQ was issued, he had envisioned a resume evaluation process, but not as part of a layoff plan. Id. at 187. Fil Martinez, the L&M contract manager, submitted the resumes with the understanding that they would be used "for reevaluation of everyone's position," but Martinez had "no knowledge whatsoever" that the resumes would be used in layoff decisions. Tr., Vol. I at 116.

The use of resumes as the basis for conducting a layoff was an unusual practice in the business community, and without precedent in the experience of the Sandia officials involved. Organizational development consultant Kelli Livermore, the expert witness called by the complainant, testified about standard practices in the personnel management field for structuring layoffs. Tr., Vol. I, at 58-72. She stated that she had never in her experience seen resumes used as the sole basis for making layoff determinations. Id. at 60. While both Sandia and L&M raised objections to the qualifications of this witness, the testimony of Sandia employees only confirmed her opinion. Harry Weaver stated that in his 15 years as a Sandia manager he had never before used resumes as the basis for layoffs. Tr., Vol. I at 208. Both Weaver and Ron Jones stated in their testimony that there were written Sandia Laboratories management guidelines which prescribed standard procedures for layoffs, but admitted that these guidelines were never consulted in conducting the layoff that resulted in Sorri's termination. Tr., Vol. I at 174 (Jones) and 210 (Weaver).

The evidence also shows that the process used by Sandia was unfair, and not designed to "build out" subjective factors. Tr., Vol. I at 62-3. First, the employees were given no notice that the resumes would be used to determine who would be retained and who would be fired. Tr., Vol. II at 88. Nor were they ever given copies of the Weaver rating sheet described below. This deprived them of any meaningful opportunity to tailor their resumes to the situation. Second, the resumes submitted were not in any standard format and, according to Ron Jones, they varied in length and style. Tr., Vol I. at 153. Jones was given a rating sheet by Harry Weaver to score the resumes in nine categories, with a maximum point value that varied depending on the category. However, Jones was given no oral instructions or written criteria by Weaver for determining how the contents of the resumes were to be translated into point values. Thus, Jones depended on his "feel for what I considered to be the maximum capability within an area or experience level within that area," though he admitted that this method was subjective and "somewhat arbitrary." Id. at 154. Finally, Harry Weaver admitted that Sorri's status as a whistleblower "had to be a subconscious factor" in the rating process. Id. at 221.

The scores that came out of this process were then used in an arbitrary fashion to determine who would be laid off and who would be retained. Since Sandia was not required to eliminate any jobs, it is conceivable that all of the MDL employees could have been found qualified to continue their employment if their scores met some independent standard of minimum qualification. We find it significant that the cutoff score of 40 out of a possible 100 points was not determined beforehand as representative of a minimum skill level needed by workers in the MDL. According to Harry Weaver, the cutoff point was selected "after the fact" by looking at how the employees scored in the ratings and finding a "natural break[ ]" in the scores. Tr., Vol I at 211. Yet, any natural break in the scores would not show how the employees rated in relation to a predefined minimum standard. If, for example, the entire group of employees was so outstanding that each employee scored exactly twice as high in the ratings, there would have been a natural break in the scores around 80. This obviously would not support a conclusion that those scoring

below 80 would not be qualified enough to keep their jobs. Thus, even if the rating process that Jones used to arrive at the individual scores had been objective, there is no rational basis in the record for Sandia's determination that those employees who scored below a "natural break" had to be terminated. That determination was an arbitrary one. As Harry Weaver admitted, the process provided "an opportunity" to eliminate Sorri. Tr., Vol. I at 211.

Harry Weaver testified that Sorri, despite a score of 28, could have been retained by Sandia and cross-trained to work in other areas of the MDL. Tr., Vol. II at 65. Weaver tried to justify his decision not to cross-train Sorri on the grounds that "there has to be some motivation" on the part of an employee for the training to be successful, and that Sorri had "given no evidence in his resume, in his dealings with people, not just management people, but with employees at Sandia, that he would be . . . willing to work in areas other than ion implantation." Tr., Vol. II at 66. This stated reason does not form a proper basis for terminating Sorri.

Under the circumstances of this case, I find it perfectly understandable that Sorri expressed a strong desire to return to work in ion implant and a reluctance to accept a change when it was forced upon him. He had been summarily "run out of the building" on February 15, 1991, one day after he filed a safety complaint with the DOE, and never allowed to return to his job. Tr., Vol II at 96. Neither contractor has contested OCEP's finding that this constituted a reprisal for Sorri's safety complaint to DOE. After that experience, Sorri testified, "all I wanted to do was to have my . . . regular assignment back in ion implant." Id. Instead, Sorri was reassigned to the job of writing maintenance procedures for the ion implanters, a task which he found difficult since he was not qualified to do it. As the Report of Investigation and Proposed Disposition concluded, reassignment to this job was clearly a reprisal against Sorri, who by his own admission "was not a technical writer," but someone who worked with his hands. Tr., Vol. II at 82, 100. Offering Sorri a choice between being cross-trained and losing his job certainly would have provided the motivation necessary to successfully cross-train him, but Harry Weaver and the contractors never gave Sorri this opportunity.

L&M maintains that Sandia alone was responsible for Sorri's termination. The firm claims that as a second-tier subcontractor, it had "no rational alternative but to terminate [Sorri]" once Sandia determined he would not retained at the MDL. Tr., Vol. II at 6-7. Simply by showing that it was unable to offer Sorri other employment after he was rejected by Sandia, L&M asserts that it has met its burden of showing by clear and convincing evidence that it would have fired Sorri in the absence of his protected conduct. This limited view of liability under Part 708 runs contrary to the whistleblower protection policy underlying the program and cannot be endorsed here. The legislative history of Part 708 makes it clear why DOE decided to extend the protection of the regulations to employees of all subcontractors:

The DOE believes that the health and safety of all contractor employees is of utmost importance and overrides enforcement and administrative difficulties that could be incurred in extending the rule to second- and lower-tier subcontractors.

57 Fed. Reg. 7533 at 7535. L&M's conduct was inextricably intertwined with that of Sandia throughout the events chronicled in this record. L&M actively participated in the pattern of reprisal against Sorri for his whistleblowing activities. Even though there is no direct evidence in the present record linking L&M to Sandia's decision not to retain him in the MDL, L&M was solely responsible for Sorri's administrative supervision and its president made the ultimate decision to fire him. Thus, there is enough evidence in the present record to warrant rejection of L&M's argument that it was not "responsible" for Sorri's termination. Moroever, even if L&M were not involved at all in rating or supervising Sorri, but only in formally terminating him, it still could conceivably be liable under Part 6708 for a reprisal. The protections afforded whistleblowers under Part 708 would be eviscerated if subcontractors could escape liability for actions adverse to whistleblowers simply because they merely "carried out" a reprisal contrived by someone else.

In light of the foregoing analysis, I have concluded that there is not even a preponderance of evidence, and certainly not clear and convincing evidence, that Sandia and L&M would have terminated Sorri if he had

not engaged in protected activities.

This conclusion is consistent with the findings of the federal courts under similar circumstances in other whistleblower cases. For example, in DeFord v. Sec'y of Labor, 700 F.2d 281 (6th Cir. 1983), a case decided under ' 210 of the Energy Reorganization Act, a Tennessee Valley Authority (TVA) employee was transferred from his position and demoted shortly after participating in a Nuclear Regulatory Commission (NRC) investigation. The United States Court of Appeals for the Sixth Circuit explained its basis for upholding the determination of the Secretary of Labor:

The Secretary found "that DeFord's transfer was a deliberate retaliation for his cooperation with NRC and his attempts to get his Quality Assurance Engineering section recognized by management." There was evidence that TVA did not follow its normal procedure in transferring DeFord, but rather unceremoniously dumped him from the quality assurance section shortly after the NRC investigation. There was evidence that DeFord had received superior performance ratings prior to the NRC investigation, although TVA claimed in defense of the transfer that he had performed badly in his job. There was evidence that DeFord worked well with his immediate supervisors and had not developed personality conflicts that would interfere with effective performance of his job. There was evidence that DeFord was singled out, in what was admittedly intended to be a negative remark, as a "very strong individual . . . who is instrumental in influencing the opinion and operation of the staff and input to management" and that such criticism of DeFord as a "strong individual" did not arise until TVA conducted its internal audit of the NRC's findings. Quite simply, there was substantial evidence to support the Secretary's conclusion that DeFord was demoted solely because he participated in an NRC proceeding.

Id. at 287 [emphasis in original]. The facts in the present case are strikingly similar, and the burden of proof for a whistleblower under Part 708 is less stringent than it was under the earlier version of ' 210 that the Sixth Circuit applied in DeFord. Sorri received above average performance ratings prior to his disclosures, including high marks in judgement and stability, cooperation, and versatility. Sorri was seen by his supervisors as "a team player" who "gets along well." Only after filing safety complaints did Sorri's rating for judgement and stability drop to 2 out of 5 (from a high of 4.5) because he pursued "trivial issues to the highest levels of Sandia management . . . ." Hearing Ex. 104. It was not until after Sorri's complaints and a series of reprisals that he was singled out for criticism by Ron Jones for "causing problems within the contract force, with negative statements during meetings and while talking to peers." Finally, like TVA in the DeFord case, Sandia did not follow normal business practices or its internal procedural guidelines in laying off Sorri.

In other cases where an employee's protected conduct is followed by the type of adverse actions taken against Sorri, and the employer cannot provide a reasonable alternative basis for its actions, the federal courts have readily concluded that the actions were taken in retaliation for the protected conduct. See Hathaway v. Merit Sys. Protection Bd., 981 F.2d 1237, 1243-44 (Fed. Cir. 1992); Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980). The courts have found even ostensibly legitimate bases for adverse personnel actions to be pretexts for punishing or getting rid of a whistleblower, based on the circumstances surrounding the action. See, e.g., Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505 (10th Cir. 1985) (requiring whistleblower to document his educational credentials while not applying similar requirement to other employees). As analyzed above, Sandia's attempt to justify its decision to fire Sorri on the basis of a purported change in mission at the MDL was not supported by the evidence in the record. Sandia failed to dispel the concrete impression that the resume process was seized upon as a pretext for getting rid of Sorri. Moreover, an employee cannot be terminated for reasons which are rooted in the employee's experience as a whistleblower, like Sorri's understandable desire to return to work in the ion implant area after he was improperly removed from his regular job there. See Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1163 (9th Cir. 1984) (discussing the need to differentiate between protected and unprotected manifestations of "bad attitude").

As in DeFord, the evidence in this case as set forth above amply supports the conclusion that Sorri's disclosures to Sandia, the DOE, and the Congress, protected under Part 708, were a contributing factor in

Sandia and L&M's termination of Sorri, and that neither Sandia nor L&M have proven by clear and convincing evidence that his termination would have taken place absent these disclosures. Accordingly, I find that Sorri's termination violated ' 708.5.

III. Remedy

Having concluded that Sandia and L&M failed to meet their burden of showing by clear and convincing evidence that they would have taken the same personnel action against Sorri absent his disclosure of safety problems, and that a violation of the prohibitions set forth in Part 708 has occurred, I now turn to the remedy.

For those cases in which discrimination against an employee in reprisal for a protected disclosure is found to have occurred, the goal of the DOE regulations is to restore the employee to the position in which he or she would otherwise have been, absent the act(s) of reprisal, in a manner similar to other whistleblower protection schemes. See, e.g., Energy Reorganization Act of 1974, 42 U.S.C. ' 5851; Whistleblower Protection Act of 1989, 5 U.S.C. ' 1214(b)(4)(B). The initial agency decision may include an award of reinstatement, transfer preference, back pay, and all reasonable costs and expenses (including attorney and expert witness fees) "reasonably incurred" by the complainant in bringing the complaint. 10 C.F.R. ' 708.10(c). Sorri does not seek reinstatement.

An award of back pay is clearly appropriate in this case. Back pay is intended to restore the complainant to his proper position by providing compensation for the tangible economic loss suffered and by acting as a deterrent to employers. See United States v. N.L. Indus, Inc., 479 F.2d 354, 379 (8th Cir. 1973). It is evident that Sorri has suffered an economic loss from his termination on March 13, 1992. After he was fired by L&M, it took Sorri seven weeks to find a new job. He states that he lost gross income totalling $3,812, an amount which does not include approximately $1,000 in unemployment compensation benefits that he received. Tr., Vol I at 228. Sandia and L&M concede in their respective post-hearing briefs that the amount of unemployment compensation received should not be subtracted from the amount of back pay awarded to Sorri if a violation of ' 708.5 is found to exist. This result is consistent with the generally accepted "collateral source rule," which holds that unemployment compensation benefits should not be deducted from back pay awards. See, e.g., NLRB v. Gullett Gin Co., 340 U.S. 361 (1951).

In addition, the OCEP Report of Investigation found that as a result of his downgraded performance evaluation, Sorri lost $639.20 in salary enhancements he should have received. Sorri testified that he also lost $128.22 which would have been the approximate value of L&M's company contribution to a 401(k) program. Tr., Vol. I at 227. The amount of the lost 401(k) contribution is uncontested, but L&M claims that the Report of Investigation erred in the calculation of Sorri's lost salary enhancement. Tr., Vol II at 139. According to L&M, Sorri's overall performance rating for the period ending December 31, 1990 was 4.33 and not 4.375 as stated on page 11 of the Report. In the hearing, L&M's counsel also claimed that since the firm generally lowered the ratings for all employees by an average of .54 points, it is reasonable to assume that Sorri's rating would have dropped by that amount. Therefore, L&M maintains that if Sorri's rating had otherwise remained constant for the period ending July 1, 1991, .54 points should be deducted from 4.33 which would result in an adjusted rating of 3.79. As a result, L&M contends that the $639.20 salary enhancement calculated by OCEP was incorrect because it failed to take this factor into account. This contention is flawed. First, there is no evidence in the record to show how much Sorri's specific rating would be affected by a general lowering of the curve. Thus, there is no valid basis for concluding that Sorri's rating would have decreased by the average decline of .54 points. Second, in view of the finding that Sorri's lowered performance rating was a reprisal for his protected activities, it would contravene the whistleblower protection policy underlying Part 708 to base his salary enhancement on anything but his initial rating of 4.33. The purpose of the remedy is to restore Sorri to the position in which he would otherwise have been absent the acts of reprisal. 57 Fed. Reg. at 7539. Consequently, no adjustment will be made to the $639.20 salary enhancement calculated in the Report of Investigation. See 10 C.F.R. ' 708.10(b) (Hearing Officer may rely on findings in the Report of Investigation).

As part of his back pay and these other salary-related elements of the award, Sorri should receive interest to compensate him for the time value of money lost while while bringing his complaint. See, e.g., Garst v. Dep't of the Army, 90 FMSR & 5037 (1993) (interest on back pay awarded under WPA) (Garst). Since Part 708 does not specify the rates of interest that should be applied to back pay awards for DOE contractor employee whistleblowers under ' 708.10(c), I will follow the practice of the Merit Systems Protection Board under the WPA. The MSPB awards interest on back pay under the Office of Personnel Management (OPM) regulation found at 5 C.F.R. ' 550.806(d). That regulation refers to the "overpayment rate" established by the Secretary of the Treasury in 26 U.S.C. ' 6621. The overpayment rate is the Federal short-term rate, plus two percentage points. The Federal short-term rate for a particular calendar quarter is the short-term rate for the first month of the preceeding calendar quarter, rounded to the nearest whole percent. 26 U.S.C. ' 6621(a)(1); (b)(2)(A). The sum of Sorri's back pay, lost 401(k) contribution, and lost salary enhancements is $4,579. Interest on this amount will be assessed from April 1, 1992 through December 31, 1993, based on the quarterly overpayment rates for the seven calendar quarters included in that period, and compounded quarterly. The total amount of interest calculated in this manner is $527. The interest calculations are shown in the Appendix to this decision. Thus, the total amount of back pay and related items, plus interest, to be awarded Sorri is $5,106.

An award of all reasonable costs and expenses, including attorney and expert witness fees, is also appropriate. First, I will consider Sorri's prehearing legal expenses. The Proposed Disposition directed that Sorri be awarded attorney fees and costs "in connection with the processing of his complaint" under Part 708. Proposed Disposition at 12. This should include the attorney's fees charged by Barbara Pryor, Esq. on May 21, 1992 and by David S. Proffit, Esq. on September 29, 1992. The record indicates that Sorri contacted Barbara Pryor for legal services after he was terminated on March 13, 1992. In a letter to Pryor, Sorri requested that she provide legal services on a contingency basis. Sorri had no further communication with Pryor, who billed him $38. Tr., Vol. I at 229. Sorri later contacted David Proffit after his termination, seeking to obtain his legal services on a contingency basis. Proffit provided legal advice before Sorri's attempt at informal resolution. He also discussed the possibility of filing lawsuits in state and federal courts. Sorri paid $372.99 for Proffit's legal services. Tr., Vol I at 230. Sorri's claim for these amounts is uncontested.

Next, I consider the amount of attorney's fees that Sorri "reasonably incurred" for the hearing before OHA. Sorri entered into an agreement with Thad M. Guyer, Esq., his hearing counsel, to pay him a retainer of $2,500 to take all actions necessary within the scope of the hearing. Tr., Vol I at 231-234. This rate was quoted to Sorri based on the public interest nature of his case and did not constitute Guyer's normal hourly rate. Id. at 232. In addition, the retainer agreement stated that if Sorri were successful in his claim under Part 708, Guyer would ask the OHA to award a fee equal to the number of hours billed times his normal hourly rate. Sorri contends that any attorney fee awarded should be based on what is reasonable--the full value of Guyer's services--and not on what the complainant was able to pay his attorney before the hearing.

Sandia argues that the fee which Sorri should be awarded should be capped by the amount he agreed to pay his attorney, or $2,500. As authority for this argument, Sandia relies on Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (Fifth Cir. 1974) (Johnson). I reject Sandia's position. This issue was considered and resolved by the U.S. Supreme Court in Blanchard v. Bergeron, 489 U.S. 87 (1989), which overruled a lower court decision on the award of fees that had also relied on Johnson. The Court held that an attorney's private fee arrangement, standing alone, does not resolve the question of what is a "reasonable" fee. It held that the defendant should be required to pay a higher amount, "should a fee agreement provide less than a reasonable fee calculated." Id. at 92. According to the Court, the "lodestar figure--the product of reasonable hours times a reasonable rate--represents a reasonable fee...." Id. at 95. I will interpret the phrase "reasonably incurred" in ' 708.10(c) like the Supreme Court, and apply the same "lodestar" approach for determining the amount of attorney's fees to award to the successful complainant in this case under Part 708. See Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 886, 888 (1984) (directing lower courts to apply the lodestar approach). As a matter of Departmental policy, it is also important to recognize the public interest nature of representing a whistleblower under

Part 708, and to award a reasonable fee to encourage attorneys to take these cases. E.g., Blanchard at 96.

I have concluded that an award of back pay (plus interest), together with reasonable costs and expenses, including reasonable attorney and expert witness fees, is the appropriate remedy in this proceeding. In addition to the categories discussed above, Sorri should receive restitution for any other costs "reasonably incurred" in bringing his complaint under Part 708. These additional costs include the value of time lost from his current job in bringing the complaint, the value of time lost for the hearing (including time spent preparing for the hearing, and attending the hearing itself), and milage, long distance telephone charges, postage, copying, court reporters (for depositions), and all other related expenses. This decision will direct counsel Guyer to submit a full accounting of his hourly charges for attorney's fees together with any costs, expenses, and expert witness fees incurred in representing Sorri, and a full accounting of any and all other costs and expenses reasonably incurred by Sorri in bringing his complaint under Part 708. The fee applicant has the burden of producing satisfactory evidence that his requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. See Blum v. Stenson, supra. Therefore, Guyer should also submit appropriate evidence to show what is a reasonable hourly rate for him to receive in this case.

IV. Conclusion

For the reasons set forth above, I conclude that Sorri has proven by a preponderance of the evidence that he engaged in activities protected under Part 708 and that these activities were a contributing factor in the decision by Sandia and L&M to terminate his employment. Neither Sandia nor L&M has proven by clear and convincing evidence that it would have terminated Sorri absent his protected activities. Furthermore, I conclude that Sandia and L&M were jointly responsible for the termination of Sorri's employment. I therefore find that a violation of Part 708 has occurred and Sorri should be awarded back pay lost as a result of the reprisals taken against him (plus interest), as well as all costs and expenses reasonably incurred by him in bringing the present complaint. After Guyer has provided the information described in Section III above, I will issue a Supplemental Order specifying the exact amount to be awarded Sorri.

It Is Therefore Ordered That:

(1) Sandia National Laboratories and L&M Technologies shall pay to Ronald Sorri the following amounts in compensation for actions taken against him in violation of 10 C.F.R. ' 708.5:

(a) $639.20 for lost salary enhancements for the period July 1, 1991 through March 13, 1992;

(b) $128.22 for lost L&M contributions to Sorri's 401(k) fund;

(c) $3,812.00 for income lost by Sorri from March 13, 1992 to the beginning of his employment with Phillips Semiconductors;

(d) $527 for interest on the amounts in (a) through (c) above, for the period April 1, 1992 through December 31, 1993;

(e) $410.99 for legal fees paid by Sorri to Barbara Pryor and David Proffit;

(f) An amount to be determined based on the information provided under paragraph (2) below in compensation for all costs and expenses, including attorney and expert witness fees, reasonably incurred by Ronald Sorri in bringing his complaint under Part 708.

(2) Thad M. Guyer, attorney for Sorri, shall, no later than 30 days after the issuance of this Decision, submit to the Hearing Officer a full accounting of his hourly charges for attorney fees together with any costs, expenses, and expert witness fees incurred in representing Sorri, including appropriate documentation as evidence that the rates requested are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. In addition to the

cost categories described above, Guyer shall submit, on behalf of Sorri, a full accounting of any and all other costs and expenses reasonably incurred by Sorri in bringing his complaint under Part 708.

(3) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director, Office of Contractor Employee Protection.

Thomas O. Mann

Hearing Officer

Office of Hearings and Appeals

Date:

APPENDIX

I. Sorri Chronology

March 1990: Sorri begins employment with L&M.

August 23, 1990: Sorri receives performance evaluation rating of 4.588 on a 5 point scale for period ending 7/1/90, above the average of 4.16 for L&M employees in the MDL.

August 1990: Sorri verbally raises concerns to Mike Nicholas about overpressurized gas cylinders in ion implanters.

December 1990: Sorri writes a memorandum to Nicholas further detailing his concerns about pressures in the gas cylinders. Meeting between Sorri and managers from L&M and Sandia results in agreement to order new, lower pressure cylinders.

January 3, 1991: Sorri files internal safety complaint with Sandia after learning that new cylinders had not been ordered.

January 1991: Additional meetings are held between Sorri and managers from L&M and Sandia, at which agreement is reached on how safety concerns should be resolved. Sorri raises fears that reprisals will be taken against him.

February 13, 1991: Nicholas orders Sorri to vent cylinders of toxic arsine gas to reduce pressure; Sorri believes this is unsafe and contrary to agreement reached in January.

February 14, 1991: Sorri files safety complaint with DOE.

February 15, 1991: Sorri ordered to remove personal items from the MDL, stripped of employee badge, escorted from the premises, and relocated to L&M headquarters.

February 27, 1991: Sorri placed on administrative leave with pay.

March 22, 1991: Sorri receives performance evaluation rating of 4.33 on a 5 point scale for period ending 12/31/90, below the average of 4.6 for L&M employees in the MDL.

March 25, 1991: Sorri returned to MDL; assigned to review and rewrite ion implant maintenance procedures.

March 28, 1991: Sorri writes to Congressman Panetta, disclosing concerns regarding safety and the resolution of his safety complaints.

July 19, 1991: Sorri receives lowered performance evaluation rating of 3.438 on a 5 point scale for period ending 7/1/91, below the average of 4.06 for L&M employees in the MDL.

November 1991: Sorri again writes to Congressman Panetta regarding reprisals for his health and safety concerns.

December 3, 1991: Sorri files complaint with Sandia regarding safety of the mid-current ion implanter.

January 27, 1992: Sandia president Narath receives inquiry from DOE Albuquerque Office regarding Sorri's November 1991 letter to Congressman Panetta.

January 31, 1992: Sandia issues Request for Quotation to L&M, proposing an amendment of their contract to consolidate job descriptions in the MDL under three general task areas, and requesting resumes of L&M employees being proposed for tasks described in the RFQ.

February 5, 1992: Ron Jones sends memo to Harry Weaver stating that Sorri had "not progressed on a timely basis" on his writing assignment and "is causing problems within the contract force, with negative statements during meetings and while talking to his peers."

February 7, 1992: Fil Martinez sends memo to L&M employees requesting updated resumes by February 12, 1992.

February 12, 1992: Sandia president Narath writes in letter to DOE Albuquerque Office that Sorri will not be returned to his maintenance responsibilities in Ion Implant because the MDL's "new operation mode does not call for maintenance to support production."

February 1992: L&M submits resumes for its MDL contract employees to Sandia. Ron Jones evaluates resumes using rating scheme developed by Harry Weaver. Sorri receives a rating of 28, the lowest of all L&M employees.

March 2, 1992: Harry Weaver sends memo to Peercy stating that four MDL employees, including Sorri, will be terminated.

March 13, 1992: Sorri is terminated by L&M president Montoya.

March 27, 1992: Sorri given performance evaluation rating of 2.625 on a 5 point scale for period ending 1/1/92.

* * * *

II. Calculation of Interest on Back Pay and Related Awards

Calendar Quarter	Starting Amount	Interest Rate	Ending Amount
2d Quarter 1992	$4,579	7 %	$4,659
3d Quarter 1992	4,659	7%	4,741
4th Quarter 1992	4,741	6 %	4,812
1st Quarter 1992	4,812	6 %	4,884
2d Quarter 1992	4,884	6 %	4,957
3d Quarter 1992	4,957	6 %	5,031
4th Quarter 1992	5,031	6 %	5,106

* At the hearing, Sandia reiterated its challenge to the timeliness of Sorri's complaint. Since Sandia has

failed to provide any new evidence or legal arguments which would lead us to change our initial ruling, we affirm our determination that Sorri's complaint was properly accepted by the OCEP Director.

David Ramirez

March 17, 1994

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: David Ramirez

Date of Filing: September 22, 1993

Case Number: LWA-0002

This Decision involves a complaint filed by David Ramirez ("Ramirez" or "the complainant") under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. Ramirez contends that a reprisal was taken against him after he raised safety concerns with Brookhaven National Laboratory/Associated Universities, Inc. ("BNL" or "the Laboratory"), a DOE contractor. Specifically, the complainant alleges that he was terminated from employment at BNL on March 20, 1992, in retaliation for his having raised safety issues with his BNL supervisor. The DOE's Office of Contractor Employee Protection (OCEP) investigated the complaint and found that Ramirez' termination did not constitute a reprisal. Ramirez requested a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer under 10 C.F.R. § 708.9(a), again maintaining that his termination was a reprisal for his safety disclosures. Neither BNL, nor Ramirez's employer, J. P. Daly & Sons, Inc. (Daly), a BNL contractor and thus DOE subcontractor, requested a hearing to challenge any of OCEP's findings. The hearing in this case was held on December 14 and 15, 1993, at the BNL facility in Upton, Long Island, New York.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE Contractor Employee Protection Program became effective on April 2, 1992. 57 Fed. Reg. 7533 (March 3, 1992). Its purpose is to encourage contractor employees at DOE's government-owned, contractor-operated (GOCO) facilities to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers. 10 C.F.R. § 708.1.

Before Part 708 was promulgated in 1992, contractor employee protection at DOE's GOCO facilities was governed by DOE Order 5483.1A (6-22-83) ("Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities"). As with Part 708, the Order prohibited contractors from taking reprisals against whistleblowers. However, no formal procedures existed under Order 5483.1A. The Part 708 regulations were adopted to improve the process of resolving whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee.

B. Factual Background

The following summary is based on the testimony of witnesses at the December 14-15 hearing and the OCEP investigation.1/ From December 1985 until March 20, 1992, Ramirez was continuously employed at

BNL as an electrician by a series of DOE subcontractors, each of which had a contract with BNL to provide electrician labor support. These subcontractors supplied electricians to BNL on an "as-needed" basis through a referral process utilizing Local 25 of the International Brotherhood of Electrical Workers Union (IBEW). While working at BNL, the electricians were supervised by BNL personnel. At the time of the alleged reprisal, the firm that supplied electricians to BNL was Daly, which had become a BNL contractor, and therefore Ramirez' employer, on March 14, 1992.

Under the terms of the contract between BNL and Daly, BNL had authority to lay off subcontractor electricians working at BNL when their services were no longer required. When a work slowdown was anticipated, subcontractor electricians sometimes were laid off and sometimes were permitted to agree voluntarily to an informal system of furloughs to obviate the necessity of layoffs. When an electrician was laid off, the individual's name was placed on the bottom of the IBEW referral list for future work.

In January 1992, Ramirez' BNL supervisor, Donald Jesaitis, was promoted and replaced by a new Electrical Construction Support Supervisor, Bill Softye (Softye). Ramirez alleges that he informed Softye about two safety issues and that in retaliation for making these disclosures he was laid off from his position as a subcontractor electrician.

The first alleged disclosure occurred in mid-February 1992 when Ramirez and another electrician were working in Building 902. While tracing out electrical feeders in a high voltage "experimental cubicle" area, the power came on and red indicator lights flashed. Ramirez states that he became concerned and related his concerns to Softye. Ramirez alleges that Softye's response was "Another problem Dave?" Ramirez states that he returned to work, despite still feeling concerned about his safety, because he felt threatened by Softye's response. Softye disputes Ramirez' account of this incident and asserts that he was not made aware of the activation of the power source until subsequently.

The second disclosure by Ramirez involves asbestos in the ceiling of a hospital corridor in Building 490. While removing electrical fixtures on February 21, 1992, Ramirez was approached by a hospital custodian who informed him of the possibility that there was asbestos in the ceiling. Ramirez then apprised Softye about the potential asbestos problem. Softye contacted Peter Stelmaschuk,2/ Supervisor of Carpenters, who informed him that there was no asbestos in the ceiling tiles. Softye thereupon informed Ramirez that the "area was clean," and Ramirez returned to work. BNL has stipulated that Ramirez raised his concern regarding asbestos in good faith. Transcript of Proceedings (December 14-15, 1993 Hearing) at 21 (hereinafter "Tr.").

Ramirez' concern about asbestos did not end with the February 21 disclosure, however. During the week of February 24, 1992, carpenters started to remove the ceiling tiles in the hospital corridor where Ramirez had raised his asbestos concern. After completing their work on the morning of Friday, February 28, the carpenters were taken off the job because BNL's Health Physics Department had determined that there was a potential for release of asbestos-containing material from the area above the ceiling. Tr. at 330 (Ramirez); see also April 15, 1992 Safety & Environmental Protection Division (S&EP) Investigation Report at 2, OCEP Complaint File Tab P (S&EP Report). Ramirez was reluctant to install temporary pre-fabricated "carnival" lighting, as Softye had directed, and instead wanted to use temporary "pigtail" lighting.3/ However, after another electrician was assigned to assist him, he worked on the carnival lighting installation. Later that day, Ramirez and Softye had an argument regarding Ramirez' initial refusal to do this job.

Ramirez raised his asbestos concern the following work day, March 2, when he called the business manager of IBEW Local 25, William Lindsay (Lindsay). As a result of that call, Lindsay met with Ramirez and some of the other contract electricians the following day. At that meeting, Ramirez again mentioned his safety concerns with regard to the asbestos in Building 490 and also the incident in Building 902. Tr. at 336; see also Report at 17 (Lindsay Interview). Lindsay in turn informed William Slavinsky (Slavinsky), General Supervisor for Construction Support and supervisor of both Softye and Peter Stelmaschuk, of the concerns raised at his meeting with the contractor employees. Tr. at 449

(Slavinsky). Soon afterwards, Slavinsky and Softye went out speak with Ramirez. A heated argument between Ramirez and Softye occurred.

Ramirez again raised his safety concerns regarding the high voltage area in Building 902 and asbestos in Building 490 the following day, March 4, at a meeting of all the contract electricians. Softye in turn mentioned certain specific jobs that, he alleged, Ramirez had not performed as directed. Ramirez again lost his temper and, in a loud voice, accused Softye of lying.

At the March 4 meeting, Slavinsky had denied that there was any asbestos problem in the ceiling in the hallway in Building 490 where Ramirez had strung the carnival lighting. However, on the weekend of March 7 and 8, carpenters wearing protective clothing and respirators removed the ceiling tiles. Tr. at 87-89 (Ronald Kister).4/

On March 19, 1992, BNL notified Daly that there was an anticipated work slowdown, and directed Daly to lay off Ramirez and two other subcontractor electricians (Dennis Rhodes and Richard Chesney). On the following day, the three men were laid off. Ramirez alleges that his layoff was in retaliation for having previously raised legitimate concerns regarding safety.

BNL denies that Ramirez' layoff was in reprisal for his having disclosed safety concerns. BNL asserts that the decision to lay off several subcontractor electricians was based on a slowdown in work. Slavinsky and Softye assert that they independently decided that the same three electricians should be laid off, the former basing his decision on leadership potential, and the latter utilizing four criteria: seniority, attendance, performance, and work attitude. Both men state that they included Ramirez in the group to be laid off because of his frequent tardiness, failure to perform assigned jobs as directed, and bad attitude.

C. Procedural History of the Case

On May 19, 1992, Ramirez filed a complaint with the DOE Chicago Field Office under Part 708. After an unsuccessful attempt to reach an informal resolution, the complaint was forwarded on July 28, 1992 to OCEP to institute a formal investigation. OCEP conducted an investigation of Ramirez' allegations of reprisal and issued a Report of Investigation (OCEP Report) and a Proposed Disposition on July 29, 1993. The Proposed Disposition, which relied upon the findings in the OCEP Report, determined that Ramirez had established by a preponderance of the evidence that his safety disclosures may have been a contributing factor in BNL's decision to lay him off. However, the Proposed Disposition concluded that BNL had shown by clear and convincing evidence that the termination of Ramirez as a subcontractor electrician would have occurred absent his disclosure of safety concerns. Moreover, OCEP concluded that Ramirez was selected to be laid off because of factors that included his attendance, performance, and work attitude. Finally, OCEP did not find any evidence during its investigation to support Ramirez' allegation that his layoff was retaliatory.

On August 16, 1993, Ramirez submitted to OCEP his request for a hearing pursuant to section 708.9. On September 22, 1993, OCEP transmitted that request, together with the complaint file, to the OHA. On the following day, the Director of OHA appointed the undersigned as Hearing Officer. A hearing date and prehearing briefing schedule were established in letters sent to the parties on September 28, 1993. Subsequently scheduling changes were made on the basis of good cause shown by the attorneys for Ramirez and BNL. Prehearing statements were filed on behalf of Ramirez and BNL on November 5 and November 26, 1993, respectively. Counsel for Ramirez also separately submitted the names of witnesses she wanted subpoenaed by the Hearing Officer, and BNL submitted the affidavit of Daniel Ahearn, a proposed witness for both parties, who was to be out of the country on the scheduled hearing dates. A prehearing telephone conference was held on December 3, 1993.

In a letter filed on December 8, 1993, Daly, in its first submission in the proceeding, requested that the scheduled December 14 and 15, 1993 hearing be postponed.5/ Daly asserted that a determination should be made on its potential liability prior to the hearing. According to Daly, Ramirez had no legitimate complaint against Daly and the DOE had no jurisdiction over Daly. In a December 9, 1993 letter to Daly,

the Hearing Officer denied the firm's request for a suspension of the hearing.

At the start of the December 14, 1993 hearing, Daly and BNL each made an oral motion to dismiss the proceeding against it on jurisdictional grounds. For the reasons stated on the record, see Tr. at 15-16, and more fully set forth below, both motions were denied. However, on the basis of the OCEP Report and the proposed testimony of the parties at the hearing, the Hearing Officer dismissed Daly from the proceeding on the grounds that there was nothing in the record upon which he could find a prima facie case against the firm.

Since there was not sufficient time at the conclusion of the hearing for closing statements, permission was given for the submission of written closing statements. Written statements were filed by counsel for Ramirez and BNL on February 3 and 17, 1994, respectively.

The Part 708 regulations do not specify what is to be included in the record of the proceedings provided for in that Part. Consistent with a determination in the first case in which a hearing was requested pursuant to Part 708, the Hearing Officer defined the "record" in this proceeding to consist of the OCEP Complaint File, which includes the OCEP Report, all papers filed by the parties with the OHA, all letters and memoranda of telephone conversations in which procedural or other interlocutory determinations were made, the transcript of the testimony at the hearing, and any exhibits submitted by the parties at the hearing. Tr. at 6-7.

II. Discussion

A. The Motions to Dismiss

At the hearing, Daly argued that the proceeding should be dismissed against the firm since: (1) Daly's contract with BNL had no provisions for whistleblower procedures; (2) the whistleblower provisions under which this proceeding is being conducted did not go into effect until April 2, 1992, and Ramirez was laid off prior to that date; and (3) Ramirez was employed by Daly for only five days, and his raising of safety issues occurred while he was an employee of another BNL subcontractor, A & H Electrical Contractors (A&H).

At the hearing, and also in its pre-hearing written submission, BNL argued that Ramirez has no legal basis for bringing this case against the Laboratory. Like Daly, BNL contends that this case should be dismissed since the alleged reprisal occurred prior to the effective date of the Part 708 regulations. In addition, BNL contends that Ramirez does not have "standing" to bring a complaint against BNL since BNL was not his employer. BNL also argues that the case against it should be dismissed since its contract with Daly was entered into before the effective date of the Part 708 regulations and never incorporated those regulations.

As indicated above, at the hearing I rejected these arguments and denied the motions. Part 708, by its own words, applies to any complaint filed after the effective date if (i) the alleged reprisal stems from a disclosure, participation or refusal involving health and safety matters, and (ii) the underlying procurement contract requires compliance with all applicable health and safety regulations and requirements of DOE. 10 C.F.R. § 708.2(a); see also 57 Fed. Reg 7533 (March 3, 1992) ("This final rule is effective April 2, 1992"). There is nothing in the Part 708 regulations that limits these proceedings to alleged reprisals involving health and safety matters that occur after the effective date.6/ It is undisputed that the complaint in this case was filed after the effective date of Part 708 on April 2, 1992. Therefore, Ramirez' complaint is properly within the purview of Part 708. This conclusion is consistent with the first DOE whistleblower case issued under these regulations, Ronald A. Sorri, 23 DOE ¶ 87,503 (1993) (review requested December 22, 1993) (Sorri). In that case, while the contractor and subcontractor challenged the timeliness of the filing of the complaint under the "60 day rule" in section 708.6(d), they conceded the applicability of the Part 708 procedures to alleged acts of reprisal that occurred prior to April 2, 1992.

It is important to note in this regard that the Part 708 prohibition against reprisals for health and safety disclosures does not impose any new standards of conduct on contractors. Section 970.5204-2 of the

Department of Energy Acquisition Regulations, 48 C.F.R. § 970.5204-4, in effect in BNL's contract with DOE in March 1992, provided that "[t]he contractor shall take all reasonable precautions in the performance of the work under this contract to protect the safety and health of employees and of members of the public and shall comply with all applicable safety and health requirements ...of DOE." Similarly, the contract which Daly entered into with BNL on March 14, 1992, required that Daly "comply with all applicable environmental, safety and health regulations and requirements [of BNL] and DOE." Contract No. 482511, Attachment A, Article 30, OCEP Complaint File Tab L. DOE Order 5483.1A (6-22-83), which was in effect in March 1992, prohibited reprisals by contractors against employees who made workplace health and safety disclosures.7/ The Part 708 regulations thus changed only the procedures with regard to complaints by employees that they had been discriminated against for making health and safety disclosures and was effective with respect to any such complaints made after April 2, 1992.

BNL's argument that Ramirez does not have standing to bring this action against it because he was not employed by the Laboratory is also unpersuasive. Proceedings under Part 708 are not brought to vindicate an employee's contractual rights vis a vis his employer. Rather, they are intended to extend in a meaningful way to employees of DOE contractors (including subcontractors) the important national policy of protecting whistleblowers from reprisals for, inter alia, their disclosure of conditions dangerous to health and safety. Cf. 57 Fed. Reg. 7533-34 (March 3, 1992) (Preamble to Part 708 Regulations); see also URA, 23 DOE at 89,022. As the agency stated in explaining why it was extending the Contractor Employee Protection Program to cover the employees of subcontractors:

The DOE believes that the health and safety of all contractor employees is of the utmost importance and overrides enforcement and administrative difficulties that could be incurred in extending the ruling to second- and lower-tier subcontractors.

57 Fed. Reg at 7535.

In cases such as the present one, in which the day-to-day activities of a subcontractor employee are supervised by the prime contractor, it is evident that adverse personnel actions are frequently going to be taken by the subcontractor based solely on the directions of the prime contractor. Were we to accept BNL's attempt to avoid jurisdiction based upon the formalities of the employer-employee relationship, any contractor could be insulated from the prohibitions against whistleblower reprisals simply by virtue of having utilized a subcontractor. This would deprive Ramirez and many other whistleblowers of the procedures that were promulgated specifically to provide them with an equitable method of resolving complaints of illegal reprisals. Since this would be contrary to the overall framework and stated purpose of Part 708, BNL's argument must be rejected. Cf. Sorri, 23 DOE at 89,018 (prime contractor jointly liable for paying compensation under section 708.10(c) to complainant who was an employee of a subcontractor).

B. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under section 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). Thus, in order to meet his burden under this section, Ramirez must prove by a preponderance of the evidence, i.e., that it is more probable than not, see 2 McCormick on Evidence § 339 at 439 (4th ed. 1992), that he engaged in a protected activity that was a "contributing factor" in his termination.

The standard of proof adopted in section 708.9(d) is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221(e)(1), and the 1992 amendment to § 210 (now § 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In explaining the "contributing factor" test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation's chief House sponsors, stated:

The words "a contributing factor", ... mean any factor which, alone or in connection with other factors,

tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant", "motivating", "substantial", or "predominant" factor in a personnel action in order to overturn that action.

135 Cong. Rec. H747 (daily ed. March 21, 1989)(Explanatory Statement on Senate Amendment-S.20). See Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993)(applying "contributing factor" test).

In addition, "temporal proximity" between a protected disclosure and an alleged reprisal has been held to be "sufficient as a matter of law to establish the final required element in a prima facie case of retaliatory discharge." County v. Dole, 886 F.2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that Ramirez has met his burden under Part 708 of proving by a preponderance of the evidence that his safety disclosures were contributing factors in his being laid off by BNL. As indicated above, BNL has stipulated to the fact that Ramirez made a good faith safety disclosure concerning asbestos. In addition Ramirez' disclosure of the activation of the high energy power source was a protected safety disclosure.8/ Although there are inconsistencies in the testimony of Nelson Briggs, the foreman of the subcontractor electricians, Ramirez, and Softye regarding this incident, I am persuaded from Ramirez' testimony that he had a good faith belief that the activation of the power source created a substantial danger to his safety. I am also persuaded that Ramirez disclosed his safety concern to BNL prior to the alleged reprisal.9/

It is also evident that BNL's decision to direct Daly to terminate Ramirez' employment at the Laboratory was a "personnel action ... against the complainant" as that phrase is used in section 708.9(d).10/ Finally, Ramirez' employment at the Laboratory was terminated shortly after he raised his safety concerns. In fact, the last occasion when he raised those concerns was at the March 4, 1992 meeting, which occurred only 15 days before the BNL supervisors to whom he raised those concerns decided to lay him off. For these reasons I find that the record supports Ramirez' position that his safety disclosures were a contributing factor to his termination and is sufficient to shift the burden under section 708.9(d) to BNL.

No such finding can be made with respect to Daly, however.11/ It is undisputed that Ramirez' disclosures were made prior to his being employed by Daly. In addition, there is no evidence in the record that Daly, or its predecessor, A&H, had any knowledge of these disclosures. It is also undisputed that the decision to terminate Ramirez' employment at BNL was made solely by BNL employees.12/ This case is therefore readily distinguishable from the Sorri case, in which the Hearing Officer denied the subcontractor's motion to dismiss on the grounds that its actions were "inextricably intertwined" with those of the prime contractor. Sorri, 23 DOE at 89,012. For these reasons, Daly was dismissed from the proceeding at the start of the hearing.

C. The Contractor's Burden

Subsection 708.9(d) provides that, once the complainant has met his burden under that subsection, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure...." 10 C.F.R. § 708.9(d). The standard of proof by "clear and convincing evidence" is more stringent than the "preponderance of the evidence" standard applied to complainants, but not as high as the "beyond a reasonable doubt" standard used in criminal cases. See 2 McCormick on Evidence § 340 at 442. It has been described as that evidence sufficient to persuade a trier of fact that the truth of a contested fact is "highly probable." Id. For the reasons set forth below, I have concluded that BNL has not met this stringent standard.13/

As an initial matter, I am not persuaded that it was necessary for BNL to lay off, as opposed to furlough, Ramirez. BNL advanced two reasons for resorting to layoffs in March 1992. Slavinsky testified that, at the time the decision to lay off was made on March 19, furloughs were not an option because there was not much work for the subcontractor electricians and he did not anticipate that work would pick up soon, possibly not even for three months. Tr. at 455-56.14/ Slavinsky also stated that his decision was done to

"accommodate[]" IBEW Local 25 Business Manager Lindsay, after a conversation in which Lindsay had stated that furloughs were in violation of the union contract. Id. at 456.

Neither explanation is persuasive, and both appear to be mere pretexts. First, the work slowdown was very temporary, and during temporary slowdowns in the past experienced electricians such as Ramirez had not been laid off. On May 5 and 11, 1992, only a month and a half after Ramirez was laid off, two new subcontractor electricians began working at BNL. OCEP Complaint File Tab O (J.P. Daly [Brookhaven Lab] Listing of Employees). Prior to 1992, when there was a temporary slowdown such as this one, it had been the practice of Softye's predecessor, Donald Jesaitis, to maintain a "skeletal crew" of experienced subcontractor electricians by permitting them to take their union-mandated annual vacations. Tr. at 280-81 (Jesaitis). This skeletal crew included Ramirez. Indeed, even after Softye took over, one member of the skeletal crew, Dennis Rhodes, took his vacation in February 1992; two others, Dennis Thomas and Daniel Ahearn, took their vacations during the week of April 24, 1992, only a month after Ramirez was laid off; and another subcontractor electrician, Nelson Briggs, took a vacation during the week of May 8. Id. at 40 (Briggs). Ramirez and the other subcontractor electricians were also willing to take their vacations during the slow period in the spring of 1992. See, e.g., id. at 260-61, 267-70 (Michael Porwick).

Slavinsky's statement that he decided to lay off Ramirez in deference to the wishes of IBEW Local 25 is equally lacking in credibility. First, it is undisputed that the Laboratory was not a party to the contract with IBEW 25, and there is no evidence that it made any other attempts to comply with the union's wishes. On the contrary, counsel for BNL went to great lengths to emphasize that BNL was under no obligation to comply with the union's preferences with respect to type of temporary lighting fixtures to be installed by subcontractor union electricians. See, e.g., id. at 129-31 (cross examination of Dennis Thomas). Moreover, there is no reason to believe that the union's policy against furloughs was a new policy in early 1992 or that Slavinsky first learned about it in 1992. Even if there were a greater number of electricians unemployed in March 1992 than in prior years, neither the testimony of Slavinsky nor that of any other witness persuades me that accommodating IBEW 25 was an important BNL priority or that BNL would have laid off an experienced electrician like Ramirez unless it had its own reasons to do so. 15/

Thus the reasons presented by BNL for resorting to layoffs rather than permitting vacation furloughs are unconvincing. However, this in and of itself does not mean that BNL has failed to meet its burden of proof. To make a determination on that issue, we must also evaluate the reasons that BNL has advanced to support its contention that Ramirez was laid off for reasons other than the safety concerns that he raised.

In their testimony, both Slavinsky and Softye strongly denied that their decision to lay off Ramirez was based in any way upon his safety complaints. Softye stated that he rated each of the subcontractor electricians on a scale of one to ten in four categories -- performance, attendance, attitude and seniority -- and recommended that the three electricians with the lowest scores be laid off. While this sounds like an objective formula, the record suggests that it is nothing more than an after-the-fact rationalization for a much more informal and subjective decisionmaking process. First, no document containing these calculations was ever entered into the record; in fact, Softye never even stated that he wrote these calculations down anywhere. Moreover, his testimony raises serious questions concerning what, if any, calculations he actually performed:

Q. So was it the ones who received the lowest total score from you were laid off, you recommended to be laid off?

A. I don't recall. Yes, I believe it was.

Tr. at 533 (Direct Examination)

Q. How many points did Mr. Ramirez get for seniority?

A. I don't recall. I would say it was my understanding at the time that he had seven years seniority here.

Q. So would you score one point for every year?

A. I believe that's what I did, yes.

Q. And how many points did Mr. Ahearn get for seniority?

A. I think at that point maybe two years.

Q. And do you recall what kind of points were scored by Chesney for performance?

A. No, I do not.

Q. Do you recall what kind of points Mr. Rhodes scored for performance?

A. No, I do not.

Q. Do you recall what kind of points were scored for attendance, meaning the number of days on the job or missed?

A. No, I do not.

Q. Yet it's your testimony that you used this ten-point system and that's how you arrived at your decision?

A. That's correct.

Q. And you don't recall how these points were assigned? A. Not at this time, I don't.

Id. at 555-556 (Cross Examination)16/

Despite BNL's failure to advance a credible explanation of the process by which Ramirez was selected to be laid off, the Laboratory has shown that there were job-related factors involved in the layoff decision that were not related to Ramirez' protected activities. Softye and Slavinsky testified to nine incidents during the first two and a half months in 1992 in which Ramirez allegedly did not do a job as directed by Softye or otherwise caused trouble on the job. BNL's and Ramirez' versions of these incidents are briefly summarized in the Appendix to this Decision. In addition, there was testimony about Ramirez' tardiness, which allegedly was also a factor in the decision to lay him off.17/

Although BNL has shown that there were non-safety related factors involved its decision to lay off Ramirez, this is not sufficient to sustain the Laboratory's burden under section 708.9(d). First, with the exception of the carnival lighting incident (Appendix item H), these factors are all relatively trivial. Secondly, upon reviewing the entire record, I am persuaded that the crucial carnival lighting incident was an integral part of the asbestos safety issue raised by Ramirez. Finally, I am convinced that Ramirez would not have been terminated were it not for his behavior at the meetings that took place on March 3 and 4, shortly before BNL's layoff decision. In those meetings, which were a direct outgrowth of the carnival lighting incident, Ramirez' behavior was far more disruptive than that alleged with respect to any of the non-safety related factors cited by BNL. However, at the same time, Ramirez also raised his safety concerns.

Although it previously appeared to me that the carnival lighting incident was separate from the asbestos issue, see, e.g., Tr. at 128 (Hearing Officer), my evaluation of the entire record convinces me otherwise. This incident occurred in the same location where Ramirez made his asbestos disclosure on February 21. On February 28, the day that Softye first directed Ramirez to install the carnival lighting at that location, nothing had been done to remove the asbestos since BNL did not think that there was an asbestos problem. However, Ramirez had good reason to believe that, contrary to what Softye had indicated the previous week, there was in fact asbestos present in the ceiling where Softye wanted him to snake the carnival

lighting. When Softye had told Ramirez that the "area was clean," see supra p.3, he was relating what Peter Stelmaschuk had told him about the absence of asbestos in the ceiling tiles; he apparently had not asked Stelmaschuk about the presence of asbestos in the area above the ceiling. According to Ramirez, when he was directed to install the carnival lighting he was very worried about the asbestos both because the carpenters had been pulled off the job site earlier that day as a precaution and because Slavinsky appeared concerned about the asbestos. Tr. at 330-332.

Since Ramirez was aware of the presence of asbestos in the area above the ceiling, I find credible his assertion that he initially refused to install the carnival lighting because of his safety concern about the asbestos. I reach this finding despite the fact that Ramirez apparently did not expressly raise his safety concern when Softye directed him to install the carnival lighting. BNL contends that the reason Ramirez refused to do the job was because of the union's opposition to this type of prefabricated temporary lighting. However, as can be seen from the testimony of Softye excepted below, Ramirez, contrary to his reputation as a person who is outspoken and argumentative, did not assertively justify his initial refusal to do the job on the union's position:

Q. Did Mr. Ramirez say anything to you when you told him you had bought this lighting fixture and you wanted him to install it?

A. He seemed hesitant. I didn't know what the problem was at that point. He just seemed hesitant to get involved with it.

Q. Did he express [why] he was hesitant about it?

A. Not at that point.

...

Q. Did you subsequently have an opportunity to inspect the hospital or Building 490 job?

A. Yes.

Q. And what did you find?

A. That no progress had been made on the job.

Q. Was there any explanation given as to why no progress had been made?

A. No. Dave was just hesitant to even talk. ...

...

A. ... I think he said he needed help or assistance.

Tr. at 524-525.

Softye then testified that he asked Dennis Thomas, whom he had assigned to help Ramirez on the job, why Ramirez had initially refused to install the carnival lighting. In response, Thomas stated that "maybe" it was because Ramirez felt it was contrary to the union contract. Id. at 525. Softye in turn asked Ramirez whether that was the reason for his refusal to perform the job. According to Softye, Ramirez "just expressed the opinion that the union didn't like this type of light." Id. at 526.

That Ramirez' initial refusal to install the carnival lighting was based in large part on his concern about the asbestos in the ceiling is also confirmed by his raising a safety concern about asbestos on the following work days (Monday - Wednesday, March 2-4). On March 2, after he had been taken off the carnival lighting job by Softye, Ramirez called Bill Lindsay, the IBEW 25 business manager, "to express my

concerns because I was not getting any kind of positive input from management at the contract labor office in regards to the concerns I brought up." Id. at 336. That those "concerns" included the asbestos issue is made clear from accounts of Lindsay's meetings the next day both with Ramirez and some of his co-workers and with Slavinsky. According to the OCEP investigator, Lindsay indicated that at his meeting with some of the subcontractor electricians, Ramirez "outlined a number of what appeared to be serious safety concerns, involving asbestos and a high power generator." OCEP Report at 17 ¶ c. Lindsay then mentioned these matters to Slavinsky. Id.; see also Tr. at 449 (Slavinsky).18/

Lindsay's meeting with Slavinsky on March 3 led directly to the first of the two meetings in which Ramirez' confrontations with his supervisors finally impelled BNL to get rid of him. Ramirez stated that at his meeting with Messrs. Softye and Slavinsky on March 3 he brought up the same issues that he had raised with Lindsay. Id. at 337. As indicated in the previous paragraph, those issues included Ramirez' concern about the asbestos in the ceiling of Building 490. Ramirez testified that in response Softye called him a liar and he in turn lost his temper and called Softye a "fucking liar." Id. at 337-38.19/

We now come to the climactic March 4 meeting in which another confrontation occurred between Ramirez and his BNL supervisors. During the course of the proceeding, BNL has argued at great length that the March 4 meeting was not a "safety meeting." E.g., Respondent's Statement of Fact and Law at 6. It is not really important how the meeting is denominated. What is important is the ample evidence that Slavinsky convened this meeting in large part because of the safety concerns raised by Ramirez, and that Ramirez raised those concerns at this meeting.

Ramirez' contention that this meeting was a direct result of the safety concerns that he had previously raised with Lindsay and his BNL supervisors is confirmed by Slavinsky's explanation of how he came to convene the meeting. Slavinsky testified that during the course of the encounter on March 3 between Ramirez and Softye:

Nelson Briggs walked in. I said to Nelson Briggs, ... "Tomorrow morning, everybody reports to Building 452. We're going to have an open meeting, ... tell everybody that they are going to be able to express their viewpoints, either personal, safety related, anything that they want to bring up. They are going to have a chance to voice this right in front of Bill Softye, right to me, and we will resolve all the issues that Bill Lindsay had a concern over."

Tr. at 450. Slavinsky attempts to downplay the safety issue by his reference to "all the issues." However, as the record shows, Lindsay had gotten involved in this matter because of the telephone call in which Ramirez, shortly after the carnival lighting incident, had expressed his safety concerns.

It is undisputed that at the March 4 meeting Ramirez again raised his concerns about asbestos in Building 490. He did not limit his remarks to the February 21 incident; he also referred to the carnival lighting incident. See, e.g., Tr. at 153 (Thomas). In response, Slavinsky strongly denied that there was any asbestos problem. Id. at 453-54 (Slavinsky). Despite Slavinsky's statement, however, a few days later, carpenters who worked in his department under the supervision of Peter Stelmaschuk removed ceiling tiles in Building 490 wearing full asbestos containment clothing and equipment. See supra p.4.

Softye disputed the safety concerns raised by Ramirez and mentioned various incidents which BNL now relies upon to justify its decision to lay off Ramirez. Tr. at 347-48 (Ramirez).20/ Ramirez, as he has throughout this proceeding, strongly disputed Softye's account of these incidents. He also lost his temper and started yelling loudly at Softye.

BNL has referred to Ramirez' behavior on March 3 and 4 to support its contentions that Ramirez had a bad attitude and that there was a personality conflict between Ramirez and Softye. However, neither assertion, even if true, is sufficient to enable BNL to meet its burden in this case. Courts have considered the issue of profanities and other obstreperous behavior by purported whistleblowers on a number of occasions. While such behavior is not a protected activity, it is not sufficient to refute a claim of reprisal if it is

closely related to the events in which the protected activity occurred. For example, in Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984), the Secretary of Labor had dismissed a whistleblowers's claim of unlawful reprisal because there was substantial evidence that he was a difficult employee who created friction in his relations with his co- workers and superiors. However, the court of appeals remanded the case because the Secretary had failed to determine the extent to which the whistleblower's "troublesomeness arose from his persistence ... in identifying quality and safety problems." Id. at 1165. Accord, Passaic Valley Sewerage Commissioners v. Department of Labor, 992 F.2d 474, 481 (3rd Cir. 1993); see also Lewis Grocer Co. v. Holloway, 874 F.2d 1008 (5th Cir. 1989).

In the present case, Ramirez' behavior on March 3 and 4 was a continuation of a persistent attempt to raise the asbestos and high voltage issues. The asbestos issue was originally raised on February 21 and was also present in the context of the carnival lighting dispute. Although Ramirez' co- worker on the carnival lighting job on February 28, Dennis Thomas, testified that he had "no knowledge that [Ramirez] was laid off because of safety reasons," Tr. at 144-45, he also stated that there was a potential danger when installing carnival lighting when asbestos was in the ceiling or around the pipes there. Id. at 123-26. Similarly, Dennis Rhodes, who worked with Ramirez on that job on March 2, testified as to the potential safety problems when snaking carnival lighting through a ceiling area in which asbestos is present. Id. at 226-28.

Finally, I am not persuaded that Ramirez' lay off can be explained solely in terms of a "personality conflict," as suggested by a number of Ramirez' co- workers. When Dennis Thomas, for example, attributes Ramirez' lay off to a "personality difference," he is referring to Ramirez' failure to use more "diplomacy" in dealing with Softye. Id. at 145, 155. The record makes it clear that on no occasion was Ramirez more undiplomatic than at the meetings on March 3 and 4.21/ However, Ramirez' behavior in those meetings was inseparable from the safety concerns that he raised on those occasions. Thus, BNL has not presented clear and convincing evidence that Ramirez would have been laid off in the absence of the disclosures of his safety concerns. Accordingly, I find that BNL's decision to lay off Ramirez violated section 708.5.

III. Remedy

Having concluded that BNL has failed to meet its burden of showing by clear and convincing evidence that it would have taken the same personnel action against Ramirez absent his disclosure of safety problems, and that a violation of the prohibitions set forth in Part 708 has occurred, I now turn to the remedy.

In an addendum to his pre-hearing statement, Ramirez requested the following relief:

[F]ull restitution of all damages sustained since his wrongful discharge, such as back pay and the aggregate amount of all reasonable costs and expenses, including but not limited to attorney fees and expert-witness fees, reasonably incurred by him in bringing the complaint as well as transportation and other costs associated with alternative job-seeking.

Addendum (filed November 9, 1993).

There was no testimony or other evidence submitted at the hearing as to the amount of Ramirez' damages. However, in the Addendum Ramirez preserved his claim for relief. For this reason and in order to effectuate the important policies underlying the Part 708 regulations, Ramirez will be permitted to supplement the record by submitting written evidence of his damages.

For those cases in which discrimination against an employee in reprisal for a protected disclosure is found to have occurred, the goal of the DOE regulations is to restore the employee to the position in which he or she would otherwise have been, absent the act(s) of reprisal, in a manner similar to that provided by other whistleblower protection schemes. See Sorri, 23 DOE at 89,016. Section 708.10(c) provides that the initial agency decision may include an award of reinstatement, transfer preference, back pay, and all reasonable

costs and expenses (including attorney and expert witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision is issued.

Ramirez does not seek reinstatement, and transfer preference is not applicable to the circumstances of this case. An award of back pay is appropriate, however. Back pay is intended to restore the complainant to his proper position by providing compensation for the tangible economic loss suffered and by acting as a deterrent against unlawful reprisals. See United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973). Ramirez suffered an economic loss as a result of being laid off by BNL on March 20, 1992.

Ramirez must, however, document the extent of that loss during the period from March 20, 1992, until he was rehired to work at BNL.22/ In order to do this, his counsel must submit the information described in Ordering Paragraph (3), infra. As part of his back pay and any other salary-related elements of his award, Ramirez should receive interest to compensate him for the time value of money lost while bringing this complaint. In the Sorri case, the Hearing Officer followed the practice of the Merit Systems Protection Board (MSPB) under the WPA in determining the rate of interest that should be applied to the back pay award to a contractor employee whistleblower under section 708.10(c). The MSPB awards interest on back pay under the Office of Personnel Management regulation found at 5 C.F.R. § 550.806(d). That regulation in turn refers to the "overpayment rate" established by the Secretary of the Treasury under 26 U.S.C. § 6621(a)(1). The overpayment rate is the Federal short-term rate plus two percentage points. The Federal short-term rate for a particular calendar quarter is the short-term rate for the first month of the preceding calendar quarter, rounded to the nearest whole percent.

With respect to attorney's fees, I will follow the precedent of the Sorri case by applying the "lodestar approach" to determine the amount of attorney's fees to award in this case. See 23 DOE at 89,018 (citing Blanchard v. Bergeron, 489 U.S. 87, 95 (1989); Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 886, 888 (1984)). Under this approach, a reasonable attorney's fee is the product of reasonable hours times a reasonable rate. Interpreting the phrase "reasonably incurred" in section 708.10(c) in this manner recognizes the public interest nature of representing a whistleblower under Part 708 and encourages attorneys to take these cases. The Order below will direct counsel for Ramirez to submit a full, documented accounting of her hourly charges for attorney's fees together with any costs and expenses incurred in representing Ramirez. The fee applicant has the burden of producing satisfactory evidence that the requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. See Blum v. Stenson, supra. Therefore, counsel for Ramirez should also submit appropriate evidence to show what is a reasonable hourly rate for her to receive in this case.23/

In addition to the categories discussed above, Ramirez should receive restitution for any other costs "reasonably incurred" in bringing his complaint under Part 708. These additional costs include the value of time lost from any employment he may have had in bringing the complaint (including the time lost for preparing and attending the hearing), and mileage, long distance telephone charges, postage, copying, the court reporter (for the transcript of the hearing), and all other related expenses.24/

IV. Conclusion

For the reasons set forth above, I conclude that Ramirez has established by a preponderance of the evidence that his disclosures of safety concerns regarding asbestos in building 490 and a high voltage incident in building 902 were contributing factors in the determination of BNL to lay him off as a subcontractor electrician on March 20, 1992. However, no such evidence was submitted with respect to Daly, and that firm has therefore been dismissed from this proceeding. BNL has failed to prove by clear and convincing evidence that it would have laid off Ramirez absent his protected activities. I therefore find that a violation of Part 708 has occurred and Ramirez should be awarded back pay lost (plus interest) as a result of the reprisal taken against him, as well as all costs and expenses reasonably incurred by him in bringing the present complaint. After counsel for Ramirez has provided the information described in Ordering Paragraph (3), infra, and BNL has had a chance to comment on that information, I will issue a

Supplemental Order specifying the exact amount to be awarded Ramirez.

It is Therefore Ordered That:

(1) David Ramirez' request for relief under 10 C.F.R. Part 708 is hereby granted as set forth in paragraph (2) below and is denied in all other respects.

(2) Brookhaven National Laboratory/Associated Universities, Inc. (BNL) shall pay to David Ramirez an amount to be determined based on the information provided under paragraph (3) below in compensation for lost salary and benefits, and interest thereon, and for all costs and expenses, including attorney's fees reasonably incurred by David Ramirez in bringing his complaint under Part 708.

(3) Claire C. Tierney, attorney for David Ramirez, shall, no later than 30 days after the issuance of this Decision by the Office of Contractor Employee Protection, submit to the undersigned Hearing Officer and to Andrea S. Christensen, attorney for BNL:

(a) a detailed schedule showing the amount of wages and other benefits that David Ramirez would have earned from his employment at BNL from March 20, 1992, until he was rehired to work at BNL. This schedule must specify the assumptions upon which it is based, including hourly wage and hours per week;

(b) a monthly schedule showing the amount of any wages, benefits and other income that David Ramirez earned from employment or self employment during this same period of time.

(c) copies of Ramirez' Federal Income Tax Return Form 1040 and Schedule C, if any, for 1992 and 1993, together with copies of all W2 forms;25/

(d) a full accounting of her hourly charges for attorney fees together with any costs and expenses incurred in representing David Ramirez, including appropriate documentation of both hours worked and that the rates requested are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation;

(e) a full accounting of any and all other costs and expenses reasonably incurred by David Ramirez in bringing his complaint under Part 708.

Ms. Tierney shall send this information to Ms. Christensen by United States Postal Service Express Mail, or an equivalent private overnight delivery service, or by facsimile transmission.

(4) Andrea S. Christensen, attorney for BNL, shall, no later than 15 days after receipt of a copy of the submission referred to in paragraph (4), submit to the Hearing Officer and to Ms. Tierney a response to that submission. This response shall be limited to the reasonableness and accuracy of the calculations set forth in that submission. Ms. Christensen shall send this information to the Hearing Officer and Ms. Tierney by United States Postal Service Express Mail, or an equivalent private overnight delivery service, or by facsimile transmission.

(5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director of the Office of Contractor Employee Protection.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date: March 17, 1994

APPENDIX

The Nine Incidents

A. Building 911 (January 1992). BNL alleges that Ramirez did not use all new bolts to reassemble cable trays, as instructed by Softye. Ramirez claims that his use of galvanized spray on the rusty bolts was a more efficient way of doing this job and was approved by Softye, but he acknowledges that Softye was unhappy that he did not replace all of the bolts. Tr. at 308, 369.

B. Building 923.* BNL alleges that Ramirez installed wires on the outside of the walls, and not on the inside as instructed by Softye. Ramirez claims that Softye initially did not specify how the wires were to be installed, and that, when Softye expressed displeasure with the outside wiring, he re- routed the wires inside the walls even though this required the use of an additional 40-50 feet of wiring.

C. Building 923 (same day as item B). BNL alleges that Ramirez failed to label plates, as Softye had instructed. Ramirez asserts that he had intended to do so, but had not gotten around to this task which was to be done at the very end of the job.

D. Building 1008.* In connection with a rush job, BNL alleges that Ramirez did not replace light bulbs in the manner in which Softye had instructed. It is undisputed that the job was completed prior to the deadline. Ramirez asserts that his testing of the emergency circuits and ballasts was necessary to ensure that the lights would work.

E. Building 820.* In his interview with the OCEP investigator, Softye alleged that Ramirez failed follow instructions and label a circuit after replacing a disconnect switch. In her prehearing statement, counsel for Ramirez indicated that he did not remember this incident. At the hearing, Ramirez testified about the job, but did not address the allegation, which Softye subsequently testified to.

F. Building 902.* Softye testified at the hearing that several times when he went to check up on work that Ramirez was doing at this site, he found that Ramirez was not in his work area, but was conversing with other electricians. In response to a similar allegation in Softye's statement to the OCEP investigator, counsel for Ramirez asserted that those conversations were work related. However, at the hearing Ramirez did not testify about this matter.

G. Tank Farm Job. Softye alleges that Ramirez spent his time arguing with the team leader, Daniel Ahearn, rather than doing the assigned job. Ramirez claims that the job could not be done because of the absence of necessary tools and other equipment and that this was the responsibility of the lead person, Ahearn.

H. Building 490 (February 28 and March 2, 1992). BNL alleges that Ramirez refused to install temporary carnival lighting, as instructed by Softye. Ramirez asserts that his initial refusal to do this job was because of his concern about asbestos in the ceiling, but that he eventually did the job with the assistance of a co-worker.

I. The raincoat incident.* BNL alleges that Ramirez caused trouble by telling a carpenter to leave the work site and ask his BNL supervisor for a raincoat. Ramirez asserts that he simply brought up the subject, but that the carpenter left the work site at his own initiative.

* No testimony as to date of incident

1/ The OCEP investigation included the acquisition and analysis of relevant documents and the conducting of on-site interviews. Summaries of the interviews are contained in the OCEP Report of Investigation, OCEP Complaint File Tab E. Unless otherwise noted, any statement quoted from the OCEP Report is from the investigator's account of an oral statement made by one of the persons interviewed and is not a direct quote from the interviewee.

2/ Mr. Stelmaschuk's name is spelled "Stomajick" in the hearing transcript.

3/ Carnival and pigtail lighting are two types of temporary lighting fixtures. The former is a pre-assembled fixture that comes in one-hundred foot sections with wiring, lamp sockets every few feet, and cages with hooks so that it can be supported in the ceiling. A pigtail is a device that holds one lamp and is installed in the existing wiring.

4/ On the basis of air samples collected from the carpenters and bulk samples collected from utilities above the ceiling on March 6, S&EP concluded that the amount of asbestos was below OSHA regulatory limits. S&ECP Report at 4. This conclusion was accepted by the DOE in response to an Occupational Safety & Health Complaint filed by Ramirez on March 31, 1992. See Letter from Frank J. Crescenzo, Deputy Area Manager, DOE, to David Ramirez (May 4, 1992), OCEP Complaint File Tab P. This conclusion is disputed by Edward Olmsted of the New York Committee for Occupational Safety and Health in a December 22, 1992 letter to Ramirez. See Respondent's Statement of Issues Presented for Review, Attachment A.

5/ In a telephone conversation with the Hearing Officer on December 9, 1993, Daly's vice president, John P. Daly, III, stated that he had previously sent to the DOE Chicago Area Office a letter commenting on Ramirez' complaint. That letter is not a part of the record of this proceeding.

6/ In contrast, section 708.2(a) provides that, with respect to a disclosure, participation or refusal regarding matters other than health or safety, Part 708 is applicable only to alleged reprisals that occur after the April 2, 1992 effective date. This provision also requires that the underlying procurement contract with DOE contain a clause requiring compliance with the Part 708 regulations. However, once such a clause is incorporated into a procurement contract, any alleged reprisal after the April 2, 1992 effective date is subject to Part 708, even if it occurred prior to the modification of the procurement contract. See Universities Research Association, Inc., 23 DOE ¶ 87,504 (1993) (URA).

7/ Under the DOE Order, an employee could file a complaint with the head of the appropriate DOE office, who was authorized to investigate and resolve the complaint.

8/ At one point during the hearing I incorrectly stated that this disclosure was subject to BNL's stipulation. Tr. at 297.

9/ Softye denies that Ramirez notified him of this incident on the date in February that it occurred and suggests that he may not have heard about it until after Ramirez was laid off. Tr. at 528. However, Slavinsky testified that he heard about the incident several days after it occurred and was pretty sure that he had heard about it from Softye. Tr. 446-47. In addition, Ramirez' testimony that he raised this issue during the March 4 meeting at which Softye was present, id. at 346, is confirmed by Slavinsky's statement to the OCEP investigator. OCEP Report at 27.

10/ During the course of the hearing, counsel for BNL disputed the use of the word "termination" with regard to BNL's action on the grounds that, since BNL was not Ramirez' employer, it could not have terminated his employment. See, e.g., Tr. at 26-27. She did acknowledge that the decision to lay off Ramirez was made by BNL. Id. Regardless of what term is used, it is clear that BNL's action, if it occurred for the reasons alleged by Ramirez, would constitute a prohibited "discriminatory act" as that term is defined in section 708.4. The record in this case also makes it quite clear that Ramirez was an employee of Daly solely by virtue of Daly's contract with BNL, i.e., he had no independent employment contract with Daly outside of his employment at BNL, and that his being laid off by BNL terminated his employment and placed him at the bottom of the union's referral list.

11/ In fact, Ramirez does not even claim that Daly wrongfully discriminated against him in reprisal for his disclosures, and made his complaint solely against BNL. See, e.g., Proposed Disposition at 2 n.*, OCEP Complaint File Tab F.

12/ Although Nelson Briggs, the foreman of the subcontractor electricians and a Daly employee by virtue of Daly's contract with BNL, informed Ramirez that he was laid off, see 1 Tr. at 83-84, BNL does not suggest that he had any role in making the decision to lay off Ramirez.

13/ The standard of proof under section 708.9(d) is much more stringent than the standard applied by the National Labor Relations Board (NLRB) in denying Ramirez' unfair labor practice complaint against Daly and Brookhaven. See Letter Determination of Alvin Blyer, NLRB Regional Director (November 20, 1992) (Blyer Letter), Exhibit B to BNL's Statement of Fact and Law in Opposition to Complainant's Whistleblower Claim. Under the NLRB standard, after a complainant establishes a prima facie case, the respondent only has the burden of going forward; the ultimate burden of persuasion remains with the complainant. See NLRB v. Wright Line, 662 F.2d 899, 904-05 (1st Cir. 1981), cited with approval in Blyer Letter. Thus, in Ramirez' NLRB case, the respondents were not required to establish their position by clear and convincing evidence. For this reason, and because the record in Ramirez' NLRB case is not before me, I have given no weight to the NLRB determination.

14/ Slavinsky first said that he did not think that there would be work for "several weeks," but quickly increased that to "seven, eight weeks ...maybe even three months." Id. at 456. According to the OCEP investigator, Slavinsky stated that "BNL did not anticipate work picking up any time soon." OCEP Report at 27 ¶ i. In his testimony, Slavinsky indicated that, in view of the expected length of the slowdown, layoffs were a necessary cost-cutting measure. Tr. at 456-57. However, BNL did not submit any evidence to show that the work slowdown was projected to be any longer than other slowdowns or that the Laboratory was more concerned about the budgetary implications of work slowdowns in 1992 than in prior years.

15/ Although Slavinsky asserted that there were 600 "or so" unemployed electricians in March 1992, 2 Tr. at 456, I am more inclined to accept the figure of approximately 500, as testified to by two men who were placed at the bottom of the IBEW 25 referral list in that month. See Tr. at 294 (Ramirez); Id. at 237 (Rhodes). Although Rhodes indicated that there may have been a couple of hundred more electricians out of work in 1992 than 1991, he did not appear certain of either number, Id. at 245; see also id. at 235 (in which Rhodes agreed with counsel for BNL that there were "400-odd" electricians out work). Moreover, BNL has not introduced any objective, credible evidence that the number of electricians on the IBEW Local 25 referral list was significantly greater in March 1992 than in 1991 or prior years.

16/ While this testimony was given more than a year and a half after the events in question, Softye did not provide any more details of his rating process when he was interviewed by the OCEP investigator on August 25, 1992, five months after Ramirez was laid off. See OCEP Report at 23-24 ¶ r.

17/ In his direct examination, Softye asserted that Ramirez was "habitually late." Tr. at 533. Under cross examination, he quantified that by stating that Ramirez was late five or six times by ten or fifteen minutes. Id. at 521. Similar testimony was given by Nelson Briggs. Id. at 78 ("maybe once a week for like a month's time ... about five or ten minutes late").

18/ Slavinsky also stated that Lindsay had mentioned that some "personality problems" had been raised by the electricians. Id. However, he did not specify the nature of those problems or indicate that they were unrelated to the safety concerns.

19/ On cross examination, Ramirez stated that this incident occurred on Monday, March 2, prior to his call to Lindsay. Tr. at 412. However, his testimony on direct examination, that the incident occurred the day prior to the March 4 meeting and thus after his call to Lindsay, is confirmed by both Softye and Slavinsky. See id. at 449-51 (Slavinsky); id. at 528-29 (Softye).

20/ Although Ramirez stated that Softye brought up four or five different incidents, the only two non-safety related incidents that he expressly mentions are the tunnel job (Appendix item D) and the tank farm job (Appendix item G). It is likely that Softye mentioned other incidents which BNL has relied on in this

proceeding to justify its termination of Ramirez, including the then-recent carnival lighting incident.

21/ BNL might well have responded to Ramirez' safety concerns differently if he had raised them in a more tactful manner, see, e.g., 1 Tr. at 145 (positive response to safety concern raised by Dennis Thomas). However, there is nothing in Part 708 that permits the Laboratory to avoid the prohibition against reprisals on the grounds that a whistleblower raises safety concerns in an obnoxious manner.

22/ In her Closing Statement, counsel for Ramirez requested a back pay amount through November 1993. Closing Statement at 29. However, there is evidence in the record that Ramirez was rehired by a BNL subcontractor prior to that time and then laid off again. See, e.g, Record of September 23, 1993 Telephone Conversation between Ramirez and Len Tao, OHA attorney (Case No. LWA-0002). Although Ramirez apparently claims that the subsequent layoff was in reprisal for his earlier whistleblower complaint, id., there is no evidence in the record of the present proceeding to substantiate that claim. Accordingly, we will not consider that claim here, and in this proceeding Ramirez will not be awarded back pay for any time after he was rehired to work at BNL.

23/ Reasonable attorney's fees also include the services of a law clerk, paralegal or law student. Cf. 5 C.F.R. § 550.807(f).

24/ I will not, however, grant Ramirez' request for restitution for transportation and other costs associated with alternative job-seeking. Section 708.10(c) does not provide for this relief and Ramirez has not cited any other authority for it. Nor has Ramirez claimed that the transportation costs that he incurred in job seeking were any greater than those he would have incurred commuting to the Laboratory. In addition, Ramirez is not entitled to his requested expert-witness fees since no expert witness testified on his behalf.

25/ Counsel may delete Ramirez' social security number and other personal non-financial information, e.g., information about dependents. However, if Ramirez wishes any of financial information to be treated as confidential, counsel shall submit to the Hearing Officer one complete copy of the income tax returns and two copies with confidential information deleted, and shall prepare a protective order for signature by the parties and their attorneys and issuance by the Hearing Officer.

Universities Research Association, Inc.

March 17, 1994

Initial Agency Decision

Name of Petitioner: Universities Research Association, Inc.

Date of Filing: November 4, 1993

Case Number: LWA-0003

I. Introduction

Universities Research Association, Inc. (URA) manages and operates the Department of Energy's Superconducting Super Collider Laboratory (the Laboratory) in Waxahachie, Texas. On October 27, 1992, URA notified Dr. Naresh Mehta, a physicist at the Laboratory, that it was dismissing him from his employment. Mehta subsequently filed a complaint of reprisal under the provisions of the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (the Whistleblower Regulations). In his complaint, Mehta alleged that URA had dismissed him because he had charged URA with mismanaging the Laboratory's hypercube computer.

The Department of Energy (DOE) referred Mehta's complaint to its Office of Contractor Employee Protection (OCEP). After conducting an investigation, OCEP issued a Report of Investigation and Proposed Disposition on October 15, 1992. OCEP found that URA had violated the Whistleblower Regulations in dismissing Mehta, and proposed that Mehta be granted appropriate remedies.

In response to OCEP's Report and Proposed Disposition, URA filed a request for a hearing under 10 C.F.R. § 708.9(a). We conducted the hearing at the Laboratory site on January 5 and 6, 1994. After consideration of OCEP's Report of Investigation with the testimony given at the hearing and the briefs filed by both parties, we find that URA committed an act of reprisal prohibited under 10 C.F.R. §708.5.

II. Background

A. Mehta's employment at the Laboratory

Mehta was graduated from the University of California at San Diego with a doctorate in applied physics in 1978. After graduation, he worked as a physicist in several research and industrial positions. 1/ On October 22, 1990, Mehta was hired by URA for employment at the Laboratory in the grade of Scientist I. 2/ He was promoted to the grade of Scientist II by November 1991. 3/

When Mehta began work at the Laboratory, he was assigned to the Accelerator Physics Group. Initially, the Group Leader for the Accelerator Physics Group was Dr. Alex Chao. In June 1991, Dr. Michael Syphers replaced Chao as Group Leader. 4/ Mehta was working in Syphers' group at the time of his dismissal.

B. Mehta's concerns about the hypercube

In January, 1991, URA installed a hypercube computer in the Laboratory facility. Unlike a standard computer, the hypercube consists of processing nodes arranged in a parallel configuration. The arrangement facilitates the processing of scientific simulations. Funding for the purchase of the hypercube,

which cost approximately $995,000, was obtained from the DOE capital equipment fund. 5/

In the summer of 1992, Mehta concluded that his scientific research would benefit from the use of the hypercube. Mehta discussed the guidelines for using the hypercube with Ravishankar, the Group Leader of the Project Computing Group. Ravishankar told Mehta that most users were restricted to using 16 of the hypercube's 64 processing nodes. In addition, users generally could run programs for only a few hours at a time on the hypercube. 6/

Ravishankar also told Mehta that certain users could run programs on the hypercube for a longer period of time and use all 64 nodes. 7/ Mehta also learned members of this group could run a program, known as "kick," that would terminate any other programs that were in process. 8/ Dr. George Bourianoff, group leader of the Machine Simulation and Corrections Group, controlled the scheduling of hypercube users desiring to use more than 16 nodes or a few hours of time. 9/

Mehta felt the procedures for using the hypercube were "unfair" and "insulting," and discouraged other scientists from using the hypercube, leading to low utilization of the machine. He occasionally discussed the usage procedures with Syphers, his group leader, during the summer of 1992.

Executing programs on the hypercube requires special techniques. 10/ Between July and October 1992, Mehta logged onto the hypercube on several occasions to learn how to compile and run programs on it. Mehta says he made repeated attempts to log onto the hypercube over Labor Day weekend, September 4-7, 1992. He claimed he was unable to log on because all 64 nodes of the hypercube were in use for the entire weekend. Mehta says he continued to discuss the hypercube usage procedures with Syphers. He stated that usage statistics showed that one scientist, who worked in Bourianoff's group, was responsible for 60% to 90% of total hypercube usage. 11/

C. Mehta's dismissal

During the week of October 19, 1992, Mehta attended a workshop at the DOE's Brookhaven National Laboratory in Upton, New York. He returned to work at the Laboratory on Monday, October 26. That afternoon, he received a phone call from Syphers' secretary.

The secretary asked Mehta to see Syphers at 10 o'clock the next morning. When Mehta arrived, Syphers escorted him to a meeting in the office of Dr. Richard Briggs. As head of Accelerator Physics for the Laboratory, Briggs was Syphers' supervisor. Besides Mehta, Syphers, and Briggs, Merritt Wilkinson, an Employment Specialist at the Laboratory, was present at the meeting.

Thus far, Mehta had a record as a satisfactory employee at the Laboratory. That changed abruptly at the meeting. Briggs told Mehta that he had decided to dismiss him. The reason for dismissal given by Briggs was that Mehta had misused the Laboratory's computer by running programs connected with research unrelated to the Superconducting Super Collider project. Wilkinson instructed Mehta to turn in his keys and identification badge.

Later that day, Mehta requested a meeting with Steven Brumley, URA's general counsel at the Laboratory. The meeting was eventually held on November 3. Brumley arranged for Mehta to be placed on paid administrative leave pending an internal review of his dismissal. In a letter dated December 16, 1992, Douglas Kreitz, URA's personnel director at the Laboratory, informed Mehta that the review was complete and URA was going forward with his dismissal. Mehta filed his complaint of reprisal with OCEP on February 4, 1993.

III. URA's Motion to Dismiss

A. URA's claim that the Whistleblower Regulations were not applicable to Mehta's dismissal

At the outset of this case, URA moved to dismiss on the ground that the Whistleblower Regulations were

not applicable to Mehta's complaint. We denied the motion. Universities Research Association, 23 DOE ¶ 87,504 (December 22, 1993)(the December 22 Decision and Order). Nevertheless, URA has renewed its claim that the Whistleblower Regulations were not effective when Mehta was dismissed.

URA first argues the application of the Whistleblower Regulations to Mehta's dismissal is an example of the retroactive application of an administrative regulation. URA cites numerous cases to show that the retroactive application of regulations is disfavored. This argument is irrelevant to the facts of Mehta's case. The Whistleblower Regulations became effective on April 2, 1992, eight months before Mehta was formally notified of his dismissal. Hence the application of the Whistleblower Regulations to Mehta's dismissal involves no retroactivity.

Nevertheless, URA continues to argue that the Whistleblower Regulations were not effective until after Mehta's dismissal. It bases this contention on a strained reading of the scope provision at 10 C.F.R. § 708.2(a), which provides that:

This part is applicable to complaints of reprisal filed after the effective date of this part that stem from disclosures, participations, or refusals involving health and safety matters, if the underlying procurement contract described in sec. 708.4 contains a clause requiring compliance with all applicable safety and health regulations and requirements of DOE (48 C.F.R. 970.5204-2). For all other complaints, this part is applicable to acts of reprisal occurring after the effective date of this part if the underlying procurement contract described in sec. 708.4 contains a clause requiring compliance with this part.

Mehta's complaint, which concerns a matter of mismanagement rather than health or safety, falls under the second sentence of the section. This sentence provides that the Whistleblower Regulations are applicable if the act of reprisal occurred after the effective date (April 2, 1992), and if the procurement contract between the contractor and DOE contains a clause requiring compliance with the Whistleblower Regulations.

URA interprets the second sentence, however, to mean that the Whistleblower Regulations are applicable only after the procurement contract is modified. URA's procurement contract with DOE was modified on March 31, 1993. As Mehta was formally notified of his dismissal on December 16, 1992, or three months before the procurement contract was modified, URA argues that the Whistleblower Regulations are not applicable to Mehta's dismissal.

We cannot agree with URA's interpretation of §708.2(a). In the first place, the DOE's authority to promulgate the Whistleblower Regulations was granted by the Congress of the United States, and the DOE does not require the approval of URA to put the Whistleblower Regulations into effect. 12/ The modification to URA's procurement contract was mandatory and not a subject of arm's-length bargaining between the DOE and URA. The DOE has not expressed any intent to further delegate its authority to URA by allowing it to choose the date when it would be subject to the Whistleblower Regulations.

In addition, URA's interpretation goes against the plain meaning of the words. If the intent of the section was to provide that the Whistleblower Regulations applied to acts occurring after the procurement contract was modified, it would have said so. Instead, the section provides that the Whistleblower Regulations apply to acts that occur after the effective date of the Regulations. This provision would be mere surplusage if URA's interpretation were to prevail.

The intent of the phrase, "if the underlying procurement contract contains a clause requiring compliance with this part," is clarified in an Acquisition Letter issued by the DOE's Office of Procurement on December 8, 1992:

Contracting officers shall modify existing contracts and purchase orders which fall within the scope of the clause prescription at DEAR 913.507, 922.7101, and 970.5204, to incorporate the Whistleblower Protection for Contractor Employees clause not later than March 31, 1993. However, the clause need not be incorporated into contracts and purchase orders that are due to expire by June 30, 1992.

As the Acquisition Letter makes clear, some contracts, such as those that were to expire by June 30, 1992, would not be modified. Section 708.2(a) exempts these contracts from coverage by the Whistleblower Regulations, by providing that the Regulations are applicable only if the contract is ever modified. This provision has nothing to do with when the Whistleblower Regulations are applicable for contracts that are modified. The effective date is stated earlier in the section to be the effective date of the Whistleblower Regulations. URA does not dispute that (1) the alleged act of reprisal against Mehta occurred after April 2, 1992; and (2) the underlying procurement contract was modified. It follows, therefore, that the Whistleblower Regulations apply to Mehta's dismissal. 13/

B. URA'S Mediation Agreement

In our December 22 Decision and Order, we also pointed out that URA had signed a Mediation Agreement on September 21, 1993. In the Mediation Agreement, URA agreed that Mehta's complaint would be processed under the Whistleblower Regulations if mediation was unsuccessful. Such an agreement, we found, estopped URA from now asserting that the Whistleblower Regulations did not apply to Mehta's dismissal.

URA has objected to our use of the Mediation Agreement, arguing that it is a privileged document relating to an attempt at settlement. The argument is frivolous. So that the ensuing discussion will be clear, we cite the Mediation Agreement in its entirety:

MEDIATION AGREEMENT

This certifies agreement by senior officials of Universities Research Association, Inc. and Dr. Naresh Mehta to attempt to resolve Complaint No. SSC-93-0001, filed pursuant to Part 708, title 10, Code of Federal Regulations, through mediation. At the mutual request of the above parties, Sandra L. Schneider, Director, Office of Contractor Employee Protection (OCEP), and Steven D. Dillingham, Supervisory Adjudicator, OCEP, will assist in the mediation of this complaint.

Both parties have agreed that if attempts to resolve this complaint are unsuccessful, the complaint will be processed further consistent with Part 708, and the Director, OCEP, will issue a Report of Investigation and Proposed Disposition in this case.

/s/ Ezra D. Heitowit, University Research Association, Inc.

/s/ Norman Landa, attorney for Dr. Naresh Mehta

/s/ Sandra L. Schneider

URA asserts that the Mediation Agreement is "similar" to settlement discussions which are inadmissible as evidence under Federal Rule of Evidence 408. That Rule provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed at to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.... This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

(Emphasis added). It is clear that Rule 408 provides for the exclusion of certain specific matters, and that the Mediation Agreement is not one of them. The Mediation Agreement is not an offer or promise, but an executed agreement. It makes no mention of valuable consideration. It was not cited by us in the December 22 Decision and Order to prove URA's liability for Mehta's dismissal or the amount due to Mehta. Contrary to URA's assertion, the Mediation Agreement does not constitute settlement negotiations that are protected by Rule 408. It is merely an agreement to enter into negotiations, and as such is not

privileged. Cf. Hanson v. Waller, 888 F.2d 806, 813 (11th Cir. 1989) (letter from counsel asking opposing counsel to discuss the case held not excluded under Rule 408). In short, there is nothing in URA's arguments that refutes our earlier finding that Mehta's dismissal is subject to the Whistleblower Regulations.

IV. The inclusion of OCEP's Report of Investigation in the

record

A. URA's claim that the Proposed Disposition is not contemplated by the Whistleblower Regulations

URA argues that the Proposed Disposition issued by OCEP should be stricken from the record. URA first contends that the Proposed Disposition "is not a document permitted, recognized, or prescribed by Part 708." 14/

In making this argument, URA has ignored the clear language of the Whistleblower Regulations. Section 708.9(f) provides that:

The investigator, within 60 days of appointment, shall submit a Report of Investigation to the Director. The Report of Investigation shall become a part of the record and shall state specifically a finding, and the factual basis for such finding, with respect to each alleged discriminatory act.

The Report of Investigation issued by OCEP on October 15, 1992 consists of two parts. The first part, not separately titled, consists of a narration of the facts in the case and a summary of the testimony obtained by the OCEP investigators. This first part of the Report draws no conclusions and states no findings.

The second part of the Report is the subject of URA's objection. This part contains the OCEP's finding, as required in the Whistleblower Regulations. In issuing the Proposed Disposition, the Director of OCEP is merely carrying out the duty to make and report a finding that is delegated to her in § 708.9(f) of the Whistleblower Regulations. Furthermore, since it is a part of the Report of Investigation, § 708.9(f) of the Whistleblower Regulations directs us to make it a part of the record.

B. URA's claim that the Proposed Disposition is inadmissible as opinion or hearsay

URA also objects to the Proposed Disposition section of the Report on the grounds that it "contains views and opinions" and is "composed, in its entirety, of inadmissible hearsay." 15/ There is no reason, however, why rules excluding opinion and hearsay evidence, formulated to protect juries, should be binding in administrative proceedings, because

One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received, and, since he will base his findings upon the evidence which he regards as competent, material, and convincing, he cannot be injured by the presence in the record of material which he does not consider competent or material.

Donnelly Garment Co. v. NLRB, 123 F.2d 215, 224 (8th Cir. 1942).

It is well-settled, therefore, that administrative agencies like the Office of Hearings and Appeals are not bound by the technical rules of evidence that control judicial proceedings. FTC v. Cement Inst., 333 U.S. 683 (1948); reh'g denied, 334 U.S. 839 (1948). The guiding principle in administrative proceedings is to admit "all evidence which can conceivably throw any light upon the controversy." Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (3rd Cir. 1945), cert. denied, 326 U.S. 734 (1945), reh'g denied, 326 U.S. 809 (1945), motion denied, 155 F.2d 1016 (2d Cir. 1946).

Thus, neither of the judicial rules excluding opinion evidence or hearsay evidence is mandatory in an administrative proceeding. Brockton Taunton Gas Co. v. SEC, 396 F.2d 717 (C.A.Mass 1968) (opinion

evidence); Martin- Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974), cert. denied, 419 U.S. 1113 (1975), reh'g denied, 420 U.S. 984 (1975) (hearsay).

We will therefore deny URA's argument to exclude the Proposed Disposition section of the Report of Investigation. In so doing, we will follow the provision of the Whistleblower Regulations that we "may rely upon, but shall not be bound by, the findings contained in the Report of Investigation." 10 C.F.R. § 708.10(b).

V. Mehta's prima facie case

A. The protected status of Mehta's disclosure

The Whistleblower Regulations require a complainant in a whistleblower case to establish by a preponderance of the evidence: 1) that there was a protected disclosure, participation, or refusal; and (2) that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant. 10 C.F.R. § 708.9(d).

URA argues that Mehta has failed to meet the first requirement, claiming Mehta's expressions of dissatisfaction about the hypercube usage procedures are not protected under the Whistleblower Regulations. According to URA, Mehta simply complained that the priorities for using the hypercube were "unfair and insulting." By URA's reasoning, Mehta cannot claim the protection of the Whistleblower Regulations because he made his disclosures merely to "further his own private interests." 16/

The record does not support URA's characterization of Mehta's complaints. Mehta testified that he discussed with Syphers an alternate plan for scheduling on the hypercube. 17/ Syphers confirmed this in his testimony, stating that Mehta "started telling me about how he felt the ... allocation on the hypercube could be done better. And he was concerned about it and wanted to know if there was anything we could do to improve that." 18/ Furthermore, Mehta asserted in an electronic mail message, "If a user cannot get even ONE node on our 64-node Hypercube for three days, there is something wrong with the way the Hypercube resources are managed." 19/

The record thus indicates that Mehta was concerned about the general procedures for use of the hypercube, and not merely his own use of the machine. Furthermore, if he had been concerned only about mismanagement as it applied to his personal use of the hypercube, we fail to see why that invalidates the protected status of his complaints. 20/ As the Whistleblower Regulations specifically protect disclosures relating to mismanagement, we find that Mehta's criticism of the hypercube management forms a protected disclosure under the Whistleblower Regulations. 10 C.F.R. §§ 708.1; 708.3; 708.5 (a)(1)(iii).

Finally, we note that we need not reach the question of whether Mehta was right in claiming the hypercube was mismanaged. The Whistleblower Regulations provide protection for the whistleblower who makes his disclosure in good faith, but do not require that he be correct. 10 C.F.R. 708.5(a)(1).

B. URA's managers' awareness of Mehta's whistleblowing

URA claims that "Mehta was not terminated because he voiced complaints about the hypercube's user priorities. Briggs, the supervisor responsible for terminating Mehta, was unaware of Mehta's concerns. Briggs based Mehta's termination on the fact that most of the work he performed was not relevant to [Laboratory] work." 21/

URA, in other words, believes that Mehta's dismissal could not be retaliatory if Briggs did not know about his complaints. We disagree. Syphers and Bourianoff, managers who were directly below Briggs, were aware of Mehta's complaints. Though Briggs was formally responsible for the decision to dismiss Mehta, his decision was not based on his personal assessment of Mehta's work. Briggs testified that he was not familiar with Mehta's work at the Laboratory until July 1992. Even after July 1992, his assessment of Mehta's work was not based primarily on first-hand knowledge, but on his discussions with Syphers and

Bourianoff. 22/

Briggs' testimony shows that Syphers' advice was instrumental in his decision to dismiss Mehta. 23/ In addition, it appears that Bourianoff played a part in Mehta's dismissal. Bourianoff testified that Briggs, before Mehta's dismissal, said in a meeting with Syphers and Bourianoff, "I'm getting ready to terminate Dr. Mehta. Do either of you have a problem with that?" Bourianoff told him he had no problem with dismissing Mehta. 24/

More importantly, Bourianoff assumed responsibility for reporting to Syphers that Mehta's computer file directory contained material unrelated to the Laboratory's mission. 25/ The record indicates that this report played a significant part in Syphers' finding that Mehta misused government property and his decision to recommend to Briggs that Mehta be dismissed.

It is difficult to explain Bourianoff's involvement in Mehta's dismissal except as his reaction to Mehta's complaints about his management of the hypercube. Bourianoff's key role here is consistent with the fact that he was instrumental in the Laboratory's acquisition of the hypercube. 26/ During Mehta's employment at the Laboratory, Bourianoff was personally responsible for managing the hypercube and scheduling users on it. 27/

Syphers admitted that Mehta disclosed to him his dissatisfaction with the hypercube management. 28/ Bourianoff, however, testified that no one ever complained to him about lack of access to the hypercube. 29/ The evidence contradicts Bourianoff's assertion.

An indication that Bourianoff was aware of complaints is found in an electronic mail message he sent to David Pan on August 20, 1992:

I am responsible [sic] for allocating time on the cube according to my evaluation of the relevant urgency of production jobs. This is NOT your or Ravi's responsibility. You are supposed to provide system support and have absolutely [sic] no responsibility or authority to allocate time. I take full responsibility for my decision and if you receive any complaints, please direct them to me. If the content of this message is unclear in any way, I will be happy to discuss it in person. 30/

It is difficult to conceive of such a message, significantly titled by Bourianoff "Cube Usage Contention," being sent unless some dispute had arisen over allocating time on the hypercube. In addition, the vehement tone of the message evidences annoyance on the part of Bourianoff in response to a challenge to his management of the hypercube.

Bourianoff also testified that he knew nothing about Mehta's difficulties logging onto the hypercube over the Labor Day weekend. 31/ This assertion is also contradicted by the evidence. Pan testified that he told Bourianoff about Mehta's problems logging on over the Labor Day weekend, specifying that it was Mehta who was making the complaint. 32/ In doing so, Pan would have been following the instructions of Bourianoff in the electronic mail message cited above, which had been sent less than three weeks earlier.

Bourianoff, in carefully chosen words, denies Pan's claim that Pan told him that Mehta had complained about hypercube scheduling. He concedes that Pan and Ravishankar, Pan's supervisor, came to him on several occasions, saying that "they wanted the ability to allocate time. And they said that people were putting pressure on them. They refused to name the people." 33/ Bourianoff also concedes that Syphers came to him to discuss a problem Mehta had with the hypercube. Bourianoff characterized Syphers' discussion with him as "more of a request for information" than a complaint. 34/ It is apparent from his testimony that Bourianoff's claim that he knew of no complaints about the management of the hypercube is plausible only by using a very restricted definition of "complaint." During his testimony on the issue it was clear from Bourianoff's demeanor that he was answering questions by using carefully chosen words and was not being candid.

Even if Pan or Syphers did not name Mehta in relaying his complaints to Bourianoff, it would not have

been difficult for Bourianoff to figure out that Mehta was the source of the complaints. Only about ten to fifteen people were using the hypercube at any one time. 35/ The majority of the users apparently came from Bourianoff's own group, which consisted of twelve people. 36/ Bourianoff could have easily, by process of elimination, determined that it was Mehta who took issue with the hypercube usage procedures.

Further evidence that Bourianoff knew of Mehta's complaints, is found in a memorandum Bourianoff issued for general distribution on September 9, 1992, the day after Mehta complained to Pan. The memorandum stated:

The current policy regarding access to the cube is to encourage the widest possible utilization within the laboratory.... For short runs ... just log onto Sycamore and do it. The machine is available on a first come first serve basis. In order to get larger blocks of time for production runs, it is necessary to check with me so I can coordinate the work load. Up to the present time, it has been possible to fill all such requests promptly. When and if competing demands for time exceed the available resources, the mechanism exists to convene a committee of interested parties to help set priorities. Until such time however, I would like to handle the scheduling on an informal basis. 37/

Bourianoff's memorandum does not announce a new policy about the hypercube; it merely restates and, to some extent, defends the existing policy. It is difficult to see why Bourianoff would issue such a memorandum unless he was aware that was some dissatisfaction with the scheduling of the hypercube. The fact that the memorandum was issued the day after Mehta complained to Pan raises the strong inference that Bourianoff was aware of Mehta's complaint.

Retaliatory intent can be inferred not only from knowledge of whistleblowing activity by the official who effectuates the dismissal, but also from knowledge by an official who advises dismissal. Warren v. Department of Army, 804 F.2d 654 at 658 (Fed. Cir. 1986). If this were not the case, a contractor could easily evade the Whistleblower Regulations by delegating all dismissal decisions to an official who was insulated from day-to-day contact with the whistleblower. It is therefore immaterial whether Briggs knew about Mehta's complaints, because Syphers and Bourianoff knew and were instrumental in influencing Briggs to dismiss Mehta.

C. Mehta's disclosure as a contributing factor in his dismissal

URA also argues that "to state a claim under [the Whistleblower Regulations], an employee must suffer a reprisal or retaliation because of his or her disclosure.... In other words, [the Whistleblower Regulations require] a 'nexus' between the employees actionable disclosure and his or her termination." 38/ URA questions whether Mehta has established the "nexus" between his complaints and his dismissal.

Contrary to URA's assertion, the Whistleblower Regulations do not require the showing of a "nexus." Instead, they require that the complainant show that the protected disclosure was a contributing factor in a personnel action taken against him. 10 C.F.R. § 708.9(d).

In order to clarify the meaning of "contributing factor," we look to a corresponding provision in the Whistleblower Protection Act (WPA) (Pub.L. No. 101-12, 103 Stat. 16, codified at various sections of 5 U.S.C.). The WPA protects employees of the federal government from reprisals for whistleblowing. The legislative history reveals that Congress intended the term "contributing factor" to have an expansive definition:

The words "a contributing factor" ... mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant", "motivating", substantial", or "predominant" factor in a personnel action in order to overturn that action.

135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20).

Thus, the "contributing factor" test means that:

a personnel action, taken "because of" a protected disclosure, or "as a result of " a prohibited personnel practice ... may be taken "because of" or "as a result of" many different factors, only one of which must be a protected disclosure and a contributing factor to the personnel action in order for the [the whistleblower's] protection to take effect. Indeed, ... "any" weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the "contributing factor" test. It is thus evident ... that ... a whistleblower need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action....

Marano v. Department of Justice, 2 F.3d 1137 at 1140-41 (Fed. Cir. 1993) (emphasis in the original). Mehta has shown that the two principal figures in his dismissal, Bourianoff and Syphers, were aware of his disclosures and acted to have him dismissed only after they learned of the disclosures. We find that Mehta has therefore met the burden of showing that his disclosures were a contributing factor in his dismissal.

Mehta has shown that he made a protected disclosure about perceived mismanagement of the hypercube, and that he was dismissed from his employment. 39/ He has further shown that the disclosure was a contributing factor in his dismissal. We find therefore that Mehta has made prima facie case of retaliatory dismissal for whistleblowing.

VI. URA's defense that the dismissal was not retaliatory

A. URA's allegation that Mehta misused government property

The burden now shifts to URA to prove by clear and convincing evidence that it would have dismissed Mehta absent his whistleblowing. 10 C.F.R. 708.9(d). Throughout the proceeding, URA has advanced several different reasons for dismissing Mehta. None of them is credible.

URA first claimed that Mehta had misused government property. According to URA, Mehta's misuse consisted of running programs of personal interest in adaptive optics that were not relevant to the Laboratory's work. 40/ We find that the evidence does not support a credible claim of misuse by Mehta.

URA bases this charge on two incidents that occurred shortly before Mehta's dismissal. In the first incident, Syphers observed some materials that Mehta was printing on a Laboratory printer. Syphers noticed that the materials related to adaptive optics. 41/ In the second incident, Syphers, at Bourianoff's instigation, examined the directory of the computer at Mehta's work station. 42/ Syphers found that 86% of the disk space on Mehta's hard disk that contained files was occupied by files relating to adaptive optics. 43/

It is not clear whether, by misuse of "government property" URA refers to Mehta's computer work station or the hypercube. As to Mehta's work station, we are not at all persuaded that his activities constitute misuse of government property. We believe that the costs of storing files on Mehta's hard disk were de minimis. In addition, we do not believe the storage of the adaptive optics program files was an improper use of government property.

URA never established that Mehta's programs in adaptive optics could be fully differentiated from his work for the Laboratory. Mehta's primary function at the Laboratory was to produce computer codes. 44/ Mehta believed that he could modify codes from the field of adaptive optics, which he was familiar with, for use in accelerator physics. 45/ His belief is supported by the testimony of Frank Guy, a physicist at the Laboratory. Mehta gave Guy a program routine that he had originally developed for adaptive optics, but which Guy used in making calculations for the Laboratory's linear accelerator. 46/

Dr. Harvey Lynch, a physicist at the Laboratory, is another witness who testified that Mehta's programs

were potentially relevant to the Laboratory's mission. Lynch had been assigned by URA to conduct an independent review of Mehta's dismissal. Lynch reported:

It is [Mehta's] position that [his computations on adaptive optics were] a platform to study a more general problem of dynamic control, and he believes that such control algorithms are of value to the [Superconducting Super Collider].... The fundamental problem is whether or not the work on dynamic control is applicable to the machine. I am not in a position to evaluate this question... On the face of it, the idea makes sense. I have a great deal of difficulty with the fact that Mehta apparently worked on such things for quite a while under the impression that it was useful, if in fact they are not useful. Apparently, no one told him they were not useful to the machine. If that is the case how is he supposed to know? He was hired at [the Laboratory] for his computing skills; he is not an accelerator physicist. 47/

Therefore, in view of the low cost and possible uses to the government, we do not believe the storage of Mehta's adaptive optics programs on his hard disk can be considered a misuse of government property.

Furthermore, we cannot agree that Mehta misused the hypercube. Mehta's use of the hypercube was minimal. The evidence shows that Mehta logged on to the hypercube five times in order to familiarize himself with how to compile, link, and run programs on it. 48/ Apparently, he was logged on for a very brief time and never used more than one node. 49/ Mehta is a highly- educated, experienced computational physicist who would have a legitimate interest in learning how to run programs on the hypercube. Even if the programs he ran were not directly related to the Laboratory's work, Mehta's effort to familiarize himself with parallel processing by running simple programs he had written in the past seems a valid and reasonable use of the hypercube. Bourianoff conceded that there were "legitimate things such as linking and computing" that one could learn by logging on to one node of the hypercube. 50/

We note also that the hypercube was available to persons outside the Laboratory; Bourianoff testified that a Professor Sugar of the University of Santa Barbara "ran extensively" on the hypercube. 51/ If someone outside the Laboratory could run programs unrelated to the Laboratory's mission, it is unclear why a scientist at the Laboratory should not have the same privilege.

There are two final circumstances supporting the conclusion that Mehta did not misuse government property. First, URA recognized that it is under a contractual obligation to report significant instances of misuse of government property to the DOE Inspector General. Steven Brumley, URA's general counsel at the Laboratory, admitted in January, 1993 that URA had not found grounds at that time to report Mehta to the Inspector General. 52/ At the hearing, Brumley conceded that URA has never reported Mehta's alleged misuse to the Inspector General. 53/

Second, the record shows that Mehta's work on adaptive optics was generally known to URA managers and that Mehta was never given any specific guidance regarding his use of government computers. 54/ It is simply not credible that URA had evidence of misuse that would warrant dismissing Mehta on the spot, but not enough information to discuss the matter with him prior to the dismissal, nor enough to fulfill its contractual obligation to submit a report to the Inspector General.

B. URA's allegation that Mehta was an unproductive employee

URA next purports to have dismissed Mehta because he was an unproductive or incompetent employee. 55/ At the hearing, both Briggs and Syphers testified to the inadequacy of Mehta's work. 56/ There is no corroboration in the evidence to support their testimony.

Mehta's performance was formally evaluated twice by URA. Both evaluations were written by Syphers. In the first evaluation, dated June 30, 1991, Mehta's overall performance was rated "fully satisfactory." 57/ The evaluation noted that Mehta had attended weekly accelerator physics classes. 58/

Syphers claimed at the hearing that he had little knowledge of Mehta's performance when he wrote the first evaluation because he had just moved to the Accelerator Theory Group. 59/ He said that he based the

evaluation on nothing more than his 25 days as group leader, and did not consult with Chao, his predecessor as group leader. 60/ Chao, however, stated that he provided Syphers with input for Mehta's first evaluation. 61/ As Chao had merely moved to another position at the Laboratory, it seems improbable that Syphers would have been unable to get his evaluations of the group members. We see no reason, therefore, to question that Mehta's first evaluation accurately reflects his performance as jointly appraised at the time by Chao and Syphers.

Mehta's second evaluation, dated July 22, 1992, was written by Syphers only three months before the dismissal. The rating scale on this form differed from the one used in Mehta's first evaluation; Syphers gave Mehta an overall rating of "meets expectations." On the evaluation form, Syphers wrote "Naresh produces quality work in a timely manner. He brings new insights to accelerator physics and operational issues with his experience in optimization and control algorithms; creative and resourceful." 62/

Syphers attempted to downplay this evaluation at the hearing by relating that he had originally prepared an evaluation rating Mehta as less than satisfactory. No copy exists of the purported original evaluation. Syphers said that he had to go over the evaluation with Mehta right after Mehta's return from a vacation. Syphers claimed that he felt it was not right to give someone a less-than-satisfactory evaluation immediately after a vacation, so he tore up the original evaluation and wrote the satisfactory evaluation. We do not believe that Syphers could be so derelict in carrying out his supervisory responsibilities.

We find that Syphers' attempt to explain away Mehta's positive performance appraisals completely lacks credibility. Except for rationalizing statements made by URA managers after the dismissal, the evidence shows that Mehta held a satisfactory employment record. Even as late as August 1993, ten months after Mehta's dismissal, Syphers commented that, "Dr. Mehta's output from his work was to produce codes and papers. The codes developed by him were unique and original. They were not an extension or add-on to a previously produced code. Many of the codes ... take a long time to develop." 63/ In addition, two of Mehta's colleagues in the Accelerator Physics Group -- Drs. Kenneth Kauffmann and Theodore Garravaglia -- testified that the quality of his work was on a par with the work of other physicists at the Laboratory. 64/

Here again, we have a situation in which URA management alleges that Mehta's performance was a basis for immediate dismissal, but the record shows that management did not deem his performance unsatisfactory enough to discuss with him before the dismissal. We find URA's assertions unreasonable, and conclude that there is no evidence to support URA's allegation that Mehta was dismissed because of poor performance. The record clearly shows that the issue of the quality of Mehta's work was raised only after URA realized that the evidence would not sustain a charge of misuse of government property.

C. URA's allegation that Mehta's work was irrelevant

Finally, URA alleges that Mehta's work was not "relevant" to the work of the Laboratory. 65/ This allegation has the same defects as charges of Mehta's poor performance -- there is simply no evidence to support it, it was not considered important enough to have been discussed with Mehta before his dismissal, and it was developed only after Mehta was dismissed. In the 1992 performance evaluation, Syphers set a goal for Mehta to "continue present studies." URA now claims that, only 90 days later, these same studies were found unrelated to the Laboratory's mission. URA made no attempt to show that the Laboratory's mission had undergone such a rapid change.

VII. Conclusion

After considering all the testimony, we have arrived at several conclusions concerning the witnesses. We believe the leading figure in Mehta's dismissal was Bourianoff. Despite his assertion that he did not know about Mehta's complaints, we believe that Bourianoff knew, or could infer, that Mehta was critical of the management of the hypercube. The evidence indicates that Bourianoff allowed outside users to access substantial blocks of time on the hypercube and was very sensitive to criticism of his management of the machine. Realizing that Mehta was critical of his management, and that the outside use of hypercube

would be difficult to explain to an investigator, Bourianoff decided to look at Mehta's file directory. He then reported to Syphers a series of half-truths that implied Mehta was misusing the hypercube. Mehta's dismissal soon followed.

After Mehta had been dismissed and it was apparent that the original charge of misuse of government property was untenable, URA managers tried to rationalize the dismissal with charges of poor performance and lack of productivity. These charges are unsupported by any evidence. We find that the real motive, therefore, was reprisal for Mehta's criticism of Bourianoff's management of the hypercube.

URA's testimony in defense of its treatment of Mehta is glaringly inconsistent. URA's managers assert that they dismissed Mehta because of the inadequacy or irrelevancy of his work. These managers would have us believe that Mehta had performed so poorly that they should dismiss him without bothering to hear his side of the matter. 66/ Yet these same managers worked with Mehta for two years without finding it necessary to talk with him about any deficiencies. We do not believe that URA's managers would have operated in such a self-contradictory manner.

Far from being clear and convincing, URA's evidence to establish a legitimate motive for dismissing Mehta is muddled and incredible. The inability of URA to set out a consistent account of the dismissal confirms our belief that the reasons it adduces for dismissing Mehta are pretexts. We find that URA has failed to meet its burden of showing by clear and convincing evidence that it would have dismissed Mehta absent his complaints about the management of the hypercube. We conclude therefore that URA violated the provisions of 10 C.F.R. Part 708 in dismissing Mehta.

It is Therefore Ordered That:

(1) Universities Research Association, Inc. (URA) shall reinstate Dr. Naresh Mehta (Mehta) to his former position as Scientist II or a comparable position.

(2) URA shall award Mehta all pay and benefits, including medical insurance payments, withheld from him due to the adverse actions taken against him by URA, retroactive to December 16, 1992, and all costs and expenses reasonably incurred by him in bringing Complaint No. SSC-93-0001 under 10 C.F.R. Part 708.

(3) Yona Rozen, attorney for Mehta, shall, no later than 30 days after the date of this Decision, submit to the Hearing Officer and to URA a full accounting of her hourly charges for attorney fees and any costs, expenses, and expert witness fees incurred in representing Mehta, including documentary evidence that the rates requested are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. URA shall reimburse Rozen for all such fees.

(4) URA shall remove from Mehta's personnel records all information that indicates that Mehta's employment with URA was terminated for cause.

(5) Within thirty days of the date of this Decision, and notwithstanding any appeal or request for review, URA shall submit to the Hearing Officer a schedule listing the amount or description of each item of restitution it proposes to render to Mehta in accordance with Paragraph 2 above, together with the manner in which it proposes to provide the restitution. If Mehta objects to the amount, description, or manner of provision of any of the items of restitution proposed by URA, or requests any item not proposed by URA, he shall submit a statement explaining such objection or request to the Office of Hearings and Appeals within 15 days of the receipt of the schedule from URA. The Office of Hearings and Appeals will then determine the proper amount and manner of provision.

(6) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director, Office of Contractor Employee Protection.

Thomas L. Wieker

Deputy Director

Office of Hearings and Appeals

Date: March 17, 1994

Notes:

1/ Hearing Exhibit Mehta-1.

2/ Report of Investigation at 3.

3/ Hearing Exhibit Mehta-2.

4/ Report of Investigation at 3.

5/ "Acquisition Plan, Research Computer for the Superconducting Super Collider Laboratory, Accelerator Systems Division," Hearing Exhibit URA-8 at 10.

6/ Tr. at 343-44.

7/ Statement of Mehta, Exhibit 20 to Report of Investigation.

8/ See electronic mail message from Ben Cole to David Pan, dated July 29, 1991 (Exhibit 31 to Report of Investigation). The message provides that members of I&D, or the Instrumentation and Diagnostics Group, have priority in use of the hypercube over all other users. Bourianoff was head of a section within the I&D Group. Statement of Kauffmann, Exhibit 17 to Report of Investigation. After a reorganization, the I&D Group was dissolved and priority use of the hypercube was apparently assumed by members of Bourianoff's Machine Simulations and Corrections Group. Tr. at 132; cf. Hearing Exhibit URA-2 (Laboratory organization in October 1990) with Hearing Exhibit URA-3 (Laboratory organization in February 1993). All hypercube users at the Laboratory, including Mehta, had access to a version of "kick" that would terminate programs run by users outside the Laboratory. Tr. at 129.

9/ Tr. at 123; 125; 137; 154.

10/ Tr. at 117; 128; 159.

11/ Statement of Mehta, Exhibit 20 to Report of Investigation.

12/ See 42 U.S.C. 2201(b), 2201(c), 2201(i), and 2201(p); 42 U.S.C. 5814 and 5815; 42 U.S.C. 7251, 7254, 7255, and 7256.

13/ The Acquisition Letter also answers another argument that URA makes. URA claims that "following the [December 22 Decision and Order's] logic to its absurd end, URA's contract could have been modified today -- more than a year after URA's alleged acts of reprisal -- and Mehta would still be able to access its procedures. The drafters of 10 C.F.R. Part 708 could not have intended this sort of far-reaching retroactive effect." Post-Hearing Brief at 19. As the Acquisition Letter shows, the modification of all contracts that were going to be modified had to be completed by March 31, 1993, avoiding the "far-reaching retroactivity" that concerns URA.

14/ Pre-hearing Brief at 4.

15/ Pre-hearing Brief at 4.

16/ Pre-hearing Brief at 10

17/Tr. at 357-58.

18/ Tr. at 210.

19/ Electronic Mail Message from Mehta to David Pan, leader of the Laboratory's Programming and Analysis Section, dated September 8, 1992; Exhibit 2 to Report of Investigation (emphasis in the original).

20/ URA discusses at some length whether Mehta's complaints would have been protected by the public policy exception to the common-law right of an employer to terminate employment at will. Pre-hearing Brief at 7-10. Since this case arises under a federal regulation that specifically includes disclosures relating to mismanagement, we do not see how the analysis of a more restrictive common-law doctrine sheds any light on the issues. We note further that Mehta's allegations about the hypercube did not merely involve matters of URA's internal management. The hypercube cost nearly $1 million of federal funds, and the potential mismanagement of it is a legitimate concern of the DOE.

21/ Pre-hearing Brief at 13.

22/ Tr. at 35-40.

23/ Tr. at 112-115.

24/ Tr. at 146.

25/ Tr. at 158-59.

26/ Tr. at 122.

27/ Tr. at 123-25.

28/ Statement of Syphers, Exhibit 27 to Report of Investigation.

29/ Tr. at 126.

30/ Exhibit 30 to Report of Investigation (emphasis in the original).

31/ Tr. at 133.

32/ Sworn statement of David Pan submitted to the Office of Hearings and Appeals, February 25, 1994. Pan was out of the country during the hearing.

33/ Tr. at 138.

34/ Tr. at 149.

35/ Tr. at 128.

36/ Tr. at 112; 135.

37/ Exhibit 3 to Report of Investigation.

38/ Pre-hearing Brief at 11 (emphasis in the original).

39/ In fact, there is nothing in the record that indicates Mehta's employment has been formally terminated. It appears that he has been in a permanent leave-without-pay status since December, 1992. We find,

however, that placement in such a status is the practical equivalent of dismissal for purposes of this proceeding.

40/ Report of Lynch, Exhibit 4 to Report of Investigation; Statement of Brumley, Exhibit 14 to Report of Investigation; Statement of Chao, Exhibit 15 to Report of Investigation; Statement of Syphers, Exhibit 27 to Report of Investigation.

41/ Tr. at 181-83.

42/ Tr. at 182-83.

43/ Tr. at 184. It was never made clear what this 86% represented. Briggs testified that he did not even know what the 86% meant, although he considered it a factor in his decision to dismiss Mehta. Tr. at 56; 109.

44/ Statement of Syphers, Exhibit 27 to Report of Investigation.

45/ Report of Lynch, Exhibit 4 to Report of Investigation.

46/ Tr. at 415-17.

47/ Exhibit 4 to Report of Investigation. Lynch was requested to make his report after the October incident in Briggs' office and he completed it before Kreitz notified Mehta that the decision to dismiss was final. Lynch's report is critical of both the ground for dismissing Mehta and the procedures that URA took in dismissing him. Apparently, the report was ignored by URA's management. Lynch was asked to give an oral report at a meeting of URA managers, but stated that "my feeling coming out of the meeting was that Dr. Mehta was to be fired regardless of the results of my findings." Exhibit 19 to Report of Investigation.

48/ Tr. at 134; Statement of Bourianoff, Exhibit 13 to Report of Investigation.

49/ Tr. at 352.

50/ Tr. at 159-61

51/ Tr. at 129.

52/ Letter from Brumley to Yona Rozen, counsel for Mehta, dated January 19, 1993, Exhibit 8 to Report of Investigation.

53/ Tr. at 543.

54/ Tr. at 178-80

55/ Report of Lynch, Exhibit 4 to Report of Investigation; Letter of Brumley to Rozen, Exhibit 8 to Report of Investigation; Statement of Briggs, Exhibit 13 to Report of Investigation; Statement of Brumley, Exhibit 14 to Report of Investigation; Statement of Syphers, Exhibit 27 to Report of Investigation.

56/ Tr. at 38; 173. Briggs testified that his perception of Mehta's work was obtained from conversations with Syphers. Tr. at 39.

57/ Hearing Exhibit URA-13.

58/ In his testimony at the hearing, Syphers claimed that Mehta attended only a few of the accelerator classes in attempting to show that Mehta was an unmotivated employee. Syphers' testimony would seem to be contradicted by his words in the evaluation. Tr. at 174.

59/ Tr. at 169-70.

60/ Tr. at 217.

61/ Statement of Chao, Exhibit 15 to Report of Investigation.

62/ Hearing Exhibit URA-14.

63/ Statement of Syphers, Exhibit 27 to Report of Investigation.

64/ Statement of Kauffmann, Exhibit 17 to Report of Investigation and Tr. at 475 (Kauffmann); Tr. at 502 (Garravaglia).

65/ Letter from Douglas P. Kreitz, URA Personnel Director at the Laboratory, to Mehta, dated December 16, 1992, Exhibit 5 to Report of Investigation; Letter from Brumley to Rozen dated January 19, 1993, Exhibit 8 to Report of Investigation.

66/ Tr. at 78.

Case No. LWA-0005

July 29, 1994

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Francis M. O'Laughlin

Date of Filing: January 10, 1994

Case Number: LWA-0005

This Decision involves a complaint filed by Francis M. O'Laughlin (O'Laughlin) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. O'Laughlin contends that certain reprisals were taken against him after he raised concerns relating to health and safety with Boeing Petroleum Services, Inc. (BPS), a DOE contractor. The alleged reprisals included wrongfully denying O'Laughlin a management position to which he ostensibly was entitled, and later taking adverse personnel action against O'Laughlin which included a demotion and corresponding salary reduction. The DOE's Office of Contractor Employee Protection (OCEP) investigated the complaint and found that O'Laughlin had not actually made health and safety disclosures that might entitle him to relief for the alleged reprisals under Part 708. O'Laughlin requested a hearing before the Office of Hearings and Appeals (OHA) under 10 C.F.R. ' 708.9(a), reasserting his claim that reprisals were taken against him by BPS as a result of raising health and safety concerns. The hearing in this case was held on May 18 and 19, 1994, in New Orleans, Louisiana.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for processing complaints of this nature.

Before Part 708 was promulgated, contractor employee protection at DOE's government-owned, contractor-operated (GOCO) facilities was governed by DOE Order 5483.1A (6-22-83) ("Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities"). As with Part 708, the Order prohibited contractors from taking reprisals against whistleblowers. However, no formal procedures existed under Order 5483.1A. The Part 708 regulations were adopted to improve the process of resolving whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for

review by the Secretary of Energy or her designee.

B. Factual Background

The following summary is based on the testimony of witnesses at the May 18 and 19, 1994 hearing as cited below (the hearing transcript is hereinafter "Tr."), and pleadings submitted on behalf of O'Laughlin and BPS in the course of this proceeding. Except as indicated below, these facts are uncontroverted.

O'Laughlin is a logistics engineer who in March 1987 began working for BPS, then the management and operating (M&O) contractor for the DOE's Strategic Petroleum Reserve (SPR), at BPS' central SPR office facilities located in New Orleans, Louisiana. In January 1990, O'Laughlin was promoted to the position of Integrated Logistics Systems (ILS) Manager, a subgroup of the Engineering Directorate which was one of several directorates within the BPS organization. As described below, the actions underlying the present complaint stem from a BPS reorganization that was devised in March and April 1991, and then implemented in May 1991. This reorganization had the effect of splitting the ILS and substantially reducing the scope of O'Laughlin's management responsibilities.

Under O'Laughlin, ILS was generally divided into two components comprised of management organizations which performed these functions: (1) Reliability, Availability and Maintainability (RAM), and (2) Maintenance Management Information Systems (MMIS). See Tr., O'Laughlin Exhibit 1. The RAM division was primarily charged with conducting an ongoing performance analysis of SPR equipment and provisioning inventories for parts replacement on a priority basis. See Tr., Vol. I at 35. The principal functions of MMIS were preventive maintenance (PM) reporting and reliability centered maintenance (RCM). These MMIS functions warrant greater discussion.

Preventive maintenance at the SPR crude oil storage and transfer facilities was generally conducted by maintenance personnel in the field by adherence to a schedule of thousands of preventive maintenance procedures for the various equipment at the SPR sites. As these procedures were scheduled and completed, that information was put into a database which could then be accessed by various departments within BPS. Under the PM reporting function performed by ILS, this data was retrieved by MMIS personnel located at the central SPR office in New Orleans, who then generated a monthly PM status report for use by BPS management and the DOE. See Tr., Vol. I at 38-39.

The RCM function involves a system of anticipating potential equipment failure through an ongoing analysis of whether the equipment is performing in accordance with prescribed specifications. The RCM function performed by ILS under O'Laughlin was part of the Logistics Service Support Analysis (LSSA) program, a maintenance corrective action program that was adopted by BPS and endorsed by the DOE in late 1989 after a consultant study. The LSSA established a list of recommended procedures and initiatives designed to improve SPR logistics and maintenance, referred to as "milestones", which were to be scheduled and completed. See Tr., Vol. I at 35-36, and at 358-59. Under O'Laughlin, it was the responsibility of the ILS, working in conjunction with and assisted by other affected departments within BPS, to see that the LSSA milestones, including RCM, were completed as scheduled. See Tr., Vol. II at 20-21.

However, in late 1990, the President of BPS, Jerry E. Siemers (Siemers), determined that the firm should be reorganized in order to remedy material and logistics deficiencies on the part of BPS under the SPR M&O contract that had been identified by DOE. See Tr., Vol. I at 390-92, Vol. II at 506-08. Siemers determined that a new directorate, the Material Directorate, should be formed and headed by Anthony J. George (George), who had previously worked at BPS, but was then at a BPS affiliate. In January 1991, George accepted the position as Manager of the Material Directorate and, in March and April 1991, conducted a series of meetings with BPS management personnel in order to determine which organizations should become part of the new Material Directorate. See Tr., Vol. II at 283.

During the reorganization planning meetings in March and April 1991, one of the options proposed involved splintering ILS among several directorates, including moving the MMIS from the Engineering

Directorate to the Operations and Maintenance (O & M) Directorate. According to George, it was not his preference to split up ILS and he therefore solicited reasons from affected managers, including O'Laughlin, in support of keeping the ILS intact. See Tr., Vol. II at 285-87. Notwithstanding, in May 1991, it was ultimately determined by BPS management that the reorganization would proceed with the break up of ILS among three directorates as follows: (1) the Engineering Directorate retained the RAM function, (2) the MMIS, including the PM reporting and RCM functions, was placed under the O & M Directorate, and (3) all other logistics functions, involving logistical analysis and provisioning, were placed within the new Material Directorate under a newly created Logistics Manager position. See Tr., Vol. I at 25-26, Vol. II at 287.

When presented with the ILS breakup under the reorganization during the March and April 1991 meetings, O'Laughlin raised the following five concerns to George and others:

1) The Logistics Service Support Analysis (LSSA) milestones would not be met on a timely basis if Integrated Logistics Systems (ILS) were split up under the reorganization. See Tr., Vol. I at 48, Vol. II at 376. Although many of the LSSA milestones had already been completed, O'Laughlin believed that under the Operations and Maintenance (O & M) Directorate, the maintenance manager in charge of completing the remaining LSSA milestones, Charlie Mitchell, did not view the milestones as a priority. See Tr., Vol. I at 88, Vol. II at 51. O'Laughlin maintained this concern although the responsibility for monitoring the completion of the LSSA milestones remained in the Logistics Manager under the Material Directorate. Id. at 225.

2) The dispersal of logistics functions under the reorganization would be in violation of a pertinent DOE logistics order governing the SPR, SPRPMO 4000.1B. Although O'Laughlin concedes that the policy directive in this DOE order may reasonably be subject to a different interpretation, he believed that this order required that all logistics functions be integrated in one department rather than separated. See Tr., Vol. I at 48-49, and at 234-35.

3) It would be unwise to place the preventive maintenance (PM) reporting function under the Operations and Maintenance (O & M) Directorate whose personnel was responsible for performing maintenance since O & M would not objectively view the data sent in from the field in preparing the PM reports. O'Laughlin described his concern in this regard as "like putting the fox in the henhouse", although George did not recall his use of that expression. See Tr., Vol. I at 20, 49, Vol. II at 377. O'Laughlin's concern was based upon the possible falsification of data entered into or reported from the PM database, but was aware that there were independent departments within BPS responsible for monitoring the accuracy of data relating to PM performance and reporting. See Tr., Vol. I at 241-42, Vol. II at 296-97.

4) The reliability centered maintenance (RCM) milestone, described above, would not be done if Integrated Logistics Systems (ILS) were split up. Tr., Vol. I at 49. Similar to the other LSSA milestones, O'Laughlin had doubts concerning the willingness of Charlie Mitchell, the manager within O & M who would receive this responsibility, to perform this milestone. Id. at 89, 121. George could not recall O'Laughlin conveying this specific concern. Tr., Vol. II at 379.

5) Data concerning the packaging, handling, storage and transportation (PHST) of hazardous material should be incorporated into the logistics database. Tr., Vol. I at 50. O'Laughlin was aware that this data was already contained in a database maintained by the Property Control Division within BPS, which was in charge of handling the movement of any hazardous materials, but O'Laughlin believed that there should also be an integrated logistics PHST database. Tr., Vol. II at 66-68, and at 299-300. Although O'Laughlin maintains that George rejected his idea, the PHST data was incorporated in a database maintained by the Catalogue Division under the Logistics Manager following the reorganization. Id. at 300-01.

In communicating the five concerns described above, O'Laughlin made no references to health and safety, did not describe any dangerous situation, nor did he convey his concerns in those terms. See Tr., Vol. I at 233, 254, Vol. II at 45. However, O'Laughlin maintains that George, as Manager of the Material

Directorate, knew or should have known that safety is among the issues involved in the reorganization. Id. at 255.

According to O'Laughlin, reprisals were taken against him by BPS in retaliation for the five communications which he made to George. O'Laughlin states that he was led to assume that under the reorganization, he would be given the position of Logistics Manager, who would report directly to the Manager of the Material Directorate, George. See Tr., Vol. I at 216. George confirms that O'Laughlin started out being the leading candidate for the job. See Tr., Vol. II at 320. But instead, on May 13, 1991, the day office space was being reassigned under the reorganization, O'Laughlin was informed by George that O'Laughlin would not be the Logistics Manager, but that he had been given the position of ILS Manager, reporting to David Ryan who had been selected as Logistics Manager. See Tr., Vol. I at 136-38.

O'Laughlin contends that a second act of alleged reprisal occurred on August 15, 1991, when O'Laughlin was issued a Corrective Action Memo (CAM) which informed him that he had been demoted from his management position for failure to perform certain assigned duties as ILS Manager. Id. at 145-47. O'Laughlin was then transferred from his position as ILS Manager to the function of Policy Compliance, a non-management position, with a demotion that entailed a 7 percent reduction in annual salary, amounting to approximately $4,000. Finally, O'Laughlin claims that thereafter he continued to be subjected to harassment and intimidation by BPS management to the extent that he felt compelled to submit his resignation to BPS, which became effective May 15, 1992.

C. Procedural History of the Case

Beginning in August 1991, O'Laughlin initiated attempts of informal resolution of the adverse personnel action through internal BPS procedures. These attempts having been unsuccessful, however, O'Laughlin filed a complaint with the SPR Office pursuant to 10 C.F.R. Part 708, on April 1, 1992. That complaint was forwarded to DOE's Office of Contractor Employee Protection (OCEP) on April 3, 1992, but was initially dismissed by OCEP on April 10, 1992, for failure to state an actionable claim under Part 708. In reaching this determination, OCEP found that O'Laughlin's complaint did not reveal that he had made disclosures that related to actual or potential health or safety issues or that his disclosure contributed to the adverse personnel actions taken against him. On May 8, 1992, O'Laughlin filed for review with the Deputy Secretary of DOE and submitted an amended complaint asserting that his disclosures involved issues of health and safety, as well as possible waste, mismanagement, and the violation of a DOE Order. On August 30, 1992, the Deputy Secretary reinstated the complaint, and afforded an opportunity for attempts at informal resolution. During the interim, O'Laughlin submitted his resignation to BPS, which became effective on May 15, 1992.

Then, having been informed by the SPR Office that attempts at informal resolution had failed, OCEP performed an on-site investigation of the matter during the period February 28 through March 5, 1993, and issued a Report of Investigation and a Proposed Disposition on December 16, 1993. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that O'Laughlin's communications regarding the ILS reorganization did not present disclosures relating to health and safety protected under Part 708; it further concluded that the adverse personnel actions taken against him were not the result of any protected disclosure.1/ Accordingly, OCEP proposed to deny O'Laughlin's request for relief under Part 708.

During the deliberative stage of the OCEP proceeding, a change of the M&O contractor occurred at the SPR. On March 31, 1993, BPS ceased operations in that capacity and, on April 1, 1993, DynMcDermott Petroleum Operations Company (DynMcDermott) assumed the SPR M&O contract. As the succeeding M&O contractor, DynMcDermott has generally hired the employees formerly employed by BPS with the exception of upper management.

On January 2, 1994, O'Laughlin submitted his request for a hearing pursuant to 10 C.F.R. ' 708.9 to OCEP. On January 10, 1994, OCEP transmitted that request, together with the investigative file, to the OHA, and

requested that a Hearing Officer be appointed. I was appointed Hearing Officer on January 11, 1994. On February 10, 1994, procedures and a briefing schedule were established for the hearing in this case under ' 708.9(b).2/ Noting that O'Laughlin had requested reinstatement among the remedies he sought in compensation for the alleged whistleblower reprisals,3/ I determined that DynMcDermott should also be served with the Proposed Disposition and Report of Investigation, and provided the firm an opportunity to file a pre-hearing brief on the same basis as the other parties in the proceeding. Letter from Fred L. Brown, Deputy Assistant Director, OHA, to John A. Poindexter, General Counsel, DynMcDermott, January 31, 1994.

On March 24, 1994, BPS filed its pre-hearing brief which included a Motion to Dismiss the O'Laughlin complaint on grounds of timeliness and failure to state an actionable claim under Part 708. On March 25, 1994, DynMcDermott similarly filed a pre-hearing brief, in the form of a Motion to Dismiss the firm as a party to the proceeding. In his pre-hearing brief, also filed on March 25, 1994, O'Laughlin reasserts his claim and request for relief under Part 708. On April 8, 1994, BPS and O'Laughlin filed respective Responses to the pre-hearing briefs of the other parties.

On April 20, 1994, I issued an interlocutory Decision and Order in which I determined that BPS' Motion to Dismiss the O'Laughlin complaint should be denied. Boeing Petroleum Services, Inc., 24 DOE & 87,501 (1994). I further determined, however, that DynMcDermott's motion to be dismissed as a party should be granted on the basis of our finding that, under the particular circumstances of this case, reinstatement was not a remedy properly available to O'Laughlin even assuming his claim were successful on the merits. See 24 DOE at 89,006-08. Thereafter, on May 3, 1994, a conference telephone call was conducted among the OHA Hearing Officer and respective counsel for O'Laughlin and BPS, in order to clarify matters concerning pertinent issues to be addressed, proper witnesses and the conduct of the hearing. As previously indicated, the hearing was conducted on May 18 and 19, 1994 at the SPR facilities in New Orleans, Louisiana. On June 20, 1994, O'Laughlin and BPS filed post-hearing briefs that were authorized by the Hearing Officer at the close of the hearing. Finally, on June 30, 1994, O'Laughlin and BPS filed responses to the post-hearing brief of the opposing party.

II. Legal Standards Governing This Case

In 10 C.F.R. Part 708, we find the rule applicable to the review and hearing of allegations of reprisal based on protected disclosures made by an employee of a Department of Energy (DOE) contractor.4/ Proceedings under Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee. See David Ramirez, 23 DOE & 87,505 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has " . . . [d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences . . . a substantial and specific danger to employees or public health or safety." 10 C.F.R. ' 708.5 (emphasis added).

The Complainant's Burden

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

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

10 C.F.R. ' 708.9(d).

It is the task of the finder of fact to weigh the sufficiency of the evidence presented by both parties at trial. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence ' 339 at 439 (4th Ed. 1992). Under this standard, the risk of error is allocated roughly equally between both parties. Grogan v. Garner, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). O'Laughlin has the burden of proving by evidence sufficient to "tilt the scales" in his favor that when he communicated the five specific concerns discussed above, he disclosed information which evidenced his belief in good faith 5/ that there was a substantial and specific danger to employees or public safety. 10 C.F.R. ' 708.5(a)(1)(ii). If this threshold burden is not met, O'Laughlin has failed to make a prima facie case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a contributing factor in a personnel action taken against the complainant. 10 C.F.R. ' 708.9(d); see Universities Research Association, Inc., 23 DOE & 87,506 (1993).

The Contractor's Burden

If the complainant has met his burden, the burden shifts to the contractor. The contractor must prove by "clear and convincing" evidence that it would have taken the same personnel action against the complainant absent the protected disclosure. "Clear and convincing" evidence is a much more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". See Hopkins, 737 F. Supp. at 1204 n.3. Thus if O'Laughlin has established that it is more likely than not that he made protected disclosures that were a contributing factor to his demotion and/or non-selection as manager of the new unit, BPS must convince us that it would have taken these actions despite the five concerns communicated by the complainant to his managers from March through April 1991.

III. Analysis

In this case, the scope of the acts protected by this program are restricted to disclosures related to issues of health and safety that O'Laughlin made to the DOE and its M&O contractor for the Strategic Petroleum Reserve, Boeing Petroleum Services, Inc. (BPS). See Boeing Petroleum Services, Inc., 24 DOE & 87,501 at 89,002 and n.2 (1994). To be considered protected disclosures for purposes of the Contractor Employee Protection Program, O'Laughlin's disclosures must have divulged "information that the employee in good faith believes evidences . . . (ii) a substantial and specific danger to employees or public health or safety." 10 C.F.R. ' 708.5(a)(1).

In the course of this proceeding, O'Laughlin alleges that he made five distinct disclosures to various BPS employees, most notably to Anthony George, who was designated to become Manager of the Material Directorate under the BPS reorganization. According to O'Laughlin, George knew or should have known that implicit in these disclosures were his good faith concerns for health and safety. As a group, the disclosures clearly relate O'Laughlin's concerns that the proposed (and ultimately adopted) reorganization of BPS' logistics component would adversely affect its ability to carry out its mission. It is clear from the record that O'Laughlin had concerns about the success of the contractor's logistics operations under the reorganized structure, and expressed them both before and after the reorganization was implemented. His concerns alone, however, are not sufficient to raise his disclosures to the level of health and safety disclosures protected under the Program's regulations.

In considering this case, I must observe initially that the nature of O'Laughlin's principal disclosures are different from the type of health and safety disclosure where we have found the protection of Part 708 appropriate, involving the good faith belief on part of the complainant of an actual, existing danger to health and safety. For instance, in Ronald Sorri, 23 DOE & 87,503 (1993), the complainant, a technician, had disclosed an actual health and safety danger relating to the contractor's use of over-pressurized gas cylinders containing lethal gas in its production facilities. Similarly in David Ramirez, 23 DOE & 87,505

(1994), the complainant, an electrician, disclosed an unexplained high voltage power reading and his good faith belief that there was asbestos present in the ceiling from which he was removing electrical fixtures. In the present case, however, the purported health and safety dangers, claimed by O'Laughlin to be evident in his stated concerns, were not tangible but instead conditioned upon his belief, not shared by or within the reasonable perception of senior management, that under the BPS reorganization certain individuals would tend to be derelict or deceptive in their performance of the assigned duties for which he had previously been responsible.

The context in which O'Laughlin's disclosures were made also differentiates this case from the typical case involving a health and safety disclosure, such as Sorri and Ramirez. In those cases, the disclosures were made to the contractor by the complainant after having independently perceived or determined what the complainant in good faith believed to be a danger to health and safety. In other words, it was the perception of the health and safety danger that precipitated the disclosure. In the present case, however, O'Laughlin's concerns were actually solicited by BPS management, in the context of canvassing all affected managers for reasons for and against keeping ILS intact under the reorganization.

Finally, by his own admission, O'Laughlin never expressed his concerns in terms of health and safety or specified any dangerous situation possibly inherent in his concerns. While this is not determinative, particularly in a situation where a substantial health and safety danger is manifest in a complainant's disclosures, it certainly has bearing here in evaluating the relatively amorphous nature of the health and safety matters which O'Laughlin claims were evident in his stated concerns. The burden is on O'Laughlin to establish, by a preponderance of the evidence, that in communicating his concerns, he disclosed within the reasonable understanding of BPS management his good faith belief concerning a danger to health and safety.

Each of O'Laughlin's disclosures will be discussed in detail below. After reviewing the various pleadings submitted in this case and the testimony elicited at the hearing, I have concluded that O'Laughlin has not established by a preponderance of the evidence that his disclosures were of a nature that warrant protection under Part 708, because they did not meet the Program regulations' threshold test of disclosing "information that the employee believes evidences . . . a substantial and specific danger to . . . health or safety." 10 C.F.R. ' 708.5(a)(1)(ii).

1. The LSSA Milestones

As ILS Manager, O'Laughlin initiated performance of the Logistics System Support Analysis (LSSA) milestones before the time period at issue in this proceeding. Tr., Vol. I at 73. These milestones were published in a September 1989 report. Id. At the hearing, O'Laughlin described a "milestone" as "a date by which a project is estimated to become completed or some status on that project is to be identified as completed." Tr., Vol. I at 75. O'Laughlin testified that he communicated his concern that the LSSA milestones could not be completed on time in one-on-one meetings with George and in larger meetings with George, and affected managers, Tim Hewitt, Jim Morris, and in some instances Richard Dropik and Billy Mitchell. Tr., Vol. I at 52. He also communicated his reasons for his concern: under the reorganization, some of the logistics functions over which he had formerly had control were transferred to other directorates, and he had little confidence that the other directorates would complete the milestones on time. Tr., Vol. I at 48, 52. Regarding completion of the LSSA milestones, O'Laughlin had reservations about Charlie Mitchell (not related to hearing witness Billy Mitchell), who would acquire this responsibility: "The manager in charge of maintenance, Charlie Mitchell, I had been working with for a number of years [a]nd it was my opinion that these milestones would not be accomplished, primarily due to priorities that they viewed these milestones . . . different from mine." Tr., Vol. I at 88.

From the outset of this proceeding, however, O'Laughlin has been remiss in describing any health and safety matter which he actually communicated in expressing this, among other, concerns regarding the reorganization, but has instead expended considerable effort reemphasizing that there is general relationship between SPR equipment maintenance and health and safety. After gauging the tenor of

O'Laughlin's pre-hearing brief, I admonished counsel for O'Laughlin that I was prepared to take notice that there is, of course, a relationship between preventive maintenance and health and safety, and that he should instead focus his presentation upon the actual content of the alleged health and safety disclosures made by O'Laughlin. Letter of April 26, 1994, from Fred L. Brown, Deputy Assistant Director, OHA, to J. Arthur Smith, III, counsel for O'Laughlin and Stanford O. Bardwell, Jr., counsel for BPS. Accordingly, at the outset of the hearing, I took notice of the general relationship between preventive maintenance and health and safety. See Tr., Vol. I at 12-13. Notwithstanding, O'Laughlin focused much of his testimony on this general relationship rather than following my admonition to discuss what was actually stated in the pertinent communications with BPS management.

In the hearing, O'Laughlin testified at length that several of the LSSA milestones concern health and safety in his opinion. Tr., Vol. I at 76-85. Much of O'Laughlin's testimony centered on the general nature of logistics and the inherent concern for safety "within the functional process." Tr., Vol. I at 76. As O'Laughlin addressed each of the milestones he considered to have health and safety considerations, he focused for the most part on implicit aspects. For example, discussing LSSA Milestone 1, which concerns evaluating the logistic support function, he stated, "Obviously, you want to ensure that training is available to personnel so they can do the work safely. And in that context I believe that particular milestone has health and safety implications." Tr., Vol. I at 76-77. In another instance, regarding Provisioning Milestone 1, which concerns incorporating actual failure data into a particular database, O'Laughlin testified that it is important to distinguish between equipment that "failed in a safe mode or failed in an unsafe mode." Tr., Vol. I at 79. He also testified that equipment repair is a matter of health and safety, and that milestones concerning preventive maintenance and repair have health and safety implications. Tr., Vol. I at 84-85. 6/

Evidence that safety in the most general sense was referred to does not satisfy the regulatory standard of the complainant having actually disclosed information which in good faith is believed to evidence a substantial and specific danger, that applies to protected health and safety disclosures. We must instead consider whether O'Laughlin's actual communications imparted his good faith belief that failure to meet a specific milestone presented a "substantial and specific danger to employees or public health or safety." In this regard, the testimony elicited during the hearing demonstrates that although O'Laughlin clearly expressed his concerns that the LSSA milestones would no longer be met, he did not communicate to others any health and safety implications he may have in good faith believed to be inherent in his concerns. Indeed, when asked that in communicating this concern regarding completion of the LSSA milestones to George, whether he stated that there was any danger of someone getting hurt, O'Laughlin replied: "I don't remember saying anything like that." Tr., Vol. I at 233; see also Pre-Hearing Brief of Francis M. O'Laughlin, Appendix A at 3.

Richard Dropik (Dropik) testified that he heard O'Laughlin express his concerns in meetings that the split-up of the ILS functions into different directorates would impede timely completion of the LSSA milestones. Tr., Vol. I at 295. He also stated, however, that O'Laughlin never explicitly expressed in these meetings any health and safety concerns concerning the milestones. Tr., Vol. I at 337. Consequently, although he, as a logistician, perceived health and safety implications in O'Laughlin's communications, he believed that the others present in those meetings, including George and David Ryan, lacked the experience in the field of logistics to perceive those implications. Tr., Vol. I at 337-338, 343. Dropik's belief that O'Laughlin's health and safety concerns were not communicated to others attending the meetings is corroborated in the testimony of George. Tr., Vol. II at 290-291, 376. In addition, David Ryan, O'Laughlin's immediate supervisor after the reorganization testified that O'Laughlin never communicated to him that the split-up of ILS would create a potential safety or health problem on the SPR. Tr., Vol. II at 414, 447.

After reviewing the record in this proceeding, and in particular the testimony presented at the hearing, I have determined that O'Laughlin has not met his burden of establishing the disclosure of information which conveyed his good faith belief of a substantial and specific danger to health and safety in his expressing his concerns regarding completion of the LSSA milestones under the reorganization. Under the circumstances of O'Laughlin's communications, when BPS management was seeking alternative views

concerning the proposed reorganization, I find that the reasonable perception of BPS management was that in expressing the LSSA concern, O'Laughlin was merely identifying a potential performance difficulty rather than attempting to convey any substantial and specific danger to health and safety. Moreover, to the extent that there was a health and safety concern implicit in O'Laughlin's communication based upon the general nexus between preventive maintenance and health and safety, I cannot find that O'Laughlin revealed his good faith belief of any "substantial danger" to health and safety where, as here, the danger was not actual but potential and conditioned upon the listener agreeing with his unilateral judgment concerning the ability of BPS to handle logistics functions under the reorganization.7/ Nor can I find that O'Laughlin disclosed a "specific danger" to health and safety when he never expressed his concern in those terms and the health and safety danger was not apparent on the basis of what he said.

2. SPRPMO Order 4000.1B.

O'Laughlin testified at the hearing that this order "identifies the ILS requirements[,] policy[, and] procedure for the SPR." Tr., Vol. I at 48. In his opinion, splitting up the ILS functions or decentralizing them violated this order. Tr., Vol. I at 49. O'Laughlin raised this issue with George individually, in group meetings with George also attended by Tim Hewitt and Billy Mitchell, and with Bill Smollen of the DOE. Tr., Vol. I at 52. O'Laughlin did testify, however, that his interpretation of the order, which required the ILS functions to remain within a single organization, was not an exclusive interpretation, but in fact someone could read the order to require only that all logistics functions be performed rather than be integrated in one organization. Tr., Vol. I at 234-235.

Thus, on its face, O'Laughlin's concern with regard to the DOE order presents only an issue of interpretation and does not portend any health and safety matter. Further, O'Laughlin neither gave direct testimony nor produced any other evidence to demonstrate that he intimated any health and safety concern in raising this possible infringement of the DOE order. George testified that although he believed O'Laughlin raised the issue of potential violation of the order with him, Tr., Vol. II at 376, he did not recall the issue of safety or health problems being raised in that context. Tr., Vol. II at 293.

The burden of proof lies with O'Laughlin to establish by a preponderance of the evidence that he made a disclosure of information that he, in good faith, believed demonstrated a substantial and specific health or safety danger. Based on the record developed in this proceeding, I find that O'Laughlin has not met this burden in this instance. Although it is clear that he raised the issue of potential violation of SPRPMO Order 4000.1B with George and possibly others, there is no evidence any health and safety concerns were ever communicated. Nor is there any evidence that these concerns represented a substantial and specific health or safety danger. The little evidence regarding this disclosure seems to indicate that it is highly debatable whether the split-up of the ILS functions would actually constitute a violation of the order, let alone whether such a violation would create a health and safety danger of any type at all.

3. Preventive Maintenance Reporting

The third disclosure that O'Laughlin maintains is entitled to protection under the Program regulations consists of his objections to the transfer of the preventive maintenance (PM) reporting function under the reorganization, from the Maintenance Management and Information Systems (MMIS) component of ILS to the Operations and Maintenance (O & M) Directorate. Essentially, this function entailed preparing a monthly PM status report from data that was retrieved from a PM database which was continually updated by maintenance personnel in the field at the SPR facility sites as PM procedures were completed as scheduled. As the maintenance personnel were under the O & M Directorate, O'Laughlin expressed his belief that it would be improper to also place the PM reporting function under that Directorate since, according to O'Laughlin's testimony, permitting those performing the maintenance to measure their own performance was "like putting the fox in the henhouse." Tr., Vol. I at 49. In particular, O'Laughlin was concerned that the "level of objectivity would be diminished" in preparing the report, and that in analyzing the PM data to prepare the report "this evaluation may not have maintained the same standardized level it had in the past." Id. at 105, 253. Similar to the disclosures discussed above, O'Laughlin put forth this

concern to George, individually and at staff meetings attended by others including Tim Hewitt and Billy Mitchell, and to Billy Mitchell and Bill Smollen individually. Tr., Vol. I at 53.

O'Laughlin's testimony on cross-examination again reveals, however, that he never expressed his concern regarding transfer of the PM reporting function in terms of health and safety. He admittedly did not tell George that this transfer could create a dangerous situation for any employee. Tr., Vol. I at 254. The testimony of other witnesses also indicate that the health and safety dangers O'Laughlin may have perceived were not communicated to others. Richard Dropik testified that, in the meetings he attended, the gist of O'Laughlin's stated opposition to the split-up of the ILS functions was that a decentralized ILS organization would be unable to perform its required tasks. Tr., Vol. I at 285-286. Billy Mitchell testified that, in the meetings he attended, he could not recall any discussion of the possibility of employee safety issues arising as the result of the split-up of ILS. Tr., Vol. I at 379-380. George testified that O'Laughlin never made him aware that the MMIS transfer would create a potential safety problem. Tr., Vol. II at 293-294.

Despite conceding that no explicit health and safety matter was stated in expressing this concern regarding the reorganization, O'Laughlin nonetheless maintains that he expected that George, as head of the Material Directorate, "would know or should have known" that safety was among the issues inherent in transferring the PM reporting function. Tr., Vol. I at 255. However, the context of O'Laughlin's stated concern leads me to disagree. It is important to note that there is no direct connection between PM reporting and the actual performance of maintenance by field personnel at the SPR sites. In performing this function, the PM component of ILS did not perform or oversee maintenance, but merely captured information from a database, which was accessible throughout BPS, concerning completion status of scheduled PM procedures. For this reason, Billy Mitchell referred to PM reporting as "primarily a bean-counting function." Tr., Vol. II at 372. O'Laughlin asserts that there would be an adverse affect upon PM performance if the O & M Directorate falsified or failed to include pertinent data in preparing the PM status report. See Tr., Vol. I at 104-07. However, the pertinent testimony indicates that a cognizable likelihood of false PM reporting existed only in O'Laughlin's view. George testified that it was ultimately the oversight responsibility of O & M to assure the actual performance of maintenance, and the actual completion of PM procedures was monitored by a BPS division referred to as PP&C (Program, Planning and Control). Tr., Vol. II at 296-97.

Based on the record before me, I have determined that O'Laughlin has not effectively met his burden of establishing, by a preponderance of the evidence, that he communicated information which evidenced a substantial and specific danger to employees or public health or safety when he raised his objection to the transfer of the PM reporting function to the O & M Directorate. O'Laughlin's stated concern was couched in terms of performance efficiency with regard to the reorganization, and the speculative health and safety consideration which was arguably implicit in that concern did not rise to the level of communicating his belief of a health and safety danger which was either "substantial" or "specific."

4. Reliability Centered Maintenance

O'Laughlin's fourth disclosure focuses on his belief that reliability centered maintenance (RCM), a principal LSSA milestone conducted by the MMIS division of ILS, would not be conducted after the reorganization. According to O'Laughlin, responsibility for this milestone shifted to an O & M Directorate organization that, he believed, did not want to do it. Tr., Vol. I at 49, 121. O'Laughlin stated that the health and safety issue that he sees in this disclosure is "operational safety, being able to identify a piece of equipment before it fails and, in particular, fails catastrophically where it might injure somebody or contaminate the environment." Tr., Vol. I at 122. O'Laughlin testified that he raised this issue individually with George, Billy Mitchell and Bill Smollen. Tr., Vol. I at 53, 121, 132. Billy Mitchell testified that at one meeting he attended, "the concern was expressed that if that function went to the maintenance department, it may be in jeopardy of [not] being implemented." Tr., Vol. I at 361-362. George could not recall whether O'Laughlin ever raised this issue with him. Tr., Vol. II at 298, 379.

Again, O'Laughlin has presented no evidence and does not maintain that he expressed his concerns regarding the RCM milestone in terms of health and safety. 8/ Although George did not recall the RCM issue being raised, Billy Mitchell confirms that he never heard O'Laughlin express any health and safety danger in stating his objections, including the RCM milestone issue, to the proposed reorganization. See Tr., Vol. I at 379-80. For the reasons discussed above in considering O'Laughlin's objections to the reorganization regarding the LSSA milestones, I have concluded that O'Laughlin has not established, by a preponderance of the evidence, that in his statements to George and others concerning RCM he disclosed a good faith belief of a substantial and specific danger to employees or public health or safety.

5. Packaging, Handling, Storage and Transportation (PHST)

The final matter claimed by O'Laughlin as a protected disclosure involves his recommendation that data concerning the packaging, handling, storage, and transportation (PHST) of hazardous materials should be incorporated into the logistics database. Tr., Vol. I at 50. O'Laughlin testified that he made this recommendation once to George individually during a meeting in April 1991, prior to the reorganization. See Tr., Vol. I at 125-26. In making this recommendation, O'Laughlin was aware that this data was already contained in a database maintained by BPS' Property Control Division which had PHST responsibility; indeed, he had conferred with the Property Control Division concerning PHST data. See Tr., Vol. II at 66. O'Laughlin believed, however, that PHST data should be incorporated into the logistics database since military standards called for it, although the particular military standard which he cited had not been adopted by BPS at that time. See Tr., Vol. I at 126. He testified at the hearing that he addressed this concern to George once "for clarity and approval to proceed." Tr., Vol. I at 53-54.

I am again unable to find that in making this recommendation to George, O'Laughlin disclosed information evidencing a substantial and specific danger to health and safety. In claiming that this was a protected disclosure, O'Laughlin asserts the obvious, that "[a]ny type of hazardous material you're dealing with has a health and safety implication. . . [and] the packaging, handling, storage, and transportation of those materials, to me, is a safety concern . . . ." Tr., Vol. I at 125. However, the record of this proceeding reveals that the only matter actually communicated to George by O'Laughlin was his desired enhancement of the logistics database to include PHST information that was already maintained by the BPS division having this ultimate responsibility.

My view is confirmed by George's testimony in this regard. According to George, he was well aware that before and after the reorganization, the Property Control Division had the responsibility "for handling, safeguarding, and moving what little transportation of hazardous materials we had," and that Division maintained a Supply Services Manual that governed this function. See Tr., Vol. II at 300. George further testified that the idea to incorporate PHST data into the logistics database "came up from a number of camps" (id. at 299), but recalls that O'Laughlin made this recommendation:

Not as a concern. I remember him raising the issue of hazardous materials to me . . . in the context that it would be an enhancement to the logistics database . . . if we were able to use it in some fashion to identify hazardous materials or to expand it to incorporate the hazardous-materials area.

Tr., Vol. II at 379-380. 9/

Once again, the record clearly indicates that O'Laughlin made the statements he claims to have made. Once again, however, the record lacks a preponderance of evidence that indicates that, through his statements, O'Laughlin disclosed "information that [he] in good faith believe[d] evidence[d] . . . [a] substantial and specific danger to employees or public health or safety." 10 C.F.R. ' 708.5(a)(1)(ii).

IV. Conclusion

As set forth above, I have determined that O'Laughlin has not met his burden of proof of establishing by a preponderance of the evidence that he made disclosures protected under 10 C.F.R. Part 708. It is clear that O'Laughlin had some specific concerns about the reorganization of BPS, and expressed those concerns to

both DOE and contractor personnel. He did not, however, explicitly disclose any matter of health and safety which may have also been within his contemplation. Nor am I persuaded that he implicitly communicated a cognizable health and safety danger by his stated concerns, since the adverse impact upon health and safety that O'Laughlin claims "should have been known" was in fact highly general and speculative, based upon his uniquely subjective perspective of BPS' capacity to perform logistics functions under the reorganization. Finally, the ostensibly self-serving nature of O'Laughlin's stated objections is also a consideration from which I cannot escape. The unavoidable reality is that the BPS reorganization, which was encouraged by DOE to remedy certain logistics supply failures, came at the expense of O'Laughlin's management authority. I am therefore drawn to the view that O'Laughlin was adamant in attempting to keep ILS intact for personal reasons, and I am indelibly left with that impression by the record of this proceeding. I find any health and safety motivation O'Laughlin claims to have had to be transparent.

On this basis, I conclude that O'Laughlin has failed to show by a preponderance of the evidence that he disclosed information evidencing any health and safety danger, let alone a danger which rises to the level of substantial and specific. Because O'Laughlin has failed to make a prima facie case, there is no need to address the remaining regulatory criteria, e.g., whether the disclosures were contributing factors in the personnel actions taken, or whether Boeing would have taken those actions absent O'Laughlin's disclosures. 10 C.F.R. ' 708.9(d).

It Is Therefore Ordered That:

(1) Francis M. O'Laughlin's request for relief under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director of the Office of Contractor Employee Protection.

Fred L. Brown

Hearing Officer

Office of Hearings and Appeals

Date: July 29, 1994

NOTES

1/ OCEP states that although information relating to O'Laughlin's alleged disclosures regarding possible waste, mismanagement, and violation of a DOE Order was also examined, OCEP did not assert jurisdiction under Part 708 on the basis of these alleged disclosures. Notwithstanding, OCEP found in the Proposed Disposition that "[O'Laughlin]'s continued disagreement with the reorganization did not constitute disclosures of possible waste or mismanagement that merit protection under Part 708, had jurisdiction under that criteria been asserted in this case." Proposed Disposition at 15.

2/ Section 708.9(b) provides that hearings conducted under Part 708 "will normally be held . . . within 60 days from the date the complaint file is received by the Hearing Officer . . . ." However, upon initial contact, O'Laughlin informed the OHA Hearing Officer in this case that he would not be available within the 60-day time frame since he was about to begin 90 days of previously scheduled duty with the U.S. Naval Reserve. O'Laughlin therefore requested, and I as Hearing Officer approved, an extension of time for the convening the hearing until after the completion of his duty assignment in May 1994.

3/ OCEP states in the Report of Investigation that during the attempted informal resolution of the matter, O'Laughlin sought the following remedies: (1) reinstatement to his prior position, (2) back pay and

benefits, and (3) removal from his personnel files of any reference to the events and personnel actions surrounding the complaint. Report of Investigation at 5-6.

4/ I note at this time that the respondent BPS has renewed its objection to these proceedings, arguing that the rule (1) was applied retroactively and (2) does not comply with the Administrative Procedure Act (APA), 5 U.S.C. ' 551 et seq. Post-Hearing Brief of BPS at 1. I disagree. First, the original motion to dismiss was denied by the Hearing Officer. See Motion to Dismiss, Boeing Petroleum Services,Inc., 24 DOE & 87,501 (1994). It is DOE's position that the 60-day filing period of 10 C.F.R. '708.6(d) was tolled while O'Laughlin contacted BPS' parent company seeking resolution of his complaint. For the same reason, I again deny this objection. Second, these proceedings are not "subject to and governed by" the APA as interpreted by the Supreme Court in Ardestani v. I.N.S., 112 S. Ct. 515, 518-19 (1991) (holding that proceedings that fall "under section 554" are required by statute to be determined on the record after opportunity for an agency hearing). 5 U.S.C. ' 554 delineates the scope of proceedings governed by the formal adjudication requirements of the APA. "On the record" is interpreted as a proceeding held before an administrative law judge; the OHA Hearing Officer is not required to be and generally will not be an administrative law judge.

5/ The regulations provide protection for a good faith disclosure, even if incorrect. See Universities Research Association, Inc., 23 DOE & 87,506 (1993).

6/ Cross examination of O'Laughlin revealed that many of the LSSA milestones which he identified as involving health and safety had already been designated as completed in company reports, prior to the reorganization. See Tr., Vol. II at 51.

7/ As confirmed by the testimony of Billy Mitchell, simply moving the MMIS to the O & M Directorate did not, in and of itself, have any health and safety ramification. See Tr., Vol. I at 372-73. Furthermore, the actual business context of the reorganization is significant. According to the testimony of Ted Williams, a DOE employee who oversees the SPR M&O;contract, and Jerry Siemers, President of BPS, the reorganization was undertaken and in fact encouraged by DOE primarily to remedy logistics supply failures that had occurred in BPS' management of the SPR, while O'Laughlin was ILS Manager. See Tr., Vol. II at 507-09. It is therefore no surprise that when O'Laughlin continued to raise potential performance difficulties with the breakup of the ILS, his concerns "fell on deaf ears." Testimony of Richard Dropik, Tr., Vol. I at 295. Finally, senior BPS management did not share O'Laughlin's opinion that Charlie Mitchell was incapable or unwilling to perform the LSSA milestones under the O & M Directorate. See also note 8, infra. Siemers testified: "I have all the confidence in the world in Charlie Mitchell and his performance. So I had no concern with that reorganization." Tr., Vol. II at 517.

8/ O'Laughlin's testimony revealed that, similar to the other LSSA milestones, he doubted the commitment of Charlie Mitchell, an O & M Directorate manager, to administer RCM. According to O'Laughlin, he was told by Reggie Swanson, a maintenance engineer who had previously worked under him but then worked under Charlie Mitchell, that Charlie Mitchell was "not going to do RCM." Tr., Vol. I at 121. O'Laughlin states that when he informed George, "George told me that it wasn't my concern anymore; it was Charlie Mitchell's concern." Id. at 132. O'Laughlin stated nothing more concerning the content of their conversation regarding RCM.

9/ There was a conflict in the testimony concerning George's attitude towards O'Laughlin's PHST data recommendation. O'Laughlin believed his recommendation was "turned down" by George who felt that "we didn't need to do it." (cont'd) Tr., Vol. I at 50, 126. However, George testified that he thought "it was a good idea" (Tr., Vol. II at 300) and following the reorganization, incorporated PHST data within a database maintained by the Catalogue Division under the Logistics Manager. Tr., Vol. II at 301-02. O'Laughlin testified that he was unaware that PHST data had been incorporated into a database under the Logistics Manager following the reorganization. Id. at 68.

Case No. LWA-0006

September 2, 1994

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Helen Gaidine Oglesbee

Date of Filing: February 28, 1994

Case Number: LWA-0006

This Decision involves a whistleblower complaint filed by Helen Gaidine Oglesbee (Oglesbee) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. Oglesbee has been and is currently an employee of Westinghouse Hanford Company (WHC), the management and operating contractor at the DOE's Hanford Nuclear Site. She alleges that she made health and safety complaints to her immediate supervisor from December 1990 to August 1991, and that beginning in October or November 1991, she elevated these concerns to higher management officials at WHC. Oglesbee maintains that WHC took the following reprisals against her: failing to respond to her health-related issues and denying her access to reports and analyses of those issues; removing her designation as "lead" secretary; issuing her a performance improvement plan; transferring her involuntarily to another WHC office; issuing her a performance expectations letter; issuing her written reprimands, and delaying promotions to Level IV Secretary and to permanent Plant Engineer. These alleged actions occurred during the period January 1991 through June 1993. The DOE's Office of Contractor Employee Protection (OCEP) investigated the complaint and found that no reprisals had been taken against Oglesbee that would entitle her to relief under Part 708. Oglesbee requested a hearing before the Office of Hearings and Appeals (OHA) under 10 C.F.R. § 708.9(a), reasserting her claim that reprisals were taken against her for raising health and safety concerns. The hearing in this case was held on June 15 and 16, 1994 in Richland, Washington.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[ ] fraud, mismanagement, waste, and abuse" at DOE's government-owned, contractor-operated (GOCO) facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. In several previous decisions issued under Part 708, OHA Hearing Officers have determined that contractors discriminated against employees for such disclosures, and directed them to provide appropriate relief. See, e.g., Ronald Sorri, 23 DOE ¶ 87,503 (1993), David Ramirez, 23 DOE ¶ 87,505 (1994), Universities Research Association, Inc., 23 DOE ¶ 87,506 (1994). In another decision, however, an OHA Hearing Officer found that the complainant failed to meet his threshold burden of proving that a disclosure warranting protection under § 708.5 had been made, and denied relief. Francis M. O'Laughlin, 24 DOE ¶ 87,___, Case No. LWA-0005 (July 29, 1994).

B. Factual Background

The following summary is based on the OCEP investigative file, the hearing transcript (hereinafter "Tr."), and the pleadings submitted to OHA by the parties. Except as indicated below, these facts are uncontroverted.

Beginning in June 1987, Oglesbee was employed by WHC at the Hanford B Plant facility. OCEP Proposed Disposition at 2. B Plant was built in 1943 as part of the Manhattan Engineer District, the secret wartime project to develop the atomic bomb. From 1944 until approximately 1952, the facility was used to produce plutonium for nuclear weapons. See WHC Post-hearing Brief at 6. It was later used to extract radioactive strontium and cesium isotopes from liquid waste, and to store cesium capsules. Id. B Plant has been inactive since the mid-1980s, but given its history of processing toxic and radioactive materials, it must be maintained in safe condition for eventual decontamination and demolition. Id.

Oglesbee was first employed as a Secretary Level III (June 1987 to September 1992). OCEP Proposed Disposition at 2. During the time the alleged reprisals took place, Oglesbee was promoted to Secretary Level IV (September 1992 to January 1993), to a Temporary Upgrade Plant Engineer (January 1993 to June 1993), and finally, to a permanent Plant Engineer (June 1993 to the present). During this same period, Oglesbee received five successive pay raises, the last of which resulted in a 26.13 percent salary increase. Id. Her present duty station is located at the Federal Building in the city of Richland. Tr., Vol. I at 124-25.

At the hearing, Oglesbee's counsel set forth her allegations of reprisal in a chronology highlighting "seven significant periods of disclosure . . . almost immediately followed by some sort of an adverse personnel action." Tr., Vol. I at 9.

First, Oglesbee alleges that in December 1990, she told her supervisor, the late Robert Higbee, that she would not tolerate an unhealthy work site, and also wrote a memo to Michael Grygiel, then B Plant manager, complaining of intimidation of employees at B Plant who raised safety concerns. Id. at 10-11. In January 1991, and allegedly in reprisal for raising these concerns, Oglesbee was removed from her position as B Plant Operations lead secretary. Id. The second alleged reprisal was a Performance Improvement Plan issued to Oglesbee on March 26, 1991, which Oglesbee claims was a response to a March 19, 1991 memo she wrote to management requesting permission for the B Plant clerical staff to participate in Operation Clean Sweep sessions. Id. at 12-13. Third, Oglesbee alleges that in July 1991 she was transferred from her position as secretary to Higbee in response to disclosures she made during meetings that month with Michael Dickinson of the WHC employee concerns office. Id. at 13-14.

On November 3, 1991, the beginning of the fourth period of alleged reprisal, Oglesbee submitted a 13-page document to WHC management containing her health and safety concerns, to which Grygiel and WHC Vice- President Ronald Bliss responded in a January 3, 1992 memorandum to Oglesbee. Id. at 14-15. On January 10, 1992, a meeting was held in Bliss' office in which it was decided to return Oglesbee to the position from which she had been transferred. Id. at 15-16. In a second meeting held the same day, WHC management decided not to return Oglesbee to her former position, a decision she alleges was a reprisal in response to her health and safety complaints. Id. at 16.

Two alleged acts of reprisal took place during the fifth period set forth by the complainant. Oglesbee was issued a performance expectations letter on January 30, 1992, by her supervisor, Ray Menard, which she alleges was in retaliation for complaints she had made in a January 28, 1992 meeting with Larry Musen, the DOE Richland Field Office (DOE/RL) employee concerns program manager. Id. at 16-17. In addition, on February 26, 1992, one day after WHC received a letter from the DOE regarding the issues raised by Oglesbee, she received a written reprimand from Menard. Id. at 17-18. The sixth period began when Musen filed a report on April 5, 1992 stating that Oglesbee may have been exposed to hazardous materials and that WHC management appeared to be "scared of" Oglesbee. Id. at 18. On April 6, 1992, Oglesbee wrote to the DOE stating that WHC had not adequately responded to her concerns. Id. at 18. The

following day, Menard issued a second written reprimand to Oglesbee. Id. at 19.

The final reprisal alleged by Oglesbee occurred after she had filed her complaint under Part 708 on August 21, 1992, triggering OCEP's investigation of her complaints. In January 1993, Oglesbee was promoted to the position of temporary plant engineer, an action which Oglesbee contends was an attempt to persuade her to stop pursuing her concerns. Id. at 20. Oglesbee alleges that because she continued to raise health and safety concerns, she was informed by B Plant manager Duane Bogen on May 20, 1993 that her promotion to plant engineer would not become permanent until OCEP's investigation was completed. Id. at 20- 21.

WHC maintains that Oglesbee did not articulate specific health and safety concerns prior to November 1991, and steadfastly denies that any of the actions taken against the complainant were in reprisal for her protected disclosures. Tr., Vol. I at 24; Vol. II at 7. Rather, the company contends that these actions were taken in response to Oglesbee's interpersonal conflicts with supervisors and coworkers, and in response to deficiencies in her performance. Tr., Vol. I at 24-25. The company also notes that the letters of reprimand issued to the complainant were ordered removed by a WHC Employee Appeals Board, and that Duane Bogen's message regarding the delay in Oglesbee's permanent promotion to Plant Engineer was withdrawn and Oglesbee was quickly promoted to that position. Therefore, WHC argues that there is no basis for the complainant's claim that she is entitled to relief under Part 708 for any of these actions. Tr., Vol. II at 4.

C. Procedural History of the Case

On August 24, 1992, Oglesbee filed a complaint with DOE/RL pursuant to 10 C.F.R. Part 708. On October 2, 1992, after an unsuccessful attempt was made by DOE/RL to reach an informal resolution, Oglesbee's complaint was forwarded to OCEP to institute a formal investigation. OCEP conducted an on-site investigation of Oglesbee's allegations of reprisal and issued a Report of Investigation and a Proposed Disposition on February 18, 1994. Before the on-site phase of OCEP's investigation, Oglesbee alleged that WHC had threatened to extend her status as Temporary Plant Engineer, rather than promoting her to a permanent position. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that Oglesbee had made protected disclosures related to her health and safety concerns, but that a preponder- ance of the evidence did not support a finding that the disclosures were a contributing factor in any of the allegedly retaliatory actions taken against her. 1/

On February 28, 1994, Oglesbee submitted her request for a hearing under 10 C.F.R. § 708.9 to OCEP. On March 10, 1994, OCEP transmitted that request to the OHA, and a Hearing Officer was appointed. On May 4, 1994, procedures and a briefing schedule were established for the hearing in this case under § 708.9(b).

On April 5, 1994, WHC filed a Motion to Dismiss the proceeding, and submitted a statement in support of that Motion on May 13, 1994. The complainant filed a reply on May 18, 1994. In its statement, WHC maintained that Oglesbee's August 24, 1992 complaint was not timely filed, and that the complaint was insufficient to confer jurisdiction on OCEP to investigate Oglesbee's allegations. On May 26, 1994, I denied WHC's Motion to Dismiss, having determined that the acceptance of Oglesbee's complaint was a reasonable exercise of discretionary authority under Part 708 by the OCEP Director. See Westinghouse Hanford Co., 24 DOE ¶ 87,502 (1994).

The hearing was held in Richland, on June 15 and 16, 1994. 2/ At the close of the complainant's case, WHC again moved to dismiss the complaint. Tr., Vol II at 3-6. First, WHC reiterated its procedural arguments that the Oglesbee's complaint was insufficient to confer jurisdiction on OCEP under Part 708, and that the complaint was untimely filed. Second, WHC argued that the complainant had not met her burden of proving by a preponderance of the evidence that she had made disclosures protected under Part 708 and these disclosures were a contributing factor in personnel actions taken against her. WHC's procedural arguments were identical to those in its written motion, and I rejected them for the same reasons. Tr., Vol. II at 8-9; see Westinghouse Hanford Co., 24 DOE ¶ 87,502 (1994).

On the substantive issues, I dismissed the complainant's allegation that WHC failed to provide access to reports and analyses regarding her health concerns, on the grounds that this was not a discriminatory act that would form the basis for granting relief under Part 708. Tr., Vol. II at 8; see 10 C.F.R. § 708.5(a). The remaining allegations were not dismissed because the complainant had presented sufficient evidence, which, if uncontroverted by WHC, might have led me to conclude that she had made protected disclosures followed closely in time by adverse personnel actions that constituted violations of Part 708. Tr., Vol II at 8-16. Even though there were close calls on many of the issues at that stage in the case, I decided to deny the motion and hear the company's evidence. See Fed. R. Civ. Proc. 52(c). 3/

At the conclusion of the hearing on June 16, the parties elected to forego oral argument, and requested permission to file post-hearing briefs 30 days after they received copies of the transcript. Their post-hearing briefs were filed on August 8, 1994.

After considering the record established in the OCEP investigation, the evidence presented by both parties at the hearing, and their post-hearing briefs, I now conclude that with regard to certain of the allegations raised, the complainant failed to meet her burden to prove by a preponderance of the evidence that she made substantial and specific disclosures concerning health and safety to WHC. In those instances where the complainant made protected disclosures under Part 708 followed closely in time by adverse personnel actions, I find that WHC has proven by clear and convincing evidence that it would have taken the same actions absent her disclosures, or that WHC has already provided the complainant with an adequate remedy for the actions taken against her. Accordingly, I conclude that no relief is warranted under § 708.10.

II. Legal Standards Governing This Case

Proceedings under 10 C.F.R. Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee. See David Ramirez, 23 DOE ¶ 87,505 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has "[d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences . . . a substantial and specific danger to employees or public health and safety." 10 C.F.R. § 708.5; see also Francis M. O'Laughlin, 24 DOE ¶ 87,___, Case No. LWA-0005 (July 29, 1994).

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993), citing McCormick on Evidence § 339 at 439 (4th ed. 1992).

B. The Contractor's Burden

If the complainant has met her burden of proof by a preponderance of the evidence that her protected activity was a "contributing factor" to the alleged adverse actions taken against her, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993), citing McCormick on Evidence, § 340 at 442 (4th ed. 1992). As a practical matter, the application of these standards means that if Oglesbee has established that it is more likely than not that she made a protected disclosure that was a contributing factor to an adverse personnel action, WHC must convince us that it is highly probable that the company would have taken this action even if Oglesbee had not raised any health and safety concerns.

III. Analysis

A. Oglesbee's Removal as Lead Secretary

Under 10 C.F.R. Part 708, Oglesbee has the burden of establishing by a preponderance of the evidence that a disclosure of health and safety issues was a contributing factor in her removal from the position of lead secretary in January 1991. I find that the Complainant has not met this burden. Specifically, Oglesbee has not established that she ". . . [d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor) information that [she] in good faith believes evidences . . . a substantial and specific danger to employees or public heath and safety." 10 C.F.R. § 708.5 (emphasis added). See O'Laughlin, 23 DOE ¶____, Case No. LWA-0005 (July 29, 1994). Moreover, WHC has shown by clear and convincing evidence that intra-office personnel conflicts between December 1990 and January 1991 instigated Oglesbee's removal from the position of lead secretary. 4/

In December 1990, Oglesbee was designated as a lead secretary by Robert Higbee, her immediate supervisor in B Plant Operations. On December 8, 1990, the complainant had a doctor's appointment concerning medical problems which she thought were related to occupational exposures. Tr. Vol. I at 132. After this appointment, which complainant's counsel characterized as a "turning point for Ms. Oglesbee," she allegedly made two different protected disclosures of health and safety problems to her superiors. Tr. Vol. I at 10. First, on December 8, Oglesbee claims she told Higbee that she wasn't going to "tolerate the exposures any more." Tr. Vol. I at 132. However, Higbee died in November 1991, and there is no corroborating evidence in the record about the content of Oglesbee's dialogue with him on this occasion. Second, on "approximately December 11, 1990," the complainant claims that she sent a note, entitled "Product and Solution Data Sheets," to Higbee's supervisor, Michael Grygiel, "which identified [her] safety concerns." OCEP Report of Investigation (hereinafter "ROI"), Ex. 1 at 4. Oglesbee argues that these two disclosures resulted in her removal from the unofficial position of lead secretary in January 1991, in "[r]etaliation for safety and health issues." Tr. Vol. I at 133.

With respect to her removal as lead secretary, I find that Oglesbee has not met her burden of proving that a protected disclosure described under § 708.5 occurred, and that such act was a contributing factor in an adverse personnel action. See David Ramirez, 23 DOE ¶ 87,505 at 89,029 (1994). Although Oglesbee alleges that she complained to Higbee about "exposures," her December 8, 1990 statement to him does not constitute a protected disclosure about a "specific danger." At the hearing, her testimony about this occasion was vague, and it was not corroborated by any other contemporaneous evidence. As noted in O'Laughlin, to form a basis for relief under Part 708, a complaint must be more specific and it must point to a substantial danger.

As for the other alleged disclosure during this period, Oglesbee has failed to prove that a note from her actually reached Grygiel before the alleged reprisal in January 1991. OCEP Exhibit 1 at 5. She admits that the note could have gotten lost, since it was sent through Plant mail distribution. Due to this possibility, the complainant later reattached it to "a more formal safety document dated 11/3/91." Id. There is nothing in the record which shows that Grygiel actually received Oglesbee's note before her removal as lead secretary. Consequently, the note cannot be considered a protected disclosure under § 708.5 which was a contributing factor to that action.

Moreover, WHC has demonstrated by clear and convincing evidence that "Oglesbee's conduct during the period of time that she was the lead secretary was disruptive and was negatively impacting her co-workers whom she was 'leading,'" and therefore, her removal as lead secretary was unrelated to health and safety issues. WHC's Post-Hearing Brief at 19. At the hearing, I heard from numerous WHC employees, including Vikki Chappelle (an employee at B Plant from May 1990 to May 1992), who testified that the complainant was abusive during meetings that were called in an attempt to resolve personnel conflicts between Oglesbee and other employees:

She acted like she was going to get out of her chair. She wouldn't let you talk at all. She was almost to the

point of screaming. Her voice was very, very loud and to me . . . that's abusive . . . . Tr. Vol. II at 45.

I did not permit WHC to call a number of additional witnesses whose testimony would have been duplicative of Chappelle's testimony. Instead of presenting these witnesses at the hearing, counsel for WHC made proffers of what their testimony would have been, and counsel for Oglesbee entered into stipulations based on those proffers. These stipulations confirmed that other WHC employees had similar clashes with the complainant which negatively affected their work and "had nothing to do with any safety issues raised by Oglesbee." Tr. Vol. II at 254-256.

Based on the foregoing, I find that Oglesbee has neither "establish(ed) by a preponderance of the evidence that there was a disclosure . . .described under § 708.5" nor proved that it was a "contributing factor" in her removal from the position of lead secretary in January 1991. 10 C.F.R. §708.9 (d). Moreover, WHC has proven that there was an independent, non-discriminatory reason for Oglesbee's removal as lead secretary, even though it is not required to do so under the regulations. 10 C.F.R. § 708.9(d). In this instance, WHC management took what it saw as the necessary step to resolve a disruptive personnel situation and removed certain duties from the complainant.

B. Performance Improvement Plan

Oglesbee alleges that the second reprisal was a Performance Improvement Plan issued to her on March 26, 1991. This occurred during a time when WHC instituted a safety program known as Operation Clean Sweep, to encourage employees to write their concerns about health and safety issues on cards which they submitted. Tr. Vol I. at 105. On March 19, 1991, Oglesbee wrote a memo to management seeking permission for the B Plant clerical staff to participate in Operation Clean Sweep program sessions.

The record shows that on March 26, 1991, a Performance Improvement Plan prepared by Higbee was delivered to Oglesbee by Dan Lawrence, a WHC Human Resources Manager. It states that Oglesbee should "confine dealings during work hours to issues which pertain to: the direct operation of the B Plant Operation Manager's Office, personnel who directly deal with B Plant Operations Manager . . . , and preparation of correspondence, tracking of actions and resolutions of issues included in your job description." WHC Exhibit 1. Higbee also indicated that Oglesbee's "current unacceptable performance levels must change to improve your effectiveness on the job and your relationship with other plant personnel." Id. The complainant argues that her March 19 memo precipitated the Performance Improvement Plan, and that the memo is evidence that she made WHC aware of her health and safety concerns. See Complainant's Post Hearing Brief at 11. Oglesbee also testified that she filed Clean Sweep cards to voice her opinion about safety issues without reprisal. Tr., Vol. 1 at 134.

After reviewing the record, I find that like the complainant in the O'Laughlin case, Oglesbee has not met her threshold burden of showing that she made any protected disclosures during this period. For example, on one of her Clean Sweep cards Oglesbee wrote that "managers need to listen to all employees in a fair consistent manner, giving clear, concise directives that can be enforced by management." She further stated that "management needs to listen and handle with fairness and promptness the complaint of any employee." WHC Ex. 3. These writings simply do not raise a substantial and specific danger to health and safety. Likewise, Oglesbee's March 19 memo only vaguely indicated that she had health and safety concerns. In that memo, Oglesbee wrote "I am sure we have common complaints about our environment and procedure that should be discussed at this time." OCEP Ex. 10. Evidence that safety [and health] in the most general sense was referred to does not satisfy the standard prescribed in § 708.5 that the complainant must show she actually disclosed information which in good faith she believed evidences a substantial and specific danger. In O'Laughlin, the Hearing Officer found that the complainant failed to make a prima facie case when the evidence did not show that he disclosed information evidencing any substantial and specific health and safety concerns. The same conclusion is warranted regarding this particular aspect of Oglesbee's claim.

In addition to Oglesbee not meeting her threshold burden, WHC has shown by clear and convincing

evidence that the Performance Improvement Plan was issued in response to Oglesbee's disruptive interaction with co- workers which caused a decline in her work performance, and had nothing to do with her alleged mention of health and safety issues. During the hearing, several witnesses testified that Oglesbee was the cause of a disruptive work environment. For example, Vikki Chappelle described the situation as follows:

The job that I was doing at the time I liked very well but it became almost a regular basis when I'd wake up in the morning that I didn't want to go work . . . because of the conflicts at the office with Gai [Oglesbee]."

Tr., Vol. II at 46 and 47. See also the testimony of Ken Strickler, Tr., Vol. II at 238-247, and the stipulated testimony of Irene Palfrey and Tammy Doty, Id. at 255-6. Under these circumstances, there is no basis in the record for finding that the Performance Improvement Plan was an act of reprisal by Westinghouse that violated Part 708.

C. Transfer

Oglesbee alleges that following the issuance of the Performance Improvement Plan in February 1991, Higbee continued to retaliate against her for escalating her health and safety concerns with his superiors. Tr., Vol. I at 13. In July 1991, Oglesbee was transferred from her secretarial position in B Plant Operations to a similar position in B Plant Production Control. Oglesbee testified that she expressed her dissatisfaction with the possibility of a transfer. Tr., Vol I at 137. She was told that her transfer was suggested to increase her "organizational efficiency" and to relieve tensions between her and Higbee. Oglesbee believes that her transfer was retaliatory because it occurred close in time with meetings she had in July 1991 with Michael Dickinson of the WHC Employee Concerns Program office. She claims she raised health and safety concerns in these meetings. Dickinson testified that in these early meetings with him, Oglesbee primarily discussed the interpersonal problems she had with Higbee. Tr., Vol. II at 60. He indicated that the only health matter Oglesbee actually raised before the transfer concerned the alleged failure to issue a proper occurrence report after an incident in which a small quantity of asbestos fell through the ceiling into Higbee's office in 1989. Tr., Vol. I at 95-6. According to Dickinson, it was not until later in the process of working with Oglesbee--well after the transfer took place in July 1991-- that she began to articulate additional health and safety concerns in more specific detail. Id. Nevertheless, I find that the mention of the asbestos incident to Dickinson around the time of the transfer is sufficient to meet Oglesbee's burden of proving by a preponderance of the evidence that her disclosure was a contributing factor to the transfer. See, e.g., Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993).

The burden therefore shifts to WHC to prove by clear and convincing evidence that the transfer would have taken place even in the absence of Oglesbee's disclosure to Dickinson of the asbestos incident. As indicated below, I find that WHC has met that burden. There is ample evidence to show Oglesbee's transfer was not a reprisal for protected disclosures, but was instead the result of her problems with her supervisor and interpersonal conflicts with her co-workers. For example, Ken Strickler testified that Oglesbee became loud, threatening and disruptive during a meeting convened by the WHC Human Resources office to resolve conflicts between her and other clerical employees who worked in the same area. Tr., Vol. II at 246. During this period, WHC managers diligently attempted to address Oglesbee's personnel problems, and it is clear that they sincerely believed her transfer would provide a fresh start and an opportunity to work in a new environment. Tr., Vol. II at 137-8. Moreover, the record indicates that Oglesbee initially benefitted from her transfer. In October 1991, she received a high rating on her performance appraisal from Ray Menard, her new manager. Oglesbee herself indicated in her comments on that appraisal that she enjoyed her new job with Production Control. See WHC Exhibit 6, Tr., Vol. I at 212.

As indicated in the preceding discussion, I find that WHC has shown by clear and convincing evidence that it would have transferred Oglesbee absent any health and safety concerns raised by her. Accordingly, I find that Oglesbee's transfer in July 1991 to B Plant Production Control was not a violation of Part 708.

D. WHC's Decision Not to Return Complainant to B Plant Operations

In October 1991, Oglesbee told Dickinson that she wanted to return to her former position in B Plant Operations. Tr., Vol. II at 61. In response to this request, two meetings were held on January 10, 1992, with WHC Vice- President Ron Bliss, Dickinson, and others in attendance. The first meeting concluded with a decision to return Oglesbee to her former position. In the second meeting, which included the new B Plant Manager, Duane Bogen, the earlier decision was reversed and it was decided that Oglesbee would remain in her position in Production Control.

Tr., Vol. I at 98-101.

At the hearing, Oglesbee's counsel described this latter decision as one of the adverse personnel actions taken against the complainant, although this was not one of the allegations raised by Oglesbee in her complaint to OCEP. Tr., Vol I. at 15-16. This claim is without merit. I found above that WHC's initial decision to transfer Oglesbee from her job in Operations did not violate Part 708 since it had two legitimate purposes: (i) to relieve tensions in Operations, and (ii) to give her a fresh start in a new office. The transfer was successful initially in achieving its goals, and there is no basis for concluding that the decision to keep her in Production Control was a "discriminatory act" as defined in 10 C.F.R. § 708.4.

In addition, rather than constituting a reprisal, WHC's handling of the complainant's request to return to B Plant Operations demonstrates that the company separated Oglesbee's safety concerns from her personnel matters, e.g., her disagreements with Higbee and coworkers, and her desire to return to her former position. Dickinson testified that the company took this approach as Oglesbee set forth more specifically her complaints of "exposures," including the following: the incident where asbestos particles fell into Higbee's office (October 1989); the expulsion of dust-contaminated air by the plant's "fresh air" recycling fan, the Buffalo Forge Unit (between 1987 and 1990); the leaking of unknown liquids through the ceiling from the plant's Aqueous Make-Up area onto the wall in Oglesbee's office (1987- 1991); and the leaking of liquid from a light ballast on one occasion in Higbee's office (either 1989 or 1990). Tr., Vol. II at 63-64; see OCEP Report of Investigation at 2, 6-9.

There is no dispute that the company gave separate consideration to Oglesbee's safety disclosures and her personnel problems, although the complainant argues this was done "to deflect attention given to [her] complaints by the DOE and [WHC] Employee Concerns." Complainant's Post-Hearing Brief at 36. After listening to the witnesses at the hearing, I am convinced that WHC's attempt to investigate and address Oglesbee's safety issues on a separate basis from her personnel problems was a rational response to the complaints she raised. Moreover, Dickinson testified that it was not unusual for the company to deal with an employee's concerns in this manner. Tr., Vol. II at 64. An example of this approach is a January 3, 1992 memorandum from Grygiel, then B Plant Manager, which responded to a November 18, 1991 memorandum in which Oglesbee raised both personnel and safety issues. OCEP Exs. 28 and 31. In that memo, Grygiel addressed each item of the complainant's personnel concerns, and then stated with regard to her safety issues that, although none of the issues raised appeared to be a current problem, any additional safety issues were to be brought to "the immediate attention of your manager or to plant management." OCEP Ex. 31.

Finally, in a January 22, 1992 memo to the complainant, WHC President Thomas Anderson affirmed the company's decision to keep Oglesbee in her Production Control position, and stated that his memo was "our final response to your employee concern." OCEP Ex. 38. Dickinson testified that while he considered her personnel issues closed by the Anderson memo, he continued to investigate the safety issues raised by Oglesbee. Tr., Vol. II at 64.

E. Performance Expectations Letter and Reprimands

In early 1992, Oglesbee received a Performance Expectations Letter and two letters of reprimand, each of which she contends was a reprisal for her health and safety disclosures. These were given to the

complainant by Ray Menard, Oglesbee's supervisor after she was transferred to B Plant Production Control. Menard testified that Oglesbee initially performed well in her job, but that in late 1991 he became concerned because Oglesbee was spending a great deal of time on the telephone in the morning during the office's peak hours. He observed that Oglesbee would at times not answer incoming telephone calls, and that certain work was not being performed in a timely manner, such as producing daily reports and processing time cards. Tr., Vol. II at 205-09. Menard testified that he related his concerns to Oglesbee in November 1991, and that after her performance did not improve, he issued her a Performance Expectations Letter in January 1992. Id. at 209-11. On February 26, 1992, after continuing dissatisfaction with her performance and two contentious meetings with the complainant, Menard gave Oglesbee a letter of reprimand. Id. at 211-16; OCEP Ex. 82. A second reprimand was issued on April 7, 1992, following complaints from B Plant Deputy Manager Russ Murkowski that another employee, Sandra Rigney, had received unwanted telephone calls from the complainant. Tr., Vol. II at 216-18; OCEP Ex. 84.

It is undisputed that the Performance Expectations Letter and reprimands were issued to Oglesbee at a time when she was making continuing complaints to WHC management and the DOE which included health and safety concerns. In fact, it was Menard's observation that Oglesbee was not answering telephones or performing timely work because of the time spent on her concerns. See Tr., Vol. II at 223-23. Thus, an inference can be drawn that Oglesbee's protected disclosures were a contributing factor in these personnel actions. See, e.g., Ronald Sorri, 23 DOE ¶ 87,503 at 89,009-10 (1993).

The burden therefore shifts to WHC to prove by clear and convincing evidence that the same actions would have been taken against Oglesbee absent her protected health and safety disclosures. The company has not met this burden. Admittedly, the complainant's concerns were not confined to health and safety issues, and it is clear that some of Oglesbee's activities were not protected under the regulations. For example, it appears that the second reprimand issued to Oglesbee was prompted at least in part by complaints from the B Plant deputy manager about her annoying phone calls to Sandra Rigney. Tr., Vol. II at 217-18; OCEP Ex. 84. Nonetheless, the second letter of reprimand refers to "14 written communications and numerous phone calls" initiated by Oglesbee in pursuing her concerns with WHC and the DOE. OCEP Ex. 84. Although the record is not definitive on this point, the burden of persuasion remains with WHC, and there is not clear and convincing evidence that the Performance Expectations Letter and reprimands would have been given to the complainant if it were not for her protected activities.

To be sure, every employer has a strong interest in running an efficient organization, and it is not the purpose of Part 708 to hinder the ongoing work of DOE contractors. As a manager, Menard faced a dilemma. There is no evidence that his actions were taken in response to the substance of Oglesbee's complaints. Rather, his main concern appeared to be that Oglesbee complete her work on time, and he saw that the time spent on her concerns was getting in the way of effective performance. However, he also stated in his testimony that Oglesbee would have had 3-4 hours per day to pursue her complaints during the office's non-peak hours, so there was clearly room here to accommodate the interests of both employer and employee. Tr., Vol. II at 233. Unfortunately, the record indicates that this was never communicated to Oglesbee, either orally or through the disciplinary letters issued to the complainant. Id. at 237-38.

Thus, while Menard claims that he never intended to discourage Oglesbee from expressing her concerns, the Performance Expectations Letter and letters of reprimand as written could reasonably have been perceived as an attempt to do just that. It would therefore be consistent with the stated policy of the Part 708 regulations to conclude that such letters should not appear in a complainant's personnel file. See 10 C.F.R. § 708.3 (employees should be free to make disclosures "without fear of reprisal"). However, the regulations also favor resolution of whistleblower complaints through internal company grievance procedures. See 10 C.F.R. § 708.6. In the present case, a WHC Employee Appeals Board ordered that the letters of reprimand be removed from Oglesbee's personnel file on April 27, 1992. Colleen Lloyd, a WHC Personnel Records Custodian, confirmed that Oglesbee's personnel file does not contain the January 30, 1992 Performance Expectations Letter, or the two letters of reprimand. Tr., Vol II at 24. The Board's decision to remove the letters of reprimand was based on its finding that Menard had failed to follow the WHC progressive discipline policy. It did not conclude that the disciplinary letters were issued in

retaliation for the reporting of health and safety concerns. Tr., Vol. II at 120-3; OCEP Ex. 86. Regardless of the reason for its action, however, I conclude that the relief ordered by the Board renders this issue moot.

My conclusion regarding the mootness of the reprimand issue is in accord with two relevant federal court decisions. One is a U.S. Supreme Court case which discusses the issue in the Title VII context. County of Los Angeles v. Davis, 440 U.S. 625 (1979). The court stated that a controversy becomes moot when "(1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur . . . and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Id. at 631 (citations omitted) (quoting United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953)). In that case, the conditions for mootness were met because (1) there was no reasonable expectation that the City would go back to using an old civil service examination that had been found to be discriminatory, and (2) the City's changed hiring practices had eradicated the effect of the past discrimination.

In the present case the conditions for mootness are met because (1) given WHC's treatment of Oglesbee since the reprimands, there is no reason to think that this particular problem will recur, and (2) the effects of the reprimands were eradicated when they were removed from her personnel file.

The second case is a federal employee whistleblower case decided by the U.S. Court of Appeals for the D.C. Circuit, and the facts are analogous. Frazier v. Merit Sys. Protection Bd., 672 F.2d 150 (D.C. Cir. 1982). In this case, the MSPB found that Frazier had been transferred improperly based on his exercise of EEO appeal rights. Frazier appealed the decision because the Board did not find, as he had contended, that the transfer was prompted by disclosures he made to Congress. He therefore claimed that the decision had a continuing "chilling" effect on him. The court found that "[e]ven if we determined that the Board's decision on this point was incorrect, Frazier would be entitled to no more relief than he has already received. Under these circumstances, Frazier presents us with no continuing controversy and we will therefore dismiss his petition . . ." Id. at 160-61.

Similarly in the present case, regardless of the reason that the WHC Appeal Board found that the reprimands should be removed, and whether or not we think that the Appeal Board should have found that Oglesbee's disclosures led to the reprimands, Oglesbee is entitled to no more relief than she already received. As OCEP noted in its Proposed Disposition, the proper remedy for the reprimands, if they had been found to be reprisals, would have been the removal of the material from her personnel file.

F. Delay in Promotion to Secretary IV

In September 1992, under a new supervisor, Don Bailey, Oglesbee was promoted to Secretary Level IV. Oglesbee alleged in her complaint to OCEP that this promotion would have taken place sooner were it not for her health and safety disclosures. While the complainant did not present any specific evidence at the hearing to support this allegation, WHC offered the testimony of Colleen Lloyd, a WHC Personnel Records Custodian. Lloyd testified that the five and one-half years spent by Oglesbee in her Secretary Level III position was not an unusually long time for an employee to remain in that position, and that the decision to promote secretaries is left to individual managers. Tr., Vol. II at 25.

Given the lack of evidence presented by the complainant on this issue, and the conflicts Oglesbee experienced with her supervisors and co-workers described above which occurred prior to any specific health and safety disclosures, it would be difficult to conclude that Oglesbee was not promoted because of protected activity. In fact, the complainant spent a comparatively brief time in her Level III position from the time of her initial disclosure in July 1991 to her promotion to Level IV Secretary in September 1992. I therefore find that Oglesbee has failed to meet her burden of showing by a preponderance of the evidence that her protected disclosures were a contributing factor to any delay in her promotion to a Level IV Secretary.

Even though WHC has no burden of going forward with the evidence on this aspect of the claim, the

record indicates that WHC management attempted to work with Oglesbee to find a position that would suit both her and the company, while at the same time demonstrating a concern for the health and safety issues she raised. For example, as discussed above, WHC continued to investigate the health and safety issues raised by the complainant after her personnel matters were considered closed. On July 9, 1992, Douglas Falk, a WHC Industrial Hygienist, issued a comprehensive report in response to Oglesbee's health and safety complaints. See OCEP Ex. 48. There is no claim that the report was not issued in good faith. In addition, when Oglesbee was promoted to the position of Plant Engineer, she was given the responsibility of monitoring employees' hazardous exposure concerns as part of the company's "ALARA" (As Low As Reasonably Achievable) program. Tr., Vol. I at 152-54. It is the circumstances surrounding this promotion that are the focus of Oglesbee's final allegation of reprisal.

G. Delay in Promotion to Permanent Plant Engineer

Oglesbee alleges that the final reprisal taken against her occurred close in time after she filed her complaint under Part 708 on August 21, 1992. Tr., Vol. I at 20. In January 1993, Oglesbee had been promoted to a Temporary Plant Engineer and was promised that her promotion would become permanent within six months. See OCEP Report of Investigation at 41. However, as explained at the hearing, promotions had to follow a routine procedure in WHC's personnel system under which employees were required to "post" for new positions. Tr., Vol. II at 164.

Duane Bogen, Plant Engineer, described the WHC posting process:

The Westinghouse system of filling positions, with the exception of management positions, is that you would fill out a position description and submit it to human resources, they would then publish this site-wide. All individuals on site who thought they would qualify and had interest in the position that was being advertised or posted could then apply for it.

Tr., Vol. II at 164-165. Bogen further testified that the manager of records (in Human Resources) would then sort through these postings, tentatively select an eligible applicant, and determine the pay grade based upon the applicant's qualifications. The job would then be offered to the applicant at that rate of pay, and he or she could decide whether to accept the offer. Id. A temporary upgrade did not require the use of this system, and it could last anywhere from a few months to a year. Tr., Vol. II at 175.

In May 1993, Oglesbee sent an electronic mail message to Bogen after she had occupied the position of Temporary Plant Engineer for five months, and after being informed by him that her temporary position would be extended an additional six months (until December 31, 1993). Tr., Vol. II at 172. Bogen testified that Oglesbee's message queried whether WHC was having "a problem with her upgrade because of her ongoing concern issues." Tr., Vol. II at 174. He responded with the following message:

You are doing OK. Very well in fact, according to Don Bailey. Until the investigation is over, and all recommendations have been made, it made sense to us to leave the situation as "Status Quo". It has nothing to do with your work performance.

Tr. Vol. II at 184.

When Bogen's superior, Ron Bliss, became aware of this response, he verbally reprimanded Bogen for taking an improper action, and immediately promoted Oglesbee to Permanent Plant Engineer effective May 24, 1993, thereby by-passing the normal requirements of the WHC posting procedure. Tr., Vol. II at 183.

Oglesbee's counsel contends that Bogen's e-mail message is "direct evidence that the extension of complainant's temporary upgrade was (1) a retaliatory action and (2) was taken solely because complainant filed a complaint under 10 C.F.R. 708." See Complainant's Post-Hearing Brief at 15. Standing alone, this evidence is enough to satisfy the complainant's burden of showing by a preponderance of the evidence that her health and safety concerns were a contributing factor to the delay in making permanent

her promotion to Plant Engineer. Thus, the burden is shifted to WHC to show by clear and convincing evidence that the delay in making Oglesbee's promotion permanent would have occurred even in the absence of her whistleblowing activities. The record shows that Bogen had two reasons for his action. First, he testified that:

My understanding is that generally [when] investigation, labor-type investigations are made, you try to leave the situation as is, status quo, you don't promote people, you try to leave things as is until it shakes out and truth is known and whatever decisions are made.

Tr. Vol. II at 178. Unfortunately, Bogen did not consult the WHC Legal Department before sending his reply to Oglesbee's e-mail message, or he would have learned that his first reason was incorrect. Id.

Second, and more importantly, Bogen went on to explain that there was an independent procedural reason for delaying the promotion of Oglesbee to the permanent position. WHC was downsizing its security guard force during this period. As a result, the normal posting process for all WHC jobs, including the Permanent Plant Engineer position, was temporarily halted while the effort was under way to place the guards whose jobs were eliminated into other positions at the Hanford Site. Tr., Vol. II at 175. Until the Plant Engineer job could be posted, Bogen lacked the authority to promote Oglesbee to the permanent position. Id. at 178. In other DOE whistleblower cases, we have found violations of Part 708 when contractors departed from their normal personnel procedures to the detriment of the complainant. E.g., Ronald Sorri, 23 DOE ¶ 87,503 (1993); see also Deford v. Sec'y of Labor, 700 F.2d 282 (6th Cir. 1983) (evidence showed that the agency did not follow its normal procedure in transferring whistleblower). In this case, however, the record indicates that WHC was merely following its normal personnel procedures by not making Oglesbee's promotion permanent until the job could be posted.

Based on the record developed in this proceeding, I find that WHC has shown by clear and convincing evidence that there were independent, non- discriminatory reasons which justified the delay in promotion. Although Bogen's e-mail message may have appeared to Oglesbee to be a reprisal, Bliss immediately recognized the problem and exercised his authority as WHC Vice- President to remedy any potential harm to Oglesbee. In doing this, the company by-passed its normal personnel procedures, but its action worked to Oglesbee's great advantage: she got the promotion without waiting until the position could be posted, and she received a 26 percent increase in salary. Under these circumstances, there is no basis in the record for finding that the delay in Oglesbee's promotion to permanent Plant Engineer was an act of reprisal by Westinghouse that violated Part 708.

III. Conclusion

As set forth above, I have determined that with regard to certain of the allegations raised, the complainant failed to meet her burden of proving by a preponderance of the evidence that she made substantial and specific disclosures concerning health and safety to WHC. In those instances where the complainant made protected disclosures under Part 708 followed closely in time by adverse personnel actions, I find that WHC has proven by clear and convincing evidence that it would have taken the same actions absent her disclosures, or that the complainant has already been provided an adequate remedy for the actions taken against her. Accordingly, I conclude that the complainant has failed to establish the existence of any violations of the DOE Contractor Employee Protection Program for which further relief is warranted under § 708.10.

It is Therefore Ordered That:

(1) Helen Gaidine Oglesbee's request for relief under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director of the Office of Contractor Employee Protection.

Thomas O. Mann

Hearing Officer

Office of Hearings and Appeals

Date: September 2, 1994

1/ With regard to Oglesbee's complaints that she was issued written reprimands and that her promotion to Plant Engineer was delayed, the OCEP found that these issues had already been resolved by WHC in accordance with the relief OCEP would have recommended had it found that the actions were retaliatory. WHC removed the written reprimands from Oglesbee's personnel file in April 1992, and she was promoted to Plant Engineer in June 1993.

2 / OHA staff attorneys Steven J. Goering and Kimberly A. Jenkins attended the hearing, and along with OHA staff analyst Stephani Ratkin, assisted in the drafting of this decision.

3 / As characterized by one federal court, a denial of defendant's motion to dismiss at the close of plaintiff's case "amounts to nothing more than a refusal to enter judgment at that time. At most it constitute[s] a tentative and inconclusive ruling on the quantum of plaintiff's proof." See Sanders v. General Services Admin., 707 F.2d 969, 972 (7th Cir. 1983) (quoting Armour Research Foundation of Illinois Institute of Technology v. Chicago, Rock Island & Pacific Railroad, 311 F.2d 493, 494 (7th Cir.), cert. denied, 372 U.S. 966 (1963)).

4/ The unofficial title of "lead secretary" is not a job position recognized by WHC's Human Resources department and therefore, has no pay or benefits attached to it. (WHC's Post-hearing Brief at 17).

Case No. LWA-0010

January 4, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Howard W. Spaletta

Date of Filing: June 27, 1994

Case Number: LWA-0010

This Decision involves a whistleblower complaint filed by Howard W. Spaletta (Spaletta) under the Department of Energy's (DOE) Contractor Employee Protection Program. From 1970 through May 1992 when he retired, Spaletta was employed as a metallurgical engineer at DOE's Idaho National Engineering Laboratory (INEL). For a number of years, EG&G, Idaho, Inc. (Contractor) was the management and operating contractor at INEL, and Mr. Spaletta was employed by EG&G Idaho at the time he filed his complaint.(1) Spaletta alleges that the Contractor retaliated against him for making health and safety disclosures to EG&G upper-level management, DOE's Idaho Operations Office (ID), DOE's Office of Inspector General, members of Congress, and the Nuclear Regulatory Commission (NRC). Spaletta maintains that because he made disclosures the Contractor (1) referred fewer and less important work assignments to him, (2) lowered his annual merit pay increases, (3) required him to take unpaid leave during a 1990 Christmas holiday curtailment of operations, and (4) constructively terminated him.(2)

After bringing his allegations of reprisal to the attention of a number of governmental entities, Spaletta filed a complaint with ID on April 14, 1992. ID was unable to resolve the complaint and forwarded it to the DOE's Office of Contractor Employee Protection (OCEP). OCEP investigated Spaletta's complaint and issued a Report of Investigation and Proposed Disposition on May 12, 1994. In its Proposed Disposition, OCEP found that Spaletta had made protected disclosures and thereafter the Contractor had retaliated against him by referring fewer work assignments to him and by reducing his annual merit pay increases. At the same time, OCEP found that Spaletta had not shown that the Contractor had retaliated against him by failing to assign him important and meaningful work, by requiring him to solicit work, or by requiring him to take unpaid leave during a Christmas 1990 holiday curtailment of work. In a letter dated June 7, 1994, Spaletta requested a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer to challenge OCEP's findings and conclusions.

I. Background

A. Factual Background

The following summary is based on the OCEP investigative file, the hearing transcript (hereinafter "Tr."), and the submissions of the parties. Except as indicated below, the facts set forth below are uncontroverted.

In 1970, Spaletta began his employment at INEL's Materials Technology Group (MTG). His duties included design and program review, engineering failure analysis, materials specification, materials

performance evaluation, and technical consulting. OCEP Proposed Disposition at 1. The record shows that he enjoyed, and continues to enjoy up to the present time, a reputation among his peers and managers for excellence in engineering, technical integrity, and reliability.

In October 1985, the Tennessee Valley Authority (TVA) contracted with DOE to provide an independent evaluation of welding at TVA's Watts Bar Nuclear Power Plant, Unit One (Watts Bar), located in Oak Ridge, Tennessee. The purpose of the evaluation was two-fold: to determine whether TVA's welding program had complied with its Final Safety Analysis Report (FSAR) commitments, and to address the 472 concerns raised by TVA employees about the safety of welding performed at Watts Bar. DOE assigned the responsibility for conducting the evaluation to the Contractor. The Contractor in turn established a Weld Evaluation Program (WEP) and named Frank Fogarty as the WEP's director. In July 1986, Fogarty created a Senior Review Committee (SRC) consisting of Spaletta and four other EG&G employees to assist in evaluating the code compliance of the Watts Bar welding program and to review the WEP's final report (the report). James (Curt) Haire was chosen by Fogarty to act as Chairman of the SRC. During the week of July 7, 1986, the SRC members conducted an on-site assessment of the WEP at Watts Bar.

Spaletta and the three other members of the SRC with technical expertise each developed reservations about the Watts Bar welding program. Among their concerns was WEP's use of an inspection code (NCIG-01(3)) that was different from the inspection code TVA committed to use in the Watts Bar plant's FSAR (AWS D1.1, 1972, Rev. 2, 1974(4)). The SRC members believed that the welding standards contained in the NCIG-01 code were less stringent than the standards contained in the AWS D1.1 code.(5) On August 22, 1986, Chairman Haire wrote a memorandum to Fogarty on behalf of the SRC summarizing the results of the SRC's on-site review of the WEP. In that memorandum, Haire informed Fogarty of the SRC members' concerns, including the use of the NCIG-01 code to evaluate welds at the Watts Bar plant. In the following years, each of the SRC's technical experts communicated their concerns about the WEP or the final report to Fogarty or Haire in writing. *See* December 8, 1987, Interoffice Correspondence from T.F. Burns to J.C. Haire; December 11, 1987, Interoffice Correspondence from Ralph Marshall, Jr., to F.C. Fogarty. Spaletta's concerns about this issue were two-fold. First, he was concerned that the FSAR required welds at Watts Bar to be inspected using the AWS D1.1 code. Second, Spaletta was concerned that using the less stringent NCIG-01 code to evaluate employee safety concerns resulted in a conclusion which Spaletta believed to be false, namely, that the employee concerns were almost all inconsequential.

Fogarty prepared a draft version of the WEP final report, which he then provided to the members of the SRC for review and comment. The SRC identified a number of areas in which the report could be improved. While the final version of the report incorporated a number of the SRC members' suggestions, it did not incorporate all of them. Among those unheeded suggestions was a recommendation that the final report explicitly acknowledge that the WEP reinspected the welds using the NCIG-01 code instead of the AWS code set forth in the FSAR. Instead, the final report stated that the welds were reinspected to "applicable codes." Each of the SRC's technical experts expressed concern that the draft final report obscured the WEP's use of the less stringent NCIG-01 reinspection code without prior NRC approval. Testimony at the hearing indicated that adoption of this suggestion would have resulted in the addition of one or two sentences in the report and the modification of one table. The final report also stated that 451 of the 472 employee concerns about safety-related weld issues -- 95.6 percent -- could not be specifically confirmed. Of the remaining 4.4 percent, the final report found that two-thirds identified welds that "are in compliance with the applicable code and required no corrective action." Final Report, Weld Evaluation Program, ¶ 4.3 at 13.

The WEP final report was issued to ID in November 1987. On January 26, 1988, ID forwarded the WEP report to TVA. TVA submitted the WEP report to the NRC on February 17, 1988.

After the final report was issued, Spaletta continued to express his concerns about the final report to various EG&G and ID officials. He also sought its retraction or correction. A little more than one year after the TVA submitted the report to the NRC, on March 9, 1989, ID submitted Spaletta's concerns to the NRC. On July 10, 1989, the NRC's Office of Nuclear Reactor Regulation issued a document entitled

"Allegation Evaluation" in response to the issues raised by Spaletta. In its evaluation, the NRC stated in pertinent part:

The NRC staff concluded that the allegation is substantiated because the same observations were made by the NRC staff during its review of the DOE/WEP report. However, these issues were resolved in a meeting held on October 11, 1988 and based on the NRC staff's review of the raw data compiled by WEP, the staff concluded that the DOE/WEP reinspection at [Watts Bar] was an effective sampling effort, thus the reinspection results can be used to assess the welding at [Watts Bar]. Further, the staff concluded that the WEP was adequately implemented. In addition, TVA's current corrective action plans that resulted from the DOE/WEP evaluation appear adequate and, if properly implemented, should provide reasonable assurance that the quality of the welds at [Watts Bar] are adequate.

Allegation Evaluation at 6. Despite this NRC evaluation, Spaletta continued his efforts to have the Report retracted or corrected. On April 24, 1990, Spaletta sent a letter to Don Kerr, the Executive Vice President of EG&G, Inc. (EG&G Idaho's parent corporation), expressing his concerns about the WEP Report. On June 19, 1990, Spaletta sent a similar letter to John M. Kucharski, the Chairman and Chief Executive Officer of EG&G, Inc. On September 25, 1990, Spaletta wrote to William F. Willis, TVA's Executive Vice President, expressing his concerns. On October 16, 1990, Spaletta sent a letter to the DOE's Office of Inspector General (OIG) communicating his concerns about the WEP and its associated report.

During the period in which Spaletta made disclosures, he: (1) had difficulty obtaining work assignments; (2) received the lowest annual percentage merit increases of any professional employee in his work unit; (3) was warned that his continued failure to obtain new work assignments could result in the loss of his job; and (4) was directed to take leave during a company-wide, Christmas 1990, holiday work curtailment. Spaletta's employment at INEL ended on May 29, 1992, when he accepted an offer of early retirement.

B. Procedural History of the Case

On April 14, 1992, Spaletta filed a complaint with ID pursuant to 10 C.F.R. Part 708. On May 12, 1992, after concluding that it had found no record of retaliatory personnel actions by EG&G against Spaletta, ID forwarded Spaletta's complaint to OCEP. OCEP conducted an on-site investigation of Spaletta's allegations of reprisal and issued a Report of Investigation and a Proposed Disposition on May 12, 1994. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that: (1) Spaletta had made protected disclosures related to health and safety concerns; and (2) EG&G had retaliated against Spaletta by granting him lower annual merit pay increases than he otherwise would have obtained, and by referring less work to him.(6) Accordingly, OCEP proposed to order EG&G to:

(1) Pay lost wages representing the difference between his merit pay increases subsequent to February 11, 1991, and the average of the merit pay increase percentages given in 1991 and 1992 to employees within EG&G's Science and Technology Department who were rated as either "Excellent" or "Excellent Minus" in 1991, and rated "Excellent" or "Good" in 1992, and who were in the same salary range quintile as Spaletta;

(2) Pay Spaletta "reasonable" interest on his lost wages;

(3) Pay Spaletta's legal fees and expenses; and

(4) Review its policies and practices governing both work referrals and employee requirements for developing their own work assignments in order to safeguard against reprisals and adverse consequences stemming from protected employee disclosures and actions.

On June 7, 1994, Spaletta sent a letter to OCEP in which he requested a hearing under 10 C.F.R. § 708.9. The OHA received Spaletta's request from OCEP on June 27, 1994. On July 1, 1994, the Director of the OHA appointed me as Hearing Officer. Spaletta's pre-hearing brief was received on September 2, 1994,

and the Contractor's pre-hearing brief was received on September 20, 1994. A pre-hearing conference was conducted via telephone on September 27, 1994. The hearing was held in Idaho Falls, Idaho, on October 3-4, 1994.(7) At the conclusion of the hearing on October 4th, the parties elected to forego oral argument, and requested permission to file post-hearing briefs. The parties' post-hearing briefs were received by the OHA on December 5, 1994.

II. Legal Standards Governing This Case

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[ ] fraud, mismanagement, waste, and abuse" at DOE's government-owned, contractor-operated (GOCO) facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers.

Proceedings under 10 C.F.R. Part 708 offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by providing for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee.*See David Ramirez*, 23 DOE ¶ 87,505, *affirmed*, 24 DOE ¶ 87,510 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has "[d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences [a] violation of any law, rule, or regulation [or] a substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5(a)(1); s*ee also Francis M. O'Laughlin*, 24 DOE ¶ 87,505 (1994).

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)).

B. The Contractor's Burden

If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d). *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Spaletta establishes that he made a protected disclosure that was a contributing factor to an adverse personnel action, EG&G must convince me that it would have taken the action even if Spaletta had not raised any health or safety concerns.*Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507, at 89,034-35 (1994).

III. Analysis

After considering the record established in the OCEP investigation, the parties' submissions, the testimony presented at the hearing, and the post-hearing briefs, for the reasons stated below I have concluded that Spaletta has met his burden of proving by a preponderance of the evidence that he made protected disclosures concerning health or safety that resulted in adverse personnel actions against him. In addition, I have concluded that the Contractor has not shown by clear and convincing evidence that the same

personnel actions would have been taken absent Spaletta's disclosures. Accordingly, relief is warranted under § 708.10.

A. Whether Spaletta's Disclosures Are Protected Under 10 C.F.R. § 708.5(a)(1).

There is no dispute that Spaletta has made numerous disclosures to EG&G's management, to the DOE, and to Congress consisting, in part, of allegations that a safety report prepared by the Contractor for submission to DOE concealed the WEP's use of a weld inspection code less stringent than the code required by the Watts Bar FSAR. The Contractor contends that Spaletta's disclosures are not protected under § 708.5(a)(1) because: (1) his disclosures were made out of a concern for his reputation rather than a good faith belief that a threat to safety existed; (2) the safety issues disclosed by Spaletta were not substantial and specific; (3) Spaletta's disclosures related to technical and administrative issues rather than safety concerns; and (4) after the NRC had determined that the underlying data collected by the WEP established that the welds at Watts bar were "suitable for service," any subsequent disclosures could not have been made with a good faith belief that a threat to health or safety existed. Each of these arguments will be discussed in turn.

First, the Contractor contends that Spaletta's safety disclosures were not made in "good faith" because they were motivated by Spaletta's concern for his personal reputation rather than his concern for safety. As an initial matter, the Contractor has misinterpreted the term "good faith" as used in the regulations. The requirement that disclosures be made in "good faith" is not intended to require that a complainant prove that his only motive for making a disclosure was a concern for safety (or any of the other protected subjects). Instead, the good faith clause is intended to relieve complainants of the burden of proving that their allegations are correct or accurate. Under 10 C.F.R. § 708.5(a)(1), complainants must show only that they had a r*easonable belief* that their allegations were accurate. Therefore, as long as the complainant reasonably believed that his allegations were accurate, they were protected, regardless of the complainant's ultimate motives for making the disclosures. Accordingly, whether Spaletta was in fact motivated to protect his reputation is irrelevant to the question of whether the disclosures are entitled to protection under §708.5(a)(1).(8)

Second, the Contractor contends that the safety issues disclosed by Spaletta were not substantial and specific, as required by 10 C.F.R. § 708.5(a)(1). The Contractor spends many pages in its pre-hearing brief arguing that the facts in this case are similar to the facts in *Francis M. O'Laughlin*, 24 DOE ¶ 87,505 (1994), in which the OHA hearing officer held that the disclosures were not specifically related to safety. However, in that case, O'Laughlin complained about a proposed company reorganization, and none of the people to whom he complained reasonably understood there to be any safety implications in his complaints based upon the content and context of his communications. In the present case, not one witness has suggested that safety concerns were not involved in Spaletta's disclosures. I therefore conclude that the record amply indicates the presence of reasonable-held safety concerns of a "substantial and specific" nature.

The Contractor next contends that Spaletta's disclosures were not related to safety but were technical or administrative in nature. There were numerous disclosures by Spaletta during the relevant period, and the record supports the Contractor's position that some of them concerned non-safety issues. For example, on December 28, 1988, Spaletta wrote a memorandum to Dennis Keiser, a senior manager, articulating his concern that EG&G's management did not have an effective procedure for resolving employee concerns.(9) However, most of Spaletta's complaints involved a report concerning a safety inspection of a controversial nuclear power plant which he contends intentionally concealed potential safety problems, denigrated safety-related employee concerns, and violated NRC requirements and EG&G internal guidelines. I would be hard pressed to find a more substantial and specific danger to public health or safety than allegations of this nature.

Finally, the Contractor argues that any of Spaletta's disclosures made after July 10, 1989, (when the NRC informed Spaletta that it had resolved the WEP issues brought to its attention by Spaletta) could not have

been made with a good faith belief that a threat to safety existed. This contention is without merit. First, it incorrectly assumes that a complainant's disagreement with a regulatory agency's safety determination could not be reasonable. Second, the NRC's written report actually confirmed Spaletta's concerns and reserved its final judgment of the suitability of Watts Bar welds for a future date. Finally, this argument ignores the changing nature of Spaletta's allegations over time. As Spaletta began elevating his concerns up the chain of EG&G management, he began focusing on what he perceived to be a systematic failure on the part of EG&G management to address what he believed to be a recurring safety and quality problem. Spaletta frequently alleged that management's emphasis on business development often prevented its employees from bringing safety and quality problems to the attention of management. Spaletta often analogized this systematic deficiency to similar conditions identified by the Presidential Commission that investigated the Challenger space shuttle disaster. He also alleged that EG&G did not have a formal system established to resolve such concerns. In any event, many of the disclosures pre-dated the NRC's evaluation of the issues raised by Spaletta.

Under these circumstances, I have concluded that Spaletta made his disclosures with a good faith belief that the final report did not disclose that WEP had used a weld inspection code that was not mentioned in the FSAR and, as a consequence, evaluated employee weld safety concerns against a standard different from the standard contained in the FSAR. After considering the evidence submitted in this matter and the testimony and demeanor of the witnesses at the hearing, I have also concluded that Spaletta believed that these conditions impacted on safety at the Watts Bar plant. I therefore hold that Spaletta's disclosures are protected by 10 C.F.R. § 708.5(a)(1)(i) and (ii).

B. Whether the Contractor Retaliated Against Spaletta

Spaletta contends that as a result of his disclosures, EG&G retaliated against him by: (1) referring fewer work assignments to him, (2) lowering his annual merit pay increases, (3) requiring him to take unpaid leave during a 1990 holiday curtailment of operations, and (4) constructively terminating him. I will discuss each of Spaletta's contentions in turn.

1. Whether the Contractor Referred Fewer Work Assignments to Spaletta

Spaletta asserts that because of his disclosures, EG&G managers began referring fewer work assignments to him. The Contractor admits that the demand for Spaletta's services did noticeably decline, but contends that Spaletta's reduction in work assignments merely reflected the changing nature of the INEL's mission, which was shifting away from nuclear reactor production to research and environmental protection. According to the Contractor, this change in mission produced a decrease in demand for Spaletta's expertise.

The record, however, supports Spaletta's assertions. It shows that: (1) prior to Spaletta's disclosures his services as a welding engineer were in high demand, (2) despite the high esteem in which Spaletta's engineering skills were held by both his colleagues and managers, he began receiving fewer work referrals and assignments from them, (3) the decline in demand for Spaletta's services occurred after his disclosures to DOE, NRC, TVA, and EG&G management, (4) at least one EG&G manager who frequently referred assignments to Spaletta discontinued assigning work to Spaletta out of concern that the manager would antagonize a higher level EG&G manager, and (5) during the period in which Spaletta's work assignments declined, EG&G utilized the services of another engineer and hired an additional welding engineer to undertake assignments which Spaletta was capable of handling.

As late as early 1989, Spaletta's services were in demand at INEL. Two witnesses, Ralph Marshall and Bert L. Barnes, testified at the hearing that Spaletta's services were in great demand at INEL. Tr. at 61 (Marshall), Tr. at 109 (Barnes). No one suggested otherwise. At the same time, while Spaletta’s dispute about the WEP report was known to many of his peers and managers, the record contains numerous statements by EG&G employees attesting to Spaletta's engineering excellence. In fact, at the hearing a number of witnesses went out of their way to state that they still considered Spaletta to have excellent

technical skills. The testimony concerning Spaletta's excellent professional reputation is corroborated by comments contained in Exhibit 47 to the Report of Investigation, which is Spaletta's performance evaluation for the year 1989.

However, Spaletta began having difficulty obtaining work assignments and referrals. His supervisor began discussing this failure to obtain referrals of new work assignments in his performance evaluations and eventually began warning him that his failure to obtain new assignments could result in the loss of his job. Handwritten note of Dennis Keiser (July 18, 1991).

The testimony of one EG&G employee, Bert L. Barnes, provides crucial information about why this reduction in work assignments occurred. Barnes testified that he had formerly referred a great deal of consulting work for the NRC to Spaletta because of his high regard for Spaletta's engineering expertise and reliability. Tr. at 108-10. However, Barnes also testified that he discontinued referring or assigning projects to Spaletta because he feared retaliation from EG&G Management, particularly Frank Fogarty. Tr. at 108-09, 112-13, 119; Proposed Disposition at 13 (quoting E-mail Message from Barnes to Fogarty). Barnes testified that he was aware of Spaletta's disagreements with EG&G management about the WEP project since the disagreements were common knowledge among EG&G's employees. Tr. at 121. Those disagreements, Barnes testified, motivated him to discontinue referring work to Spaletta. Tr. at 108-12. Barnes also testified that no EG&G manager, including Fogarty, ever told him not to refer work to Spaletta. Nevertheless, it is clear that one EG&G manager -- Mr. Barnes -- discontinued assigning work to Spaletta because of his disclosures.

The loss of referrals from Barnes most likely had a significant impact on Spaletta's workload. An EG&G questionnaire completed by Spaletta on December 12, 1984, indicated that his consulting activities for NRC accounted for approximately 30 percent of his working hours. Since Barnes assigned NRC work to Spaletta, it appears that Barnes' decision to stop assigning Spaletta work resulted in a significant reduction in Spaletta's work assignments.

The record shows that EG&G hired other welding engineers during the period in which the demand for Spaletta's services declined. Ralph Marshall testified that the Advanced Test Reactor Project, which was managed by Frank Fogarty, hired additional personnel to do the work that had previously been assigned to Spaletta. Tr. at 62. Marshall specifically testified that EG&G had hired another welding engineer, Downey, who, in his opinion, was not as well qualified as Spaletta. Tr. at 63, 92-93. Marshall's testimony was corroborated by Spaletta's testimony that the Advanced Test Reactor Project had hired Downey as a welding engineer, Tr. at 465. Spaletta and Marshall's testimony concerning Downey was further corroborated by the testimony of Mark Henderson, EG&G's Manager of Loop Engineering Support. Tr. at 526. The record also shows that EG&G hired another metallurgical engineer, Peter Nagata, in May 1989. Nagata's primary function was to act as a consultant to the NRC. Tr. at 521-22. Although Nagata specialized in evaluating the brittleness of metal exposed to radiation, he testified that he was used on a number of occasions to evaluate weld failures. He stated that he saw no reason why he was assigned to do that work instead of Spaletta. Mark Henderson testified that he assigned work to Nagata that could have been performed by Spaletta. Tr. at 528-29.

The evidence cited above meets Spaletta's burden of proving that fewer work assignments were referred to him because of his disclosures. Accordingly, the burden shifts to the Contractor to submit clear and convincing evidence that the decline in demand for Spaletta's services would have occurred absent Spaletta's disclosures.

The Contractor has offered a number of reasons why Spaletta's workload decreased at this time. First, in support of its contention that Spaletta's reduction in work assignments was due to INEL's changing mission, the Contractor presented a number of witnesses who agreed with the statement that the mission and kind of work at INEL has changed since 1989. However, none of the witnesses was able to link the changes in mission at INEL to specific decreases in Spaletta's workload. The witnesses at the hearing agreed with the logic that the change in mission would necessarily mean that there would be less need for

the services of a welding engineer. But they never went beyond that to support the Contractor's contention by saying that Spaletta's workload would be affected in a substantial way. Indeed, some of the testimony at the hearing, outlined just above, contradicts these general statements. For example, at the time the mission at INEL was changing, an additional welding engineer was hired. Under these circumstances, I find that these statements fall short of the applicable clear and convincing evidentiary standard and are clearly rebutted by the evidence summarized above.

The Contractor also submitted the testimony of two witnesses to attempt to show that the decline in availability of work for Spaletta resulted from his poor performance. Ronald Hilker testified that he was dissatisfied with the results of an assignment that he had provided Spaletta. According to Hilker, during the two months that Spaletta charged his time to the assignment, Spaletta showed no progress and exceeded the budget for the assignment. Hilker testified that he had to remove responsibility for the assignment from Spaletta and have it completed by others. Robert Neilson, Spaletta's direct supervisor at this time, testified that he had heard some complaints about Spaletta's performance. However, the record strongly suggests that Spaletta's inability to obtain assignments was not due to his poor performance or a poor reputation. To the contrary, each of the individuals testifying at the hearing agreed on one thing: to this day Spaletta enjoys an excellent reputation among his peers and is a highly skilled engineer. Hilker himself testified that he was surprised about Spaletta's performance on the assignment he had provided and that he viewed it as an aberration. Neilson testified that the number and severity of complaints he received about Spaletta were not unusual, given the type of work Spaletta did. Neilson also testified that he received a number of compliments regarding Spaletta's work. After considering the Contractor's contentions together with the testimony presented at the hearing, I find that the Contractor has not shown that the decrease in work assignments resulted from any performance deficiencies on the part of Spaletta.

Accordingly, Spaletta has proven, by a preponderance of the evidence in the record, that his disclosures were a contributing factor in the reduction in work assignments he suffered during the period beginning in 1990 and continuing through 1992. Since the Contractor has not submitted clear and convincing evidence to the contrary, I hold that EG&G retaliated against Spaletta for making protected disclosures by reducing the amount of work assigned him. By doing so, EG&G violated 10 C.F.R. § 708.5.

2. Whether Spaletta's Work Performance was Evaluated Properly

The Record also supports Spaletta's claims that the Contractor retaliated against him by reducing his annual merit pay increases for the years 1989 through 1991.(10) Exhibit 48 to the Report of Investigation shows that for 1987, 10 of the 18 employees who were then employed in Spaletta's work unit received higher merit increase percentages than Spaletta. The next year, 1988, 11 of these 18 employees received higher merit increase percentages than Spaletta. For 1989, 1990 and 1991, however, Spaletta received the lowest merit increase, as a percentage, of any employee in his work unit, which by 1992 had grown to 30 employees.

The timing of Spaletta's fall from grace coincides with a period in which Spaletta began to escalate his concerns. During 1989 and 1990, Spaletta's concerns were brought to the attention of the NRC, TVA, DOE's Inspector General, and the highest levels of EG&G's parent corporation's management. *See, e.g.*, Memorandum of Telephone Conversation between Dave Terao and G. Georgiev of the NRC's Office of Special Projects and Spaletta (April 13, 1989); Letter from Spaletta to Don Kerr, Executive Vice President EG&G, Inc. (April 14, 1990); Letter from Spaletta to John M. Kucharski, Chairman and CEO, EG&G, Inc. (June 19, 1990). The proximity in time between these protected disclosures and the precipitous decrease in Spaletta's merit increase percentage relative to his peers strongly suggests that they were related, and therefore suffices to meet Spaletta's burden of showing that his disclosures were a contributing factor in those merit increases. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993).

Accordingly, the burden shifts to the Contractor who must show that it would have given Spaletta the same merit increases even if he had not made his protected disclosures. The Contractor attempts to meet this burden by contending that Spaletta's merit salary increases were determined solely by his work

performance and his relatively high position in his job classification's salary range. However, the record does not support this explanation.

It is hard to reconcile the Contractor's contention that Spaletta's low merit increases resulted from his work performance. As discussed above, the record contains a great deal of evidence that Spaletta enjoyed, and continues to enjoy to this time, an excellent reputation among his peers and EG&G's managers, including those with whom he had an adversarial relationship regarding the WEP report. Indeed, the only negative comments appearing in his performance evaluations involve his failure to develop work and his exceeding time and cost limits for projects. As I will show below, these were not the reasons EG&G reduced Spaletta’s merit pay increases.

The performance evaluations' comments concerning Spaletta's "failure" to develop new work are instructive. As I discussed above, Spaletta's difficultly in obtaining work was due at least in part to his disclosures. Therefore, these statements provide a direct link between the withholding of work from Spaletta and his receipt of lower pay. Since Spaletta has established that his disclosures were a factor contributing to his difficulty in obtaining work assignments, lowering his annual merit increases because of his inability to develop new work violated 10 C.F.R. § 708.5(a).

While the record shows that Spaletta had exceeded some cost and time limits on projects assigned to him, the Contractor has failed to show that other employees who similarly exceeded cost and time limits incurred significant merit pay percentage decreases. An EG&G manager, Ronald Hilker, testified that he had assigned a project to Spaletta that exceeded the previously agreed upon time and cost limits. Tr. at 500. However, Hilker also testified that it was not uncommon for cost and time limits to be exceeded and that similar problems had arisen with other employees in the past. Tr. at 510. Similarly, another EG&G manager, Robert Neilson, Jr., Spaletta's direct supervisor from 1988 through 1992, testified that he had received some complaints about cost overruns and missed deadlines on various projects conducted by Spaletta. Tr. at 232-33. However, Neilson also testified that he had received complimentary feedback concerning Spaletta and admitted that Spaletta was not the only employee who missed deadlines and overran costs. *Id.* On the basis of the testimony at the hearing, I conclude that the Contractor has failed to show by clear and convincing evidence that the cost and time overruns by Spaletta justify the precipitous decline to the lowest merit pay increases of any employee in his unit.

The Contractor also contends that Spaletta's relatively high salary for his job classification accounts for his relatively low merit increases. However, this contention is not supported in the record. While it appears that Spaletta's salary was relatively high for his job classification and that EG&G took an employee's position within his or her job classification's salary range into account when making its merit pay increase determinations, the Contractor has failed to provide either an adequate explanation or documentation of its claim that Spaletta's position in his salary range accounted for his low merit pay increase percentages. Moreover, my analysis of the information supplied to OCEP by EG&G suggests that EG&G's determinations of Spaletta's merit increases for the years 1989, 1990, and 1991 were inconsistent with its standard practices. As the Contractor explained, it used a grid to allocate its budgeted merit pay increases in each year. One of the grid's coordinates consisted of five possible performance ratings. The other coordinate consisted of salary quintiles which were calculated by dividing a job classification's salary range into five equal ranges. This grid was designed to combine the two factors in order to equitably determine an employee's merit salary increase percentage. A higher performance rating was to positively affect an employee's merit increase and a higher position in an employee's salary range was supposed to lower an Employee's merit salary increase percentage. Spaletta's performance evaluations and Exhibit 48 to the Report of Investigation show that Spaletta should have at least been placed in that portion of the grid which corresponded to the second highest salary quintile and the second highest performance rating for 1989, 1990, and 1991. Given Spaletta's relatively high performance ratings during the years in question and given the fact that Spaletta was not in the highest salary quintile for his job classification in any of the years in question, it is surprising that Spaletta received the lowest merit increase percentage in his work group. The Contractor was in position to show that other employees in the same portion of the grid received similar merit increase percentages or that no other employees occupied similar or less favorable

sectors of the grid, but did not do so. Accordingly, I find that the Contractor has failed to submit clear and convincing evidence showing that the grid was properly applied to Spaletta.

Spaletta has shown that his disclosures were a contributing factor to an inability to obtain new work, which negatively impacted his performance evaluations and his merit pay increases. As a result, the burden shifted to the Contractor to show that it would have given Spaletta the same merit increases if he had not made the protected disclosures. I find that the Contractor has failed to submit clear and convincing evidence that Spaletta's merit increases for the years 1989, 1990, and 1991 were not negatively affected by his disclosures.

3. Whether the Contractor's Requirement that Spaletta Take Leave During the Holiday Curtailment of 1990 was a Reprisal.

Spaletta alleges that EG&G retaliated against him by requiring him to take leave without pay during a company-wide work curtailment at the end of 1990. On August 14, 1990, Spaletta received a memorandum sent to all EG&G Idaho employees urging them to take leave during the period between December 25, 1990 and January 1, 1991, unless their work was "required." According to Spaletta, this memo also stated that no employees would be compelled to take time off. On December 19, 1990, Spaletta alleges that his supervisor urged him to take leave during the curtailment, but reiterated that Spaletta would not be required to do so. Two days later, however, Spaletta received a memorandum from his supervisor informing him that since his services were not essential he was "requested" to take either vacation leave or leave without pay during the curtailment. Spaletta apparently elected to take leave without pay during the work curtailment period.

The record is devoid of any evidence supporting even a reasonable inference that the EG&G's holiday curtailment policy was applied to the Complainant during the relevant period in a manner that was inconsistent with that applied to other EG&G employees. Accordingly, I find that the Complainant has failed to carry his burden of proof on this issue.

4. Whether Spaletta Was Constructively Terminated.

Spaletta alleges that the Contractor constructively terminated him. Traditionally, employees alleging constructive discharge bear the burden of proof. *Boze v. Bransteter*, 912 F.2d 801, 804-05 (5th Cir. 1990). Courts considering claims of constructive discharge require employees to prove that their working conditions were so difficult or unpleasant that a reasonable employee in their shoes would have felt compelled to resign. *See, e.g., Ugalde v. W.A. McKenenzie Asphalt Co.*, 990 F.2d 239, 242-43 (5th Cir. 1993); *Goldsmith v. Mayor and City Council of Baltimore*, 987 F.2d 1064, 1072 (4th Cir. 1993); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 200 (5th Cir. 1992). An employee seeking to show constructive discharge must also establish that the intolerable working conditions resulted from the deliberate actions of the employer. *See, e.g., Johnson v. Shalala*, 991 F.2d 126 (4th Cir. 1993); *Jurgens v. EEOC*, 903 F.2d 386, 390 (5th Cir. 1990). The test is an objective one, and therefore the question is not whether the employee felt compelled to resign, but whether a reasonable person in the employee's shoes would have felt so compelled. *Guthrie v. J.C. Penney Co., Inc.*, 803 F.2d 202, 207 (5th Cir. 1986). Whether a reasonable employee would feel compelled to resign depends on the facts of each case. *Barrow V. New Orleans S.S. Ass'n.*, 10 F.3d 292 (5th Cir. 1994). "Deliberateness can be demonstrated by actual evidence of intent by the employer to drive the employee from the job, or circumstantial evidence of such intent, including a series of actions that single out [an individual] for differential treatment." *Johnson v. Shalala*, 991 F.2d 126, 131 (4th Cir. 1993). A showing of constructive discharge is difficult to make.

Spaletta has failed to meet his burden of proof on this issue. As an initial matter, I note that Spaletta did not claim that he had been constructively terminated until he filed his pre-hearing brief, which occurred relatively late in this proceeding. That fact, while not fatal to a constructive discharge claim, detracts from its credibility. More importantly, Spaletta has failed to submit any evidence in support of his constructive discharge claim. Nor has Spaletta made any apparent effort to develop the claim in his pre-hearing

submissions, at the hearing, or in his post-hearing brief. Under these circumstances, I must conclude that Spaletta has failed to show that EG&G deliberately created a work environment that a reasonable employee would find intolerable.

C. Remedy

Having concluded that the Contractor has failed to meet its burden of showing by clear and convincing evidence that it would have taken the same personnel actions against Spaletta absent his protected disclosures, and that a violation of Part 708 has occurred, I now turn to the remedy.

For those cases in which discrimination against an employee in reprisal for a protected disclosure is found to have occurred, the goal of the DOE regulations is to restore the employee to the position to which he or she would have otherwise have been absent the acts of reprisal, in a manner similar to other whistleblower protection schemes. *See, e.g.*, Energy Reorganization Act of 1974, 42 U.S.C. § 5851; Whistleblower Protection Act of 1989, 5 U.S.C. § 1214(b)(4(B). The initial agency decision may include an award of reinstatement, transfer preference, back pay, and all reasonable costs and expenses (including attorney and expert witness fees) "reasonably occurred" by the complainant in bringing the complaint. 10 C.F.R. § 708.10(c). Spaletta does not seek reinstatement or a transfer preference.(11) Instead, Spaletta seeks back pay, compensation for lost benefits, as well as, costs and expenses (including attorney's fees) associated with the prosecution of the present claim. In addition, Spaletta seeks the following forms of extraordinary relief:

1) "That EG&G Idaho, Inc. must review its policies and practices governing both work referrals and employee requirements to develop their own work assignments in order to safeguard against reprisals and adverse consequences stemming from protected employee disclosures and actions." Pre-hearing brief at 2.

2) "That EG&G Idaho, Inc., shall formally withdraw its Weld Evaluation Project (WEP) final report for the Tennessee Valley Authority's Watts Bar Nuclear Power Plant Unit 1, dated November 1987 (Ref: DOE/ID-107175-9). Further, this report shall not be used by the Nuclear Regulatory Commission for licensing purposes or any other safety related activity."

3) "That DOE shall, within 120 days after the date of order, conduct a hearing to ensure that EG&G Idaho, Inc., complies with the relief sought [above]."

The first form of extraordinary relief proposed by Spaletta is that EG&G be required to conduct an internal review of its policies concerning work referrals and requirements that its employees develop their own work assignments. However, this request is now moot. As of October 3, 1994, EG&G was replaced by Lockheed Idaho Technologies Company as INEL's management and operating contractor.

The second form of extraordinary relief requested by Spaletta is the formal withdrawal of the Weld Evaluation Program final report. This remedy would clearly be inappropriate. Part 708 proceedings are not designed to make findings concerning the validity of a whistleblower’s safety related allegations. While it is clear that the issuance of the report in its final form has caused Spaletta a great deal of discomfort, directing the withdrawal of the WEP report would not mitigate an adverse action taken against Spaletta. Therefore, I conclude that withdrawal of the report is beyond the scope of the present proceeding.

I therefore turn to the third and final form of extraordinary relief requested by Spaletta: that OHA conduct a hearing to ensure compliance with its order of relief. This request is simply unnecessary. Spaletta has not provided any evidence that such a procedure is necessary to effectuate the relief granted by this decision.

I turn now to Spaletta's request for back pay. Back pay is intended to restore the complainant to his proper position by providing compensation for the tangible economic loss suffered by the complainant and to act as a deterrent to future acts of reprisal by employers. *See United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973). Spaletta seeks: (1) the salary and benefits that he would have received if he had

not retired in May 1992, but rather continued to work for EG&G until the present; and (2) compensation for any reduction in merit pay increases resulting from his protected disclosures.

Spaletta's request for salary and benefits for the period between his retirement and the present is based upon his contention that he was constructively discharged. However, since I have found that Spaletta has failed to show that he was constructively discharged, an award of this nature is inappropriate.

However, Spaletta has shown that his annual merit pay increases for work performed during the years 1989, 1990, and 1991 were negatively affected by his protected disclosures. Thus an award of relief in the form of back pay is appropriate. Such relief is appropriately calculated as the difference between the annual merit pay increase percentage that Spaletta actually received during each of the three years and the average annual merit increase percentage of those employees in Spaletta's work group who received the highest performance rating and who were in the second highest salary quintile. Since I do not have the information necessary to accurately calculate this award, I will direct the Contractor to provide us with sufficient information to allow us to accurately calculate this portion of the award. After I receive this information I will issue a Supplemental Order specifying the exact amount of back pay to be granted to Spaletta.

Spaletta should also receive interest compensating him for the time value of money lost while bringing his complaint. *See, e.g., Garst v. Dep't of the Army*, 90 FMSR ¶ 5037 (1993) (interest on back pay awarded under the Whistleblower Protection Act) (*Garst*). In the past, OHA Hearing Officers have followed the practice of the Merit Systems Protection Board under the Whistleblower Protection Act. *See, e.g., Ronald Sorri*, 23 DOE ¶ 87,503 (1993). The MSPB awards interest on back pay under the Office of Personnel Management (OPM) regulation found at 5 C.F.R. § 550.806(d). That regulation refers to the "overpayment rate" established by the U.S. Treasury in 26 U.S.C. § 6621. The overpayment rate is the Federal short-term rate, plus two percentage points. The Federal short term rate for a particular calendar quarter is the short term rate for the first month of the preceding calendar quarter, rounded to the nearest whole percent. 26 U.S.C. § 6621(a)(1); (b)(2)(A). I will calculate an exact amount of interest in a Supplemental Order.

Next I consider Spaletta's request for reimbursement of legal expenses. Since Spaletta has prevailed in his whistleblower claim, he may receive from the Contractor an amount corresponding to all of the direct costs he reasonably incurred in bringing his whistleblower claim, including the reasonable value of the attorney services he utilized. In addition to attorney's fees, Spaletta may also receive mileage, long distance phone charges, postage, photocopying, and any other related expense.

Attorney's fees shall be calculated by the use of the "lodestar" approach described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989), and first applied to proceedings under 10 C.F.R. Part 708 by the OHA Hearing Officer in *Ronald Sorri*, 23 DOE ¶ 87,503 (1993). Under the lodestar approach, reasonable attorney's fees are calculated as the product of reasonable hours multiplied by reasonable rates. The fee applicant has the burden of producing satisfactory evidence that his requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Blum v. Stenson*, 465 U.S. 886, 888 (1984).

Accordingly, Spaletta should submit a full accounting of all costs and expenses he reasonably incurred in bringing the complaint. This accounting should include the following elements.

a) A detailed and itemized list of each and every expense incurred, the dates incurred and the provider of the good or service in question.

b) Documentation for each requested expense such as bills, invoices, receipts or affidavits.

c) For any attorney fees claimed; the identity of each attorney providing such services, the date, time, duration and nature of all services provided to the complainant.

d) For any attorney who provided services to Spaletta; evidence that the hourly rate for services incurred is

comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

After Spaletta and the Contractor have provided the information described above, I will issue a Supplemental Order specifying the exact amount to be awarded Spaletta.

IV. Conclusion

For the reasons set forth above, I have concluded that Spaletta has proven by a preponderance of the evidence that he engaged in activities protected under 10 C.F.R. Part 708 and that those activities were a contributing factor to his receipt of fewer work assignments and lower annual merit increases for the years 1989, 1990, and 1991. The Contractor has failed to prove by clear and convincing evidence that it would have taken these adverse personnel actions absent Spaletta's protected activities. I therefore find that a violation of 10 C.F.R. §708.5 has occurred and Spaletta should be awarded back pay lost as a result of the reprisals taken against him (plus interest), as well as all costs and expenses reasonably incurred by him in bringing the present complaint.

It Is Therefore Ordered That:

(1) Howard W. Spaletta's request for relief under 10 C.F.R. Part 708 is hereby granted as set forth in this Decision and denied in all other aspects.

(2) Howard W. Spaletta shall no later than 30 days after the issuance of this Decision, submit to the Hearing Officer a full accounting of any and all costs and expenses reasonably incurred by him in bringing this complaint under 10 C.F.R. Part 708. This accounting shall include a full accounting of hourly charges for attorney's fees and appropriate documentation as evidence that the rates requested are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. A copy of any submission shall be sent on the same day to Lockheed Idaho Technologies Company.

(3) EG&G, Idaho, Inc., or its successor Lockheed Idaho Technologies Company, shall no later than 30 days after the issuance of this Decision, submit to the Hearing Officer information which shows the average merit increase percentage for employees in Howard W. Spaletta's work unit who received the second best performance rating and who were in the second highest salary quintile for the years 1989, 1990, and 1991. A copy of any submission shall be sent on the same day to Howard W. Spaletta.

(4) No later than 15 days after receipt of a copy of the submissions referred to in paragraphs (2) and (3), Howard W. Spaletta and Lockheed Idaho Technologies Company may submit to the Hearing Officer a response to the submission served by the other party. Each response shall be limited to the reasonableness and accuracy of the calculations set forth in that submission.

(5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the complaint in part unless within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director of the Office of Contractor Employee Protection.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: January 4, 1995

(1) As of October 3, 1994, Lockheed Idaho Technologies Company became the management and operating contractor at INEL. Lockheed has agreed to assume the responsibilities of the contractor in this proceeding. Hearing Transcript at 12.

(2) Spaletta was still employed by EG&G when he filed his complaint with ID. Thus his complaint did not contain any allegation of constructive termination. His constructive termination allegation first appears in his pre-hearing brief.

(3) The NCIG-01 code was promulgated by the Nuclear Construction Issues Group.

(4) The AWS code was promulgated by the American Welding Society.

(5) They were not alone in harboring these concerns. Similar concerns were expressed by the NRC. See July 24, 1986 letter from B.J. Youngblood, Director of PWR Project Directorate #4, NRC, to S.A. White, TVA's Manager of Nuclear Power.

(6) OCEP also concluded that Spaletta's other allegations of retaliation by EG&G were not sufficiently substantiated.

(7) OHA staff attorneys Steven Fine and Ann Augustyn attended the hearing and assisted in the preparation of this decision.

(8) Moreover, the record contradicts the contention that Spaletta's disclosures were not motivated by his concerns about the safety consequences of the Report. While the record contains Spaletta's complaint that the WEP report had hurt his reputation, that fact alone does not suggest that Spaletta was not concerned about safety and adherence to safety rules and regulations. To the contrary, the record contains numerous instances of Spaletta's contemporaneous statements expressing his concerns that the allegedly misleading nature of the WEP report would compromise the safety of the Watts Bar welding program, interfere with the proper functioning of Watts Bar's NRC-mandated employee concerns program, and serve to cover-up TVA's failure to meet its FSAR commitments. For example, in the same letter in which Spaletta expressed his opinion that "[t]he subject report is an embarrassment to me," he also expresses a safety concern by stating: "There are many similarities between the causes of the Challenger disaster and the conduct of EG&G Idaho's Management during the TVA weld program." Memorandum from Howard W. Spaletta to Dennis Keiser (August 17, 1989). Spaletta went on to contend that EG&G violated some of its own internal guidelines by preparing a misleading Report. Id. at 2.

(9) While Spaletta characterizes this concern as safety related, it is more in the nature of an administrative concern.

(10) Merit pay increases for a given year were based up a performance evaluation that occurred in February of the next year. Therefore, for example, a merit pay increase for 1989 was based on an employee’s evaluation in February 1990.

(11) In his post-hearing brief, Spaletta for the first time states that he seeks reinstatement. While I might be inclined to entertain such a late request if I were to find that he had been constructively discharged, I have not so found and I decline to consider that request.

Ronald A. Sorri

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motions for Discovery

Supplemental Order

Name of Petitioner: Ronald A. Sorri

L&M Technologies, Inc.

Ronald A. Sorri

Dates of Filing: September 24, 1993

September 27, 1993

October 12, 1993

Case Numbers: LWD-0008

LWD-0009

LWX-0011

This determination will consider two requests for discovery filed with the Office of Hearings and Appeals (OHA) on September 24 and 27, 1993, by Ronald A. Sorri (Sorri) and L&M Technologies, Inc. (L&M), respectively. These motions concern the hearing requested by Sorri under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708, on June 9, 1993 (OHA Case No. LWA-0001). The DOE Contractor Employee Protection Program and the Sorri proceeding are described in a previous decision issued by the OHA, Sandia National Laboratories, 23 DOE ¶ 82,502 (1993) (Sandia). The hearing will be convened on October 26 and 27, 1993, in Albuquerque, New Mexico. In addition to ruling on the discovery requests, we will establish procedures for the submission of exhibits before the hearing, and set the order of witnesses.

I. Requests for Discovery

In a letter dated September 24, 1993, Sorri requested discovery of "all resumes and ranking materials for each L&M employee ranked, and for each of these ranked employees, the last two written performance appraisals immediately preceding the resume ranking process." Sorri indicated that he planned to have an expert witness examine the performance appraisals and testify about their role in the decision by Sandia officials not to retain Sorri as an employee of L&M. */ As explained in Sandia, Sorri claims that decision constituted an act of retaliation for his filing of a safety complaint with DOE about conditions in the Microelectronics Development Laboratory (MDL). In a letter dated September 27, 1993, L&M requested that Sorri identify the expert witness he planned to call at the hearing, and provide answers to written interrogatories.

The issuance of discovery orders in proceedings under Part 708 is within the discretion of the Hearing Officer. As indicated in the preamble to the DOE Contractor Employee Protection regulations,

administrative hearings conducted under Part 708 are intended to be informal in nature and are not intended to emulate formal trial proceedings. 57 Fed. Reg. 7533, 7537-8, (March 3, 1992) (formal rules of evidence, including the Federal Rules, are to be used only as a guide in hearings under Part 708). While the regulations do not provide a formal mechanism for conducting discovery, they grant the Hearing Officer authority to

arrange for the issuance of subpoenas for witnesses to attend the Hearing on behalf of either party, or for the production of specific documents or other physical evidence, provided a showing of the necessity for such witness or evidence has been made to the satisfaction of the Hearing Officer.

10 C.F.R. § 708.9(f); see also 10 C.F.R. §§ 708.9(c), (i) and (j) (sanctions for failure to comply with a lawful order of the Hearing Officer including adverse findings, and dismissal of a claim, defense or party). In the same manner as suggested in the preamble to Part 708 for informally using the Federal Rules of Evidence, we will use the Federal Rules of Civil Procedure as a guide for discovery. It is within the spirit of both the Federal Rules and the DOE Contractor Employee Protection Program regulations that arrangements for pre-hearing discovery be worked out between the parties, without the need of a formal discovery order from the OHA Hearing Officer. However, as we advised the parties to this proceeding, the OHA is prepared to issue a discovery order if necessary to ensure compliance with any reasonable discovery request. On October 5 and 6, 1993, Sorri reported certain difficulties that he had encountered in obtaining the requested discovery from the other parties. This matter was discussed at length in a telephonic prehearing conference with counsel for the parties that was held on October 12, 1993.

As explained in the prehearing conference, we have determined that Sorri's request for the L&M performance appraisals, and any other ranking materials used by Sandia MDL manager Ronald V. Jones in the selection process, is reasonable. It is designed to yield evidence that may be relevant and material to the alleged retaliatory discharge issue in this case, and it is not unduly burdensome on either L&M or Sandia to produce the requested documents. Therefore, we will order that L&M and Sandia produce these materials no later than October 15, 1993. For the same reasons, we also find that the L&M request for discovery about Sorri's expert witness is reasonable under the circumstances of this case. Thus, we will also order Sorri, as soon as possible, to provide L&M and Sandia with full information about the identity and qualifications of his expert witness, and the substance of the facts and opinions to which the expert is expected to testify.

II. Other Prehearing Matters: Exhibits and Witnesses

In addition to discovery, our October 12, 1993 prehearing conference also discussed arrangements for the submission of exhibits, and the scheduling of witnesses. With respect to exhibits, we stated that each party shall, no later than October 22, 1993, file with the OHA and serve on the other parties, a numbered list, and one numbered set, of any exhibits which the party intends to submit at the hearing. We determined that the order of witnesses will be as follows: (1) witnesses for Sorri; (2) witnesses for Sandia; and (3) witnesses for L&M. If necessary, arrangements will be made to schedule the hearing on October 27 to accommodate a Federal court appearance by Sandia's counsel.

It Is Therefore Ordered That:

(1) The Motions for Discovery filed by Ronald Sorri and L&M Technologies, Inc., Case Nos. LWD-0008 and LWD-0009, are hereby granted as set forth in Paragraphs (2), (3), and (4) below.

(2) L&M Technologies, Inc. shall submit to counsel for Ronald A. Sorri, no later than October 15, 1993, the two written performance evaluations immediately preceding the ranking process for each of the L&M contract employees ranked under Task II of the contract between L&M and Sandia National Laboratories

(3) Sandia shall submit to Sorri, no later than October 15, 1993, all resumes and other materials used in ranking L&M contract personnel under Task II of the contract between L&M and Sandia.

(4) Sorri shall submit to the counsels for L&M and Sandia, at the earliest possible date prior to the hearing in this matter, information regarding:

(a) the identity of the expert witness whom he expects to call to testify at the hearing,

(b) the subject matter on which the expert is expected to testify,

(c) the relevant credentials of the expert which qualify the expert in the subject matter to which he or she will testify,

(d) the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

In addition, the prospective expert witness shall be made available for depositions or shall provide answers to written interrogatories of L&M and Sandia prior to the hearing.

(5) Sorri, Sandia, and L&M shall submit to the OHA and to each other, no later than October 22, 1993, a numbered list, and one numbered set, of any exhibits which the party intends to submit at the hearing.

(6) This is a final Order of the Department of Energy.

Thomas O. Mann

Deputy Director

Office of Hearings and Appeals

Date:

*/ Sorri also requested that subpoenas be issued to several L&M and Sandia employees he planned to call as witnesses, and sought the opportunity to depose these persons. Arrangements have been made between counsel for the parties to conduct these depositions in Albuquerque on October 15 and 20, 1993.

Case No. LWJ-0004

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Protective Order

Name of Petitioner: Westinghouse Hanford Company

Date of Filing: May 31, 1994

Case Number: LWJ-0004

On February 28, 1994, Helen "Gai" Oglesbee filed a request for hearing under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. This request has been assigned Office of Hearings and Appeals (OHA) Case No. LWA-0006. On May 31, 1994, Westinghouse Hanford Company (WHC) filed a request that the OHA issue a Protective Order concerning certain documents which the company has agreed to provide to the Government Accountability Project (GAP) and Thad M. Guyer, counsel for Ms. Oglesbee.

In conjunction with the request, WHC has submitted a Stipulated Protective Order, attached to this Decision, to which WHC, GAP and Mr. Guyer have agreed to be bound.*/ The Order states, inter alia, that GAP and Mr. Guyer shall not make use of nor disclose any information in the documents provided by WHC except for purposes related to the present proceeding, and that upon the termination of the proceeding shall either destroy the documents or return them to WHC.

We have reviewed the attached Stipulated Protective Order and have concluded that it should be issued as an Order of the Department of Energy. This Order is issued pursuant to the authority given the Hearing Officer under the Part 708 regulations to "arrange . . . for the production of specific documents or other physical evidence, provided a showing of the necessity for such . . . evidence has been made to the satisfaction of the Hearing Officer." 10 C.F.R. ' 708.9(e).

It Is Therefore Ordered That:

The attached Stipulated Protective Order is hereby issued as a final Order of the Department of Energy.

Thomas O. Mann

Hearing Officer

Office of Hearings and Appeals

Date:

*/ Charles K. MacLeod, Senior Labor Counsel, WHC, and Alene Anderson, GAP, have signed the Order. In a May 30, 1994 telephone conference, Thomas G. Carpenter, GAP, stated that Ms. Anderson was authorized to sign the Order on behalf of Mr. Carpenter and GAP, and Mr. Guyer stated that he agrees to be bound to the Order to the same extent as is GAP.

Case No. LWN-0003

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Interim Order

Name of Petitioner: Dr. Naresh Mehta

Date of Filing: July 18, 1994

Case Number: LWN-0003

On March 17, 1994, the Department of Energy (DOE) issued an Initial Agency Decision in the matter of Universities Research Association (URA), Case No. LWN-0003. In the Decision, we found that URA had discharged Dr. Naresh Mehta in violation of the Contractor Employee Protection Regulations, 10 C.F.R. Part 708. Universities Research Association, 23 DOE & 87,506. As part of Dr. Mehta's remedy, we ordered URA to reinstate him to his former position as Scientist II, or to a comparable position.

URA requested a review of our Decision by the Secretary of Energy pursuant to 10 C.F.R. ' 708.10(c)(2). The request is still pending. Because the Decision has not become final, Dr. Mehta has not received any remedy for the retaliatory discharge.

Dr. Mehta had been employed by URA at DOE's Superconducting Super Collider (SSC) Laboratory in Waxahachie, Texas. He was discharged in December 1992 and filed a complaint with the DOE's Office of Contractor Employee Protection in February 1993. In October 1993, before Dr. Mehta's complaint was resolved, the U.S. Congress cut off funding for the SSC project. Preparations were made to shut down the SSC Laboratory and lay off the employees. In November 1993, a severance benefits package was announced for employees of project contractors, including URA. The benefits package includes a dislocation allowance, severance pay, medical insurance, and job placement assistance.

On July 15, 1994, Dr. Mehta filed through counsel a petition for interim reinstatement. Dr. Mehta proposes that interim reinstatement would help alleviate the burden of eighteen months without employment, to tie up loose ends at his workplace, and to secure personal effects that are still in his office. Authority for interim reinstatement is found in 10 C.F.R. ' 708.10 (c) (3), which provides that:

[I]f the agency decision contains a determination that a violation of ' 708.5 has occurred, it may contain an order requiring the contractor to provide the complainant with interim relief, including but not limited to reinstatement, pending the outcome of any request for review. This paragraph shall not be construed to require the payment of any award of back pay or attorney fees before the DOE decision is final.

URA claims in its response to Dr. Mehta's request that there is no relevant work for Dr. Mehta to do at the SSC Laboratory. Even if this were true, we do not believe it would be adequate reason for denying him interim reinstatement. By delaying the resolution of the case through various appeals processes, URA is prolonging and thus increasing the harm to Dr. Mehta. Moreover, because of the imminent shut down of the SSC laboratory, delay in providing interim relief to Dr. Mehta could reduce the value of any restitution that the DOE could provide to him.

If URA has no work for Dr. Mehta after reinstating him, it should treat him like its other employees at the SSC Laboratory and provide him with the severance benefits package. URA has not alleged that any harm

will come to it from the interim reinstatement of Dr. Mehta. For the reasons stated above, we will grant Dr. Mehta's petition.

It Is Therefore Ordered That:

(1) Universities Research Association shall reinstate Dr. Naresh Mehta on August 15, 1994 to his former position as Scientist II or a comparable position. This reinstatement shall be on an interim basis, pending the outcome of the review by the Secretary of Energy or designee of the Initial Agency Decision issued March 17, 1994. Furthermore, the reinstatement shall be notwithstanding any appeal or request for review.

(2) This is a final Order of the Department of Energy.

Thomas L. Wieker

Deputy Director

Office of Hearings and Appeals

Date:

Case No. LWX-0013

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: David Ramirez

Date of Filing: April 18, 1994

Case Number: LWX-0013

This Decision supplements an Initial Agency Decision, dated March 17, 1994, issued by the undersigned Hearing Officer of the Office of Hearings and Appeals (OHA) of the Department of Energy in a case involving a "whistleblower" complaint filed by David Ramirez (Ramirez) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. See David Ramirez, 23 DOE & 87,505 (1994) (Ramirez or "the March 17 Decision").1/ In the March 17 Decision I found that Brookhaven National Laboratory/Associated Universities, Inc. (BNL or "the Laboratory"), a DOE contractor, had violated the provisions of 10 C.F.R. ' 708.5 by directing the termination of Ramirez' employment as a BNL subcontractor employee in reprisal for his making protected safety disclosures. The March 17 Decision further determined that Ramirez should be awarded back pay and reimbursement for all costs and expenses reasonably incurred by him in bringing his complaint. Since there was no evidence in the record as to the amount of Ramirez' damages, he was provided an opportunity to supplement the record by providing certain specified information regarding back pay and expenses. Ramirez submitted this information on April 18, 1994, in a submission consisting of an affidavit (Ramirez Aff.) with attached exhibits and an attorney's affirmation by his attorney, Claire C. Tierney (Tierney Aff.). BNL submitted a response to the April 18 submission on May 16, 1994.1/ This Supplemental Order awards Ramirez $122,088.18 in back pay

(including interest) and costs and expenses (including attorney's fees).

I. Ramirez' Claim

As compensation for his damages, Ramirez requests a total of $121,474.28, of which $89,822.08 is for lost wages and benefits (and reimbursement for miscellaneous expenses) and $31,652.20 is for attorney's fees and disbursements.

A. Back Pay

Ramirez calculates that his lost pay (including fringe benefits and estimated overtime pay) during the period from his layoff at BNL on March 20, 1992 through his rehiring by a BNL subcontractor on June 7, 1993 was $90,493.30.1/ From this amount, Ramirez subtracted $3,397.26 in earnings from UE&C Catalytic, Inc. in April 1993 and $17,700 in state unemployment benefits to arrive at a net lost pay figure of $69,396.04.

B. Attorney's Fees

In her attorney's affirmation in support of Ramirez' request for attorney's fees reasonably incurred in bringing the complaint in this case, Ms. Tierney describes her legal experience and states that her normal

and customary fee in a case of this type is $175 per hour. She also indicates that she made an informal survey of the hourly fees of plaintiff's-side labor attorneys on Long Island, and that the range of those fees is from $175 to $225. Ms. Tierney also states that she has spent, or will spend, approximately 140 hours on this case. In an attached schedule, she documents 138.5 hours that she spent from October 25, 1993 through April 15, 1994. At 140 hours, Ms. Tierney's fee would total $24,500 ($175 x 140). Ms. Tierney also states that her law clerk, a third year law student, worked a total of 24 hours on the case and is paid at the rate of $10 per hour. Finally, Ms. Tierney documents disbursements of $87.35. The total of these fees and documented disbursements is $24,827.35 ($24,500 + $240 + $87.35). The total amount requested by Ms. Tierney is $31,652.20.1/ No explanation is given for the additional requested amount of $6,824.85 ($31,652.20 - $24,827.35).

C. Other Costs and Expenses

Ramirez asserts that he was compelled to withdraw money from his union annuity and welfare funds as a result of his being laid off from his job at BNL, and requests $19,625 for the damages that he alleges he incurred as a result of these withdrawals. Finally, Ramirez requests reimbursement of $801.04 for incidental expenses incurred in bringing his whistleblower complaint.

II. BNL's Response

In its response to Ramirez' April 18 submission, BNL disputes only two parts of Ramirez' claim. The Laboratory contends that Ramirez has not proven that he was compelled to withdraw money from his union annuity and welfare funds, and therefore should not be compensated for those withdrawals. Citing cases decided under Rule 54(d) of the Federal Rules of Civil Procedure (FRCP), the Laboratory argues that any costs that Ramirez may have incurred as a result of these withdrawals were not "reasonable costs and expenses" incurred by him in bringing his complaint under Part 708. In addition, BNL contends that Ramirez' request for $2,755 in lost overtime pay should be denied. The Laboratory argues that there is no evidence in the record that he would have earned any overtime pay during the period in which he was laid off.

III. Discussion

Section 708.10(c) states that an Initial Agency Decision may include back pay and "reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was issued." This section, by its reference to "costs and expenses," is by its very terms broader than FRCP Rule 54(d), which refers only to"costs."1/ Thus, the first Initial Agency Decision under the DOE whistleblower regulations interpreted the "costs and expenses" covered by section 708.10(c) more expansively than the way the word "costs" is generally interpreted under FRCP Rule 54(d). Compare Ronald A. Sorri, 23 DOE & 87,503 at 89,016-89,018 (1993) (Sorri), with 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure ' 2677 at 370-372 (1983). In the general discussion on remedy in the March 17 Decision, I indicated that I would follow the standards set forth in the Sorri Decision. Ramirez, 23 DOE at 89,035-037. With these considerations in mind, I now turn to the remedy requested by Ramirez.

A. Back Pay

After considering the submissions by Ramirez and BNL, I have decided to approve, with the adjustments noted below, Ramirez' request for back pay, including overtime.

Ramirez has documented the number of hours that he would have worked by reference to a logbook maintained by his former foreman (Briggs) for the period from March 20, 1992 through March 26, 1993 (Ramirez Aff. Exhibit 6) and by reference to the pay stubs of a BNL subcontractor journeyman electrician employee for the remainder of the relevant period (Ramirez Aff. Exhibit 7). He has also documented the amount of hourly wages, including fringe benefits, that he, as a unionized journeyman electrician working

for a BNL subcontractor, would have earned (Ramirez Aff. Exhibits 5A and 5B). BNL has not objected to this aspect of Ramirez' back pay claim, and his calculations are, for the most part, accurate.1/ Accordingly, after making the adjustments indicated in footnote 6, I find that Ramirez' lost regular pay for the period of his layoff is $89,187.78.

Ramirez, however, has not justified the total amount of overtime pay that he claims. Using the Briggs logbook, he calculates that during the relevant period BNL subcontractor electrician employees worked 141 hours of overtime at one and a half times basic hourly pay and 50 hours at double time.1/ Ramirez asserts that overtime was generally divided among five subcontractor electrician employees, and, on that basis, divides the total number of overtime hours by five to arrive at the amount of hours that he claims that he would have received overtime pay at time and a half and at double time. He therefore requests $1,871 for 28.2 hours at $66.36 per hour and $884 for 10 hours at $88.48 per hour.

Contrary to the argument advanced by BNL, I find that the logbook constitutes sufficient evidence of the likelihood that Ramirez would have worked some overtime and a means to estimate that amount. According to the logbook, during the relevant period there were 22 subcontractor employees, of whom 12 worked a total of 149.5 hours overtime at time and a half. Although 10 employees did not work overtime, the four experienced electricians who were on the "skeletal crew" (see Ramirez, 23 DOE at 89,031) at the time Ramirez was laid off all worked overtime at time and a half. I find it reasonable to assume that, like the other members of his team, Ramirez would have worked some overtime too. Since the total amount of overtime presumably would have been the same even if Ramirez had been employed, I have divided 149.5 by 13 (the 12 employees who worked overtime plus Ramirez) to arrive at 11.5 hours as a reasonable estimate of the number of overtime hours that Ramirez would have worked at time and a half. Since Ramirez has documented that the hourly rate for overtime at time and a half was $66.36, he is entitled to back pay of $763.14 for this lost overtime pay. Similarly, I have divided the 50 double time hours by 7 (the 6 employees who worked this overtime plus Ramirez) to arrive at 7.14 hours as a reasonable estimate of the number of overtime hours that Ramirez would have worked at double time. Since the hourly rate for overtime at double time was $88.48, Ramirez is entitled to back pay of $631.75 for this lost overtime pay. Thus the total amount of pay that Ramirez lost as a result of his lay off was $90,582.67 ($89,187.78 + $763.14 + $631.75).

As indicated above, Ramirez has deducted from his back pay claim $3,397.26 in earnings in April 1993 and $17,700 in state unemployment benefits. However, on the basis of the Initial Agency Decision in the Sorri case, I have decided not to offset Ramirez' lost wages by the unemployment compensation payments that he received. The determination in Sorri was in accordance with the generally accepted "collateral source rule." See 23 DOE at 89,016 (citing NLRB v. Gullett Gin Co., 340 U.S. 361 (1951)). This doctrine holds that as a general rule damages cannot be mitigated or reduced because of payments received by an injured party from a source wholly independent of and collateral to the wrongdoer. Although state unemployment benefits have not always been treated as collateral source payments, in recent years federal circuit courts of appeal generally have determined that unemployment benefits should not be deducted from back pay awards. See Gaworski v. ITT Commercial Finance Corp., 17 F.3rd 1104, 1112-14 (8th Cir. 1994), and cases cited therein. Although those cases involved discrimination complaints, the policy reasons for applying the collateral source rule in those cases are equally applicable to whistleblower cases; namely, to make victimized employees whole for the injuries suffered as a result of prohibited conduct by an employer and to deter such conduct by the employer in the future. Id. at 1113. Accordingly, I have decided not to deduct the state unemployment benefits received by Ramirez from the back pay award in this case. Ramirez is thus entitled to $87,185.41 in back pay ($90,582.67 less $3,397.26 in earnings in April 1993).

In addition, as decided in the March 17 Decision, Ramirez is entitled to pre-judgment interest on this back pay award. The total amount of interest that will have accrued during the period through June 30, 1994 is $9,278. Compound interest was calculated by multiplying the aggregate net amount of lost wages, fringe benefits and overtime for each calendar quarter by the quarterly "overpayment rate" for that quarter.1/ The "overpayment rate," as established by the Secretary of the Treasury pursuant to 26 U.S.C. ' 6621, is the

Federal short-term rate, plus two percentage points. The Federal short-term rate for a particular quarter is the short-term rate for the first month of the preceding calendar quarter, rounded to the nearest whole percent. See Rev. Rul. 94-21, 1994-14 I.R.B. 9.

B. Attorney's Fees

I have decided to approve Ramirez' request for reasonable attorney's fees. The specific dollar award will be limited to those fees that have been documented in Ms. Tierney's affirmation and the attached schedule.

As indicated above, Ms. Tierney has documented 138.5 hours of work that she performed on this case and has explained how she arrived at a fee of $175 as a reasonable hourly fee. She has also estimated that she would spend 1.5 hours on preparing the reply brief to BNL's brief in support of its request for review of the March 17 Decision. BNL has not objected to either the amount of hours or the hourly fee claimed by Ms. Tierney and both factors appear reasonable. Accordingly, Ramirez will be awarded reasonable attorney's fees in the amount of $24,740.1/

However, there is no basis in the record for approving the $6,824.85 which Ms. Tierney requests over and above her documented fees and disbursements. Since Ms. Tierney expressly requests leave to revise Ramirez' attorney fee claim in the event the reply brief consumes more time than anticipated, see n. 4, supra, I assume that the additional amount, totally or in large part, reflects an "upward adjustment" in her hourly fee and not an amount for unanticipated work. Ms. Tierney does not present any reasons in support of this enhancement and, accordingly, it must be denied. See Blum v. Stenson, 465 U.S. 886 (1984), cited in Ramirez, 23 DOE at 89,018.

C. Other Expenses

The bulk of the remaining costs and expenses for which Ramirez requests reimbursement relates to funds that Ramirez received from his union during the period of his lay off. For the reasons set forth below, this request will be denied with respect to the union payments, but will be approved, with one adjustment, for the incidental costs and expenses incurred by Ramirez or disbursed by Ms. Tierney.

Ramirez documents that he prematurely withdrew $9,000 from his union annuity fund during the relevant portion of 1992 and $5,000 more during four of the first five months of 1993. He requests reimbursement for these amounts plus what he claims is a 20 percent penalty for these early withdrawals. He also documents his receipt of $2,700 from his union welfare fund in 1992 and $675 from his union health and benefit fund in 1993, and requests reimbursement for these amounts.

This portion of Ramirez' claim is denied. In my view, the withdrawal of these funds does not meet the section 708.10(c) criterion of "reasonable costs and expenses ... reasonably incurred by the complainant in bringing the complaint upon which the [initial agency] decision was issued." Most of the amount claimed by Ramirez involves payments received by him and not expenses incurred by him. With respect to the annuity fund payments, the exhibits submitted by Ramirez contradict his claim that he incurred a 20 percent penalty because of the premature withdrawal of these funds.1/ The 20 percent figure represents not a penalty, but the amount of Federal income tax withholding required when there is a premature withdrawal of an annuity. See Ramirez Aff. Exhibit 4 (a union instruction sheet entitled, "To: Applicants for Annuity Fund Pre-Retirement Benefits") & 5. Moreover, according to the W-2 forms submitted by Ramirez, while a portion of his annuity payments was withheld in 1993, nothing was withheld in 1992. See Ramirez Aff. Exhibits 3A and 3B. The union instruction sheet does indicate that there is a 10 percent penalty tax for the withdrawal of annuity funds. Ramirez Aff. Exhibit 4 & 6. However, there is no penalty if the recipient is 59 1/2 years of age or older or qualifies for certain other exemptions. Id. Ramirez does not allege that he incurred the 10 percent penalty tax and it is not reflected in his Federal income tax returns for 1992 and 1993. See Ramirez Aff. Exhibits 3A and 3B.1/ Finally, Ramirez has not explained or quantified how he was damaged by his receipt of the other union benefits included in his claim.1/

Even if Ramirez incurred uncompensated financial loss as a result of his withdrawal of money from the

union funds, he has not shown that this loss was incurred in connection with his bringing this case. Rather, as his affidavit makes clear, he needed these funds in order to meet his living expenses. See Ramirez Aff. && 7, 25. This is understandable in view of his lack of employment, but it appears to be too remote from the litigation-related costs and expenses for which reimbursement is provided by section 708.10(c). Examples of the types of expenses which are covered by this section are payment for court reporters for a hearing transcript, photocopying of the transcript, long distance telephone calls and postage. Accordingly, Ramirez will be awarded $797.42 as reimbursement for expenses incurred by him for the hearing transcript and long distance telephone calls and $87.35 as reimbursement for Ms. Tierney's disbursements for copying and postage.1/

V. Conclusion

For the reasons set forth above, Ramirez shall be awarded the following amounts of back pay and reimbursement for costs and expenses in accordance with the provisions of 10 C.F.R. ' 708.10(c):

Back Pay (including overtime)	$87,185.41	
Interest on Back Pay	$9,278.00 (as of 6/30/94)	
Attorney's Fees		$24,740.00
Miscellaneous Expenses	$884.77	
Total		$122,088.18

It is Therefore Ordered That:

(1) Brookhaven National Laboratory/Associated Universities, Inc.

shall pay to David Ramirez the following amounts in compensation for actions taken against him in violation of 10 C.F.R. ' 708.5:

(a) $87,185.41 for lost wages, fringe benefits, and overtime pay for the period from March 20, 1992 through June 7, 1993.

(b) $9,278 in interest on the lost wages, fringe benefits and overtime pay as of June 30, 1994, plus additional interest from July 1, 1994 until the date of payment calculated by multiplying the cumulative amount of unpaid back pay plus interest each calendar quarter by the quarterly "overpayment rate" for that quarter.

(c) $797.42 for reimbursement for incidental expenses incurred by David Ramirez in bringing his complaint under 10 C.F.R. Part 708.

(d) $24,827.35 for attorney's fees and disbursements incurred in this proceeding with respect to Claire C. Tierney, Esq.

(e) An additional amount, at the rate of $175 per hour for each hour in excess of 140 hours reasonably spent by Claire C. Tierney, Esq. in representing David Ramirez before the Department of Energy in this case.

(f) An additional amount as reimbursement for documented, reasonable disbursements incurred by Claire C. Tierney, Esq. in her representation of David Ramirez in this case subsequent to April 15, 1994 and for long distance telephone calls documented in the attachment to Ms. Tierney's affirmation, dated April 15, 1994.

(2) This is a Supplemental Order to the Initial Agency Decision issued on March 17, 1994, and shall be subject to review by the Secretary of Energy or her designee pursuant to the request for review that Brookhaven National Laboratory submitted to the Office of Contractor Employee Protection on April 1,

1994.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date:

1/ The OHA case number for the Ramirez Decision is LWA-0002. As indicated above, the OHA case number for this Supplemental Order is LWX-0013. 1/ On April 1, 1994, BNL submitted a request for review of the March 17 Decision pursuant to 10 C.F.R. ' 708.10(c). That request is currently pending, and this Supplemental Order is being issued with the expectation that it will be reviewed by the Secretary of Energy or her designee together with the March 17 Decision. 1/ This consists of $87,738.30 for lost wages, see n. 6, infra, and $2,755 in estimated lost overtime pay. 1/ Ms. Tierney requests that this amount be subject to revision should her reply brief to BNL's brief in support of its request for review of the March 17 Decision consume more time than anticipated. 1/ In Crawford Fitting Co. v. J.J. Gibbons, Inc., 482 U.S. 437 (1987), the Supreme Court held that costs awarded under Rule 54(d) are limited to the items set forth in 28 U.S.C. ' 1920 and other related statutes. 1/ In paragraph 21 of his affidavit, Ramirez submits the following breakdown for 61 of the 62 weeks of his lay off (through the week ending May 28, 1993): 5 weeks of 35 hours at $41.90 per hour = $ 7,332.50 45 weeks of 35 hours at $44.24 per hour= $69,678.00 (includes 4 weeks with one paid vacation day) 4 weeks of 28 hours at $44.24 per hour = $ 4,954.88 (includes 4 weeks with one unpaid vacation day) 4 weeks of 32 hours at $45.14 per hour = $ 5,772.92 (should be $5 more [$5,777.92]) 1 unpaid Christmas week 0.00 2 weeks union-paid vacation in 1992 0.00 61 weeks $87,738.30 Since Ramirez did not return to work at BNL until June 7, 1993, there was one additional week of 32 hours at $45.14 per hour for a total of $1,444.48. Thus the gross amount of lost pay is $89,187.78 ($87,738.30 + $5.00 + $1,444.48). The payment of two weeks' vacation is verified by a W-2 Form from the union VHT fund for 1992. See Ramirez Aff. Exhibit 3A. 1/ During the relevant time period, BNL subcontractor electricians were paid at time and a half when they worked more than the standard number of hours in a day or week (7 hours a day for 5 days during the period prior to May 1, 1993, and 8 hours a day for 4 days for the period beginning May 1, 1993) and were paid double time when they worked on a Saturday. See Ramirez Aff. && 11, 12, 16. 1/ These calculations are summarized in the Appendix to this Supplemental Order. The work week ending March 27, 1992 has been included in the first quarter for which interest was calculated, the quarter ending June 30, 1992. For the purpose of calculating the accrual of interest on lost overtime pay, the $1,395 of lost overtime pay was prorated according to the approximate number of overtime hours during the relevant periods as follows: $625 during the quarter ending September 30, 1992, $221 during the quarter ending December 31, 1992, and $549 during the quarter ending March 31, 1993. As a result of the rounding of the back pay figures used in the interest calculations, the cumulative back pay + interest figure in the Appendix is slightly less than the total of the back pay and interest figures in ordering paragraph (1)(a)&(b). 1/ This amount is the total of 140 hours of work performed by Ms. Tierney at $175 and the 24 hours of work performed by Ms. Tierney's law clerk multiplied by $10. 1/ Ramirez requests reimbursement for $2,250, which he claims was the 20 percent penalty incurred in 1992, but he does not specify an amount for 1993. 1/ Ramirez has also not attempted to quantify the amount of the interest income that he lost as a result of his withdrawal of money from the union annuity fund. Even assuming that such damages are covered by section 708.10(c), they would be compensated for by the interest on back pay being awarded by this Supplemental Order. 1/ Although Ramirez does not refer to these payments as supplemental unemployment benefits, they are identified as "S.U.B." benefits in his W-2 forms for 1992 and 1993. See Ramirez Aff. Exhibits 3-A and 3-B. While Ramirez could have been damaged if these benefits were depleted as a result of BNL's wrongful reprisal, he has not alleged that these benefits have not been available to him as a result of his receipt of payments made during the March 1992 to June 1993 period. 1/ The amount approved for long distance telephone calls is slightly less than the amount claimed by Ramirez because of the deduction of two telephone calls that were made not to the DOE, but to the National Labor Relations Board. Ms. Tierney

has documented the date and length, but not the cost, of approximately one dozen long distance calls made in connection with this case. Ramirez will be entitled to reimbursement for the cost of these calls and for other, reasonable, documented disbursements made after April 15, 1994 by Ms. Tierney in her representation of Ramirez before the DOE.

Case No. LWX-0014

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: Ronald A. Sorri

Date of Filing: September 26, 1994

Case Number: LWX-0014

This Decision supplements an Initial Agency Decision, dated December 16, 1993, issued by the undersigned Hearing Officer of the Office of Hearings and Appeals (OHA) of the Department of Energy in a case involving a "whistleblower" complaint filed by Ronald A. Sorri (Sorri) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. See Ronald A. Sorri, 23 DOE & 87,503 (1993) (Sorri). In the December 16 Decision, I found that Sorri had proven by a preponderance of the evidence that he engaged in activities protected under Part 708 and that these activities were a contributing factor in the decision by Sandia National Laboratories (Sandia) and L&M Technologies, Inc. (L&M) to terminate his employment. I further concluded that Sandia and L&M were jointly responsible for the termination of Sorri's employment and that a violation of Part 708 had occurred. In the December 16 Decision, I determined that Sorri should be awarded back pay lost as a result of the reprisals taken against him, as well as all costs and expenses reasonably incurred by him in bringing his complaint. At that time, Thad M. Guyer, attorney for Complainant, was directed to submit a full accounting of his hourly charges for attorney's fees together with any costs, expenses, and expert witness fees incurred in representing Sorri, and a full accounting of any other costs and expenses reasonably incurred by Sorri in bringing his complaint under Part 708.

Both Sandia and L&M filed requests for review of the December 16 Decision by the Secretary of Energy or her designee. See ' 708.11. Sandia subsequently withdrew its request; however, L&M did not. The parties entered into negotiations, and on June 7, 1994, they stipulated to the dismissal of the Part 708 proceeding against L&M. By so stipulating, the parties agreed that the dismissal of L&M shall not operate to affect the liability established against Sandia. In a Final Decision and Order issued on August 25, 1994, the Deputy Secretary, as the Secretary's designee under ' 708.11, approved the dismissal of L&M as a party to this proceeding, and affirmed the elements of relief ordered by the OHA. On September 26, 1994, Guyer submitted a motion for attorney's fees and costs, together with a supporting affidavit and attachments. The OHA served Sandia with a copy of Guyer's motion and Sandia submitted a response on October 11, 1994. On October 17, 1994, Guyer submitted a reply to Sandia's response. This Supplemental Order awards Guyer $25,356.43 in attorney's fees and costs.

I. Discussion

Section 708.10(c) states that an Initial Agency Decision may "include an award of reinstatement, transfer preference, back pay and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was issued." In Sorri, I concluded that an award of back pay, together with reasonable costs and expenses, including reasonable attorney and expert witness fees was the appropriate remedy in this proceeding. Id. In addition, I determined that Sorri should receive

restitution for any other costs "reasonably incurred" in bringing his complaint under Part 708, which includes mileage, long distance telephone charges, postage, copying, court reporters, and all other related expenses. As stated above, I further directed Guyer to submit a full accounting of his hourly charges for attorney's fees together with any costs, expenses, and expert witness fees incurred in representing Sorri, as well as a full accounting of any and all other costs and expenses reasonably incurred by Sorri in bringing his complaint.

As compensation for his costs and expenses, Guyer requests a total of $25,356.43, of which $22,093.75 is for attorney's fees, $900.00 is for legal assistant costs, and $2,362.68 is for litigation costs and expenses. In Guyer's affidavit in support of his request for attorney's fees and costs, Guyer describes his legal experience and states that his normal hourly billing rate is $175, which is commensurate with that charged by other lawyers with his experience in Albuquerque, New Mexico. In an attached schedule, Guyer documents 126.25 hours that he spent working on the Sorri case from September 8, 1993 through April 6, 1994. At 126.25 hours, Guyer's fee totals $22,093.75 ($175 x 126.25). In addition, Guyer documents 60 hours that his legal assistant spent working on the Sorri case from October 12, 1993 through November 15, 1993. At 60 hours, Guyer's legal assistant costs total $900.00 ($15 x 60). Finally, Guyer documents his litigation costs and expenses which include the cost of depositions, the cost of an expert witness, as well as indirect litigation costs of transportation and lodging for him and his legal assistant at the hearing. These litigation costs and expenses also include costs personally incurred by Sorri, such as telephone, postage, and travel expenses. The total of these costs and expenses is $2,362.68.

In its response to Guyer's Motion for Attorney's Fees and Costs, Sandia does not contest either the amount of Guyer's hours or the reasonableness of Guyer's hourly billing rate. However, Sandia states that Guyer's charges for the activities of organizing, abstracting and indexing exhibits, as well as conducting research for a post hearing brief appear to duplicate the time charged for these same categories of work performed by Guyer's legal assistant. Guyer has responded by explaining that his tasks were clearly distinct and different from those of his legal assistant. He states that he organized, abstracted and indexed the most important exhibits and that he used his legal assistant to organize, abstract and index exhibits which he determined were of lesser importance. See Guyer's Reply at 1 and 2. I find that Guyer's explanation of these charges resolves the question raised by Sandia about apparent double billing. The use of a legal assistant to perform this work was clearly a cost saving measure. I therefore find that the reimbursement of $900 for the work performed by Guyer's legal assistant is reasonable, and it should be approved.

Sandia also argues that the guidelines established in DOE's interim policy statement for litigation management limit the reimbursement of travel time to the portion of time during which an attorney actually performs legal work. See 59 Fed. Reg. 44981 (August 31, 1994). Sandia states that "Guyer's charges for travel should be reduced accordingly." Sandia's Response at 1. However, Guyer has responded by explaining that he did not bill Sorri for his travel time, but only for legal work actually done while in flight. As an example, Guyer explains that he drove his car "five hours each way to get to the Sacramento airport to get the cheapest flight to Albuquerque" and that he did not charge Sorri for this travel time. Guyer's Reply at 2. Guyer also explains that while in flight he studied exhibits, reviewed DOE regulations and worked on pleadings. Id. Based on Guyer's explanation, I find that his requested legal fees for time spent working on the case during travel are reasonable.

Sandia nevertheless argues that according to the interim guidelines, incidental postage charges, long distance telephone charges, mileage reimbursements, and travel expenses should be considered part of Guyer's general overhead and not recoverable as litigation costs. In regard to travel expenses, Sandia cites cases which generally state that they are not recoverable as costs.1 However, these cases are distinguishable because they involved costs sought under the Rule 54(d) of the Federal Rules of Civil Procedure, and the Supreme Court has stated that such costs are generally limited to the restrictive list of items set forth in 28 U.S.C. ' 1920 and other related statutes.2 This restrictive definition of costs is clearly inapposite to the present case, where there is a more expansive provision in the governing regulations that authorizes the reimbursement of costs to the complainant. As noted above, 10 C.F.R. ' 708.10(c) states that an Initial Agency Decision "may include...reimbursement to the complainant up to the aggregate amount

of all reasonable costs and expenses...reasonably incurred by the complainant in bringing the complaint upon which the decision was issued." 10 C.F.R. ' 708.10(c). I find that Guyer's travel expenses are reasonable out-of-pocket expenses that should be recoverable as costs. With regard to the incidental postage charges, long distance telephone charges and mileage reimbursements, Guyer has indicated that these expenses were personally incurred by Sorri and not a part of Guyer's overhead. These charges have been sufficiently documented and I find that they are also reasonable costs. I have therefore determined that Guyer's request for reimbursement of $2,362.68 for these litigation costs and expenses is reasonable, and it should be approved.

It is important as a matter of Departmental policy to recognize the public interest nature of representing an alleged whistleblower under Part 708, and to award a reasonable fee to encourage attorneys to take these cases. See Sorri, 23 DOE & 87,503 at 89,018 (1993) and cases cited therein. Based upon my review of Guyer's Motion and the supporting Affidavit and attachments, I have decided to approve Guyer's request for attorney's fees and costs. As indicated above, Guyer has documented 126.25 hours of work performed on the Sorri case and has affirmed that $175 is a reasonable hourly billing rate for lawyers with similar experience in Albuquerque, New Mexico. Sandia does not contest these figures, and I find that they are reasonable. See David Ramirez, 24 DOE 87,504 (1994), appeal pending, (OHA Hearing Officer determined that the attorney's hourly rate of $175 for representing a whistleblower under Part 708 was reasonable and awarded fees of $24,740). Accordingly, I have concluded that Guyer should be awarded attorney's fees of $22,093.75, which is consistent with the "lodestar" approach (the product of reasonable hours times a reasonable rate for determining the amount of attorney's fees to award a successful complainant) approved by the Supreme Court in Blum v. Stenson, 465 U.S. 886, 888 (1984).

II. Conclusion

For the reasons set forth above, Guyer shall be awarded the following amounts of attorney's fees, legal assistant costs, and litigation costs and expenses in accordance with the provisions of 10 C.F.R. ' 708.10 (c):

Attorney's Fees $22,093.75

Legal Assistant Costs $900.00

Litigation Costs and Expenses $2,362.68

Total $25,356.43

It Is Therefore Ordered That:

(1) Sandia National Laboratories shall pay Thad M. Guyer $25,356.43 in compensation for actions taken against Ronald A. Sorri in violation of 10 C.F.R. ' 708.5.

(2) Sandia National Laboratories shall pay the above amounts to Thad M. Guyer within 20 days of the issuance of this Order.

(3) This is a Supplemental Order to the Initial Agency Decision issued on December 16, 1993, and may be appealed to the Deputy Secretary of Energy.

Thomas O. Mann

Deputy Director

Office of Hearings and Appeals

Date:

1 Wahl v. Carrier Mfg. Co., Inc., 511 F.2d 209 (7th Cir. 1975); Kiefel v. Las Vegas Hacienda, Inc., 404 F. 2d 1163 (7th Cir. 1968). 2 See Crawford Fitting Co. v. J.J. Gibbons, Inc., 482 U.S. 437 (1987); see also Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d ' 2677 (1983).

Sandia National Laboratories

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motions to Dismiss

Names of Petitioners: Sandia National Laboratories

L & M Technologies, Inc.

Dates of Filing: August 11, 1993

August 17, 1993

Case Numbers: LWZ-0021

LWZ-0022

This determination will consider two Motions to Dismiss filed by Sandia National Laboratories (Sandia) and L & M Technologies, Inc. (L&M) on August 11 and 17, 1993, respectively. In their Motions, Sandia and L&M seek the dismissal of the underlying complaint and hearing request filed by Mr. Ronald A. Sorri (Sorri) under the Department of Energy's Contractor Employee Protection Program. Sorri's present request for a hearing under § 708.9 was filed on June 9, 1993, and it has been assigned Office of Hearings and Appeals (OHA) Case No. LWA-0001. Sorri's is the first hearing request received by the OHA under the DOE's new Contractor Employee Protection Program.

I. Background

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[ ] fraud, mismanagement, waste, and abuse" at DOE's Government- owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. In view of its recognized jurisdiction, the DOE established new administrative procedures to deal with complaints of this nature. The Notice of Proposed Rulemaking for these new administrative procedures was published in the Federal Register on March 13, 1990. 55 Fed Reg. 9326 (March 13, 1990). Interested persons were given the opportunity to submit written comments, and the final rule was published in the Federal Register on March 3, 1992. 57 Fed. Reg. 7533 (March 3, 1992). The new DOE Contractor Employee Protection Program regulations, codified as Part 708 of Title 10 of the Code of Federal Regulations, became effective on April 2, 1992.

The following three provisions of the regulations in Part 708 are relevant to the present Decision. Section 708.6(d) provides, in pertinent part:

A complaint . . . must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later.

Once a complaint has been filed, § 708.8(a)(2) provides that the Director of DOE's Office of Contractor Employee Protection (OCEP) may accept the complaint, unless she determines that the complaint is untimely. The third provision, § 708.15, permits the "Secretary or designee," i.e. the appropriate DOE official depending on the stage of the proceeding, to extend the time frames set forth in Part 708.

Sorri was a Senior Maintenance Technician employed by L&M, a subcontractor at the Microelectronics Development Laboratory (MDL) at Sandia National Laboratories in Albuquerque, New Mexico, from March 1990 until March 1992. During that time, Sorri disclosed safety concerns to management officials of both L&M and Sandia involving the possible release of lethal gases as a result of overpressurized gas cylinders. After communicating his safety concerns on a number of occasions to officials at Sandia, Sorri filed a formal safety complaint with the DOE on February 14, 1991. He alleges that after doing so, L&M and Sandia took the following reprisal actions against him: reassignment and relocation from the MDL to L&M's off-site headquarters, cancellation of requested training, a downgraded performance evaluation, and termination from employment on March 13, 1992.

On July 23, 1992, Sorri filed a complaint with the DOE Albuquerque Field Office (DOE/AL) pursuant to 10 C.F.R. Part 708. After an unsuccessful attempt was made by DOE/AL to reach an informal resolution, Sorri's complaint was forwarded on September 29, 1992, to the DOE's Office of Contractor Employee Protection to institute a formal investigation. The OCEP conducted an on-site investigation of Sorri's allegations of reprisal and issued a Report of Investigation and a Proposed Disposition on April 30, 1993. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that Sorri's relocation and reassignment, as well as his downgraded performance evaluation, occurred as a result of his protected disclosures. However, the Proposed Disposition also concluded that the cancellation of Sorri's training and his termination were not the result of, or constituted reprisals for, his protected disclosures.

On May 14, 1993, Sorri submitted his request for a hearing pursuant to 10 C.F.R. § 708.9 to OCEP. On June 9, 1993, OCEP transmitted that request, together with the investigative file, to the OHA, and requested that a Hearing Officer be appointed. On June 16, 1993, procedures and a briefing schedule were established for the hearing in this case under § 708.9(b). The hearing is presently set for September 14 and 15, 1993, in Albuquerque, New Mexico.

On August 11, 1993, Sandia filed a Motion to Dismiss the proceeding. In its Motion, Sandia maintains that Sorri's July 23, 1992 complaint was not timely filed. The regulations require an individual to file a complaint under the Contractor Employee Protection Program "within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later." 10 C.F.R. § 708.6(d). Sandia asserts that this requirement is jurisdictional in nature, and that the DOE therefore does not have the authority to proceed in any case where the time period for filing a complaint is exceeded. According to Sandia, Sorri filed his complaint too late to challenge an event occurring on March 13, 1992, the date on which Sorri's employment with L&M was terminated. Motion to Dismiss at 1. Sandia states that Sorri would have had to file his complaint by May 30, 1992, in order to meet the 60-day time period, and even if the 60 days was counted from the effective date of the new Part 708 regulations on April 2, 1992, Sorri's complaint, filed on July 23, 1992, is still untimely. Id. Finally, Sandia maintains that the discussion of the 60-day filing requirement in the preamble to Part 708 "makes it clear that DOE feels that 60 days is reasonable because investigation of claims filed after 60 days is made more difficult by fading memories." Id.; see 57 Fed. Reg. at 7537 (March 3, 1992). On August 17, 1993, L&M filed a similar Motion to Dismiss in which it also claims, for the reasons cited in Sandia's motion, that the Sorri complaint is time barred.

II. Analysis

The DOE regulations governing this proceeding do not expressly provide for the submission of motions to dismiss based upon an allegation that the underlying complaint was untimely. As noted above, under § 708.8(a)(2), the OCEP Director must determine whether to dismiss a DOE Contractor Employee

Protection Program complaint on the grounds that it is untimely. While it is true that § 708.6(d) states that a complaint must be filed within 60 days after the alleged discriminatory act occurred, § 708.15 allows "all time frames" set forth in Part 708 to be extended. It is therefore clear that under these regulations, the decision to accept a complaint filed after the 60-day period in § 708.6(d) is within the discretion of the OCEP Director. In the present case, the OCEP Director did not dismiss the complaint as untimely, and there is nothing in the record to suggest that she abused her discretion. As explained below, her decision to accept and investigate Sorri's complaint is consistent with the important Departmental policy objectives behind Part 708. Moreover, there is no evidence in the present record that the investigation was hampered in any way because Sorri may have exceeded the 60-day time period, nor any reason to believe that any party has been prejudiced as a result.

In its Motion, Sandia attempts to avoid this conclusion by characterizing the 60-day time period in § 708.6(d) as jurisdictional. However, there is nothing in Part 708 that would indicate that the 60-day period was meant to be inflexible - i.e. jurisdictional - in nature. Indeed, there are a number of reasons why § 708.6(d) should not be read as barring the investigation of a complaint that is filed more than 60 days after the alleged discriminatory act occurred or should reasonably have been discovered.

First, the DOE Contractor Employee Protection Program is intended to encourage contractor employees to come forward "with information that in good faith they believe evidences unsafe, unlawful, fraudulent, or wasteful practices." 57 Fed. Reg. at 7533 (March 3, 1992). Employees of DOE contractors and subcontractors should be able to disclose safety concerns without fear of employer reprisal, and employees who believe they have been subject to a reprisal should feel they are able to seek protection from the DOE. It is clear from the regulatory history of this new program that the 60- day time limitation for the submission of complaints was never intended as an ironclad technical requirement. Such a technical, not generally understood requirement could dissuade employees from disclosing such important information.

Second, the preamble to Part 708 states that the reason for adopting a time limit for the filing of a complaint of discrimination under this new program was to ensure the investigation of complaints would not be rendered "more difficult as memories grow dimmer with the passage of time." 57 Fed. Reg. at 7537 (March 3, 1992). In the present case, after conducting an investigation, the OCEP Director found that there was sufficient evidence on which to move forward, so there is no evidence at this stage in the proceeding that any delay in the filing of the complaint hampered the investigation. Nor has there been any showing (or even a credible suggestion) by Sandia or L&M that either was prejudiced in its ability to defend itself against Sorri's allegations as a result of any delay which may have occurred.

A motion to dismiss is appropriate only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. See M&M Minerals Corporation, 10 DOE ¶ 84,021 (1982). Since dismissal is the most severe sanction that we may apply, it should be used sparingly, and only to prevent a miscarriage of justice. In this regard, we have determined that the acceptance of Sorri's complaint was a reasonable exercise of discretionary authority under Part 708 by the Director of the Office of Contractor Employee Protection. There is no evidence that the policy underlying the 60-day time limit has been contravened by the acceptance of the complaint, or that either Sandia or L&M was prejudiced by any brief delay which may have occurred between Sorri's termination in March 1992 and the filing of his complaint under the newly promulgated provisions of Part 708 in July of that year. Accordingly, the Motions to Dismiss filed by Sandia National Laboratories and L & M Technologies, Inc. should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Sandia National Laboratories on August 11, 1993, is hereby denied.

(2) The Motion to Dismiss filed by L & M Technologies, Inc. on August 17, 1993, is hereby denied.

(3) This is an Interlocutory Order of the Department of Energy.

Roger Klurfeld

Assistant Director

Office of Hearings and Appeals

Date:

Universities Research Association, Inc.

December 22, 1993

Motion to Dismiss

Name of Movant: Universities Research Association, Inc.

Date of Filing: December 9, 1993

Case Number: LWZ-0023

Universities Research Association, Inc. (URA) is the management and operating contractor for the Department of Energy's (the DOE) Superconducting Super Collider Laboratory (the Laboratory) in Waxahachie, Texas. On February 4, 1993, Dr. Naresh C. Mehta, a former physicist at the Laboratory, filed complaint SSC-93-0001 against URA under 10 C.F.R. Part 708 (the "Whistleblower Regulations"). In his complaint, Mehta alleged that URA had terminated his employment because he had charged URA officials with mismanaging the Laboratory's hypercube computer. 1/

The DOE referred Mehta's complaint to its Office of Contractor Employee Protection (OCEP). After an extensive investigation, OCEP issued a Proposed Disposition on October 15, 1993. In the Proposed Disposition, OCEP found that Mehta had made a good faith disclosure of his concerns about mismanagement of the hypercube. Furthermore, OCEP found that URA had not shown a legitimate business reason for terminating Mehta's employment. OCEP concluded that URA's actions against Mehta were retaliatory and prohibited under the Whistleblower Regulations. Accordingly, OCEP ordered URA to reinstate Mehta, grant him back pay and benefits, pay his legal fees and costs, and expunge information relating to the termination from his personnel record.

URA filed a request for a hearing on the merits of the complaint under § 708.9 of the Whistleblower Regulations. The DOE's Office of Hearings and Appeals scheduled the hearing for January 5, 1994. URA filed the present Motion to Dismiss on December 9, 1993. The grounds of URA's Motion to Dismiss are (1) the Whistleblower Regulations were not in effect for the Laboratory when URA committed the alleged acts of reprisal; and (2) Mehta's complaint was not timely filed. For reasons discussed below, we reject both grounds and will deny the motion.

The term "whistleblowing" has been described as referring to "employees who make disclosures outside of their organizations, [as well as] employees who raise questions about improper practices through their employers' internal channels, or who refuse to carry out illegal instructions." 2/

The current Secretary of Energy, Hazel O'Leary, has established a departmental policy of encouraging whistleblowing. Secretary O'Leary has stated that "I need whistleblowers, the department needs whistleblowers, and our country needs whistleblowers." Concerning employers' reprisals against whistleblowers, she added that, "I commit today to zero tolerance, zero tolerance of reprisals," seeking to "encourage dissent, encourage disagreement...." 3/

The DOE has been given the statutory authority to prescribe rules and regulations deemed necessary or appropriate to protect health, life, and property and to otherwise administer and manage its responsibilities and functions. See, e.g., the Atomic Energy Act of 1954, as amended (42 U.S.C. 2201); the Energy Reorganization Act of 1974, as amended (42 U.S.C. 5814 and 5815); and the Department of Energy Organization Act, as amended (42 U.S.C. 7251, 7254, 7255, and 7256). These statutory grants were the basis for the DOE's Whistleblower Regulations, published in 57 Fed. Reg. 7533 (March 3, 1992), with an

effective date of April 2, 1992.

In addition, the DOE amended the Department of Energy Acquisition Regulations (DEAR) (48 C.F.R. Chapter 9) to require that all DOE contracts and subcontracts contain a provision requiring compliance with the Whistleblower Regulations. 57 Fed. Reg. 57638 (December 8, 1992). The DOE described this amendment as "a technical and conforming change to make the DEAR consistent with 10 C.F.R. Part 708."

URA's first argument follows from its reading of 10 C.F.R. § 708.2 (a), which sets out the scope of the Whistleblower Regulations. The section provides that:

For all other complaints [i.e., not relating to health or safety matters], this part is applicable to acts of reprisal occurring after the effective date of this part if the underlying procurement contract ... contains a clause requiring compliance with this part.

URA's argument hinges on the clause, "if the underlying procurement contract ... contains a clause requiring compliance with this part," hereafter referred to as the Compliance Clause. URA contends that the Compliance Clause means that "for complaints of reprisal allegedly arising out of other [i.e., not relating to health or safety] protected disclosures, including mismanagement, Part 708 was not applicable until the contract contained the clause required by DEAR 970.5204-59." URA's contract with the DOE was modified to conform with the Whistleblower Regulations and to incorporate its protections for contractor employees on March 31, 1993. 4/ Because URA terminated Mehta's employment before the modification was signed, URA contends that the Whistleblower Regulations do not apply in Mehta's case.

URA's interpretation is incorrect. The focus of the Compliance Provision is not when the Whistleblower Regulations are effective, but whether a contractor is subject to the Regulations. Employees of the Laboratory are covered by the protections of the Whisleblower Regulations because the contract between URA and DOE has been modified to incorporate those protections. In a letter transmitted with the modification, Terrell C. Cone, Director of the Department's Contract Administration Office for the Superconducting Super Collider Project, explained the scope of the Whistleblower Regulations:

Once the clause specified at 970.5204-59 and the subject of modification A033 was accepted by Universities Research Association, Inc. and by the DOE Contracting Officer, all cognizant allegations of reprisal after April 2, 1993 (including fraud, mismanagement, etc.,) are covered.

Cone's explanation of the scope of the Whistleblower Regulations is supported by the DOE's Acquisition Letter 92-9, dated December 8, 1992. The Acquisition Letter states that:

With respect to complaints involving other matters, Part 708 is applicable to acts of reprisal occurring on or after April 2, 1992, if the subject contract contains a clause requiring compliance with Part 708....

The Acquisition Letter then explains that certain contracts will not be modified:

Contracting officers shall modify existing contracts and purchase orders which fall within the scope of the clause prescription at DEAR 913.507, 922.7101, and 970.5204, to incorporate the whistleblower protection for Contractor Employees clause not later than March 31, 1993. However, the clause need not be incorporated into contracts and purchase orders that are due to expire by June 30, 1993.

It follows from the discussion in the Acquisition Letter, and from the plain meaning of § 708.2 (a), that URA's reliance on the Compliance Provision is misplaced. The Compliance Provision does not establish an effective date for the Whistleblower Regulations. Rather, it provides for the eventuality that some contracts would not be modified. URA's contract has been modified, and therefore, as with all contractors performing under contracts that have been modified, URA is subject to the provisions of the Whistleblower Regulations as of April 2, 1992.

Furthermore, URA has entered into an agreement with the DOE in which it concedes that Mehta's complaint will be processed pursuant to the Whistleblower Regulations. The agreement, styled a "Mediation Agreement," was executed on September 21, 1993 by Ezra D. Heitowit, Vice-President/Secretary of URA; Norman Landa, attorney for Mehta; and Sandra L. Schneider, Director of OCEP. The agreement provides in part that:

This certifies agreement by senior officials of Universities Research Association, Inc. and Dr. Naresh Mehta to attempt to resolve Complaint No. SSC-93-0001, filed pursuant to Part 708, title 10, Code of Federal Regulations, through mediation.... Both parties have agreed that if attempts to resolve this complaint are unsuccessful, the complaint will be processed further consistent with Part 708, and the Director, OCEP, will issue a Report of Investigation and Proposed Disposition in this case. 5/

URA thus voluntarily agreed to be bound by the Whistleblower Regulations in Mehta's case. It would be manifestly unjust to allow URA to assert that the Whistleblower Regulations are not applicable after OCEP made a determination, pursuant to the Regulations, that URA finds unfavorable. The Mediation Agreement estops any claim by URA that the Whistleblower Regulations are not applicable to Mehta's complaint.

URA's second argument is that Mehta failed to file his complaint within 60 days of the termination of his employment. There is no supporting discussion of this argument in the motion. Apparently, URA attempts to rely on § 708.6 (d) of the Whistleblower Regulations, which provides that:

A complaint filed pursuant to ... this section must be filed within 60 days after the alleged discriminatory act occurred.... In cases where the employee has attempted resolution through internal company grievance procedures ... the 60-day period for filing a complaint shall be tolled during such resolution period and shall not again begin to run until the day following termination of such dispute-resolution efforts.

The "discriminatory act," as defined in § 708.4 of the Whistleblower Regulations, is the termination of Mehta's employment. URA concedes in its motion that Mehta was notified of the termination on October 27, 1992. On November 3, 1992, Steven Brumley, the Laboratory's legal counsel, agreed to arrange at Mehta's request an independent review of the termination. 6/ Douglas P. Kreitz, the Laboratory's personnel director, notified Mehta in a letter dated December 16, 1992, that the review had been completed and that the Laboratory was "proceeding with [Mehta's] termination." 7/ Mehta then filed his complaint on February 4, 1993.

Mehta's request for review constitutes an attempted resolution through internal company grievance procedures as required in §708.6 (d). Thus, the 60-day filing period did not begin running until Mehta knew, or should have known, that the review had been completed. URA has made no attempt to show that Mehta knew or should have known about the completion of the review before Kreitz's letter of December 16, 1992. Mehta filed his complaint on February 4, 1993, which is within 60 days of December 17, 1992, the day after Kreitz's letter. We reject, therefore, URA's assertion that Mehta failed to file a timely complaint.

In conclusion, we find no basis in URA's motion that justifies the dismissal of Mehta's claim. We will therefore deny the motion.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Universities Research Association, Inc. on December 9, 1993, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy.

Thomas L. Wieker

Deputy Director

Office of Hearings and Appeals

Date: December 22, 1993

Notes:

1/ A "hypercube" is a type of computer that uses a large number of parallel processors arranged in a particular manner. It is currently used in certain scientific applications. See Frenkel and Verity, "Is There More Than Hype to Hypercubes?" Business Week, June 8, 1987 at 112.

2/ Westman, Whistleblowing: The Law of Retaliatory Discharge 19 (1991).

3/ Tri-City Herald (Pasco, Wash.), November 7, 1993, at A-3, Col. 4.

4/ Modification A033 to Contract No. DE-AC35-89ER40486. The original contract was dated January 18, 1989.

5/ OCEP Case File, Volume II, Exhibit "E."

6/ OCEP Report of Investigation at 3.

7/ OCEP Report of Investigation, Exhibit 5.

Case No. LWZ-0026

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Motions to Dismiss

Names of Petitioners: Boeing Petroleum Services, Inc.

DynMcDermott Petroleum Operations Company

Dates of Filing: March 24, 1994

March 25, 1994

Case Numbers: LWZ-0026

LWZ-0027

This determination will consider two Motions to Dismiss filed by Boeing Petroleum Services, Inc. (Boeing) and DynMcDermott Petroleum Operations Company (DynMcDermott) on March 24 and 25, 1994, respectively. In the Motion filed by Boeing, the firm seeks the dismissal of the underlying complaint and hearing request filed by Mr. Francis M. O'Laughlin (O'Laughlin) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. O'Laughlin's present request for a hearing pursuant to section 708.9 of those provisions was filed with the Office of Hearings and Appeals (OHA) on January 10, 1994. Francis M. O'Laughlin v. Boeing Petroleum Services, Inc., OHA Case No. LWA-0005. In the Motion filed by DynMcDermott, the firm seeks the dismissal of DynMcDermott as a party in the O'Laughlin proceeding.

I. Background

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for processing complaints of this nature.

From March 1987 until his resignation on May 15, 1992, O'Laughlin was employed by Boeing, the then management and operating (M&O) contractor for the DOE's Strategic Petroleum Reserve (SPR) Office located in New Orleans, Louisiana. In January 1990, O'Laughlin was appointed to the position of Integrated Logistics Systems (ILS) Manager, a subgroup of the Engineering Directorate, which was responsible for a number of logistics functions including: (1) Logistics Engineering, which entailed oversight of the Logistics Service Support Analysis (LSSA) program; and, (2) Maintenance Management Information Systems (MMIS), which reported the status of preventive maintenance of SPR facilities. However, in late 1990 or early 1991, notification was given by the Boeing Project Manager to the various

managers that a reorganization was planned which involved, inter alia, moving many logistics functions to a newly formed Material Directorate under the management of an individual designated as the Material Director. In addition, it was determined that other ILS functions should be splintered among other Directorates. In particular, the reorganization called for moving the MMIS preventive maintenance reporting function to the previously existing Operations and Maintenance (O&M) Directorate within Boeing.

During April and May 1991, when implementation and potential impacts of the planned reorganization were being discussed, O'Laughlin voiced and documented his objections to the dispersal of the ILS functions, particularly with regard to the transfer of preventive maintenance reporting to the O&M Directorate. O'Laughlin advised Boeing management that transfer of the preventive maintenance function was not prudent and would result in inefficiency since it amounted to having the O&M Directorate report on itself.1 In addition, O'Laughlin expressed concern that splintering logistics functions from the ILS might result in Boeing not meeting LSSA program milestones established by agreement with the DOE, and indeed might constitute a violation of a pertinent DOE Order, SPRO Order 4000.1B, Strategic Petroleum Reserve Integrated Logistics Support Policy.

According to O'Laughlin, two acts of reprisal were taken against him by Boeing. First, although preliminary drafts of the proposed Material Directorate organization chart specified O'Laughlin as the Logistics Manager, who would report directly to the Material Director upon reorganization, O'Laughlin did not receive this position. Instead, on May 13, 1991, the day after the office was physically restructured under the reorganization, O'Laughlin was surprised to learn upon trying to locate his new office that he would not be the Logistics Manager, but would be the ILS Manager, reporting to the Logistics Manager. The second act of alleged reprisal occurred on August 15, 1991, when O'Laughlin was issued a Corrective Action Memo which informed him that he had been demoted from his management position. O'Laughlin was then transferred from his position as ILS Manager to the function of Policy Compliance, a demotion that entailed a reduction in annual salary of approximately $4,000.

Beginning in August 1991, O'Laughlin initiated attempts of informal resolution of the adverse personnel action through internal Boeing procedures. These attempts having been unsuccessful, however, O'Laughlin filed a complaint with the SPR Office pursuant to 10 C.F.R. Part 708 on April 1, 1992. That complaint was forwarded to DOE's Office of Contractor Employee Protection (OCEP) on April 3, 1992, but was initially dismissed by OCEP on April 10, 1992, for failure to state an actionable claim under Part 708. In reaching this determination, OCEP found that O'Laughlin's complaint did not reveal that he had made disclosures that related to actual or potential health or safety issues or that his disclosure contributed to the adverse personnel actions taken against him. On May 8, 1992, O'Laughlin filed for review with the Deputy Secretary of DOE and submitted an amended complaint asserting that his disclosures involved issues of health and safety, as well as possible waste, mismanagement, and the violation of a DOE Order. On August 30, 1992, the Deputy Secretary reinstated the complaint, and afforded an opportunity for attempts at informal resolution. During the interim, O'Laughlin submitted his resignation to Boeing, which became effective on May 15, 1992.

Then, having been informed by the SPR Office that attempts at informal resolution had failed, OCEP performed an on-site investigation of the matter during the period February 28 through March 5, 1993, and issued a Report of Investigation and a Proposed Disposition on December 16, 1993. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that O'Laughlin's communications regarding the ILS reorganization did not present disclosures relating to health and safety protected under Part 708; it further concluded that the adverse personnel actions taken against him were not the result of any protected disclosure.2 Accordingly, OCEP proposed to deny O'Laughlin's request for relief under Part 708.

During the deliberative stage of the OCEP proceeding, a change of the M&O contractor occurred at the SPR. On March 31, 1993, Boeing ceased operations in that capacity and, on April 1, 1993, DynMcDermott assumed the SPR M&O contract. As the succeeding M&O contractor, DynMcDermott has generally hired

the employees formerly employed by Boeing with the exception of high management officials.

On January 2, 1994, O'Laughlin submitted his request for a hearing pursuant to 10 C.F.R. ' 708.9 to OCEP. On January 10, OCEP transmitted that request, together with the investigative file, to the OHA, and requested that a Hearing Officer be appointed. On February 10, 1994, procedures and a briefing schedule were established for the hearing in this case under ' 708.9(b). The hearing is presently set for May 18 and 19, 1994, in New Orleans, Louisiana.3 Noting that O'Laughlin had requested reinstatement among the remedies he sought in compensation for the alleged whistleblower reprisals,4 we determined that DynMcDermott should also be served with the Proposed Disposition and Report of Investigation, and provided the firm an opportunity to file a pre-hearing brief on the same basis as the other parties in the proceeding. Letter from Fred L. Brown, Deputy Assistant Director, OHA, to John A. Poindexter, General Counsel, DynMcDermott, January 31, 1994.

On March 24, 1994, Boeing filed its pre-hearing brief which included the present Motion to Dismiss. DynMcDermott similarly filed a pre-hearing brief in the form of a Motion to Dismiss on March 25, 1994. In his pre-hearing brief, also filed on March 25, 1994, O'Laughlin reasserts his claim and request for relief under Part 708. On April 8, 1994, Boeing and O'Laughlin filed respective Responses to the pre-hearing briefs of the other parties.

II. Analysis

A. Boeing's Motion To Dismiss

In its Motion to Dismiss the O'Laughlin complaint, Boeing lists five reasons in support of its motion. Boeing Motion to Dismiss; Boeing Memorandum in Support of Motion to Dismiss. First, Boeing states that the complaint does not state a claim cognizable under 10 C.F.R. Part 708 because the allegations of protected disclosure and reprisal occurred prior to the effective date of the regulation. Second, Boeing claims that the information allegedly submitted to it regarding safety concerns resulting from a proposed reorganization does not constitute a disclosure under section 708.5. Third, Boeing submits that the complaint is untimely, since it was filed more than 60 days after the alleged reprisal and more than 60 days following the termination of internal company grievance procedures. Fourth, Boeing alleges that the disclosure does not describe a substantial and specific danger to employees or to public health or safety. Finally, Boeing states that no disclosure of a safety concern was ever expressed. The first and third reasons can be analyzed together since the underlying issue concerns the time requirements imposed by the regulations. We will discuss reasons 2, 4, and 5 together since they deal with the issue of the content and relevance of the alleged disclosure, and whether that content was entitled to protection under Part 708. For the reasons below, we have determined that Boeing's Motion to Dismiss must be denied.

1. Timeliness of the Complaint

A complaint must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or should have known of the alleged discriminatory act, whichever is later. 10 C.F.R. ' 708.6 (d). This 60-day period is tolled while an employee attempts resolution through internal company grievance procedures, and begins to run again the day following termination of such dispute resolution efforts. Id. According to Boeing, the O'Laughlin claim should be dismissed because the alleged retaliatory acts occurred prior to the effective date of the regulation and there is no specific language in the statute to give it retroactive effect. Further, Boeing contends that the complaint should be dismissed for being filed more than sixty days after the alleged retaliatory action occurred.

We note here that the DOE Contractor Employee Protection Program regulations do not expressly provide for the submission of motions to dismiss based upon an allegation that the underlying complaint was untimely or an allegation that the retaliatory events occurred prior to the effective date of the regulation. The regulations do, however, allow the Director of the Office of Contractor Employee Protection (Director) to make a determination of the timeliness of the complaint prior to its acceptance or rejection. 10 C.F.R. ' 708.8 (a) (2). In addition, the regulations provide for the extension of all time frames with the

approval of the Secretary or her designee. 10 C.F.R. ' 708.15; see also Sandia National Laboratories and L & M Technologies, 23 DOE & 82,502 (1993) (Sandia). It is also clear that DOE will not tolerate frivolous or meritless complaints, and has given the Director broad discretion to dismiss such actions early in the process. 57 Fed. Reg. 7539 (Mar. 3, 1992). Therefore, although DOE established a specific timetable for this administrative procedure5, ample opportunity exists for the appropriate official to relax these guidelines in order to further the underlying policy, which is to encourage contractor employees to disclose practices which are unsafe, unlawful, fraudulent or wasteful. 57 Fed. Reg. 7533 (March 3, 1992).

In the present case, we find that the Part 708 60-day filing period was tolled pending final resolution by Boeing of O'Laughlin's employee grievance which he filed subsequent to receiving the Corrective Action Memo and demotion in August 1991. On December 3, 1991, the Boeing human resources director rejected O'Laughlin's appeal. O'Laughlin wrote to the company again on March 3, 1992 requesting advice on the company appeal process. Addendum to O'Laughlin Reply to Pre-hearing Brief. After one month had passed without a reply, O'Laughlin wrote to Boeing's parent company on April 3, 1992 requesting its involvement. Id. O'Laughlin filed this complaint on April 1, 1992. In view of these actions, we find that the Director has not abused her discretion by accepting this complaint. In fact, we agree with the Director that the complainant actively pursued redress within Boeing until notification on April 29, 1992 by the Human Resources Manager of the parent company (Boeing Inc.) that no further appeal procedures existed. See Proposed Disposition, Francis M. O'Laughlin v. Boeing Petroleum Services, Inc., Case No. SPRO-92-0001 (December 15, 1993) at 4. Thus, the filing period was tolled beyond the April 2, 1992 effective date of Part 708.

Boeing contends that the complainant's attempts to obtain relief through the parent company cannot be considered a part of the appeal process. We disagree. It is not DOE's policy to discourage employees from seeking any means of resolution possible within the overall corporate structure in which they operate. Moreover, an employee of a subsidiary could reasonably make inquiries at the parent company in an attempt to find resolution of an employment (or personnel) issue involving the subsidiary, since the parent company may well have some authority over the personnel activities of a subsidiary. 18A Am. Jur. 2d Corporations ' 773 (1985) (describing the relationship between a parent company and its subsidiary as one in which one party owns and has custody of the other, as in the relationship between parent and child or warden and prisoner). Moreover, the underlying policy of the regulations directs us to encourage reasonable attempts at internal company resolution before an employee embarks upon the costly and time-consuming process of a formal administrative hearing. See 57 Fed Reg. 7538 (March 3, 1992); 10 C.F.R. ' 708.6 (c). This is not an attempt to "unilaterally create out of thin air an adjunct procedure" (Boeing Memorandum III. at 2), but rather a reasonable effort by a subsidiary company employee to seek to be heard by an organization he considers the supreme authority within his corporate environment.

2. Content and Relevance of the Disclosure

Boeing alleges that the disclosures made by the complainant are not of the type contemplated by DOE as requiring protection under section 708.5. Memorandum in Support of Motion to Dismiss at II, IV and V. Boeing contends that O'Laughlin's disclosures were so speculative and limited in impact as to be "meaningless for purposes of performing corrective action." Id., at IV. Boeing frames the pertinent issues in this matter as ". . . whether the complainant disclosed to management a `substantial and specific safety risk' about the reorganization," and ". . . whether senior management heard and understood that a safety objection was being raised." Boeing Response to Pre-Hearing Memorandum at I; Memorandum in Support of Motion to Dismiss at V. Boeing therefore argues that O'Laughlin's claim is legally insufficient since O'Laughlin's communications in objecting to the Boeing reorganization had only a theoretical connection with health and safety, and the record reveals "utterly no knowledge or perception on [Boeing management's] part of [O'Laughlin's] objections being safety driven . . . ." Id.

A motion to dismiss is appropriate only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. See M&M Minerals Corporation, 10 DOE & 84,021 (1982). OHA considers dismissal "the most severe

sanction that we may apply," and has stated that it will be used sparingly. See Sandia, 23 DOE & 82,502 (1993) (reserving use of a motion to dismiss only to prevent a miscarriage of justice). Based upon this standard, we are unpersuaded that O'Laughlin's claim should be dismissed at this point in the proceedings.

O'Laughlin continues to maintain that "[his] concern regarding this [reorganization] issue was not given serious attention by the Material Director and most certainly did involve Health and Safety," and that Boeing management "knew or should have known." O'Laughlin Pre-Hearing Brief at 2, 3; Appendix "A" at 4. We therefore do not consider the present complaint to be frivolous. We agree that O'Laughlin bears the burden of proving that his communications constituted a protected disclosure under 10 C.F.R. ' 708.9(d). We further believe, however, that he should be afforded that opportunity. The asserted state of mind of Boeing management in perceiving the substance of O'Laughlin's objections to the reorganization is certainly not determinative of whether a health and safety concern was adequately communicated. It is apparent that substantial disputed issues of fact remain concerning the nature, content and reasonable interpretation of O'Laughlin's communications, and we therefore find that the interests of all the parties will best be served by proceeding with the requested hearing.

B. DynMcDermott's Motion to Dismiss

In its Motion to Dismiss, DynMcDermott argues that it is not a proper party to the O'Laughlin proceeding. DynMcDermott points out that the firm never employed O'Laughlin since it assumed the SPR M&O contract on April 1, 1993, nearly a year after O'Laughlin resigned from Boeing, and consequently was not involved in any of the circumstances surrounding the O'Laughlin Part 708 complaint.

DynMcDermott further argues in support of its dismissal from the proceeding that: (1) in order to be a proper party under Part 708, one must be or have been the employer of the complainant; (2) Part 708 does not impose liability on a party that did not commit a proscribed act; (3) DynMcDermott cannot be considered a "proper party" to the proceeding since the firm cannot give effect to the "reinstatement" remedy sought by O'Laughlin when he was never employed by DynMcDermott; (4) the inclusion of DynMcDermott in the proceeding will only duplicate litigation costs while serving no fruitful purpose; (5) reinstatement is only one of the available remedies under Part 708, and is not appropriate under the present circumstances where O'Laughlin voluntarily resigned from his position; and (6) requiring DynMcDermott to employ O'Laughlin would unduly interfere with the firm's contractual right to evaluate all of the employees it assumed from Boeing, during the 12-month phase-in period of the new M&O contract with DOE (see 48 C.F.R. ' 970.5204-56(c)). In its pre-hearing brief, Boeing concurs with DynMcDermott that "DynMcDermott is not in a position to grant [O'Laughlin] the relief contemplated in [Part] 708, especially as it relates to reinstatement to his previous job [and t]here is no reason for them to be made a party." Boeing Pre-Hearing Brief at 4.

Nonetheless, reinstatement remains one of the remedies sought by O'Laughlin, in addition to back pay, expunging of his personnel records, and reimbursement of costs and fees. O'Laughlin's present requests for relief are set forth in Appendix "B" of his pre-hearing brief. Although somewhat confusing and ostensibly contradictory, O'Laughlin states as follows with respect to reinstatement:

The following is the relief that I seek:

1. Reinstatement to my former position with title, management level, and commensurate salary based on previous history of performance prior to the establishment of the [Boeing] Material Directorate, or, equivalent position.

. . . .

4. If reinstatement is not desired by DynMcDermott, I am seeking reimbursement of future lost wage and benefits on my reduction in salary (September 1991) and subsequent constructive discharge (May 1992).

With regard to liability for the relief requested, O'Laughlin states that "[Boeing] is totally responsible for

any monetary relief, however, DynMcDermott should be held accountable for reinstatement." O'Laughlin Pre-Hearing Brief, Appendix "D". O'Laughlin argues that DynMcDermott should be held to share liability since there is a substantial continuity of business operations from Boeing to DynMcDermott, which uses the same facilities and employs substantially the same work force. O'Laughlin Response at 2, citing Kolosky v. Anchor Hocking Corp., 585 F. Supp. 746 (W.D. Pa. 1983).

We have carefully considered the matter of DynMcDermott's joinder in this proceeding. It is clear that DynMcDermott, which succeeded Boeing as M&O contractor nearly a year after O'Laughlin's resignation, in no way participated in the actions forming the basis of the present complaint. Thus, the parties concur, and we agree also, that DynMcDermott's joinder in this proceeding is necessary and proper only to the extent that reinstatement is a potential remedy available to O'Laughlin were his claim to be successful on the merits. We do not endorse, nor need we necessarily reach, the arguments in opposition to joinder advanced by DynMcDermott in its present motion. For the reasons below, however, we have determined that reinstatement is not a remedy which is properly available to O'Laughlin in this case, and DynMcDermott's motion for dismissal will therefore be granted.

We must initially reject O'Laughlin's reliance on Kolosky, supra, as a basis for extending liability to DynMcDermott in this case. That case concerns situations in which a successor corporation may be held liable for a discriminatory act or practice of its predecessor under Title VII of the Civil Rights Act, 42 U.S.C. ' 2000e-5(g), on the basis that the successor corporation has purchased the assets of the corporation and essentially constitutes a continuation of the predecessor corporation. See Kolosky, 585 F. Supp. at 748, citing EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1091 (6th Cir. 1974); see also Trujillo v. Longhorn Manufacturing Co., Inc., 694 F.2d 221, 224-25 (10th Cir. 1982). No such corporate nexus exists between Boeing and DynMcDermott in this case. DynMcDermott operates the same facilities as did Boeing because the DOE owns those facilities and, similarly, DynMcDermott has taken on nearly all of the former Boeing employees not as a result of any dealings with Boeing but as a condition of assuming the M&O contract with the DOE.

Instead, this case is substantially similar to the circumstances confronted by the court in Holley v. Northrop Worldwide Aircraft Services, Inc., 835 F.2d 1375 (11th Cir. 1988), which held that a worker (Holley) who had proven an illegal retaliatory discharge (Fair Labor Standards Act, 29 U.S.C. ' 215(a)(3)) by his employer (Northrop) was not entitled to reinstatement after the government contract under which he had been employed was terminated. Indeed, the court denied any relief for the period following the termination of the contract. Although Northrop recommended its employees to the new contractor (which in fact retained 75% of the former Northrop employees), the court found that "Holley presented nothing more than circumstantial and inconclusive evidence to support the proposition that the employment decisions made by the new company were influenced by Northrop's recommendation." 835 F.2d at 1377. The decision in Holley was followed by the court in Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992), a case brought under the employee protection (whistleblower) provisions of the Energy Reorganization Act of 1974, 42 U.S.C. ' 5851(c), holding that though the complainant has proven a retaliatory discharge, "liability ends when the contract under which the employee worked is terminated." 982 F.2d at 129.

Thus, as a general matter, we do not believe that reinstatement is an appropriate remedy under Part 708 where, as here, there is a new M&O contractor that has no connection with the firm actually employing the complainant or the circumstances surrounding the discharge of the complainant, and the retention of employees by the new contractor is not directly influenced by the former contractor but merely a condition of assuming the M&O contract. Nonetheless, we remain keenly aware of the strong policy dictates underlying Part 708, favoring full protection of contractor employees that have been wrongfully discharged as a result of a protected disclosure. Therefore, we might exercise our equitable authority under Part 708 to order the reinstatement of a wrongfully discharged employee under particular circumstances.6 However, even assuming O'Laughlin's claim were meritorious, we do not believe that this remedy is appropriate in this case.

O'Laughlin has requested reinstatement to a management position equivalent to that which he occupied

prior to the Boeing reorganization, in which he had extensive authority over SPR logistics functions. DynMcDermott indicates that it has a "different organizational structure" (DynMcDermott Pre-Hearing Brief at 5) from Boeing and consequently there is no assurance that such a position exists. However, even assuming its existence, arguendo, it is clear that a management position of this capacity is singular in nature and the reinstatement of O'Laughlin would therefore require the displacement of an innocent employee, independently selected by DynMcDermott. Under these circumstances, reinstatement is a disfavored remedy. See, e.g., Edwards v. Department of Corrections, 615 F. Supp. 804, 811 (M.D. Ala. 1985).7

Finally, O'Laughlin has now conditionally relinquished his request for reinstatement, stating that "[i]f reinstatement is not desired by DynMcDermott, I am seeking reimbursement of future lost wage and benefits . . . ." O'Laughlin Pre-Hearing Brief, Appendix "B". It is certainly unmistakable from DynMcDermott's submission that it does not "desire" to reinstate O'Laughlin. Though ordering future lost wages (or front pay) is not among the remedies specified under Part 708,8 we take note that O'Laughlin is amenable to receiving monetary compensation in lieu of reinstatement. Therefore, in fashioning any relief which may be ordered were O'Laughlin successful on the merits of this case, we will consider whether O'Laughlin is entitled to any additional back pay9 in lieu of reinstatement, having determined that reinstatement is not an available remedy in this case.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Boeing Petroleum Services, Inc. on March 24, 1994, is hereby denied.

(2) The Motion to Dismiss filed by DynMcDermott Petroleum Operations Company on March 25, 1994, is hereby granted.

(3) This is an Interlocutory Order of the Department of Energy.

Fred L. Brown

Deputy Assistant Director

Office of Hearings and Appeals

Date:

1As will be explored in greater detail in considering Boeing's Motion to Dismiss, a critical factual issue in this case is whether, and the extent to which, O'Laughlin's communications to Boeing management disclosed matters relating to health and safety.

2OCEP states that although information relating to O'Laughlin's alleged disclosures regarding possible waste, mismanagement, and violation of a DOE Order was also examined, OCEP did not assert jurisdiction under Part 708 on the basis of these alleged disclosures. Notwithstanding, OCEP found in the Proposed Disposition that "[O'Laughlin]'s continued disagreement with the reorganization did not constitute disclosures of possible waste or mismanagement that merit protection under Part 708, had jurisdiction under that criteria been asserted in this case." Proposed Disposition at 15.

3Section 708.9(b) provides that hearings conducted under Part 708 "will normally be held . . . within 60 days from the date the complaint file is received by the Hearing Officer . . . ." However, upon initial contact, O'Laughlin informed the OHA Hearing Officer in this case that he would not be available within the 60-day time frame since he was about to begin 90 days of previously scheduled duty with the U.S. Naval Reserve. O'Laughlin therefore requested, and the Hearing Officer approved, an extension of time for the convening the hearing until after the completion of his duty assignment in May 1994.

4OCEP states in the Report of Investigation that during the attempted informal resolution of the matter,

O'Laughlin sought the following remedies: (1) reinstatement to his prior position, (2) back pay and benefits, and (3) removal from his personnel files of any reference to the events and personnel actions surrounding the complaint. Report of Investigation at 5-6.

5 The preamble to Part 708 states that the reason for adopting a time limit for the filing of a complaint under this program was to ensure that investigations would not be rendered "more difficult as memories grow dimmer with the passage of time." 57 Fed. Reg. 7537 (March 3, 1992).

6Thus, we reject DynMcDermott's position that it is beyond the scope of the DOE's authority under Part 708 to order the reinstatement by a succeeding M&O contractor of an employee found to have been wrongfully discharged by the previous M&O contractor as a result of a protected disclosure. The DOE procurement contracts executed after the effective date of Part 708, such as DynMcDermott's contract, generally incorporate a provision requiring full compliance with all pertinent health and safety regulations, including Part 708. See 10 C.F.R. ' 708.2(a); 48 C.F.R. (DEAR) ' 970.5204-2. DynMcDermott argues that imposition of reinstatement would infringe upon its right under its M&O contract with DOE to conduct evaluation of employees the firm was required to employ during the 12-month period following its assumption of the contract. DynMcDermott Pre-Hearing Brief at 7 citing 48 C.F.R. (DEAR) ' 970.5204-56(a)(2)(c). However, merely requiring DynMcDermott to reinstate an employee under condition that it could temporarily treat the employee as a new employee subject to evaluation would hardly amount to a serious infringement of its contractual rights. In any event, the DOE has sovereign authority to modify contracts to effectuate overriding regulatory policies adopted in the public interest. See Winstar Corporation v. United States, 994 F.2d 797 (Fed. Cir. 1993).

7Boeing further asserts that, in any event, O'Laughlin has waived his right to reinstatement, and is entitled to only limited back pay, since he voluntarily resigned from his position in May 1992. Indeed, there is ample support for Boeing's position that an employee, although discriminated against, is not entitled to reinstatement where there was no actual or constructive discharge from employment. See, e.g., Maney v. Brinkley Municipal Waterworks and Sewer Department, 802 F.2d 1073, 1075 (8th Cir. 1986); Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986). However, O'Laughlin maintains that his resignation was precipitated by being "belittled and harassed by management personnel" and therefore did in fact constitute a "constructive discharge", thus entitling him to reinstatement and back pay. O'Laughlin Response to Boeing Pre-Hearing Brief at 4. Since this is a factual matter that is in dispute, it is premature for us to rule upon whether O'Laughlin has established the existence of circumstances amounting to a "constructive discharge" from his position.

8Section 708.10(c) specifies the following remedies where a Part 708 violation is determined: "[The initial agency decision may include an award of reinstatement, transfer preference, back pay, and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was based."

9The amount of any back pay that O'Laughlin is entitled to, assuming his complaint were determined to be meritorious, is a matter in dispute. As noted above, Boeing contends that the pertinent period for purposes of calculating this remedy should terminate as of May 15, 1992, since O'Laughlin "voluntarily" resigned on that date, while O'Laughlin contends that his termination from employment constituted a "constructive discharge". It is therefore conceivable in this case, depending upon the determinations reached, that the back pay period that O'Laughlin might be awarded could terminate on the date of his resignation or the date the Boeing contract terminated. It is also within our authority, however, to extend the back pay period to the date of issuance of a final determination in this matter if O'Laughlin has not obtained other employment.

Case No. LWZ-0031

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioners: Westinghouse Hanford Company

Date of Filing: April 5, 1994

Case Number: LWZ-0031

This determination will consider a Motion to Dismiss filed by Westinghouse Hanford Company (WHC) on April 5, 1994. In its Motion, WHC seeks the dismissal of the underlying complaint and hearing request filed by Helen "Gai" Oglesbee under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. Oglesbee's request for a hearing under 708.9 was filed on February 28, 1994, and it has been assigned Office of Hearings and Appeals (OHA) Case No. LWA-0006.

I. Background

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[ ] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased (GOCO) facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

Oglesbee is currently an employee of WHC, the prime contractor at the DOE's Hanford Nuclear Site. Since June 1987, Oglesbee has been employed by WHC as a Secretary Level III (June 1987 to September 1992), Secretary Level IV (September 1992 to January 1993), Temporary Upgrade Plant Engineer (January 1993 to June 1993), and Plant Engineer (June 1993 to the present).

Oglesbee alleges that she made various health and safety complaints to her immediate supervisor on a continuing basis from June 1987 to August 1991, and that beginning in October or November 1990 she raised these concerns with her supervisor's superiors. She alleges that after doing so, WHC retaliated by failing to respond to her health-related issues and denying her access to reports and analyses of those issues; removing her designation as "Lead" Secretary; denying her a promised promotion; issuing her a performance improvement plan; transferring her involuntarily to another WHC office; issuing her a performance expectations letter; and issuing her written reprimands. These

alleged actions occurred over a period from 1987 through April 1992 (issuance of second written reprimand).

On August 24, 1992, Oglesbee filed a complaint with the DOE Richland Field Office (DOE/RL) pursuant to 10 C.F.R. Part 708. On October 2, 1992, after an unsuccessful attempt was made by DOE/RL to reach an informal resolution, Oglesbee's complaint was forwarded to the DOE's Office of Contractor Employee Protection (OCEP) to institute a formal investigation. OCEP conducted an on-site investigation of Oglesbee's allegations of reprisal and issued a Report of Investigation and a Proposed Disposition on February 18, 1994. / Prior to the on-site phase of OCEP's investigation, Oglesbee alleged that WHC had

threatened to extend her status as Temporary Plant Engineer, rather than promoting her to a permanent position. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that Oglesbee had made protected disclosures related to her health and safety concerns, but that a preponderance of the evidence did not support a finding that the disclosures were a contributing factor in any of the alleged actions taken against her. / With regard to Oglesbee's complaints that she was issued written reprimands and that her promotion to Plant Engineer was delayed, the OCEP found that these issues had already been resolved by WHC in accordance with the relief it would have recommended had it found that the actions were retaliatory. WHC removed the written reprimands from Oglesbee's personnel file and she was promoted to Plant Engineer in June 1993.

On February 28, 1994, Oglesbee submitted her request for a hearing under 10 C.F.R. 708.9 to OCEP. On March 10, 1994, OCEP transmitted that request to the OHA. On May 4, 1994, procedures and a briefing schedule were established for the hearing in this case under 708.9(b). The hearing is presently set for June 15, 16, and 17, in Richland, Washington. On April 5, 1994, WHC filed a Motion to Dismiss the proceeding, and submitted a statement in support of that Motion on May 13, 1994 (hereinafter "Statement"). The complainant filed a reply to WHC's statement on May 18, 1994 (hereinafter "Reply"). In its statement, WHC maintains that Oglesbee's August 24, 1992 complaint was not timely filed, and that the complaint was insufficient to confer jurisdiction on OCEP to investigate Oglesbee's allegations. For the reasons stated below, I find both arguments to be without merit. I will therefore deny WHC's Motion.

II. Analysis

A. Timeliness of the Complaint

The Part 708 regulations provide that a "complaint . . . must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later." 10 C.F.R. 708.6(d). WHC asserts that Oglesbee's August 24, 1992 complaint must be dismissed because it was filed more that 60 days after the discriminatory acts alleged by the complainant. Statement at 7-8.

Once a complaint has been filed, 708.8(a)(2) provides that the OCEP Director may accept the complaint, unless she determines that the complaint is untimely. While it is true that 708.6(d) states that a complaint must be filed within 60 days after the alleged discriminatory act occurred, 708.15 permits the "Secretary or designee," i.e. the appropriate DOE official depending on the stage of the proceeding, to extend "all time frames" set forth in Part 708. It is therefore clear that under these regulations, the decision to accept a complaint filed after the 60-day period in 708.6(d) is within the discretion of the OCEP Director. In the present case, the OCEP Director did not dismiss the complaint as untimely, and there is nothing in the record to suggest that she abused her discretion.

In its Statement, WHC attempts to avoid this conclusion by characterizing the 60-day time period in 708.6(d) as jurisdictional. In Sandia National Laboratories, 23 DOE 87,501 (1993) (Sandia), we considered, and ultimately rejected, the same argument. There is nothing in Part 708 that would indicate that the 60-day period was meant to be jurisdictional in nature. / WHC analogizes the Part 708 proceedings to the employee protection schemes administered by the Department of Labor, where, WHC argues, a "30-day limitations period has been strictly construed . . . ." Statement at 9. However, as pointed out by the complainant, the time limits imposed in DOL proceedings are expressly prescribed by statute. Reply at 6; see Solid Waste Disposal Act, 42 U.S.C. 6971; Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Comprehensive Environmental Response, Compensation and Liability Act of 1974, 42 U.S.C. 9610; Toxic Substances Control Act, 15 U.S.C. 2622; Energy Reorganization Act, 42 U.S.C. 5851; Federal Water Pollution Control Act, 33 U.S.C. 1367; Clean Air Act, 42 U.S.C. 7622. By contrast, the more flexible time frames governing this proceeding originated in the Part 708 regulations, which were not mandated by a specific statute, but were issued pursuant to the broad authority granted the DOE to manage the GOCO facilities in its nuclear weapons complex by the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201, the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5814 and 5815, and the Department of

Energy Organization Act, as amended, 42 U.S.C. 7251, 7254, 7255, and 7256. Indeed, there are a number of reasons why 708.6(d) should not be read as barring the investigation of a complaint that is filed more than 60 days after the alleged discriminatory act occurred or should reasonably have been discovered. See Sandia, 23 DOE at 89,002-03.

First, the DOE Contractor Employee Protection Program is intended to encourage contractor employees to come forward "with information that in good faith they believe evidences unsafe, unlawful, fraudulent, or wasteful practices." 57 Fed. Reg. at 7533 (March 3, 1992). Employees of DOE contractors and subcontractors should be able to disclose safety concerns without fear of reprisal, and employees who believe they have been subject to a reprisal should feel they are able to seek protection from the DOE. The regulations should be construed in a manner which furthers this primary purpose. It is clear from the regulatory history of this new program that the 60-day time limitation for the submission of complaints was never intended as an ironclad technical requirement. Id.; see also Sandia, supra.

Second, the preamble to Part 708 states that the reason for adopting a time limit for the filing of a complaint of discrimination under this new program was to ensure the investigation of complaints would not be rendered "more difficult as memories grow dimmer with the passage of time." 57 Fed. Reg. at 7537 (March 3, 1992). In the present case, after conducting an investigation, the OCEP

Director found that there was sufficient evidence on which to move forward. WHC's argument that fading memories "may have easily hampered OCEP's investigation in ways that may not be brought out until the proposed hearing" is purely speculative at this time. Statement at 10-11. At this stage in the proceeding there is no evidence that any delay in the filing of the complaint hampered the investigation.

Finally, WHC contends that it "has been prejudiced in its ability to defend itself because of Ms. Oglesbee's delay in filing the Complaint." Statement at 11. Again, any argument based on prejudice is purely conjectural at this stage of the case. I fail to see how any delay conceivably worked to the detriment of WHC, since OCEP found in favor of the company with regard to each of the complainant's allegations.

B. Sufficiency of the Complaint

In its Statement, WHC also maintains that the Complaint is insufficient because it does not meet the criteria outlined in 708.6 (c). WHC contends that there are no allegations in the Complaint that **specifically** state or identify acts of reprisal by WHC. The firm also states that OCEP does not have the authority to find alleged discriminatory acts outside of the Complaint and cannot create a sufficient complaint by verbal discussions. Finally, WHC contends that OCEP's investigation of the Complaint violated the Administrative Procedure Act (APA). Statement at 2-7.

The criteria for filing a complaint are stated in 708.6 (c):

A complaint need not be in any specific form provided it is signed by the complainant and contains the following: A statement setting forth specifically the nature of the alleged discriminatory act, and the disclosure, . . . a statement that the complainant has not . . . pursued a remedy available under State or other applicable law; and an affirmation that all facts contained in the complaint are true and correct to the best of the complainant's knowledge and belief. Additionally, the complaint must contain a statement affirming that (1) All attempts at resolution through an internal company grievance procedure have been exhausted; (2) The company grievance procedure is ineffectual . . . or (3) The company has no such procedure.

10 C.F.R. 708.6 (c).

Oglesbee's formal written complaint was filed with DOE/RL on August 24, 1992 and consisted of a document entitled "Review of Ms. Gai Oglesbee's Submitted Issues." It was forwarded to OCEP along with many pages of supplemental documentation provided by Oglesbee. OCEP was provided with additional information, both orally and in writing, throughout the investigation. At this stage of the

proceedings, Oglesbee's complaint file consists of a voluminous amount of supplemental documentation, including records of telephone conversations between Oglesbee and OCEP personnel.

We need not analyze whether Oglesbee's complaint specifically met each of the criteria outlined in 708.6, since the decision to accept a complaint is clearly within the discretion of the OCEP Director. In the present case, although Oglesbee's complaint was not perfect, the Director exercised her discretion to accept the complaint while also accepting supplemental documentation to support the complaint.

It is clear from the regulatory history that the remedial purpose underlying Part 708 is to ensure that contractor employees are protected from reprisal for disclosing valuable information. Sandia, supra. Therefore, it is important to construe these regulations liberally in favor of disclosure, and not to hold these employees to the strictest standards of technical pleading. As noted above, there is no evidence in the record to suggest that the OCEP Director abused her discretion in accepting Oglesbee's complaint.

In addition, the purpose of the requirement that a complaint be specific and informative is to avoid unfairness to the contractor. In this case, WHC received adequate notice of the allegations in Oglesbee's complaint. WHC was apprised of Oglesbee's allegations during the investigation, and the alleged retaliatory actions were outlined in a September 29, 1993 letter to WHC. OCEP also sent a letter dated May 28, 1993 to Mr. Thomas M. Anderson, president of WHC, setting forth the WHC actions which Oglesbee alleges were in retaliation for her disclosures. WHC has therefore been afforded a full opportunity to respond to Oglesbee's allegations of reprisal. Also, as evidenced by OCEP's favorable ruling for WHC with regard to each of the complainant's allegations, WHC has certainly not been prejudiced to date by the acceptance of the complaint.

Lastly, WHC asserts in its Statement that the APA was violated by OCEP's investigation of the Complaint, citing 5 U.S.C. 706. Section 706 states, in pertinent part, that "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." However, as stated above, there is no evidence whatsoever in the record that the OCEP Director abused her discretion in accepting Oglesbee's complaint; nor is there evidence that the acceptance of the complaint was arbitrary or capricious. For this reason, I find this argument to be without merit.

III. Conclusion

A motion to dismiss is appropriate only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. See Sandia, 23 DOE at 89,003. Since dismissal is the most severe sanction that we may apply, it should be used sparingly, and only to prevent a miscarriage of justice. In this regard, we have determined that the acceptance of Oglesbee's complaint was a reasonable exercise of discretionary authority under Part 708 by the Director of the Office of Contractor Employee Protection. Accordingly, the Motion to Dismiss filed by WHC will be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Westinghouse Hanford Company on April 5, 1994, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy.

Thomas O. Mann

Hearing Officer

Office of Hearings and Appeals

Date:

July 8, 2005

**DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Gilbert J. Hinojos

Date of Filing: May 13, 2005

Case Number: TBA-0003

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on April 27, 2005, involving a Complaint filed by Gilbert J. Hinojos (also referred to as the employee or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his Complaint, Hinojos claims that his former employer, DOE contractor Honeywell Federal Manufacturing & Technologies (Honeywell or the contractor), retaliated against him for engaging in activity that is protected by Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that the employee engaged in activity that is protected under Part 708, but that Honeywell showed that it would have taken the same personnel action in the absence of the protected activity. Hinojos appeals that determination. As set forth in this decision, I have decided that the determination is correct.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their

employers. Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"], will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by Hinojos in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of the Complaint are fully set forth in the IAD. *Gilbert J. Hinojos* (Case No. TBH-0003), 29 DOE ¶ 87,005 (2005)(hereinafter IAD). For purposes of the instant appeal, the relevant facts are as follows.

Hinojos was employed by Honeywell as a "material control coordinator, sr." at a DOE facility in Albuquerque, New Mexico. In July 2002, he filed a Complaint under Part 708, alleging that his employer retaliated against him for filing several complaints with the Equal Employment Opportunity Commission (EEOC) and the New Mexico Human Rights Division (NMHRD). These complaints alleged discrimination based on national origin. In January 2003, while the Complaint under Part 708 was pending, the employee was discharged from his position with the Contractor. The employee was permitted to amend his Part 708 Complaint to include this termination as a retaliation for participating in conduct protected under Part 708. 10 C.F.R. § 708.5(b). 1/

After completion of an investigation pursuant to 10 C.F.R. § 708.22, Hinojos requested and received a hearing on this matter before an Office of Hearings and Appeals Hearing Officer. The hearing lasted two days. Hinojos testified as to why he believed his termination was a result of the filing of his Part 708 Complaint. He presented no other witnesses. The contractor

---

1/ The Hearing Officer dismissed the EEOC and NMHRD claims because they are barred under Section 708.4. However, the claim of the termination as a retaliation for participating in a proceeding under Part 708 was permitted. *Gilbert J. Hinojos*, 28 DOE ¶ 87,037 (2003).

presented the following witnesses: (i) the director of the contractor's New Mexico operations (the director); (ii) the employee's supervisor (the supervisor); (iii) the contractor's manager of environment, safety & health (the ESH manager); (iv) the contractor's human resources manager (HR manager) and (v) a forklift operator who was a co-worker of Hinojos (co-worker or forklift operator). The contractor also submitted an exhibit book with numbered exhibits (hereinafter referred to as Ex.)

After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

II. The Initial Agency Decision

The IAD set forth the burdens of proof in cases brought under Part 708. The IAD stated that it is the burden of the complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation. *See* 10 C.F.R. §§ 708.5 and 29. The IAD further noted that if the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. 10 C.F.R. § 708.29. The IAD considered the application of these elements to the Hinojos proceeding.

A. Protected Activity and Contributing Factor

The IAD found that the employee's initial Part 708 Complaint was made in good faith. The IAD also found that a human resource manager who participated in the separation review board that made the decision to terminate Hinojos' employment had knowledge of his Part 708 Complaint. Further, given the pendency of the employee's Part 708 hearing request at the time of his termination, the IAD determined that there was sufficient temporal proximity to conclude that filing the Part 708 Complaint was a contributing factor to the termination. Based on these findings, the Hearing Officer concluded that the employee satisfied his burden of proof under Part 708. IAD, slip op. at 4.

B. Whether Honeywell would have terminated Hinojos absent the Protected Activities

At the hearing, the contractor's witnesses maintained that the complainant was terminated because he was a safety risk. The IAD recounted testimony describing the following incident which was the reason given for his discharge. On December 6, 2002, the employee was assigned to drive a government-owned flat-bed truck carrying large, aluminum containers, known as CRTs, from the contractor's facility to an off-site vendor. The CRTs weigh about 250 pounds each. The co-worker, who operated a fork lift, assisted the employee in loading the CRTs onto the flat bed of the truck. The CRTs were not secured in the bed of the truck, but merely stacked on top of each other. The employee then proceeded to transport the CRTs over public roadways to a facility where the CRTs were to be sandblasted in order to remove rust buildup. During transport of the CRTS, the employee stopped the truck suddenly, and the unsecured CRTs shifted and struck the rear window of the truck cab, shattering the glass, and shifting part of the load to the top of the cab. It was the testimony of the contractor's witnesses that the accident was very severe, and although no one was injured, the accident "had the potential to be a very serious incident and in and of itself was a very serious incident." IAD at 4-6; Transcript of Hearing (Tr.) at 253.

The contractor's witnesses testified that it was the employee's responsibility to make sure the CRTs were secured with tie-down straps that were provided for this purpose. IAD at 9. In this regard, the forklift operator testified that he provided the employee with a tie-down strap and told him to secure the load. According to contractor witnesses, the employee stated in one interview that the forklift operator/co-worker might have told him to secure the load, but he did not remember exactly. Ex. 16 at 637. In another interview, the employee purportedly stated that he asked the forklift operator whether he needed to tie down the load, and the forklift operator replied that it did not need to be tied down. Ex. 16 at 642. IAD at 9. The IAD ultimately found that as the driver of the vehicle, the employee was responsible for ensuring that the load was secure prior to transport. The IAD also noted the contractor's testimony that the employee had received specific training on securing loads. IAD at 5.

The IAD also addressed the issue of the contractor's assessment that the accident was severe and the contractor's contention that the employee's reaction to the accident demonstrated indifference to the importance of safety and a lack of understanding of the

severity and potential consequences of the accident. In particular, the IAD noted the testimony of the HR manager that in a post-accident interview, the employee was asked if he realized "how close he was to being severely injured by the CRT coming through the back of the window." The witness testified that the employee used words to the effect that "it wasn't that big of a deal." It was the employee's testimony that the accident could not have had the severe consequences that the contractor's witnesses believed could have occurred, and that he did not see the danger in driving with the unsecured load. He denied saying that the accident was not "that big of a deal," but stated that he did not put himself or anyone else at risk. The IAD agreed with the contractor's assessment that the accident was a serious one, and also found that the employee did not believe that the accident could have had grave consequences. The IAD therefore agreed with the contractor's position that the employee's attitude constituted a safety risk. IAD at 11-12. Finally, the IAD found highly relevant the evidence of the contractor that in a previous incident, in which a senior maintenance worker failed to take proper safety measures and cut through an electrical conduit while digging a trench in an area with electrical lines, the worker was terminated outright solely as a result of the incident. According to the contractor, of all its terminations, that termination incident was most similar to the instant case, because they both involved potential for severe consequences, even multiple fatalities. IAD at 6.

The IAD therefore found clear and convincing evidence that Hinojos would have been terminated whether or not he engaged in protected activity under Part 708. In sum, the IAD concluded that Hinojos was not entitled to relief.

III. Analysis

Hinojos filed a statement identifying the issues that he wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). Honeywell filed a Response to the Statement. 2/ 10 C.F.R. § 708.33.

2/ There is no need in the instant case to set out the specifics of the response, some of which are incorporated into my analysis below.

After fully reviewing the voluminous record in this case, as well as the arguments raised in the Statement of Issues, I find that there is no basis for overturning the result in this case.

The employee first claims that the Hearing Officer "merely accepted as credible the contractor's self serving statement" that he was terminated because he was a safety risk, and not because he engaged in protected activity. In this regard, the employee argues that "instead of giving weight to [Hinojos'] testimony, the Hearing Officer accepted at face value" the version of the facts offered by contractor management officials.

This assertion is incorrect. The Hearing Officer did not simply "accept" as credible the contractor's statement as to the reason for the termination. In fact, the contractor brought in the testimony of five witnesses, including the director of the contractor's New Mexico operation, the employee's supervisor, the contractor's manager of environmental safety & health, the contractor's human resources manager and a forklift operator who was a co-worker of the employee. These witnesses consistently supported the contractor's overall position that the individual caused a safety incident that in itself was serious and could have caused severe damage. The only testimony brought forward by the employee was his own. The employee's testimony on this point was that the event was not particularly serious, and overall was not his fault. The Hearing Officer analyzed all the testimony in detail, and concluded that the testimony of the contractor's witnesses was more persuasive. This is the very essence of the role of the Hearing Officer: to listen to the testimony of witnesses, observe their demeanor, and make a judgment as to their credibility. I see no error in the judgment of the Hearing Officer that the five contractor witnesses were more credible than the employee and that, overall, their testimony outweighed the employee's testimony. In fact, given that the only testimony in this case that supported the employee was his own, I am inclined to believe that it was the employee's testimony that was self serving, and not that of the contractor's witnesses.

The employee next reargues the issue of whether the accident was severe, claiming that the accident, when reviewed in light of the evidence presented, was not severe. As described above, the accident involved large pieces of heavy equipment that were placed in the bed a truck that was being driven on public streets. The equipment was dislodged, pierced the glass window of the cab and shifted to the roof of the cab of the truck. In my view this incident in and of itself is a very serious one, and could have been disastrous. For example, the employee could have been seriously

injured by the glass and equipment that pierced the cab. Other drivers on the public road could also have been seriously injured. The Hearing Officer's determination that the accident was severe was clearly well supported by the record. I reviewed the photos of the accident that were included in the exhibits submitted in this case. Exh. 8. They are in my view irrefutable, graphic evidence that not only was this indeed a serious incident, but also that only by sheer good fortune was it not a horrific one. 3/ The employee's assertion that the accident was not particularly severe is subterfuge or self-delusion. I see no Hearing Officer error here.

In this regard, the employee raises once again an argument about his own attitude toward the seriousness of the accident. He believes that it was "well within his rights to disagree with the contractor's assessment," and for the Hearing Officer not to weigh this into his decision was arbitrary and capricious. I concur that the employee had the right to disagree with the determination of the contractor regarding the seriousness of the accident. However, as I indicated above, I believe that the accident was very serious, and that the Hearing Officer made a correct determination in this regard. The employee's protestation to the contrary leads me to believe that he has a rather callous view of this serious safety incident. It does not cause me to make any adjustment in the IAD.

The employee next raises the issue of training. He states that "it is clear that Mr. Gibb Lovell [the fork lift operator] was not trained in how to load and secure material." This is irrelevant. It is simply a transparent but useless attempt to shift the blame to another employee. In this regard, I have reviewed the record in this case and I see no error in the Hearing Officer's determination that it was the employee's responsibility to secure the load. I note the testimony of the fork-lift operator, safety manager and the supervisor that the driver of the load has responsibility for securing the load. IAD at 9. It is convincing. This operating procedure makes more common sense than the procedure put forth by the employee, i.e., that it was the fork lift operator's job to see that the load was secure.

3/ In his testimony, the employee denied that a CRT pierced the glass and another CRT shifted to the roof of the cab. IAD at 10. I agree with the Hearing Officer's finding that the contractor's version was more plausible. The photos belie the testimony of the employee.

I further note the employee's testimony that contractor policy did not require him to use the straps to take the CRTs over to be sandblasted, but only on the way back. The reason, purportedly, was that on the way over, the rust would keep the CRTs from shifting, but on the way back they needed protection so they would not be scratched. Tr. at 99-100 This nonsensical explanation is wholly unconvincing. It does not convince me that the contractor's policy did not require the driver to secure the load. In fact, it is simply another example of inconsistent explanations that the employee has put forth in this case: on the one hand he states that it was the fork lift operator's job to secure the load, and on the other hand he states that the load needed to be secured only on the return trip. These statements lead me to suspect the overall credibility of the employee.

Finally, the employee contends that he was never provided with a copy [of the report] of the investigation by the Human Resources Department and was never given notice of the separation committee meeting or allowed to refute the basis for his termination, including any inconsistent statements that were attributed to him.

None of these contentions indicates that the result in this case should be overturned. As I concluded above, the company policy is that the driver of the vehicle has the ultimate responsibility to secure the load. Therefore, the employee's argument that he did not make inconsistent statements about tying down the load is ultimately irrelevant. Even if he convinced me that he made no inconsistent statements, it would not cause me to change the result here. 4/

Finally, I see no harm to the employee in connection with his assertion that he did not have the opportunity to appear before the separation committee. Even if he was entitled to appear before the committee and was not provided that opportunity, I see no reason to conclude that the employee did not have the chance to fully air any response to committee's conclusions in the context of the hearing and on this appeal. I see no unfairness that should be redressed by any change in the result of this case.

4/ As I indicated above there is at least one instance in his hearing testimony in which the employee made inconsistent statements. This leads me to think that the contractor's assertion that the employee gave inconsistent statements in his post-accident interviews is probably correct.

In sum, I am convinced that there was sufficient evidence in the record in this case to support the hearing officer's conclusion that Honeywell clearly and convincingly established that it would have terminated Hinojos absent his protected activity.

V. CONCLUSION

As is evident from the above description of the IAD, this case involves factual issues which are strongly disputed. Ultimately, it was the role of the Hearing Officer to make findings of fact based on his assessment of the witnesses and their testimony. The Hearing Officer did so, and after the reviewing the entire record, I find no error. I see nothing in the Hinojos Statement of Issues that would cause me to overturn the IAD in this case. Accordingly, the instant appeal should be denied and the IAD affirmed.

It Is Therefore Ordered That:

(1) The Appeal filed by Gilbert Hinojos on May 13, 2005 (Case No. TBA-0003), of the Initial Agency Decision issued on April 27, 2005, be and hereby is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 8, 2005

February 22, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case:	**Gary S. Vander Boegh** **Weskem, LLC** **Bechtel Jacobs Company, LLC**
Date of Filing:	**July 11, 2003**
Case Number:	**TBA-0007**

This determination concerns appeals filed by Gary S. Vander Boegh (Vander Boegh or complainant), Weskem, LLC (Weskem), and Bechtel Jacobs Company, LLC (BJC) under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program (Part 708). All three appeals challenge various aspects of an Initial Agency Decision (IAD) issued by a DOE Office of Hearings and Appeals (OHA) Hearing Officer on the merits of a complaint filed in 2001 by Gary S. Vander Boegh against his employer Weskem and his employer's higher tier contractor BJC.[1] *Gary S. Vander Boegh*, 29 DOE ¶ 87,040 (2003). In the IAD, the Hearing Officer found that Vander Boegh had made protected disclosures under 10 C.F.R. Part 708 regarding landfill procedures at the DOE's Paducah Kentucky site, and that Weskem and Bechtel had retaliated against Vander Boegh in reprisal for those protected disclosures. The Hearing Officer found that Vander Boegh was entitled to relief. Vander Boegh appealed that decision, as did Weskem and BJC. This proceeding will hereinafter be referred to as Vander Boegh I.

In February 2006, Vander Boegh filed another Part 708 complaint with the DOE. This proceeding will be referred to as Vander Boegh II. In this complaint, he made similar allegations that his employer retaliated against him for making disclosures about

---

[1] **At the time Mr. Vander Boegh filed his 2001 complaint, BJC was the management and integration (M&I) contractor at the DOE's Paducah Gaseous Diffusion Plant located in Paducah, Kentucky. Weskem was a subcontractor at the plant in 2001. On April 24, 2006, a new M&I contractor, Paducah Remediation Services (PRS), and a new subcontractor, Duratek, assumed operations at DOE's Paducah, Kentucky plant.**

landfill procedures. He alleged ongoing employment retaliations, which eventually included termination by Weskem, the outgoing sub-contractor, and the failure of the incoming contractor/subcontractor (Paducah Remediation Services and Duratek) to hire him. On April 18, 2006, during the pendency of that complaint, Vander Boegh filed a complaint with the Department of Labor (DOL) under numerous statutory provisions, including Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In that filing, Vander Boegh also argued that he was being terminated for raising concerns about landfill pollution activities at the DOE's Paducah, Kentucky facility. Vander Boegh was terminated by Weskem on April 23, 2006, and on April 24, 2006, a new prime contractor and subcontractor took the place of BJC and Weskem, respectively. Vander Boegh claimed that the new contractor's failure to hire him was a retaliation for his protected disclosures. On July 13, 2006, DOL found that there was no evidence to support Vander Boegh's allegation of wrongful termination for engaging in whistleblower activities, or that the new contractor's failure to hire him was retaliatory.

Based on the DOL decision, we dismissed Vander Boegh II. We cited 10 C.F.R. §708.17(c)(3), which provides that dismissal is appropriate if a complainant filed a "complaint under State or other applicable law with respect to the same facts as alleged under this regulation." *Gary S. Vander Boegh*, 29 DOE ¶ 87,010 (2006). We found that the issues raised in the DOL proceeding and those raised in the Vander Boegh II complaint were virtually identical, and accordingly dismissed Vander Boegh II. This determination was upheld by the Deputy Secretary of Energy. 10 C.F.R. § 708.19. See Letter of January 9, 2007 from Fred L. Brown, Acting Director, Office of Hearings and Appeals to Gary S. Vander Boegh.

Given this background, we asked Vander Boegh to show good cause why his appeal in Vander Boegh I should not also be dismissed as moot. See Letter of February 1, 2007, from Fred L. Brown, Acting Director, Office of Hearings and Appeals, to John Stewart, et al., counsel for Vander Boegh. In his response, dated February 14, 2007, Vander Boegh raises the following arguments: (i) the DOL determination has not yet been made final; (ii) the doctrines of mootness, res judicata and collateral estoppel do not yet apply here, and therefore do not preclude further consideration of Vander Boegh I, even in light of the DOL determination; and (iii) there are several remedies for which Vander Boegh is eligible even though he has been terminated, including back pay, compensation for lowered merit increases and attorney fees.

After reviewing these contentions, we find that they are without merit. As an initial matter, Vander Boegh's assertions regarding the finality of the DOL determination and whether the doctrines of res judicata and collateral estoppel come into play here are irrelevant. There is no need for us to wait for a final DOL decision on the issues here. As we stated above, Section 708.15(a) provides that a complainant "may not *file* a complaint under this regulation if, with respect to the same facts, [he] chooses to pursue a remedy under State or other applicable law. . . ." (Emphasis added). In this case, as stated above, Vander Boegh elected to file a complaint with the DOL regarding the same essential facts: he believed that his employer retaliated against him for voicing concerns regarding landfill pollution. The retaliations involved pay issues, and, ultimately, termination. We find that the issues involved in the DOL determination are virtually the same as those raised in Vander Boegh I and he therefore no longer has the option of continuing to pursue those very issues here. While Vander Boegh asserts that the pay issues are different from his termination, which was directly considered by DOL, we believe these alleged retaliations all fall within the same retaliatory stream that was engendered by the landfill disclosures, and which culminated in the termination. We therefore find that in the overall scheme of this case, the pay and attorney fee issues have been subsumed into the DOL proceeding, and are covered by that proceeding. Accordingly, based on Section 708.17, we have determined that the complainant may no longer pursue Vander Boegh I under Part 708 at the DOE, and the relief proposed in that proceeding.

Accordingly, the Vander Boegh appeal should be dismissed. The appeals filed by Weskem and BJC should therefore also be dismissed.

It Is Therefore Ordered That:

The appeals filed in Case No. TBA-0007 by Gary S. Vander Beogh, Weskem LLC, and Bechtel Jacobs Company, LLC be and hereby are dismissed.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: February 22, 2007

July 9, 2007

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: **Franklin C. Tucker**

Date of Filing: **April 25, 2007**

Case Number: **TBA-0023**

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on April 9, 2007, involving a Complaint of Retaliation filed by Franklin C. Tucker (also referred to as the employee or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his Complaint, Tucker claims that his former employer, DOE contractor BWXT Y-12, L.L.C. (BWXT or the contractor), retaliated against him for engaging in activity that is protected by Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that the employee engaged in activity that is protected under Part 708, but that BWXT showed that it would have taken the same adverse personnel actions in the absence of the protected activity. Tucker filed a Statement of Issues appealing the IAD determination. 10 C.F.R. § 708.33. As set forth below, I have decided that the IAD is correct.

I. Background

A. The DOE Contractor Employee Protection Program

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

actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"], will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by Tucker in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Tucker's Complaint are fully set forth in the IAD. *Franklin C. Tucker* (Case No. TBH-0023), 29 DOE ¶ 87,021 (2007). For purposes of the instant appeal, the relevant facts are as follows.

Tucker was employed by BWXT at a DOE facility in Oak Ridge, Tennessee, first as a security inspector, then as a laboratory technician, and finally as a chemical operator. On October 20, 2003, he filed a Complaint of Retaliation under Part 708, alleging that his employer retaliated against him for disclosing safety-related concerns. According to the record, on September 30, 2001, the complainant alleged that proper precautions were not taken during the removal of PCB paint chips in his work area and that management did not require respirators to be worn while workers were involved in the process of converting liquid waste to dry material for disposal.

The complainant alleged that thereafter BWXT took the following adverse personnel actions against him. First, in November 2001, the complainant received counseling for sleeping while on duty. Then, in February and March 2002, the complainant was not interviewed for two BWXT positions for which he applied. Next, on May 17, 2002, the complainant received a "pattern of absence" letter. In addition, on June 14, 2002, the complainant left work on two weeks of medical leave authorized by the BWXT medical department. This short-term leave was extended through January 2003. In a January 2003 case review meeting, the medical department at BWXT again reviewed the complainant's case and found that in view of his medical condition, certain restrictions on his work assignments were appropriate, including that the complainant refrain from prolonged or strenuous exertion, use of a ladder over four feet high and work at an unprotected elevation. BWXT then

determined that the complainant could not be permitted to return to work as a chemical operator with his work-related restrictions. Finally, Tucker contends that BWXT allowed another employee to harass him and to circulate rumors that he was a "snitch for the DOE." 1/ These actions constitute the contractor's retaliations that Tucker alleges took place in this proceeding.

On October 20, 2003, the complainant filed this Part 708 whistleblower complaint with the Oak Ridge Operations Office of the DOE. The matter was referred to the Office of Hearings and Appeals for an investigation, and a Report of Investigation (ROI) was issued on February 2, 2005. 10 C.F.R. § 708.22, .23.

Thereafter, Tucker requested and received a hearing on this matter before an Office of Hearings and Appeals Hearing Officer. The Hearing Officer received testimony from 14 witnesses. The complainant testified and presented the testimony of two of his former co-workers, Mark Korly and Carl Smith. BWXT presented the testimony from the following employees: Les Reed, the division manager for environment safety and health for BWXT Y-12 at the time of the allegations; Ben Davis, operations manager for special materials; Earl Dagley, shift manager; Karl Vincent, chemical supervisor and the complainant's direct supervisor; Janet Sexton, labor relations representative; Diane Grooms, staffing manager; Pat Fortune, department manager for the assembly and disassembly organization; Gary Bowling, general foreman in the garages and the fleet; Tonya Warwick, certified physician assistant in the medical department; Dr. Russ Reynolds, staff clinical psychologist; and Steve Laggis, manager of the special materials organization. 2/

After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

1/ The Hearing Officer determined that BWXT took appropriate steps to minimize this matter and that it is not the responsibility of BWXT to ensure that employees get along. Accordingly, she gave this issue no further consideration.

2/ All the job descriptions relate to the time during which the complainant has alleged that he was retaliated against. Many of these employees have changed job titles since then; one has retired.

II. The Initial Agency Decision

The IAD set forth the burdens of proof in cases brought under Part 708. The IAD stated that it is the burden of the complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation. *See* 10 C.F.R. §§ 708.5 and .29. The IAD further noted that if the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. 10 C.F.R. § 708.29. The IAD considered the application of these elements to the Tucker proceeding.

A. Protected Activity and Contributing Factor

The IAD first noted that BWXT admitted that the complainant made protected disclosures, and that it took the four personnel actions about which Tucker has complained. Further, the IAD found that the complainant established by a preponderance of the evidence that his protected disclosures were a contributing factor to the personnel actions. The Hearing Officer based this conclusion on the fact that there was proximity in time between the disclosures and the allegedly retaliatory personnel actions. The Hearing Officer also found that Tucker made his protected disclosures to the very supervisors who were involved in the adverse personnel actions, and that they were thus aware of the protected disclosures. Based on these findings, the Hearing Officer concluded that the employee satisfied his burden of proof under Part 708. IAD at 20.

B. Whether BWXT would have terminated Tucker absent the Protected Activity

The IAD analyzed each of the alleged retaliations cited by Tucker.

<u>Sleeping on Duty</u>

The IAD found that in spite of the fact that the complainant denied he was sleeping on duty, the weight of the evidence was convincing that BWXT was justified in "coaching and counseling" Tucker in this regard. This level of discipline was the mildest possible and was less than other employees had received for this infraction. Accordingly, the IAD determined that BWXT would have taken this same action absent the protected disclosures. The IAD also noted that since there was nothing in the complainant's permanent record

to show that he was coached and counseled, there is no remedy that OHA could provide.

Not Being Interviewed for Two BWXT Positions

After hearing the testimony of the contractor's witnesses and considering the job qualifications as specified in the relevant postings, the Hearing Officer found that Tucker did not have the necessary qualifications for either of the two positions. She found convincing the testimony of the staffing manager and the two persons responsible for choosing those who would be interviewed for the positions that the complainant's resume did not indicate that he had the minimum qualifications for the positions. IAD at 21.

Pattern Absence Letter

BWXT witnesses testified that the complainant had a pattern of absences in which he took sick leave adjacent to a scheduled day off or a holiday. IAD at 10-12. They believed that the incidence of his "pattern" of such absences was excessive when compared to other employees. IAD at 12. For this reason, the individual was issued a pattern absence letter which informed him that he would be required to have a doctor's verification if he wished to be paid for the days that he took sick leave. The Hearing Officer was convinced by testimony that there was a pattern of absences by this individual prior to a holiday, scheduled day off or weekend. She also noted BWXT evidence showing 31 examples of pattern absence letters that were presented to other employees. Based on this evidence, the Hearing Officer concluded that BWXT would have issued the Tucker pattern absence letter in the absence of the protected disclosures. IAD at 21-22.

Long Term Disability

The IAD stated that BWXT placed the complainant on long term disability when it was unable to find a position for him with the work restrictions placed by the BWXT medical department. The Hearing Officer found that BWXT showed that the medical department had reasonable concerns about the complainant's ability to do strenuous work. She noted that the complainant admitted to the staff clinical psychologist that he had pressured his personal physician into releasing him to work. While the complainant denied at the hearing that he made this statement, the Hearing Officer found the testimony of the staff clinical psychologist more convincing on this matter. The Hearing Officer also noted the testimony of the staff clinical psychologist to the effect that the

complainant had symptoms that concerned him, such as night sweats which kept him from sleeping and caused him to be extremely fatigued the following day.

The Hearing Officer was not convinced by the complainant's assertions that many people work at BWXT with more restrictions than his. She believed BWXT's evidence that the restrictions under which he would have had to work would have made it impossible for him to work as a chemical operator. Based on these considerations, the Hearing Officer concluded that BWXT had shown by clear and convincing evidence that it would have taken the same action absent the complainant's protected disclosures.

IAD therefore found clear and convincing evidence that BWXT would have taken each of the personnel actions regarding Tucker even if he had not engaged in protected activity under Part 708. In sum, the IAD concluded that Tucker was not entitled to relief.

III. Issues on Appeal and Analysis

Tucker filed a statement identifying the issues that he wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or appeal). BWXT filed a Response to the Statement of Issues. 3/ 10 C.F.R. § 708.33.

After fully reviewing the arguments raised in the Statement of Issues, I find that there is no basis for overturning the result in this case.

Complainant's Arguments On Appeal

A. Medical Disability

The complainant's chief objection to the IAD involves the issue of his medical disability. As stated above, the Hearing Officer found that BWXT justifiably placed the complainant on long term disability when it was unable to find a position for him with the work restrictions placed on his return to work by the BWXT medical department. In reaching this conclusion, the Hearing Officer noted that the complainant admitted to the staff clinical psychologist,

---

3/ There is no need in the instant case to set out the specifics of the response, some of which are incorporated into my analysis below.

Dr. Russ Reynolds, that he had pressured his personal physician into releasing him to work. In his appeal, Tucker claims that this statement is false, and insists that he did not "pressure" his physician into "returning him to work." He points to two reports that were filed at the time he tried to return to work, one by his physician, Dr. Bennet, and the other by his psychologist, Dr. Simmons. He alleges that both reports show he was able to return to work. Tucker therefore claims that he had no need to assert to Dr. Reynolds that he had "pressured" his doctors to allow him to return to work.

I have reviewed those reports, copies of which were included with the appeal. Dr. Bennet's report was made in connection with Tucker's disability claim. Seemingly dated November 27, 2002, it advises that Tucker is able to return to work as of that date. The "Supplemental Statement of Functional Capacity" signed by Dr. Simmons does not indicate any significant function impairment, other than depression and anxiety disorder, which according to the report "have improved substantially." Thus, Tucker's claim that his own physicians held the opinion that he was fit to return to work in November 2002 seems to be substantiated by these two reports. However, the reports do not prove or disprove any assertion regarding whether Tucker may have pressured those doctors to return him to work. In any event, this point, even if true, does not establish that Tucker is entitled to prevail. The key here is whether Tucker was fit to return to work as a chemical operator, or whether BWXT correctly placed him on long term disability.

I see nothing in the record here that would suggest that the Hearing Officer's finding was incorrect. From my own review of the hearing transcript, I note that Dr. Reynolds stated that Tucker was "exhausted," and "stressed," and experienced fevers. Transcript of Hearing (Tr.) at 237-38. Dr. Reynolds had "real concerns" about the complainant's return to work as a chemical operator. Tr. at 245. I also note the testimony of the BWXT physician assistant, Tonya Warwick, who performs "return to work" evaluations for BWXT. Tr. at 218. She stated that she did not necessarily agree with opinions of "outside doctors" who recommended that employees be returned to work, because these outside physicians are not familiar with the working conditions faced by employees. Tr. at 224. Thus, she provided an important reason why the reports of Tucker's own medical team might not be considered definitive.

The record shows that as of January 2003, Dr. Reynolds and Ms. Warwick believed that Tucker's functional status was such that he could only return to work with significant restrictions. Tr. at

240-41. Thus, there is considerable evidence to support the Hearing Officer's determination that BWXT would not have allowed Tucker to return to full time work as a chemical operator even if he had not made protected disclosures. There is also evidence from Dr. Reynolds that BWXT did not have any part time work of this nature available for Tucker, whom he believed had only "two or three good days a week." I therefore see no reason to disturb the Hearing Officer's determination regarding the long term disability issue.

B. Work Place Violence Issue

Tucker reiterates that BWXT did not correctly handle his concerns about work place violence by restraining Danny Mullins. The Hearing Officer found that BWXT took appropriate steps to minimize this matter. IAD at note 3. In fact, Tucker has not shown any retaliatory action by BWXT in this regard. He has simply made allegations that a fellow employee may have acted improperly. Thus, overall, I find no adverse personnel action with respect to Tucker that falls within the purview of Part 708.

C. Animosity of Earl Dagley

Tucker also argues that shift manager Earl Dagley did not want him to return to work. Tucker explains in great detail the reasons for the animosity that Earl Dagley purportedly felt towards him. Tucker thereby implies that the adverse testimony from Earl Dagley regarding the pattern absence letter, not being interviewed for the two job openings, the long term disability determination, and the counseling for sleeping on duty was false, simply reflected Dagley's own negative view of Tucker, and should therefore be disregarded.

The fact that Earl Dagley may have had some reason to seek Tucker's severance from the BWXT workplace does not establish any error in the IAD. Even if Tucker's assertions regarding Dagley's animosity towards him were true, I find that the Hearing Officer's conclusion about the reliability of testimony and other evidence concerning the adverse personnel actions was sound. Tucker's accusations in and of themselves do not establish that the Hearing Officer's overall conclusions were incorrect, based on the testimony at the hearing. There was ample evidence besides that of Dagley to support her conclusion. For example, the Labor Relations Representative provided considerable testimony on the issue of the pattern absence letter, and the Hearing Officer relied extensively on that testimony. IAD at 21-22. With respect to the job interview issue, the Hearing Officer relied on the testimony of the staffing manager, Diane Grooms, for her conclusion that Tucker was not qualified for

either of the advertised positions. IAD at 21. I reviewed above, the solid evidence confirming that BWXT's placing Tucker on long term medical disability was justified. Accordingly, I will not overturn the Hearing Officer's conclusions based on Tucker's assertion that Dagley did not want him to return to work.

D. False and Misleading Statements

In his appeal, Tucker alleges 13 instances of false and misleading testimony by five witnesses. He requests that his allegations be reviewed and that the witnesses providing that testimony "be stripped of their clearances and turned over to the Department of Justice for further action."

After reviewing Tucker's allegations, I cannot find that he has established falsification in any of those examples. Accordingly, I see no basis for any further action with respect to the allegations, and furthermore see no reason to disturb the Hearing Officer's conclusions based on any of these assertions regarding falsehood. I discuss below three typical examples of the purportedly false or misleading testimony.

The complainant's technique in several instances is to ask "questions" about the testimony. These "questions" do not establish error or falsehood. For example, Tucker cites testimony of Earl Dagley that a piece of machinery that Tucker operated was dangerous. Tucker then states, "How come my line supervisor was not notified?" This type of objection does not show any false or misleading testimony by Dagley or any error in the IAD.

As an example of purportedly unreliable testimony, Tucker cites the following: "Earl Dagley states he saw Dennis Nabors on Dock 212 and that he told Mr. Dagley I was being interviewed for an assembly position and this was close to happening. [Tr. at 103 line 20.] On page 199 line 8 Diane Grooms states that I did not meet the requirements for the assembly job and I would not be interviewed. Why did Dennis Nabors state I was close to an interview to Earl Dagley when Diane Grooms states I wasn't even qualified for the job." With respect to this example, I find that the Hearing Officer properly gave little weight to the second-hand, hearsay evidence of Dagley, and properly relied on the direct testimony of Diane Grooms. Further, although these two witnesses may have held differing views of Tucker's situation regarding a possible interview, I no evidence of any falsification, especially since Dagley was only referring to what he had heard from Nabors.

Tucker also reargues the conclusion by the Hearing Officer that BWXT should have accommodated his work restrictions. In this regard, he stated: "Another operator had restrictions to the amount of weight he could move. When I returned to work I had no restrictions placed on me by my doctor. The plant medical staff placed restrictions on me when I returned to work. It is shown that SMO [Special Materials Organization] had operators working with work restrictions. Why didn't SMO accommodate me like they did the other operators?"

With respect to this assertion, Tucker cites testimony by Dagley at page 96, line 13 of the hearing transcript. In this part of his testimony, Dagley was referring to another SMO employee who had had work restrictions that involved weight. Accordingly, SMO measured the weight of the carts this employee would be required to push. Dagley testified that the carts weighed 35-40 pounds. There was no testimony that this individual was offered any kind of accommodation due to his restriction. Dagley's testimony only confirmed that the amount of weight that a worker might be required to push was 35 to 40 pounds, and that SMO knew this because it had to measure the weight on behalf of an employee with weight restrictions. Thus, Tucker's assertion that this testimony shows other employees' restrictions were accommodated, but his was not, is simply unfounded. Moreover, there is nothing in this testimony that is false or misleading.

None of Tucker's contentions persuades me that the result in this case should be overturned, or that there is any false or misleading testimony in the examples Tucker has offered. I am convinced that there was sufficient evidence in the record in this case to support the Hearing Officer's conclusion that BWXT clearly and convincingly established that it would have taken the cited personnel actions absent Tucker's protected activity. I am also convinced that the testimony received at the hearing was given in good faith and that the Hearing Officer properly relied on it.

E. Procedural Objections

Tucker also raises two procedural objections in this case. He complains of an excessive time period between the date he filed his complaint of retaliation in 2003 and the hearing date in August 2006. This delay, while indeed unfortunate, does not in and of itself show any error in the IAD. However, Tucker further argues in this regard that because he was excluded from the BWXT site he could not gain access to information from Larry Jones of the National Nuclear Security Administration (NNSA) or from the OHA

investigator in this proceeding. Tucker contends that the Hearing Officer refused to subpoena these witnesses.

Tucker seems to think the Jones report is necessary because he claims the Jones report showed "what I had complained about was true as far as health and safety went." Since the substance of Tucker's protected disclosures is not an issue in this case, there was no need for testimony or other evidence on this point.

It was further unnecessary to have testimony from the OHA investigator in this case. Tucker asserts that the investigator found that retaliation by BWXT was probable, thereby implying that her testimony would have helped him. 4/ The investigator's conclusion is not determinative. She simply made some preliminary findings of fact about the issues here. The Hearing Officer is not required to follow those findings. 10 C.F.R. § 708.30(c). Tucker has provided no basis for requiring the testimony of the investigator and I see none here.

Thus, the refusal to issue subpoenas to these two individuals was correct.

IV. Conclusion

As is evident from the above discussion, Tucker disputes both the findings of fact and conclusions of law reached in the IAD. Ultimately, it was the role of the Hearing Officer to make findings of fact based on her assessment of the witnesses and their testimony. The Hearing Officer did so and, after the reviewing the entire record, I find no error. I see nothing in the Tucker Statement of Issues that would cause me to overturn the IAD in this case. Accordingly, the instant appeal should be denied and the IAD affirmed.

4/ This assertion is not accurate. The investigator concluded that BWXT had not provided clear and convincing evidence that it would have taken the adverse personnel actions in the absence of the protected disclosure.

It Is Therefore Ordered That:

(1) The Appeal filed by Franklin C. Tucker on April 25, 2007 (Case No. TBA-0023), of the Initial Agency Decision issued on April 9, 2007, be and hereby is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: July 9, 2007

May 9, 2007

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Clint Olson

Date of Filing: November 18, 2005

Case Number: TBA-0027

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on October 27, 2005, involving a Complaint of Retaliation filed by Clint Olson (also referred to as the employee or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Olson was an employee of BWXT Pantex (also referred to as BWXT, the firm, or the contractor), the Management and Operating Contractor at the DOE's Pantex Plant in Amarillo, Texas. In his Complaint, Mr. Olson claims that BWXT retaliated against him for making disclosures that are protected under Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that the employee engaged in activity that is protected under Part 708, and that BWXT did retaliate against him for the disclosures. BWXT has appealed that determination. As set forth in this decision, I have decided that the Appeal filed by BWXT should be granted, and that Mr. Olson's request for relief should be denied, on the ground that BWXT has proven, by clear and convincing evidence, that it would have taken the same action, in not granting a proposed comparative salary increase to Mr. Olson's working group, without Mr. Olson's protected disclosures.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent,

or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"], will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of "retaliation").

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by BWXT in the present Appeal, is performed by the Director of OHA. 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of the Complaint are fully set forth in the IAD. Clint Olson (Case No. TBH-0027), 29 DOE ¶ 87,007 (2005) (hereinafter IAD). For purposes of the instant Appeal, the relevant facts are as follows.

From July 1999 until November 2004, Mr. Olson was employed by BWXT in the counter-intelligence unit (CIU) as a counter-intelligence officer (CIO) at the Amarillo Plant. In March 2004, he filed a Complaint under Part 708, alleging that BWXT retaliated against him for making disclosures regarding the handling of a classified hard drive. In this regard, Mr. Olson stated that in February 2002 he told his supervisor about BWXT personnel who he believed were grossly negligent in the handling of a classified drive. Mr. Olson indicated that BWXT's security incident report regarding this matter reached an incorrect conclusion regarding the destruction of the classified hard drive. Based on his review of the report, Mr. Olson believed that the facts as stated in the report did not support the report's conclusion that the missing classified hard drive had actually been destroyed. Mr. Olson also stated that in a March 2002 conversation he allegedly told BWXT's Safety, Security, and Planning (SS&P) Manager that contrary to BWXT's conclusion in the incident report, it was not clear that the classified hard drive had in fact been destroyed. Mr. Olson believed that disclosures that the report's conclusion overstated the likelihood that the hard drive had been destroyed were protected under Section 708.5, which (in part) protects disclosures that concern substantial violation of a law, rule, or regulation. Moreover, Mr. Olson alleged that BWXT took retaliation against him for making these protected disclosures by taking no action on a pending request for a comparative salary increase for his working group, the CIU. IAD, 29 DOE at 89,022-24.

After completion of an investigation pursuant to 10 C.F.R. § 708.22, Mr. Olson requested and received a hearing on this matter before an OHA Hearing Officer. At the Hearing, testimony was received from twelve witnesses. The complainant testified and presented the testimony of BWXT's former Senior CIO, Curtis Broaddus (the complainant's supervisor); DOE's former Safety, Security, and Planning (SS&P) Manager at Pantex; a Special Agent with the Federal Bureau of Investigation (FBI); the Chief of the Office of Defense Nuclear Counterintelligence in DOE's National Nuclear Security Administration (NNSA), Catherine Sheppard (the Defense Nuclear CI Chief); BWXT's

former Human Relations Compensation and Employment Manager, John T. Merwin (the former HR Compensation Manager); and BWXT's current Compensation Manager, Richard E. Frye. BWXT presented the testimony of BWXT's current Senior CIO, Darlene Holseth; DOE's Assistant Site Manager, Safeguards and Security, for the Pantex Site Office (the DOE Assistant Site Manager); BWXT's Division Manager for Safeguards and Security, Alexandra Sowa (BWXT's current S&S Manager); BWXT's former General Manager, Dennis Ruddy; and BWXT's current General Manager, Michael Mallory. IAD, 29 DOE at 89,022.

After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

II. The Initial Agency Decision

The IAD set forth the burdens of proof in cases brought under Part 708. The IAD stated that it is the burden of the complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation. IAD, 29 DOE at 89,033 (citing 10 C.F.R. §§ 708.5, 708.29). The IAD further noted that if the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. Id. The IAD considered the application of these elements to the Olson proceeding, as well as several procedural issues.

After finding that the Complaint was timely filed (IAD, 29 DOE at 89,033-35), the IAD held that Mr. Olson had shown, by a preponderance of the evidence, that on two occasions he had made protected disclosures under Part 708, which were a contributing factor to BWXT's decision not to grant the comparative salary increase to Mr. Olson's working group; and that BWXT had failed to show, by clear and convincing evidence, that it would have taken the same action, in not granting the comparative salary increase, in the absence of Mr. Olson's protected disclosures. Id. at 89,035-42. The IAD therefore concluded that BWXT should be required to take restitutionary action by making payment to Mr. Olson of "a sum equal to the fifteen percent comparative salary increase that he would have received if the Defense Nuclear CI Chief's March 2002 proposal had been accepted and implemented." Id. at 89,042.

III. Analysis

BWXT filed a statement identifying the issues that it wished the Director of OHA to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). BWXT identified the following issues: (1) the Hearing Officer erred in finding that the Complainant's Part 708 disclosures involved a danger to public safety and health; (2) the Hearing Officer did not adhere to the regulations; (3) the IAD denied BWXT procedural due process; (4) the IAD is arbitrary and capricious and an abuse of discretion; (5) the Hearing Officer erred in finding that the Complaint was timely filed; (6) the Hearing Officer erred in finding that BWXT's failure to grant a pay raise was an act of retaliation; (7) the Hearing Officer erred in relying upon improper activities imputed to a

DOE official (Defense Nuclear CI Chief Catherine Sheppard, who had proposed the comparative salary increase for Mr. Olson's working group); and (8) the Hearing Officer erred in giving substantial weight to the testimony of Mr. Olson's former supervisor, Curtis Broaddus, and BWXT's former HR Compensation Manager, John Merwin. BWXT also filed supplemental information regarding issue (7) above. This supplemental material included a January 5, 2006 affidavit of Daniel E. Glenn, a DOE employee and the Site Manager at the Pantex Site Office, and a series of e-mail messages among DOE officials generated between April and June 2002. Mr. Olson filed a response to BWXT's Statement and supplemental information, in which he responded to the arguments raised by BWXT. 10 C.F.R. § 708.33.

After fully reviewing the arguments raised by BWXT, I find that the Appeal filed by BWXT should be granted, and that Mr. Olson's request for relief should be denied, on the ground that BWXT has proven, by clear and convincing evidence, that it would have taken the same action, in not granting the proposed comparative salary increase to Mr. Olson's working group, without Mr. Olson's protected disclosures, for the non-retaliatory reason that DOE determined that its Defense Nuclear CI Chief lacked the authority to propose and fund that salary increase. BWXT identified that issue as number (7) in its Statement. Because that is the fundamental ground on which the Appeal is granted, this Appeal Decision will not address the other issues identified by BWXT in its Statement.

A. BWXT Has Proven, By Clear And Convincing Evidence, That It Would Have Taken the Same Action In Not Granting The Salary Increase Proposed By DOE's Defense Nuclear CI Chief, Without Mr. Olson's Protected Disclosures, Because DOE Determined That Its Defense Nuclear CI Chief Lacked The Authority To Propose And Fund That Salary Increase.

It was the Defense Nuclear CI Chief in DOE's NNSA, Catherine Sheppard, who proposed the comparative salary increase for Mr. Olson's working group. The IAD was correct in finding that at a November 2001 meeting, Ms. Sheppard first made her proposal to BWXT by telling BWXT's General Manager, Dennis Ruddy, that "she would provide the funding to bring the salaries at the Pantex CIU [Counterintelligence Unit] up to a comparable level with CIU's at other DOE facilities" (IAD, 29 DOE at 89,039); that Mr. Ruddy "responded positively to her offer to provide additional funds for comparative salary increases for BWXT's CIU" (id.); that in a January 13, 2002 letter from Ms. Sheppard to Mr. Ruddy, she stated, "We at Headquarters are prepared to provide the dollars to support increases just as soon as we get the word" (id. at 89,039-40); and that in a March 27, 2002 letter from Ms. Sheppard to the DOE Contracting Officer, Office of Amarillo Site Operations, Ms. Sheppard requested, "I ask that you take action to immediately effect the following adjustments to their current pay" at BWXT's CIU, which was Mr. Olson's work unit, including an "increase by fifteen percent" for Mr. Olson's position (id. at 89,040).

The IAD was also correct in finding, based on uncontested portions of the record, that "[a]t the Hearing, the Defense Nuclear CI Chief [Ms. Sheppard] stated that she was notified by the DOE that her March 2002 proposal to raise salaries for BWXT's CIU was inappropriate and had been rejected" (IAD, 29 DOE at 89,041 n.10) (emphasis added); and that "[s]he testified that she was later notified

by the DOE that her proposal to raise the salaries was not appropriate" (id. at 89,027) (emphasis added).

Ms. Sheppard's testimony that it was the DOE that rejected her salary increase proposal was confirmed by the testimony of BWXT's Mr. Ruddy, which the IAD accurately described as follows:

> [Mr. Ruddy] testified that when in March 2002 the Defense Nuclear CI Chief [Ms. Sheppard] sent a letter to Pantex indicating that the DOE would support specific raises for BWXT employees in the Pantex CIU, he referred it to the DOE's site office manager who "took immediate action to have the letter withdrawn."
>
> > . . . he thought it was highly inappropriate, a conclusion that I shared, and it was not the purview of that office or any other office to direct individual salaries.
>
> TR at 36-37. He stated that managing and operating contractors had a responsibility for conducting a process that insured fair compensation to their employees, and that accepting guidance from the Government would undermine that process and could lead to other groups "petitioning their customer for some special consideration." TR at 108.

IAD, 29 DOE at 89,032 (emphasis added).

Ms. Sheppard's and Mr. Ruddy's testimony that it was the DOE that rejected her salary increase proposal is further confirmed by the Affidavit of Daniel E. Glenn, DOE's site manager at the Pantex Site Office in Amarillo, Texas. That affidavit was submitted by BWXT during its appeal of the IAD. In his affidavit, Mr. Glenn explained that DOE rejected Ms. Sheppard's salary increase proposal, and the reasons for DOE's rejection:

> In April of 2002, it came to my attention that Catherine Sheppard, Chief of the Office of Defense Nuclear Counterintelligence, (previously known as Catherine Eberwein) had made certain representations to the Contractor concerning funding counterintelligence unit salary increases. These representations were made during the time she was conducting a review of the Pantex Counterintelligence operations. In response, I communicated to Ms. Sheppard my concerns in several areas, including the fact that it was inappropriate for her review to have included any discussion on wages and salaries. During our discussion, I further advised Ms. Sheppard that management and operating employee salaries were to be based on the Contractor's internal processes, consistent with the M&O contract, and that her report would not set a precedent to change the policy since she had no contractual authority over the matter of compensation for BWXT Pantex employees.
>
> Further, I discussed this matter with Mr. Dennis Ruddy, then the General Manager of BWXT Pantex and the supervisor of the Chief Counterintelligence Officer, and told him that it was inappropriate for the representations from Ms. Sheppard to have included any

> discussion on wages and salaries. Ms. Sheppard did not have any authority to direct the Contractor on wages and salaries of its employees. M&O employee salaries were to be based on their internal company processes, consistent with the contract, and this review did not set a precedent that was to change that policy. I made it clear to Mr. Ruddy that he was not to consider any salary statement in the report as directive in nature, and that all salary actions should be consistent with existing internal corporate practices and contract requirements. My instructions to Mr. Ruddy were consistent with communications on this subject from the highest level of the Procurement Directorate in the Department of Energy.

Affidavit of Daniel E. Glenn (Glenn Affidavit) at 1-2 (emphases added).

The Glenn Affidavit, together with the above-quoted testimony of Ms. Sheppard and Mr. Ruddy, thus provides clear and convincing evidence that it was DOE – not Mr. Ruddy or BWXT – that rejected Ms. Sheppard's proposal for a salary increase for contractor employees. Mr. Glenn, as the DOE site manager with authority over the Pantex Plant where Mr. Olson was employed, confirms that the non-retaliatory reason that BWXT did not grant the salary increases proposed by Ms. Sheppard was that DOE determined that her proposal was ultra vires: "Ms. Sheppard did not have any authority to direct [BWXT] on wages and salaries of its employees," and her "representations to [BWXT] concerning funding counterintelligence unit salary increases" were inappropriate "since she had no contractual authority over the matter of compensation for BWXT Pantex employees." Glenn Affidavit at 1.

In finding that BWXT had not met its burden of proof, the IAD paraphrased the testimony of BWXT's Mr. Ruddy in a manner that created the impression that Mr. Ruddy – and not DOE – had rejected Ms. Sheppard's proposed salary increases as "inappropriate." The IAD paraphrased, "[Mr. Ruddy] testified that he rejected the proposal of the Defense Nuclear CI Chief to fund specific comparative salary increases for BWXT's CIU on the grounds that it was inappropriate." IAD, 29 DOE at 89,041. However, Mr. Ruddy's complete testimony, as cited elsewhere in the IAD, included his statement that the DOE's "Site Office Manager, Dan Glenn (phonetic), he took immediate action to have the letter withdrawn," and that "what Mr. Glenn ex-, expressed to me, that he thought it was highly inappropriate, a conclusion that I shared, and, and that it, it was not the purview of that office or, in fact, any other office to direct individual salaries." TR at 36-37, cited in IAD, 29 DOE at 89,032. Thus, Mr. Ruddy testified that the rejection was by DOE, on the ground that Ms. Sheppard's proposal was inappropriate (because it was beyond her office's purview, or authority, as confirmed in the Glenn Affidavit). Mr. Ruddy testified that he shared DOE's conclusion.

The IAD also stated that "[w]hile [Mr. Ruddy] provides a plausible explanation for rejecting the offer of the Defense Nuclear CI Chief to raise those salaries, it is not convincing in light of the testimony provided by" John Merwin, BWXT's former Human Relations Compensation Manager. IAD, 29 DOE at 89, 042. The IAD then paraphrased Mr. Merwin's testimony as stating that "Ruddy initially supported increasing salaries of BWXT's CIU employees, but that he later emphatically rejected an internal BWXT proposal for increasing those salaries because he was upset about the CIU's activities concerning the classified hard drive," which had been the subject of Mr. Olson's

disclosures;[1] and as stating that "Ruddy rejected his [Merwin's] advice when he [Ruddy] later rejected the Defense Nuclear CI Chief's proposal." 29 DOE at 89,042. However, Mr. Merwin's complete testimony, as cited elsewhere in the IAD, included his statement that when Mr. Ruddy had sought his guidance on whether Ms. Sheppard could solicit a pay increase for the Pantex CIU, Mr. Merwin had answered that "it is highly unusual for the Department of Energy to look at a contractor and to determine what those salary determinations should be, because we make those salary determinations based on salary studies, and [they] are determinations based across the [DOE] complex;" but that Mr. Merwin had nevertheless told Mr. Ruddy that "[i]t is probably politically astute to make payment and move forward." TR at 365-66, cited in IAD, 29 DOE at 89,040-41. Mr. Merwin thus confirmed to Mr. Ruddy that it was "highly unusual" for a DOE employee in Ms. Sheppard's position to make the proposal that she had made. Mr. Ruddy – instead of doing what Mr. Merwin described as "probably politically astute" – referred, to DOE's Mr. Glenn, the letter from Ms. Sheppard in which she made her "highly unusual" proposal. It was then DOE's Mr. Glenn who rejected Ms. Sheppard's salary increase proposal as beyond her authority.

The Glenn Affidavit, and the testimony of Ms. Sheppard, Mr. Ruddy, and Mr. Merwin cited above, thus make it clear that there were three distinct, consecutive actions after Ms. Sheppard made her proposal: (1) Mr. Ruddy's referral, to DOE's Mr. Glenn, of Ms. Sheppard's letter containing her "highly unusual" proposal to increase the salaries of Mr. Olson's work group and provide DOE funding for that increase; (2) DOE's rejection of Ms. Sheppard's proposal on the ground that she had

[1] Specifically, the IAD found that Mr. Olson made two disclosures, in February and March 2002, in which he told other BWXT employees that he believed that there was insufficient evidence to support the findings in a BWXT Incident Report that a missing classified computer hard drive had been destroyed and there was no compromise of classified data. After Mr. Olson's disclosures, the Incident Report's findings were amended from "Loss/Compromise did not occur" to "Probability of Compromise is remote." IAD, 29 DOE at 89,035-37. Although Mr. Olson had contended throughout the proceeding that his disclosures were protected because they revealed substantial violations of law under 10 C.F.R. § 708.5(a)(1), the IAD instead found that his disclosures were protected for a different reason, i.e., because they revealed a substantial and specific danger to employees and to public health and safety under 10 C.F.R. § 708.5(a)(2). Id. However, in a closely-related Part 708 case involving the identical disclosures made by Mr. Olson's supervisor, Curtis Broaddus, a different OHA hearing examiner issued an IAD that found that the disclosures were not protected under Part 708 because Mr. Broaddus had not met his burden of establishing that he reasonably believed that the disclosures revealed a substantial violation of law under section 708.5; and that IAD did not find that the disclosures were protected for any other reason. Curtis Broaddus, Case No. TBH-0030, slip op. at 12-14 (Nov. 7, 2006). Therefore, the Broaddus IAD denied the request for relief filed by Mr. Broaddus (id.); and did not consider actions taken by BWXT allegedly in retaliation for a protected disclosure (id. at 6). With regard to the Olson IAD, this Appeal Decision will not address the Broaddus issue of whether the complainant Mr. Olson met his burden of proof, because the fundamental ground on which this Appeal is granted is that BWXT has met its own burden of proof, as explained above.

no authority to make the proposal; and (3) BWXT's action in not granting Ms. Sheppard's salary increase proposal that DOE had determined was beyond her authority.

Therefore, BWXT has done more than provide a plausible explanation for its not granting Ms. Sheppard's salary increase proposal. BWXT has also provided substantiation to support its explanation. The Glenn Affidavit helps to establish that DOE itself rejected Ms. Sheppard's proposal because it was ultra vires, and confirms the testimony on that issue by Ms. Sheppard and Mr. Ruddy. It even confirms the testimony of Mr. Merwin, on whom the IAD relied, that Ms. Sheppard's proposal was "highly unusual." It has now been established that her proposal was so highly unusual because, as determined by DOE, "she had no authority over the matter of compensation for BWXT employees." Glenn Affidavit at 1.

In Complainant's Response to BWXT's Statement and Supplemental Statement, at 9-10, Complainant (1) argues that the OHA Director should not afford weight to the Glenn Affidavit as newly discovered evidence; and (2) responds to the Glenn Affidavit by alleging that "it is unclear whether NNSA would not have funded the salary increase but rather Mr. Glenn, DOE Pantex Site Office, objected to Ms. Sheppard's determination of what the compensation level should be for the Pantex counterintelligence salaries." Id. at 10. First, the Glenn Affidavit is indeed newly discovered evidence. It was not created until after the date on which the IAD was issued. The OHA Director's consideration of the Glenn Affidavit will not prejudice the Complainant, because the Affidavit does not introduce a new issue into the case, but confirms the testimony of Ms. Sheppard, Mr. Ruddy, and Mr. Merwin; and because the Complainant has had the opportunity, in his Response, to respond to the Glenn Affidavit. Second, the Complainant's above-quoted response to the Glenn Affidavit is not persuasive. In his Affidavit, Mr. Glenn does not personally "object[] to Ms. Sheppard's determination of what the compensation level should be for the Pantex counterintelligence salaries," as the Complainant alleges. On the contrary, Mr. Glenn states that "Ms. Sheppard did not have any authority to direct [BWXT] on wages and salaries of its employees," and her "representations to [BWXT] concerning funding counterintelligence unit salary increases" were inappropriate "since she had no contractual authority over the matter of compensation for BWXT Pantex employees." Glenn Affidavit at 1. He concludes by stating that his instructions "were consistent with communications on this subject from the highest level of the Procurement Directorate in the Department of Energy." Id. at 2.

In addition, a recent OHA decision, that was issued after the hearing officer issued the IAD in the present Appeal, provides further support for BWXT's position in this case. On September 19, 2006, OHA issued its decision in John Merwin, 29 DOE ¶ 87,012 (2006), in which Mr. Merwin had filed his own Part 708 complaint against BWXT. Mr. Merwin claimed in that case that BWXT retaliated against him because he had appeared as a witness in the hearing in the present case involving Mr. Olson. Mr. Merwin alleged that BWXT retaliated against him by refusing to certify him under DOE's Human Reliability Program (HRP), 10 C.F.R. Part 712. OHA held that "if Merwin can establish that BWXT has not followed its normal procedures in determining whether to submit his name to the DOE for HRP status, this could fall within the realm of a Part 708 retaliation;" and that "[i]n such a case, we could, if otherwise appropriate . . . , direct BWXT to follow its normal

procedures and submit Mr. Merwin for HRP consideration." Merwin, 29 DOE at 89,052 (emphases added). OHA then found that the record did not suggest that BWXT had not followed its normal procedures. OHA therefore sustained the determination regarding Mr. Merwin's HRP status, and denied Mr. Merwin's appeal of the dismissal of his complaint. Id.

In the present Appeal, the record has established that BWXT followed normal procedures, as it did in the Merwin case, in not granting the comparative salary increase that had been proposed by Ms. Sheppard. As explained above, the affidavit of DOE's Mr. Glenn confirmed that "management and operating employee salaries were to be based on the Contractor's internal processes, consistent with the M&O contract, and that her report would not set a precedent to change the policy since she had no contractual authority over the matter of compensation for BWXT Pantex employees." Glenn Affidavit at 1 (emphasis added). By following the "policy" that its employee salaries were to be based on its internal processes consistent with its contract with DOE, and not setting "a precedent to change the policy," BWXT was following normal procedures in the present case, as in the Merwin case.

BWXT has thus shown that it was DOE that determined that Ms. Sheppard lacked the authority to propose and provide DOE funding for the salary increase for BWXT's employees. That left BWXT in the same position that it had been in before Ms. Sheppard's ultra vires proposal, when BWXT lacked the funds to pay for the comparative salary increase for its employees. Mr. Merwin – BWXT's former Compensation Manager, on whom the IAD relied – testified that "[t]he problem was, at that period of time there was no money available;" and that "they knew from when I first came in and did my analysis and sat down with Mr. Broaddus [Mr. Olson's supervisor] and Mr. Mallory [BWXT's General Manager at the time of the hearing] that we were near to being broke with regards to the compensation fund." TR at 350-51 (emphases added), cited in 29 DOE at 89,040.

In this regard, OHA has held in another case that "the remedies available under Part 708 are aimed at restoring employees to the employment position and situation that they occupied before Part 708 retaliations took place;" and "that Part 708 did not provide a remedy for longstanding salary differences that predated an individual's protected disclosures." Gary S. Vander Boegh, 28 DOE ¶ 87,040 at 89,296 (2003). Similarly, in the present case, after BWXT's action in not granting the comparative salary increase that Ms. Sheppard had proposed (without authority) for DOE to fund, Mr. Olson had the same longstanding salary difference, compared to other employees at other DOE sites, that predated his protected disclosures. Moreover, Mr. Olson later received merit pay increases after BWXT's action in not granting him Ms. Sheppard's proposed comparative salary increase in 2002. Indeed, he received at least the average merit pay increase for the Pantex site. IAD, 29 DOE at 89,039 (citing TR at 422-23).[2]

[2] Those facts may explain why Mr. Olson waited for two years, after BWXT's action in not granting him the comparative salary increase proposed by Ms. Sheppard, to file his Part 708 (continued...)

In sum, I find that BWXT has proven, by clear and convincing evidence, that it would have taken the same action, in not granting the proposed comparative salary increase to Mr. Olson's working group, without Mr. Olson's protected disclosures, for the non-retaliatory reason that DOE determined that its Defense Nuclear CI Chief lacked the authority to propose and fund that salary increase.

IV. CONCLUSION

For the reasons set forth above, I find that BWXT's Appeal of the IAD should be granted, and that the complainant Mr. Olson's request for relief should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by BWXT Pantex on November 18, 2005 (Case No. TBA-0027), of the Initial Agency Decision issued on October 27, 2005, is hereby granted.

(2) The Request for Relief filed by the complainant Clint Olson under 10 C.F.R. Part 708 is hereby denied.

(3) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: May 9, 2007

[2](...continued)
complaint, instead of filing his complaint within 90 days, as provided in 10 C.F.R. § 708.14. Although BWXT has objected to the IAD's finding that Mr. Olson's complaint was timely filed, despite the passage of two years. This Appeal Decision will not address that issue because the fundamental ground on which the Appeal is granted is that BWXT has met its burden of proof, as explained above.

August 29. 2007

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Curtis Broaddus

Date of Filing: November 22, 2006

Case Number: TBA-0030

Curtis Broaddus filed a complaint of retaliation under the Department of Energy (DOE) Contractor Employee Protection Program. *See* 10 C.F.R. Part 708. Mr. Broaddus alleged that he engaged in protected activity and that his employer, BWXT Pantex (BWXT), retaliated by not giving his working group a proposed salary increase. An Office of Hearings and Appeals (OHA) Hearing Officer denied relief, and Mr. Broaddus filed the instant appeal. In a companion case involving Mr. Broaddus' subordinate, Clint Olson, I held that BWXT's failure to grant the proposed salary increase was not retaliatory. That holding governs this case. Accordingly, Mr. Broaddus' request for relief - a retroactive salary increase - is denied.

I. Background

Mr. Broaddus was BWXT's senior counter-intelligence officer. Mr. Broaddus' subordinate, Mr. Olson, was also a counter-intelligence officer.

In 2002, Mr. Broaddus and Mr. Olson raised security concerns about the protection of classified information. Thereafter, BWXT did not implement a DOE proposal to give their working group a fifteen percent "comparative" salary increase, i.e., an increase to bring their salaries more in line with those of others doing comparable work.

In 2004, Mr. Broaddus and Mr. Olson filed retaliation complaints. See 10 C.F.R. Part 708. They alleged that, when they raised their security concerns, they made "protected disclosures" and that BWXT retaliated by failing to grant the

fifteen percent comparative salary increase. Mr. Broaddus also alleged other retaliations specific to him.

The Broaddus and Olson complaints were referred to OHA. An OHA attorney investigated the complaints and issued a separate Report of Investigation (ROI) for each. *See* 10 C.F.R. §§ 708.22, 708.23. Upon the issuance of the ROIs, two Hearing Officers were appointed - one for each complaint. The Hearing Officers held a joint hearing on the issues common to the complaints, and then the Broaddus Hearing Officer held a further hearing on issues specific to the Broaddus complaint.

Each Hearing Officer issued an Initial Agency Decision (IAD). The IADs reached opposite results. The Hearing Officer for the Olson complaint held that Mr. Olson was entitled to relief. *Clint Olson (Case No. TBH-0027),* 29 DOE ¶ 87,007 (2005) (the Olson IAD). The Hearing Officer for the Broaddus complaint held that Mr. Broaddus was not entitled to relief. *Curtis Broaddus (Case No. TBH-0030),* 29 DOE ¶ 87,015 (2006) (the Broaddus IAD). BWXT appealed the Olson IAD, and Mr. Broaddus appealed the Broaddus IAD.

In May 2007, I reversed the Olson IAD. *Clint Olson (Case No. TBA-0027),* 29 DOE ¶ 87,023 (2007) (the Olson Appeal Decision). I held that BWXT had demonstrated, by clear and convincing evidence, that its failure to grant the comparative salary was not retaliatory. Because that holding precluded the grant of relief to Mr. Olson, I did not address BWXT's other challenges to the Olson IAD.

In the instant appeal, Mr. Broaddus requests that I reverse the Broaddus IAD and grant him relief. As explained below, Mr. Broaddus' request is denied.

II. Applicable Standards

The DOE Contractor Employee Protection Program sets forth the standards governing the program. The contractor employee has the burden of showing, by a preponderance of the evidence, that the employee engaged in protected activity and that the protected activity was a contributing factor to an alleged retaliation. 10 C.F.R. § 710.29. If the employee meets that burden, the contractor has the burden of showing, by clear and convincing evidence, that it would have taken the same action in the absence of the protected activity. *Id.*

III. Analysis

I need not address the issue of whether Mr. Broaddus engaged in protected activity or whether such a disclosure was a contributing factor to the alleged retaliations. I have concluded that no Part 708 retaliation occurred.

In the Olson Appeal Decision, I considered whether BWXT's failure to grant a fifteen percent comparative increase to Mr. Broaddus' working group was retaliatory. I discussed the extensive evidence in the proceeding, which indicated that the salaries of individual contractor employees are based on the contractor's internal processes, consistent with the contract with DOE. *Olson,* 29 DOE at 89,126. Contrary to that policy, a DOE official proposed a fifteen percent comparative salary increase and related funding for Mr. Broaddus' working group, and BWXT referred the "highly unusual" proposal to DOE. *Id.* at 89,125. The DOE site manager informed BWXT that the DOE official lacked the authority to direct or fund such an increase. *Id.* BWXT lacked the funds for such an increase. *Id.* at 89,126. Accordingly, I held that BWXT had demonstrated, by clear and convincing evidence, that its failure to grant the fifteen percent salary increase was not retaliatory.

I have reviewed the Olson Appeal Decision and continue to believe that it was correct. Accordingly, consistent with the Olson Appeal Decision, Mr. Broaddus' claim concerning the fifteen percent comparative salary increase should be denied.

The Broaddus Hearing Officer agreed to consider other alleged retaliations. *See Broaddus IAD*, 29 DOE at 89,065. Mr. Broaddus devoted little or no attention to those allegations at the hearing.

The first alleged retaliation was the former plant manager's statement "I don't know what I'm going to do to you, Curtis, but I am doing to do something." Mr. Broaddus conceded that this statement followed a DOE-sponsored audit that criticized aspects of Mr. Broaddus' operations. Tr. at 652-71.

The second alleged retaliation was a purported "reprimand" for a traffic violation. During the investigation, the manager stated that he had counseled, but not reprimanded, Mr. Broaddus. *See* ROI at 26. The ROI invited Mr. Broaddus to produce evidence of a reprimand, *id.,* but Mr. Broaddus did not do so.

The third alleged retaliation concerned Mr. Broaddus' supervisory responsibilities for the Human Reliability Program (HRP), *see* 10 C.F.R. Part 712. The deputy plant manager assumed Mr. Broaddus' responsibilities. During the investigation, the deputy plant manager stated that Mr. Broaddus did not support the HRP program. *See* ROI at 26-27. Mr. Broaddus did not challenge that statement.

The fourth alleged retaliation was a supervisory change. The current plant manager reassigned Mr. Broaddus to his deputy. Although the ROI invited Mr. Broaddus to explain how this change may have harmed him, see ROI 27-28, 33, Mr. Broaddus did not do so.

The fifth alleged retaliation concerned a Personnel Assurance Program meeting at which a BWXT psychologist discussed a psychiatric evaluation of Mr. Broaddus. Mr. Broaddus alleged that the disclosure of that information was improper. The information gathered in the investigation indicated that the attendees consisted of authorized BWXT personnel and two of Mr. Broaddus' invitees. *See* ROI at 16; Interviews of Roxanne Steward (3/7/05), Sharon Armatrout (3/9/05), John Bovey, MD (3/28/05). Mr. Broaddus presented no testimony to the contrary.

As the foregoing indicates, Mr. Broaddus has not met his burden of showing, by a preponderance of the evidence, that a potential retaliation occurred. In fact, Mr. Broaddus did not request any specific relief for these alleged retaliations. Instead, they were apparently intended to establish BWXT animus and, therefore, bolster Mr. Broaddus' contention that BWXT's failure to grant the fifteen percent salary increase was retaliatory. As indicated above, I have rejected that contention.

IV. Conclusion

BWXT's failure to grant a fifteen percent comparative salary increase for Mr. Broaddus' working group was not retaliatory. Mr. Broaddus has not shown, by a preponderance of the evidence, that the other five alleged retaliations were potential retaliations.

It Is Therefore Ordered That:

(1) The Appeal filed by Curtis Broaddus on November 22, 2006 (Case No. TBA-0030), of the Initial Agency Decision issued on November 7, 2006, be and hereby is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: August 29, 2007

February 13, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeals

Names of Petitioners:	Curtis Hall Bechtel National, Inc.
Date of Filings:	April 2, 2007 April 2, 2007
Case Numbers:	TBA-0042 TBA-0064

This Decision considers two Appeals of an Initial Agency Decision (IAD) issued on March 15, 2007, by a Hearing Officer in the Department of Energy's (DOE) Office of Hearings and Appeals (OHA). The IAD addressed the merits of a whistleblower complaint filed by Curtis Hall against his former employer, Bechtel National, Inc. (BNI), under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. *See Curtis Hall*, 29 DOE ¶ 87,022 (2007). In his complaint, Mr. Hall alleged that BNI inappropriately selected him for termination under a reduction in force (RIF) in retaliation for his having made disclosures protected under the provisions of Part 708. In the IAD, the OHA Hearing Officer found that BNI had retaliated against Mr. Hall in violation of Part 708, and ordered BNI to take certain remedial action. In its Appeal, BNI challenges the IAD's findings of liability in the case. OHA has designated BNI's Appeal as Case No. TBA-0064. Mr. Hall's Appeal focuses on the remedy provided in the IAD, arguing principally that the Hearing Officer should have afforded the parties an opportunity to submit arguments on matters relating to the appropriate relief in the case. OHA has designated Mr. Hall's Appeal as Case No. TBA-0042. As set forth in this Decision, I have determined that BNI's Appeal is without merit and that the Hearing Officer's liability determination contained in the IAD should be sustained. With regard to Mr. Hall's Appeal, I have determined that some portions of it have merit and that the Appeal should be granted in part.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary

purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"], will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations contained in 10 C.F.R. Part 708 establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by BNI and Mr. Hall in their respective Appeals, is performed by the Director of the Office of Hearings and Appeals (OHA).[1] 10 C.F.R. § 708.32.

B. Factual Background

At all times relevant to this proceeding, BNI was the prime contractor at the DOE's Hanford Site[2] in Richland, Washington. Under the terms of its contract with the DOE, BNI is charged with designing, building, and commissioning the Waste Treatment Plant (WTP) at the Hanford Site to immobilize millions of gallons of chemical and radioactive waste through a process known as vitrification, whereby the waste will be mixed with molten glass and the resulting glass logs will be shipped to a federal repository for safe storage. IAD at 3.

BNI hired Curtis Hall on January 10, 2005, for the position of Controls and Instrumentation (C&I) Engineer in BNI's Plant Wide Systems Group (PWS) at the WTP. *See* BNI Exhibit (Ex.) 2. The PWS group is responsible for the design, configuration and qualification testing of the Integrated Network Control (INC) System and interconnected field devices that track waste and materials as they are processed through the WTP. IAD at 4. The INC being developed for use in the WTP at the time Mr. Hall began his employment with BNI was designed by ABB, a recognized industrial automation and engineering firm. Hereinafter the INC will be referred to as the ABB control system. The communication technology that linked the ABB control system to external monitoring devices throughout the plant was Foundation Fieldbus (FF). ROI at 3. The fieldbus devices associated with the FF consist of transmitters, analyzers, indicators and control valves that measure and execute various process variables, including pressure, temperature, flow, conductivity and radiation. *Id.* Mr. Hall's principal responsibility as a

---

1 On April 4, 2007, the Acting OHA Director at the time, Fred L. Brown, appointed Ann S. Augustyn to act in the capacity as OHA Director to perform the functions specified in 10 C.F.R. §§ 708.33 and 708.34 in connection with the two Appeals under consideration. While the two Appeals were pending, the Deputy Secretary of Energy appointed the undersigned as OHA Director.

2 The 586-square mile Hanford Site was established during World War II to produce plutonium for the nation's nuclear weapons defense and operated for four decades until the late 1980s. *See* Report of Investigation in Case No. TBI-0042 (ROI). Since that time, the Hanford Site has been engaged in the world's largest environmental cleanup. *Id.* Sixty percent by volume of the nation's high-level radioactive waste is stored at Hanford in 177 underground storage tanks. *Id.*

C&I Engineer was to configure and test software for FF field devices to determine their compatibility with the ABB control system. *Id.*

On two occasions in April 2005, April 1st and April 15th, Mr. Hall raised safety concerns with his BNI supervisors about his perception that the ABB control system was unreliable.[3] IAD at 5. BNI relieved Mr. Hall of significant job responsibilities after April 1, 2005, and selected him for a RIF that resulted in the termination of his employment from BNI in July 2005. *Id.*

C. Procedural Background

Mr. Hall filed a Part 708 complaint on October 20, 2005, with the DOE's Employee Concerns Program Office (ECP) at the Hanford Site, alleging that he was improperly selected for the RIF because he had raised protected disclosures about the safety of the ABB control system. When efforts to mediate the complaint proved futile, Mr. Hall requested the ECP on February 23, 2006, to forward his complaint to the DOE's Office of Hearings and Appeals (OHA) for an investigation followed by a Hearing. An OHA investigator conducted an investigation into the allegations contained in Mr. Hall's complaint and then issued a Report of Investigation (ROI) on June 22, 2006. In the ROI, the OHA investigator concluded that Mr. Hall had made a protected disclosure that, on the basis of its proximity in time, was a contributing factor to adverse personnel actions taken against him by BNI. ROI at 18. The OHA investigator also concluded that the evidence developed during the investigation did not support a finding that BNI had met its "clear and convincing evidence" burden that it would have selected Mr. Hall for the RIF in the absence of his having made a protected disclosure. *Id.*

Immediately following the issuance of the ROI, the OHA Director appointed a Hearing Officer in the case. The Hearing Officer conducted a four-day hearing in Richland, Washington, from October 3, 2006, to October 6, 2006. At the hearing, 15 witnesses testified and hundreds of exhibits were discussed. After receiving closing arguments and considering the parties' briefs, along with the documentary and testimonial evidence presented, the Hearing Officer issued the 65-page IAD on March 15, 2007, finding in favor of Mr. Hall.

II. The IAD

In the IAD, the Hearing Officer first found that Mr. Hall had met his burden of establishing by a preponderance of evidence that he had made disclosures, as described in 10 C.F.R. § 708.5, and that those disclosures were contributing factors to an act of retaliation against him by BNI. IAD at 44-45. Specifically, the Hearing Officer determined that Mr. Hall had made disclosures to BNI officials on April 1 and April 15, 2005, that were based on his reasonable belief that there were serious problems with the interoperability of the ABB control system selected for use at the WTP with other digital programs. *Id.* at 45. In addition, the Hearing Officer found that Mr. Hall's April 1 and 15,

[3] The thrust of Mr. Hall's disclosures was that any malfunction in a computerized system that "controls" the production processes in a nuclear waste treatment operation implicates public health and safety.

2005, disclosures constituted "protected" disclosures under 10 C.F.R. § 708.5(a)(2) because they revealed information about a "substantial and specific danger to employees or to public health or safety." *Id.* Next, the Hearing Officer determined that BNI's selection of Mr. Hall for the RIF that led to his eventual termination in July 2005, constituted an act of retaliation as defined in 10 C.F.R. § 708.3. *Id.* at 52. Finally, the Hearing Officer decided that Mr. Hall's protected disclosures were contributing factors to BNI's retaliation against him because (1) the BNI officials responsible for the retaliation had actual knowledge of Mr. Hall's protected disclosures; and (2) there was temporal proximity between the two April 2005 protected disclosures and Mr. Hall's selection for inclusion in the RIF that led to his July 2005 termination. *Id.* at 51.

Once the Hearing Officer concluded that Mr. Hall had met his "preponderance of evidence" burden as described above, he shifted his analysis to evaluating whether BNI had met its "clear and convincing" evidentiary burden that it would have terminated Mr. Hall through the RIF process absent Mr. Hall's protected disclosures.[4] The Hearing Officer first rejected BNI's contention that workplace conflict between Mr. Hall and another employee, Brandon Gadish, would have resulted in Mr. Hall's termination. *Id.* at 55. The Hearing Officer next rejected BNI's argument that it had selected Mr. Hall for inclusion in the RIF based on a ranking that it did of Mr. Hall's group in February and March 2005. *Id.* at 56. The Hearing Officer also found without merit BNI's position that the B-minus rating it had given to Mr. Hall in February 2005 reflected Mr. Hall's job skills or performance. *Id.* In addition, the Hearing Officer found unpersuasive BNI's argument that it would have terminated Mr. Hall because he had been selected for termination by an "Assignment Complete" [5] date in March 2005. *Id.* at 59. Finally, the Hearing Officer concluded that testimony at the hearing indicated that BNI officials had considered Mr. Hall's protected disclosures in selecting him for the July 2005 RIF. *Id.* In the end, the Hearing Officer decided that BNI had not shown by clear and convincing evidence that it would have selected Mr. Hall for the July 28, 2005, RIF had he not made protected disclosures on April 1 and 15, 2005. *Id.* at 62. Accordingly, the Hearing Officer ordered BNI to provide relief to Mr. Hall for the company's retaliation against him.

With regard to the relief, the Hearing Officer ordered BNI to reinstate Mr. Hall to his former position at the WTP or to a position that is comparable to the one from which he was laid off. The Hearing Officer further directed BNI: (1) to provide Mr. Hall with lost wages, [6] plus interest, to be calculated in accordance with an Appendix attached to the

---

[4] The Hearing Officer first found that the purpose and scope of the RIF was legitimate based on convincing evidence that the RIF was necessitated by a reduction in federal funding for the construction of the WTP and the need to adjust the design of the plant. *Id.* at 52.

[5] One of the managers at WTP testified that BNI maintained a document called the "register" that listed every employee by his or her position number, the date the employee began his or her employment, and the projected release date for the employee. Tr. at 780-781. The projected release date was referred to throughout the Part 708 proceeding as the "Assignment Complete" date.

[6] The Hearing Officer did not specify in the Ordering Paragraphs of the IAD that Mr. Hall was entitled to compensation for lost benefits such as sick leave, annual leave, overtime pay, and retirement benefits. The Appendix to the Decision, however, clearly enumerated these lost benefits as part of the remedial action in the case.

Decision; and (2) to reimburse Mr. Hall for reasonable legal fees and other expenses related to his Part 708 complaint. *Id.* at 64.

III. BNI's Appeal

On April 2, 2007, BNI filed a Notice of Appeal with OHA in accordance with 10 C.F.R. § 708.32. BNI filed its "Statement of Issues" for review on appeal on April 17, 2007, and it filed its brief in support of its Appeal on June 13, 2007. Mr. Hall, through his counsel, filed his response to BNI's brief on July 13, 2007.

In its Appeal, BNI does not contest the IAD's finding that Mr. Hall made protected disclosures on April 1 and 15, 2005, about safety issues pertaining to the ABB control system. BNI Brief at 1. Instead, BNI raises several legal and factual challenges to the Hearing Officer's findings that: (1) Mr. Hall established by a preponderance of evidence that his protected disclosures were contributing factors to BNI's ultimate termination of Mr. Hall's employment, and (2) BNI failed to establish by clear and convincing evidence that it would have selected Mr. Hall for inclusion in the RIF and eventual termination on July 28, 2005, absent his protected disclosures. *Id.* at 2. More specifically, BNI argues that the Hearing Officer made a legal error in his "contributing factor" analysis in that he failed to properly consider that BNI had designated Mr. Hall's employment as "Assignment Complete" prior to any of Mr. Hall's protected disclosures. *Id.* at 1, 21-22, 28. Moreover, BNI also submits that it had legitimate, non-retaliatory, business reasons for selecting Mr. Hall for the RIF, and argues that the Hearing Officer erred in finding otherwise.

A. Analysis

It is well established in appeals brought under 10 C.F.R. Part 708 that factual findings of a Hearing Officer are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,501, 89,001 (1995); *O'Laughlin v. Boering Petroleum Services, Inc.*, 24 DOE ¶ 87,513, 89,064 (1995); *Rosie L. Beckham*, 27 DOE ¶ 87, 557, 89,317 (2000). With respect to a Hearing Officer's conclusions of law, they are reviewable *de novo*. *Salvatore Gianfriddo*, 27 DOE ¶ 87,544 (1991); s*ee Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion').")

1. BNI's Challenges to the IAD's "Contributing Factor" Findings

BNI first contends that the Hearing Officer misapplied the law with regard to his "contributing factor" analysis and finding, arguing that Mr. Hall's showing of a coincidence of timing between his protected disclosure and an adverse employment action is not sufficient to prove retaliation. BNI Appeal at 28. BNI then re-argues most of the matters that it raised its in Post-Hearing Closing Argument, including its

contention that Mr. Hall's protected disclosure post-dated the "Assignment Complete" process. Relying on *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (*Breeden*), BNI then argues that Mr. Hall's protected disclosures "could not possibly have motivated [its] layoff decision because Hall was designated "Assignment Complete" and destined for layoff *before* the "disclosures" were made. For the following reasons, I find all of BNI's arguments on this issue to be devoid of merit.

a. The Applicable Legal Framework Underlying the "Contributing Factor" Analysis

Regarding BNI's contention that the Hearing Officer misapplied the law in his "contributing factor" analysis in this case, the legal burden-shifting framework embodied in the Part 708 regulations was first explained by OHA in 1993 in *Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (*Sorri*). In *Sorri*, the Hearing Officer stated that in most cases, it is impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Thus, the Hearing Officer concluded that a Part 708 complainant can meet its burden of proof through circumstantial evidence. *Citing* among other cases, *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*Couty*), the Hearing Officer in *Sorri* held that a protected disclosure may be found to have been a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Sorri* at 89,010. The Hearing Officer in *Sorri* also noted that the standard of proof adopted in the Part 708 regulations is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C.§ 1221(e)(1), and the 1992 amendment to Section 210 (now 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. The Hearing Officer in *Sorri* then pointed to the legislative history of the WPA and explained that "any" weight given to the protected disclosure, either alone or in combination with other factors, can satisfy the "contributing factor" test:

> The word "a contributing factor" . . . means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant", "motivating", or predominant" fact in a personnel action in order to overturn that action.

135 Cong. Rec. H747 (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20).

In cases arising under 10 C.F.R. Part 708, OHA Hearing Officers have consistently relied, in deciding whether a complainant has met its burden of proof, on the contributing factor analysis first articulated in *Sorri. See e.g. Barbara Nabb*, 27 DOE ¶ 87,519 (1999), *Jimmie Russell*, 28 DOE ¶ 87,002 (2000); *Franklin Tucker*, 29 DOE ¶ 87,021 (2007). The instant case is no exception. In the IAD, the Hearing Officer determined that the

testimonial evidence in the record supported a finding that BNI officials had actual knowledge of Mr. Hall's protected disclosures. *See* IAD at 51. Specifically, the Hearing Officer found that Mr. Hall made his protected disclosures to: (1) his group leader and his supervisor on April 1, 2005, and (2) his supervisor and BNI's Discipline Engineering Manager on April 15, 2005. *Id.* The Hearing Officer also found that Mr. Hall's supervisor immediately conveyed Mr. Hall's disclosures to other BNI officials, including Ms. McKenney and Mr. Stewart. *Id.* With regard to the temporal proximity, the Hearing Officer found that the protected disclosures took place in early and mid-April 2005, and that BNI's decision to include Mr. Hall in a July 28, 2005 RIF, took place in early July 15, 2005.[7] *Id.* The Hearing Officer then opined that "a reasonable person could conclude that the protected disclosures were a factor in BNI's decision to RIF [Mr. Hall] because the RIF selection process began shortly after the disclosures were made and lasted only about three months." *Id.*

I am unpersuaded by BNI's argument that Mr. Hall failed to meet his burden of showing by a preponderance of evidence that BNI's decision to select him for the RIF constituted retaliation under Part 708 because Mr. Hall failed to prove "retaliatory intent" on BNI's part. BNI Brief at 20-21, 28. The *Couty* and *Sorri* cases and their progeny are clear that temporal proximity between protected activity, combined with actual or constructive knowledge of the protected activity, can fully support an inference of retaliatory motive. [8] Accordingly, I find that the Hearing Officer's use of the contributing factor analysis was proper, and consistent with the OHA precedent first established in the *Sorri* case.

---

[7] In reaching this finding, the Hearing Officer rejected BNI's contention that it had made a final decision to terminate Mr. Hall before July 2005. *See* footnote 15 to the IAD.

[8] BNI claims that "countless courts have rejected such claims, absent actual evidence of retaliatory motive. BNI Brief at 28. BNI then cites four cases to support this proposition: *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913 (7th Cir. 2000), *Longstreet v. Illinois Department of Corrections*, 276 F.3d 379 (7th Cir. 2002), *Gagnon v. Sprint Corp*., 284 F.3d 839 (8th Cir. 2002), and *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein.* All of the cases cited by BNI arise under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (Title VII). BNI's reliance on these cases is misplaced. The legal burden of proof in cases arising under 10 C.F.R. Part 708 and the WPA is different from the burden of proof in cases arising under Title VII. In the former kinds of cases, as noted above, the complainant must establish that his or her whistleblowing was "a contributing factor" in an adverse employment action, while under Title VII, the complainant must establish a "causal connection" between his or her protected activity and an adverse employment action. *See Rouse v. Farmers* State Bank *of Jewell, Iowa*, 866 F.Supp. 1191, 1207 (N.D. Iowa 1994), *Hill v. Mr. Money Finance Company*, 491 F.Supp.2d 725 (N.D. Ohio 2007).

BNI also cites three OHA cases for the same proposition: *Janet L Westbrook*, Case No. VBH-0059 (2001), *Thomas T. Tiller*, Case No. VWH-0018 (1999) and *Ronny J. Escamilla*, Case No. VWA-0012 (1996). BNI's reliance on these cases is also misplaced. In all three of the OHA cases cited above, the Hearing Officer found that the complainant had established a prima facie case that his or her protected disclosure was a contributing factor to an act of retaliation. None of the OHA cases cited by BNI required the complainant to prove "retaliatory intent;" rather the cases inferred retaliatory motive based on the temporal proximity and management knowledge test set forth in *Sorri.*

b. Whether the Hearing Officer Erred in Rejecting BNI's Claim that It Had Marked Mr. Hall for Termination Prior to his Protected Disclosures

In its Appeal, BNI does not challenge the Hearing Officer's findings that the BNI officials who were involved in the decision to put Mr. Hall on the RIF list that led to his termination had actual or constructive knowledge of Mr. Hall's protected disclosures. Rather, BNI believes that it rebutted the presumption of retaliation stemming from the temporal proximity between the protected disclosures at issue and Mr. Hall's termination. Specifically, BNI contends in its Appeal, as it did at the hearing, that its decision to place Mr. Hall on the RIF list pre-dated either of his two protected disclosures. BNI argues that "the record is clear and the evidence uncontroverted that on March 28, 2005 – before Hall and four other Grade 24 engineers were designated 'Assignment Complete,' portending layoff." BNI Brief at 22. According to BNI, the fact that it identified Mr. Hall for layoff before his protected activity, even if only preliminarily, negates any reasonable inference of retaliation in this case. *Id.* at 24. Furthermore, BNI argues that the deferral of the layoff only benefitted Mr. Hall, thereby dispelling any inference of retaliation.

i. The IAD Findings

In the IAD, the Hearing Officer made extensive findings of fact to support his conclusion that the March 2005 "Assignment Complete" process was not connected to BNI's decision in July 2005 to terminate Mr. Hall's employment. *See* IAD at 53-54, 56-57, 59, 61-63. Specifically, the Hearing Officer made six separate factual findings on this issue. First, the Hearing Officer pointed to the testimony of Mr. Douglass (Tr. at 530) that the February/March 2005 salary rankings and ratings for Mr. Hall (upon which the "Assignment Complete" rankings were compiled) were not based on Mr. Hall's performance but instead upon a "B-" rating that BNI assigned to all newly hired engineers who had not yet been given a performance evaluation. From this testimonial evidence, the Hearing Officer concluded that BNI officials had not assessed Mr. Hall's job skills and job performance for purposes of the subject performance salary ranking. *Id.* at 56-57. Second, the Hearing Officer found that the March 29, 2005 "Assignment Complete" list was based solely on the February/March salary rankings and that Mr. Hall's ranking was not related in any way to Mr. Hall's actual performance as an employee at WTP. *Id.* at 59, citing Mr. Anderson's testimony (Tr. at 745), Mr. Hall's Exhibit 13 and BNI Exhibit 276. Third, the Hearing Officer found that the testimony of Tanya Zorn indicated that the selection of employees for termination by "Assignment Complete" dates was based primarily on the most recent employee ratings. IAD at 58. In this connection, the Hearing Officer noted that Ms. Zorn testified that the March 29, 2005 "Assignment Complete" selections relied on the "reward for performance" employee rankings completed in February 2005 for engineering employees in various peer groups. *Id.* The Hearing Officer further pointed to Ms. Zorn's testimony that the employees whose positions were selected for "Assignment Complete" dates were the lowest ranked employees because higher ranked employees in positions scheduled for an early termination date had the right to bump lower ranked employees. *Id.* Fourth, the Hearing Officer found, contrary to Mr. Anderson's testimony, that "changing an employee's 'Assignment Complete' date generally is not an action which leads" to that employee's

termination. *Id.* Fifth, the Hearing Officer determined that there was no evidence that BNI ever evaluated Mr. Hall's job performance prior to April 1, 2005. Sixth, the Hearing Officer found that the four other engineers in the group of five who were to be terminated based on the "Assignment Complete" list were not new hires like Mr. Hall and that the low ratings for the other four engineers were based on actual performance evaluations. From this fact, the Hearing Officer concluded that Mr. Hall's inclusion in this group was arbitrary.

ii. BNI's Challenges to the IAD Findings

With the exception of the Hearing Officer's factual findings regarding Ms. Zorn's testimony, BNI does not attempt to demonstrate that any of the other five factual findings enumerated in Section A.1.b.i. above are clearly erroneous. Instead, BNI simply re-argues factual assertions that the Hearing Officer already rejected. In *S.R. Davis v. Fluor Fernald, Inc.*, 29 DOE ¶ 87,014 (2006) (*S.R. Davis*), the OHA Director refused to entertain, on appeal, the appellant's re-arguments of the same matters already considered by the Hearing Officer on the basis that the Hearing Officer had reviewed voluminous documentary evidence and considered testimony that had been subject to cross examination. Leaving aside the Hearing Officer's factual findings regarding Ms. Zorn's testimony, BNI has not attempted (1) to show that the Hearing Officer made any findings of facts relative to the "Assignment Complete" process that were unsupported by the evidence in the record, or (2) to point to any material facts in the record that the Hearing Officer overlooked which would have led to a different outcome. *S.R. Davis* controls here. Accordingly, I will not review five of BNI's six factual challenges to the IAD as they relate to the Hearing Officer's "contributing factor" finding. *See also C. Lawrence Cornett v. Maria Elena Torano Associates, Inc.*, 27 DOE ¶ 88,020 (1998) (Deputy Secretary holding that there is a difference between a Hearing Officer overlooking facts and rejecting them in the Initial Agency Decision.)

With regard to Ms. Zorn's testimony, BNI alleges that the "IAD misstated Tania Zorn's testimony about the role of performance ratings in the 'Assignment Complete' process." BNI Brief at 33, n.10. According to BNI, the IAD's conclusion is completely contrary to what Ms. Zorn stated. *Id.* BNI asserts that Zorn actually testified that an "Assignment Complete" date was totally unrelated to an employee's rating and cites the transcript at pages 977 to 983 to support its assertion. I have carefully reviewed Ms. Zorn's testimony with particular focus on those pages cited by BNI to support its challenge to the Hearing Officer's characterization of Ms. Zorn's testimony. There is nothing in the cited pages that undermines the Hearing Officer's characterization of Ms. Zorn's testimony. On page 982, the Hearing Officer asked Ms. Zorn: "So you used ratings to arrive [at] an assignment complete date; generally?" Ms. Zorn replied, "generally," adding, "If there was a higher-rated individual holding a position that ended sooner than a lower-rate individual, then the higher-rated individual would bump that person, the lower-rated individual and his or her employment would be extended for the position end date and the lower-rate individual would either be transferred to another position within the WTP or at another Bechtel project or their employment would end." Tr. at 982-983.

In reviewing Ms. Zorn's testimony in its entirety on appeal, I noted that she admitted that the "Assignment Complete" dates are "very fluid" and not a good indication of whether an employee would lose his or her job. Tr. at 987. On page 989 of the transcript, Ms. Zorn contradicted her earlier testimony when she advised that "Assignment Complete" dates are not based on ratings but are tied to positions. *Id.* at 989. When the Hearing Officer expressed confusion on this matter and asked again whether ratings were factored into the "Assignment Complete" dates, Ms. Zorn responded: "They're not tied into when - - they're not tied into the schedule of the position. The only time the rating comes into play is if the position has been identified by the manager to end and there is a higher-rated performer." *Id.*

Regarding the Assignment Complete dates in general, Ms. Zorn testified that she determined the assignment end dates in the initial instance for the engineering group and would then go to the manager and inquire if the release date was "real." *Id.* at 990. If the manager confirmed the release date, she would generate a list with the employee's name, send it to Human Resources (HR), and if approved by HR, notified the employee of his termination. *Id.* She added that nine times out of ten, the "Assignment Complete" dates were not "real." *Id*. When a manager informed Ms. Zorn that the "Assignment Complete" date was not "real," she re-worked the "Assignment Complete" date and extended it for six more months. *Id.* By way of explanation, Ms. Zorn stated that a manager had to review his or her schedule and budget to determine whether the "Assignment Complete" date was "real." *Id.* at 991.

Ms. Zorn then provided the following information regarding Mr. Hall's "Assignment Complete" dates. On February 7, 2005, Mr. Hall's "Assignment Complete" date was listed as January 15, 2006. *Id.* at 991. The documentary evidence in the record supports Ms. Zorn's testimony. *See* BNI Ex. 89. On February 21, 2005, BNI extended Mr. Hall's "Assignment Complete" date to September 7, 2006. *Id.* Again, the documentary evidence supports this fact. *See* BNI Ex. 91. On March 29, 2005,[9] Ms. Zorn sent an e-mail to HR attaching a list of employees with Assignment Complete dates of May 5, 2005. *See* BNI Ex. 103. Mr. Hall's name was on that list. Six days later, on April 4, 2005, Mr. Hall's "Assignment Complete" date was changed back to September 7, 2006. *See* BNI Ex. 110.

iii. Conclusion

The record is clear that BNI was constantly evaluating its employees' "Assignment Complete" dates and that those dates were, as Ms. Zorn testified, "fluid." The fact that BNI changed Mr. Hall's "Assignment Complete" date back to September 7, 2006, on April 4, 2005, undermines BNI's argument that the July 2005 RIF merely effectuated a decision that it had made on March 29, 2005, to lay Mr. Hall off from his employment. While Ms. Zorn's testimony may not be the model of clarity, in the end, it is the Hearing Officer who is responsible for assessing the demeanor and credibility of the witnesses, including Ms. Zorn. Since BNI has not convinced me that the Hearing Officer improperly

[9] Mr. Hall's "Assignment Complete" date was confirmed as being September 7, 2006, on six more occasions between February 21, 2005, and March 29, 2005: on February 28, March 4, March 7, March 14, March 18 and March 21, 2005. *See* BNI Exs. 94, 96, 97, 99, 100, 101.

characterized Ms. Zorn's testimony or made any other factual findings with regard to the contributing factor analysis that were clearly erroneous,[10] I affirm the Hearing Officer's finding that the "Assignment Complete" date was not connected to BNI's decision to terminate Mr. Hall.

2. Whether the Hearing Officer Erred in Finding that BNI Had Failed to Meet its Evidentiary Burden in the Case

BNI also challenges the Hearing Officer's finding that it did not present clear and convincing evidence that it would have terminated Mr. Hall in the absence of his protected disclosures. First, BNI maintains that it did, in fact, submit overwhelming evidence that Mr. Hall was among the least qualified to survive the RIF. BNI Brief at 35. Second, BNI contends that the Hearing Officer overlooked "critical comparative evidence" in the case. *Id*. at 36. Third, it argues that the Hearing Officer's reasoning is "demonstrably flawed" because he failed to consider the collective effect of the factors that led to Mr. Hall's termination. *Id.*

To support its first argument, BNI states "any reasonable manager would have concluded that Hall was among the least qualified to survive the layoff," and cites in support thereof portions of its own "Statement of Facts" on appeal that refers to testimony at the hearing. BNI does not attempt, however, to point out why the Hearing Officer's findings with regard to these same facts[11] are clearly erroneous. Instead, BNI re-asserts the same arguments that the Hearing Officer rejected in the IAD. Mere disagreement with the Hearing Officer's factual determinations is not sufficient for me to overturn his findings. As noted *supra*, it is well settled that the factual findings of a Hearing Officer are subject to being overturned only if they can be deemed clearly erroneous, giving due regard to the trier of fact to weigh the evidence and to judge the credibility of the witnesses. *Eugene J. Dreger*, 27 DOE ¶ 87,564 at 89,351-52 (2000), citing, *Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87501, 89,001 (1995), *et. al*.

BNI's second argument is that the Hearing Officer failed to consider that Mr. Hall was terminated along with the four other employees who were designated on March 29, 2005, for completion of their assignments on May 5, 2005. BNI Brief at 36. BNI contends in this regard that it treated Mr. Hall in the same manner as it did the four others who did not engage in protected conduct. *Id.* BNI is incorrect on this matter. In the IAD, the Hearing Officer carefully analyzed the evidence before him and assessed the credibility of several key BNI officials before finding that Mr. Hall's ranking in late March 2005 was based on an arbitrary rating ("B-") assigned to him because Mr. Hall had not, like the

---

[10] I rejected BNI's contention that its deferral of Mr. Hall's layoff dispelled any inference of retaliation. I base this finding on the evidence in the record that the "Assignment Complete" date was fluid and not determinative of layoff.

[11] In the IAD, the Hearing Officer held: "BNI's assertions fail to establish by clear and convincing evidence that, in the absence of his protected disclosures, [Mr. Hall] would have been included in the July 28, 2005 RIF based on workplace conflicts, poor performance or because he lacked the necessary job skills." IAD at 55. The Hearing Officer provided ample support for this finding in the IAD. *Id* at 55-59.

others in his group, been at BNI long enough to receive "reward for performance employee rating" or any other job evaluations. IAD at 56-59, 63. The Hearing Officer also carefully analyzed the ratings given to Mr. Hall by Mr. Billings in early July 2005 before concluding that BNI had not provided probative evidence to demonstrate that BNI's negative assessment of Mr. Hall would have occurred in the absence of his protected disclosures. I find that the Hearing Officer provided clear, compelling reasons to support his findings under review. I find that BNI has not demonstrated that the Hearing Officer's factual findings on this matter are clearly erroneous.

BNI also argues that the Hearing Officer committed other errors in the IAD. Specifically, BNI alleges that the Hearing Officer: (1) failed to consider the collective effect of the factors that led to Mr. Hall's low performance rating, instead considering each factor in isolation; (2) assumed rather than demonstrated that Hall's low ratings were the product of retaliation, (3) failed to determine whether any retaliatory bias in the ratings actually mattered, and (4) accepted as persuasive Mr. Hall's unsubstantiated statements that his low ratings in connection with the RIF were retaliatory. BNI Brief at 36. To support its position, BNI provides the following elaboration.

With regard to the first alleged error, BNI contends that the Hearing Officer failed to consider Mr. Hall's performance, skill set, and alleged lack of teamwork individually rather than collectively in deciding that no factor, on its own, was sufficient to "justify" discharge. *Id.* at 37. I find that BNI's position on this matter is simply untenable. The Hearing Officer provided ample justification for rejecting BNI's contention that it would have terminated Mr. Hall for the deficiencies that he allegedly possessed. *Id.*

BNI next claims that in a RIF case, the employer is never expected to prove a case for discharge. It then complains that the Hearing Officer should have examined whether BNI had honestly judged Mr. Hall to be among those who logically could be released. *Id.* at 38. Finally, BNI claims that the Hearing Officer exceeded his role as fact-finder because he acted like a "personnel manager of last resort." *Id.* at 39. Specifically, BNI argues that the Hearing Officer second-guessed BNI's judgment about the amount of Foundation Fieldbus testing needed, and whether Hall or another engineer could have performed it. *Id.* BNI is incorrect on all counts. First, it was indeed BNI's burden under the Part 708 regulations to demonstrate by clear and convincing evidence that it would have terminated Mr. Hall in the absence of his protected disclosures. The Hearing Officer concluded, and I agree based on the record in this case, that BNI did not meet its evidentiary burden in the case. Second, I find that the Hearing Officer analyzed the structure of the RIF in question and carefully reviewed the worksheets that BNI completed to rate Mr. Hall and 38 other employees. *Id.* at 61-62. The record supports the finding made by the Hearing Officer after his extensive review of the worksheets and his assessment of the testimonial evidence relating to the worksheets that BNI failed to prove that the very low ratings given to Mr. Hall were accurate assessments of his performance, teamwork and skills. *Id.* at 62. Contrary to BNI's contentions, I find that the Hearing Officer did not second-guess BNI's judgment; he merely reached findings based on the evidence presented and the entire record in the case.

BNI next argues that the Hearing Officer failed to examine the factors upon which Mr. Hall was rated in the July 8, 2005 weighted rating and compare them to the shortcomings identified before Hall's April 2005 protected disclosures. BNI Brief at 39. The company further argues that the Hearing Officer's finding that BNI would not have rated Hall as low as he did absent his protected disclosures lacks support in the record. *Id.* at 40. Moreover, BNI argues that the Hearing Officer should have explained who should have replaced Hall on the layoff list because the Hearing Officer failed to explain whether Hall would have been rated differently enough to have survived layoff. Having reviewed the relevant portions of the IAD, I find that the Hearing Officer carefully examined the ratings by Mr. Hall's supervisor, Mr. Billings, which led to Mr. Hall being placed on the RIF list. *See* IAD at 61-62. It was BNI's responsibility, not the Hearing Officer's, to do whatever comparisons it deemed necessary to meet its clear and convincing evidence burden that it would have selected Mr. Hall for the RIF in the absence of his protected disclosures. [12] This it failed to do.

BNI's final argument is that the Hearing Officer accepted Mr. Hall's unsupported uncorroborated testimony that he was rated erroneously in the RIF decision-making process. Id. at 41. There is no merit to this contention. I find that the Hearing Officer carefully evaluated and weighed the testimony of Mr. Billings, Mr. Douglas, Mr. Anderson, Ms. Zorn, and Ms. Tuttle and numerous exhibits in the case before rendering his finding on this matter. BNI also argues that "it is not retaliatory or discriminatory for an employer to make erroneous personnel judgments, and an inference of discrimination or retaliation cannot be drawn just because a fact-finder apprises qualifications differently." This argument seems to constitute an admission by BNI that it erred in its personnel decision to place Mr. Hall on the RIF. Assuming that this is a fair reading of BNI's argument, it is not probative on the appeal before me.

3. Summary

On the basis of the foregoing, I conclude that there is ample evidence in the record to support the Hearing Officer's findings that Mr. Hall made two protected disclosures which were contributing factors to BNI's decision to place Mr. Hall on the RIF list that

---

[12] It does not appear from the record that BNI questioned Mr. Billings at the hearing about the performance problems that resulted in the low scores. In short, BNI did not carry its burden at the hearing of justifying these critical ratings that it gave to Mr. Hall. Moreover, the Hearing Officer was concerned from the testimonial evidence in the record that Mr. Billings' low ratings of Mr. Hall were the product of knowing manipulation designed to ensure Mr. Hall's layoff. In *Sorri*, OHA rejected an employer's RIF defenses where "[a] cloud of suspicion hangs over the entire process that was used to justify [the whistleblower's] termination." *Sorri* at 89,012. In that case, the Hearing Officer found that a contractor cannot sustain its affirmative defense in a RIF case where "[t]he evidence also shows that the process by [the contractor] was unfair, and not designed to 'build out' subjective factors." *Id.* at 89,013. In cases where there is a subjective rating process, tainted by consideration of protected activity, as the Hearing Officer thought there was in this case, BNI needed to present first hand probative, specific evidence to validate its ratings of Mr. Hall. *See Steven F. Collier*, 28 DOE ¶ 87,041 (2003). It did not do so, and it cannot now complain that the Hearing Officer should have performed comparative analyses that were not raised in the first instance by BNI.

lead to his termination in July 2005. I also find that the Hearing Officer properly found that BNI had failed to meet its evidentiary burden in this case. I therefore deny BNI's Appeal and affirm the Hearing Officer's liability finding in the IAD.

IV. Mr. Hall's Appeal

On April 2, 2007,[13] Mr. Hall filed a Notice of Appeal with OHA in accordance with 10 C.F.R. § 708.32. Mr. Hall filed his "Statement of Issues" for review on appeal on April 19, 2007, and its brief in support of its appeal on June 12, 2007. BNI, through its counsel, filed its response to Mr. Hall's brief on July 10, 2007.

In his Appeal, Mr. Hall seeks review only of the remedy portions of the IAD. According to Mr. Hall, the Hearing Officer committed a procedural error when he (1) entered an appealable order prior to calculating the final award of Mr. Hall's relief in the case, and (2) failed to allow the parties an opportunity to provide input into all the remedies before summarily denying all relief except the relief awarded in the IAD. Mr. Hall also complains that the Hearing Officer was not specific enough in his ordering paragraphs. For example, Mr. Hall states that the Hearing Officer did not define "immediately" when he ordered BNI to "immediately" reinstate Mr. Hall. Similarly, Mr. Hall complains that the Hearing Officer did not define "former position" or establish a process for determining what Mr. Hall's former position was. Finally, Mr. Hall requests that I remand the case to the Hearing Officer with instructions that he complete the remedy process set forth in the IAD, including, if necessary, the taking of additional evidence as to monetary, reinstatement and affirmative relief remedies.[14] Hall Brief at 3.

A. Whether the Hearing Officer Erred in Entering the IAD as an Appealable Order

Mr. Hall first argues that the Hearing Officer should have issued the IAD as an interlocutory order, solicited supplemental evidence on the remedy in the case, and then issued a final appealable order which incorporated the specific remedy ordered. Mr. Hall's argument is without merit. Prior to the hearing, Mr. Hall provided a very detailed enumeration of the relief that he sought in this Part 708 proceeding. *See* Mr. Hall's Ex. 1

---

[13] BNI has challenged the timeliness of Mr. Hall's appeal, arguing that Mr. Hall filed his Appeal two days late. BNI is incorrect on this matter. I have verified with OHA's Docket Control Division that Mr. Hall filed his Appeal at 3:37 p.m. on April 2, 2007 through OHA's special e-mail address, OHA.filings@hq.doe.gov.

[14] Mr. Hall also requests in his Appeal that I award him additional relief not previously requested. That additional relief includes: (1) reinstatement until the completion of the project in 2019; (2) a retroactive seniority date and transfer; (3) front pay until 2019 in lieu of reinstatement; (4) reimbursement of costs and expenses, including attorney's fees that Mr. Hall paid to his prior counsel; and (5) expungement of Mr. Hall's personnel record. Mr. Hall's Brief at 4-5. Only those remedies requested by Mr. Hall prior to the issuance of the IAD will be considered on appeal. Mr. Hall will not be allowed to augment his remedial relief request at the Appeal stage of this proceeding.

at 39-40.[15] Hence, there was no need for supplementary evidence on the remedy issue. The regulations at 10 C.F.R. § 708.30(d) state that: "If the Hearing Officer determines that an act of retaliation has occurred, the initial agency decision will include an order for any form of relief permitted under § 708.36." This regulatory provision supports the Hearing Officer's decision to include the remedy in his IAD. Moreover, inasmuch as the IAD considered both liability and remedy, it was appropriate for the Hearing Officer to deem the IAD "final" as both parties had the opportunity to present evidence on all issues before the Hearing Officer and to appeal the IAD under 10 C.F.R. § 708.32.

B. Whether the Hearing Officer Erred in Not Allowing the Parties an Opportunity to Provide Input into the Remedy in the Case

Mr. Hall contends that the Hearing Officer should have afforded the parties an opportunity to provide input into all the possible remedies available prior to his issuing the IAD which set forth the remedy in this case. Mr. Hall is mistaken on this matter. As noted above, Mr. Hall had ample opportunity during the prehearing phase of this case to advance his remedial requests. In fact, he clearly articulated in one of his prehearing exhibits the remedial relief that he was seeking in this proceeding. During the hearing, the Hearing Officer advised the parties at the hearing that he would ask for the precise calculations of lost wages, and expenses after issuing the IAD if he found in favor of Mr. Hall. Tr. at 212. Both parties agreed to this approach at the hearing. *Id.* In the IAD, the Hearing Officer ordered BNI to reinstate Mr. Hall to his former position or a comparable position and to pay Mr. Hall for his lost wages, plus interest, and his litigation expenses. The Hearing Officer then ordered both parties to make specific calculations to effectuate the Hearing Officer's remedial findings. In addition, the Hearing Officer provided a period of up to 60 days for the parties to discuss and negotiate any disputes concerning the calculations. There will be ample opportunity for the parties to collaborate on the remedial aspects of this case during the negotiation period provided for in the IAD, and to report back, if necessary, to the Hearing Officer at the conclusion of that period, as required by the IAD.

C. Whether the Hearing Officer Erred in Denying All Relief Except That Ordered by the Hearing Officer

Mr. Hall asserts that the Hearing Officer set forth a comprehensive and reasonable post-decision process for determining the specific relief that should be awarded, with the exception of the generalized ruling that "all other relief is denied." Mr. Hall's Brief at 2. According to Mr. Hall, the Hearing Officer gave no reasons or fact findings as to why all other relief was peremptorily denied. *Id.* at 3. The Hearing Officer was under no obligation to address "all" the possible relief that Mr. Hall might have been entitled to in the IAD. I find, however, that the Hearing Officer did not provide his reasons for

---

[15] In his pre-hearing exhibit, Mr. Hall requested the following remedies: (1) reinstatement to a Grade 25 "Not-at-Will" position, with at 10% raise, and guaranteed employment until 2011 or 2015; (2) transfer preference; (3) back pay at two times his hourly rate; (4) reimbursement of reasonable costs and expenses, including attorney and expert witness fees; (5) formal classroom training and (6) compensation for pain and suffering and emotional distress. Ex. 1.

rejecting some of the relief that Mr. Hall had requested prior to the hearing. That "other" relief included the specific terms of the reinstatement requested, *i.e*. a Grade 25 "Not-at-Will" position, with at 10% raise, and guaranteed employment until 2011 or 2015, as well as transfer preference, back pay at two times his hourly rate, formal classroom training and compensation for pain and suffering and emotional distress. Rather than remanding the case to the Hearing Officer and further delaying this proceeding, I have decided to evaluate, on my own, the remedies requested by Mr. Hall and not addressed by the Hearing Officer in the IAD. *See* 10 C.F.R. § 708.34(b)(1).

As an initial matter, I find that the following remedies requested by Mr. Hall are not available under the Part 708 regulations: (1) reinstatement to a position at a grade higher than that vacated as the result of the July 2005 RIF; (2) reinstatement to a "not-at-will" position when the position vacated was an "at-will" position; (3) guaranteed employment at the WTP, or reinstatement for a fixed period of time at the site; (4) backpay at a rate double that of what he was earning prior to the RIF; (4) compensation for pain, suffering and emotional distress. The remedies enumerated immediately above, if granted, would have placed Mr. Hall in a position better than that occupied by him prior to his termination. This is not the goal of the Part 708 regulations. The preamble to the interim final rule to 10 C.F.R. Part 708 clearly announced that the goal of the restitutionary remedies set forth in 10 C.F.R. § 708.36 "is to restore employees to the position that they would have occupied but for the retaliation." 64 Fed. Reg. 12862, 12867 (March 15, 1999). The final rule that set forth the Part 708 regulations stated that: "A complainant should consider other forums if he or she seeks more than the abatement of the retaliatory practices and basic restitution." *See* Final Rule at 65 Fed. Reg. 6314 (March 10, 2000).

As for the 10% raise that Mr. Hall requested, I find that there is no evidence in the record to support Mr. Hall's request for a 10% raise. Nevertheless, in order to place Mr. Hall in the position that he would have been in had he not made his protected disclosures, I find that Mr. Hall might be entitled to that raise if similarly situated Grade 24 engineers received such a raise between July 2005 and the date that Mr. Hall is reinstated.

Regarding Mr. Hall's request for formal classroom training, BNI should provide this training only if it cannot reinstate Mr. Hall to his former position[16] and can find a comparable Grade 24 engineer position for him at the worksite. OHA has previously ordered a DOE contractor to provide training at the contractor's expense as an associated feature of reinstatement. *See Sue Rice Gossett*, 28 DOE ¶ 87,028 (2002). Finally, I find it appropriate to grant Mr. Hall transfer preference if BNI is able to place him in a position comparable to the one that he vacated.

[16] BNI states in its Response Brief on the Remedial Appeal that BNI eliminated Mr. Hall's former position after it deemed the position to be no longer necessary due to the change in the scope of the project at the WTP. *See* BNI Response Brief at 14.

D. Whether the Terminology Contained in the Remedial Provisions of the IAD Lacked Specificity

Mr. Hall contends that the Hearing Officer's award of "immediate" reinstatement and possible reinstatement to a "comparable" position is not specific enough for the parties to understand how and when reinstatement will be effectuated in this case. There is some merit to Mr. Hall's contentions. To remedy this matter, I will order the parties to discuss and negotiate these matters during the 60-day "Negotiation Period" established by the Hearing Officer in the Appendix to the IAD. Should the parties agree upon a "comparable" position for Mr. Hall, BNI will reinstate Mr. Hall to that "comparable position" no later than 61 days following the issuance of this Appeal. By way of clarification, the 60-day negotiation period will commence on the date this Appeal Decision is issued by OHA. These time periods will, however, be suspended if either party seeks Secretarial Review of this appeal in accordance with 10 C.F.R. § 708.35.

V. Summary

As discussed above, the arguments advanced by BNI in its Appeal, Case No. TBA-0064, are without merit. Therefore, I find that the liability determinations contained in the IAD should be sustained and BNI's Appeal denied. As for Mr. Hall's Appeal, Case No. TBA-0042, I have determined that some of his arguments have merit and that his Appeal should be granted in part. For administrative efficiency, however, I have rendered findings myself on those remedial matters that could otherwise have been remanded to the Hearing Officer.

It Is Therefore Ordered That:

(1) The Appeal filed by Bechtel National, Inc. on April 2, 2007, Case No. TBA-0064, be and hereby is denied;

(2) The Appeal filed by Curtis Hall on April 2, 2007, Case No. TBA-0042, be and hereby is granted in part as set forth in paragraphs 3, 4, 5, 11, 13, 14, and 15 below, and denied in all other respects;

(3) Paragraph (2) of the Initial Agency Decision issued on March 15, 2007, by Hearing Officer Woods in the matter of *Curtis Hall v. Bechtel National, Inc*., Case No. TBH-0042, be and hereby is amended as follows: No later than 61 days after the issuance of this Appeal, and after conferring with counsel for Curtis Hall, BNI will reinstate Mr. Hall to the position that he occupied prior to his termination (at-will, Grade 24 engineer), if that position is available, or to a "comparable position" to be agreed upon with counsel for Mr. Hall in accordance with paragraphs (14) and (15) below;

(4) Paragraph (4) of the Initial Agency Decision issued on March 15, 2007, by Hearing Officer Woods in the matter of *Curtis Hall v. Bechtel National, Inc*., Case No. TBH-0042, be and hereby is amended as follows: Bechtel National, Inc. shall produce a report that calculates the lost wages and lost benefits (such as sick leave, annual leave,

overtime pay, and retirement benefits), plus interest payable to Mr. Hall. Bechtel National Inc.'s report shall be calculated in accordance with the Appendix attached to the Initial Agency Decision;

(5) Paragraph (5) of the Initial Agency Decision issued on March 15, 2007, by Hearing Officer Woods in the matter of *Curtis Hall v. Bechtel National, Inc.*, Case No. TBH-0042, be and hereby is amended as follows: Bechtel National, Inc. shall pay Mr. Hall lost wages and lost benefits (such as sick leave, annual leave, overtime pay, and retirement benefits), plus interest. The amount of this payment shall be determined in accordance with the report specified in Paragraph (4) immediately above;

(6) Except to the extent altered in this Appeal, the ordering paragraphs contained in the Initial Agency Decision in Case No. TBH-0042, and Sections A, B, C and E of the Appendix which is attached to the Initial Agency Decision are affirmed;

(7) Mr. Hall's request that he be promoted to a Grade 25 engineer position as part of his reinstatement be and hereby is denied;

(8) Mr. Hall's request that he be reinstated to a "not-at-will" position be and hereby is denied;

(9) Mr. Hall's request that he be guaranteed employment by BNI, or be reinstated for a fixed duration at the Waste Treatment Plant, be and hereby is denied;

(10) Mr. Hall's request that he be reinstated to a position that pays twice his previous hourly rate be and hereby is denied;

(11) Mr. Hall's request that he receive a 10% raise when reinstated will be granted only if BNI determines that similarly situated Grade 24 engineers at the Waste Treatment Plant received 10% more in compensation between July 2005 and the date of Mr. Hall's reinstatement;

(12) Mr. Hall's request for compensation for pain, suffering and emotional distress be and hereby is denied;

(13) BNI will provide formal classroom training to Mr. Hall only if it cannot reinstate Mr. Hall to his former position and can place him in a comparable Grade 24 engineer position at the Waste Treatment Plant;

(14) If BNI is able to place Curtis Hall in a position comparable to the one that he vacated, the company will provide Mr. Hall with transfer preference;

(15) Section D entitled, "Negotiation Period" which is contained in the Appendix to the Initial Agency Decision issued on March 15, 2007, by Hearing Officer Woods in Case No. TBH-0042 be and hereby is amended to read as follows:

> The parties will have up to sixty days from the date of this Appeal Decision (or, if appealed, the final determination issued pursuant to 10 C.F.R. § 708.35(d)) to discuss and negotiate any disputes regarding (1) the calculations to be made under the terms of the Initial Agency Decision, and (2) Mr. Hall's reinstatement, including, but not limited to, what comparable positions, if any, are available for Mr. Hall and, what training, if any, would be necessary to allow Mr. Hall to quickly assimilate into that comparable position. During the period of negotiation, both parties will provide reasonable information to the other party to facilitate the other party's understanding of the calculations and the reinstatement matters.

(16) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 13, 2008

March 10, 2009

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Battelle Energy Alliance

Date of Filing: July 3, 2008

Case Number: TBA-0047

Dennis D. Patterson filed a complaint of retaliation under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Patterson alleged that he engaged in protected activity and that his employer, Battelle Energy Alliance (BEA), engaged in a series of retaliatory acts. An Office of Hearings and Appeals (OHA) Hearing Officer granted relief, *Dennis D. Patterson,* Case No. TBH-0047 (2008),[1] and BEA filed the instant appeal. As discussed below, the appeal is denied.

I. Background

The DOE established its Contractor Employee Protection Program to safeguard public and employee health and safety; ensure compliance with applicable laws, rules and regulations; and prevent fraud, mismanagement, waste and abuse at DOE facilities. 57 Fed. Reg. 7533 (1992). To that end, the program prohibits a contractor from retaliating against an employee who discloses certain information or engages in certain activity. 10 C.F.R. § 708.1.[2]

If an employee believes that a Part 708 retaliation has occurred, the employee may file a complaint requesting that the DOE order the contractor to provide relief. *Id.* The employee has the

[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[2] Part 708 concerns (i) disclosures of information concerning substantial violations of law; dangers to health and safety; and fraud, gross mismanagement, and abuse of authority, and (ii) refusals to participate in dangerous activities. 10 C.F.R. §§ 708.1, 708.5.

burden of showing, by a preponderance of the evidence, that the employee engaged in protected activity and that the protected activity was a contributing factor to the alleged retaliation. 10 C.F.R. § 710.29. If the employee meets that burden, the contractor has the burden of showing, by clear and convincing evidence, that it would have taken the same action in the absence of the protected activity. *Id.*

Patterson has worked at the Idaho National Laboratory (INL) and its predecessor, the Idaho National Engineering and Environmental Laboratory (INEEL), since 1980. Ex. 3. In 1994, the site management contractor at the time – Lockheed Martin Idaho Technologies Company (LMITCO) - appointed Patterson as manager of its ethics office, a position reporting to the company president. Ex. 114; Tr. at 535-38. In 1999, Bechtel BWXT Idaho, LLC (BBWI) replaced LMITCO and moved Patterson's office to the audit and oversight office, headed by Douglas Benson. Tr. at 548, 637. As a result, Patterson reported to Benson. *Id.* at 637. For each of the years 2000 through 2004, Benson rated Patterson's performance as "outstanding." Exs. C-G.

In 2005, BEA succeeded BBWI, and Patterson continued to report to Benson, as the manager of employee concerns. Tr. at 629, 646. That same year, a site worker - the son of Patterson's cousin – reported that the BEA security office improperly revoked his site access. Patterson investigated and concluded that the revocation did not comply with applicable procedures. Exs. 10, 127. Ultimately, BEA acknowledged that procedures had been violated, restored the worker's site access, and disciplined the BEA personnel security manager responsible for the revocation. Nonetheless, Patterson pressed for additional action, arguing that racial discrimination was an underlying factor. BEA's Equal Employment Opportunity (EEO) officer investigated and concluded that no racial discrimination had occurred.

Patterson's relationship with BEA management became strained as he continued to press his views that racial discrimination had occurred and that BEA management had engaged in misconduct. BEA's parent organization – Battelle Memorial Institute (BMI) - investigated and issued a report. Ex. 37. BMI concluded that BEA managers had not engaged in unethical conduct. *Id.* at 2. BMI did, however, voice a concern that Patterson refused to (i) accept the EEO officer's conclusion that no racial discrimination had occurred and (ii) recognize that his involvement in a relative's concern created the appearance of a lack of impartiality. *Id.* at 2-3. BMI recommended actions to improve the working relationship between Patterson and the others involved in the site access issue. *Id.* at 3.

In early 2006, Patterson received his 2005 performance appraisal and associated merit pay increase. Patterson's overall rating was "all expectations met, some exceeded." Ex. H. Also, in early 2006, BEA reclassified Patterson's position from "manager" to "specialist," because he did not have any direct reports. Exs. 41, 43; Tr. at 646. Thereafter, Patterson refused to refer to himself as the manager of employee concerns, instead using the term "specialist." Tr. at 384, 646. He also declined Benson's invitations to attend two manager meetings. *Id.* at 690-91.

In March 2006, Patterson filed an EEO complaint with the Idaho Human Rights Commission (IHRC), alleging discrimination and retaliation. Ex. 44. On May 1, 2006, BEA counsel told Patterson that BEA did not permit employees to use company time and resources "to pursue personal litigation matters." Ex. 45. Thereafter, Patterson used company email to withdraw the IHRC complaint, stating that he intended to pursue another avenue of relief. Exs. 49-51. Upon seeing the emails, BEA counsel asked BEA's security office to investigate Patterson for misuse of company time and resources. Ex. 54.

On June 1, 2006, Patterson filed a Part 708 complaint, alleging that BEA retaliated against him for disclosing (i) the security office's improper revocation of the worker's site access and (ii) subsequent management impropriety. Ex. J. He alleged that BEA retaliated against him by, *inter alia,* giving him a lower performance appraisal and pay increase and by reclassifying his job from "manager" to "specialist."

In July 2006, a security office investigator interviewed Patterson, asking him about his use of company time and resources for (i) his IHRC and Part 708 complaints and (ii) emails with a diversity organization. Ex. 54 at 5-9. In late August 2006, the investigator made a follow-up telephone call to Patterson about the investigation, and he asked if Patterson knew about a new investigation. Patterson responded, but did not answer the question.

In September 2006, the security office investigator interviewed Patterson in the new investigation, which concerned a manager's allegation that Patterson exhibited bias in investigating an employee concern filed by the manager's subordinate. Ex. 61. Just before that interview, Patterson asked BEA counsel whether BEA permitted the use of company time and resources to pursue a Part 708 complaint. She responded that such use was permitted, subject to certain limitations. Ex. 60.

During the September 2006 interview, the security office investigator asked Patterson again if he had advance knowledge of the new investigation. When Patterson answered "no," the

security office investigator asked why Patterson had not answered the question a week earlier. Patterson answered "to keep you guessing" and "keep the playing field level" (hereinafter the "keep you guessing/level the playing field" comment). Ex. 61 at 28. When Patterson made the statement, both parties laughed. Tr. at 934, 962 (security office investigator).

Although the security office investigator did not review the file documenting the investigation giving rise to the bias allegation against Patterson, Tr. at 950-51, the security office investigator asked Patterson numerous questions about the process. One question he asked concerned the fact that Patterson's report was not marked "Official Use Only." Ex. 61 at 14. Patterson conceded the error, but argued that he was being unfairly singled out, stating that others were sending unmarked emails about his Part 708 complaint. *Id.* The security investigator asked Patterson if Benson's administrative assistant had shared information with him, and Patterson refused to answer. *Id.* at 15-16. The security investigator then interviewed Benson's administrative assistant and another employee, but did not substantiate that any such sharing had occurred.

A week after the September 2006 interview, Patterson amended his complaint, citing the security office investigations as retaliations for his pursuit of his Part 708 complaint. Ex. W. The investigations did not substantiate that Patterson had misused company time and resources or that Patterson had exhibited bias.

In October 2006, BEA suspended Patterson for three days without pay. Ex. 65. The suspension notice cited, *inter alia*, a failure to cooperate with the security office investigator during the September 2006 interview and a failure to follow BEA counsel's May 1, 2006, instruction not to use company resources to pursue litigation against BEA. Exs. 65, 67 at 5. Patterson amended his complaint again, citing the suspension as retaliation for pursuit of his Part 708 complaint. Ex. Z.

In January 2007, Benson gave Patterson his 2006 performance appraisal, with an overall rating of "some expectations not met." Ex. 79. Benson cited, *inter alia,* the suspension notice and conduct referenced therein. *Id.* Patterson amended his complaint, citing the appraisal as retaliation for his pursuit of his Part 708 complaint. Ex. CC.

During the spring of 2007, Patterson had ongoing discussions with Benson about an employee concern that had been transferred to the security office. Ex. 76 at 1. Patterson refused to provide the name of the concerned employee, arguing that the security office did not need the name and its disclosure would violate the BEA's

written procedure that confidentiality should be protected to the maximum extent possible. Ex. 66 at 19. Discussions on this matter escalated in March and April 2007, Exs. 82-89, and culminated in an April 24, 2007, meeting, in which Benson instructed Patterson to provide the name, Ex. EE. The meeting took place at 3:00 P.M., and Benson instructed Patterson to provide the name by 9:00 A.M. the next day. Patterson proposed elevating the matter to the site head; Benson stated that Patterson's right to talk to the site head did not affect his right to impose the deadline. Patterson did not provide the name, but provided information from which the security office identified the individual.

In June 2007, Benson told Patterson that, as a result of his 2006 performance appraisal, his 2007 pay did not include a merit pay increase. The same month, BEA reassigned Patterson to another position at the same pay; BEA cited, *inter alia,* Patterson's conduct during the April 24, 2007, meeting. Ex. FF. Patterson amended his complaint, citing the zero merit pay increase and reassignment as retaliations for his pursuit of his Part 708 complaint. Ex. HH.

As of November 2007, the parties were preparing for Patterson's Part 708 hearing. BEA had filed a Motion for Summary Judgment, which the Hearing Officer granted in part, dismissing the allegations in the original complaint, largely on the grounds of timeliness. *Battelle Energy Alliance,* Case No. TBZ-0047 (2007). The same month, the Hearing Officer convened a four-day hearing, and the parties presented witnesses and documents.

Various witnesses testified about the two investigations. Benson justified his choice of the security office to investigate the bias concern on the ground that he, and the legal and personnel offices, had actual or perceived conflicts. Tr. at 656-660. As to the October 2006 suspension notice, Benson testified that, although the suspension notice listed various items as "misconduct," the actual basis for the suspension was Patterson's conduct during the September 2006 security interview, specifically his "keep you guessing/level the playing field" comment and his refusal to answer the question concerning Benson's administrative assistant. Benson further testified about the other alleged retaliations, including the directed reassignment. Benson testified that, despite the various conduct cited in the memorandum that directed the reassignment, the actual basis for the reassignment was Patterson's conduct during the April 24, 2007, meeting. Tr. at 900.

On June 20, 2008, the Hearing Officer found in favor of Patterson. *Dennis D. Patterson,* Case No. TBH-0047 (2008) (the IAD). The Hearing Officer found that Patterson's pursuit of his

Part 708 complaint was a contributing factor to the investigations and subsequent adverse actions. IAD at 16-18. In doing so, she rejected BEA's contention that an investigation cannot constitute a Part 708 retaliation. *Id.* at 19-20. The Hearing Officer further found that, with one exception (the June 2006 investigation), BEA would not have taken the same actions in the absence of the protected activity.

The Hearing Officer rejected BEA's rationale for choosing the security office to investigate the bias concern, i.e., that the security office did not have an actual or perceived conflict. IAD at 20-21. She cited the "controversy" over the security office's June 2006 investigation of Patterson. *Id.* at 21.

As for the suspension, the Hearing Officer found that Benson overstated the seriousness of Patterson's remarks during the September 2006 interview. She found that Patterson "jokingly" made the "keep you guessing/level the playing field" comment. IAD at 11. She found that Patterson's refusal to answer the question concerning Benson's administrative assistant did not impede the bias investigation. *Id.* at 23. She rejected BEA's example of the discipline of another employee for failure to cooperate with an investigation, as not comparable, because it also involved time card fraud. *Id.*

As for the marginal 2006 performance appraisal and zero merit pay increase, the Hearing Officer noted that much of the appraisal referred to the suspension (and events cited therein) and two other questionable rationales. IAD at 24-25. She found that BEA had not presented clear and convincing evidence that the rating would have been the same in the absence of the protected activity. *Id.* at 25.

Finally, the Hearing Officer addressed the directed reassignment. Benson testified, although the memorandum directing the reassignment cited various conduct, Benson's basis was Patterson's conduct toward Benson and the security office manager during the April 24, 2007, meeting. Tr. at 900. The Hearing Officer found that Patterson had been less than professional, but that the context was significant, i.e., that Patterson was accountable to INL senior management and that he believed Benson's order was not consistent with BEA procedures and put BEA at risk. IAD at 26.

Based on the foregoing, the Hearing Officer ordered various forms of relief. IAD at 29-30. The relief included monetary relief and an order that the contractor identify any vacancy comparable to Patterson's previous position and, if Patterson desires, transfer Patterson to that position.

In July 2008, BEA filed the instant appeal. As an initial matter, BEA contends that an investigation cannot constitute a Part 708 "retaliation." BEA Br. at 13-32. In any event, BEA contends that it would have taken all of the same actions in the absence of Patterson's pursuit of his Part 708 complaint. BEA Br. at 36-137. In support of this contention, BEA challenges many of the Hearing Officer's findings and conclusions.

II. Analysis

The standard of review for Part 708 appeals is well-established. Conclusions of law are reviewed *de novo. See Curtis Hall,* Case No. TBA-0042 at 5 (2008). Findings of fact are overturned only if they are clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *Id.; Salvatore Gianfriddo,* Case No. VBA-0007 (1999).

A. Whether an Investigation Can Be a Part 708 "Retaliation"

In support of its contention that an investigation cannot be a Part 708 retaliation, BEA argues that the Part 708 definition of "retaliation" governs. BEA Br. at 18. BEA further argues that the definition's examples indicate that it does not encompass investigations, even if they are retaliatory. *Id.* at 19.

BEA is correct that the Part 708 definition of "retaliation" governs, but BEA is incorrect that it does not encompass retaliatory investigations. Part 708 defines "retaliation" as follows:

> *Retaliation* means an action (including *intimidation,* threats, restraint, coercion or *similar action*) taken by a contractor against an employee with respect to employment (*e.g.,* discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities defined in Section 708.5 of this subpart.

10 C.F.R. § 702.8. As the regulation indicates, the Part 708 definition of "retaliation" includes "intimidation" or "similar action." A retaliatory investigation is a form of "intimidation" or "similar action." The Part 708 preamble supports this conclusion. During the rulemaking, a commenter asked about whether a retaliatory investigation fell within the term "retaliation." In response, the DOE stated that a retaliatory investigation and other specified actions were "generally meant to be covered by the broad definition of "retaliation." *Criteria and Procedures for DOE Contractor Employee Protection Program,*

65 Fed. Reg. 6314, 6316 (2000). Consistent with the preamble, OHA precedent recognizes a broad definition of "retaliation." *See generally John Merwin,* Case No. TBU-0052, at 3 (2006) (deviation from normal procedures to require multiple psychological evaluations could constitute a "retaliation"). Given the plain meaning of the definition, the Part 708 preamble, and OHA precedent, there is no merit to BEA's reliance on the examples of retaliations provided in the definition of retaliation, or BEA's other arguments as to why retaliatory investigations cannot be Part 708 retaliations. *See also Russell v. Dep't of Justice,* 76 M.S.P.R. 317 (1997).

B. Whether BEA Would Have Taken the Same Actions in the Absence of the Protected Activity

BEA contends that the Hearing Officer erred when she concluded that it would not have taken the same actions in the absence of the protected activity. Throughout its lengthy brief, BEA argues that the Hearing Officer ignored, misconstrued, or inaccurately described evidence.

The Hearing Officer saw the witnesses testify, and she listened to the tapes of the two security office interviews of Patterson, Tr. at 185, 916. She was, thus, in a position to consider the testimony and tape recordings in conjunction with the documentary evidence presented at the hearing. Most of the alleged Hearing Officer errors are mere disagreements with the Hearing Officer's assessment of the testimony, evidence, and credibility of the witnesses. The Hearing Officer's findings in this regard are not clearly erroneous and will be allowed to stand. Any actual Hearing Officer error is insignificant.

1. The September 2006 Bias Investigation

BEA contends that the Hearing Officer erred in concluding that it had not presented clear and convincing evidence that it would have chosen the security office to investigate the bias allegation in the absence of the protected activity. In support, BEA makes two principal arguments.

First, BEA argues that the Hearing Officer ignored evidence that the bias concern required an investigation. BEA Br. at 38-44. That is not correct. The Hearing Officer acknowledged Benson's testimony that the manager's allegation of bias was more serious than prior concerns. IAD at 20. What the Hearing Officer did reject was Benson's rationale for choosing the security office, which is the subject of BEA's second argument.

BEA argues that Benson's testimony – that he thought Patterson would be comfortable with a security office investigation -

recognized that Benson, and the legal and personnel offices, had actual or alleged conflicts; accordingly, BEA argues, it was "necessary" for Benson to transfer the concern to the security office for an investigation. BEA Br. at 40 n. 11, 45-46. BEA's argument ignores, however, that the security office also had a conflict or the appearance of a conflict. Patterson's 2005 investigation found security office deficiencies that resulted in corrective action, *see, e.g.,* Ex. 19 at 3, Patterson's allegations of security office and BEA management unethical behavior led to a review of the security office by BMI, *see, e.g.,* Ex. 30 at 5, and Patterson included these allegations in his Part 708 complaint, s*ee, e.g.,* Ex. 1 (June 1, 2006 complaint). The Hearing Officer alluded to this when she cited the "controversy" over the first investigation. IAD at 21. Because BEA's rationale for transferring the investigation outside of Benson's office would have eliminated the security office, BEA has not demonstrated that the Hearing Officer erred when she rejected the rationale.

2. The October 2006 Suspension

BEA also contends that the Hearing Officer erred in concluding that it did not present clear and convincing evidence that it would have suspended Patterson in the absence of the protected activity. In support, BEA makes three principal arguments.

First, BEA contends that the Hearing Officer erred when she found that Patterson made the "keep you guessing/keep the playing field level" comment "jokingly," citing Patterson's belief that the investigation was unfair, and the security office investigator's testimony that he not take the comment as a joke. BEA Br. at 54. The Hearing Officer listened to the tape-recording of the conversation, Tr. at 916; Patterson testified to some "levity" in his answer, *id.* at 934; and the security office investigator conceded that he and Patterson laughed at Patterson's answer, *id.* at 934, 962. The parties' contemporaneous laughter amply supports the Hearing Officer's skepticism of BEA's reliance on the comment as a basis for suspension. On this issue, BEA has not demonstrated Hearing Officer error.

Second, BEA contends that the Hearing Officer erred when she found that Patterson's refusal to answer the question about Benson's administrative assistant did not impede the investigation, stating that Patterson's refusal required that the security office investigator interview two employees and review emails. BEA Br. at 55.

As an initial matter, BEA's argument assumes that a Patterson answer would have avoided additional interviews. More importantly, as the security office investigator conceded, the

unanswered question concerning Benson's administrative assistant was not relevant to the bias investigation. Tr. at 959-60. Accordingly, the additional interviews on that question do not contradict the Hearing Officer's finding that Patterson's refusal to answer did not interfere with the investigation being conducted – the bias investigation. On this issue, BEA has also not demonstrated Hearing Officer error.

Finally, BEA contends that the Hearing Officer erred in rejecting its examples of discipline meted out to other employees as not involving similar conduct. BEA Br. at 58-62. This contention is based on BEA's characterization of Patterson's conduct as a "failure to cooperate" with an investigation. As discussed above, the Hearing Officer concluded that BEA's evidence on this issue was not clear and convincing, and BEA has not demonstrated otherwise. Since BEA has failed to establish a "failure to cooperate," BEA's reliance on discipline for "failure to cooperate" or other "prohibited practices" is misplaced. *See, e.g.,* BEA Br. at 59. Accordingly, BEA has not demonstrated that the Hearing Officer erred in rejecting examples of treatment of other employees.

3. 2006 Performance Appraisal and 2007 Zero Merit Pay Increase

BEA contends that the Hearing Officer erred in concluding that BEA would not have given Patterson a marginal performance appraisal in the absence of the protected activity. BEA Br. at 80-88. This contention lacks merit. In concluding that BEA's evidence was not clear and convincing, the Hearing Officer found that the performance appraisal given to Patterson relied extensively on the September 2006 investigation and related October 2006 suspension. IAD at 25. BEA has not argued, let alone demonstrated, that Patterson would have received the same rating in the absence of those events. Accordingly, BEA has not demonstrated Hearing Officer error.

4. Directed Reassignment

BEA contends that the Hearing Officer erred in concluding that it did not present clear and convincing evidence that it would have reassigned Patterson in the absence of the protected activity. BEA Br. at 88-122. This contention lacks merit.

The Hearing Officer discussed the circumstances of the meeting. IAD at 25-27. She did not question that Patterson could have behaved more professionally. *Id.* at 26. She noted, however, that (i) Patterson was accountable to senior INL management, (ii) Patterson had never before been ordered to disclose a reporting employee's name, and (iii) Patterson believed that

Benson's order was not consistent with BEA procedures. *Id.* at 26. These matters are not disputed. It is also undisputed that (i) the meeting occurred at 3:00 P.M. in the afternoon, (ii) Benson gave Patterson a deadline of 9:00 A.M. the next morning, (iii) Patterson asked to elevate the issue to INL senior management, and (iv) Benson refused to modify the deadline. The Hearing Officer also heard Patterson's former and current manager testify that Patterson treats colleagues with respect. Tr. at 543-46, 1011-13. Thus, the record indicates that Benson's refusal to extend the deadline, following BEA's prior retaliatory acts, precipitated Patterson's behavior. Since the behavior would not have occurred in the absence of the protected activity, BEA has not demonstrated, by clear and convincing evidence, that it would have reassigned him in the absence of the protected activity.

Finally, BEA argues that Patterson's post-reassignment behavior toward various BEA managers and employees precludes reinstatement to the employee concerns manager position. The Hearing Officer heard the witnesses testify on this issue and found that the testimony was not convincing. IAD at 26-27. Accordingly, BEA has not demonstrated that the Hearing Officer's findings were clearly erroneous.

III. Conclusion

The Hearing Officer correctly concluded that Patterson met his burden of showing, by a preponderance of the evidence, that he engaged in protected activity which was a contributing factor to the alleged retaliations. The Hearing Officer also correctly concluded that BEA did not meet its burden of showing, by clear and convincing evidence, that it would have taken the same actions in the absence of the protected activity.

It Is Therefore Ordered That:

(1) The Appeal filed by Battelle Energy Alliance on July 3, 2008 (Case No. TBA-0047), of the Initial Agency Decision (IAD) issued on June 20, 2008, be and hereby is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 10, 2009

December 18, 2008

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioners:	David L. Moses UT-Battelle, L.L.C.
Date of Filing:	September 8, 2008
Case Number:	TBA-0066

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on September 3, 2008, involving a Complaint of Retaliation filed by David L. Moses (also referred to as the employee or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708.[1] In his Complaint, Moses alleged that his former employer, UT-Battelle, L.L.C. (UT-Battelle or the contractor), retaliated against him for engaging in activity protected under Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that Moses engaged in activity protected under Part 708, but UT-Battelle established that it would have taken the same adverse personnel action in the absence of the protected activity. Moses appealed that determination. The IAD also made a finding regarding the applicability of the attorney-client privilege with respect to two exhibits submitted at the hearing, finding that certain redacted portions of those exhibits were not shielded by the attorney-client privilege and should be released. UT-Battelle appealed the portion of the IAD ordering the release of the redacted information. As set forth below, we find that the determination in the IAD that UT-Battelle met its burden under Part 708 is correct. In addition, we find that the issue of whether the redacted portions of two exhibits are protected by the attorney-client privilege is moot and, therefore, UT-Battelle shall not be required to release the documents.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, was and abuse" at DOE's government-owned or –leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary

[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

purpose is to encourage contractor employees to disclose information which they "reasonably and in good faith" believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. § 708.5(a). Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"], will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations set forth at 10 C.F.R. Part 708 establish administrative procedures for the processing of complaints. Under these regulations, review of an IAD, as requested by Moses and UT-Battelle in their respective appeals, is performed by the Director of the OHA. 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Moses' Complaint are fully set forth in the IAD. *David L. Moses*, Case No. TBH-0066 (2008). With respect to this appeal, the relevant facts are as follows.

UT-Battelle is the contractor employed by the DOE to manage and operate the Oak Ridge National Laboratory (ORNL). Moses was employed by UT-Battelle as Senior Program Manager for Nuclear Nonproliferation Programs at ORNL. A requirement of his position at ORNL was that he secure funding from DOE elements for his time. On February 23, 2007, he filed a Complaint of Retaliation under Part 708, alleging that his employer retaliated against him for disclosing irregularities in DOE contracting practices and alleging waste of funds related to a particular research project.

In 2004 and early 2005, Moses was the ORNL Lead Program Manager on DOE's Fissile Materials Disposition Program (FMDP), a program sponsored by the National Nuclear Security Administration (NNSA) Office of Fissile Materials Disposition (NA-26). Between January 10, 2004, and April 4, 2005, Moses sent 17 emails to various DOE officials and others regarding DOE contracting practices. In those emails, Moses referred to possible violations of the Foreign Corrupt Practices Act (FCPA), the Federal Acquisition Regulations (FAR), and the Department of Energy Acquisition Regulations (DEAR). Among the 17 emails was a February 2005 email to Bruno Sicard, a French representative to a multinational effort to modify Russian VVER-1000 reactors, in which Moses raised concerns that a Russian firm was impeding ORNL's ability to create contracts that did not violate the FCPA. IAD at 5. After learning of Moses' email to Sicard, Moses' NA-26 point of contact, Robert Boudreau, expressed concerns to Moses' manager, Dr. Lawrence J. Satkowiak, Director of ORNL's Nuclear Nonproliferation Office, regarding whether Moses should continue as Lead Program Manager of the FMDP. Subsequently, Moses was replaced as Lead Program Manager for the FMDP and he became a Senior Adviser to the Program.

After his change from Lead Program Manager to Senior Adviser for the FMDP, Moses sent a copy of the memorandum announcing the change to an NNSA employee at the DOE's Savannah River site, along with an email accusing his former NA-26 point of contact, Norman Fletcher, of

improper behavior in connection with the VVER-1000 project. *Id*. at 5-6. The NNSA employee forwarded Moses' email to Kenneth M. Bromberg, the NNSA Acting Deputy Administrator for Fissile Material Disposition. Ultimately, Bromberg decided that, given Moses' problems and "unsupported allegations" regarding NA-26 staff, NA-26 would no longer fund Moses' work. *Id*. at 6.

After losing his NA-26 funding, Satkowiak arranged for Moses to begin working on a project in the DOE's Reduced Enrichment for Research and Test Reactors (RERTR) program, sponsored by NNSA's Office of Global Threat Reduction (NA-21). *Id*. at 6. In September 2006, Moses exchanged emails with Charlie Allen at the University of Missouri Research Reactor Center (MURR) and George Vandergrift at Argonne National Laboratory (ANL) regarding the RERTR program. Those emails were copied to Satkowiak, Ralph Butler, MURR Director, and Parrish Staples, Moses' NA-21 point of contact, as well as others within ANL and ORNL. In a September 6 email, Moses harshly criticized Allen's and Vandergrift's research practices and alleged wasteful spending regarding the program. Following this email, Moses was placed on paid administrative leave for one week, without access to the ORNL computer system, and was issued a "disciplinary written warning" due to the unprofessional language and tone he used in addressing his colleagues in the September 6 email. Subsequently, NA-21 withdrew its funding of Moses' work. *Id*. at 9.

On October 5, 2006, Satkowiak sent Moses a memorandum which, among other things, reminded Moses that his position as a Senior Program Manager required him to secure funding for his time. The memo further stated that, if Moses did not secure alternate funding, his employment with ORNL would be terminated for failure to meet the performance requirements of his position. *Id*. On January 25, 2007, Moses received a rating of "Not Fully Contributing" on his 2006 performance assessment. Moses received a Performance Improvement Plan (PIP) on February 2, 2007, which emphasized his need to secure funding for his work and correct the behaviors which led to his loss of funding from NA-26 and NA-21. On February 25, 2007, Moses informed Satkowiak that he had not secured funding for work beyond March 2007. Consequently, Satkowiak referred Moses' case to an ORNL Suspension/ Termination Review Committee (STRC), with a recommendation that Moses's employment be terminated for lack of funding. On March 12, 2007, the SRTC determined that Satkowiak should offer Moses the option of early retirement and, if Moses declined that option, Satkowiak had the STRC's approval for termination. Moses elected early retirement. *Id*. at 10.

This matter was referred to OHA for an investigation followed by a hearing. An OHA investigator issued a Report of Investigation on October 2, 2007. 10 C.F.R. §§ 708.22, 708.23. Subsequent to the investigation, an OHA Hearing Officer held a hearing in this matter over a period of three days. During the hearing, the Moses testified on his own behalf and presented the testimony of two additional witnesses: an ORNL management employee and a DOE official. UT-Battelle presented the testimony of eight ORNL management employees.

After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the IAD that is the subject of this appeal.

II. INITIAL AGENCY DECISION

The IAD set forth the burdens of proof in cases brought under Part 708. The IAD stated that it is the burden of the complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation. 10 C.F.R. §§ 708.5, 708.29. The IAD further noted that if an employee meets this burden, the burden then shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's protected disclosure or activity. 10 C.F.R. § 708.29. The IAD considered the application of these elements to the Moses proceeding.

A. Protected Activity and Contributing Factor Analysis

The IAD noted that the Complainant's alleged protected disclosures fall into two categories: (1) the 2004-2005 emails regarding DOE contracting practices and (2) the September 6, 2006, email concerning alleged wasteful spending on the RERTR program. As to the first category of disclosures, the IAD found that the 2004-2005 emails, with the exception of the February 2005 email to Bruno Sicard, contained protected disclosures under Part 708. The IAD noted that UT-Battelle agreed that those emails contained protected disclosures. *Id*. at 11. The IAD further noted that the September 6, 2006, email contained information that the Complainant reasonably believed revealed a gross waste of funds. *Id*. at 13.

The IAD further noted that the Complainant alleged that three negative personnel actions were retaliations for his making protected disclosures: (1) in September 2006, he was placed on paid administrative leave for one week, with no access to his work computer or email during that time; (2) he was denied a merit increase as a result of an unsatisfactory fiscal year 2006 performance assessment, and (3) he was offered the choice between early retirement and termination in March 2007. *Id*. at 14.

Regarding whether the protected disclosures were a contributing factor to the alleged retaliations, the Hearing Officer found that the January 2004 - April 2005 emails were not a contributing factor in either the September 2006 decision to place Moses on paid administrative leave, or in his receipt of an unsatisfactory fiscal year 2006 performance appraisal and the resulting denial of a merit increase. *Id*. at 17-18. The Hearing Officer based this finding on the fact that the alleged retaliations took place approximately 17 months and 21 months, respectively, after the most recent protected disclosure in April 2005. Therefore, he found that a reasonable person could not conclude "that the April 2005 disclosure, and those that preceded it, were contributing factors in these two personnel actions." *Id*. at 17. However, the Hearing Officer determined that the 2004-2005 emails were a contributing factor in the STRC's decision to offer the Complainant the choice between early retirement or termination. The Hearing Officer based this finding on the temporal proximity between the time the STRC members made their decision, during the March 12, 2007, STRC meeting, and when they learned of the nature of the 2004-2005 emails, either on the day of the meeting or the business day preceding it. *Id*. at 19. Similarly, the Hearing Officer found that the September 6, 2006, email was a contributing factor to each of the three alleged retaliations noted above based solely on the temporal proximity between the email and when each of the alleged retaliations occurred. *Id*. at 15-16.

B. UT-Battelle's Affirmative Showing

The Hearing Officer analyzed each of the alleged retaliations in light of the protected disclosures and determined in the IAD that UT-Battelle established by clear and convincing evidence that it would have taken the same actions in the absence of Moses' protected disclosures. As an initial matter, the IAD noted that it is "the disclosure of particular information contained in a communication that is protected [under Part 708], not the communication itself." *Id*. at 20. Therefore, the Hearing Officer concluded that Moses' September 6, 2006, email contained protected disclosures, but the email as a whole was not protected. *Id*. This distinction is of particular importance in light of the reasons offered by UT-Battelle for the allegedly retaliatory actions taken against Moses. Those reasons are set forth below. In examining each of the three allegedly retaliatory actions taken against Moses, the Hearing Officer considered several factors, including: "(1) the strength of the employer's reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees." *Id*. at 20 (*citing Kalil v. Dep't of Agriculture*, 479 F. 3d 821, 824 (Fed. Cir. 2007)).

1. September 2006 Paid Administrative Leave and "Not Fully Contributing" Rating on 2006 Performance Assessment (and Resulting Denial of Merit Increase)

The Hearing Officer found that Satkowiak, Moses' manager, would have placed Moses on paid administrative leave in September 2006, and would have given him a "not fully contributing" rating on his 2006 performance assessment, even if the September 6, 2006, email had not contained protected disclosures.

The Hearing Officer found strong evidence in the record supporting UT-Battelle's assertion that its objection to the email was not anchored in any protected disclosures contained in the email, but rather was based solely on the tone and language used in the email to convey those disclosures. *Id*. at 21-22, 23. According to the Hearing Officer, the September 6, 2006, email "went well beyond being merely blunt, and became sarcastic and gratuitously insulting to his fellow scientists." *Id*. at 22. The IAD also noted that given the nature of the email, and the fact that Moses had already lost his funding from NA-26 the previous year, Satkowiak had ample reason to be concerned that the email "would be disruptive in its consequences, a concern that was proven to be well-founded when NA-21 decided later that month that it could no longer fund Moses' work." *Id*. Therefore, the Hearing Officer concluded that there were strong reasons for the decision to place Moses on paid administrative leave apart from his protected disclosures.

Similarly, the Hearing Officer found that Satkowiak had strong reasons for giving Moses a "not fully contributing" rating on his 2006 performance assessment. The basis for this rating was Moses' "inability to interact professionally with [the] NNSA/NA-20 sponsors," as well as his inability to secure alternate funding for his time after losing both his NA-26 and NA-21 funding.[2] *Id*. at 23. The Hearing Officer concluded that Satkowiak's assessment that Moses was unable

[2] NNSA's Office of Defense Nuclear Nonproliferation, NA-20, is comprised of seven program offices, including NA-26 and NA-21.

to "interact professionally" was based on the manner and tone he used in presenting his disclosures in the September 6, 2006, email, not on the disclosures themselves. Similarly, the Hearing Officer found that Satkowiak's comments in the assessment pertaining to Moses' inability to secure funding for his time were well-founded given that by the time the performance assessment was prepared, Moses had alienated two of the "primary sources of potential funding," NA-26 and NA-21. *Id.*

In addition, the Hearing Officer found no evidence of any motive on the part of Satkowiak, or UT-Battelle, to retaliate against Moses for making protected disclosures by placing him on administrative leave or giving him a less than favorable rating on a performance assessment. The IAD noted that the disclosures were not critical of Satkowiak or ORNL. Rather, the disclosures pertained to "officials at other DOE laboratories and at DOE headquarters." *Id.* at 22. Finally, the IAD noted that UT-Battelle had not presented evidence of similar actions against similarly situated employees. Citing *Kalil* and *Carr v. Social Security Administration*, the Hearing Officer found, however, that an employer can meet its evidentiary burden despite the lack of such evidence. *Id.* at 22, 24; *see also Kalil*, 479 F.3d at 825; *Carr v. Soc. Security Admin.* 185 F.3d 1318, 1326-27 (Fed. Cir. 1999) .

2. Decision of STRC to Offer Moses Choice of Early Retirement or Termination

Applying the three factors listed above, the Hearing Officer determined that the STRC would have made the same decision in the absence of Moses' protected disclosures. The Hearing Officer found, based on the evidence in the record, that the basis for the STRC's decision was Moses' inability to secure funding for his time. The IAD noted that, when the STRC met to discuss Moses' case, five months had passed since he lost his NA-21 funding, and his prospects for securing funding in the future "were dim." *Id.* at 26. As with the allegedly retaliatory actions discussed above, the Hearing Officer found no motive on the part of the STRC to retaliate against Moses, given that the targets of the disclosures were not ORNL or any of the STRC members, but rather were officials at other DOE laboratories and DOE headquarters. *Id.*

Finally, the Hearing Officer considered the evidence presented by UT-Battelle of its similar treatment of similarly situated employees. Among that evidence was a document showing that nine other ORNL employees who were expected to secure funding for their time like Moses were ultimately terminated after failing to do so. The length of time between when those employees lost their funding and the date their employment was terminated ranged from "zero to seven and one-half months, and average[ed] approximately three and one-half months." *Id.* at 27. Moses was offered the choice between early retirement and termination approximately five months after losing his NA-21 funding. *Id.* at 25. Based on these factors, the Hearing Officer concluded that, due to Moses' lack of funding and lack of prospects for future funding, the STRC would have offered him the choice between early retirement and termination absent his protected disclosures.

III. ARUGUMENTS ON APPEAL AND ANALYSIS

Moses appealed the Hearing Officer's findings in the IAD and filed a statement identifying the issues that he wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding and a subsequent supplement to that statement (hereinafter "Moses Statement of Issues" and "Supplementary Statement," respectively). UT-Battelle filed a response to the Moses Statement of Issues.[3] 10 C.F.R. § 708.33. In addition, UT-Battelle appealed a portion of the IAD, Section I. C., and submitted a statement of issues supporting its appeal (hereinafter "UT-Battelle Statement of Issues"). Moses did not file a response to UT-Battelle's appeal. *Id*.

A. Moses' Appeal of Initial Agency Decision

On appeal, Moses does not specifically challenge any of the Hearing Officer's findings regarding whether his disclosures were a contributing factor to the retaliations and whether UT-Battelle satisfied its burden under Part 708. Rather, Moses alleges that the Hearing Officer's findings in the IAD overstep the regulatory limitations placed on OHA by various statutes. Moses Statement of Issues at 1. In his Statement of Issues, Moses argues:

> The [IAD] exceeds its statutory mandates in excusing the actions taken by UT-Battelle … the [IAD] fails to provide remedies both as required by law and in likely violation of the equal protection and due process provisions of civil rights law based on the manner in which the statutory authorization for 10 C.F.R. Part 708 has been reinterpreted to excuse the contractor for improper, noncompliant[,] if not illegal[,] acts.

Id. at 7. Essentially, Moses' Statement of Issues and Supplementary Statement can be distilled down to one principal argument: OHA's interpretation of 10 C.F.R. § 708.29, which sets forth the burdens of proof of the parties in a Part 708 proceeding, exceeds its authority by violating provisions of various statutes. *See* Moses Statement of Issues at 1; Supplementary Statement at 2. According to Moses, having found that he satisfied his burden of demonstrating that he made protected disclosures which were a contributing factor to an alleged retaliation, the Hearing Officer had no choice but to grant Moses relief. Moses Statement of Issues at 4. He further argues that the only issue for the Hearing Officer to decide was whether his complaint was frivolous. If he found that the complaint was not frivolous, Moses contends, the Hearing Officer was required to grant him relief. *Id*. at 6. This argument is completely inconsistent with any reasonable interpretation of the Part 708 regulations.

Part 708 was promulgated pursuant to the broad authority granted to DOE by the Atomic Energy Act of 1954 and the Department of Energy Organization Act to implement rules and regulations as necessary or appropriate to protect health, life and property. 57 Fed. Reg. 7533 (March 3, 1992). As stated above, the program's primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those employees from consequential reprisals by their employers. Section 708.29

[3] It is unnecessary in this case to set out the specifics of the response, some of which are incorporated into my analysis below.

states that after a complainant has satisfied his or her Part 708 burden, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's [protected conduct]." 10 C.F.R. § 708.29. OHA's interpretation and application of Part 708 – specifically, the burdens of proof set forth in section 708.29 – are well-settled case law. *See Franklin C. Tucker*, Case No. TBA-0023 (2007); *Gilbert J. Hinojos*, Case No. TBA-0003 (2005); *Janet Westbrook*, Case No. VBA-0089 (2002).

Essentially, under section 708.29, a complainant has the burden of establishing a *prima facie* case of retaliation. The burden then shifts to the contractor to rebut the complainant's *prima facie* case. Contrary to Moses' assertions, the inquiry does not end after a complainant has made his or her showing under Part 708. The language of section 708.29 is clear – the contractor has the opportunity to rebut the complainant's showing, by demonstrating that it would have taken the same action absent any protected conduct. Moses has presented no evidence which persuades us that our long-standing precedent in this regard is improper, and we see none.

We find no error in the Hearing Officer's application of section 708.29 in this case. After concluding that Moses satisfied his Part 708 burden, the Hearing Officer then examined the contractor's evidence. The Hearing Officer weighed the evidence and testimony and was persuaded that the contractor would have taken the same action absent Moses' protected disclosures. Moses presented no evidence indicating that any of the Hearing Officer's findings on this issue are clearly erroneous, and we find none on our review of the record. Consequently, we find nothing in the record which would cause us to set aside the Hearing Officer's findings in the IAD.

Moses also argues that the Hearing Officer denied him "access during the hearing to witnesses who could corroborate the truth of my disclosures…" Moses Statement of Issues at 7. This argument is completely baseless. Part 708 does not impose on complainants the burden of establishing the truth of their protected disclosures. Rather, in order to satisfy his or her Part 708 burden, a complainant must show that they disclosed information which they *reasonably and in good faith* believed revealed, *inter alia*, fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a).[4]

In this case, the Hearing Officer did not hear testimony from witnesses whose sole purpose, according to Moses, would be to attempt to establish the truth of his protected disclosures. Such testimony was irrelevant here, there being no dispute that Moses made disclosures or as to the reasonableness of his belief that the disclosures revealed information protected under Part 708. To include it would have been an unnecessary waste of time and resources. Accordingly, we find no error in the Hearing Officer's decision to exclude the testimony of these witnesses at the hearing.

Based on the foregoing, we find that Moses has not brought forth any evidence indicating an error in the IAD warranting reversal of the Hearing Officer's findings.

[4] In some Part 708 proceedings, evidence purporting to establish the truth of a complainant's disclosures might be relevant. For instance, in a case where there is a dispute regarding a complainant's reasonable belief that his disclosures revealed protected information, as set forth in section 708.5, evidence as to the truth of those disclosures may be useful in helping the complainant meet his evidentiary burden on that issue.

B. UT-Battelle's Appeal of Section I. C. of the Initial Agency Decision

Claiming attorney-client privilege, UT-Battelle redacted material from the following documents submitted at the hearing: Exhibit A and the portion of Exhibit 22 marked "Attorney-Client Privilege 0002."[5] After an *in camera* review of the unredacted versions of those documents, the Hearing Officer determined that they were not shielded by the attorney-client privilege. Therefore, he ordered that "unless UT-Battelle file[d] a notice of appeal by the fifteenth day after its receipt of [the IAD], a copy of the information [he found was] not protected [would] be released to the complainant." *Id*. at 4. UT-Battelle has appealed the Hearing Officer's ruling pertaining to the release of the redacted documents. UT-Battelle disagrees with the Hearing Officer's interpretation and application of the privilege to the documents in question, and cites various cases in support of its position.

We have reviewed the redacted information *de novo*. We find that it is irrelevant to any of the arguments presented during the hearing or on appeal, and its release would not change the findings and ultimate result in the IAD. In this regard, the Hearing Officer noted that even if he had considered all of the redacted information as evidence, he would have reached "the same relevant legal conclusions and the same ultimate decision" he reached without considering the redacted information. *Id*. at 29, n. 17. Further, as stated above, Moses did not file a response to UT-Battelle's appeal on this issue. We are unable to discern any way that release of the withheld information could have changed either the result of the IAD or the outcome of this appeal. Therefore, the issue of whether the information is shielded by the attorney-client privilege, and consequently whether it should be released, is moot and we need not reach it here. Accordingly, UT-Battelle will not be required to comply with ordering paragraph (2) in the IAD, which requires release of the unredacted copies of the exhibits at issue.

IV. CONCLUSION

As is clear from the discussion above, Moses' appeal of the IAD turns not on any factual disputes, but rather on a disagreement with OHA's interpretation and application of the Part 708 regulations. As stated above, OHA's interpretation and application of the Part 708 regulations are well-settled case law and nothing in Moses' appeal convinces us that our established precedent on this issue is improper. Therefore, we find no error in the Hearing Officer's consideration of the evidence presented by UT-Battelle to satisfy their evidentiary burden under Part 708. Accordingly, we will deny Moses' appeal of the IAD. In addition, we find the issue of whether the redacted portions of two exhibits submitted at the hearing are shielded by the

---

[5] Exhibit A, is a record of the STRC meeting convened to consider Moses' case. It contains three separate portions redacted by UT-Battelle pursuant to the attorney-client privilege. The first redaction contains advice from UT-Battelle's in-house counsel about including the requirement that an employee secure funding for his or her time in performance improvement plans intended to address funding deficiencies. The second redaction pertains to the in-house counsel's opinion regarding whether the amount of time Moses was afforded to secure alternate funding was reasonable. Finally, the third redaction concerns the in-house counsel's advice regarding potential legal consequences should the STRC decide to terminate Moses' employment. The portion of Exhibit 22 marked "Attorney-Client Privilege 0002" is an email from the UT-Battelle in-house counsel to an ORNL official regarding Moses' protected disclosures.

attorney-client privilege is moot. Therefore, UT-Battelle will not be required to release unredacted copies those documents.

It Is Therefore Ordered That:

(1) The appeal filed by David L. Moses on September 8, 2008 (Case No. TBA-0066), of the Initial Agency Decision issued on September 3, 2008, be and hereby is denied.

(2) UT-Battelle shall not be required to comply with ordering paragraph (2) of the Initial Agency Decision, which required release of unredacted copies of Exhibit A and the portion of Exhibit 22 marked "Attorney-Client Privilege 0002."

(3) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 18, 2008

December 18, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Case:	Gary S. Vander Boegh Weskem, LLC Bechtel Jacobs Company, LLC
Date of Filing:	May 9, 2007
Case Number:	TBA-0069

This Decision considers three Appeals of an Initial Agency Decision (IAD) issued on July 11, 2003, involving a complaint filed by Gary S. Vander Boegh under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his Complaint, Vander Boegh claimed that his former employer, Weskem, LLC (Weskem) and the contractor that employed Weskem, Bechtel Jacobs Company, LLC (Bechtel), retaliated against him for making disclosures that were protected by Part 708.[1] In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that some of Vander Boegh's disclosures were protected. He also found that with regard to some of Bechtel and Weskem's personnel actions, the firms had failed to demonstrate by clear and convincing evidence that they would have taken these personnel actions in the absence of the protected disclosures. In the IAD, the Hearing Officer ordered Weskem and Bechtel to undertake a number of actions to mitigate the retaliatory personnel actions. Weskem and Bechtel each filed appeals from the IAD. Because the Hearing Officer did not grant all of the relief requested, Vander Boegh also appealed the decision. The three appeals are consolidated for review, and have been assigned a single case number by OHA, Case No. TBA-0069.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their

[1] Bechtel was the Management and Integration contractor at the DOE's Paducah, Kentucky, facility at the time of the alleged retaliatory activities.

employers. Thus, contractors found to have retaliated against an employee for such a disclosure, or for participating in a related proceeding, will be directed by the DOE to provide relief to a complainant.

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by Vander Boegh, Weskem and Bechtel in the present Appeals, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding and General Background

The events leading to the filing of the instant Complaint are fully set forth in the IAD. *Gary S. Vander Boegh* (Case No. TBH-0007), 28 DOE ¶ 87,040 (2003) (*Vander Boegh I*).[2] For purposes of the current appeal, the relevant facts are as follows.

Vander Boegh was a landfill manager at the DOE's Paducah facility from 1992 to the date of his termination, April 23, 2006. At the time of his Part 708 complaint, Vander Boegh was the manager of the C-746-U Landfill (U Landfill), a sanitary/industrial landfill located three miles from the DOE's Paducah facility. The U Landfill was constructed by DOE to dispose of solid waste. In 1998, DOE contracted with Bechtel to be the management and integration contractor responsible for environmental management of the DOE's Paducah facility. At that time, Vander Boegh became a Bechtel employee. In February 2000, Bechtel subcontracted the operation of the U Landfill to Weskem and Vander Boegh then became a Weskem employee.

Beginning on February 2, 2001, Vander Boegh sent several E-mails to officials at Weskem and Bechtel identifying the lack of reserve leachate (groundwater) tank space as a potential problem that could affect the operation of the landfill.[3] On March 4, 2001, Vander Boegh sent an E-mail to two Weskem officials entitled "C-746-U Leachate Issues." In this message, Vander Boegh identified problems with the lack of storage capacity in the groundwater tanks, the lack of groundwater transfer equipment and the potential risk to the landfill's 2001 operating permit if remedial action wasn't taken. Subsequently, Vander Boegh experienced a number of personnel actions he believed were motivated by his disclosures. Eventually, Vander Boegh filed a Part 708 complaint on January 4, 2002. [4]

---

[2] The Hearing Officer decision will be referred to either as the IAD or *Vander Boegh I*.

[3] The U Landfill generates groundwater under the landfill itself and this groundwater is pumped to storage tanks for later disposal. The regulatory authority for the Commonwealth of Kentucky, the Kentucky Division of Waste Management (KDWM), issued a permit in February 2001 for the U Landfill. The permit specified that the groundwater tanks must have enough space to store groundwater for 15 days at U Landfill's peak production rate. Additionally, the permit required that enough groundwater must be continually removed from the tanks so that at all times the tanks have the capacity to store another 8 days production of groundwater from the landfill (8-day reserve requirement).

[4] When Vander Boegh submitted his whistleblower complaint, the Employee concerns manager dismissed his complaint for lack of jurisdiction on April 21, 2003. Vander Boegh appealed and in considering the appeal, OHA decided that, in fact, jurisdiction existed to allow the employee concerns manager to continue to process the case. *Gary S. Vander Boegh*, 28 DOE ¶ 87,038 (2003).

The Hearing Officer conducted a hearing on March 4-6, 2003, concerning Vander Boegh's whistleblower complaint.[5] In his July 11, 2003 IAD, the Hearing Officer found that Vander Boegh's February 2, 2001 E-mail to two Weskem officials detailing potential problems with groundwater storage and transfer was protected under 10 C.F.R. Part 708. He further found that none of Vander Boegh's claims of retaliation were barred due to a lack of timeliness.

The Hearing Officer then analyzed the alleged retaliations. The Hearing Officer found that the following personnel actions were retaliatory[6]:

> 1. A March 5, 2001, memorandum from Mr. Dan Watson, a project manager at Weskem regarding the priorities that should be given to various functions of Vander Boegh's employment and warning Vander Boegh about excessive E-mails;
> 2. The Weskem and Bechtel decision to halt construction of an office trailer at the U Landfill site for Vander Boegh;
> 3. Weskem's August 2001 proposal to relocate Vander Boegh's office to the Paducah Plant site;
> 4. Bechtel's proposal to DOE for contract changes (Option A) that would have transferred Vander Boegh's position from Weskem to Bechtel;
> 5. Weskem's low rating of Vander Boegh in several performance categories and critical remarks contained in his 2001 performance review.

To remedy the retaliatory actions taken against Vander Boegh, the Hearing Officer found that Vander Boegh was entitled to the following remedial actions:

> 1. Removal of the March 5, 2001, memo from Vander Boegh's personnel file;
> 2. An Order mandating the construction of an office trailer at the U-Landfill;

---

[5] As an initial matter, before the hearing, the Hearing Officer found that he could not provide a remedy for longstanding salary differences between Vander Boegh and similarly situated employees that predated his protected disclosures. The Hearing Officer also determined that he would not consider claims regarding the inadequacy of Vander Boegh's support staff or the deficiencies of Vander Boegh's office space that existed prior to the alleged protected disclosures discussed *Vander Boegh I*, 28 DOE at 89,281.

[6] The Hearing Officer found that the "aggressive" actions and threats and intimidation taken by Bechtel and Westkem employees towards Vander Boegh did not merit a full determination whether the actions were retaliatory, since Bechtel had counseled the employee responsible for three of the specific acts of threats and intimidation against Vander Boegh and thus there was no need for Part 708 relief. *Vander Boegh I*, 28 DOE at 89,291-92.

3. An Order that Vander Boegh's primary office not be moved from the U-Landfill site for a period of one year without the permission of Vander Boegh;
4. An Order prohibiting Bechtel from recommending any change with respect to Vander Boegh's job for a period of one year without the permission of Vander Boegh;
5. Removal of the 2001 Performance Appraisal from Vander Boegh's personnel file;
6. Preparation of a list of litigation expenses incurred by Vander Boegh;
7. An Order requiring Weskem and Bechtel to pay the litigation expenses detailed in the schedule of litigation expenses prepared by Vander Boegh.

Bechtel and Weskem appealed the IAD. Vander Boegh also filed an appeal claiming that the Hearing Officer had failed to address the issue of whether or not the negative March 5, 2001 memo and the below-average ratings in certain performance categories adversely affected Vander Boegh's pay raise for that year. *See Vander Boegh's Limited Appeal of Order*, Case No. TBH-0007 (August 4, 2003).

On March 19, 2003, during the pendency of the appeal, Vander Boegh filed a second complaint with DOE (Complaint No. 2). *See* Employee Concerns Reporting Form (received March 19, 2003). In Complaint No. 2, Vander Boegh alleged that Bechtel employees had interfered with his ability to perform his proper duties as a Landfill manager in retaliation for his Part 708 complaint. He also alleged that he was improperly forced by Bechtel officials to sell the Lockheed-Martin stock in his 401(k) retirement plan in retaliation for his Part 708 activities.

In an agreement dated January 4, 2004, Vander Boegh and Bechtel settled Vander Boegh's Complaint No. 2. *See Settlement Agreement and Full and Final Release of Claims.* In the Settlement Agreement, Bechtel agreed to undertake a number of actions with regard to the Vander Boegh's job and working conditions in exchange for Complainant's agreement to withdraw Complaint No. 2 and release Bechtel from liability related to that particular complaint.

On February 21, 2006, Vander Boegh filed another whistleblower complaint and later submitted two supplements to the complaint (collectively "February 21 Complaint"). The February 21 Complaint first alleges that Bechtel breached several provisions of the Settlement Agreement relating to an inquiry Bechtel agreed to make concerning Vander Boegh's liquidation of his Lockheed Martin stock and Bechtel's failure to submit disclosure statements that would have identified him as "Landfill Manager" to the KDWM. Vander Boegh alleges that as a result he was thus subject to intimidation by Bechtel and Paducah Remedial Services (PRS), the new M&I contractor at the DOE's Paducah facility, in an effort to accept waste in violation of the DOE waste acceptance criteria and the Commonwealth of Kentucky's administrative regulations. Vander Boegh also alleged that Bechtel had failed to honor a provision in the Settlement Agreement whereby Bechtel employees were forbidden to disapprove WESKEM recommendations for promotions or salary increases for Vander Boegh. In this regard, the Complaint alleged that he had been informed that his continued employment was not guaranteed when PRS and a new subcontractor, Duratek, took over operations at the DOE's Paducah facility. Vander Boegh alleged that he was informed that he could not attend a work force transition meeting, but as a subcontractor employee was offered an opportunity to attend

a "retirement session." Vander Boegh believed that he was being marked for termination due to his Part 708 activities.

Vander Boegh was subsequently terminated from his position on April 23, 2006. On April 14, 2006, Vander Boegh filed a complaint with the Occupational Safety and Health Administration (OSHA) of the United States Department of Labor. This complaint accused Bechtel, Weskem, PRS, Duratek and the DOE of violations of various environmental statutes and alleged the same facts as his February 21 Complaint. On July 13, 2006, the Regional Administrator of OSHA issued findings concerning the April 14, 2006 OSHA Complaint. In her findings, the Regional Administrator found that Weskem, Bechtel and DOE provided clear and convincing evidence that they had not engaged in a conspiracy to take adverse action against Vander Boegh and that PRS and Duratek had provided clear and convincing evidence that they would have hired another landfill manager notwithstanding Vander Boegh's raising safety concerns or filing complaints against them.[7] *See* July 13, 2006, Determination Letter from OSHA to Gary S. Vander Boegh at 4.

On June 29, 2006, the DOE's Environmental Management Consolidated Business Center (EMC) dismissed Vander Boegh's February 21 Complaint for lack of jurisdiction. EMC determined that the February 21 Complaint should be dismissed under 10 C.F.R. § 708.17(c)(3), which provides for dismissal of Part 708 claims for lack of jurisdiction if an individual files a complaint under state or other applicable law with respect to the same facts as those alleged in the 708 complaint. EMC found that Vander Boegh's April 14, 2006, OSHA complaint alleged the same facts as his February 21 Complaint. Vander Boegh then filed an appeal of EMC's dismissal with OHA. In an August 3, 2006 decision, OHA, after examining the DOL's determination of Vander Boegh's complaint, affirmed EMC dismissal of the February 21 complaint, citing 10 C.F.R § 708.17(c)(3). [8] *Gary S. Vander Boegh* (Case No. TBU-0049), 29 DOE 87,010 (2006) (*Vander Boegh II*).

After *Vander Boegh II* was issued, the Acting Director of the OHA, Fred L. Brown, sent a letter to the parties, dated February 1, 2007, in which he ordered the parties to show cause why all of the appeals of *Vander Boegh I* should not be dismissed. The Acting Director stated that, in light of recent events, namely, the change in M&I contractor and subcontractor, rendering the workplace relief granted in *Vander Boegh I* moot and the findings in regard to Vander Boegh's OSHA complaint that held that Vander Boegh's discharge was not retaliatory, dismissal of all appeals might be appropriate. Vander Boegh filed a response to the show cause letter on February 14, 2007.

On February 22, 2007, the Acting Director subsequently issued a Decision regarding all appeals in this matter. *Gary S. Vander Boegh* (Case No. TBA-0007), 29 DOE ¶ 87,018 (2007). The Decision

---

[7] Vander Boegh has appealed this decision and a hearing concerning his OSHA complaint is scheduled for February 26-29, 2008.

[8] The decision noted that there were some alleged retaliations that were not explicitly considered by the DOL but that these retaliations were not of the type that Part 708 was designed to remedy. Additionally, with regard to a claim of retaliation in being forced to sell his Lockheed-Martin stock, the decision found that there was "no meaningful direct relationship" between the stock sale and an adverse personnel action against Vander Boegh. *Vander Boegh II*, 29 DOE at 89,048.

dismissed all of Vander Boegh's whistleblower claims. Subsequently, however, on May 10, 2007, the Acting Director withdrew this Decision because he had been the investigator of Vander Boegh's original whistleblower complaint. To be addressed in this Decision are the appeals by the parties of *Vander Boegh I.*

II. Analysis

Under the Part 708 regulations pertaining to whistleblower hearings, Vander Boegh has the burden of establishing by a preponderance of the evidence that he made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal. *See* 10 C.F.R. § 708.29.

A Hearing Officer's findings of fact are entitled to deference unless they are clearly erroneous. *Kaiser-Hill Company, L.L.C.*, 27 DOE ¶ 87,555 (2000); *Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,510 at 89,001 (1995). With regard to a Hearing Officer's conclusions of law, these are subject to *de novo* review. *Salvatore Gianfriddo*, 27 DOE ¶ 87,544 at 89,221 (1991); *see Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

A. Preclusive effect of Vander Boegh's OSHA complaint on this Appeal

Section 708.17 provides that the Employee Concerns Manager may dismiss a complaint if "[Vander Boegh] filed a complaint under State or other applicable law with respect to the *same facts* as alleged in a complaint under this regulation." 10 C.F.R. § 708.17 (emphasis added). In the current case, the Employee Concerns Manager dismissed the February 21 Complaint on this ground and OHA affirmed the Manager's decision. *See Vander Boegh II.* Vander Boegh's April 14, 2006, OSHA Complaint, however, does not reference the alleged breaches of the Settlement agreement. Nevertheless, Vander Boegh's remedy for a breach of the contractual provisions of the Settlement Agreement lie in civil court, not a DOE whistleblower administrative proceeding. Thus any complaints about a breach of the Settlement Agreement are also dismissed.

Nevertheless the April 14, 2006, OSHA complaint does not pre-empt consideration of the original whistleblower complaint decided in *Vander Boegh I*. Vander Boegh's April 14, 2006, OSHA complaint does not reference any of the whistleblower retaliations or the underlying facts or allegations cited by Vander Boegh that were decided in the March 2003 whistleblower hearing. The April 14, 2006, OSHA Complaint involves facts and circumstances immediately leading up to Vander Boegh's dismissal in 2006, not the retaliations that took place in 2001-2002. Consequently, I find that Vander Boegh's April 14, 2006, OSHA Complaint does not share the same facts as his original whistleblower complaint. Therefore, *Vander Boegh I* is not precluded from consideration on appeal.

B. Vander Boegh I

1. Timeliness of Vander Boegh's Part 708 Complaint

Weskem and Bechtel specifically challenge the Hearing Officer's finding that Vander Boegh's original Part 708 complaint was not time barred by the provisions of Section 708.14. This section provides that an employee must file a complaint by the 90th day after the date he knew or should have reasonably known of the retaliation. 10 C.F.R. § 708.14. Weskem asserts that Vander Boegh filed his Part 708 complaint in January 2002. However, the first alleged retaliatory act claimed by Vander Boegh was the issuance of a memo on March 5, 2001, approximately nine months from the date the complaint was filed. Similarly, the proposal in August 2001 to move Vander Boegh from the U Landfill as well as Weskem's decision in March 2001 to halt construction of an office trailer for Vander Boegh at the U Landfill occurred long before the complaint was filed. Further Weskem argues that Vander Boegh sent Seaborg an August 3, 2001, E-mail in which he states, "I feel I am being attacked on all fronts." Vander Boegh Exhibit K. Consequently, Weskem argues that Vander Boegh must have believed he was experiencing retaliation by August 3, 2001. Weskem goes on to argue that, since Vander Boegh must have known about the retaliation on that date, Vander Boegh's complaint should have been time barred with respect to all of the retaliatory acts found by the Hearing Officer in *Vander Boegh I* described above with the exception of the 2001 performance review.

In his Decision, the Hearing Officer found that none of these retaliations was so obviously adverse in nature that a reasonable person would have known it was retaliatory in nature and that Vander Boegh did not realize the retaliatory nature of these actions until shortly before he filed his Part 708 complaint in January 2002. *Vander Boegh I*, 28 DOE at 89,284. The Hearing Officer found that while Vander Boegh did not view the retaliatory actions as "neutral or innocent" employment actions, the actions themselves were not so overtly punitive in nature that a "reasonable person should have known they were Part 708 retaliations when they occurred." *Vander Boegh I*, 28 DOE at 89,283. Specifically, the Hearing Officer noted that Vander Boegh's response to the March 5, 2001, memo did not indicate that Vander Boegh thought the memo was hostile. Nor could the Hearing Officer find anywhere in the record where Vander Boegh considered the termination of construction of an office trailer retaliation. The Hearing Officer determined that the only evidence as to the date Vander Boegh knew he was being retaliated against was contained in Vander Boegh's January 4, 2002, complaint. The Hearing Officer found that the weight of the evidence indicated that Vander Boegh did not recognize that the various actions taken against him were retaliations until shortly before he submitted his complaint. *Vander Boegh I*, 28 DOE at 89,284. Further, the Hearing Officer concluded that a reasonable person would not have recognized these actions as being Part 708 retaliations until January 2002.

My examination of the record indicates that there is significant evidence to conclude that Vander Boegh in fact must have subjectively known or should have reasonably believed the personnel actions taken were retaliations. Vander Boegh testified as to his feelings when he received the March 5 memorandum on March 5, 2001:

> Well, his tone of his letter was, in my opinion at that point, an attempt to say and put

> in a negative file - begin a negative file on me. And, so, I stopped him, I said, before - would you mind if I read the letter myself? Because I could see that he was beginning to develop a negative file on what was happening.

Tr. at 85.[9] Even before he received this memorandum, Vander Boegh testified, he felt "threatened" by a prior March 4, 2001, E-mail from Watson. Tr. at 84; *see* Vander Boegh Exhibit I. Vander Boegh's response to the March 5 memorandum complains that the memorandum contains "so many inaccuracy and innuendo [sic]." Administrative Record (AR) at 16.

With regard to the proposal to remove him from the U Landfill site, in an August 2, 2001, E-mail Vander Boegh asks:

I respectufully request an explanation of why this move is being proposed by Weskem, especially at this time of great importance affecting the overall ability for
DOE to accept waste.

Vander Boegh Hearing Exhibit J. The question itself indicates that Vander Boegh suspected that the motivation for the proposed move was improper. In an E-mail on August 3, 2001, to Seaborg, in which he references the proposal to move him, Vander Boegh states "I feel I'm being attacked on all fronts, due to a lack of understanding of others (not DOE)." Vander Boegh's Exhibit K. Given the evidence in the record, I believe that the Hearing Officer's determination that Vander Boegh did not realize that he was being retaliated against until shortly before he filed his complaint on January 4, 2002, is clearly erroneous. I find that Vander Boegh reasonably should have known that he was being retaliated against beginning on March 5, 2001. *Cf. Steven F. Collier*, 28 DOE ¶ 87,036 (2002) (Hearing Officer, after examining factual evidence, finds that whistleblower failed to demonstrate that he did not know or could not have reasonably known that an act constituted retaliation). As such, all of the actions that the Hearing Officer determined to be retaliatory should have been barred from consideration with the exception of the 2001 performance review which was issued to Vander Boegh on April 4, 2002. [10]

2. Vander Boegh's 2001 Performance Evaluation by Weskem

[9] Vander Boegh testified concerning the March 5 memorandum "I took this letter and took it to my attorneys, because it bothered me that I received this letter after also getting that Sunday afternoon e-mail." Tr. at 202.

[10] I also note that, with regard to Bechtel's liability, the Hearing Officer found that Bechtel had not met its burden to avoid liability, because it had failed to show that it proposed Option A knowing that it would not have adversely affected Vander Boegh. *Vander Boegh I slip op.* at 34. This analysis misapplies the standard given in Section 708.2. To find liability for Bechtel, the Hearing Officer should have determined whether Bechtel had shown by clear and convincing evidence *that it would have proposed Option A* to DOE notwithstanding Vander Boegh's protected disclosures. The state of Bechtel officials' knowledge as to the potential harm to Vander Boegh or whether Vander Boegh, in fact, would have been harmed is irrelevant to this determination. While the Hearing Officer's analysis started with a statement of the correct standard, he did not use that formulation of the standard in his analysis. Had I not found that the claim against Bechtel was time barred, I would have remanded this issue to the Hearing Officer so that he might make a specific finding using the correct standard.

The sole remaining basis for finding that Weskem retaliated against Vander Boegh is Vander Boegh's 2001 Performance evaluation by Weskem. The Hearing Officer determined in *Vander Boegh I* that Vander Boegh's previous two performance evaluations in 1998 and 1999, issued by Bechtel, were complimentary of his work. *Vander Boegh I*, 28 DOE at 89,294. These evaluations did not contain overall numeric and descriptive ratings. The Weskem 2001 performance evaluation of Vander Boegh gave him an overall rating of "Fully Satisfactory." AR at 597-600. Nine specific performance ratings were rated as "needs improvement" and were rated as a "3" on a scale from "1"- marginal to "9" - "Distinguished." *Vander Boegh I*, slip op. at 36. The Hearing Officer also cited a critical narrative passage written by the evaluator concerning Vander Boegh's ability to work with others. *Vander Boegh I*, 28 DOE at 89,295. The Hearing Officer found that Vander Boegh had met his burden to show that he had suffered a negative personnel action and that his protected disclosures were a contributing factor to that action. Specifically, the Hearing Officer noted that the evaluation was written during the pendency of Vander Boegh's Part 708 complaint. *Vander Boegh I*, 28 DOE at 89,295.

The Hearing Officer went on to find that Weskem had failed to show by clear and convincing evidence that it would have given Vander Boegh the same ratings notwithstanding his protected disclosures. While Weskem presented evidence that its evaluation system was totally different from the prior Bechtel system, testimony from Vander Boegh's Weskem supervisor that the review was an "average review overall," and testimony from the general manager of Weskem expressing his dislike of grade inflation, the Hearing Officer found that Weskem provided insufficient evidence to meet the "clear and convincing" standard. Specifically, the Hearing Officer found that Weskem had failed to demonstrate that Vander Boegh's job performance had actually deteriorated significantly in the areas cited in the 2001 evaluation. *Vander Boegh I*, 28 DOE at 89,295. Additionally, he found that Weskem had failed to produce evidence that other employees with similar performance problems had received similar ratings in their reviews.

On appeal, Weskem argues that it is not appropriate to compare different rating systems. Further, it argues that the Hearing Officer ignored the fact that Vander Boegh's supervisor had to intercede in a number of incidents where Vander Boegh and another individual had "heated discussions" and that the supervisor had to "counsel" Vander Boegh. With regard to the Hearing Officer's opinion that Weskem would have to show that Vander Boegh was treated the same as other employees with similar performance problems, Weskem argues that no other Weskem employee had performance problems similar to Vander Boegh's. Weskem also asserts that even if all of the nine performance ratings cited areas cited by the Hearing Officer as potentially affected by his disclosure were scored as high as possible, the overall score would not have been sufficient to push Vander Boegh to the next higher level of performance evaluation, "Commendable."

After examining the record, I believe that Weskem has provided compelling arguments for me to reverse the Hearing Officer's finding of retaliation regarding the 2001 performance evaluation. An examination of Vander Boegh's 2001 Performance Evaluation Form indicates that Vander Boegh was rated on 12 areas of performance each containing 5 sub-elements which the evaluator could rate from 1 to 9 as described above. A numerical score for each area was obtained by totaling the sub-element scores and dividing by 5. The area scores were added together to obtain an overall score which was used to determine the overall performance rating. For example, a overall score of 46 to

81 would result in an employee receiving a rating of "Fully Satisfactory." AR at 600. Vander Boegh's overall score was 55.4. Even if each of the nine alleged retaliatory lower rated sub-element (each rated as a "3") had been rated instead at "9," the highest score possible, Vander Boegh's overall score would have been 66.2 points, which would not have resulted in a higher overall rating. Vander Boegh would have still only been rated "Fully Satisfactory." Consequently, assuming that Weskem retaliated against Vander Boegh in this manner, Weskem has demonstrated that this retaliation caused no harm to the Complaint's overall rating or pay raise for that year.

3. Vander Boegh's Appeal

Vander Boegh's Appeal argues that the Hearing Officer failed to consider the negative effect that the March 5, 2001, Memo and the 2001 Performance evaluation had on Vander Boegh's pay raise for that year. *See Vander Boegh's Limited Appeal Issue (Case No. TBH-0007)* (August 4, 2003). This argument is unavailing. Even assuming that the Hearing Officer improperly failed to consider these retaliation's effect on Vander Boegh's pay raise and future pay, such an error would be harmless in this case. As demonstrated above, Weskem has demonstrated that the alleged retaliation concerning the 2001 Performance evaluation did not affect Vander Boegh's pay raise. Further, the testimony presented at the hearing indicated that the March 5, 2001, memo was never a part of Vander Boegh's personnel file. Tr. at 492. Consequently, given the facts in front of me, Weskem has demonstrated that Vander Boegh's pay raise was not in fact affected by the two alleged retaliations. Consequently, I will dismiss Vander Boegh's appeal.

4. Summary of Appeal Decision concerning Vander Boegh I

As discussed above, I find that all the actions that the Hearing Officer determined to be retaliatory should have been time barred from consideration with the exception of the 2001 performance review which was issued to Vander Boegh on April 4, 2002. With regard to the 2001 performance review, I find that sufficient factual evidence exists to reverse the Hearing Officer's finding that Vander Boegh was harmed by the lowered scores on the 2001 performance review. I also find, for the reasons discussed above, that Vander Boegh's appeal is without merit. Consequently, I will grant Weskem's and Bechtel's appeals and deny Vander Boegh's appeal.

It Is Therefore Ordered That:

(1) The Appeals filed by Weskem, LLC and Bechtel Jacobs, LLC from the Initial Agency Decision issued on July 11, 2003, concerning Gary S. Vander Boegh's Part 708 complaint are hereby

granted. All remedial actions ordered by the Hearing Officer in the Initial Agency Decision are hereby reversed. Bechtel Jacobs, LLC and Weskem, LLC need not undertake any of the remedial actions ordered by the Hearing Officer in the July 11, 2003, Initial Agency Decision.

(2) The Appeal filed by Gary S. Vander Boegh from the July 11, 2003, Initial Agency Decision is hereby denied.

(3) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Acting Director
Office of Hearings and Appeals

Date: December 18, 2007

Department of Energy
Washington, DC 20585

JUL 22 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Petitioner:	Dean P. Dennis
Date of Filing:	March 2, 2009
Case Number:	TBA-0072

Dean D. Dennis filed a complaint of retaliation under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Dennis alleged that he engaged in protected activity and that his employer, National Security Technologies, LLC (NSTec), subsequently terminated him. An Office of Hearings and Appeals (OHA) Hearing Officer denied relief in *Dean P. Dennis,* Case No. TBH-0072,[1] and Mr. Dennis filed the instant appeal. As discussed below, the appeal is denied.

I. Background

The DOE established its Contractor Employee Protection Program to "safeguard public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). To that end, the program prohibits a contractor from retaliating against an employee who discloses certain information or engages in certain activity. 10 C.F.R. § 708.1.[2]

If an employee believes that a Part 708 retaliation has occurred, the employee may file a complaint requesting that the DOE order the contractor to provide relief. *Id.* The employee has the burden of showing, by a preponderance of the evidence, that the employee engaged in protected activity and that the protected activity was a contributing factor to the alleged retaliation. 10 C.F.R. § 708.29. If the employee meets that burden, the contractor has the burden of showing, by clear and convincing evidence, that it would have taken the same action in the absence of the protected activity. *Id.*

---

[1] Decisions issued by the Office of Hearings and Appeals after November 16, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm. The Hearing Officer's Decision in this matter will be cited henceforth as "H.O. Decision."

[2] Part 708 concerns (i) disclosures of information concerning substantial violations of law, substantial dangers to health and safety, and fraud, gross mismanagement or waste of funds, or abuse of authority; (ii) participation in Congressional proceedings; and (iii) refusals to participate in dangerous activities.

The facts surrounding Mr. Dennis's complaint have been set forth in detail in the Hearing Officer's Decision from which Mr. Dennis has taken this appeal, and a full recounting will not be reproduced here. The facts pertinent to this appeal are as follows. Mr. Dennis's educational background is in finance and management. In 2003 he began working at the Nevada Site Office as a contractor employee. Due to a reorganization of his initial employer, Mr. Dennis's position was abolished, and his new position was that of a Senior Operations Specialist. He was asked to assume additional duties as an Information Systems Security Officer (ISSO) at the Sensitive Compartmented Information Facilities (SCIF)[3] at the Remote Sensing Laboratory (RSL) and the Nevada Intelligence Center. *See* Ex. D. Mr. Dennis testified that he had no background or training for either the Senior Operations Specialist position or the ISSO position. When NSTec became the management and operating (M&O) contractor for the NNSA's Nevada Test Site and the Nevada Site Office in 2006, it retained Mr. Dennis in the same position. Although NSTec management recognized that Mr. Dennis had no background in the positions that he occupied, it believed that he was qualified for his positions with "some on-the-job training." Mr. Dennis participated in several training programs that covered cyber security and other security-related topics. H.O. Decision at 5.

Due to the nature of his position, Mr. Dennis reported to several supervisors and managers. Ron Gross, Manager of the Special Programs Department, was his manager of record. For technical matters, he reported to Jeff Harvey, the Information Systems Security Manager (ISSM). For functions he performed in the RSL SCIF, he reported to Loretta DeVault, the Deputy Field Intelligence Element (FIE) Director and Special Security Officer, or, in her absence, Rhonda Fulkerson, the Alternate Special Security Officer. All of these supervisors reported to Alan Will, the Deputy Director of the RSL and the Director of FIE. *Id.* at 6.

Early in 2007, the DOE directed NSTec to implement new procedures to improve the safeguarding of classified and non-classified media. His reaction to these new procedures caused two of his supervisors, Mr. Gross and Ms. DeVault, to raise concerns with Mr. Will. Among the concerns they brought to Mr. Will, in separate conversations, were that Mr. Dennis sought permission to use a thumb drive, which had been banned under the new procedures; that he had gained access to a large number of classified documents as a derivative classifier; that he often worked after regular business hours, in isolated circumstances; that he was suffering financial and emotional stress due to a divorce and an automobile accident; that he was accessing classified sites on the computer that he should not have; that he had often expressed his opinion that the new procedures were ineffective; and that he had on at least one instance stated that, as an insider with his responsibilities, he had the ability to circumvent the procedures without being detected. Mr. Will communicated these concerns to NSTec senior management and to the DOE overseer of NSTec's operations in April 2007. *Id.* at 6-9.

---

[3] A SCIF is an "accredited area, room, group of rooms, or installation where Sensitive Compartmented Information may be stored, used, discussed, and/or electronically processed." *See* DOE Order 5639.8A at http://www.directives.doe.gov.

In mid-May 2007, Mr. Dennis reported to Mr. Harvey that he had discovered tracking software on his computer. Mr. Harvey immediately brought this matter to the attention of Ms. DeVault and Mr. Will. On May 31 and June 1, 2007, Mr. Dennis sent e-mails to Mr. Will requesting an opportunity to discuss with him the negative impact of the new procedures on his work responsibilities; this meeting was scheduled for June 6, 2007. At roughly the same time, the DOE notified NSTec that Mr. Dennis was no longer to work in the SCIF. NSTec senior management then met and unanimously agreed to terminate Mr. Dennis's employment. Mr. Dennis was terminated on June 6, 2007. *Id.* at 9-10.

On August 10, 2007, Mr. Dennis filed a Part 708 Complaint against NSTec with the local DOE Employee Concerns Program (ECP) Office. After efforts to engage in mediation proved unsuccessful, the ECP Office transferred the Complaint to OHA for an investigation, followed by an administrative hearing. In his Complaint, as clarified in conversations with the OHA investigator, Mr. Dennis alleged that he made six disclosures to NSTec management that led to his termination, four related to security matters and two related to management issues. *Id* at 2-3. At the hearing, the Hearing Officer received evidence regarding all six alleged disclosures, but ultimately held, in her February 12, 2009, Decision, that only one—Mr. Dennis's reporting that there was tracking software on his classified computer—was a protected disclosure under Part 708. *Id.* at 3, 13-14. She also determined that the disclosure was a contributing factor in his termination, and therefore found that Mr. Dennis had successfully met his burden under the Part 708 regulations. *Id.* at 15-16. Mr. Dennis did not ultimately prevail in his request for relief under Part 708, however, because the Hearing Officer also found that NSTec had proven by clear and convincing evidence that it would have terminated Mr. Dennis even if he had not made a protected disclosure. *Id.* at 16-20.

On March 2, 2009, Mr. Dennis filed the instant appeal. In his appeal, Mr. Dennis challenges the Hearing Officer's finding that NSTec met its burden of demonstrating, by clear and convincing evidence, that it would have terminated him even if he had not made his protected disclosure. Dennis Br. at 2. His primary argument is that the Hearing Officer relied on the testimony of Loretta DeVault, despite the fact that she had found her testimony on one occasion not to be credible. *Id.* at 3-6. He also contends that Mr. Will was aware that Mr. Dennis had a concern about tracking software before he was terminated, *id.* at 7, and that NSTec's claim that it had lost trust in Mr. Dennis is not supported by the evidence. *Id.* at 8-9. Finally, Mr. Dennis argues that his immediate termination, without following a process of progressive discipline, did not adhere to NSTec's company policy and was without precedent. *Id.* at 9, 11-12. Throughout his brief, Mr. Dennis argues that the Hearing Officer relied on non-credible testimony, ignored inconsistent testimony, and misinterpreted evidence, all of which caused her to reach her erroneous conclusion. He also presents new facts in his brief to demonstrate that the conclusion is wrong. After careful consideration of the various bases for Mr. Dennis's appeal, I have determined, as explained below, that the Hearing Officer was correct when she concluded that NSTec met its evidentiary burden.

II. Analysis

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

As stated above, Mr. Dennis has limited his appeal to a challenge of the Hearing Officer's conclusion that NSTec met its burden of showing by clear and convincing evidence that it would have terminated Mr. Dennis even if he had not made a protected disclosure. My review of the testimony and other evidence in this proceeding is therefore restricted to those portions of the evidence that had a bearing on that conclusion. For the reasons set forth below, I find that the Hearing Officer's findings of fact are not clearly erroneous and her conclusions of law are sound. Consequently, the Hearing Officer's decision will be allowed to stand as written.

A. The Credibility of Loretta DeVault as a Witness and NSTec's "Loss of Trust"

A substantial portion of Mr. Dennis's appeal is devoted to attacking Ms. DeVault's credibility, both as a supervisor reporting to management and as a witness at the hearing. Mr. Dennis argues that Ms. DeVault was the source of all complaints that NSTec management received about Mr. Dennis, and it should not have given credence to her complaints. Dennis Br. at 3-4. He further argues that NSTec management's alleged loss of trust in Mr. Dennis arose solely from those complaints, and therefore was unfounded. *Id.* at 4. Whether NSTec was reasonable in believing Ms. DeVault's complaints about Mr. Dennis's behavior is not a proper subject for appeal in this forum. This appellate review may consider whether the Hearing Officer erred in her findings of fact or conclusions of law, but it is not a vehicle for finding whether the contractor was at fault for misplacing its belief in one of its employees.

I may therefore review whether the Hearing Officer properly supported her conclusion that NSTec would have terminated Mr. Dennis in the absence of his disclosure regarding tracking software. NSTec's stated position is that (1) it terminated Mr. Dennis because it "lost trust" in him, and (2) that loss of trust was predicated upon information its management received from his supervisors, including Ms. DeVault. Therefore, if NSTec management knew that the information it received from Ms. DeVault was not reliable, then its reliance on that information would demonstrate that it was less than candid in claiming a loss of trust, and the Hearing Officer improperly concluded that the purported loss of trust was the basis for Mr. Dennis's termination. After reviewing the record in this proceeding, I conclude that there is simply no evidence that would have supported the Hearing Officer finding that NSTec management had any reason to question the accuracy of the concerns Ms. DeVault expressed concerning Mr. Dennis's behavior.

In her Decision, the Hearing Officer did find Ms. DeVault's testimony not credible in one respect: that she did not recollect that Mr. Harvey had reported the discovery of

unauthorized tracking software on Mr. Dennis's computer. H.O. Decision at 13 n.17. In his appeal, Mr. Dennis sets forth the following argument: if Ms. DeVault was not credible regarding her recollection in the above instance, then none of her testimony should be considered credible regarding any of the complaints she raised to NSTec management about Mr. Dennis. Dennis Br. at 3. Mr. Dennis contends that Ms. DeVault was factually inaccurate in three areas: her recollections of certain meetings, her reporting of Mr. Dennis's financial and emotional difficulties to management, and her testimony that Mr. Dennis had asked her to research the clearance of a former girlfriend. *Id.* at 4-5. As support for these accusations, he refers to portions of his own testimony at the hearing and offers new testimony and opinion in the body of the appeal. For example, he claims that Ms. DeVault included "fictitious allegations" regarding his divorce and an insurance claim when she spoke to Mr. Will about her concerns, and reiterates facts and dates from his testimony to establish that those difficulties were no longer relevant at the time Ms. DeVault reported them to Mr. Will. *Id.* at 5; *see* Tr. at 480, 488. In addition, he objects to Ms. DeVault's testimony, at Tr. at 381, that, at Mr. Dennis's request, she obtained the security status of a former girlfriend. In his appeal, he contends that "[t]he truth regarding this can easily be verified as this simply didn't happen," and then submits his version of the events. Dennis Br. at 5-6.

Mr. Dennis's contention that the Hearing Officer erred in finding any of Ms. DeVault's testimony credible is flawed in two respects. First, as trier of fact, the Hearing Officer assessed the credibility of all of the witnesses who appeared before her, including Ms. DeVault. The Hearing Officer saw the witnesses testify and had the opportunity to observe their demeanor. She was in a position to consider the testimony in conjunction with the documentary evidence presented at the hearing. Although she found that, in one particular instance, Ms. DeVault's testimony was not credible, the Hearing Officer clearly determined that the remainder of Ms. DeVault's testimony was reliable. *See, e.g., id.* at 8-9. That determination is not clearly erroneous merely because the Hearing Officer found one portion of the witness's testimony unreliable. The Hearing Officer observed Ms. DeVault as she testified, and received additional testimony, such as that of Mr. Gross and Mr. Will, that permitted her to assess the reliability of Ms. DeVault's testimony regarding what she divulged to Mr. Will. Tr. at 290-97 (testimony of Gross), 384 (testimony of Will). The references to Mr. Dennis's testimony and the recitations of facts that Mr. Dennis has produced in his appeal brief do not in fact support his challenge to Ms. DeVault's credibility as a witness at the hearing, because they do not establish that she provided Mr. Will with information different from that which she testified she did. Instead, they address his contention that the concerns she expressed to Mr. Will contained "fictitious allegations." Even if they successfully established that Ms. DeVault's concerns were not based in fact, they do not constitute evidence that Ms. DeVault did not testify credibly at the hearing about the concerns she expressed to Mr. Will. Consequently, I cannot find that the Hearing Officer was clearly erroneous in accepting Ms. DeVault's testimony as credible in this regard.

Second, Mr. Dennis appears to assume that if he can establish that NSTec relied on false information in its deliberations regarding his June 2007 termination, then the Hearing Officer was wrong to conclude that NSTec would have terminated Mr. Dennis absent his

protected disclosure. That assumption lacks logic. Mr. Dennis does not claim that Ms. DeVault's testimony was untrue regarding her recollection of which concerns she brought to Mr. Will's attention; the Hearing Officer's enumeration of that information is not challenged. What is challenged, however, is the factual bases for those concerns. Mr. Dennis has supported his challenge with references to his own testimony, which the Hearing Officer has already considered, and with new versions of facts, of which the Hearing Officer was not aware. The critical question regarding Mr. Dennis's termination was what information the decisionmakers relied upon in reaching their decision. However, even if we were to assume that the concerns Ms. DeVault provided to Mr. Will, and through him to senior management, were falsified, and even if we were also to assume that NSTec relied on those concerns when it decided to terminate Mr. Dennis because it had "lost trust" in him, it does not follow that the Hearing Officer's conclusion was incorrect.[4] Nothing in the record indicates that the decisionmakers believed or had any reason to believe that any information before it had been deliberately falsified or was unreliable. If NSTec had no reason to believe the concerns were factually unfounded, the Hearing Officer correctly concluded that NSTec lost trust in Mr. Dennis and would have terminated him even in the absence of his protected disclosure.[5]

Moreover, the record reflects that Mr. Dennis is incorrect in contending that NSTec management relied solely on Ms. DeVault's concerns when it determined that it had "lost trust" in Mr. Dennis. Mr. Will had transmitted Mr. Gross's concerns, as well as Ms. DeVault's, to senior management and to the DOE in early April 2007. Tr. at 384, 389. In addition, at the time of its decision, NSTec management also knew that DOE no longer supported Mr. Dennis working in the SCIF. *Id.* at 389. Thus, NSTec management clearly had other, independent information before it when it decided to terminate Mr. Dennis and, even if the decisionmakers had discounted Ms. DeVault's concerns, the Hearing Officer had a sufficient basis to conclude that NSTec would have terminated Mr. Dennis absent his protected disclosure, based on its "loss of trust" in Mr. Dennis.

B. Whether Mr. Will Knew Mr. Dennis Was Aware of the Tracking Software

---

[4] I note that the Hearing Officer found no credible evidence to support NSTec's concern about Mr. Dennis's alleged financial difficulties. H.O. Decision at 17 n.21. Discounting this alleged concern, she nevertheless concluded that NSTec management had "lost trust" in Mr. Dennis.

[5] Although Mr. Dennis did not raise this argument, there is one situation in which Ms. DeVault's alleged falsification might have a bearing on this conclusion. If Ms. DeVault, as Mr. Dennis's supervisor, had fabricated her concerns in response to Mr. Dennis making a protected disclosure to her, in an effort to have his employment adversely affected, her fabrications might constitute an act of retaliation under Part 708. Under the facts presented in this case, however, this result is not possible. Ms. DeVault discussed her concerns with Mr. Gross and Mr. Will before Mr. Gross issued his performance evaluation of Mr. Dennis in March 2007. Tr. at 257-58 (testimony of Mr. Gross), 282-83 (testimony of Mr. Will). Mr. Dennis testified that he reported his discovery of the tracking software to Mr. Harvey, who immediately reported it to Ms. DeVault, in mid-May 2007. *Id.* at 92, 94, 96. Therefore, because Mr. Dennis made his protected disclosure about two months after Ms. DeVault delivered her concerns to management, even if those concerns were falsified as Mr. Dennis claims, his protected disclosure could not possibly have been a contributing factor to her expression of concerns.

In his appeal, Mr. Dennis contends that Mr. Will knew that he was aware of tracking software on his computer and had asked for a meeting with Mr. Will on that topic. Dennis Br. at 7. Mr. Will testified at the hearing that he believed Mr. Dennis had requested the meeting in order to discuss access procedures in the SCIF. Tr. at 378-81. To establish that Mr. Will was incorrect in his belief, Mr. Dennis cites a portion of a June 1, 2007, e-mail message from Mr. Dennis to Mr. Will, which reads, "I don't even know what the rules are. At first, I had to be let in, which doesn't pose a problem for me at all . . . but now I have to be 'escorted' but not really." Dennis Br. at 7-8.

I fail to see how the cited language establishes that Mr. Will's belief was other than that to which he testified. Moreover, I fail to see what bearing Mr. Will's belief regarding the scope of the requested meeting has on the Hearing Officer's finding that NSTec had met its burden. Mr. Will was clearly aware of the tracking software issue, Tr. at 403, even if he did not believe it to be the topic Mr. Dennis wanted to discuss with him. The Hearing Officer acknowledged that NSTec management was aware of Mr. Dennis's knowledge of the tracking software, because she found that Mr. Dennis had made a protected disclosure in that regard. H.O. Decision at 14. She nevertheless found that NSTec would have terminated Mr. Dennis in the absence of his protected disclosure. H.O. Decision at 19. Mr. Dennis has not presented any argument regarding the tracking software that convinces me that her conclusion should be overturned.[6]

C. Whether NSTec Followed Its Termination Procedures

In his appeal, Mr. Dennis contends that NSTec's failure to follow its own procedures when it terminated his employment is additional evidence that the Hearing Officer erred in finding that NSTec had met its burden. Mr. Dennis argues that he should have been subjected to progressive discipline rather than immediate termination.[7] Dennis Br. at 6, 9. He also challenges NSTec's contention that other employees who had been immediately terminated were similarly situated to Mr. Dennis. *Id.* at 9.[8]

---

[6] Mr. Dennis also asserts that Mr. Will admitted in his testimony that "the decision to speed up Dennis' termination was based on his protected disclosure that he found" the tracking software. Dennis Br. at 11-12 (citing Tr. at 403). I have reviewed that portion of Mr. Will's testimony and have determined that the context in which it was presented does not in any way support Mr. Dennis's interpretation: the "decision" that Mr. Will states needs to be made refers to reaching a conclusion in an ongoing cyber security investigation, not reaching a conclusion regarding Mr. Dennis's possible termination.

[7] He also finds NSTec at fault for "not using the DOE Administrative Review process for security matters" and for not "even asking my client any questions." I note that administrative review is one stage of adjudication of an individual's eligibility for access to classified material or information under 10 C.F.R. Part 710. It has no bearing on employment determinations and thus does not constitute an alternative mechanism for resolving workplace concerns raised by an employee's managers.

[8] Mr. Dennis also contends that the Hearing Officer ignored evidence that the decision to terminate him had been made before the meeting of the NSTec managers at which his termination was ostensibly decided. *Id.* at 11 (citing Mr. Gross's testimony, Tr. at 305, that a few days earlier he had been told that Mr. Dennis was going to be terminated). As this is the totality of the evidence on this matter, and it is unclear even who relayed this information to Mr. Gross, let alone its accuracy, I find that it is not reliable enough to prove, as Mr. Dennis alleges, that NSTec "lied about its [termination] process." Dennis Br. at 11.

To place this argument in the appropriate context, the Hearing Officer addressed NSTec's compliance with existing employee relations procedures in her application of a Federal Circuit opinion that provides guidance on whether an employer has met its evidentiary burden in a Part 708 case. *See Kalil v. Dep't of Agriculture,* 479 F.3d 821 (Fed. Cir. 2007). *Kalil* sets forth three factors to consider in evaluating the employer's burden. The third factor is "any evidence of similar action against similarly situated employees . . ." *Id.* at 824. After finding that the first two factors weighed in favor of NSTec having met its burden, the Hearing Officer considered the evidence relevant to this factor: that the company president admitted he had never previously fired anyone else for concerns related to national security, but that the employee relations manager testified that the company had terminated other employees when it determined that termination was "the immediate and only discipline." Tr. at 467. Acknowledging that NSTec had not had "an employee similarly situated to Mr. Dennis," the Hearing Officer found that NSTec had demonstrated that "it has disciplined other employees through immediate termination when it deemed conduct to be so serious that it resulted in management losing 'trust' in an employee." H.O. Decision at 19.

I find no error in the Hearing Officer's finding that, despite the non-existence of a similarly situated employee who faced similar action by the employer, NSTec satisfied the third factor of the test set forth in *Kalil.* Even if Mr. Dennis's behavior was not identical to the behavior that led to the termination of other employees—and it clearly was not—the record supports the Hearing Officer's finding that the company had lost trust in Mr. Dennis and deemed his conduct to be extremely serious. Moreover, NSTec established that, in such circumstances, it had immediately terminated employees, as it did Mr. Dennis. Taking into consideration that these findings of fact affected only one of three factors the Hearing Officer considered, and that the Hearing Officer found that NSTec clearly met two of the three *Kalil* factors in addition to this factor, I agree with the Hearing Officer that under the *Kalil* test, the company met its burden of proving that it would have taken the same action against Mr. Dennis even if he had not made his protected disclosure.

D. Other Grounds for Appeal

In his appeal, Mr. Dennis raises a number of additional challenges to the Hearing Officer's conclusion that NSTec met its evidentiary burden, and he is therefore not entitled to relief under Part 708. He claims that the Hearing Officer misinterpreted or misunderstood some of the evidence in the record. Examples of such evidence are whether, in his role as a derivative classifier, he was in fact aggressively pursuing classified information, Dennis Br. at 8-9, and whether he was in fact an insider threat to national security, when he told Ms. DeVault and others of the security breach he could inflict were he so inclined. *Id.* at 10-11. Mr. Dennis also questions why his complaints about the prohibition against using thumb drives raised a concern, when Mr. Will himself testified that many employees were unhappy with the new rule. *Id.* at 10. As with other facts in evidence in this proceeding, Mr. Dennis's opinion of their significance to his termination is at odds with the opinions of a number of NSTec managers, including those to whom he made statements and those responsible for his termination. Despite the

divergence of opinion and Mr. Dennis's reiteration of his interpretation of the import of these facts, I cannot find that the Hearing Officer was clearly erroneous in finding the facts as she did. Consequently, I cannot overturn her decision on these grounds.[9]

III. Conclusion

The Hearing Officer correctly concluded that NSTec met its burden of showing, by clear and convincing evidence, that it would have terminated Mr. Dennis even if he had not made a protected disclosure.

It Is Therefore Ordered That:

(1) The Appeal filed by Dean P. Dennis on March 2, 2009 (Case No. TBA-0072), of the Initial Agency Decision IAD) issued on February 12, 2009, under 10 C.F.R. Part 708 is hereby denied.

(2) This Appeal Decision shall become the Final Decision of the Department of Energy unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this Decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: JUL 22 2009

[9] Finally, Mr. Dennis demands that certain passages of the Hearing Officer's decision be stricken, as they consist of "speculative remarks," *id.* at 11, and "speculative conclusions . . . that are inappropriate and potentially damaging to Mr. Dennis's reputation." *Id.* at 10. In fulfilling her duties to reach findings of facts and conclusions of law, the Hearing Officer must draw inferences that are based on her interpretation of the evidence before her. To the extent that any of her inferences appear derogatory, I do not find them excessively inflammatory or beyond her proper role as Hearing Officer.

December 3, 2009

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Names of Petitioners:	Billy Joe Baptist
Date of Filing:	May 27, 2009
Case Number:	TBA-0080

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on May 7, 2009, involving a complaint of retaliation filed by Billy Joe Baptist ("Baptist," or "Complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Baptist alleged that his former employer CH2M-WG Idaho (CWI) retaliated against him for engaging in activity protected under Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that five of the six alleged acts of retaliation set forth in the complaint are time-barred under Part 708. The Hearing Officer also granted summary judgment to CWI regarding the sixth act of retaliation, Baptist's termination, and then dismissed the complaint without a hearing. Baptist appealed the decision. As set forth below, the appeal is denied.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned or-leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they "reasonably and in good faith" believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. § 708.5 (a). Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"] will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations set forth at 10 C.F.R. Part 708 establish administrative procedures for the processing of complaints. Under these regulations, review of an IAD, as requested by Baptist, is performed by the Director of OHA. 10 C.F.R. §708.32.

B. History of the Complaint Proceeding

For purposes of review, I set forth the pertinent facts as averred in the Report of Investigation (ROI) and in the subsequent IAD.[1] CWI is the management and operating contractor for the Idaho Cleanup Project at the DOE Idaho National Laboratory (INL) site. Baptist was a CWI employee who was appointed to serve on the Electrical Safety Committee (ESC), a group that monitored the implementation of the Electrical Safety Improvement Plan. Baptist alleges that two weeks after CWI won a DOE safety contest in January 2006 that recognized Baptist's personal efforts, the then-president of CWI designated Baptist as a Subject Matter Expert (SME) for electrical safety.[2] Baptist was responsible for conducting independent assessments and in May 2007, he submitted a report alleging safety and regulatory violations concerning a transformer on the site. At a June 4, 2007, ESC meeting, Baptist expressed his safety concerns about the transformer to CWI senior management. Baptist alleges that he was removed from his supervisory duties, his duty as a SME, and his positions on several CWI safety committees immediately after the meeting. ROI at 6.

Baptist took personal leave for a medical condition after the ESC meeting on June 4, 2007. On June 6, 2007, he completed an application for short-term disability benefits (STD) with CWI's insurance carrier, Cigna Insurance Group. ROI at 7. Debbie Anglin, CWI Human Resources Benefits Specialist, assisted Baptist with his application. Shortly thereafter he had surgery for his condition and began to receive STD payments. In October 2007, Cigna contacted CWI to determine if Baptist could return to work. Baptist's physician cleared him to return to work with a 15-pound weight restriction and Anglin asked Baptist's supervisor if a light duty position was available.[3] She then told Cigna that CWI could not accommodate Baptist in a light duty position. IAD at 4.

In December 2007, Baptist was approved for long term disability benefits (LTD) when his STD ran out. He requested Inactive Employee Status (IES) on Dec 19, 2007, and his manager approved the IES request retroactive to July 2007. [4] ROI at 7; IAD at 4.

---

[1] The events leading to the filing of Baptist's complaint are fully set forth in the IAD. *See Billy Joe Baptist*, Case No. TBH-0080 (2009). Decisions issued by OHA are available on the OHA website located at http://www,oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[2] CWI denies that Baptist was designated an SME. ROI at 4.

[3] Baptist's managers did not recall speaking to Anglin about a new position for Baptist.

[4] IES is a form of unpaid leave available to regular full-time CWI employees who have worked for at least one year and need to be absent from work due to illness or injury. ROI at 15. There are four options for an employee whose IES status has expired: (1) return as a full time employee after receiving medical clearance; (2) return to work as a part time employee after receiving medical and management clearance; (3) take an unpaid administrative leave of absence; and (4) termination. IES required CWI to return an employee to the same or equivalent position, assuming that the employee complied with the requirements to obtain proper clearances. Response at 12, fn 50. Complainant does not dispute that he understood the policy that he would be terminated for failure to get the proper medical clearances to return to work. CWI asserts that its policy is that all employees who are on IES for one year and who have not sought reinstatement or other employment with the company during that year are automatically terminated. IAD at 4, fn 10.

On January 10, 2008, Baptist filed a complaint under the DOE Worker Health and Safety Program, 10 C.F.R. Part 851.[5] On March 6, 2008, Baptist filed a whistleblower complaint under Part 708. He alleges that he made two protected disclosures: (1) he submitted a safety report in May 2007, and (2) he discussed his safety concerns at the June 4, 2007, ESC meeting. In the whistleblower complaint, Baptist described five acts of alleged retaliation (Retaliations 1-5): (1) CWI relieved him of his supervisory duties; (2) CWI removed him from his responsibilities as a SME for electrical safety; (3) CWI removed him from the Project Evaluation Board PEB; (4) CWI removed him from Energy Facilities Contractor's Group Committee (EFCOG) committee; and (5) CWI removed him from the PLN-1971 Board. According to Baptist, Retaliations 1-5 occurred on January 4, 2007, the day of the ESC meeting. He also claimed that his termination in June 2008 at the expiration of his IES was the sixth retaliatory act (Retaliation 6).

CWI sent Baptist a letter on April 29, 2008, stating that if he wished to return to work he needed to obtain medical clearances as specified in his Request for IES.[6] Baptist never indicated that he sought to return to work and never contacted the INL medical dispensary to obtain a medical clearance to return to work. He also assumed that CIGNA would explore a new position for him at CWI. Response at 11. Baptist asserts that because of the weight restriction on his physical activities, he could only return to work as an SME for Electrical Safety. ROI at 8. CWI terminated his employment on June 10, 2008, as Baptist had anticipated in his complaint, stating that his IES status had expired.

The Idaho Operations Office referred the complaint to OHA for an investigation. An OHA investigator issued a Report of Investigation (ROI) on December 19, 2008. 10 C.F.R. §§ 708.22-23. In the ROI, the investigator concluded that the first five retaliations were "time-barred [o]n their face" because they occurred in June 2007, ten months prior to the filing. ROI at 9.[7] Because he did not file his complaint until March 2008, the investigator concluded that Baptist had the burden of showing that he had good cause for missing the 90-day deadline. [8] She also found that Retaliation 6, Baptist's anticipated termination on June 2008, fell within the regulatory deadline. *Id.*

On February 3, 2009, an OHA Hearing Officer issued a Show Cause Order, asking Baptist to show why Retaliations 1-5 were not barred from consideration under the 90-

---

[5] The DOE Worker Safety and Health Program establishes worker safety and health requirements that govern the conduct of contractor activities at DOE-controlled workplaces. *See* 10 C.F.R. Part 851.

[6] According to the request, an employee who wishes to return to work requires written release from their personal physician and then must report to the nearest INL medical dispensary to obtain a medical clearance.

[7] She found that Baptist was aware of the retaliation in June 2007 when it occurred because he had visited a doctor for work-related stress and the doctor had prescribed medicine (blood pressure, nerves, and sleeping pills) for stress-related ailments prior to the alleged retaliations. ROI at 9.

[8] Part 708 states that "[you] must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation." 10 CFR § 708.14 (a).

day deadline in 10 C.F.R. 708.14. On February 18, 2009, CWI filed a Motion for Summary Judgment asking OHA to dismiss the final alleged retaliatory act, Baptist's termination. Baptist filed responses to the Show Cause Order and the Motion for Summary Judgment on April 20, 2009. CWI filed a reply to Baptist's Response to the Motion for Summary Judgment on April 27, 2009.

C. The Initial Agency Decision (IAD)

The IAD set forth the Hearing Officer's decision regarding the Show Cause Order, the Motion for Summary Judgment and Baptist's Complaint. The Hearing Officer concluded that: (1) Retaliations 1-5 were time-barred from his consideration; and (2) CWI met its burden of showing that it would have terminated Baptist in June 2008 (Retaliation 6) notwithstanding his protected disclosures because Baptist's IES status expired in June 2008. In the IAD therefore, the Hearing Officer granted CWI's Motion for Summary Judgment and dismissed Baptist's complaint.

(1) Timeliness of Retaliations 1-5

In his response to the Show Cause Order, Baptist argued that his complaint should not be deemed untimely because: (1) DOE-Idaho field officials accepted the complaint; (2) CWI failed to investigate his whistleblower complaint after he contacted the benefits specialist in June 2007 and told her about the retaliation; and (3) he worked in a hostile work environment, making the retaliations part of a continuing violation by CWI. IAD at 6. The Hearing Officer was not persuaded by any of these arguments.

First, the Hearing Officer found that mere acceptance of a complaint by the field office does not cure an untimely filing. He cited OHA precedent in support of his finding. *See, e.g., Ronald E. Searle*, Case No. TBU-0065 (2007) (case dismissed for failure to comply with 90-day deadline). Second, the Hearing Officer concluded that the failure of CWI's Benefits Specialist to investigate Baptist's complaint was not an act of retaliation against Baptist. Instead he found that Baptist should have had no reasonable expectation that a conversation with the CWI Benefits Specialist about Baptist's disability benefits would trigger a whistleblower investigation. IAD at 7. The Hearing Officer was also concerned that Baptist did not raise the issue of failure to investigate until one year after filing his whistleblower complaint. IAD at 7.

Finally, the Hearing Officer found no evidence of a hostile work environment. Making reference to the Supreme Court definition of a hostile work environment as "an environment where the workplace is sufficiently permeated with harassment that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," the Hearing Officer concluded that those elements were not present in Baptist's complaint. IAD at 8 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)). Thus, the alleged "failure to investigate" was not a continuing violation that would permit the complaint to proceed to hearing with alleged retaliations that fell outside the 90-day filing deadline. Therefore, the Hearing

Officer concluded that Baptist did not provide evidence of a hostile work environment at CWI.

(2) Retaliation 6 - Complainant's Termination

In its Motion for Summary Judgment, CWI argued that there were no disputed material facts concerning Baptist's complaint and that the facts demonstrate as a matter of law that his protected disclosures could not have been a contributing factor to his termination because: (1) CWI's Benefits Specialist had no constructive knowledge of Baptist's protected disclosures; (2) there was no temporal proximity between the disclosures and Baptist's termination due to the 12 months between those events; and (3) Baptist was terminated simply for failure to comply with the requirements for reinstatement under CSI's long-standing IES policy. CWI argued that it had shown by clear and convincing evidence that CWI would have terminated Baptist notwithstanding his disclosures. IAD at 9.

According to CWI, Baptist did not comply with the CWI procedures that require an employee in IES status to indicate his intention to return to employment. [9] Consequently, CWI, in accordance with its IES policy, terminated Baptist in June 2008. Thus, the Hearing Officer concluded that CWI had shown that it would have terminated Baptist despite his protected disclosure because IES policy clearly stated that an employee on IES who did not indicate that he wanted to return to work, or did not choose any of the other available alternatives under the policy, would be terminated upon the expiration of the IES (one year). CWI had sent Baptist documents explaining his options for retaining employment after his IES status expired.[10] In addition, CWI argued that the Benefits Specialist had no actual or constructive knowledge of Baptist's alleged protected conduct, since she had no contact with him beyond the issue of his medical disability leave. Finally, CWI argued that the time between Baptist's disclosure and his termination (one year) was too long to permit any inference that the disclosure was a factor in Baptist's termination. The Hearing Officer found the above arguments to be persuasive.

In summary, the Hearing Officer ruled in the May 7, 2009, IAD that Retaliations 1-5 were time-barred and that there was clear and convincing evidence that CWI would have terminated Baptist from his position notwithstanding his disclosures. Consequently, the Hearing Officer granted the Motion for Summary Judgment on Retaliation 6 and dismissed Baptist's complaint. IAD at 6. Because all six alleged retaliatory acts had been dismissed or time-barred, the Hearing Officer did not convene a hearing on the matter.

D. The Appeal

[9] "IES" is used to describe the entire year that an employee is on STD and LTD. ROI at 7.

[10] The CWI Benefits Specialist stated that ten employees had been terminated under similar situations since 1998. CWI Response to Appeal at 9.

On May 27, 2009, Baptist appealed the Hearing Officer's findings in the IAD and filed Complainant's Statement of the Issues for Appeal identifying the issues that he wished the Director of OHA to review in the appeal phase of the Part 708 proceeding. *See Appeal*. Baptist also requested a hearing on his complaint. On July 7, 2009, CWI filed a response to Baptist's Appeal. *See Response.* In the Response, CWI requested that OHA deny the Appeal and dismiss the underlying complaint.

In his Statement, Baptist sets forth two issues on appeal:

(1) Are there any disputed facts as to whether the Complainant was retaliated against by the contractor's failure to return him to his former position or accommodate him in a comparable position that he could perform within his 15-pound lifting limitation?

(2) Can a contractor's complete failure to investigate a whistleblower retaliation complaint constitute a continuing violation under a hostile work environment claim for purposes of Part 708's 90-day period of limitations?

See Appeal at 8, 11.

As for Issue 1, Baptist argues that he was terminated because the CWI Benefits Specialist mismanaged his IES application and because CWI failed to return him to a job that did not require heavy lifting. *Id.* at 8. Complainant contends that he had no choice but to apply for IES because CWI would not provide a position that he could perform without risk of injury. Baptist argues that this issue must be reviewed *de novo* because it was not discussed in the IAD, and that "the IAD is entitled to no weight or deference on such review." Appeal at 2. According to Baptist, "[t]he IAD does not acknowledge or discuss that the Complainant only took inactive status because the retaliators would not allow him to be active in his prior or comparable position." Appeal at 8.

Regarding Issue 2, Baptist advances three arguments: (1) the Hearing Officer erred in holding that a failure to investigate a retaliation complaint is not actionable under Part 708; (2) the Hearing Officer erred in holding that there can be no hostile work environment claim unless the hostile acts are similar and within the same chain of command; and (3) the Hearing Officer has created a "strict pleading rule" for Part 708 cases by holding that Baptist's failure to plead "failure to investigate" in his initial complaint bars its consideration at any later stage of the proceeding. Appeal at 11.

Finally, Complainant also questions the summary judgment decision. Baptist argues that the Hearing Officer's finding--that there were no material facts in dispute regarding Baptist's termination--is a conclusion of law and thus reviewable *de novo*, and that all evidence should be viewed most favorably to the party (Baptist) opposing summary judgment. Appeal at 2. Baptist argues that the IAD should be overturned because the Hearing Officer did not view the evidence most favorably "both because ignoring evidence means it has not been favorably viewed, but also because the IAD repeatedly gives more favorable views to the contractor's evidence." Appeal at 2.

II. ANALYSIS

The standard of review for Part 708 appeals is well established. Conclusions of law are reviewed *de novo*. *See Curtis Hall*, Case No. TBA-0002 at 5 (2008). Findings of fact are overturned only if they are clearly erroneous, giving due regard to the trier of fact to judge the credibility of the witness.

A . Appeal Issue 1- Retaliation and Accommodation

Baptist's claims that there are disputed facts as to whether he was retaliated against by CWI's failure to either return him to his former position or to accommodate him in a comparable position that he could perform within his 15 pound lifting limitation. The Appeal states that "[t]he IAD is completely silent on this question, which complainant thoroughly briefed in his opposition to summary judgment." Appeal at 8. According to the Appeal, Baptist was forced to take IES status because CWI's retaliatory actions prevented him from holding a light duty position. Appeal at 2.

I agree with Baptist that the IAD is silent on this question, and rightfully so. Based on my review of the record, the Hearing Officer had no actionable claim in front of him that would allow him to proceed to the question of retaliation. The retaliations in the complaint fell outside of the 90-day deadline, and Baptist did not show good cause for the Hearing Officer to waive the deadline. The record reflects Baptist's perception that CWI was retaliating against him prior to the June 2007 ESC meeting. *See* ROI at 8-9. Complainant did not avail himself of the opportunities under the IES policy to request a new position, or any of the other alternatives under IES. Baptist asks us to ignore his noncompliance with the policy and procedures of Part 708, his failure to exercise the options available to him under the IES policy that may have allowed him to return to work, and the OHA precedent that complainants are presumed to understand their rights and responsibilities under the regulations. IAD at 7.

Under Baptist's logic, a Hearing Officer would be required to examine the issues underlying a claim that the Hearing Officer has previously found to be barred from consideration due to a fatal procedural error. Such a policy would diminish the importance of the regulations that were thoughtfully designed to govern Part 708 proceedings.

I find that the Hearing Officer did not commit error by failing to address this issue. Rather, the Hearing Officer did not reach this issue because the complaint did not meet the threshold procedural requirements to proceed to the hearing stage. The Hearing Officer cannot address the issue of retaliation (or any other issue) if the complaint does not meet the procedural requirements. In this case, Baptist filed his Part 708 complaint in March 2008, nine months after five of the six alleged retaliatory acts occurred and six months beyond the 90-day deadline.[11] Thus, I find that the Hearing Officer properly

[11] The Hearing Officer did not err when he found that the field office's acceptance of the complaint did not cure any filing deficiencies. Moreover, even though Mr. Baptist was a *pro se* complainant, he was familiar

concluded that the first five retaliations were time-barred. Once he reached that conclusion, the regulations precluded any consideration of whether the contractor refused to offer accommodation to Baptist.[12] Even assuming, *arguendo*, that there are disputed facts surrounding this issue, Baptist has not shown good cause to waive the regulatory procedures and consider the allegations.[13] Therefore, once the Hearing Officer decided that Retaliations 1-5 were time-barred and Retaliation 6 was not a retaliatory action, his determination was complete.[14]

C. **Appeal Issue 2 - Failure to Investigate and a Hostile Work Environment**

(1) Failure to Investigate

Baptist argues that the IAD erred in concluding that a contractor's failure to investigate cannot be an act of retaliation under Part 708. However, I find that Baptist misstates the conclusion of the IAD. The IAD sets forth the following two reasons why Baptist could not rely on a failure to investigate as his excuse for missing the 90-day deadline: (1) because Baptist did not raise the issue until one year after he filed his complaint; and (2) because failure to investigate could not be considered retaliation under the facts of this case as there was no reasonable expectation that conversations with an employee benefits specialist would trigger a whistleblower investigation. The IAD did *not* hold that a failure to investigate is not actionable under Part 708. Rather, the Hearing Officer found in this specific case that it was not actionable because there was no reasonable expectation that the CWI Benefits Specialist would investigate. The CWI Benefits

---

with the procedure for filing complaints, having filed a Part 851 complaint with the appropriate office in January 2008.

[12] Complainant suggests that his application for IES in December 2007 was the result of a retaliation (CWI would not accommodate Mr. Baptist's lifting restriction), and thus the retaliation fell within the 90-day limit (because the complaint was filed in March 2008). Appeal at 7. However, because Complainant did not list his application for IES as a retaliatory action in the complaint, I cannot agree with Baptist's argument that we should consider his IES application a retaliatory act. This would allow Baptist to raise this argument for the first time on Appeal, wrongfully expanding the scope of the Appeal. I also note that the Hearing Officer gave Baptist an opportunity to add additional retaliatory acts to his complaint during a conference call in February 2009, and Baptist, who was represented by counsel at that time, did not supplement his complaint. CWI Response at 28.

[13] Throughout the Appeal Baptist notes the role of the Benefits Specialist in his termination. According to the record, the Benefits Specialist admitted that she did not ask him if he was going to return to work. She also told CIGNA that there was no accommodation for Baptist, even though there is some question whether his managers had agreed with this. She handled his disability applications without the input of his first line supervisor, contrary to IES policy. Baptist states that the Benefits Specialist guided him towards applying for IES and did not discuss alternatives. Nonetheless, these arguments do not change the fact that Baptist did not comply with the terms of the IES policy that could have returned him to active duty at CWI. Thus, I agree with the Hearing Officer that, based on the record, there is no proof of animus by the CWI Benefits Specialist towards Baptist.

[14] Baptist argues that the Motion for Summary Judgment was not properly granted because the Hearing Officer did not consider all materials in the light most favorable to Baptist, the opposing party. However, the Hearing Officer did just that by beginning his analysis with the assumption that Baptist made protected disclosures and that he had SME status. *See* IAD at 5, fn 13.

Specialist told Baptist that she would work with him on his disability application, and did not indicate that she would investigate his allegations of retaliation. Therefore, the contractor did not retaliate against Baptist when the CWI Benefits Specialist did not initiate an investigation into his allegations. That was not her responsibility, nor had she given Baptist any indication that she would do so. Therefore, I find no error in the Hearing Officer's decision regarding this allegation.

In addition, Complainant argues that the Hearing Officer has now imposed a "strict pleading rule" on *pro se* applicants to the Contractor Employee Protection Program because the Hearing Officer did not consider Baptist's contention that CWI failed to investigate his allegations of retaliation expressed to the CWI Benefits Specialist. According to Baptist, the Hearing Officer has concluded that unless a complainant pleads a cause of action in his initial complaint, OHA will neither consider it an adverse action nor allow an evidentiary connection to other acts of retaliation. Appeal at 12. After examining the record on this issue, I conclude that the Hearing Officer did not impose a new strict pleading rule in Part 708 cases.

The Part 708 regulations anticipate that many filings will be submitted by *pro se* complainants, and consequently the pleading rules are uncomplicated and easy to understand:

> Your complaint *does not need to be in any specific form* but must be signed by you and contain the following: (a) A statement specifically describing (1) the alleged retaliation taken against you and (2) the disclosure, participation, or refusal that you believe gave rise to the retaliation . . . "

10 C.F.R. § 708.12 (emphasis added).

Baptist's argument obfuscates the real issue—that Baptist himself failed to bring up the new allegation of "failure to investigate" until one year after filing his Part 708 complaint. Baptist had an opportunity to advance his argument in the complaint, and then again during a conference call where the Hearing Officer asked him if there were any additional retaliations that the Hearing Officer should consider. CWI Response at 28. Baptist, represented by counsel by this time, did not mention any additional retaliation, and therefore cannot now argue that an impermissible "strict pleading rule" prevented him from being heard.

In summary, the Hearing Officer did not initiate a new strict pleading rule. After examining the facts of this case, the Hearing Officer correctly concluded that Baptist had an opportunity to advance his argument much earlier in the case, but for some reason declined to do so. [15]

[15] Baptist argues that CWI would not have been surprised by the "failure to investigate claim" if OHA had not granted CWI's motion prior to Baptist's scheduled deposition. Appeal at 13. Baptist alleges that CWI could have inquired about the failure to investigate claim at the deposition, thus avoiding any surprise. This argument does not negate a party's responsibility to present their argument at the proper time.

(2) Hostile Work Environment

Baptist argues that the alleged failure to investigate was part of a hostile work environment at CWI created by his managers. After reviewing Complainant's arguments, I conclude that Baptist has provided no argument to disturb the Hearing Officer's decision on this issue. It is true that Baptist experienced sufficient stress at his workplace and that he visited a doctor seeking relief from that stress. The doctor prescribed medicine for stress-related maladies (e.g., high blood pressure and anxiety). Baptist stated in the pleadings that he felt that his work was not appreciated, and he felt that he was treated poorly. However, without minimizing the distress experienced by Mr. Baptist, on review I cannot find that his workplace could be considered a "hostile work environment." Even if I more properly characterize his argument as an "abuse of authority" under Part 708, I find no merit to his claims. [16]

To sum up, although Baptist clearly experienced a high level of stress at CWI, in this case there was insufficient evidence to support a finding that his managers had committed an abuse of authority. Therefore, I find that the Hearing Officer committed no error in his decision.

III. CONCLUSION

The Hearing Officer correctly concluded that Retaliations 1-5 were time–barred under 10 C.F.R. §§ 708.14 because they did not occur within 90 days of the date that Mr. Baptist filed his complaint. I also affirm the Hearing Officer's grant of the Motion for Summary Judgment, thereby dismissing Retaliation 6 of the complaint. I conclude that the Hearing Officer has not established a "strict pleading rule" for complainants in Part 708 actions. For the reasons discussed above, I find that Baptist's appeal is without merit. Consequently, I will deny the appeal.

It Is Therefore Ordered That:

---

[16] I further find that Baptist has misstated the conclusions of the IAD. Baptist argues that the Hearing Officer has imposed a requirement that "only hostile acts that are similar and within the same chain of command are actionable under Part 708." Appeal at 12. However, nowhere in the IAD did the Hearing Officer impose this requirement on all Part 708 cases. Rather, he used Supreme Court precedent as a guideline to make a determination about the workplace environment, not as a strict rule. The Hearing Officer stated:

> None of the alleged conduct was physically threatening or humiliating or of a severe or pervasive nature that would raise [a] hostile work environment claim. Nor can I find any other factual circumstance in this case that would support a finding of a hostile workplace environment.

IAD at 8.

(1) The Appeal filed by Billy Joe Baptist from the Initial Agency Decision issued on May 7, 2009, is hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 3, 2009

May 4, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Arun K. Dutta

Date of Filing: September 7, 2010

Case Number: TBA-0088

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on August 25, 2010, involving a Complaint of Retaliation filed by Arun K. Dutta (Mr. Dutta or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his Complaint, Mr. Dutta alleged that his former employer, Parsons Infrastructure and Technology Group, Inc. (Parsons or the contractor), retaliated against him for engaging in activity protected under Part 708. In the IAD, the Office of Hearings and Appeals (OHA) Hearing Officer determined that Mr. Dutta had engaged in activity that is protected under Part 708, but that Parsons had shown that it would have taken the same personnel action in the absence of the protected activity. Mr. Dutta appeals that determination. As set forth in this decision, I have decided that the determination is correct.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure, or participating in a related proceeding, will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an IAD, as requested by Mr. Dutta in the present Appeal, is performed by the Director of the OHA. 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of the Complaint are fully set forth in the IAD. *Arun K. Dutta*, Case No. TBH-0088 (2010).[1] For purposes of the instant appeal, the relevant facts are as follows:

Parsons is a contractor employed by the DOE to construct a salt waste processing facility (SWPF) at the DOE's Savannah River Site.[2] Mr. Dutta was employed by Parsons as a Senior Pipe Stress Engineer in March 2007. He was assigned to the Engineering Mechanics Group (EMG). IAD at 2. In the summer of 2007, Mr. Dutta was assigned to work on two specifications (documents requiring that certain equipment meets statutory and regulatory safety requirements), numbered 11818 and 11819. Specification 11818 detailed seismic qualification criteria for PC-3 vessels, and 11819 set forth seismic qualification criteria for PC-1 and PC-2 vessels.[3] *Id.* These documents had already been submitted for inter-disciplinary review (IDR), and it was Mr. Dutta's job to review, and make a preliminary disposition of, the IDR's committee's comments.[4] Mr. Dutta performed this duty, and then gave the specifications to Mr. Richard Stegan, the Lead Discipline Engineer (LDE), for his review. However, instead of approving these documents and forwarding them to his direct report, Mr. James Somma, Mr. Stegan cancelled specification 11818 and assigned another engineer, Anthony Edwards, to revise specification 11819. *Id.* Mr. Edwards incorporated elements from specification 11818, revised the specification given to him, and submitted the finished product, specification 11819, rev. 0, to Mr. Stegan. *Id.* Mr. Stegan forwarded the specification to Mr. Somma, Mr. Somma approved it, and on October 31, 2007, specification 11819, rev.0, was entered in Parsons' document control system (DCS). *See* IAD at 3.

On November 13, 2007, Mr. Dutta sent a letter to David Amerine, Senior vice President/Project Manager, SWPF, alleging that "an inferior quality document [the revised specification 11819, rev.0] was slipped into our Document Control system using fraudulent means." *Id.* Mr. Dutta also alleged that specification 11819, rev. 0 did not go through the IDR process, but was instead improperly substituted for specification 11819, which Mr. Dutta worked on, and which did go

---

[1] Decisions issued by OHA are available on the OHA website located at *http:www.oha.doe.gov*. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at *http:www.oha.doe.gov/search.htm*.

[2] A SWPF processes nuclear waste.

[3] PC-1, PC-2 and PC-3 are classes of seismic regulatory requirements. PC-1 and PC-2 are very similar, while PC-3 is more stringent.

[4] The IDR process is a review process for specifications and other documents. An engineer drafts or "initiates" a specification and sends it to a reviewer. If the reviewer "signs off" on the document, it is then sent to the IDR committee, along with an IDR form. The IDR committee returns comments on the form, and the initiator resolves the comments. The reviewer, the Lead Discipline Engineer (LDE), and the Engineering and Design Manager then review the form, and if they all sign off, the specification is then submitted to the document control system (DCS) operator, who verifies the signatures and dates on the specification and on the IDR form, and enters the data into the document control system.

through IDR. *Id.* The IDR form that originally accompanied specification 11819 was passed on with specification 11819, rev. 0. Mr. Dutta claimed that "this is a case of an intentional falsification of [a] safety document since these specs deal with design requirements of safety-related equipment." *Id.* Mr. Amerine stated that it looked as if Mr. Dutta had identified a problem and forwarded the letter to Mr. Somma. *Id.*

In November 2007, Parsons divided the EMG group into two groups: the vessel design group, under the supervision of Mr. Stegan, and the pipe stress group, under the supervision of Calvin Hughes. Mr. Dutta was placed in the pipe stress group which became official as of January 2008. *Id.* On January 3, 2008, Mr. Somma met with Mr. Dutta, Mr. Stegan and Mr. Edwards to discuss Mr. Dutta's allegations. *Id.* After the meeting, Mr. Dutta initiated a Condition Report (CR) at Mr. Somma's suggestion.[5] In November 2008, Mr. Dutta discussed a concern with Mr. Hughes that, although design of the SWPF was 90% complete, the pipe support design had not been completed. On January 15, 2009, Parsons terminated Mr. Dutta's employment. *Id.*

On April 6, 2009, Mr. Dutta filed a Part 708 Complaint with the Director of the DOE's Office of Civil Rights at the DOE's Savannah River Operations Office. This matter was referred to OHA for an investigation followed by a hearing. An OHA investigator issued a Report of Investigation on December 4, 2009. 10 C.F.R. §§ 708.22, 708.23. Subsequent to the investigation, an OHA Hearing Officer held a hearing in this matter over a period of three days. Over the course of the hearing, 14 witnesses testified. Mr. Dutta introduced 47 exhibits into the record, and Parsons submitted 68 exhibits.

After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the Initial Agency Decision that is the subject of this appeal.

II. The Initial Agency Decision

The Hearing Officer set forth the burdens of proof in cases brought under Part 708. He stated that it is the burden of the complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation. 10 C.F.R. §§ 708.5, 708.29. The Hearing Officer further noted that if an employee meets this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's protected disclosure or activity. 10 C.F.R. § 708.29. He considered the application of these elements to the Dutta proceeding.

[5] A Condition Report is a pre-printed form that an initiator used to identify issues and provide recommendations. An evaluator signs off on it, beginning an action plan. The last step verifies the action.

A. Protected Activity and Contributing Factor Analysis

The Hearing Officer found that Mr. Dutta made two protected disclosures regarding: (1) Parsons' failure to send the revised specification 11819, Rev.0 through IDR, and (2) Parsons' failure to complete the pipe support design before the construction phase of the SWPF. *Id.* at 5. He found that the complainant had a reasonable belief that Parson's failure to send the revised document through IDR violated company procedure. Likewise, with respect to the second disclosure, the Hearing Officer noted that the complainant reasonably believed that Parsons' failure to complete the pipe support design prior to the construction phase of the SWPF would result in a gross waste of funds. *Id.* at 6.

The Hearing Officer further noted that the complainant alleged that two negative personnel actions were retaliations for his making protected disclosures: (1) he claimed that his assignment to the pipe stress group was in retaliation for his first protected disclosure, and that while working in this group, he was not given work that was commensurate with his abilities and level of experience, and (2) he alleged that he was retaliated against by being terminated in January 2009. *Id.* at 7.

Regarding whether the protected disclosures were a contributing factor to the alleged retaliations, the Hearing Officer found that Mr. Dutta's November 13, 2007, disclosure to Mr. Amerine was not a contributing factor to his assignment to the pipe stress group. *Id.* at 8. The Hearing Officer based this finding on the fact that Mr. Stegan made the decision to place Mr. Dutta in the pipe stress group before November 13, 2007, thus finding that Mr. Dutta's protected disclosure on that date could not have been a contributing factor to this personnel action. Regarding Mr. Hughes' alleged treatment of the complainant, the Hearing Officer found no evidence in the record that Mr. Hughes had actual or constructive knowledge of the complainant's first disclosure until after he had filed his Complaint. Thus, he could not conclude that Mr. Dutta's first disclosure was a contributing factor to Mr. Hughes's alleged assignment of tasks to the complainant that Mr. Dutta believed not to be commensurate with his skills and experience. *Id.* at 9. However, the Hearing Officer determined that Mr. Dutta's second disclosure was a contributing factor to Parson's decision to terminate his employment. The Hearing Officer based this finding on Mr. Somma's constructive knowledge of the complainant's protected disclosure, as well as the fact that Mr. Dutta's November 2008 disclosure was sufficiently close in time to the January 2009 termination such that a reasonable person could conclude that the disclosure was a contributing factor to the termination. *Id.* at 10.

B. Whether Parsons Would Have Terminated Mr. Dutta Absent the Protected Activities

The Hearing Officer analyzed the alleged retaliation in light of the protected disclosures and determined that Parsons had established by clear and convincing evidence that it would have taken the same action in the absence of Mr. Dutta's protected disclosures. In examining the alleged retaliatory action taken against Mr. Dutta, the Hearing Officer considered several factors, including: "(1) the strength of the employer's reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees." *Id.* at 20 *(citing Kalil v. Dep't of Agriculture*, 479 F. 3d 821, 824 (Fed. Cir. 2007)).

Neither party disputed at the hearing that after the SWPF project moved from the design stages into the construction stages, a substantial number of layoffs of Parsons employees and contractors who were involved in design-related activities were necessary. Parsons maintained that a Reduction-in-Force (RIF) was necessary because it was only given limited funds to complete the project and it needed to stay within budget. IAD at 10. According to Parsons, 17 of the 22 employees in the pipe stress group were terminated, including Mr. Dutta. The Hearing Officer found that Parsons had substantial reasons for terminating Mr. Dutta's employment. The Hearing Officer also found that the RIF was conducted using facially-neutral standards, that the quality of Mr. Dutta's work in the pipe stress group was average, and that the number of calculations that Mr. Dutta completed compared to other engineers who were retained, was below average. The Hearing Officer further concluded in the IAD that these factors suggest that Parsons would have terminated Mr. Dutta in the absence of his protected disclosures. *Id.* at 14.

The Hearing Officer also examined the strength of any motive on the part of Parsons management to retaliate against Mr. Dutta. Although the Hearing Officer found that there was some evidence of a motive to retaliate on the part of Mr. Somma, who made the final decision to terminate the complainant, the Hearing Officer determined that the motive did not appear to have been particularly strong. *Id.* at 15. He further found no motive to retaliate on the part of the other Parsons management officials involved in the termination of Mr. Dutta. Finally, the Hearing Officer examined the treatment of similarly-situated employees who were selected to be laid off, and found that most, if not all, of the analysts who were in situations analogous to Mr. Dutta were also terminated. He further found, however, that a number of analysts who were selected to be laid off were either able to locate another job within Parsons or were subsequently re-hired by Parsons. *Id.* at 16. Based on the evidence in the record, these analysts re-applied for their positions, whereas Mr. Dutta did not. The Hearing Officer concluded that Parsons would have terminated the complainant's employment even in the absence of his protected disclosures. *Id.*

III. Analysis

It is well established in appeals brought under 10 C.F.R. Part 708 that factual findings of a Hearing Officer are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *See Curtis Hall*, Case No. TBA-0042 (2008). With respect to a Hearing Officer's conclusions of law, they are reviewable de novo. *Id.; see Pierce v. Underwood,* 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion').")

Mr. Dutta filed a statement identifying the issues that he wished the OHA Director to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). His Statement focuses exclusively on his contention that the Hearing Officer erred in finding that Parsons met its evidentiary burden in this case. Parsons filed a Response to the Statement arguing generally

that there is no merit to Mr. Dutta's appeal. [6] 10 C.F.R. § 708.33. As fully discussed below, after carefully reviewing the voluminous record in this case, as well as the arguments raised in the Statement of Issues, I find that there is no basis for overturning the findings in this case.

A. Whether the Hearing Officer Erred in Making Credibility Determinations

Mr. Dutta contends that the Hearing Officer erred in finding that Parsons met its evidentiary burden and asserts that the Hearing Officer gave Parsons "every benefit of the doubt" when making his credibility determinations. Statement at 1. Mr. Dutta points to several instances where the Hearing Officer incorrectly determined that the contractor's testimony in the record was credible. Specifically, Mr. Dutta asserts that the Hearing Officer erred in finding credible Parsons testimony: (1) about "the competency of Helton" [a pipe stress engineer]; (2) that the engineers had been "rated fairly by Hughes and Neidbolski [Parsons management] based on the number of calculations they performed;" and (3) that Mr. Dutta was "an average engineer and not capable of doing checker work . . ." In addition, Mr. Dutta argues that the Hearing Officer incorrectly gave little weight to the testimony of the complainant or his primary witness in finding that Parsons would have terminated Mr. Dutta's employment even in the absence of his protected disclosure. *Id.* at 2 and 3. As explained below, I find no merit to any of Mr. Dutta's arguments. I find that the record clearly shows that the Hearing Officer analyzed all of the testimony in the case in detail regarding these issues, and clearly explained his conclusion that Parsons had substantial reasons for terminating Mr. Dutta's employment.

With regard to Mr. Dutta's view that he was more qualified than at least three of the five pipe stress analysts who were retained, including Mr. Helton, and his contention that he should have been retained over Mr. Helton, the Hearing Officer adequately explained why he found Mr. Hughes' testimony to be entitled to more weight than Mr. Dutta on the issue of whether other engineers had less problems than Mr. Dutta with their calculations. Tr. at 155-158, IAD at 12. The Hearing Officer also noted that Mr. Helton had the highest cumulative score in Mr. Somma's ranking of the eight remaining pipe stress engineers. *Id.* Based on the testimony in the record, the Hearing Officer provided reasons why he could not conclude that Parsons would have retained Mr. Dutta instead of Mr. Helton in the absence of Mr. Dutta's protected disclosures. *Id.*

Second, I find that the Hearing Officer adequately assessed the validity of Mr. Dutta's claim that he was more qualified than some of the five pipe stress analysts who were retained. Specifically, the Hearing Officer reviewed the testimony of Mr. Somma who prepared a Group Assessment Summary consisting of the names of the eight remaining engineers in Hughes' pipe stress group, and ratings of each engineer in five separate skill areas. IAD at 11. Mr. Dutta received the lowest cumulative score of the eight engineers. *Id.* The Hearing Officer determined that Mr. Somma's assessment of Mr. Dutta was based in part on input from Mr. Hughes and Mr. Niedbalski regarding the work that

---

[6] In general, in its Response, Parsons maintains that Mr. Dutta identifies no specific issues for review by the OHA Director and points to no testimony or evidence that the Hearing Officer failed to consider, but rather asserts that Mr. Dutta misconstrues the findings made by the Hearing Officer. It presents numerous citations to the record to support its position. *See* Parsons Response.

was performed after Mr. Dutta joined the pipe stress group, primarily pipe stress calculations. *Id.* The record reflects that the Hearing Officer thoroughly analyzed the testimony of Mr. Hughes, Mr. Neidbalski and Mr. Dutta regarding the number and quality of the pipe stress calculations produced by Mr. Dutta . The Hearing Officer attributed more weight to the testimony of Mr. Hughes and Mr. Niedbalski characterizing Mr. Dutta's technical skills as being "average," specifically indicating that the number of calculations Mr. Dutta produced was "below average." IAD at 13, Tr. at 733, 752, 758. He based his finding in part on the fact that Mr. Niedbalski had more opportunity to observe the quality of Mr. Dutta's work. *Id.* at 13. The very essence of the role of the Hearing Officer is to listen to the testimony of witnesses, observe their demeanor, and make a judgment as to their credibility. The Hearing Officer explained why he weighed the evidence and testimony on these issues as he did. There is no evidence that the Hearing Officer abused his discretion in determining that the Parsons witnesses testimony regarding these issues was credible.

Third, I find that the Hearing Officer explained why he relied on and gave considerable weight to testimony that Mr. Dutta was an "average" engineer in determining that Parsons had substantial reasons for terminating Mr. Dutta's employment. By way of example, the Hearing Officer highlighted evidence that Mr. Dutta was not able to complete as many calculations as other engineers in the pipe stress group, and that Mr. Dutta's calculations were not more difficult than those performed by other pipe stress engineers. IAD at 12; Tr. at 166-167. The Hearing Officer did not make a finding, as Mr. Dutta asserts, that he was not "as capable of doing checker work;" rather the Hearing Officer concluded, based on the evidence taken as a whole, that the quality of Mr. Dutta's work in the pipe stress group was average at best and the number of calculations he completed was below average. [7]

Finally, I find that the Hearing Officer reviewed all of the testimony in detail, including that of Mr. Dutta and his witness, regarding Mr. Dutta's job performance. The Hearing Officer examined the number and level of difficulty of calculations Mr. Dutta had performed, as well the variation and level of difficulty of calculations performed by other engineers who were retained by Parsons. *See* IAD at 13. Again, based on his analysis of the testimony, the Hearing Officer concluded that the quality of Mr. Dutta's work was average, and the number of calculations that he completed was below average. Mr. Dutta has failed to show that the factual findings made by the Hearing Officer were "clearly erroneous." Further, after carefully reviewing the evidence, I find no evidence to suggest that the Hearing Officer abused his discretion in making credibility determinations or weighing any evidence in the case.

B. Whether the Hearing Officer Erred in Finding Motive to Retaliate

The complainant contends in his Statement that the Hearing Officer erred in finding that there was "no evidence of a strong motive to retaliate on the part of Mr. Somma." Statement at 3. He contends

---

[7] In his Statement, Mr. Dutta further asserts that the Hearing Officer's finding that he was an average engineer was "based on the testimony of the two engineers that set up a contradictory methodology for rating the engineers." Statement at 2. The Hearing Officer found no evidence in the record of a "contradictory methodology" for the rating engineers.

that out of the eight individuals who were considered for layoff, he was the "only Parsons Employee selected for layoff." *Id.* Mr. Dutta's assertions are again misplaced. I find that the Hearing Officer thoroughly examined the strength of any motive on the part of Mr. Somma and other Parsons' management to retaliate against Mr. Dutta for his whistleblowing. The record reflects that the Hearing Officer found that there was some evidence of a motive to retaliate on the part of Mr. Somma. He noted that Mr. Somma signed off on a document (specification 11819, rev.0) that the complainant called "fraudulent." He further testified that he was "a little disappointed" when the complainant presented his concerns directly to Mr. Amerine (Senior Vice President/Project Manager, SWPF) rather than coming to Mr. Somma first. However, the Hearing Officer ultimately concluded that Mr. Somma's motive to retaliate against Mr. Dutta did not appear to have been "particularly strong." *Id.* at 14. He noted that it was Mr. Stegan, who was the primary actor in the series of events that led to Mr. Dutta's first disclosure, not Mr. Somma. The record shows clearly that the Hearing Officer carefully analyzed the actions and involvement of each Parsons' management official and based his conclusions on those findings. In addition, I find no error in the Hearing Officer's analysis of the strength of a motive to retaliate on the part of Mr. Somma. Mr. Dutta's assertion that he was the only Parsons employee selected for layoff is contradicted by the evidence in the record which indicates that at least two other Parsons employees were either laid off at the same time as Mr. Dutta or scheduled for layoff, but able to obtain another position with Parsons. Again, the Hearing Officer thoroughly analyzed the record and I find no error in his findings.

In sum, I am convinced that there was sufficient evidence in the record in this case to support the Hearing Officer's conclusion that Parsons met its evidentiary burden and clearly and convincingly established that it would have terminated Mr. Dutta absent his protected activity.

IV. Conclusion

As discussed above, I find no merit to any of the arguments advanced by Mr. Dutta. Therefore, I find that Mr. Dutta's appeal should be denied and the IAD affirmed.

It Is Therefore Ordered That:

(1) The Appeal filed by Arun K. Dutta on September 7, 2010 (Case No. TBA-0088), of the Initial Agency Decision issued on August 25, 2010, be and hereby is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 4, 2011

March 14, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Case:	David M. Widger
Date of Filing:	December 14, 2010
Case Number:	TBA-0097

This Decision considers an Appeal from a November 17, 2010, Initial Agency Decision (IAD) granting the Motion to Dismiss the Complaint filed by David M. Widger (Widger) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708.

I. Background[1]

Safety & Ecology Corp. (SEC) is a subcontractor supporting the Separations Process Research Unit (SPRU) at the Knolls Atomic Power Laboratory in upstate New York. IAD at 2. In August 2008, Widger began working for SEC as a Radiological Controls Technician. IAD at 2. In February 2009, Widger became the coordinator for the "As Low As Reasonably Achievable" (ALARA) program at the facility. IAD at 2. As the ALARA coordinator, Widger drafted and revised procedures to contain radioactive materials. IAD at 2.

During the period July 2008 to October 2009, Widger claims that he made 24 protected disclosures.[2] IAD at 5. Widger believes that as a result of making these disclosures and for filing whistleblower complaints on October 19 and November 10, 2009,[3] he was subjected to the following alleged acts of retaliation: (i) he was directed to fix the issues that he brought forward; (ii) he was subjected to excessive meetings with management; and (iii) he was not adequately compensated. Widger further asserts that he left his position on November 16, 2009.[4] IAD at 11. During the OHA investigation of his Complaint, Widger asserts that his leaving should be deemed a retaliatory constructive discharge. IAD at 11.

---

[1] The events leading to the filing of the instant Complaint and Motion are fully set forth in the IAD.

[2] The Hearing Officer numbered each of these disclosures from 1 to 24. IAD at 5.

[3] OHA accepted the Complaints as one case file, TBH-0097. IAD at 2 n.1.

[4] Widger asserts that he did not formally resign his position. Appeal at 2. Despite Widger's attempt to draw a distinction between his leaving his position and a formal resignation, his action in leaving his position is a *de facto* resignation, which he himself characterizes as a constructive discharge. *See infra*. For the purposes of this decision, we will refer to Widger's abandonment of his position as a resignation.

On July 22, 2010, SEC filed a Motion to Dismiss Widger's Complaint.[5] In its Motion, SEC argued that Widger's alleged protected disclosures were vague, non-specific, and not substantial enough to be deemed a protected disclosure pursuant to Part 708. SEC also argued that the alleged disclosures related to the concerns and circumstances of employees other than Widger and, thus, were not covered by Part 708. IAD at 4. Additionally, SEC argued that Widger could not prove that, in fact, he suffered any retaliation. IAD at 11.

In the November 17, 2010, IAD, which addressed SEC's Motion to Dismiss, the Hearing Officer found that the vast majority of the disclosures cited by Widger were "frivolous" and thus not protected by Part 708. In making this determination, the Hearing Officer found that Widger had failed to provide sufficient facts or other information to allow a conclusion that the disclosure referenced a substantial threat to human health or public safety or a significant violation of any law, rule, or regulation. Further, the Hearing Officer found that some of the disclosures were not specific enough or that there was insufficient information indicating that the disclosure was a communication to SEC management. However, the Hearing Officer found that portions of Disclosure Nos. 10 and 11 (pertaining to a failure to obtain a radiation work permit for a survey) and 20 (regarding inadequate number of respirators inspected for defects) were not "frivolous" and thus might be protected disclosures for Part 708 purposes. IAD at 10-11. Further, with regard to Widger's allegation that he experienced retaliation for filing two whistleblower complaints, the Hearing Officer found that the filing of the whistleblower complaints was protected conduct for purposes of Part 708. IAD at 11.

The Hearing Officer then examined three of the alleged retaliations: (i) being required to fix the issues that he brought forward; (ii) excessive meetings with management; and (iii) substandard compensation. The Hearing Officer concluded that all were frivolous allegations of retaliations. In making this determination, the Hearing Officer found that meeting with management and addressing the concerns he raised were normal job requirements and, as such, were not retaliations actionable under Part 708. IAD at 18. Further, because SEC management was scheduled to evaluate Widger's compensation on November 13, 2009, a date Widger had voluntarily taken paid leave and three days prior to Widger's resignation, Widger's alleged inadequate compensation could not be considered actionable retaliation under Part 708. IAD at 13.

With regard to the remaining alleged retaliation, constructive discharge, the Hearing Officer examined the working conditions which Widger cited as supporting such a finding. These cited conditions are listed below:

- An SEC manager stated, "I . . . hate my job and . . . the people I work with";
- An SEC manager "pitted half his work crew against the other half on a daily basis through treatment, conflict, slander and work assignments";
- When Widger saw an SEC manager one morning, Widger said "good morning," but there was not a reply;
- SEC failed to resolve Widger's first Part 708 complaint before his resignation, which occurred approximately four weeks after the filing of the complaint;
- Widger's manager did not communicate with him;
- Widger was instructed to "not do anything unless directed";

[5] The Hearing Officer deemed this motion as a Motion to Dismiss for Lack of Jurisdiction. IAD at 4. SEC had also filed another Motion to Dismiss (Case No. TBZ-1097) which is not at issue in this Appeal.

- Widger received no direction on the ALARA program;
- SEC management refused to take Widger's input seriously;
- SEC management limited his computer access; and
- Widger felt that he was being targeted for termination.

IAD at 11-12.

In articulating the standard to be used to determine whether constructive discharge has been established for the purpose of the Motion, the Hearing Officer cited an MSPB case, *Heining v. General Serv. Admin.*, 68 M.S.P.R. 513, 519 (1995), for the proposition that resignations are presumed voluntary. He went on to use *Heining* to hold that an employee may "rebut the presumption of voluntariness" if he or she "can establish that the resignation . . . was the product of duress . . . brought on by the employer." IAD at 11 (citing *Heining*). The Hearing Officer reviewed each of the working conditions cited above. In reviewing them, he found that several of the cited conditions were only normal conditions of employment or reflected an impolite workplace which, in the absences of duress, would not constitute evidence supporting a finding of constructive discharge. IAD at 12. With regard to the delay in resolving Widger's first whistleblower complaint, the Hearing Officer noted that resolving such complaints typically takes many months and that no reasonable person could consider a one-month delay in resolving such a complaint as duress by management. IAD at 12. Other cited conditions, such as restricted access to work E-mail or allegations of management indifference, were not supported, in the Hearing Officer's opinion, by the evidence available in the record. IAD at 13. With regard to Widger's belief that he was being targeted for termination, the Hearing Officer noted that a November 11, 2009, E-mail from a co-worker named Robert Massengill (Massengill E-mail), in which Massengill stated his belief that management was out to terminate Widger, did not constitute a reasonable, objective basis for making a finding of constructive discharge. IAD at 13. Lastly, the Hearing Officer found that, based on the available evidence in the record, on the date Widger resigned, SEC management was, in fact, requesting that Widger continue working at SEC. IAD at 13. Consequently, the Hearing Officer found that Widger voluntarily chose to stop working. IAD at 13. The Hearing Officer concluded, in sum, that Widger had not "made a non-frivolous allegation that he suffered retaliation due to a constructive discharge." IAD at 13.

In his Appeal, Widger claims generally that the Hearing Officer (i) failed to provide him with sufficient guidance to enable him to support his Complaint and (ii) failed to understand or overlooked relevant information regarding the alleged protected disclosures. Specifically, Widger challenges the Hearing Officer's findings that various disclosures were frivolous and thus not protected under Part 708. With regard to the Hearing Officer's assessment as to the sufficiency of Widger's allegations concerning his alleged constructive discharge,[6] Widger asserts that the Hearing Officer erred in believing that Widger had cited his limited E-mail access as a circumstance supporting a finding of constructive discharge and that the Hearing Officer failed to appreciate the evidentiary weight of the Massengill E-mail.[7] Widger points out that Massengill, the author of the E-mail, was the Senior Project Manager for SEC during most of Widger's

[6] Widger did not challenge the Hearing Officer's finding regarding the three other alleged retaliations.

[7] The E-mail reads in pertinent part "I am sure that you heard all about the turmoil at SPRU. Dave W[idger] went to into the DOE and spilled his guts. I don't think that he had a choice because my guess is that when I left, Stace was going to make it his mission to fire Dave ." Appellant Brief (Attachment 4).

employment. Widger implies that, because of Massengill's position, the Massengill E-mail should have mandated a conclusion that Widger's resignation should be deemed a constructive discharge.

Finally, Widger challenges the Hearing Officer's finding that the failure of SEC to resolve Widger's first whistleblower complaint within a month was not a work circumstance that would support a finding that Widger had been constructively discharged. Widger alleges that employees familiar with the project he was working on could have produced a written report of investigation within two weeks.

II. Analysis

The Part 708 regulations do not include procedures and standards governing motions to dismiss. In the absence of such standards, the Federal Rules of Civil Procedure, though not governing this proceeding, may be used for analogous support. *See, e.g., Hansford F. Johnson*, Case No. TBZ-0104 (November 24, 2010); *Billy Joe Baptist*, Case No. TBH-0080 (May 7, 2009); *Edward J. Seawalt*, Case No. VBZ-0047 (August 20, 2000) (applying standards of Fed. R. Civ. P. 56 to Motion for Summary Judgment). The Motion to Dismiss filed by SEC in the present case is most analogous to what would, under the Federal Rules, be a motion to dismiss for "failure to state a claim upon which relief can be granted . . . ." Fed. R. Civ. P. 12(b)(6).

The Supreme Court has held that, to survive a Rule 12(b)(6) motion to dismiss, a complaint must plead "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While the complaint "does not need detailed factual allegations, . . . [f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the complaint's allegations are true (even if doubtful in fact)." *Id.* at 555 (citations omitted).

As an initial matter, we reject Widger's arguments with regard to the alleged lack of assistance and guidance from the Hearing Officer. The Hearing Officer, as an impartial adjudicator, cannot provide explicit guidance to any party as to the type and amount of evidence to submit in a case. The complaining employee alone has the responsibility to prove the elements of his or her complaint. 10 C.F.R. § 708.29. In addition, an examination of the record indicates that Widger had sufficient opportunities to submit evidence to support his Complaint.

Further, we need not review Widger's many arguments concerning the Hearing Officer's determinations regarding the protected disclosures. As referenced above, Widger asserts that the Hearing Officer failed to understand or appreciate the subject matter of these alleged disclosures. Even assuming, for the purposes of this appeal, that the Hearing Officer misunderstood the nature of these disclosures, the Hearing Officer still found that Widger did make three non-frivolous protected disclosures and that Widger's two whistleblower complaints were protected activities. SEC has not appealed this determination. Because there are protected disclosures and activities to sustain Widger's complaint for the purposes of considering a Motion to Dismiss, we need not consider his arguments regarding the other alleged protected disclosures.

We now turn to Widger's contention that the Hearing Officer erroneously concluded that, as a matter of law, Widger had not alleged facts sufficient to support a claim of constructive discharge, or any other type of actionable retaliation. For a whistleblower to establish that he or she was constructively discharged, the whistleblower must prove that his or her working

conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Richard L. Urie*, Case No. TBH-0063 (May 21, 2008) slip op. at 11. This is an objective "reasonable employee" standard that cannot be triggered by an employee's subjective beliefs. *See Roman v. Porter*, 604 F. 3d 34, 42 (1st Cir. 2010).

In reviewing this appeal, we will assume that all of Widger's allegations are true. Nonetheless, given Widger's allegations, no reasonable Hearing Officer could conclude that Widger's working conditions were so intolerable that a reasonable person would feel compelled to resign. As cited by the Hearing Officer, many of the working conditions cited by Widger are workplace verbal incidents reflecting a problematic working environment or reflect Widger's complaints as to his work assignments and guidance from his manager. As such, they do not support a constructive discharge claim. *See, e.g., Williams v. Giant Food Inc.*, 370 F. 3d 423, 434 (4th Cir. 2004) ("dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign"). The fact that SEC failed to address Widger's first whistleblower complaint before his resignation some four weeks later reflects only a normal working condition notwithstanding Widger's assertion to the contrary. Even if one assumes that the delay was intentional, this short delay would not rise to the level of an intolerable work condition. Lastly, with regard to the Massengill E-mail, the fact that a supervisor may have had an intent to remove Widger does not itself establish that Widger's actual working conditions were sufficiently intolerable to prompt his resignation. *Cf. Petrosino v. Bell Atlantic*, 385 F. 3d 210, 229-231 (2nd Cir. 2004) (Title VII constructive discharge case where court found that supervisors created a hostile work environment for a complainant but did not create sufficiently intolerable work conditions to compel an employee's resignation).

In sum, we conclude, as a matter of law, that Widger failed to allege sufficiently intolerable working conditions to support a constructive discharge claim under Part 708. Further, Widger has not challenged the Hearing Officer's findings regarding the non-validity of the other claimed retaliations in his Complaint. Because there are no non-frivolous retaliations alleged in Widger's Part 708 Complaint, the Complaint should be dismissed.

It Is Therefore Ordered That:

(1) The Appeal filed by David M. Widger on December 14, 2010, Case No. TBA-0097, of the Initial Agency Decision issued on November 17, 2010, is hereby denied.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 14, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Petitioner:	Vinod Chudgar
Date of Filing:	January 28, 2011
Case Number:	TBA-0100

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on January 13, 2011, involving a complaint of retaliation filed under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708, by Vinod Chudgar (hereinafter referred to as "the Complainant" or "Mr. Chudgar") against Savannah River Remediation (hereinafter referred to as "the Respondent" or "SRR"). SRR is the Management and Operations contractor for the Department of Energy's (DOE) Savannah River Site (SRS). In his complaint, Mr. Chudgar alleged that he engaged in protected activity and, as a consequence, suffered reprisals by the Respondent. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer granted a Motion to Dismiss filed by the Respondent. Mr. Chudgar appealed the decision. As set forth below, the Appeal is denied.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent [] fraud, mismanagement, waste and abuse" at DOE's government-owned or-leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they "reasonably and in good faith" believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. § 708.5 (a). Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"] will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations set forth at 10 C.F.R. Part 708 establish administrative procedures for the processing of complaints. Under these regulations, review of an IAD, as requested by Mr. Chudgar, is performed by the Director of OHA. 10 C.F.R. § 708.32.

B. Factual Background

For purposes of review, I set forth the pertinent facts as set out in the Report of Investigation (ROI) and in the subsequent IAD.[1] The Complainant has been employed at SRS since 1988. In April 2009, he was a Senior Engineer A for Washington Savannah River Company (WSRC), then the Management and Operations contractor for SRS. Mr. Chudgar's job was to electronically file software and software revisions as they were created. This software was written and tested by design engineers, implementing engineers and software end-users who were tasked with designing and implementing the software. The Complainant acknowledged that he did not use his engineering background to perform his duties as a Senior Engineer A, and other employees described his duties as clerical.

In early 2009, SRR became the prime contractor for nuclear cleanup at SRS. During the transition from WSRC to SRR, a management team was selected to evaluate all applicants for employment under the new contract. The team members were SRR managers and other managers chosen based on their expertise in the various functional areas that had vacancies. WSRC employees had to apply for employment under the new SRR contract. Applicants were asked to answer eight competency-based questions, and could also add supplemental information to their applications. The panel restricted its evaluation to the application package. They did not review or accept performance evaluations, nor did they interview or solicit information from the applicant's managers or colleagues. The panel that evaluated the Complainant's application found it to be poorly written and difficult to understand. They rated the application very low and recommended that SRR not hire Mr. Chudgar. However, SRR decided to hire all of the applicants. Over 500 applicants were offered engineering positions and 12, including the Complainant, were offered other positions. In July 2009, he was offered, and accepted, his current position as a Principal Process Computer Analyst.

C. Procedural Background

On July 13, 2009, Mr. Chudgar filed a Part 708 complaint with the Employee Concerns Manager of the DOE's Savannah River Operations Office. In the complaint, Mr. Chudgar alleged that in April 2009, while employed by the predecessor contractor WSRC, he engaged in conduct that was protected under 10 C.F.R. Part 708 and, as a result, was transferred to a non-engineering position in July 2009 when SRR won the contract. As a remedy for this alleged act of retaliation, the Complainant sought relief including reinstatement to an engineering position and disciplinary action against certain employees. July 13, 2009 complaint at 2. SRR filed its response to this complaint on October 9, 2009, arguing that Mr. Chudgar had not made a protected disclosure as defined by Part 708, that none of the people who decided to offer the Complainant his current position had any knowledge, constructive or actual, of his allegedly protected activities, and that his placement in a

---

[1]The events leading to the filing of Mr. Chudgar's complaint are fully set forth in the IAD. *See Vinod Chudgar*, Case No. TBH-0100 (2011). Decisions issued by OHA are available on the OHA website located at http://www,oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

new position was not retaliatory and did not result in a materially adverse change in his employment. The parties unsuccessfully attempted to mediate the dispute. The Employee Concerns Manager of the Savannah River Operations office then forwarded the complaint to OHA in May 2010 for an investigation followed by a hearing.

On September 27, 2010, an OHA Investigator issued her Report of Investigation (ROI). In the ROI, the Investigator identified two potentially protected disclosures. First, the Complainant claimed that a WSRC employee tried to intimidate him into archiving an incomplete revision of software that was designed to control the function of a pump that was used to move liquid from one storage tank to another, and that, after he refused, the software was archived anyway. Mr. Chudgar contends that his disclosure of these events revealed a substantial violation of a law, rule or regulation and a substantial danger to employees or to the public. Second, the Investigator cited Mr. Chudgar's contention that SRR violated a procedure because a safety committee had not approved the changes recommended in another software design package and thus it was not implemented according to established company procedures. Specifically, he claimed that engineers were not following requirements to supercede previous revisions when "baselining" the files. [2]

With regard to the first disclosure, the Investigator could not conclude from the evidence that the Complainant reasonably believed that this disclosure revealed a substantial danger to employees or to the public. She concluded that the Hearing Officer might want to ask for further evidence concerning the Complainant's contention that the disclosure revealed a substantial violation of a law, rule or regulation. ROI at 10. With regard to the second disclosure, the Investigator was also unable to conclude that it revealed a substantial danger to employees or the public or a substantial violation of a law, rule or regulation.

The Investigator also addressed the issue of whether the individuals who decided to offer the Complainant his current position had actual or constructive knowledge of his alleged protected activities, and concluded that, in all likelihood, they did not. Finally, she concluded that, even if the individual made at least one protected disclosure, and even if that disclosure was a contributing factor to a negative personnel action taken against him, it is likely that SRR would be able to offer compelling evidence that it would have taken the same action regarding Mr. Chudgar's employment in the absence of that disclosure. On December 8, 2010, SRR filed a Motion to Dismiss the complaint. Mr. Chudgar filed his response to the Motion on December 21, 2010.

D. The Initial Agency Decision

In her Initial Agency Decision (IAD), the Hearing Officer first set forth the burdens that parties to Part 708 proceedings bear. She stated that in order to prevail, a Complainant must show, by a preponderance of the evidence, that he or she made a protected disclosure, participated in a proceeding, or refused to participate as described in 10 C.F.R. § 708.5, and that such an act was a contributing factor to a retaliatory action. If the Complainant satisfies these requirements, then the

[2] "Baselining" is adding software revisions to the existing software in the library.

burden shifts to the Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same action absent any protected activity on the part of the Complainant.

The Hearing Officer then discussed the Respondent's Motion to Dismiss. In its Motion, the Respondent argued that the Complainant could not have reasonably believed that his disclosures revealed a substantial risk of harm to employees or the public or a substantial violation of a law, rule or regulation. The Respondent also contended that the complaint must be dismissed because Mr. Chudgar would be unable to show that the individuals who offered him his current position had actual or constructive knowledge of his alleged protected behavior. This is relevant because, under the circumstances in this case, in order to demonstrate that his allegedly protected behavior was a contributing factor to his reassignment, Mr. Chudgar would have to show that the personnel who reassigned him had actual or constructive knowledge of that behavior, and that the reassignment occurred sufficiently close in time to the Complainant's disclosures to permit a reasonable inference that one was a contributing factor to the other. *See, e.g., Ronald Sorri*, Case No. LWA-0001 (1993).

Next, the Hearing Officer described the Complainant's disclosures, and concluded that they did not constitute protected behavior pursuant to 10 C.F.R. Part 708. With regard to Mr. Chudgar's first disclosure, the Hearing Officer stated that on April 8, 2009, Jim Coleman, Production Lead Engineer at WSRC, brought the Complainant a software revision to archive. That revision was titled Computer Program Modification Tracker (CMT) -0133. The revision contained schematics showing a software change of the sort that Mr. Chudgar was tasked with filing, and a hardware change that was implemented using a separate document. [3] This software change was intended to alter the function of a pump that was used to move liquid from one storage tank to another. The software had been tested and accepted on April 7-8, 2009, and was in use prior to Mr. Coleman asking the Complainant to archive the software. According to the Hearing Officer, Mr. Chudgar knew that the software had been tested and accepted by two systems engineers. Mr. Coleman had to make additional changes, but could not continue with his work until the changes in the software package had been archived, thereby establishing a "baseline." The Complainant examined the schematics and realized that they depicted a hardware change, but there was no documentation about the hardware change in the package. Since the documentation did not contain an explanation of the hardware change, Mr. Chudgar refused to archive the software revision. Mr. Coleman explained that the hardware change was controlled by another document. However, the Hearing Officer observed, the Complainant refused to archive the software package and the men argued.

At this point, the Hearing Officer continued, the facts are in dispute. The Respondent claims that Mr. Chudgar did not elevate the issue to management, nor did he call for a "time out" or a "stop work." [4] Motion to Dismiss at 3. According to SRR, management was unaware of this incident until Mr. Chudgar filed his complaint on April 13, 2009. The Complainant, however, contends that on April

---

[3]Significant software and hardware changes are controlled by a Design Change Form (DCF). Software changes are tracked using a Computer Program Modification Traveller (CMT).

[4] A "time out" is an informal process used to address safety concerns where an employee (1) feels uncomfortable in performing a task or (2) observes an unsafe condition that he wants corrected.

8, 2009, he called the Quality Assurance Manager, who advised Mr. Coleman to file a Non-Conformance Report (NCR) and enter his concern into the Site Tracking, Analysis and Reporting (STAR) system. [5] There is no evidence that Mr. Chudgar or Mr. Coleman filed an NCR. In fact, Mr. Chudgar left the office for the weekend, assuming incorrectly that Mr. Coleman would not continue with the changes. However, another engineer archived the software changes after the Complainant departed. Mr. Chudgar did not make any further report until April 13, 2009, when he reported this incident to the Office of Employee Concerns. The Office of Employee Concerns then contacted WSRC management about the report, and WSRC investigated the concern and issued a timeout. The investigation concluded that there was no safety concern and that the engineers could file an "as found" document in the software archives. [6]

The Hearing Officer concluded that Mr. Chudgar's communications with WSRC concerning this incident did not constitute a protected disclosure under Part 708 because he could not have had a reasonable belief that his disclosure revealed a substantial and specific danger to employees or to the public. She pointed out that, instead of filing an NCR or calling for a time out, measures that an employee in his position with his level of experience should have taken if he was concerned about public or employee safety, the Complainant left for the weekend. In response to Mr. Chudgar's argument that the QA Manager directed Mr. Coleman to file a NCR, the Hearing Officer concluded that it was not logical that Mr. Coleman, who did not believe that there was any problem, would file such a report. The Hearing Officer did not address the issue of whether the Complainant reasonably believed that this first disclosure revealed a substantial violation of a law, rule, or regulation.

The Hearing Officer then addressed Mr. Chudgar's second alleged protected disclosure. She said that on April 23, 2009, the Complainant amended his concern, claiming that WSRC had violated its procedure when it changed to a new computer operating system. The change involved approximately 500 files, much larger than the typical software update that Mr. Chudgar was assigned to catalog and record. The Complainant reviewed the change documentation and alleged that it violated WSRC procedure because it was lacking the proper approvals by the Facility Operations Safety Committee (FOSC), and because WSRC engineers were not following requirements to supercede previous revisions when "baselining" the files.

The Hearing Officer cited with approval the Respondent's claim that the FOSC only had to approve changes that were "Safety Significant," and that only 20 pages of the 500 page package were safety significant. The Hearing Officer concluded that those 20 pages had indeed been approved. She further found that Mr. Chudgar's manager asked him to identify his concerns and notify the

---

[5] A NCR is required when an item fails to satisfy required technical, design or quality requirements, is of indeterminate quality, is found to be suspect (counterfeit), has documentation deficiencies which render the item indeterminate, or meets one or more of the previous conditions but its continued use is required. The STAR system is available to all employees to identify and report safety concerns.

[6] An "as found" document is an existing design document that defines and reflects what the field condition should be. It is placed into a DCF as a convenience for the user.

appropriate manager, but that the Complainant did not do so, and stated that he was satisfied with the package. The Hearing Officer concluded that the fact that Mr. Chudgar could not articulate his concerns when asked undermines the reasonableness of any belief that the new system violated company procedures.

Based on the evidence, the Hearing Officer found that the Complainant could not have reasonably believed that his second disclosure revealed a substantial violation of a law, rule or regulation, or a substantial and specific danger to employee or public health or safety. She cited FOSC's approval of the portion of the change package that was "safety significant," the Complainant's knowledge that the software changes had been successfully tested, that the rules cited by Mr. Chudgar were not applicable to the engineering procedures that the Complainant catalogued, and his inability to articulate to the Respondent, when asked, any safety problem that he found with the changes.

The Hearing Officer further stated that, even if either of the Complainant's two disclosures could be considered to be protected under Part 708, he would not be able to show that either of the two disclosures was a contributing factor to an act of retaliation. Specifically, the Hearing Officer concluded that the people who decided to offer the Complainant his current position did not have actual or constructive knowledge of the disclosures and the alleged retaliatory act did not occur sufficiently soon after the disclosures to permit a reasonable inference that the disclosure was a contributing factor. Furthermore, she found that Mr. Chudgar's reassignment to a non-engineering position did not constitute a retaliation because it had no negative effect on the terms and conditions of the Complainant's employment.

E. The Statement Of Issues

Mr. Chudgar's Statement of Issues was largely unresponsive to the Hearing Officer's findings in the IAD. [7] For example, a substantial portion of the Statement was devoted to the ratings given to him by the management team that offered him his current position, even though they were not a significant factor in the Hearing Officer's decision. Moreover, the Statement did not address the Hearing Officer's conclusions that the Complainant could not have had a reasonable belief that his

---

[7]Mr. Chudgar's response to the IAD was set forth in its entirety in his Notice of Appeal. In a letter to the Complainant dated January 13, 2011, the OHA acknowledged receipt of the Notice, and stated that, although the Notice included some discussion of the relevant issues, a more complete explanation of the basis for his Appeal was needed. Our letter then briefly described the bases for the Hearing Officer's decision, and said that Mr. Chudgar should identify the Hearing Officer's findings with which he disagreed and the reasons for that disagreement. *See* January 31, 2011, letter from Poli Marmolejos, Director, OHA, to Vinod Chudgar.

In a telephone conversation with Robert Palmer of this Office, Mr. Chudgar stated that he did not intend to make another filing regarding his Appeal, and that he wished for his Notice of Appeal to also serve as his Statement of Issues. *See* memorandum of February 15, 2011, telephone conversation between Mr. Chudgar and Mr. Palmer. For this reason, I have referred to his Notice as his Statement of Issues in the body of this Decision.

disclosures revealed a substantial and specific danger to employees or to the public. Also not discussed in the Statement were the Hearing Officer's findings that the management team that offered him his current position did not have actual or constructive knowledge of the individual's disclosures, that the alleged retaliation did not occur soon enough after the disclosures to allow for a reasonable inference that the disclosures were a contributing factor, and that the Complainant's reassignment did not constitute retaliation because it did not materially and adversely affect the terms and conditions of his employment. Instead, the Statement focused on Mr. Chudgar's claim that he reasonably believed that his disclosures revealed a substantial violation of a law, rule, or regulation.

II. ANALYSIS

As set forth above, the Respondent filed a Motion to Dismiss, and in the IAD, the Hearing Officer granted that Motion. However, because the Hearing Officer's analysis went beyond an examination of the sufficiency of the complaint and was in fact a ruling on the merits of the case, it can be more accurately described as a summary judgement in favor of the Respondent. I will therefore evaluate the IAD using standards established for summary judgements in prior Decisions of this Office and in the federal courts.

The Part 708 regulations do not include procedures and standards governing summary judgment. I note, however, that the Federal Rules of Civil Procedure provide that a Motion for Summary Judgement shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). While the Federal Rules do not govern this proceeding, Rule 56 has been used as a guide in the evaluation of Motions for Summary Judgment filed in a Part 708 proceeding. *See Colleen* Monk, Case No. TBA-0105 (2011); *Edward J. Seawalt*, Case No. VBZ-0047 (2000). In *Mary Ravage*, Case No. TBA-0102 (2011), we stated that summary judgment may be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. We further said that in such a case, the moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *Celotex v. Catrett*, 106 S. Ct. 2548, 2552-2553 (1986). The Supreme Court has further articulated the following test: "If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986).

Because the IAD involved questions of law, we will review the Hearing Officer's findings *de novo*. For the reasons set forth below, I conclude that, after an ample opportunity for discovery, the Complainant is unable to establish, by a preponderance of the evidence, the existence of an element essential to his case, and on which he bears the burden of proof. Consequently, no purpose would be served by proceeding to a hearing in this matter.

A. Mr. Chudgar's Disclosures Did Not Reveal A Substantial And Specific Danger To Employees Or To The Public

After reviewing the record in this matter, I agree with the Hearing Officer that Mr. Chudgar could not have reasonably believed that his disclosures revealed a substantial and specific danger to the health or safety of employees or of the public. As an initial matter, the Complainant did not call for a time out nor did he file a NCR with regard to either of his disclosures, actions that one would reasonably expect an employee of Mr. Chudgar's level of experience to take when faced with a dangerous condition. Moreover, with regard to the first disclosure, both WSRC and the DOE investigated the issue, and concluded that there was no safety concern. *See* Affidavit of David B. Little, Deputy Chief Engineer, SRR. Finally, concerning the second disclosure, the record supports, and the Complainant did not dispute, the Hearing Officer's finding that WSRC's safety committee had examined and approved the documents in question and Mr. Chudgar knew that the software changes had been successfully tested. Consequently, I will not disturb the Hearing Officer's findings on this point.

B. Whether Mr. Chudgar Reasonably Believed That His Disclosures Revealed A Substantial Violation Of A Law, Rule, Or Regulation

As previously stated, Mr. Chudgar's Statement of Issues focused on his contention that he reasonably believed that his disclosures revealed a substantial violation of a law, rule, or regulation. Specifically, he argues that WSRC's actions regarding CMT-1033 were taken in violation of the provisions governing Design Change Forms set forth in Engineering Manual E-7, Procedure 2.37. Statement at 1. He contends that his second disclosure revealed a violation of company rules set forth in Procedures 2.37 and 2.38. Statement at 2.

There is some support in the record for the Complainant's claim that he reasonably believed that his first disclosure revealed a substantial violation of company procedures. During the WSRC investigation of the Complainant's Employee Concern, the investigator concluded that "Manual E7, Procedure 2.37 *Design Change Form* requirements were violated during implementation of the referenced documents [CMT-1033]." *See* June 18, 2009 letter from Larry Adkinson, Lead Investigator, WSRC ECP, EEO & Ethics, to Mr. Chudgar (italics in original). However, because I conclude, in section II.C below, that the Complainant did not suffer retaliation as a result of his disclosures, I do not believe that further development of the record on this point at a hearing is required.

As for the second disclosure, there is no support for the proposition that the Complainant reasonably believed that it revealed a substantial violation of a law, rule, or regulation. In his Statement, Mr. Chudgar contends that WSRC engineers violated Procedures 2.37 and 2.38 and Manual 2s, Procedure 1.3 by not superceding previous software revisions before baselining the files. However, there is evidence in the record that, while this may have been the better practice, there were no company rules that required that revisions be done in this way. *See* May 11, 2009 electronic mail from the Complainant's manager, Tony Tipton, to the Complainant. The Complainant failed to point out the language in the rules that he cited that specifically prohibits the practices that he complained of, and after reviewing those provisions, I find no reasonable basis for the Complainant's belief.

According to the IAD, this is consistent with the experiences of the Respondent's investigation team, who asked Mr. Chudgar to clarify his contention that WSRC had not followed proper procedure in changing to a new computer operating system. The Hearing Officer's findings that the Complainant did not provide any clarification and the team still did not understand his concern was not disputed by Mr. Chudgar. His inability to point to specific company rules and clearly explain how WSRC's actions violated those rules strongly suggests that Mr. Chudgar did not reasonably believe that his second disclosure revealed a substantial violation of a law, rule, or regulation.

C. The Complainant's Reassignment Did Not Constitute Retaliation Under The Part 708 Regulations

Pursuant to 10 C.F.R. § 708.2, "retaliation" means "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (*e.g*., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart."

Mr. Chudgar contends that his reassignment from his previous position as a Senior Engineer A to his current position as a Principal Process Computer Analyst constituted retaliation. However, it is undisputed that he is currently employed at the same salary and grade level that he was previously receiving. [8] Moreover, there is ample evidence in the record to indicate that the Complainant was not using his engineering background in his previous position, and that his current assignment is not dissimilar to what he was doing before. During his June 17, 2010, interview with the OHA Investigator, Clifford Winkler, Chief Engineer, SRR and a member of the transition management team, stated that the job offer to Chudgar matched his previous assignment, where he worked with computers. Mike McEver, Manager, Tank Farms Process Controls Support Group, SRR, told the Investigator on June 23, 2010, that the Complainant's former job did not require an engineering background, and that Mr. Chudgar was not utilizing that background in his position. He characterized the baselining of software, in which the Complainant was engaged, as "an IT function." Tony Tipton and Albert Zaharia, his former manager and co-worker, respectively, described his previous duties as managing data and computer software. *See* memoranda of OHA Investigator's interviews with Mr. Tipton on June 24, 2010 and Mr. Zaharia on June 30, 2010. The evidence in the record indicates that the reassignment did not adversely affect the terms and conditions of the individual's employment, and therefore did not constitute "retaliation" as that term is defined in the Part 708 regulations. *See Mark D. Siciliano*, Case No. TBH-0098 (2010).

[8] The Complainant claims that in his previous position, he was able to work a substantial amount of overtime that is currently unavailable to him. However, after an ample opportunity for discovery, he was unable to submit any evidence to support this contention.

III. CONCLUSION

I agree with the Hearing Officer's findings regarding the Complainant's second disclosure, and with the Hearing Officer's conclusion that the first disclosure did not reveal a substantial and specific danger to employees or to the public. Although the Hearing Officer did not address the Complainant's claim that his first disclosure also revealed a substantial violation of a law, rule or regulation, I agree with the Hearing Officer's dismissal of the Complaint, because I conclude that the Respondent did not retaliate against the Complainant. Accordingly, I will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Vinod Chudgar from the Initial Agency Decision issued on January 13, 2011, Case No. TBA-0100, is hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date:

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

March 25, 2011

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Mary Ravage
Date of Filing:	January 19, 2011
Case Number:	TBA-0102

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on January 6, 2011, involving a complaint of retaliation filed by Mary S. Ravage ("Ravage" or "Complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her complaint of retaliation (hereinafter "the Complaint"), Ravage alleged that her former employer, Medcor, Inc. (Medcor), retaliated against her for making a protected disclosure under Part 708 regarding an alleged incident where a fellow employee slapped another fellow employee on the arm. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that Ravage had not shown, and could not show pursuant to 10 C.F.R. § 708.5(a), that she reasonably believed that in disclosing the alleged arm slap to her superiors, she revealed either (1) a substantial violation of law, rule or regulation, or (2) a substantial and specific danger to employees or to public health and safety. The Hearing Officer therefore granted a Motion for Summary Judgment filed by Medcor, and then dismissed the Complaint without a hearing. Ravage appealed the decision. As set forth below, the appeal is denied.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned or-leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they "reasonably and in good faith" believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. § 708.5 (a). Thus, contractors found to have taken adverse personnel actions against an employee for such a

disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"] will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (definition of "retaliation").

The DOE Contractor Employee Protection Program regulations set forth at 10 C.F.R. Part 708 establish administrative procedures for the processing of complaints. Under these regulations, review of an IAD, as requested by Ravage, is performed by the Director of OHA. 10 C.F.R. §708.32.

B. History of the Complaint Proceeding

For purposes of review, I set forth the pertinent facts as averred in the Report of Investigation (ROI) and in the subsequent IAD.[1] Medcor ran two clinics as a subcontractor of Bechtel National Inc. (Bechtel). Bechtel is the contractor responsible for the environmental clean-up operation for the DOE's Office of River Protection (ORP). Medcor hired Ravage in June 2009 to work on an "as needed" basis as a nurse for the clinics.

Ravage contends that on October 8, 2009, she was told by a co-worker, Kristine Welsh, that the previous evening Welsh had been struck by another co-worker, XXXXX. That evening, Ravage verbally reported Welsh's allegations to Medcor's Director of Operations, Cindi McCormack. Welsh subsequently informed McCormack that, on October 7, 2009, XXXXX had "slapped my left arm pretty hard." October 12, 2009, e-mail from Welsh to McCormack. On October 28, 2009, XXXXX was promoted to XXX XXX, and on October 29, 2009, Ravage was hired as a full-time nurse.

In her Complaint, Ravage contends that she found Welsh's allegation credible because she alleges that she too was struck by XXXXX during the week prior to XXXXX's alleged arm-slap of Welsh. Although Ravage asserts that in her October 8, 2009, conversation with McCormack, she told McCormack that she (Ravage) had been struck by XXXXX on a separate occasion, McCormack has stated that she has no recollection of Ravage making this assertion. Instead, McCormack contends that on October 8, 2009, she asked Ravage if she had ever experienced any physical assault or threat of violence in the workplace, and Ravage denied having experienced them. November 12, 2010, Affidavit of Cindi McCormack, Exhibit A to Medcor's November 23, 2010, Motion for Summary Judgment at 2. On November 1, 2009, Ravage sent an e-mail to McCormack reiterating the concerns about XXXXX's conduct towards Welsh that she had verbally expressed on October 8, 2009. Ravage's November 1, 2009, written account does not assert that Ravage was ever struck by XXXXX. The November 1, 2009, e-mail does, however, accuse XXXXX of speaking to her with "an angry voice and

[1] The events leading to the filing of Ravage's complaint are fully set forth in the IAD. *See Mary Ravage/Medcor, Inc.*, Case Nos. TBH-0102, TBZ-0102 (2011). Decisions issued by OHA are available on the OHA website located at http://www,oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

with a mean face." November 1, 2009, e-mail from Ravage to McCormack. A subsequent, December 7, 2009, e-mail from Ravage to McCormack complains about XXXXX's aggressiveness but also fails to contain an allegation that Ravage was struck by XXXXX. The first record of an allegation that Ravage was struck by XXXXX appears in a December 22, 2009, e-mail from Ravage's husband, Dr. Chris Ravage, M.D., to Medcor's Chief Operating Officer, Bennet W. Petersen. In that e-mail, Dr. Ravage alleges that XXXXX "hip-checked" his wife during the week prior to XXXXX's alleged striking of Welsh. [2]

Medcor contends that Ravage's poor work performance in November and early December 2009 resulted in two written warnings to Ravage. On December 8, 2009, Ravage was warned by a Medcor supervisory team that future problems could result in disciplinary action including termination. On January 6, 2010, Medcor asked Ms. Ravage to resign.[3] When Ravage refused to resign, Medcor terminated her employment. IAD at 3.

On January 21, 2010, Ravage filed her Complaint. The Complaint alleges that "Medcor had been given copious warning[s] that there were issues in their Richland operation and the response was to try and reign [sic] in the squeaky wheel." Complaint at 4. In this regard, the Complaint alleges that XXXXX systematically harassed and undermined Ravage in retaliation for Ravage's reporting of Welsh's allegation to McCormack. As noted above, the Complaint alleges that XXXXX had struck Ravage less than a week before the alleged incident involving Welsh. Complaint at 1.

Medcor filed responses to the Complaint on March 4, 2010, and on May 14, 2010, arguing that Ravage had made no disclosures protected under Part 708, and that her termination was not retaliatory. In June 2010, ORP's Employee Concerns Manager transmitted the Complaint to OHA for an investigation followed by a hearing. On June 9, 2010, the OHA Director appointed an Investigator (OHA Investigator) who conducted an investigation into the allegations contained in Ravage's Complaint. On September 8, 2010, the OHA Investigator issued a Report of Investigation (ROI) in this case. In the ROI, the OHA Investigator concluded that Ravage was alleging a single protected disclosure, *i.e.*, reporting to McCormack on October 8, 2009, that Welsh alleged that she was struck by XXXXX. With regard to that one disclosure, the OHA Investigator found that Ravage had not demonstrated, by a preponderance of the evidence, that this information met the criteria for a Part 708 protected disclosure. ROI at 4.

---

[2] In Ravage's Response to Medcor's Motion for Summary Judgment, Dr. Ravage refers to this alleged action by XXXXX as "a hip check like in a hockey game." Response at 1. A "hip-check" is a term used in ice hockey to describe the action that occurs when a player drops to a near-crouching stance and swings his hips towards an opposing player in order to knock him off balance. *See* http://en.wikipedia.org/wiki/Checking_(ice_hockey)

[3] Although not mentioned in the IAD, Medcor cited a subsequent event in which Ravage allegedly did not follow security rules.

Upon the issuance of the ROI, the OHA Director appointed a Hearing Officer to conduct a hearing concerning the Complaint. On November 12, 2010, Medcor submitted a Motion for Summary Judgment contending that Ravage had not met her burden of proof. Specifically, the Motion asserted that Ravage's report of an alleged arm-slapping incident involving Welsh and XXXXX does not constitute a protected disclosure under 10 C.F.R. § 708.5. Ravage filed a Cross-Motion for Partial Summary Judgment on November 12, 2010, and submitted a supplemental response to Medcor's Motion on November 22, 2010. The Cross-Motion requested a ruling that her October 8, 2009, report of an alleged arm-slapping incident constitutes a protected disclosure. Ravage asserted that her October 8, 2009, report met two of the criteria for protected disclosures set forth at § 708.5. She asserted that the reported incident "was a violation of law" under § 708.5(a)(1), and that her disclosure communicated a reasonable belief that "XXXXX posed a substantial and significant danger to employees" under § 708.5(a)(2) and. IAD at 4, *citing* Ravage Supplemental Response at 1.

C. The Initial Agency Decision (IAD)

The IAD set forth the Hearing Officer's decision regarding Medcor's Motion for Summary Judgment and Ravage's Complaint. The Hearing Officer found that it is Ravage's burden to prove, by a preponderance of the evidence, that she made a protected disclosure as described in 10 C.F.R. § 708.5, and that, if she cannot meet this threshold showing, then judgment cannot be awarded in her favor. In this regard, the Hearing Officer found that it was appropriate to grant summary judgment against Ravage if she has failed to make a showing sufficient to establish the existence of this element essential to her case. IAD at 5, *citing Celotex v. Catrett*, 106 S. Ct. 2548, 2552-2553 (1986). The Hearing Officer then considered whether Ravage had shown, or could show, that she reasonably believed that in disclosing the alleged arm slap of Welsh by XXXXX, she revealed either (1) a substantial violation of a law, rule or regulation, or (2) a substantial and specific danger to employees or to public health and safety.

1. Reasonable Belief Concerning a Substantial Violation of Law, Rule, or Regulation

The Hearing Officer found that Ravage was correct that intentionally slapping a fellow employee could violate state law depending on the circumstances and severity of the slap. However, the Hearing Officer also found that, under Part 708, a protected disclosure must communicate a reasonable belief of a *substantial* violation of a law, rule, or regulation in order to receive protection. 10 C.F.R. § 708.5(a)(1). In reviewing the record of the alleged arm slap of Welsh by XXXXX, the Hearing Officer found that Welsh contemporaneously described the alleged incident as an intentional, hard arm slap, and he concluded that while such an arm slap may have resulted in a technical violation of the law, it did not constitute a sufficiently substantial violation of law to be protected under § 708.5(a)(1). The Hearing Officer also observed that Welsh's failure to immediately report the incident indicated that Welsh did not believe that a substantial violation of law had occurred. The Hearing Officer therefore concluded that the record

contained no reliable evidence supporting Ravage's contention that she could reasonably believe that a substantial violation of law had occurred. He, therefore, granted summary judgment to Medcor on the issue of whether Ravage disclosed information that she reasonably believed revealed a substantial violation of law, rule, or regulation.

2. Reasonable Belief Concerning a Substantial and Specific Danger to Employees or to Public Health and Safety

The Hearing Officer noted that Ravage had conceded that "no reasonable person" would believe that "a simple, isolated slap on the arm . . . poses . . . a danger. It is our contention that the assault was violent, not isolated, and XXXXX showed a consistent pattern of aggressive abusive behavior." Ravage Supplemental Response at 1. The Hearing Officer found that Ravage was attempting to re-characterize her October 8, 2009, report to McCormack by asserting that she had reported a pattern of aggressive, violent, and abusive behavior, as well as an alleged incident in which XXXXX hip-checked Ravage. IAD at 6-7. The Hearing Officer found that Ravage's accounts of the alleged incident were inconsistent, and that Ravage's written communications with McCormack on November 1, 2009, and December 7, 2009, discuss allegations of angry behavior by XXXXX but do not allege any physical aggression by XXXXX against Ravage. Finally, the Hearing Officer noted that (i) McCormack denied being told by Ravage on October 8, 2009, of any physical aggression against Ravage by XXXXX, and (ii) more importantly, that Ravage admitted at her deposition that she did not know if she told McCormack of the hip-checking incident on October 8, 2009. Accordingly, the Hearing Officer found that Ravage's claim that she reported a hip-checking incident to McCormack on October 8, 2009, "is simply not credible." *Id*. at 7. He concluded that, considering all of the evidence in the light most favorable to Ravage, Ravage "will not meet her evidentiary burden regarding an alleged, hip-checking incident." IAD at 8.

With respect to Ravage's contention that she reported a pattern of aggressive, violent, and abusive behavior to McCormack on October 8, 2009, the Hearing Officer found that Ravage's statements at her deposition do not support and, in fact, undercut this claim. He notes that in her Complaint, Ravage contends that XXXXX began systematically harassing and undermining Ravage "very shortly *after*" she reported the alleged arm-slapping of Welsh to McCormack, and that, during her deposition testimony, Ravage stated that XXXXX had started being aggressive to her at some point *after* Medcor's investigation of the alleged arm-slapping incident with Welsh had been concluded. IAD at 8, *citing* Complaint at 1, November 2010 Deposition Transcript at 16. [emphasis added].

Based on these findings, the Hearing Officer concluded that Ravage would not be able to establish that she disclosed information that she reasonably believed revealed a substantial and specific danger to employees or to public health or safety, and that no reasonable trier of fact could find in her favor on this issue. IAD at 8. Accordingly, the Hearing Officer granted summary judgment in favor of Medcor on the issue of whether

Ravage had disclosed information that she reasonably believed revealed a substantial and specific danger to employees or to public health or safety.

In the IAD, therefore, the Hearing Officer concluded that no rational trier of fact would be able to conclude that Ravage made a disclosure protected by Part 708 on October 8, 2009. Accordingly, he granted Medcor's Motion for Summary Judgment and dismissed Ravage's Complaint.

D. The Appeal

On January 19, 2011, Ravage appealed the Hearing Officer's findings in the IAD and identified the issues that she wished the Director of OHA to review in the appeal phase of the Part 708 proceeding.[4] *See Appeal*. On February 22, 2011, Medcor filed a response to Ravage's Appeal. *See Response.* In the Response, Medcor requested that the IAD be affirmed.

In her Appeal, Ravage contends that the investigation of her Complaint was incomplete because individuals that she identified who could corroborate various aspects of the complaint were not interviewed. She also states that the Hearing Officer offered to facilitate discovery if the parties were unable to reach agreement, and then failed to respond to requests by Ravage for assistance with discovery items that Medcor had refused to provide. Appeal at 1.

With respect to the Hearing Officer's factual findings in the IAD, Ravage first contends that the Hearing Officer erred in stating that Medcor "issued" two written warnings to Ravage for inappropriate conduct. Ravage asserts that one of the warnings was never presented to her and that the other warning has notations from Ravage and McCormack that mitigate the concern presented in the document. *Id.*

Ravage next contends that the Hearing Officer should have found that Ravage had established by a preponderance of the evidence that she had informed McCormack in their October 8, 2009, conversation of her allegation that XXXXX had struck Ravage. In this regard, Ravage asserts that the Hearing Officer mischaracterized Ravage's deposition testimony by stating that Ravage "admitted that she does not know if she informed Ms. McCormack of this incident . . ." IAD at 7. Ravage refers to testimony at the deposition where she stated that "I know I told her - - I had to have told her that because that was the whole realm of the whole thing, of her anger, and she had done it to me." Appeal at 2, *citing* Deposition Transcript at 36.

Ravage also contends that the Hearing Officer erred in stating that none of the written communications between Ravage and Medcor in November and December 2009 state that Ravage discussed XXXXX's alleged striking of Ravage in her October 8, 2009, conversation with McCormack. Ravage asserts that Dr. Ravage's December 22, 2009, e-mail to Petersen stated that Ravage discussed this alleged striking in her October 8,

[4] Although it is entitled Notice of Appeal, Dr. Ravage confirmed by e-mail dated January 31, 2011, that Ravage had nothing to add to the issues presented in her Notice of Appeal.

2009, conversation with McCormack. Ravage asserts that this corroborative statement by Dr. Ravage "should reasonably swing the preponderance of the evidence toward believing [Ravage's] version due to its timing." Appeal at 2. Based on this finding, Ravage contends that the Hearing Officer should have concluded that Ravage did report an alleged pattern of aggressive, violent and abusive behavior involving XXXXX in her October 8, 2009, conversation with McCormack, and that therefore she disclosed information that she reasonably believed revealed a substantial and specific danger to employees or to public health and safety. *Id.*

II. ANALYSIS

The Part 708 regulations do not include procedures and standards governing motions for summary judgment. In the absence of such standards, the Federal Rules of Civil Procedure, though not governing this proceeding, may be used for analogous support. *See, e.g., Hansford F. Johnson*, Case No. TBZ-0104 (November 24, 2010); *Billy Joe Baptist*, Case No. TBH-0080 (May 7, 2009); *Edward J. Seawalt*, Case No. VBZ-0047 (August 20, 2000) (applying standards of Fed. R. Civ. P. 56 to Motion for Summary Judgment). In the instant case, we find that the Hearing Officer correctly applied the standards for determination found in Fed. R. Civ. P. 56(c) to Medcor's Motion for Summary Judgment. That rule states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The IAD correctly states that summary judgment may be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. It notes that a moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Celotex v. Catrett*, 106 S. Ct. 2548, 2552-2553 (1986). The Supreme Court has further articulated the following test: "If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986) (*Matsushita*). IAD at 5.

As an initial matter, we need not address Ravage's argument that the OHA investigation of her Complaint was incomplete. Such an allegation has no bearing on our review of the IAD. 10 C.F.R. § 708.22(a) clearly indicates that an investigation is not an essential element of a Part 708 proceeding, and our current review is confined to the determinations made by the Hearing Officer in the IAD. See 10 C.F.R. § 708.32. Nor can Ravage rely on investigative findings to support her Complaint. The complaining employee alone has the responsibility to prove the elements of his or her complaint. 10 C.F.R. § 708.29.

We also need not review Ravage's contention that the Hearing Officer erred with respect to the discovery process. 10 C.F.R. § 708.28(b) invests the Hearing Officer with all powers necessary to regulate the conduct of the hearing proceeding. It is certainly within the Hearing Officer's discretion to decline to order discovery requests that he believes are unnecessary, and to halt discovery while considering a Motion for Summary Judgment based on the present record of the case.

Furthermore, we need not review Ravage's contention that the Hearing Officer made erroneous factual findings in the IAD with respect to written warnings contained in Ravage's personnel file at Medcor. The written warnings are relevant to the issue of Medcor's basis for terminating Ravage's employment. The Hearing Officer's determination in the IAD to grant Medcor's Motion for Summary Judgment and to dismiss the Complaint is based solely on the finding that Ravage failed to make a protected disclosure under Part 708.

We now turn to Ravage's contention that the Hearing Officer erred when he concluded that Ravage would not be able to establish that she disclosed to McCormack, in their October 8, 2009, conversation, that Ravage allegedly had been struck by XXXXX. That contention is without merit. As discussed below, Ravage's own description of this alleged incident at her deposition, as well as the characterization of it in her Complaint, does not establish that it was an instance of angry striking by XXXXX that Ravage would have been likely to report to McCormack in the context of informing her about XXXXX's alleged slapping of Welsh. Moreover, Ravage admitted in her deposition testimony that she could not specifically recall relating this incident to McCormack.

At the outset, we note that Ravage's deposition testimony does not support an account of Ravage being struck by XXXXX in a manner that would necessitate mention of the incident in any discussion of XXXXX's alleged anger. At her deposition, Ravage stated that she was struck by XXXXX while XXXXX was teaching Welsh to operate the x-ray machine. She stated that XXXXX grabbed an x-ray cassette from Welsh, "walked by and pushed [Ravage] against the door and went over to the x-ray machine and slammed [the x-ray cassette] in the x-ray [machine]." Ravage stated that XXXXX "struck me with her elbow" as she "pushed me away so that she could get by me to go put [the x-ray cassette] into the x-ray machine." *Id.* at 37-38. When Dr. Ravage later asked her if XXXXX's action was an elbowing or a hip check, she replied that "It was both at the same time. Move over so she could get by." *Id.* at 75. Based on our review of the record, we find that the Hearing Officer reasonably concluded from Ravage's deposition testimony that the incident of XXXXX allegedly striking Ravage was not a clear instance of anger-motivated violence that Ravage would have been likely to report to McCormack in the context of XXXXX's alleged striking of Welsh. In this regard, we note that the Complaint described XXXXX as acting "more in arrogance than anger." Complaint at 1.

We conclude from our review of Ravage's deposition testimony that the Hearing Officer did not err in concluding that this testimony indicated that Ravage did not recall if she informed McCormack of the incident. At the November 2010 deposition, Medcor counsel asked Ravage if, during her October 8, 2009, conversation with McCormack, she had told McCormack she was struck by XXXXX. Ravage stated:

> Yes. I told her that [XXXXX] had been aggressively getting anger [sic] at everything. And I said she's even done things to me. **I don't know if I said she struck me.** But we talked to her prior - - [McCormack] prior to that, to this incident, me and Kerry did, that [XXXXX] was getting angry at work."

Deposition Transcript at 35 [emphasis added]. She was then again asked to answer the specific question of whether she told McCormack that XXXXX allegedly struck her. She stated:

> I know that I told her – I had to have told her that because that was the whole realm of this whole thing, of her anger, and she had done it to me.

Id. at 36. The Hearing Officer rationally viewed this testimony as an admission that Ravage did not recall if she told McCormack on October 8, 2009, that XXXXX allegedly struck her. Ravage's statement that she "had to have told her" because they were discussing XXXXX's alleged anger is not a statement that she recalls telling McCormack, but a rationalization based on the subject of the conversation. As discussed above, the record does not support Ravage's reasoning that she must have told McCormack of the incident because it was an instance of XXXXX's alleged anger. In the IAD, the Hearing Officer finds that, at her deposition, Ravage's initial account of allegedly being struck by XXXXX was simply being struck by XXXXX's elbow as XXXXX brushed Ravage aside, and that she mentioned XXXXX giving her a hip-check only in response to a leading question from Dr. Ravage. IAD at 7. We concur with the Hearing Officer's assessment of Ravage's account.

Finally, we find no merit in Ravage's contention that the Hearing Officer erred in not considering Dr. Ravage's December 22, 2009, e-mail to Petersen, where he states that Ravage told McCormack on October 8, 2009, of allegedly being struck by XXXXX. The Hearing Officer specifically states that Dr. Ravage made this allegation to Petersen on December 22, 2009. IAD at 7. The Hearing Officer notes that Ravage's written communications with McCormack on November 1, 2008, and December 7, 2008, discuss Ravage's concerns about XXXXX's anger in the workplace, but that these communications fail to mention XXXXX's alleged striking of Ravage in early October 2009. We find that it was reasonable for the Hearing Officer to find the omission of this incident from Ravage's communications with McCormack as support for his conclusion that Ravage's claim to have discussed this incident with McCormack on October 8, 2009, is not credible. In light of the other evidence discussed above concerning this incident, we reject Ravage's contention that Dr. Ravage's corroborative statement to Petersen on December 22, 2009, "should reasonably swing the preponderance of the evidence toward believing [Ravage's] version due to its timing." Appeal at 2.

Accordingly, we find that the Hearing Officer rationally concluded that Ravage did not report an alleged pattern of aggressive, violent and abusive behavior involving XXXXX in her October 8, 2009, conversation with McCormack, but rather an isolated act of XXXXX allegedly striking a co-worker. We therefore find that the Hearing Officer correctly concluded that Ravage did not disclose information to McCormack that she

reasonably believed revealed a substantial and specific danger to employees or to public health and safety.

III. CONCLUSION

In sum, we find that the Hearing Officer correctly concluded that Ravage did not make a disclosure to Medcor officials that is protected under 10 C.F.R. § 708.5. We also affirm the Hearing Officer's grant of the Motion for Summary Judgment, and his dismissal of Ravage's Complaint. For the reasons discussed above, we find that Ravage's Appeal is without merit and should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Mary Ravage from the Initial Agency Decision issued on January 6, 2011, is hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 25, 2011

May 5, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Names of Petitioners:	Colleen Monk
Date of Filing:	February 10, 2011
Case Number:	TBA-0105

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on January 20, 2009, involving a complaint of retaliation filed by Colleen Monk ("Monk," or "Complainant") against Washington TRU Solutions, VJ Technologies, and Mobile Characterization Services (hereinafter referred to individually as "WTS," "VJT," and "MCS," respectively, or collectively as "the Respondents"), under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her complaint, Monk alleged that, during her employment with VJT, she engaged in protected activity and, as a consequence, suffered reprisals by the Respondents. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer granted a Motion for Summary Judgment filed by the Respondents, and denied Monk's complaint. Monk appealed the decision. As set forth below, the Appeal is denied.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned or-leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they "reasonably and in good faith" believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. § 708.5 (a). Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"] will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations set forth at 10 C.F.R. Part 708 establish administrative procedures for the processing of complaints. Under these regulations, review of an IAD, as requested by Monk, is performed by the Director of OHA. 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

For purposes of review, I set forth the pertinent facts as averred in the Report of Investigation (ROI) and in the subsequent IAD.[1] WTS is the Management and Operations contractor for the DOE's Waste Isolation Pilot Plant (WIPP) in Carlsbad, New Mexico. The function of the WIPP is to safely store radioactive waste collected from various defense-related facilities around the United States. One of the departments within WTS is the Central Characterization Project (CCP).

It is the responsibility of the CCP to provide on-site analysis of the radioactive wastes, which are usually contained in 55-gallon drums, to determine their composition and to ensure that no prohibited items are included in the drums for shipment to the WIPP. Drums shipped to WIPP are subject to strict controls regarding their content, and specifically regarding the amount of liquid wastes they contain. This analysis, called "characterization," is sometimes performed by subcontractors. MCS is one such subcontractor, providing Real Time Radiography (RTR) and Non-Destructive Assay services for WTS. RTR, which is the only characterization procedure that is relevant to this proceeding, essentially consists of X-raying the 55-gallon drums and analyzing their contents.

Monk was hired by VJT, an MCS subcontractor, in September 2001. The Complainant received her qualifications and became an RTR Operator in January 2006. The Complainant alleges that, during the period from 2007 to 2009, WTS wanted all operators to also act as "spotters" for the forklifts used to move the 55-gallon drums of radioactive waste. However, Monk refused to act as a "spotter" because of a LANL rule that required forklift "spotters" to be qualified forklift operators. The Complainant had no such qualification. She alleges that WTS management was "not happy with her over this refusal." *See* Addendum to Complaint at 2. Monk alleged that her action was protected under Part 708 as a refusal to participate in an activity that caused her to have a reasonable fear of serious injury to herself or to other employees. *See* 10 C.F.R. § 708.5(c)(2).

Beginning in January 2009, the Complainant began experiencing constant pain and fatigue. She was subsequently diagnosed as suffering from Fibromyalgia. She informed her supervisor that she was taking pain medication and that she could not take her medication while working in the field (as an RTR Operator). Monk alleges that, during that same time, she made protected disclosures, primarily regarding issues related to safety at LANL.

In March 2009, she informed her supervisor of her concern that employees who were not forklift-qualified were being required to act as "spotters." *Id.* The Complainant also alleges that in the same month, she approached a Site Project Manager at LANL with her concerns about the use of an Excel spreadsheet to calculate the amount of liquid in the drums of radioactive waste. According to the Complainant, the Manager had determined that the RTR Operators' rejection

[1] The events leading to the filing of Monk's complaint are fully set forth in the IAD. *See Colleen Monk*, Case No. TBH-0105 (2011). Decisions issued by OHA are available on the OHA website located at http://www,oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

rate for the drums was too high, and asked that the Operators use the spreadsheet. Specifically, the spreadsheet would calculate the amount of liquid in a drum after the Operator entered the physical measurements of the liquid observed inside the drum. Monk and other RTR Operators believed that the spreadsheet would underestimate the amount of liquid in the drums. The Complainant states that she told the Site Project Manager of her concerns in this area during February and March 2009, and that the Manager informed her that she and other RTR Operators would have to use the spreadsheets or he would find other RTR Operators who would.

The Complainant's final alleged protected disclosure concerns a March 2009 incident during which a technician improperly performed maintenance on an energized RTR generator. Monk stated that she informed VJT and WTS management of this unsafe situation, and unsuccessfully tried to stop the technician herself, but was told by one of the VJT employees that she was "overstepping her bounds." *See* Addendum to Complaint at 13.

In August 2009, Monk, for reasons that are discussed in more detail below, requested that she be moved to another position. *Id.* at 8; *See* OHA Investigator's Record of Telephonic Interview with Steve Halliwell, Head of Nuclear Division, VJT, at 2 (Halliwell Interview) (stating the Halliwell met with Monk on August 12th or 13th and she expressed to him that she was looking for office work); OHA Investigator's Record of Telephonic Interview with Karen Ventura, HR Director, VJT, at 2.

In October 2009, because of concerns on the part of WTS and VJT management that RTR Operators were not following a consistent procedure for determining the amount of liquid in drums of radioactive waste, WTS revoked the qualifications of all RTR Operators at LANL. In November 2009, WTS management informed the Operators that they would be trained on the use of the spreadsheet and would be tested on their knowledge in order to be re-qualified. Six Operators took the test, and two of the six passed. These two were placed on the List of Qualified Individuals (LOQI), and were subsequently re-qualified as RTRs. The Complainant also passed the test, but she was not placed on the LOQI. In December 2009, Monk was moved to an administrative position with MCS. As a result of this reassignment, the Complainant's pay was reduced by about $2.00 per hour.

On January 20, 2010, Monk filed a Part 708 complaint with the DOE's Carlsbad Field Office, which referred the complaint to OHA for an investigation and hearing. The Carlsbad Field Office forwarded the complaint to OHA and the OHA Director appointed an Investigator, who issued a Report of Investigation (ROI) on August 25, 2010. 10 C.F.R. §§ 708.22-23. In the ROI, the Investigator concluded that the only alleged action of Monk that might have been protected under Part 708 was her disclosure concerning the technician's unauthorized work on an energized piece of equipment. ROI at 7; *see* 10 C.F.R. § 708.5(a)(2).

Regarding the alleged retaliations, the Investigator found that, while Monk alleged she had been subjected to a hostile work environment, the "mere assertion of a hostile work environment does not rise to the level of retaliation." ROI at 8 n.11. The Investigator also found there to be some question as to whether Monk's transfer from her position as an RTR Operator to an administrative position, with the accompanying reduction in pay, rose to the level of a retaliation under Part 708, due to the circumstances surrounding the reassignment. *Id.* at 7-8. Assuming

that it did, the Investigator stated that the Complainant might be able to show that her alleged protected disclosure was a contributing factor to this action. *Id.* at 8. However, the Investigator concluded that, in all likelihood, the Respondents would be able to show, by clear and convincing evidence, that they would have taken the same actions in the absence of any protected disclosure. *Id.* at 8-10.

On August 26, 2010, the OHA Director appointed a Hearing Officer, who requested that the parties submit briefs focusing on the findings and conclusions in the ROI with which they disagreed, and the reasons for their disagreement. The parties submitted briefs and replies setting forth their positions concerning the issues raised in the ROI. Among the briefs submitted was Respondent VJT's September 30, 2010, "Brief in Support of Summary Judgment" joined in by Respondents WTC and MCS.

C. The Initial Agency Decision (IAD)

In the IAD, the Hearing Officer noted that, while the Federal Rules of Civil Procedure do not govern a Part 708 proceeding, Rule 56 has been used as a guide in the evaluation of Motions for Summary Judgment. That rule provides that such a motion shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Hearing Officer discussed the burdens of the parties under Part 708, that the complainant must establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets this burden of proof, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." *Id.* The Hearing Officer found that summary judgment in favor of the Respondents would be appropriate if there are no genuine issues as to any material fact and the Respondents are entitled to a judgment as a matter of law on *any of these elements*.

Thus, the Hearing Officer did not determine whether the Complainant engaged in activity protected under Part 708 or whether, if she had, such activity was a contributing factor to an act of retaliation by the Respondents. Neither did the Hearing Officer rule on whether the transfer of Monk to an administrative position could be considered as retaliation as defined in section 708.2, though he expressed "serious doubts" as to whether, under the circumstances, it could. IAD at 8. Rather, the Hearing Officer concluded that, *even if* the Complainant could meet her burden as set forth in section 708.29, "as a matter of law, . . . the Respondents would have taken the same actions in the absence of any protected activity on the part of the Complainant." *Id.*

In reaching his conclusion, the Hearing Officer considered factors that have been applied by the U.S. Court of Appeals for the Federal Circuit in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled. The court has identified several factors that may be considered in determining whether an employer has shown that it would have taken

an alleged act of retaliation against a whistleblower in the absence of the whistleblower's protected conduct. Those factors include "(1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees for the non-whistleblowing aspect alone." *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007) (*citing Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006)). Because the showing that must be made by an employer is virtually identical under the WPA and Part 708, prior OHA decisions have applied the factors set forth in *Kalil*. 5 U.S.C. § 1214(b)(4)(b)(ii); 10 C.F.R. § 708.29; *see, e.g., Dean P. Dennis*, Case No. TBH-0072 (2009), *aff'd* Case No. TBA-0072 (2009); *David L. Moses*, Case No. TBH-0066 (2008), *aff'd* Case No. TBA-0066 (2008).

First, the Hearing Officer found that the Respondents' reasons for transferring the Complainant to an administrative position were "exceptionally strong," including the undisputed fact, noted above, that she had requested the transfer. IAD at 7. In addition, the Hearing Officer cited evidence that her employer was concerned about her Fibromyalgia and the pain medication that she would sometimes have to take, "including hydrocodone, that, at least on occasion, rendered her unfit for work in the field." *Id.* The Hearing Officer also found evidence of management concerns "about 'liability issues' that could result from allowing the Complainant to continue to work as an RTR operator." *Id.*

Regarding the second *Kalil* factor, the Hearing Officer found that "the strength of the Respondents' motive to retaliate appears to have been minimal." *Id.* He noted that Monk's disclosure about the technician's unauthorized work on an energized piece of equipment, the only action alleged by Monk that the OHA Investigator found might have been protected under Part 708, did not directly implicate the Respondents' employees who played a role in the Complainant's reassignment. Further, the Hearing Officer agreed with the OHA Investigator that this incident was appropriately investigated and adequately addressed by the Respondent's in a "Root Cause Analysis Report." *Id.*

Finally, the Hearing Officer found evidence that the Respondents took similar actions against a similarly-situated employee for reasons that had nothing to do with "whistleblowing." The IAD cited the record of the OHA Investigator's interview with Steve Halliwell, VJT's Head of Nuclear Division, as indicating that another RTR operator requested reassignment because of the superior benefits that he would be eligible for in his new position, *id.* at 8 (citing Halliwell Interview at 2), and that, like Monk, his name was taken off the LOQI and not placed back on the List because he was being reassigned.

D. The Appeal

In her Appeal, Monk does not take issue with the analysis of the Hearing Officer in his consideration of the second and third *Kalil* factors. Instead, she focuses on the reasons cited in the IAD for the Respondents' decision to transfer her to an administrative position. The Complainant disputes that VJT had a "genuine concern to limit liability and keep me out of the field," and contends that she "was able to perform my job functions and keep my medication to a minimum." Appeal at 2.

II. ANALYSIS

Because this case involves an Appeal of a grant of summary judgment, I review the Hearing Officer's decision *de novo*, applying the appropriate standard of law. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 465 n.10 (1992) ("on summary judgment we may examine the record de novo without relying on the lower courts' understanding"); *Maydak v. United States*, 630 F.3d 166, 174 ("We review the grant of summary judgment *de novo*, applying the same standard of review as that of the District Court."). As noted by the Hearing Officer in the IAD, prior decisions of our office have considered motions for summary judgment under the standard used by the federal courts in applying Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Mary Ravage*, Case No. TBA-0102 (2011).

Applying this standard, *de novo*, to the facts before me, I find that the Hearing Officer appropriately granted the summary judgment motion. The Complainant notes what are, arguably, genuine disputes in the record as to facts that the Hearing Officer relied upon in the IAD in reaching his conclusion. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party if there is a 'genuine' dispute as to those facts."). [2] However, as explained below, even viewing those facts in the light most favorable to the Complainant,[3] there is ample basis for finding clear and convincing evidence that VJT would have transferred Monk to an administrative position in the absence of any protected activity. As such, the Respondents were entitled to judgment as a matter of law, the basis upon which a summary judgment motion must be granted.

In addition to the undisputed findings in the IAD under the second and third *Kalil* factors, there is still a solid basis for the Hearing Officer's finding on the first factor, the strength of VJT's reason for transferring Monk to an administrative position. There is no dispute that Monk requested the transfer, and I agree with the Hearing Officer that this stands as an "exceptionally strong" reason for VJT's action. In her Appeal, Monk contends that her "request was made solely out of my fear of being let go by VJT. At the time of my request I had been through several months of a hostile work environment, . . ." Appeal at 2. However, as explained below, the Hearing Officer addressed these issues in the IAD.

---

[2] In her Appeal, the Complainant asks why, if she in fact posed a liability concern for VJT, did the company not keep her working as an RTR Operator, and allow her to do office work during the time she could not work in the field. Monk states, as an "undisputed fact," that "there have been and continue to be RTR personnel, both VJT and WTS employees, who are qualified RTR Operators/ITRs at LANL who cannot work in the field for medical, training deficiencies, or logistical issues." Appeal at 2. However, this issue, disputed or not, is not one of "material" fact. In other words, the Hearing Officer's decision did not turn on what actions VJT *could have taken*, but rather on the action that VJT *did take*, and whether it would have taken the same action in the absence of any protected activity by the Complainant. As such, the issue is not relevant to the disposition of the Motion for Summary Judgment.

[3] Monk also states in the Appeal her opinion that the investigation of her complaint was not "adequate," that "[s]everal key personnel were not interviewed," and that a hearing would allow her to "have witness validation of my allegations." Appeal at 3. However, because I agree with the Hearing Officer's conclusions, even when viewing any facts as to which there is a genuine dispute in the light most favorable to the Complainant, validation of the individual's allegations as to any such facts would not alter the outcome of this case. Thus, the Complainant's opinion notwithstanding, the Respondents are entitled to summary judgment as a matter of law.

Regarding the Complainant's allegation of a hostile work environment, the Hearing Officer found that Monk "knew, or should have known, of any hostile work environment more than 90 days prior to the date on which she filed her Part 708 complaint. Her allegation regarding a hostile work environment is therefore time-barred." IAD at 5 n.1 (citing 10 C.F.R. § 708.14(a)). Though Monk's complaint does not specify when she made her request for a transfer, the OHA Investigator cited her interview with a VJT management official that Monk approached him regarding her request on August 12 or 13, 2009. ROI at 9 (citing Halliwell Interview). In her response to the ROI, Monk does not take issue with this account, nor does she specify a later date on which she made her request.

The critical point here is that, by her own admission, the Complainant was aware of what she claims were already "several months of a hostile work environment" by the time she requested a transfer and, as the Hearing Officer correctly found, she did not file her January 20, 2010, complaint "by the 90th day after the date [she] knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a).

As for her expressed fear of being fired motivating her request for a transfer, the Hearing Officer found that Monk

> appears to be claiming that she feared termination because of a potential inability to be available for duty as an RTR operator to the extent demanded by her employer, and not because of retaliation for engaging in protected activity. Termination solely because of an inability to be available for duty on the schedule set by the employer is not a violation of the Part 708 regulations.

IAD at 7. More importantly, even if the Complainant believed in August 2009 that she faced a threat of termination in retaliation for conduct protected under Part 708, her complaint, filed on January 20, 2010, would have been untimely, just as it was as to any claim of hostile work environment. In short, to the extent Monk argues that her request for a transfer was a result of retaliation she perceived as of August 2009, her complaint as to that retaliation is clearly time-barred. If, on the other hand, the transfer is claimed to be a discrete act of retaliation by VJT, there is clear and convincing evidence that VJT would have taken the same action in the absence of any protected activity, even viewing the facts in the record in a light most favorable to the Complainant.

In addition, the burden of the Respondents aside, I share the "serious doubts" of the Hearing Officer as to whether the transfer of the Complainant could even be considered as "retaliation" under section 708.2, and this issue goes to whether the Complainant met *her* initial burden in this case. To meet the definition of "retaliation" under Part 708, an action must taken "against an employee," and the examples of actions given in the definition are described as "negative action[s] with respect to the employee's compensation, terms, conditions or privileges of employment." 10 C.F.R. § 708.2. First, the undisputed fact that Monk requested the transfer makes it extremely difficult for her to prove that the action was taken "against" her. And while the resulting reduction of pay, from $25.75 to $23.50 per hour, is clearly a "negative action," there is evidence in the record that Monk was well aware that the position being offered to her in

response to her request would pay less, and wanted the position nonetheless. Halliwell Interview at 2; Ventura Interview at 2. The Complainant does not dispute this, but chooses to focus on her alleged reasons for requesting the transfer: "I did not seek out a lower paying position because of my illness. I was afraid of losing my job." Complainant's Response to ROI at 3. Whatever her reasons, it is difficult to see how transferring Monk to a position *she sought* can be construed as an action taken "against" her.

II. CONCLUSION

For the reasons set forth above, I conclude that the Hearing Officer correctly granted the Respondent's Motion for Summary Judgment and denied Monk's complaint, as there was clear and convincing evidence that VJT would have transferred the Complainant to an administrative position in the absence of any protected activity. Moreover, while the IAD stopped short of a definitive finding on whether Monk's transfer could be considered retaliation under section 708.2, the record, as a matter of law, would support a finding that the Complainant did not meet her burden of proving that the transfer is within the scope of the definition of retaliation under Part 708. Accordingly, I will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Colleen Monk from the Initial Agency Decision issued on January 20, 2011, is hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 5, 2011

United States Department of Energy
Office of Hearings and Appeals

Greta Kathy Congable,	)	
	)	Case No. TBA-0110
v.	)	
	)	Filing Date: September 26, 2011
Sandia Corporation.	)	
	)	

Issued: May 4, 2012

Appeal

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on September 8, 2011, involving a Complaint of Retaliation that Greta Kathy Congable (Ms. Congable or the complainant) filed under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Ms. Congable alleged that she engaged in activity protected under that program and that her employer, Sandia Corporation (Sandia or the contractor), retaliated against her for doing so. In the IAD, the Office of Hearings and Appeals (OHA) Hearing Officer denied relief to Ms. Congable, dismissing her complaint. Ms. Congable appeals that determination. As set forth in this decision, I have decided that her Appeal should be denied.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE established its Contractor Employee Protection Program to "safeguard public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 2, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The Part 708 regulations prohibit retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including "disclosing to a DOE official … information that [the employee] reasonably believe[s] reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or

safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a).

If an employee believes that a Part 708 retaliation has occurred, the employee may file a complaint requesting that the DOE order the contractor to provide relief. 10 C.F.R. § 708.1, The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include "a statement specifically describing . . . the alleged retaliation taken against [the complainant] and . . . the disclosure, participation, or refusal that [the complainant] believe[s] gave rise to the retaliation." 10 C.F.R. § 708.12.

B. Factual Background

The Complainant has been employed by Sandia in a variety of administrative support positions since 1994. In August 2004, she was promoted to Administrative Staff Assistant (ASA) and assigned to Sandia's Corporate Investigations (CI) Office. In September 2006, Christopher Padilla was named Senior Manager for CI, becoming Ms. Congable's direct supervisor. Shortly thereafter, she was promoted to PASA (Principal ASA). Between September 2008 and April 2010, Ms. Congable purportedly disclosed to several individuals at Sandia and Lockheed Martin, Sandia's parent company, the presence of unprotected personally identifiable information (PII) on Sandia's computer network, and Mr. Padilla's alleged improper alteration of inquiry and case files. In June 2010, Ms. Congable was transferred from her PASA position in CI to a PASA position in Sandia's Management Assurance and Reporting Department (MA), retaining her same job title, job level, and salary.

C. Procedural Background

The facts surrounding Ms. Congable's complaint were set forth in detail in the IAD from which Ms. Congable has taken this appeal, and a full recounting will not be reproduced here. Ms. Congable filed a Part 708 complaint with the National Nuclear Security Administration Service Center (NNSA/SC) in Albuquerque, New Mexico, on September 14, 2010. In her complaint, Ms. Congable alleged that Sandia retaliated against her for making disclosures regarding the unsecured PII and Mr. Padilla's alleged misconduct by involuntarily transferring her from CI to MA. On October 27, 2010, NNSA/SC dismissed the complaint. Ms. Congable appealed the dismissal of her complaint to the OHA Director, pursuant to 10 C.F.R. § 708.18. On December 6, 2010, the OHA Director granted Ms. Congable's appeal in part, and remanded her complaint back to NNSA/SC for further processing. *See Greta Kathy Congable*, Case No. TBU-0110 (2010).[1]

On April 5, 2011, NNSA/SC transmitted Ms. Congable's complaint to OHA, together with her request for an investigation followed by a hearing. The OHA Director appointed an Attorney-Investigator, who conducted an investigation and issued a Report of Investigation (ROI) on June 1, 2011. On June 2, 2011, a Hearing Officer was appointed in this matter. At the Hearing

[1] Decisions issued by OHA are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

Officer's direction, the parties submitted briefs and replies setting forth their positions regarding the findings in the ROI. After reviewing the documents in the record and the parties' submissions, the Hearing Officer determined that further briefing was necessary on a threshold issue, namely whether Ms. Congable's transfer constituted retaliation within the meaning of Part 708. Ms. Congable submitted her additional brief on August 6, 2011. In this brief, Ms. Congable argued that her transfer led to specific, negative consequences: (1) she does not have comparable duties and, in fact, very little work, in her new position; (2) she does not have promotional opportunities in her new position, whereas she was a subject matter expert with significant responsibilities in her former position; and (3) her security clearance was downgraded due to her transfer, which further limits her employment opportunities. Complainant's Response to Request for Information Regarding Complainant's Transfer (Case No. TBH-0110) at 4-5. On August 12, 2011, Sandia submitted its reply brief in which it contended that Ms. Congable's transfer did not constitute a "retaliation" because her new position provided her the same pay, title, and benefits, and therefore was not a "negative action with respect to [her] compensation, terms, conditions or privileges of employment." Respondent's Reply to Complainant's Response to Request for Information Regarding Complainant's Transfer (Case No. TBH-0110) at 5. Absent any negative action, there could be no retaliation, Sandia argued, and requested that Ms. Congable's complaint be dismissed. *Id.*

The Hearing Officer considered the issues raised in the parties' briefs, including Sandia's request for dismissal of the complaint and, on September 8, 2011, issued an IAD. In keeping with OHA precedent, the Hearing Officer recharacterized Sandia's request for dismissal as a Motion for Summary Judgment. In the IAD, the Hearing Officer found that, based on the record in this case, the transfer did not negatively affect the terms and conditions of Ms. Congable's employment. IAD at 4-5. She determined that Ms. Congable had not shown, and could not show, that her transfer constituted a retaliation as defined at 10 C.F.R. § 708.2, an essential element of her burden under Part 708. She then granted summary judgment in favor of Sandia, and dismissed Ms. Congable's Part 708 complaint. *Greta Kathy Congable*, Case Nos. TBH-0110, TBZ-0110 (2011).

Pursuant to 10 C.F.R. § 708.32, Ms. Congable filed an appeal of the Hearing Officer's IAD on September 28, 2011. In her brief, she argues that the Hearing Officer erred (1) by *sua sponte* converting a reply brief into a Motion for Summary Judgment, (2) by ruling on that Motion without affording her, as the non-moving party, the opportunity to respond to the Motion, (3) by ruling on the Motion before scheduled discovery was completed, (4) by failing to consider the evidence in the record in the light most favorable to her, as the non-moving party, and (5) by determining that her transfer did not constitute retaliation for purposes of Part 708. Complainant-Appellant's Statement of Issues Regarding Her Notice of Appeal of Initial Agency Decision (Congable Appeal Brief). Sandia addressed each of Ms. Congable's arguments in its reply brief, contending that the Hearing Officer's IAD was correct and should stand as written. Respondent's Response to Complainant's Statement of Issues (Sandia Appeal Brief).

II. ANALYSIS

A. The Applicable Legal Standards

1. Retaliation

In order to meet his or her burden under Part 708, a complainant must demonstrate, by a preponderance of the evidence, each of the following elements: (i) he or she made a protected disclosure or engaged in protected activity; (ii) he or she was the subject of a retaliation; and, (iii) the protected disclosure or activity was a contributing factor to the retaliation.[2] 10 C.F.R. § 708.29. Only if the complainant meets his or her burden does the burden then shift to the contractor to prove, by clear and convincing evidence, that it would have taken the same action absent the protected disclosure or activity. *Id*. Because the Hearing Officer granted summary judgment for Sandia on a determination that Ms. Congable would not be able to prove retaliation, we focus the analysis on that element of Ms. Congable's burden.

The Part 708 regulations define "retaliation" as "an action (including intimidation, threats, restraint, coercion or similar actions) taken by a contractor against an employee with respect to employment (*e.g.*, discharge, demotion, or other *negative action* with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities" protected under Part 708. 10 C.F.R. § 708.2 (emphasis added). It is well established in OHA precedent that in order to constitute a "retaliation" within the ambit of Part 708, the allegedly retaliatory personnel action must negatively affect the terms and conditions of the complainant's employment. *See Colleen Monk*, Case No. TBA-0105 (2011) (transfer requested by complainant not a "negative action" within the meaning of Part 708, despite entailing slightly lower salary); *Vinod Chudgar*, Case No. TBH-0100 (2011) (transfer "did not have a negative effect on the terms and conditions of [his] employment because his new position retained his salary and grade level"); *Mark D. Siciliano*, Case No. TBH-0098 (2010) (contractor's failure to invite complainant to an event did not negatively affect the complainant's "compensation, terms, conditions or privileges of employment" and, therefore, was not a "negative action" within the meaning of Part 708).[3]

Ms. Congable argues, *inter alia*, that her new position held very little work and that it diminished her opportunities for promotion. The issue of whether the alleged reduction in workload or in advancement opportunities qualifies as retaliatory because it is a "negative action with respect to the employee's . . . terms, conditions or privileges of employment" has not previously been addressed in the Part 708 context. In cases arising under Title VII of the Civil Rights Act, which provides relief for "adverse employment actions," the courts have found that significantly

---

[2] The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely than not true when weighed against the evidence opposed to it. *See Joshua Lucero*, Case No. TBH-0039 (2006) (*citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

[3] Sandia also contends that Ms. Congable has never presented any evidence that Sandia intended or expected her new position to be "meaningless or worthless." Sandia Appeal Brief at 10-11. Sandia's intent or expectation regarding the transfer is irrelevant. Retaliatory intent is required under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), which requires a "causal connection" between protected activity and adverse employment action. The legal burden of proof in cases arising under Part 708 is different, in that it requires only that the protected activity is a "contributing factor" in one or more alleged acts of retaliation, a test that can be met through, *e.g.*, management knowledge and temporal proximity of the two events. *Curtis Hall*, Case No. TBA-0042 at 7 n.8 (2008).

reduced work responsibilities and reduced promotion potential may constitute "adverse employment actions."[4] Nevertheless, the outcomes of these cases are entirely dependent on the facts presented in each case.

2. Motion for Summary Judgment

The Part 708 regulations do not include procedures and standards governing motions to dismiss or motions for summary judgment. In the absence of such standards, the Federal Rules of Civil Procedure, though not governing this proceeding, may be used for analogous support. *See, e.g., Billy Joe Baptist*, Case No. TBH-0080 (2009). OHA has used Rule 56(a) of the Federal Rules of Civil Procedure as a guide in considering motions for summary judgment filed in Part 708 cases. *See Mary Ravage*, Case No. TBH-0102 (2011); *Colleen Monk*, Case No. TBH-0105 (2011); *Edward J. Seawalt*, Case No. VBZ-0047 (2000).

Under Rule 56, summary judgment is proper "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). Under this standard, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). The Supreme Court has viewed the plain language of Rule 56 to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In such cases, there can be "no genuine issue as to any material fact," since the non-moving party's complete failure of proof concerning an essential, threshold element of his case necessarily renders all other facts immaterial. The moving party is then "entitled to a judgment as a matter of law" because the non-moving party has failed to satisfy his burden of proof on an essential element of his case. *Id.* at 323.

The Hearing Officer specifically referred to the above standards in the IAD. IAD at 3. In addition to those standards, it is well recognized that, when considering whether summary judgment is proper, the decisionmaker must draw inferences from the existing evidence "in the light most favorable to the non-moving party, and where the non-moving party's evidence

---

[4] *See Martires v. Conn. Dep't of Transpo.*, 596 F. Supp. 2d 425, 438 (D. Conn. 2009) (disproportionately heavy workload or significantly diminished material responsibilities may constitute adverse employment actions); *Bennett v. Watson Wyatt Co.*, 136 F. Supp. 2d 236 (S.D.N.Y. 2001) (employment action is adverse if the employee endures a materially adverse change in the terms or conditions of employment, including significantly diminished work responsibilities, citing *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000)). In the same context, the courts have stated that a diminution of advancement possibilities can, if objectively established, constitute an adverse employment action: even if a transfer does not "result in a decrease in pay, title or grade, it can be a demotion if the new position proves objectively worse—such as . . . providing less room for advancement." *Alvarado v. Texas Rangers*, 492 F.3d 605, 613 (5th Cir. 2007) (internal citation omitted). *See also De la Cruz v. New York City Human Resources Admin.*, 82 F.3d 16, 21 (2d Cir. 1996) (transfer from an "elite division . . . which provided prestige and opportunity for advancement, to a less prestigious unit with little opportunity for professional growth" is adverse employment action); *Cepada v. Bd. of Educ. of Baltimore Cty.*, 814 F. Supp. 2d 500, 510 (D. Md. 2011) (*citing Boone v. Goldin*, 178 F.3d 253, 255 (4th Cir. 1999)) (adverse employment actions can include reduced opportunities for promotion).

contradicts the movant's, then the non-movant's evidence must be taken as true." *Big Apple BMW, Inc. v. BMW of N. Am., Inc*., 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied,* 507 U.S. 912 (1993); *see also Matsushita Elec. Indus. Co.. Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 158-59 (1970) (burden on moving party to show absence of genuine issue as to any material fact).

B. Whether Summary Judgment for Sandia Was Appropriate

The standard of review for Part 708 appeals is well established. Conclusions of law are reviewed *de novo. See Curtis Hall*, Case No. TBA-0042 at 5 (2008). Findings of fact are overturned only if they are clearly erroneous, giving due regard to the trier of fact to judge the credibility of the witness. *Billy Joe Baptist*, Case No. TBA-0080 at 7 (2009). *See also Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposed of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."). Because the Hearing Officer determined, as a matter of law, that Ms. Congable could not demonstrate retaliation, we review *de novo* whether that determination was appropriate.

As discussed above, OHA has often looked to Rule 56 for guidance on the matter. While we are not bound by the Rule and therefore not subject to all of its procedural requirements, we should ensure that fundamental due process be provided to the parties when we rule on a Motion for Summary Judgment. At a minimum, we consider, as the Hearing Officer stated, whether there is an absence of genuine issue of material fact and whether there has been adequate time for discovery. Any inferences we draw from the evidence are drawn in favor of the non-moving party, in this case, Ms. Congable.

The plain language of the definition of "retaliation" clearly encompasses a broad scope of negative actions, including those affecting the terms, conditions and privileges of employment. 10 C.F.R. § 708.2. *See also Lucy B. Smith*, Case No. VWZ-0020 (1999) ("privilege" held to include inclusion in a preferential rehiring database). The Hearing Officer reached her conclusion that Ms. Congable could not demonstrate retaliation after finding (1) that the record established that Ms. Congable's transfer did not result in a loss in pay, benefits, or seniority, and (2) that, despite her contention that she had no meaningful duties in her new position, her duties were comparable in her new position. IAD at 4-5. It is clear from the definition of "retaliation" that, for Part 708 purposes, retaliation may take forms other than those the Hearing Officer considered. As set forth above, Ms. Congable points to three forms of alleged retaliation in a brief requested by the Hearing Officer: (1) her security clearance was downgraded due to her transfer, (2) she does not have comparable duties and, in fact, very little work, in her new position, and (3) she does not have comparable promotional opportunities in her new position.[5] If any one of those truly constitutes retaliation, then evidence of such would be a material fact,

[5] In her Appeal Brief, Ms. Congable also alludes to an actual demotion following the transfer. She contends that she was a PASA in her old position but only an ASA in her new position. Congable Appeal Brief at 11-12. Sandia replied that Ms. Congable retained her PASA status in her new position. Sandia Appeal Brief at 12. The record clearly supports Sandia's contention, *id.* at Attachment 1-B, and I find that no actual demotion took place as the result of the transfer.

on which a legal determination could be made of an essential, threshold element of her complaint. Conversely, if none is a form of retaliation under Part 708, or if the evidence in the record demonstrates that no facts could support her claims, then Ms. Congable could not demonstrate retaliation as a result of her transfer. Under those circumstances, she would have failed to make a showing sufficient to establish the existence of an element essential to her case, and on which she bears the burden of proof, specifically retaliation, and summary judgment would be appropriate. We address Ms. Congable's arguments *seriatim.*

1. Security Clearance Downgrade as a Retaliatory Act

Ms. Congable claims that, as a result of her transfer, her security clearance was downgraded after her employer transferred her to her new position. Even if Ms. Congable established that such a downgrade in fact occurred, it could not possibly be found to be retaliation under Part 708. As defined above, "retaliation" is an action that must be taken by the contractor. Determinations regarding levels of security clearance are made by the DOE, not by contractors. Therefore, even assuming that Ms. Congable's security clearance level was reduced after her transfer, and assuming that this reduction constituted a negative consequence of the transfer, it is a negative consequence that cannot be attributed to Sandia.

2. Lack of Meaningful Work and Lack of Promotion Potential as Retaliatory Acts

Ms. Congable argues that her new position held very little work, and that it diminished her potential for promotion in comparison to her former position. Given the broad protection Part 708 is intended to provide to whistleblowers in order to encourage the reporting of unsafe, unhealthy or wasteful business practices, we believe that significantly reduced workload or work responsibilities, as well as diminished opportunities for promotion, can constitute negative actions "with respect to the employee's . . . terms, conditions or privileges of employment," and might, under some circumstances, constitute retaliation under Part 708.

In this case, the record shows that in her former administrative position, Ms. Congable performed work beyond that which she was assigned, including assisting at interviews, providing insight to the investigators she supported and asking questions on her own; assisting with discovery production; and editing the office's reports. Complainant's Response to Request for Information Regarding Complainant's Transfer (Case No. TBH-0110) at Attachments A (Performance Management Form completed by supervisor) and B (co-workers' feedback of Ms. Congable as requested by supervisor). In her new position, Ms. Congable alleges that she has no meaningful work for 80 to 85% of her workday. Deposition of Greta Kathy Congable (attachment to Complainant's Response to Request for Information Regarding Complainant's Transfer (Case No. TBH-0110)) (Deposition) at 78. When assessing a Motion for Summary Judgment, we are instructed to draw inferences in favor of the non-moving party, in this case, Ms. Congable. Even if we assume that her statement is correct, however, we must also consider whether her stated lack of work in her new position, in reality, supports her claim of retaliation. In her Deposition, Ms. Congable explains that her lack of work eliminated any promotional opportunities in her new position. Deposition at 80. For this reason, the only issue is whether her transfer diminished her potential for future promotion.

Ms. Congable expressed her opinion at her Deposition that her new position holds less promotion potential than her former position, because she will never become a subject matter expert as she was in her former position. Deposition at 80-81.[6] In the declaration he provided during the investigation stage, however, her supervisor at her former position stated that he had researched the possibility of a promotion for Ms. Congable from PASA to DASA (Distinguished ASA) in approximately September 2008, and learned that her job position would not justify such a promotion. Declaration of Chris Padilla (Case No. TBI-0110). He also stated that he had received a request from a co-worker that Ms. Congable be considered for a promotion to Member of Laboratory Staff (MLS) when she received her bachelor's degree in May 2010. As she did not receive her degree at that time, he took no action. *Id.* In an e-mail she wrote on June 29, 2010, Ms. Congable stated, "I was told that to be considered for promotion within Corporate Investigations it would be necessary for me . . . to obtain my college degree." Attachment B to Declaration of Alice Eldridge (Case No. TBI-0110). As of her deposition in 2011, Ms. Congable has not yet received her degree. Deposition at 81. Even accepting the evidence in a light most favorable to Ms. Congable, I find that she had no potential for promotion in her former position prior to the transfer, as she lacked a necessary prerequisite, her college degree. Under those circumstances, she cannot assert that her advancement opportunities were diminished as the result of her transfer. Therefore, while it is possible to establish retaliation under Part 708 by demonstrating reduced promotion potential, Ms. Congable is unable to do so in this case.

III. CONCLUSION

After reviewing the evidence in the record at the time of the Hearing Officer's grant of summary judgment, I conclude that none of Ms. Congable's three alleged negative consequences of her transfer constitutes retaliation in this case under Part 708, for various reasons. Her allegation of security clearance downgrade is not cognizable under Part 708. Her allegation of lack of work is not an independent form of retaliation, but rather a factual underpinning of her third allegation, reduction of promotion potential, which I have determined to be an allegation that cannot stand under the facts already in evidence. No additional discovery would yield relevant information in this proceeding, as there remains no genuine issue of material fact regarding Ms. Congable's allegations of retaliation. Because no further discovery is warranted, I conclude that there has been adequate time for discovery. Under those circumstances, Ms. Congable has failed to make a showing sufficient to establish the existence of an element essential to her case, and on which she bears the burden of proof, specifically retaliation, and summary judgment is appropriate.

It Is Therefore Ordered That:

(1) The Appeal filed by Greta Kathy Congable on September 26, 2011 (Case No. TBA-0110), of the Initial Agency Decision (IAD) issued on September 8, 2011, under 10 C.F.R. Part 708 is hereby denied.

(2) This Appeal Decision shall become a Final Decision of the Department of Energy unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this Decision. 10 C.F.R. § 708.35.

---

[6] There is no evidence that Ms. Congable was a subject matter expert at her former position.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 4, 2012

Department of Energy
Washington, DC 20585

SEP 19 2005

Gilbert J. Vigil, Esq.
1615 Central Avenue, NW
Albuquerque, NM 87104

Re: Case No. TBB-0003

Dear Mr. Vigil:

This letter pertains to a Petition for Secretarial Review that you filed on August 8, 2005, on behalf of Gilbert Hinojos. In the Petition, you requested that the Secretary of Energy review a July 8, 2005 appeal decision, issued by the Director of the Office of Hearings and Appeals. That appeal decision denied Mr. Hinojos' complaint of retaliation filed pursuant to 10 C.F.R. Part 708.

In an August 9 letter, we advised you that the regulations governing this matter provide that within 15 days after submitting a Petition for Secretarial Review, you are required to file a statement identifying the issues that you wish the Secretary to consider. 10 C.F.R. § 708.35. Accordingly, that filing should have been submitted by August 23.

We also informed you that the Secretary will reverse or revise an appeal decision by the OHA Director only under extraordinary circumstances. 10 C.F.R. § 708.35(d). We therefore indicated that your statement of issues should identify the extraordinary circumstances warranting a reversal of the OHA's July 8 Decision and Order.

As of this date, you have not submitted a statement of issues for the Secretary to review. Thus, the time period for filing your submission has now elapsed. Further, your August 8 submission does not identify any issues for review. Accordingly, since you have failed to complete the filing of your appeal in this case, and since there are no issues in your submission that could be considered reviewable, I find that your Petition for Secretarial Review should be dismissed.

Accordingly, the Petition for Secretarial Review filed in Case No. TBB-0003 is hereby dismissed.

If you have any questions regarding this matter, please contact Virginia Lipton at telephone number (202) 287-1436.

Sincerely,

George B. Breznay
Director
Office of Hearings and Appeals

cc: Jeffrey L. Lowry, Esq.
Rodey, Dickason, Sloan, Akin & Robb, PA
201 Third Street NW
Suite 2200
P.O. Box 1888
Albuquerque, NM 87103

Department of Energy
Washington, DC 20585

MAR - 4 2008

Timothy T. Pridmore, Esq.
McWhorter, Cob and Johnson, LLP
P.O. Box 2547
Lubbock, TX 79408-2547

Re: Case No. TBB-0030

Dear Mr. Pridmore:

This letter concerns the complaint of retaliation filed with the Department of Energy (DOE) under 10 C.F.R. Part 708 by Curtis Broaddus. On October 3, 2007, the Office of Hearings and Appeals (OHA) received your petition for Secretarial review of the August 29, 2007, Appeal Decision issued by the OHA Acting Director.

Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the Director of OHA only in extraordinary circumstances. 10 C.F.R. § 708.35. As discussed below, your submission does not meet this standard.

In your petition, you raise three arguments in support of your contention that Secretarial review is warranted. First, you claim that you were not accorded an opportunity to brief retaliation issues during the Appeal phase of this proceeding. However, the record indicates that while you did have the chance to file a brief on such matters, in a letter of August 7, 2007, you requested that the record be closed. You did not include any arguments regarding retaliation. This objection is untimely raised.

Second, you allege that the OHA Hearing Officer improperly limited the retaliations that he would consider during the hearing. The record shows that the exclusions were warranted. They involved alleged retaliations such as the reassignment of Broaddus' wife to another program, and the purportedly improper suspension of Broaddus' security clearance. Both of these actions lie outside the purview of Part 708. Since Broaddus filed the Part 708 complaint of retaliation in this case, he is entitled to a review of any alleged retaliations taken against him. However, Part 708 does not provide protections for Broaddus' wife in this same proceeding. Further, the allegedly improper suspension of Broaddus' security clearance is subject to review under the provisions of 10 C.F.R. Part 710, not under Part 708. 10 C.F.R. §710.4(b). *See also* 64 Fed. Reg. 12862 at 12867 (March 15, 1999).

In any event, objections regarding the Hearing Officer's ruling as to the scope of the retaliations that would be considered should have been raised during the hearing phase of this proceeding, not at the Secretarial review phase.

Finally, you contend that Broaddus was improperly removed from his position at BWXT. This allegation was not a retaliation claimed in this Part 708 proceeding. Therefore it lies outside the purview of the instant Secretarial appeal. Moreover, the termination took place in connection with the revocation of Broaddus' security clearance under 10 C.F.R. Part 710. As such, it is not entitled to review under the provision of Part 708.

The Deputy Secretary of Energy has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances.

Accordingly, the petition for review filed in Case No. TBB-0030 is hereby dismissed.

If you have any questions regarding this letter, please call Fred L. Brown, Associate Director, Office of Hearings and Appeals, at telephone number (202) 287-1545.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

cc: John Alan Jones, Esq.
Chief Counsel
BWXT Pantex LLC

David S. Jonas
General Counsel
National Nuclear Security Administration

Department of Energy
Washington, DC 20585

JUN 26 2006

Ms. Caroline Roberts
3113 Texas Street NE
Albuquerque, NM 87110

Re: OHA Case No. TBB-0040

Dear Ms. Roberts:

This letter concerns the complaint of retaliation that you filed with the Department of Energy (DOE) under 10 C.F.R. Part 708. On March 24, 2006, the Office of Hearings and Appeals (OHA) received your petition for Secretarial review of the February 23 jurisdictional appeal decision issued by the OHA Director. Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the Director of OHA only in extraordinary circumstances. 10 C.F.R. § 708.19.

In this case, the Whistleblower Program Manager at the DOE's NNSA Service Center dismissed your complaint of retaliation because it was untimely filed. You appealed that dismissal. After reviewing the facts in this matter, I upheld the dismissal. I found that the fact that you were unaware of the Part 708 program was not a sufficient reason to waive the Part 708 filing period.

In your petition for Secretarial review, you again contend that you were unaware of the Part 708 program. Since I responded fully to that claim in the February 23 appeal decision, no further review here is necessary. You also contend that you made many disclosures of a serious nature. This assertion, even if true, does not in and of itself entitle you to protection under Part 708 if you file an untimely complaint. You also cite alleged retaliations against you and other purported misbehavior by your contractor. Again, even if such assertions are true, they do not overcome the serious deficiency in the filing of your Part 708 complaint. In sum, your arguments here do not raise any issue of an extraordinary nature.

The Deputy Secretary of Energy has reviewed your petition and concurs with the above determinations. He has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances.

Accordingly, the petition for review filed in Case No. TBB-0040 is hereby dismissed.

If you have any questions regarding this letter, please call Virginia Lipton at telephone number (202) 287-1436.

Sincerely,

George B. Breznay
Director
Office of Hearings and Appeals

cc: Michelle Rodriguez de Varela
Whistleblower Program Manager
U.S. Department of Energy
NNSA/Service Center
P.O. Box 5400
Albuquerque, NM 87185-5400

Richard A. Marques
Los Alamos National Laboratory
Whistleblower Office
P.O. Box 1663, A108
Bikini Atoll Road
Los Alamos, NM 87545

David S. Jonas
General Counsel
National Nuclear Security Administration
7G-046 FRSTL

Department of Energy
Washington, DC 20585

JUN 26 2006

Ms. Caroline Roberts
3113 Texas Street NE
Albuquerque, NM 87110

Re: OHA Case No. TBB-0040

Dear Ms. Roberts:

This letter concerns the complaint of retaliation that you filed with the Department of Energy (DOE) under 10 C.F.R. Part 708. On March 24, 2006, the Office of Hearings and Appeals (OHA) received your petition for Secretarial review of the February 23 jurisdictional appeal decision issued by the OHA Director. Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the Director of OHA only in extraordinary circumstances. 10 C.F.R. § 708.19.

In this case, the Whistleblower Program Manager at the DOE's NNSA Service Center dismissed your complaint of retaliation because it was untimely filed. You appealed that dismissal. After reviewing the facts in this matter, I upheld the dismissal. I found that the fact that you were unaware of the Part 708 program was not a sufficient reason to waive the Part 708 filing period.

In your petition for Secretarial review, you again contend that you were unaware of the Part 708 program. Since I responded fully to that claim in the February 23 appeal decision, no further review here is necessary. You also contend that you made many disclosures of a serious nature. This assertion, even if true, does not in and of itself entitle you to protection under Part 708 if you file an untimely complaint. You also cite alleged retaliations against you and other purported misbehavior by your contractor. Again, even if such assertions are true, they do not overcome the serious deficiency in the filing of your Part 708 complaint. In sum, your arguments here do not raise any issue of an extraordinary nature.

The Deputy Secretary of Energy has reviewed your petition and concurs with the above determinations. He has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances.

Accordingly, the petition for review filed in Case No. TBB-0040 is hereby dismissed.

If you have any questions regarding this letter, please call Virginia Lipton at telephone number (202) 287-1436.

Sincerely,

George B. Breznay
Director
Office of Hearings and Appeals

cc: Michelle Rodriguez de Varela
Whistleblower Program Manager
U.S. Department of Energy
NNSA/Service Center
P.O. Box 5400
Albuquerque, NM 87185-5400

Richard A. Marques
Los Alamos National Laboratory
Whistleblower Office
P.O. Box 1663, A108
Bikini Atoll Road
Los Alamos, NM 87545

David S. Jonas
General Counsel
National Nuclear Security Administration
7G-046 FRSTL

Department of Energy
Washington, DC 20585

JUL 16 2008

Thad M. Guyer, Esq.
T.M. Guyer and Ayers, & Friends, P.C.
116 Mistletoe Street
P.O. Box 1061
Medford, OR 97501

Re: OHA Case No. TBB-0042

Dear Mr. Guyer:

This letter concerns the complaint of retaliation filed by Curtis Hall (the complainant or Mr. Hall) with the Department of Energy under 10 C.F.R. Part 708, the DOE Contractor Employee (Whistleblower) Protection Program. On March 13, 2008, the Office of Hearings and Appeals (OHA) received your Petition for Secretarial Review of the appeal decision we issued on February 13, 2008. Under Part 708 regulations, the Secretary will reverse or revise an appeal decision by the Director of OHA only in extraordinary circumstances. 10 C.F.R. § 708.35(d).

The complainant, a former employee of Bechtel National, Inc. (BNI) at the DOE's Hanford site in Richland, Washington, filed a Complaint of Retaliation under Part 708. He alleged that he had made protected disclosures regarding the safety of a control system used to track waste and materials as they are processed through the waste treatment plant at the Hanford site. The complainant claimed that, in retaliation, he was selected for inclusion in a reduction in force (RIF) that led to his termination.

OHA conducted an investigation and a hearing regarding this matter. On March 15, 2007, an OHA Hearing Officer issued a Decision (IAD), finding that Mr. Hall had made protected disclosures, and that BNI's termination of Mr. Hall in the RIF was a retaliation for those disclosures. The IAD ordered BNI to reinstate the complainant to the position from which he was laid off, or to a comparable position, and to reimburse him for lost wages, legal fees and other expenses. Mr. Hall appealed, challenging several of the relief provisions. BNI also appealed, challenging the overall finding that its decision to include the complainant in the RIF was retaliatory. On February 13, 2008, we issued a decision rejecting BNI's challenge to the IAD, and sustained the finding that Mr. Hall was entitled to relief. We made additional findings regarding the relief to which he would be entitled, including that he be provided

training and transfer preference if BNI places him in a position comparable to the one he vacated. Pursuant to 10 C.F.R. § 708.35, the complainant requested Secretarial review of our February 13 appeal decision. He filed a statement of issues for review and BNI filed a response to the statement of issues. After a review of the submissions, we believe that Mr. Hall has not shown the existence of extraordinary circumstances meriting Secretarial review under Part 708.

The complainant's key contentions at the Secretarial review phase are as follows. Mr. Hall seeks damages for pain, suffering and emotional distress. Based on Section 708.36(a)(3) and our precedent, monetary awards are limited to reimbursement of lost wages. *See also* 64 Fed. Reg. 12867-68 (March 15, 1999). Accordingly, this type of remedy has never been awarded under Part 708.

Mr. Hall also asks for a clearer description of his former position. In addition, he seeks reinstatement to the position he purportedly would have had if he had been promoted. He requests that he be reinstated to a "not-at-will" position, and guaranteed a period of employment through approximately 2019. The complainant seeks greater training and transfer preferences than those provided in the February 13 Order.

These matters do not rise to the extraordinary level necessary to invoke Secretarial review under Part 708. They amount to minor objections to the February 13 determination.

The Acting Deputy Secretary of Energy has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances. Accordingly, the Petition for Secretarial Review filed in Case No. TBB-0042 is hereby dismissed.

If you have any questions regarding this letter, please call Virginia A. Lipton at telephone number (202) 287-1436.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

cc: Barbara L. Johnson, Esq.
Paul, Hastings, Janofsky & Walker LLP
875 15th Street
Washington, D.C. 20005

Department of Energy
Washington, DC 20585

JAN - 9 2007

Mr. Gary S. Vander Boegh
7660 Old Hinkleville Road
West Paducah, KY 42086

Re: Case No. TBB-0049

Dear Mr. Vander Boegh:

This letter concerns the complaint of retaliation that you filed with the Department of Energy (DOE) under 10 C.F.R. Part 708. On September 6, 2006, the Office of Hearings and Appeals (OHA) received your petition for Secretarial review of the August 3 jurisdictional appeal decision issued by the OHA Director. Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the Director of OHA only in extraordinary circumstances. 10 C.F.R. § 708.19.

In this case, you alleged that several DOE contractor employers retaliated against you for participating in a protected proceeding and for making protected disclosures under Part 708. These retaliations included terminating you from your position. The Office of Civil Rights and Diversity of the DOE's Environmental Management Consolidated Business Center (EMCBC) dismissed your complaint of retaliation because you had filed a complaint regarding the same issues with the Department of Labor (DOL). Part 708 provides that it is appropriate to dismiss a complaint of retaliation if the complainant "filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this regulation." 10 C.F.R. § 708.17(c)(3).

You appealed that dismissal. After reviewing the facts in this matter, the Director of OHA upheld the dismissal. Specifically, he found that not only had you filed a complaint involving the same issues with both the DOE and the DOL, but also that the DOL had issued a substantive determination regarding your complaint. Specifically, the DOL found that there was clear and convincing evidence that with respect to the termination there was no retaliation by your contractor employer for your protected disclosure. The OHA Director further found that there was no merit to any of the other retaliations you raised in your complaint, but which were not specifically considered by the DOL.

In the petition for Secretarial review, your key contention is that the complaint filed with the DOL involved a different set of facts from the complaint filed with the DOE. In this regard, you state that the disclosures you alleged in the DOL complaint involved different aspects of improper handling of leachate from those asserted in your DOE complaint. You therefore believe that Section 708.17(c)(3) is not applicable. These assertions do not rise to the level necessary to invoke Secretarial review under Part 708. As an initial matter, the DOE and DOL disclosures that you refer to are not meaningfully different. They all involve your perceptions of allegedly improper leachate handling by your contractor employer. Secondly, the key retaliation you assert is identical in the DOL proceeding and the DOE proceeding: you were terminated by your contractor employer. Your petition seeks merely to reargue the findings and conclusions set out in the EMCBC and appeal determinations. However, you do not set forth any reasoning as to what extraordinary circumstances exist that would justify a reconsideration here, and I do not see any issue of an extraordinary nature.

The Deputy Secretary of Energy has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances.

Accordingly, the petition for review filed in Case No. TBB-0049 is hereby dismissed.

If you have any questions regarding this letter, please call Virginia Lipton at telephone number (202) 287-1436.

Sincerely,

Fred L. Brown
Acting Director
Office of Hearings and Appeals

cc: Mr. Bartley Fain
Assistant Director
Office of Civil Rights and Diversity
Environmental Management Consolidated Business Center
250 East 5th Street, Suite 500
Cincinnati, OH 45202

Department of Energy
Washington, DC 20585

JUL 16 2008

John Frith Stewart, Esq.
Stewart, Roelandt, Stoess,
Craigmyle & Emery LLC
P.O. Box 307
Crestwood, KY 40014

Re: Case No. TBB-0069

Dear Mr. Stewart:

This letter concerns the complaint of retaliation filed with the Department of Energy (DOE) under 10 C.F.R. Part 708 by Gary S. Vander Boegh (Vander Boegh). On February 5, 2008, the Office of Hearings and Appeals (OHA) received your petition for Secretarial review of the December 18, 2007, Appeal Decision issued by the Director of OHA.

Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the Director of OHA only in extraordinary circumstances. 10 C.F.R. § 708.35. As discussed below, your submission does not meet this standard.

In your petition, you argue that we had no authority to issue the December 18, 2007, decision because you had filed a Petition for Secretarial Review before we issued our December 18 appeal decision. However, your earlier Petition became moot when a February 22, 2007, decision dismissing Vander Boegh's complaint was withdrawn. To the extent this argument raises only a procedural legal question under Part 708, it does not merit Secretarial review.

You also assert that we erred with regard to our finding as to the timeliness of Vander Boegh's Part 708 complaint. In essence, your arguments represent a difference with our assessment of the evidence with regard to the issue of timeliness - specifically, our determination of when Vander Boegh knew or should have known that the actions taken against him by his former employers were retaliatory. These arguments disagreeing with our assessment of the weight of evidence do not rise to the standard for Secretarial review. You also argue in your Petition that Vander Boegh's former employers are "estopped" from asserting a defense of a lack of timeliness. The Petition asserts that Vander Boegh's former employers cannot argue that their actions were not retaliatory and, at the same hearing, argue that his whistleblower complaint was filed untimely. The validity of the arguments raised by Vander Boegh's former employers is irrelevant. OHA has made its own determination that the complaint was untimely.

Your Petition further argues that we erred when we found that Vander Boegh's subsequent Part 708 complaint was properly dismissed. Your Petition seeks to raise a legal argument concerning the provision of Part 708, 10 C.F.R. § 708.17, that provides for dismissal of Part 708 claims that are raised in alternate legal forums. We believe that Part 708 is clear on this point. The fact that you disagree with our view of the regulations does not present extraordinary circumstances.

The Acting Deputy Secretary of Energy has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances. Accordingly, the petition for review filed in Case No. TBB-0069 is hereby dismissed.

If you have any questions regarding this letter, please call Richard A. Cronin, Jr., Attorney-Examiner, Office of Hearings and Appeals, at telephone number (202) 287-1589.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

cc: Gavin Appleby, Esq.
Littler, Mendelson, P.C.
3348 Peachtree Road, N.E.
Suite 1100
Atlanta, Georgia 30326-1008
Counsel for Bechtel Jacobs Company, LLC

Diana K. Douglas, Esq
Boehl, Stopher & Graves, LLP
410 Broadway
Paducah, KY 42001
Counsel for Weskem, LLC

Department of Energy
Washington, DC 20585

MAR - 5 2008

Ms. Sharon M. Fiorillo
6927 Wilson Street
West Mifflin, PA 15122

Re: OHA Case No. TBB-0070

Dear Ms. Fiorillo:

This letter concerns the complaint of retaliation that you filed with the Department of Energy (DOE) under 10 C.F.R. Part 708. On August 20, 2007, the Office of Hearings and Appeals (OHA) received your petition for Secretarial review of the July 16, 2007, jurisdictional appeal decision issued by the OHA Acting Director. You filed a statement of arguments in support of your position on September 4, 2007.

Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the OHA Director only in extraordinary circumstances. 10 C.F.R. § 708.19.

The basis of this proceeding is your contention that you made a disclosure that is protected under Part 708, and that your employer improperly terminated you for making that disclosure. The disclosure that you made consisted of a statement to the DOE Office of Inspector General (DOE/IG), that your supervisor failed to take action against another employee who stated in a three-way telephone conversation with you and your supervisor that had she seen you in person she "would have spit in your face." You believe that disclosing this statement to the DOE/IG constitutes a revelation of violation of law, and your supervisor's failure to take action against the employee who made the remark is evidence of mismanagement and abuse of authority. In this case, the OHA Acting Director dismissed your complaint of retaliation, finding that the disclosure you describe was trivial. In your petition for Secretarial review, you object to this conclusion, but you do not provide any significant new arguments in this regard. Accordingly, since the OHA Acting Director responded fully to that claim in the July 16 appeal decision, no further review here of that issue is warranted.

You further maintain in your statement of arguments that it is your "personal feeling" that your termination "was to serve the purpose of alleviating funding for PRC's fixed fee award contract. . . .

[the] termination allowed PRC to maintain the funds provided by DOE for [you] ($50,000 annually-$44,449 salary plus benefits package) to promote two Secretary I's and hire a new Receptionist." This suggests that you actually believe the basis for your termination was not a retaliation due to your disclosure to the DOE/IG, but rather because your contractor employer had management and hiring goals that did not include your position.

Thus, ultimately there is no basis for your Part 708 complaint, and certainly no assertion here that rises to the extraordinary level necessary to invoke Secretarial review under Part 708.

The Deputy Secretary of Energy has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances.

Accordingly, the petition for review filed in Case No. TBB-0070 is hereby dismissed.

If you have any questions regarding this letter, please call Virginia Lipton, Assistant Director, Office of Hearings and Appeals, at telephone number (202) 287-1436.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

cc: Service List

MAR - 5 2008

SERVICE LIST
Case No. TBB-0070

Carl O. Bauer, Director
Department of Energy
National Energy Technology Laboratory
3610 Collins Ferry Road
P.O. Box 880
Morgantown, WV 26507

Kathy J. Clinton
President
Performance Results Corporation
2605 Cranberry Square
Morgantown, WV 26508

Michelle Rodriguez de Varela
Whistleblower Program Manager
Department of Energy
National Nuclear Security Administration
P.O. Box 5400
Albuquerque, NM 87185

Department of Energy
Washington, DC 20585

MAR - 4 2008

Mr. Jeffrey Burnette
102 Perry Road
Kingston, TN 37763

Re: OHA Case No. TBB-0071

Dear Mr. Burnette:

This letter concerns the Complaint of Retaliation that you filed with the Department of Energy (DOE) under 10 C.F.R. Part 708. On October 10, 2007, the Office of Hearings and Appeals (OHA) received your petition for Secretarial review of the August 30, 2007, jurisdictional appeal decision issued by the OHA Deputy Director. Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the OHA only in extraordinary circumstances. 10 C.F.R. § 708.19.

In this case, the Whistleblower Program Manager (WP Manager) of the DOE's National Nuclear Security Administration (NNSA) Service Center located in Albuquerque, New Mexico, dismissed your Part 708 Complaint of Retaliation because it was untimely filed. You appealed that dismissal. After reviewing the facts in this matter, we upheld the dismissal. We found in the determination of August 30, 2007, that you had not alleged any retaliation in your Complaint that took place within 90 days prior to the filing of that Complaint. 10 C.F.R. § 708.14.

In your petition for Secretarial review, you again allege retaliations that appear to have been connected with earlier Complaints, which were filed in 2001 and 2002. These alleged retaliations include: coercion by the contractors to settle your previous Part 708 proceeding; delay of BWXT Y-12 employment; harassment and isolation "beginning early at Y-12;" denial of a pay raise and employment opportunities; loss of seven months salary and two weeks of accrued vacation in 2001; and lost reputation.

You have not explained why you did not file a timely complaint regarding these alleged retaliations. Nor have you specifically alleged any retaliation that took place within the 90 days preceding the filing of your 2006 Complaint of Retaliation. Accordingly, there is no basis for any further review of your

Part 708 Complaint. Moreover, we fail to see any issue of an extraordinary nature warranting Secretarial review.

The Deputy Secretary of Energy has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances.

Accordingly, the petition for review filed in Case No. TBB-0071 is hereby dismissed.

If you have any questions regarding this letter, please call Virginia Lipton of my staff at telephone number (202) 287-1436.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

cc: David S. Jonas
General Counsel
National Nuclear Security Administration

George E. Dials
President and General Manager
BWXT Y-12 National Security Complex
P.O. Box 2009
Oak Ridge, TN 37831-8245

Department of Energy
Washington, DC 20585

DEC - 8 2008

Mr. Donald E. Searle
1308 Barcelona Drive
Knoxville, TN 37923

Re: Case No. TBB-0079

Dear Mr. Searle:

This letter concerns your complaint of retaliation filed with the Department of Energy (DOE) under 10 C.F.R. Part 708. On September 8, 2008, the Office of Hearings and Appeals (OHA) received your petition for Secretarial review of the July 25, 2008, Appeal Decision issued by the Director of OHA.

Under the Part 708 Regulations, the Secretary will reverse or revise an appeal decision by the Director of OHA only in extraordinary circumstances. 10 C.F.R. § 708.19. As discussed below, your submission does not meet this standard.

In your petition, you argue that in the July 25 decision, we, in essence, established an arbitrary 12-month liability "time limit" between a protected disclosure or activity and the subsequent retaliation, for purposes of having a whistleblower complaint considered. This contention essentially attempts to reargue and rebut our legal conclusion as to whether the facts alleged in your complaint, assuming they are true, could demonstrate that the filing of your first whistleblower complaint in January 2007 was a contributing factor to your allegedly inadequate pay raise in January 2008. We believe, based on the record in this proceeding, that a 12-month period between the protected activity (the filing of your January 2007 complaint) and the alleged retaliation (your January 2008 pay raise), was too long to permit the inference that the protected activity was a contributory factor to the retaliation. During the pendency of this appeal, you have not presented any additional evidence to suggest that our conclusion is in error. Your disagreement with our legal determination on this issue does not establish the existence of extraordinary circumstances.

You also argue in your petition that in assessing whether your April 7, 2008, complaint was without merit, OHA incorrectly applied the burdens of proof as set forth in 10 C.F.R. § 708.29. You believe that this section applies to only whistleblower hearings. This is incorrect. Section 708.29 sets forth the basic elements that comprise a valid whistleblower complaint and is applicable to Part 708 proceedings as a whole. In the present case, OHA assumed that the facts alleged in your complaint were true and examined these facts to determine if all of the required elements contained in Section 708.29 were present in the complaint. Thus, it is appropriate for OHA to use those legal standards in evaluating the sufficiency of your complaint of retaliation. Your arguments regarding the applicability of Section 708.29 do not rise to the level of extraordinary circumstances meriting Secretarial intervention.

Finally, you argue that OHA improperly considered the fact that UT-Battelle rehired you as evidence of your employer's lack of retaliatory intent. You allege that when UT-Battelle rehired you in May 2006 it did not yet know you were a whistleblower. This is obviously incorrect, since you made protected disclosures to your supervisor regarding beryllium handling in the summer of 2005. For the purpose of our analysis of UT-Battelle's lack of retaliatory intent, the focus is on the date you complained to your employer about beryllium handling (summer of 2005), and not the date when you actually filed your first complaint of retaliation (January 2007). It was as of the earlier date that UT-Battelle was fully aware of the disclosure. Given these facts, we reasonably concluded that the 2006 rehiring constituted important evidence that UT-Battelle had no retaliatory intent. Your argument regarding our analysis of the evidence in this case does not demonstrate extraordinary circumstances.

The Acting Deputy Secretary of Energy has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances. Accordingly, the petition for review filed in Case No. TBB-0079 is hereby dismissed.

If you have any questions regarding this letter, please call Richard A. Cronin, Jr., Attorney-Examiner, Office of Hearings and Appeals, at telephone number (202) 287-1589.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

cc: Rufus Smith
EC-Manager
Oak Ridge Office

Nicole Porter, Esq.
General Counsel
UT-Battelle

Department of Energy
Washington, DC 20585

MAY 25 2010

Thad M. Guyer, Esq.
Stephani L. Ayers, Esq.
T.M. Guyer and Ayers & Friends, P.C.
116 Mistletoe Street
Medford, OR 97501

Re: OHA Case No. TBB-0080

Dear Mr. Guyer and Ms. Ayers:

This letter concerns the Complaint of Retaliation filed by Mr. Billy Joe Baptist with the Department of Energy under 10 C.F.R. Part 708, the DOE Contractor Employee (Whistlebower) Protection Program. On January 5, 2010, the Office of Hearings and Appeals (OHA) received your Petition for Secretarial Review of the Appeal Decision that we issued to Mr. Baptist on December 3, 2009. Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the Director of OHA only in extraordinary circumstances. 10 C.F.R. § 708.35(d).

On May 7, 2009, an OHA Hearing Officer issued an Initial Agency Decision (the "IAD") in which he granted a Motion for Summary Judgment regarding Mr. Baptist's whistleblower complaint. In the IAD, the Hearing Officer first dismissed five of the six alleged retaliations because Mr. Baptist had failed to file his complaint within the 90-day deadline set forth in Part 708. With regard to the remaining alleged retaliation, *i.e.*, improper termination from his job, the Hearing Officer decided that his employer, CH2M-WG Idaho, LLC (CWI), had established that it would have terminated Mr. Baptist even if he had made no protected disclosures. The Hearing Officer therefore granted summary judgment to CWI regarding the sixth alleged act of retaliation, Mr. Baptist's termination, and then dismissed the complaint without a hearing. *See Billy Joe Baptist*, OHA Case Nos. TBZ-0080, TBH-0080 (2009).

Pursuant to 10 C.F.R. § 708.32, Mr. Baptist requested a review of the IAD by the OHA Director. On December 3, 2009, the OHA Director issued a decision concerning this appeal. *See Billy Joe Baptist*, OHA Case No. TBA-0080 . In this decision, OHA determined that arguments raised by you on behalf of Mr. Baptist, challenging OHA's interpretation and application of the filing requirements and burdens of proof set forth in Part 708, were without merit and that the appeal should be denied.

The Department has reviewed your Petition for Secretarial Review.

With respect to the timeliness of the five claims rejected by OHA on this basis, Part 708 expressly requires that complaints be filed within 90 days of the date the employee "knew or reasonably should have known of the alleged retaliation." *See* 10 C.F.R.

§ 708.14. Here the complainant waited almost nine full months to file these five claims. While the Petition for Secretarial Review attempts to place blame for this failure on the Employee Concerns office, there is no indication that the petitioner was misled or in any way otherwise prevented by that office from timely filing his claims.

Concerning the sixth claim challenging the complainant's termination, OHA granted the contractor summary judgment. OHA found that the contractor employer had established by clear and convincing evidence that the complainant's termination was due to his failure to comply with the requirements for reinstatement following a year's absence on Inactive Employee Status, including the specific requirement that an employee in these circumstances obtain a medical release before returning to duty.

The underlying decisions are well supported. The petition fails to demonstrate any "extraordinary circumstances" warranting Secretarial intervention.

The Deputy Secretary of Energy has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances. Accordingly, the Petition for Secretarial Review filed in Case No. TBB-0080 is hereby dismissed.

If you have any questions regarding this letter, please call Kent S. Woods at telephone number (202) 287-1454.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

cc: Jan Ogilvie
Employee Concerns Program Manager
Idaho Operations Office
1955 Freemont Avenue
Idaho Falls, ID 83415

Department of Energy
Washington, DC 20585

APR 19 2011

Ms. Melinda Gallegos
P.O. Box 224
Los Ojos, NM 87551

Re: OHA Case Number TBB-0103

Dear Ms. Gallegos:

This letter concerns the Petition for Secretarial Review that you filed on July 19, 2010, relating to a Complaint of Retaliation that you filed on April 15, 2010, with the National Nuclear Security Service Center (NNSA) of the Department of Energy under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. On May 20, 2010, the Whistleblower Program Manager of the DOE/NNSA dismissed your complaint as untimely. You appealed the dismissal to OHA and on June 18, 2010, OHA affirmed the dismissal of the complaint. Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the Director of OHA only in *extraordinary circumstances*. 10 C. F. R. § 708.19(d) (emphasis added). For the reasons below, we have determined that such extraordinary circumstances do not exist in this case.

You stated in your complaint that from 1989 to 1998 you were an employee of the Los Alamos County Fire Department (LACFD), a DOE subcontractor at the DOE Los Alamos National Laboratory. According to your complaint, you expressed safety concerns to your supervisor about a Criterion Task Test, and were suspended for refusing to participate in the test. In 1996, you suffered a disabling injury on the job and were placed on leave without pay for two years, and then terminated by LACFD in 1998.

In appealing the dismissal of your complaint, you argued that you were incapacitated since 1996 by spasms in your eyelid and by the effects of the medications you took for this condition. However, in upholding the dismissal, OHA noted that you filed your complaint almost 12 years after LAFCD terminated your employment. Although DOE has discretion to accept late filings of Part 708 complaints if it determines that there is a good reason for the delay, the Director found that the reasons advanced in your appeal were insufficient to justify the delay in filing the complaint. *Id.*

On July 19, 2010, OHA received the Petition for Secretarial Review of the dismissal of your appeal. 10 C.F.R. § 708.19(b). On September 22, 2010, you filed a statement of issues for review. On November 5, 2010, the County of Los Alamos filed a Response to the Petition for Secretarial Review (Response). *Id.*

After a careful review of the record, we affirm the dismissal of your appeal and agree that the complaint, filed 12 years after the alleged retaliation, is untimely. *See, e.g., Billy Joe Baptist*, OHA Case No. TBB-0080 (nine month delay untimely). We further find that the petition fails to

demonstrate any "extraordinary circumstances" that would warrant secretarial intervention. *Id.*

In addition, the Part 708 program states that you may not file a complaint against your employer under Part 708 *if the complaint is based on the same facts for which you have chosen to pursue a remedy available under state or other applicable law. See* 10 C.F.R. § 708.4 (c) (3) (emphasis added). In the present case, in 1998, you filed a complaint under the New Mexico Human Rights Act with the New Mexico Department of Labor, Human Rights Division. This complaint was closed with prejudice in 1998. *See* Exhibit A of Response. You then filed a complaint with the U.S. District Court, District of New Mexico. The District Court dismissed the complaint with prejudice in June 2000. *See* Exhibit B of Response. You then appealed the dismissal to the Tenth Circuit Court of Appeals, which affirmed the lower court's dismissal in December 2000. *See* Exhibit C of Response. Therefore, the underlying decisions are well supported and there is no evidence of extraordinary circumstances that warrant Secretarial intervention.

The Secretary of Energy has delegated the responsibility of reviewing Petitions for Secretarial Review in cases arising under 10 C.F.R. Part 708 to the Deputy Secretary of Energy. The Deputy Secretary of Energy has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances. Accordingly, the Petition for Secretarial Review filed in Case No. TBB-0103 is hereby dismissed.

If you have any questions regarding this letter, please call Valerie Vance Adeyeye, Attorney-Examiner, Office of Hearings and Appeals, at (202) 287-1486.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

cc: Michelle Rodriguez de Varela
NNSA Service Center
P.O. Box 5400
Albuquerque, NM 87185-5400

Dan A. Gonzales, Esq.
County of Los Alamos
475-20th Street, Suite D

Department of Energy
Washington, DC 20585

JUN - 5 2012

Mr. Gennady Ozeryansky
39 Newbridge Circle
Cheshire, CT 06410

Re: OHA Case No. TBB-0119

Dear Mr. Ozeryansky:

This letter concerns the Petition for Secretarial Review that you filed on September 24, 2011, relating to the complaint of retaliation that you filed on August 26, 2010, with the Employee Concerns Program (ECP) Manager of the Department of Energy under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program.

The ECP Manager issued a determination on July 13, 2011, dismissing your complaint. On July 29, 2011, you filed an appeal of the July 13 Determination and, on August 29, 2011, the Director of the Office of Hearings and Appeals (OHA) affirmed the dismissal of the complaint. On September 24, 2011, you filed a Petition for Secretarial Review of the dismissal of the OHA appeal decision, followed by a September 29, 2011, statement of issued presented for review. On November 16, 2011, SupraMagnetics filed a Response in Opposition to the Secretarial Review.

Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the Director of the Office of Hearings and Appeals (OHA) only under extraordinary circumstances. 10 C.F.R. § 708.19(d). Your statement in support of the petition contends that OHA erred in denying you protection from retaliation under Part 708, and that OHA's decision presents extraordinary circumstances meriting the intervention of the Secretary. However, far from demonstrating the requisite "extraordinary circumstances" necessary to warrant Secretarial intervention, the petition does not reveal any error in OHA's determination that, because SupraMagnetics is not a contractor or subcontractor as defined by 10 C.F.R § 708.2, there is no jurisdiction under Part 708 for consideration of your complaint.

The Secretary of Energy has delegated the responsibility of reviewing Petitions for Secretarial Review in cases arising under 10 C.F.R. Part 708 to the Deputy Secretary of Energy. The Deputy Secretary has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances warranting reversal or revision of OHA's determination. Accordingly, the Petition for Secretarial Review filed in Case No. TBB-0119 is hereby dismissed.

If you have any questions regarding this letter, please call Kimberly Jenkins-Chapman, Attorney-Examiner, Office of Hearings and Appeals, at (202) 287-1499.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

cc: Pat Zarate
Employee Concerns Program Manager
ED-4
Fors. Rm. 5B-148

Marc C. Mercier, Esq.
Beck & Eldergill, P.C.
477 Center Street
Manchester, CT 06040

April 16, 2008

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Motion to Compel Discovery

Case Names:	Jonathan K. Strausbaugh Richard L. Rieckenberg
Date of Filing:	April 2, 2008
Case Numbers:	TBD-0073 TBD-0075

Pending before me is a consolidated Motion to Compel Discovery filed with the Office of Hearings and Appeals (OHA) on behalf of Jonathan K. Strausbaugh and Richard L. Rieckenberg (the complainants) by their attorney. This Motion relates to a hearing requested by the complainants under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708), in connection with the Part 708 complaints they filed against KSL Services, Inc. (KSL). The OHA has assigned Mr. Strausbaugh's and Mr. Rieckenberg's hearing requests Case Nos. TBH-0073 and TBH-0075, respectively, and the present Motion to Compel Discovery, as it relates to each of those cases, Case Nos. TBD-0073 and TBD-0075.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

B. Factual Background

The complainants were employees of KSL at the DOE's Los Alamos site. KSL is responsible for the maintenance of the TA-3 steam distribution system, a 57-year-old steam piping system. The TA-3 system was scheduled for an extended shutdown in order to undergo extensive maintenance, beginning on May 31, 2007. The complainants had the primary responsibility for planning and coordinating the steam system shutdown. Shortly after the maintenance work

began, one crew identified a substance they suspected was asbestos in the manhole in which they were working. The work was suspended until a laboratory could analyze the substance. The substance was confirmed to be asbestos, and the complainants reported this discovery to their managers.

In their complaints, the complainants allege that KSL retaliated against them for disclosing the presence of asbestos on the worksite by terminating them. Mr. Rieckenberg further alleges that he was terminated because he raised the possibility that untreated asbestos may have been present in the manholes for a significant period of time and that there may have been numerous undocumented exposures to the substance over the years. KSL concedes that the complainants informed their managers of the presence of untreated asbestos, but maintains that the complainants were terminated for reasons unrelated to their disclosure. More specifically, KSL alleges that the complainants were terminated because they failed to take appropriate precautions in planning for the maintenance work and because they created a hostile work environment in which employees were unable to discharge their duties.

On March 10, 2008, the complainants asked KSL to produce documents, described in 22 document production requests, relating to their Part 708 complaints. KSL responded on March 31, 2008, by generally arguing that discovery had not been authorized in this proceeding, and by specifically objecting to each of the 22 requests. KSL refused to produce any documents. On April 2, 2008, the complainants then filed a Motion to Compel Discovery with this office.[1]

II. Analysis

The Part 708 regulations state that the "Hearing Officer may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint." 10 C.F.R. § 708.28(b)(1). After carefully considering the arguments of both parties on the present Motion to Compel Discovery, I have decided to grant the Motion in part.

A. General Objections

KSL first argues that discovery has not been authorized, because an order for discovery "has not been entered in this case." KSL's argument is meritless. It is within the spirit of the Part 708 regulations that arrangements for pre-hearing discovery be worked out between the parties, without the need of a formal discovery order from the OHA Hearing Officer, particularly when both parties are represented by competent counsel. In this case, the complainants' attorney specifically requested whether an order for discovery was needed, in a February 15, 2008, e-mail to me, copied to KSL. I advised the parties in writing that "I would prefer that you work with each other to obtain the discovery you seek. I will resolve any disputes that arise in the course of your discovery." E-mail from William M. Schwartz, Hearing Officer, OHA, to Timothy L.

[1] In their Motion, the complainants withdrew one request, Document Request #16, in which they sought the names of the witnesses KSL anticipates calling at the upcoming hearing. The pre-hearing schedule established for this proceeding provides a date for the exchange of witness lists by the parties.

Butler, Counsel for Complainants, and Dean Graves, Counsel for KSL, February 15, 2008. KSL did not object at the time to my guidance on this matter. Instead, it waited until it was presented with the complainants' request for document production before voicing its objections.[2] At this stage, the parties have unfortunately reached an impasse in their discovery efforts, and I will now issue an order mandating that KSL turn over certain documents to the complainants.

KSL has also objected to all of the complainants' current requests for production of documents, on the grounds that they have not made a showing that each document request is designed to produce relevant evidence and, regarding nearly all of them,[3] that they are "overly broad and unduly burdensome." Other than as I discuss below, I find that these document requests are not overly broad or unduly burdensome, and designed to produce evidence relevant to and within the scope of this proceeding. Moreover, KSL has not provided any evidence that would lead me to conclude that "complying with the discovery request would produce undue delay in this matter or otherwise prejudice" the company. *Lucy B. Smith*, 27 DOE ¶ 87,521 (August 10, 1999).

Upon careful review of the document production request, I find that six document requests (Document Requests #8, 10, 11, 15, 17, and 20) are broad beyond the scope of that which would be "designed to produce" evidence relevant to the present matter. Thus, I will grant, in part, five requests for production of documents and deny a sixth. Regarding Document Request #20, I find that the subject matter of the documents requested bears no relevancy to the matters within the scope of this proceeding and therefore deny that request. As for Document Requests #8, 10, 11, 15, and 17, I will narrow these requests as follows:

- Document Request #8, which seeks "[c]opies of all incident reports, lab sample results and documentation regarding discovery and determination/assessment of uncontrolled asbestos at issue" will refer only to documents that relate to the May 31, 2007 TA-3 steam system shutdown.

- Document Request #10, which seeks copies of e-mails and attachments between Torres and Rieckenberg, Torres and Strausbaugh, Hay and Rieckenberg, and Hay and Strausbaugh, generated in 2006 and 2007, will refer only such e-mails that relate to the May 31, 2007 TA-3 steam system shutdown, the complainants' termination, or the decision to terminate the complainants.

- Document Request #11, which seeks copies of KSL disciplinary documents in effect during the complainants' termination of Strausbaugh and Rieckenberg will refer to only those documents that address KSL's rules, regulations or policies regarding termination of employment.

---

[2] Counsel for KSL notes in its April 2, 2008, response to the Motion to Compel Discovery that it was not involved in the case at the time I advised the parties to proceed with discovery. Its relatively late entry into this proceeding as outside counsel does not excuse it from complying with clear instructions I issued to both parties.

[3] KSL does not contend that Document Requests #7, 17, and 21 are "overly broad and unduly burdensome."

- Document Request #15, which seeks "[d]ocuments relating to any complaints made by Taylor concerning Strausbaugh, Rieckenberg, Torres or against any other individuals" will refer only to documents generated through June 14, 2007.

- Document Request #17, which seeks "[c]ontact information for Trosen, and a complete description of circumstances for leaving KSL" will exclude those portions of the requested description that concern non-work-related matters.

B. Specific Objections

Regarding Document Request #2, which seeks e-mails generated or received by named individuals within specified dates "regarding the TA-3 Extended Steam Distribution Shutdown relating to the termination of" the complainants, KSL raises two objections. First, KSL objects that the request "vague." I find merit to KSL's objection and will grant the request only in part, as modified below:

> All emails and attachments from May 1, 2007 through June 30, 2007, generated or received by David Whitaker, Keith Trosen, Tom Hay, Joan Taylor, Richard Chavez, Martin Dominquez, Laura Jenkins, B.J. Tedder, Ted Torres, Steve Long, David Lujan, Jerome Gonzales, David Padilla, Benito Garcia, Rick Nelson, Mike Goodwin, Chris Tolleson, Carol Lowe, Mark Romero, Stephanie Bement, Richard Flores, and Kiki Sanchez, on the following subjects:
>
> (a) project management, project planning, project budget, project safety, asbestos, and alleged personnel harassment related to the May 31, 2007, TA-3 steam system shutdown; and
>
> (b) the decision to investigate, investigatory suspension, review and discussion of investigation, and decision to terminate Rieckenberg and Strausbaugh.

KSL also objects to Document Request #2 on the grounds that several of the named individuals named have never been KSL employees. I find no merit to this objection and will deny it. If KSL has records of any e-mails in its possession that are responsive to this document request, it should provide them; if it does not, it should so inform the complainants.

Document Request #6 seeks the complete file of KSL's investigation of the May 31, 2007 TA-3 steam system shutdown, including investigators' notes, drafts, and recordings. KSL has objected to this request to the extent that some responsive documents are protected by "the attorney-client privilege and/or the work-product doctrine." I find that there is merit to KSL's argument, to the extent that privileged documents need not be produced in discovery. Document Request #6 will therefore be granted in part and modified to read: "Complete file of KSL's investigation, including investigators' notes, drafts, and recordings, to the extent that such documents are not privileged."

Document Request #17 seeks contact information for Keith Trosen and a complete description of his circumstances for leaving KSL. KSL has objected to this request in part because, to the

extent that the complainants' attorney intends to communicate with Mr. Trosen, a former manager of KSL, such communication would be a violation of a New Mexico Rule of Professional Conduct that appears to prohibit such conduct with managers "of a corporation . . . about the subject matter of the representation even though the corporation . . . is represented by counsel." *N.M. Rules of Prof'l Conduct* R. 16-402. While I note that Mr. Trosen is no longer a manager of KSL, it would be inappropriate for me to rule on whether this rule applies to the facts of this case. Nevertheless, this objection is speculative in that we do not know what the complainants' attorney's intentions are with respect to contacting Mr. Trosen. I find no merit to KSL's objection and will grant this request.

Document Request #7 seeks a copy of PADOPS BOP-2007-0011, which the complainants allege is a Department of Energy document that concerns in some manner the May 31, 2007, TA-3 steam system shutdown. Document Request #21 seeks a copy of LANL LIR 402-810.01.1, a Los Alamos National Laboratory regulation that addresses Confined Space entries, evaluations and permits. KSL objects to each of these requests, claiming that the documents requested are not KSL documents. I find no merit to this objection and will deny it. If KSL has the requested documents in its possession, it should provide them to the complainants.[4]

C. Request for Exclusion of Evidence

In their Motion to Compel Discovery, the complainants request that I "exclude evidence at the hearing," presumably of any documents that KSL refuses to produce through discovery. I find no basis in the Part 708 regulations for doing so at this time. However, after the present order is issued and the parties have had an opportunity for full discovery, both parties should bear in mind that a hearing officer in a Part 708 proceeding "may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Hearing Officer." 10 C.F.R. § 708.28(b)(5).

[4] KSL also objects to Document Requests #6, 8, 9, 11, and 15, on the grounds that the complainants have some or all of the requested documents. I find no merit to this objection and will deny it. Clearly, KSL need not provide the complainants with additional copies of documents it has already provided. However, to the extent that it possesses documents responsive to these requests that it has not yet provided to the complainants, this objection does not relieve KSL from providing such documents. The parties should note that the following documents responsive to these requests for production of documents are part of the record in this proceeding, having been provided to this office during the investigation stage of this case:

- KSL Services Employee Relations Investigative Report (re: suspension of complainants) (7 pp.)
- Performance Improvement and Disciplinary Action for KSL Employees, 14-10-111 (12 pp.)
- Confined Space Entry, 12-10-007 (10 pp. plus one-page attachment on training plans)
- Confined Space Evaluations on Manhole 1009 (5/21/07) and Manhole 1022 (5/21/07 and 5/30/07)

Any other documents that either party wishes to rely upon at the hearing with respect to the subject matter of these requests must be provided to the opposing party and the hearing officer by the exchange date I shall establish.

III. Conclusion

For the foregoing reasons, I find that Document Request #20 should be denied, that Document Requests #1, 3, 4, 5, 7, 9, 12, 13, 14, 18, 19, 21, and 22 should be granted, and that Document Requests #2, 6, 8, 10, 11, 15, and 17 should be granted in part.

Is It Therefore Ordered That:

(1) The Motion to Compel Discovery filed by Jonathan K. Strausbaugh and Richard L. Rieckenberg, Case Nos. TBD-0073 and TBD-0075, is hereby granted in part and denied in part, as specified in Paragraphs (2) through (4) below.

(2) Document Request #20 of the March 10, 2008 Request for Discovery submitted by Jonathan K. Strausbaugh and Richard L. Rieckenberg to KSL Services, Inc., is hereby denied.

(3) Document Requests #1, 3, 4, 5, 7, 9, 12, 13, 14, 18, 19, 21, and 22 of the March 10, 2008 Request for Discovery submitted by Jonathan K. Strausbaugh and Richard L. Rieckenberg to KSL Services, Inc., are hereby granted. KSL Services, Inc., shall provide Jonathan K. Strausbaugh and Richard L. Rieckenberg with its responses to these Document Requests by no later than April 30, 2008.

(4) Document Requests #2, 6, 8, 10, 11, 15, and 17 of the March 10, 2008 Request for Discovery submitted by Jonathan K. Strausbaugh and Richard L. Rieckenberg to KSL Services, Inc., are hereby granted in part. KSL Services, Inc., shall provide Jonathan K. Strausbaugh and Richard L. Rieckenberg with its responses to these Document Requests, as modified below, by no later than April 30, 2008:

> (a) Document Request #2: All emails and attachments from May 1, 2007 through June 30, 2007, generated or received by David Whitaker, Keith Trosen, Tom Hay, Joan Taylor, Richard Chavez, Martin Dominquez, Laura Jenkins, B.J. Tedder, Ted Torres, Steve Long, David Lujan, Jerome Gonzales, David Padilla, Benito Garcia, Rick Nelson, Mike Goodwin, Chris Tolleson, Carol Lowe, Mark Romero, Stephanie Bement, Richard Flores, and Kiki Sanchez, on the following subjects:
>
> > (i) project management, project planning, project budget, project safety, asbestos, and alleged personnel harassment related to the May 31, 2007, TA-3 steam system shutdown; and
> >
> > (ii) the decision to investigate, investigatory suspension, review and discussion of investigation, and decision to terminate Rieckenberg and Strausbaugh.
>
> (b) Document Request #6: Complete file of KSL's investigation, including investigators' notes, drafts, and recordings, to the extent that such documents are not privileged.

(c) Document Request #8: Copies of all incident reports, lab sample results and documentation regarding discovery and determination/assessment of uncontrolled asbestos concerning the May 31, 2007 TA-3 steam system shutdown.

(d) Document Request #10: Copies of all e-mails and attachments between Torres and Rieckenberg, Torres and Strausbaugh, Hay and Rieckenberg, and Hay and Strausbaugh, generated in 2006 and 2007, that relate to the May 31, 2007 TA-3 steam system shutdown, the complainants' termination, or the decision to terminate the complainants.

(e) Document Request #11: Copies of KSL disciplinary documents in effect during the termination of Strausbaugh and Rieckenberg that address KSL's rules, regulations or policies regarding termination of employment

(f) Document Request #15: Documents relating to any complaints made by Taylor through June 14, 2007, concerning Strausbaugh, Rieckenberg, Torres or against any other individuals.

(g) Document Request #17: Contact information for Trosen, and a complete description of circumstances for leaving KSL, excluding those portions of the requested description that concern non-work-related matters.

(5) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of the Office of Hearings and Appeals upon the issuance of a decision by the hearing officer on the merits of the complaints.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: April 16, 2008

April 27, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Hearing Officer's Decision

Name of Case: Gilbert J. Hinojos

Date of Filing: December 20, 2002

Case Number: TBH-0003

This Decision concerns a whistleblower complaint filed by Gilbert J. Hinojos (the Employee) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The Employee worked as a "Material Control Coordinator, Sr." at Honeywell Federal Manufacturing & Technologies (the Contractor), a DOE facility in Albuquerque, New Mexico. The Employee alleges that he engaged in protected activity and that the Contractor retaliated by taking several actions. The Employee's allegation of retaliatory discharge is the subject of this proceeding. As the decision below indicates, I have concluded that the Contractor would have taken the same action in the absence of protected activity and, therefore, the Employee is not entitled to relief.

I. Background

A. The DOE's Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program prohibits contractors from retaliating against contractor employees who engage in protected activity. Protected activity includes disclosing information that an employee believes reveals a substantial violation of a law, rule, or regulation or gross fraud, waste, or abuse of authority. Protected activity also includes participating in a Part 708 proceeding. If a contractor retaliates against an employee for protected activity, the employee may file a complaint. *See* 10 C.F.R. Part 708.

B. Procedural History

In July 2002, the Employee filed a complaint under 10 C.F.R. Part 708. In the complaint, the Employee alleges that he was subject to two acts of retaliation from the Contractor due to his having filed several complaints with the Equal Employment Opportunity

Commission (EEOC) and the New Mexico Human Rights Division (NMHRD). The first alleged act of retaliation was the Contractor's denial of the Employee's request to attend classes during his scheduled work hours despite the fact that the Contractor had previously granted the Employee permission to attend those classes. The second alleged act of retaliation occurred when the Contractor told the Employee to stop circulating a letter among his co-workers seeking support for his initial request to attend classes.

On October 22, 2002, the Director of the Office of Hearings and Appeals (OHA) appointed an investigator to examine the issues raised in the Employee's complaint. In December 2002, in his Report of Investigation, the investigator concluded that the Employee had not engaged in protected conduct under the Contractor Employee Protection Program because the program does not cover claims based upon the filing of EEOC complaints. The investigator further concluded that, even if the Employee had engaged in protected conduct, there was clear and convincing evidence that the Contractor's denial of the Employee's request to attend classes during scheduled work hours was not related to his filing complaints with the EEOC and NMHRD. After the OHA investigator issued his Report of Investigation, I was appointed the Hearing Officer in the case.

In January 2003, while this Part 708 action was pending, the Employee was discharged from his position with the Contractor. The Employee requested and was granted permission to amend his original Part 708 complaint to include the termination of his employment as an additional act of retaliation.

In April 2003, the Contractor filed an Amended Motion to Dismiss the Original and Amended Complaints. The Contractor argued that the Employee failed to make a claim for which relief could be granted under Part 708. The Contractor asserted that the Employee's claims were based on actions allegedly taken as a result of his filing claims with the EEOC and NMHRD and, therefore, are barred under 10 C.F.R. § 708.4. In May 2003, I granted the Contractor's motion in part. I determined that the claims regarding the first two alleged acts of retaliation—the denial of the Employee's request to attend classes during work hours and the Contractor's demand that the Employee stop circulating a letter among his coworkers in support of that request—should be dismissed because those claims alleged that the retaliatory actions were taken as a result of the Employee filing discrimination complaints with the EEOC and NMHRD and such claims are barred by 10 C.F.R. § 708.4. I further determined that the claim of retaliatory termination was not barred insofar as the claim alleged that the discharge was due to his filing a Part 708 claim, which is protected activity. *Gilbert J. Hinojos*, 28 DOE ¶ 87,037 at 89,264 (2003) (Motion to Dismiss) (*Hinojos*).

A hearing was held at Albuquerque, New Mexico on July 14-15, 2004. The Employee testified as to why he believed his termination was a result of the filing of his Part 708 complaint. The Contractor presented evidence, in the form of several witnesses and exhibits, seeking to establish that the Contractor would have taken the same action in the absence of the protected conduct. The Contractor's witnesses were the director of the Contractor's New Mexico operations (the Director), the Employee's supervisor (the

Supervisor), the Contractor's manager of Environment, Safety & Health (the Safety Manager), the Contractor's Human Resources Manager, and a forklift operator who was a co-worker of the Employee. The Contractor submitted an exhibit book. The Contractor numbered its exhibits and they are cited as "Ex. [number]."

II. Analysis

A. The Complainant's Burden

In filing a Part 708 complaint, the complainant must establish, by a preponderance of the evidence, that the complainant engaged in protected activity and that the activity was a contributing factor to an alleged retaliation. *See* 10 C.F.R. § 708.29; *see also Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). In the present case, although the Employee had a request for a hearing concerning his Part 708 claims pending at the time of his termination, the underlying original Part 708 claims were eventually dismissed because they were barred under 10 C.F.R. § 708.4. The only claim which was not dismissed was the Employee's claim that his employment was terminated because he filed the original Part 708 claim. The question then is whether the Employee's filing of a Part 708 claim, even though it was eventually dismissed as being barred by the regulations, is "protected activity" within the meaning of the regulations and therefore entitles the Employee to the benefit of protection against retaliatory discharge under Part 708. In my previous decision in *Hinojos*, I found that filing a Part 708 complaint was a protected activity and I reaffirm my decision below.

The stated purpose of the regulations is to provide "procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities." 10 C.F.R. § 708.1. Part 708 states that an employee may file a complaint against an employer for retaliation for participating in a proceeding under Part 708. *See* 10 C.F.R. § 708.5(b). Nonetheless, as demonstrated here, the fact that a claim is filed under Part 708 does not necessarily mean that the complaint is, on its face or in substance, one covered by the regulations.

Individuals who file complaints in good faith under Part 708 should not be denied its protection simply because they were mistaken in their belief that their claims fell within the scope of the regulations. The Part 708 regulations are intended to protect employees from retaliation for making disclosures about workplace safety or violations of law. To require employees to have absolute certainty that their claims fall within the scope of the regulations would deter employees from making such claims and would possibly subject employees whose claims are ultimately dismissed to retaliation for the simple act of filing the claim. This would frustrate the intention of the regulations. If we must err, it is better to err on the side of granting the protection to employees whose claims ultimately are not covered by the regulations than denying the protection to employees who file the claims in good faith. *See Rosie L. Beckham*, 27 DOE ¶ 87,557, Case No. VBA-0044 (2000)

("[F]or purposes of Part 708 it does not matter whether the information of a putative whistleblower disclosed is ultimately factually substantiated.") Therefore, I again find that filing a claim under Part 708 constitutes a disclosure as to a potential violation of law and may be a protected activity.

In the present case, I believe that the Employee made his initial Part 708 complaints in good faith. An examination of his submissions and pleadings in this matter convince me that his initial Part 708 complaint was made in good faith. Additionally, a Human Resource Manager who participated in the separation review board that made the decision to terminate the Employee's employment had knowledge of Hinojos' previous Part 708 complaint. *See* Hearing Transcript (Tr.) at 433, 438-39. Further, given the pendency of Employee's Part 708 hearing request at the time of his termination, I believe that there is sufficient temporal proximity to conclude that the Part 708 complaint was a contributing factor to his termination. Accordingly, I find that the Employee has satisfied his burden.

B. The Contractor's Burden

If the employee makes the required showings of protected activity and retaliation, the burden shifts to the contractor to establish by clear and convincing evidence that it would have taken the same action in the absence of the employee's protected activity. *See* 10 C.F.R. § 708.29; *see also Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)).

After considering the record established in the investigation by OHA, the parties' submissions, and the testimony presented at the hearing, for the reasons stated below, I find that the Contractor has met its burden of establishing by clear and convincing evidence that it would have taken the same action in the absence of the Part 708 proceeding.

1. The Contractor's Arguments and Evidence

The Contractor maintains that the Employee's filing of the complaint was not considered when the decision regarding the termination was made. According to the Contractor, the Employee was terminated because he was a safety risk. The Contractor stated that it primarily based its decision on an accident involving the Employee which occurred on December 6, 2002. Following that incident, the Contractor convened a separation committee to evaluate the Employee and the accident. In considering whether to terminate the Employee, the Contractor looked at the severity of the accident, the Employee's failure to take preventative measures, the Employee's attitude about the accident, and a prior safety incident in which the Employee was involved. Tr. at 251. The Contractor maintains that it considered precedent in determining the best course of action and found that discharging the Employee was appropriate given the circumstances.

At the time of the December accident, the Employee was transporting large, aluminum containers, known as CRTs, from the Contractor's facility to an off-site vendor in a

government-owned truck. The CRTs weigh about 250 pounds each. Tr. at 356; Ex. 8. The CRTs were not secured in the bed of the truck. At a point during the transport the Employee stopped suddenly, causing the unsecured CRTs to shift. This resulted in the rear window of the truck cab shattering and a part of the load shifting atop the cab. [1] Tr. at 272, 304-307; Ex. 8.

The Contractor asserts that the accident was very severe and, although no one was injured, could have had very serious consequences. The Director testified at the hearing that the accident "had the potential to be a very serious incident, and in and of itself was a very serious incident." Tr. at 253. The Supervisor stated that that by failing to secure the load, the Employee "was subjecting not only the general public, but also himself and the material to danger, high probability of danger." Tr. at 409-410. The Contractor also presented evidence identifying safety as an integral component of its operations. The Director stated, "[Safety is] so ingrained in our environment that we expect each of the staff members and leadership to be safe, and be accountable for safety." Tr. at 243. The Contractor's Human Resources Manager testified that "[s]afety is paramount in our organization. In fact, safety is considered a lifestyle." Tr. at 435. The Contractor argues that, although no one was injured, the Employee could have been seriously injured had one of the CRTs struck him and that there could have been serious injury to a member of the general public had a CRT fallen off the truck and struck someone else. *See* Tr. at 355.

The Contractor also asserts that it considered the fact that the Employee had the training necessary to take preventative measures and failed to do so. The Safety Manager testified to the training the Employee received. The Safety Manager specifically mentioned training relating to the proper way to secure and transport a load. *See* Tr. at 351-355; *see also* Exhibit 1. The Supervisor also testified as to the Employee's training and stated that he believed that the Employee had the necessary training to properly secure the load he was transporting during the December 2002 accident. Tr. at 400.

The Contractor further asserts that the Employee's attitude toward the accident was a key factor in determining that the Employee should be discharged. The Director testified that it was apparent from the investigation that the Employee did not take responsibility for and did not acknowledge the seriousness of the accident. Tr. at 252.

The Contractor also stated that it considered a prior safety incident in making the decision to terminate the Employee. In August 2002, the Employee was involved in a safety incident involving an unsecured load, categorized as a "near-miss" since no one was injured and the damage was minimal. This incident involved items that were loaded onto a pallet or cart to be lowered by forklift from one floor to another. The materials were improperly secured and the load improperly balanced causing some of the items to fall. None of the individuals involved in the incident were reprimanded; they all received training on securing and transporting loads. Tr. at 250, 407. *See* Ex. 17 at 470, 632. The Contractor's position is that, although no one was assigned blame for the August 2002 incident, following the incident the Employee received training that should have

[1] The Employee denies that any of the CRTs shifted to the roof of the truck cab as a result of the December accident. Tr. at 459.

prevented the December 2002 accident. The Contractor maintains that the Employee's failure to use that training was a willful disregard for the Contractor's safety procedures.

The Contractor further asserts that in deciding the Employee's case it looked to precedent to help determine the appropriate course of action. The Director testified that in deciding the case, the Contractor looked at, among other things, "past precedent and other similar situations [the Contractor] had in the organization, [the Contractor] at large, not just New Mexico." Tr. at 248. In this regard, the Human Resources Manager testified about the procedure the Contractor's Environment Safety and Health (ES&H) Office used to find precedent. She stated that when the ES&H office was told of the accident, it "characterized" the incident. A search was run in the Contractor's databases for similar incidents. The Human Resources Manager stated that in terms of potential severity of consequences only one other case was found. In that case, a senior maintenance worker, in the process of working on an electrical problem, failed to take proper safety measures and cut through an electrical conduit while digging a trench in an area with electrical lines. Although the damage in that incident was minor, there was a potential for severe consequences, even multiple fatalities. In that case, the worker was terminated outright solely as a result of the incident. Tr. at 434-35. When asked on cross-examination about whether the incident with the maintenance worker was the only one the separation committee considered, the Human Resources Manager stated that while there may have been other incidents, the one they considered was the only one that had a potential for severe consequences similar to the Employee's accident. Tr. at 443-44; *see* Ex. 18.

Finally, the Human Resources Manager testified that the Employee's version of what happened in the December 2002 accident was inconsistent. She testified that in the ES&H investigation of the accident the Employee stated that the forklift operator may have told him to secure the load but that he did not remember exactly what was said. In a subsequent investigation of the incident by the Contractor's Human Resources department, the Employee stated that he took a strap from behind the driver's seat in the truck and put it on the bed of the truck. In that investigation the Employee also stated that he asked the forklift operator if the load needed to be secured and that the operator responded that the load did not need to be tied down. Tr. at 428. The Human Resources Manager also pointed out that the forklift operator's version of the incident (that he had told the Employee to tie down the load) remained consistent between the two investigations. *See infra* at 8-9.

The Contractor asserts that its decision to terminate the Employee was consistent with actions it had taken in the past for comparable incidents. Moreover, the Contractor argues that the Employee's failure to take the proper safety precautions to prevent the accident, the fact that he had the training to do so, the inconsistency in the Employee's version of events in the two investigations, and his attitude toward the seriousness of the accident all warranted his termination. The Contractor maintains that the Employee's general attitude toward safety made him a safety risk and, therefore, termination was an appropriate course of action. *See* Tr. at 251-53.

2. The Employee's Arguments and Evidence

The Employee alleges that his termination was based on the fact that he had filed a Part 708 complaint and that the December 2002 accident was merely an excuse to discharge him. The Employee testified at the hearing and his testimony, in pertinent part, is set out below.

The Employee stated that in December 2002 he was picking up a load of CRTs to transport them to an off-site vendor. After the forklift operator had loaded the CRTs into his truck, the employee left to deliver them to the off-site vendor. The Employee stated that while he was transporting the CRTs, he pressed on the brake of the truck and the load shifted. [2] He described the accident as follows:

> [A]ll I heard was a crash, you know, sounded like a gun went off. And I looked up, and you could just barely see one of the CRTs that had barely cleared the gate, the fence there, and it hit the frame, the window frame of the truck, not the – it didn't hit the glass at all, it just hit the frame. And I looked up at it, and I couldn't believe the noise and the glass. So I says, well, I better get out of here. I looked around and saw everything was okay. So I drove to a phone booth, and I knew there was a gas station down the road. So I drove down there and I parked the truck and I called up [a coworker], who was our lead person…I said 'I was in an accident. One of the CRTs shifted' – I think it was two of them that had shifted.

Tr. at 100. He further testified that none of the CRTs had shifted to the top of the roof of the truck's cab. Tr. at 459. The Employee stated that immediately after the accident no one was disciplined and no other action was taken. Tr. at 105. However, the Employee testified that a few days after the accident his driving privileges were restricted. Tr. at 117.

The Employee stated that about a week after the accident, an investigation of the accident began. The Employee testified that he told one of his coworkers at that time that "they're [the Contractor] trying to fire me" and that the coworker responded that he had been involved in an accident with one of the trailers and not been fired. Tr. at 119. The Employee testified that he felt he was being treated differently because of his prior complaints. *Id*. The Employee testified that he knew of several other safety incidents that did not result in terminations for those involved. Tr. at 121, 183.

C. Disputed Issues and Findings

The Employee argues that, contrary to the Contractor's stated reasons for discharging him, he had not been guilty of repeated violations of safety procedures. The Employee also maintains that the forklift operator told him that he had secured the load of CRT's

[2] The truck that the Employee drove during the December 2002 accident was a pick-up truck that had a railing around the bed of the truck. The height of the railing was approximately that of the roof of the truck's cab. *See* Ex. 8 at 659-61.

and that it was not the Employee's responsibility to secure the load. Related to this issue is whether the ultimate responsibility of securing the load belonged to the Employee or the forklift operator. The Employee also maintains that the Contractor overstates the severity of the accident. Finally, the Employee disputes the Contractor's characterization of his attitude toward the accident.

1. Stated Reasons for the Employee's Discharge from Employment

The Employee argues that one of the reasons listed in his termination notice - "repeated violations of safety procedures" - is false and is merely a pretext to fire him for filing his Part 708 complaint. See Ex. 17 at 424 (Memorandum terminating Employee's employment). The record clearly indicates that with regard to the August 2002 accident, there was no formal adjudication of responsibility. Tr. at 250, 407. Since the record only discloses one safety incident where the Employee was found at fault, namely, the December 2002 accident, one of the stated reasons for the Employee's discharge - "repeated violation of safety procedures" - is erroneous. However, the facts as described below still support a finding that the Contractor would have discharged the Employee in any event, notwithstanding his Part 708 complaint.

2. Securing the Load Prior to Transport

The Employee disputes the Contractor's assertion that he was responsible for tying or strapping the load of CRTs that shifted in the December 2002 accident. The Employee testified that while the forklift operator loaded the CRTs on to the Employee's truck, the Employee went "around the front" to take his break. Tr. at 99. He stated that before he went on his break, he handed the forklift operator a tie-down strap in case he needed it to secure the load. Tr. at 99, 160. The Employee stated that when he returned from his break he asked the forklift operator, "Is the load ready to go?" and the forklift operator responded, "Yeah, it's ready. Go ahead and go." Tr. at 100. The Employee stated that, as far as he was aware, he was not required to do an inspection of the load before he drove away from the Contractor's facility. Tr. at 101. He also testified that according to "the procedures he was aware of" it wasn't necessary to strap the CRTs down since they were "rusty and would stack on top of each other." Tr. at 99.

The forklift operator's version of events significantly conflicts with the Employee's version. He stated at the hearing that after he loaded the CRTs onto the truck he handed a tie-down strap to the Employee and told the Employee to tie down the load. Tr. at 298. The forklift operator testified that he asked the Employee whether the Employee needed help securing the load and the Employee responded, "No, I don't need any help, I'll take care of it." Tr. at 299. The forklift operator stated that after the Employee told him he did not need help in securing the load, the forklift operator backed the forklift back into the bay area and lowered the bay door. The forklift operator stated he did not see "any more of what he [the Employee] did or did not do, what he failed to do." Tr. at 332. Further, the forklift operator denied that the Employee had offered him a strap or asked him to tie the CRTs down. Tr. at 312.

The forklift operator, the Safety Manager, and the Supervisor each testified that the driver of a vehicle has the burden of ensuring that a load is secure. The forklift operator stated that "once you're the custodian of a vehicle, you're responsible for everything. He doesn't have to pull it [the vehicle] off the lot if he's uncomfortable about the way it's loaded." Tr. at 331. According to the Safety Manager, "It's still the driver's responsibility to make sure to check that load and make sure it's secure. You don't drive off without making sure that that load is secure." Tr. at 367. When asked whether it would make a difference if the driver had been told the load was secure or given the go-ahead to proceed, the Supervisor testified that such assurances do not lift the burden from the driver:

> I think he still should have looked at the load, you know. As the driver of the vehicle, he should have looked at the load, made sure that he thought it was safe to transport. And if he didn't, then he should have loaded and secured it, and resecured it or whatever he thought. It was his responsibility, in my opinion.

Tr. at 411.

After examining the evidence as well as assessing the demeanor of the witnesses, I find that the forklift operator gave the Employee the tie-down strap and told the Employee to be sure to secure the load. The forklift operator's version of events remained consistent through two investigations and at the hearing. In each of those instances, he testified that he provided the Employee with a tie-down strap and told him to secure the load. See Tr. at 303, 312, 426; Ex. 16 at 637 (ES&H Investigation); Ex. 16 at 477, 641 (HR Investigation). As mentioned above, the Human Resources Manager testified that the Employee's version of events was inconsistent from the ES&H investigation to the Human Resources investigation. The report of Employee's interview by ES&H indicate that the Employees told investigators that the forklift operator might have told him to secure the load but he did not remember exactly what was said. Ex. 16 at 637. The report of HR's interview with the Employee indicates that the Employee claims to have asked the forklift operator whether he needed to tie down the load and that the forklift operator replied that it did not need to be tied down. Ex. 16 at 642.

I also find that the driver of a vehicle is ultimately responsible for ensuring that a load is secure prior to transport. In making this finding I was persuaded by the testimony of the Safety Manager, supervisor and forklift operator. It is unreasonable to argue that the driver of a vehicle carrying a load does not have the responsibility to ensure that the load is safe for transport. I find that, despite his training on the proper securing of loads for transport, the Employee failed in his duty to ensure that the load he was transporting was secure and safe for travel.

3. Severity of the Accident

According to the Contractor, a critical factor in deciding to terminate the Employee was the severity of the accident and the possible consequences. The Contractor believes the

accident could have injured or even killed both the Employee and members of the general public. The Employee testified that, given the nature of the accident, he did not believe that anyone could have been injured. The validity of these assertions necessarily turns on what actually happened in the accident of December 6, 2002.

The Employee testified that when he pressed on his brake, the CRTs shifted forward a bit causing one to bump against the window frame which caused the glass in the rear window of the truck cab to shatter. He stated that a CRT never touched the glass. Tr. at 100. The Employee further stated that no part of a CRT ever shifted atop the cab of the truck. Tr. at 165, 170.

The forklift operator, who arrived at the scene of the accident after the Employee called a coworker to inform them of the accident, testified that a part of one of the CRTs had penetrated the rear window of the truck and that part of another CRT had shifted atop the cab roof of the truck. Tr. at 304. The forklift operator stated that he personally shifted the CRT from the roof of the truck back into place and secured the load in order to return the truck to the Contractor's facility. Tr. at 305.

In light of all of the testimony, I am inclined to agree that a CRT did penetrate the rear glass of the truck and another shifted atop the roof of the vehicle. Based upon the evidence and my assessment of the demeanor of the Employee's and forklift operator's testimony, I find that the forklift operator's version of the damage in the accident is the more plausible one. I also find the Employee's version of the damage in the accident, while not necessarily impossible, very unlikely. The forklift operator testified that he personally saw that the CRT had penetrated the glass and the other had slid atop the roof. *See* Ex. 8 at 660. The Safety Manager testified that the glass in the truck in question consisted of safety glass and that a "light broadside hit" on the frame of the back cab window would not caused the safety glass to shatter as it did. Tr. at 357. The Safety Manager also pointed out that in his opinion the Employee could have been seriously injured or killed. Tr. at 361. Given the nature of the damage in the accident, I find that the Contractor's estimation of the seriousness of the accident is reasonable.

4. The Employee's Attitude Toward the Accident

The Contractor maintains that the Employee's reaction to the accident demonstrated a disregard or indifference to the importance of safety in the workplace and a lack of understanding of the severity and the potential consequences of the accident. The Safety Manager testified that the Employee was concerned that he was going to lose job. Tr. at 358. The Safety Manager also testified that he believed the Employee "understood that it was a potentially severe situation" but that he could not speak to whether the Employee accepted responsibility for the accident. Tr. at 361. When asked about her interview with the Employee after the accident, the Human Resources Manager testified as follows:

> Q.: Did [a human resources associate] ask [the Employee] if he realized how close he was to being severely injured by the CRT coming through the back window?
>
> A.: Yes.
>
> Q.: What was [the Employee's] response?
>
> A.: That he didn't consider it serious, it wasn't that big of a deal.
>
> Q.: Did he use words like that?
>
> A.: He used words like that.
>
> Q.: Not that big of a deal?
>
> A.: Um-hum.

Tr. at 431-432. The Human Resources Manager repeated this testimony on cross-examination. Tr. at 442-443. The Employee maintains that his attitude toward the accident was not indifference toward safety, but rather a disagreement as to the seriousness of the accident. The Employee stated that he did not think the accident could have had the severe consequences the Contractor believed could have occurred. *See* Tr. at 467. The Employee testified that when he was interviewed during the investigation of the accident he was asked whether he was aware of how serious the accident was and that people could have been injured or even killed. He testified that he never made a statement disavowing any risk and saying that the accident was not serious. Tr. at 467. Instead, the Employee stated that no one could have been injured by his transporting unsecured CRTs. Tr. at 168. The Employee testified that he did not see the danger in his driving with the unsecured load based on the vehicle he was driving and his previous trips with similar loads. Tr. at 230. He also stated that he never said the accident was not "a big deal." The Employee stated that he responded that the accident was not intentional and that he did not put himself or anyone else at risk. Tr. at 122.

Based upon the testimony, I find that the Contractor's assessment of the Employee's attitude toward the accident was a reasonable one. Regardless of whether the Employee used the words "no big deal," it is clear from his own testimony at the hearing that he did not think, and still does not believe, the accident had the potential for serious consequences. As mentioned above, the Employee testified that he never made a statement in which he disavowed the risks or seriousness of the accident; however, earlier in his testimony, on cross-examination, when questioned about the statement he stated, "I felt it wasn't that serious." Tr. at 181. In essence, the Employee clearly did not believe that the accident could have had grave consequences.

III. Conclusion

After examining all of the evidence and testimony before me I find that the Contractor has presented clear and convincing evidence that it would have terminated the Employee notwithstanding the Part 708 complaint. As discussed above, I also find that the Employee was in fact responsible for ensuring that the CRT load was tied down and that he failed to fulfill this responsibility. In this regard, the testimony of the forklift operator, the Supervisor and the Safety Manager is more convincing than that of the Employee. Further I find that even if the Employee had instructed the forklift operator to tie the load down, he as the driver was ultimately responsible for ensuring that the load was properly secured. His failure to secure the load resulted in the December 2002 accident. This accident could have had serious consequences for the safety of the Employee or other public traffic around him. This accident occurred despite the fact that Employee had received specific training regarding securing loads to be transported.

The Contractor has also sufficiently proved that, in light of the severity of the accident, the Employee's failure to take appropriate preventative measures despite having prior training on the proper method of doing so, and the Employee's failure to this day to acknowledge the seriousness of the accident, the Employee was a safety risk. The Contractor further established that the Employee's case was handled in a manner appropriate for the serious safety violation involved and that the sanction of dismissal from employment was consistent with the sanction given in the only other case that the Contractor's ES&H department, after doing a database search, could find involving a similar potential for harm. Accordingly, I find that the Employee's claim for relief under Part 708 should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Complaint filed under 10 C.F.R. Part 708 by Gilbert J. Hinojos against Honeywell Federal Manufacturing & Technologies, Case No. TBH-003 is hereby denied.

(2) This is an initial agency decision, which shall become the final decision of the Department of Energy unless, within 15 days of issuance, a notice of appeal is filed with the Office of Hearings and Appeals, in which a party requests review of this initial agency decision.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals:

Date: April 27, 2005

July 11, 2003

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: **Gary S. Vander Boegh**

Date of Filing: **November 20, 2002**

Case Number: **TBH-0007**

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Gary S. Vander Boegh (also referred to as the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Vander Boegh holds the position of Landfill Manager at the C-746-U Landfill for the DOE's Paducah Gaseous Diffusion Plant (the "Paducah Plant") located outside of Paducah, Kentucky. He is an employee of WESKEM, LLC (WESKEM), a subcontractor for Bechtel Jacobs Company, LLC (BJC). BJC is the management and integration (M&I) contractor for the Paducah Plant, and WESKEM is the subcontractor charged with operating the C-746-U Landfill. In his complaint, Mr. Vander Boegh contends that reprisals were taken against him after he made certain disclosures of safety violations to officials of WESKEM, BJC and the DOE. Mr. Vander Boegh contends that WESKEM and BJC retaliated against him in response to these disclosures.

I. Summary of Determination

In this Decision, I first provide background information concerning the Part 708 program, discuss the Complainant's employment situation and the nature of his complaint, and summarize the OHA Investigator's findings and preliminary determinations made by me to frame issues for the hearing. I then present the legal standards governing this case. Next is my analysis of this complaint. In that analysis, I first find that Mr. Vander Boegh made at least three protected disclosures that are proximate in time to several personnel actions that he contends were taken by WESKEM and BJC. I find that additional personnel actions were

taken after Mr. Vander Boegh initiated his Part 708 complaint, and are also proximate in time to his protected activity. I then find that with respect to all but one of these personnel actions, Mr. Vander Boegh has shown by a preponderance of the evidence that they constitute retaliations against him under Part 708. Under these circumstances, the DOE's strong commitment to defending whistleblowers and Part 708 impose the significant requirement that WESKEM or BJC show by clear and convincing evidence that, in the absence of these protected disclosures, it would have taken the same adverse personnel actions against Mr. Vander Boegh. Next I analyze the evidence and argument presented by the contractors. Ultimately, I find that in five instances, BJC or WESKEM failed to establish by clear and convincing evidence that it would have taken the adverse personnel action in the absence of Mr. Vander Boegh's protected disclosures. In one other instance, I find that BJC has shown by clear and convincing evidence that no Part 708 relief is required.

Accordingly, I find that WESKEM and BJC committed reprisals against Mr. Vander Boegh, and that they should be required to take restitutionary action.

II. Background

A. The DOE Contractor Employee Protection Program

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

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise take any adverse personnel action against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority.

See 10 C.F.R. § 708.5(a)(l), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations are entitled to receive protections. They may file a whistleblower complaint with the DOE. As part of the proceeding, they are entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they are entitled to an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. History: Mr. Vander Boegh's Complaint and Relevant Events Concerning his Employment at WESKEM

Mr. Vander Boegh filed his Part 708 complaint with the Oak Ridge Operations Diversity Programs and Employee Concerns Office on January 4, 2002. On April 29, 2002, that Office informed him that a preliminary determination had been made by the DOE to accept jurisdiction over the complaint. Further processing of the complaint was suspended while Mr. Vander Boegh, WESKEM and BJC attempted to resolve his complaint through mediation. When this effort failed, the complaint was forwarded to the DOE Office of Hearings and Appeals (OHA) on August 15, 2002, and on that date the OHA Director George B. Breznay appointed an OHA Investigator to conduct an investigation of Mr. Vander Boegh's complaint. On November 20, 2002, the OHA Investigator issued his Report of Investigation (the ROI).

Mr. Vander Boegh's employment history at BJC and WESKEM may be summarized in the following manner. Mr. Vander Boegh has been a landfill manager since 1992, and is currently the manager of the C-746-U Landfill (U Landfill) located three miles from the Paducah Plant. The U Landfill is a sanitary/industrial landfill that was constructed from 1995 to 1997 by DOE for disposal of solid wastes generated at the Paducah Plant that are not regulated as hazardous waste under federal regulation. Construction of the U Landfill was needed to continue on-site disposal of this type of waste generated at the Paducah Plant after an older landfill was filled to capacity and closed by the Commonwealth of Kentucky regulatory authority, the Kentucky Division of Waste Management (KDWM). Mr. Vander Boegh has been the landfill manager of the U Landfill since it began operations. In 1998, DOE contracted with BJC, making the firm its management and integration (M&I) contractor responsible both for the Paducah site's

nuclear enrichment program and for the site's environmental management. At that time, Mr. Vander Boegh became a BJC employee. In February 2000, BJC subcontracted the operation of the U Landfill to WESKEM, and Mr. Vander Boegh became an employee of WESKEM. ROI at 2-3.

The events relevant to Mr. Vander Boegh's Part 708 complaint began in early 2001. Acceptance of waste into the U Landfill had been suspended in November 1999 pending an environmental assessment when it was discovered that some waste materials disposed of at the landfill contained small quantities of residual radioactive materials. On February 1, 2001, KDWM issued DOE a new operating permit (Feb. 2001 Permit) for the U Landfill, which specified a number of conditions that must be satisfied in order for the landfill to begin receiving waste again. In response, BJC and WESKEM management initiated a series of meetings, discussions and exchanges of information during February 2001, addressing the conditions necessary to begin operating the U Landfill under the Feb. 2001 Permit. A tentative target date of July 2001 was set to begin full operation of the Landfill. One of the conditions (#9) of the Feb. 2001 Permit concerns the adequacy of the leachate storage capacity at the landfill.1/

1/ As discussed in detail in the ROI at 2-3, the U Landfill has an underdrain system to collect leachate (groundwater) generated from the landfill. The amount of leachate wastewater is dependent upon a number of factors including rainfall, groundwater runoff, and levels of evaporation. Leachate collection lines transport leachate to a below ground wet well pumping facility that pumps the leachate into two 30,000 gallon leachate storage tanks (Tanks F-001 and F-002) located above ground. At this point, two leachate disposal options are allowed by the Feb. 2001 Permit. The primary disposal option is the recirculation of landfill leachate to the working phase of the U Landfill. The second option is the disposal of the leachate at the Paducah site's wastewater treatment plant. Leachate is required to be sampled for contamination and characterized prior to disposal at the Paducah site's treatment plant. Under the terms of the Feb. 2001 Permit, the leachate tanks must have enough space to store leachate for 15 days at peak production rates. In addition, enough leachate must be continually removed from the tanks to maintain enough vertical space above the level of leachate already contained in the tanks to cover eight days of

(continued...)

The ROI finds that it was known to individuals who had been working at the U Landfill since l998 that there was a potential difficulty with inadequate storage capacity of the leachate tanks, specifically the regulatory requirement that enough reserve space be maintained in the leachate storage tanks to cover eight days of additional leachate collection (the 8-day reserve requirement). The ROI finds that in 1998, an unusually heavy rainfall caused an apparent violation of the 8-day reserve requirement. Again in February and March 2001, the regulatory 8-day reserve requirement was not available for a 21 day period. ROI at 3-4.

Beginning on February 2, 2001, Mr. Vander Boegh sent several e-mails to officials at BJC and WESKEM identifying the lack of reserve tank space as a potential liability for the operation of the landfill. ROI at 3-4. Then, on March 4, 2001, he sent an e-mail to Jan Buckmaster of WESKEM, with a copy to WESKEM Project Manager Dan Watson, captioned "C-746-U Leachate Issues" in which he identified the inadequacies of the leachate storage tanks, the lack of leachate transport equipment to rectify the problem and the potential risk to the Feb. 2001 Permit for the landfill. ROI at 4.

In his complaint and subsequent filings, Mr. Vander Boegh contends that these disclosures of potential environmental regulatory violations resulted in retaliatory actions from officials at WESKEM and BJC. These alleged retaliations include:

> (1) a disciplinary memorandum, dated March 5, 2001 to him from Mr. Watson of WESKEM (March 5 Memo);
> (2) WESKEM and/or BJC's decision in 2001 not to provide additional office space for Mr. Vander Boegh and his support staff at the U Landfill;
> (3) a proposal in August 2001, by Mr. Jeff Fletcher (WESKEM Operations Manager) to relocate the complainant's office from the U Landfill to the Paducah Plant site;
> (4) a change by BJC of the final version of a July 2001 white paper on waste acceptance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);
> (5) a memorandum dated August 1, 2001 from BJC manager Stephen Davis that directed Mr. Vander Boegh not to make protected disclosures to the DOE;

1/ (...continued)
additional leachate collection. This is known as the "8-day free board reserve" (8-day reserve) requirement.

(6) a reduction in the complainant's support staff in October 2001;
(7) a proposed subcontract change notice considered in March 2002, that would have affected the Complainant's position as landfill manager;
(8) ongoing acts of harassment and intimidation by BJC personnel, particularly Mr. Kevin Barber (BJC's Subcontractor Technical Representative);
(9) an annual performance evaluation in 2001; and
(10) a low salary for the Complainant in comparison to other WESKEM managers and landfill managers.

C. The ROI's Findings and the Hearing Officer's Preliminary Determinations.

The ROI finds that Mr. Vander Boegh warned WESKEM and BJC management in February and March 2001 about excessive accumulations of leachate in the storage tanks at the U Landfill, that had reached and surpassed maximum levels that could be maintained under the reserve capacity requirements of the Feb. 2001 Permit. Specifically, it finds that the warnings contained in two emails from the Complainant to WESKEM and BJC officials dated February 16 and March 4, 2001 constituted protected disclosures under section 708.5(a)(1) of the whistleblower regulations. ROI at 10-11.

With respect to Mr. Vander Boegh's claims of retaliations, the ROI determined that only the March 5 Memo and the alleged incidents of harassment and intimidation of Mr. Vander Boegh by BJC personnel during the late summer and autumn of 2001 constitute possible retaliations under Part 708. The ROI also finds that the knowledge element and proximity in time exist between these retaliations and the protected disclosures made by Mr. Vander Boegh in February and March 2001, making them contributing factors to the retaliations. ROI at 14. The ROI further concluded that WESKEM and BJC had not provided the OHA Investigator clear and convincing evidence that those retaliations would have occurred in the absence of the complainant's protected disclosure. ROI at 15.

With respect to Mr. Vander Boegh's other claims of adverse personnel actions, the ROI noted that his allegations concerning his compensation compared to other landfill managers could warrant greater examination in the context of a hearing. ROI at 12. The ROI also found "insufficient basis" for Mr. Vander Boegh's claim that WESKEM's refusal to increase his office space at the landfill and its proposal to relocate his office to the Paducah Plant site were retaliatory. ROI at 12, n. 4.

In a November 27, 2002 letter to the parties, I established a briefing schedule for the parties. I also asked Mr. Vander Boegh to "indicate specifically the remedy that he is requesting for the March 5 memo and the alleged acts of harassment and intimidation by BJC personnel." November 27, 2002 letter at 3. Counsel for Mr. Vander Boegh responded on December 23, 2002. In a January 7, 2003 letter, I addressed issues raised by this response and by discovery requests made by BJC, and made preliminary rulings concerning the Complainant's allegations.

Specifically, I noted that the remedies available under Part 708 are aimed at restoring employees to the employment position and situation that they occupied had the retaliations not occurred. In fact, the definition of the term "retaliation" in the regulations clearly requires that the employer's action must have had a tangible effect on the employee's terms and conditions of employment in order to constitute a retaliation covered by Part 708.

> Retaliation means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee *with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment)* as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart.

January 7, 2003 letter to the parties at 1-2, *citing* 10 C.F.R. § 708.2 [emphasis added]. Accordingly, I rejected Mr. Vander Boegh's contention that he be awarded an equitable salary relative to other similarly situated employees, and stated that Part 708 did not provide a remedy for longstanding salary differences that predated an individual's protected disclosures. I ruled that any remedy concerning Mr. Vander Boegh's salary from WESKEM would be limited to relief for specific retaliatory actions found to have been taken by WESKEM following his protected disclosures. January 7, 2003 letter at 2-3.

Further, I found that certain relief requested by Mr. Vander Boegh concerning his working conditions and support staff was outside the scope of Part 708. Specifically, his requests for "adequate office facilities" to allow him to perform his functional

responsibilities, and "adequate support staff" for his position of landfill manager could not be provided as Part 708 relief. With respect to the individual's office space, I noted that any alleged deficiencies that existed prior to the individual's protected disclosures are outside my remedial authority in this proceeding, and that for me to consider a possible remedy concerning office space, Mr. Vander Boegh must establish that the current alleged deficiencies are the result of specific adverse personnel decisions taken by WESKEM or BJC following his alleged protected disclosures. *Id.*

With respect to correcting the alleged inadequacy of his support staff, I stated that I would not consider that issue in this proceeding. I stated that I could find no grounds under Part 708 for granting relief concerning an individual's support staff. Part 708 relief is limited to restoring an individual's position, salary and related benefits to remedy specific adverse actions by an employer. I found that the issue of support staff implicates larger questions involving the adequacy of management discretion to achieve program objectives that are beyond the scope of this proceeding. January 7, 2003 letter at 3. Only a showing that a staff reduction affected the Complainant's ability to perform his job functions would convince me that a Part 708 issue has been raised. In the present case, such a showing clearly is not possible because the proposed staff reduction was never implemented. Accordingly, I will not consider Complainant's alleged retaliation (6) listed above.

The parties exchanged and submitted responses to the findings of the ROI in January 2003. In these briefs, both parties objected to findings made in the ROI. 2/ The parties also exchanged and

---

2/ In a submission dated January 10, 2003, BJC moved to dismiss Mr. Vander Boegh's Part 708 complaint on the grounds that adequate relief is not available under Part 708 to remedy the alleged retaliations claimed by Mr. Vander Boegh. BJC further contended that Mr. Vander Boegh had failed to meet his initial burden under Part 708, and that, to the extent this burden had been met, the claim itself is now moot, because Mr. Vander Boegh had developed a good working relationship with BJC employees. I reviewed Mr. Vander Boegh's submissions and found that they contained claims of protected disclosures and claims of related adverse personnel actions by WESKEM and BJC that were sufficient to support a hearing. Accordingly, I denied the Motion to Dismiss. *See* February 3, 2003 letter to the parties at 3.

submitted extensive documentary evidence, reply briefs, and witness lists. On March 4, 5 and 6, 2003, I convened an evidentiary hearing (the Hearing) at which a total of seventeen witnesses presented testimony.

Following the Hearing, I permitted the parties to submit their final arguments through post-hearing briefs and reply briefs. Upon receipt of reply briefs on May 12, 2003, I closed the record of the proceeding.

III. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish

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

10 C.F.R. § 708.29.

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both Mr. Vander Boegh and by WESKEM and BJC. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

B. The Contractor's Burden

If I find that Mr. Vander Boegh has met his threshold burden, the burden of proof shifts to the contractors. WESKEM and BJC each must prove by "clear and convincing" evidence that it would have taken the same personnel actions regarding Mr. Vander Boegh absent the protected disclosure. "Clear and convincing" evidence is a more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". *See Hopkins*, 737 F. Supp. at 1204 n.3. Thus if Mr. Vander Boegh has established that it is more likely than not that he made a protected disclosure that was a contributing factor to an adverse personnel action taken by WESKEM or BJC, the contractor must convince me that it clearly would have taken this adverse action had Mr. Vander Boegh never this protected disclosure.

IV. Analysis

A. Mr. Vander Boegh Made Protected Disclosures

As discussed above, the ROI finds that Mr. Vander Boegh warned managers at WESKEM and BJC in February and March 2001 about excessive accumulations of leachate in storage tanks at the U Landfill, that had reached excessive levels, causing the freeboard reserve (8-day reserve) to shrink below the minimum capacities required under the Feb. 2001 Permit. The ROI finds that these disclosures are documented in e-mail messages to WESKEM and BJC managers dated February 16 and March 4, 2001. A. Record at 172-173 and 181-182. The ROI concludes that these warnings constituted protected disclosures under both Section 708.5(a)(l), which involves a believed substantial violation of law, rule or regulation, and Section 708.5(a)(2), which involves a believed substantial or specific danger to public health and safety. ROI at 11. In their filings in this proceeding, neither WESKEM nor BJC dispute that these two communications from Mr. Vander Boegh constituted protected disclosures under Part 708. Accordingly, I concur with the ROI's conclusion in this regard.

In addition, I find that an earlier E-mail communication discussed in the ROI constituted a protected disclosure. That E-mail, dated February 2, 2001, was from Mr. Vander Boegh to Stephen Davis, BJC's Paducah Project Manager, with a copy to WESKEM manager Dan Watson. It also reported a potential environmental concern regarding the U-Landfill's leachate. As noted above, the Feb. 2001 Permit specified a number of qualifying requirements, including a specific

reference to adequate leachate storage capacity. ROI at 3. In commenting on this document in his E-mail to Mr. Davis, Mr. Vander Boegh stated in part:

> It is interesting that [KDWM] emphasized leachate storage capacity in condition #9 (in the Technical Application also) of the new operating permit. I've always interpreted this as a potential liability, especially since 28,000 gallons of leachate were recorded in the Quarterly Report after a heavy rainfall event over 2 years ago. At that time, KDWM inquired about this event and log entry.

February 2, 2001 E-mail from Mr. Vander Boegh to Mr. Davis with a copy to Dan Watson of WESKEM. A. Record at p. 146. In this communication, Mr. Vander Boegh clearly identified the U Landfill's limited storage tank capacity for leachate as a "potential liability" that could keep the landfill from qualifying for the Feb. 2001 Permit. He also provided Mr. Davis and Mr. Watson with information concerning a specific instance where KDWM previously expressed concern about leachate capacity. The KDWM operating permit requirements concerning leachate storage capacity clearly are intended to protect the public from the potentially serious environmental hazards posed by the danger of leachate contamination of groundwater. Accordingly, I find that the February 2, 2001 E-mail from Mr. Vander Boegh to Mr. Davis makes a protected disclosure involving "a substantial or specific danger to public health and safety." 10 C.F.R. § 708.5(a)(2).

B. None of Mr. Vander Boegh's Allegations of Retaliation Are Barred for Lack of Timeliness

As an initial matter, I must determine whether the first three of Mr. Vander Boegh's alleged retaliations can properly be considered in this proceeding. 10 C.F.R. § 708.14(a) requires that complainants file their complaint "by the 90th day after the date you knew, or should have known, of the alleged retaliation." WESKEM and BJC both contend that because Mr. Vander Boegh did not file his complaint until January 4, 2002, this provision bars any consideration of the complaints relative to the March 5, 2001 memorandum of Dan Watson and to the decisions of BJC and WESKEM not to provide Mr. Vander Boegh with an office trailer at the U Landfill. WESKEM Post Hearing Brief at 11-12. BJC Post Hearing Brief at 9-10. BJC also contends that this provision bars consideration of Mr. Vander Boegh's claim that BJC employee Steve Davis' August 1, 2001 memorandum regarding permit modification

roles and responsibilities was an adverse personnel action. BJC Post Hearing Brief at 10. Applying the logic of this argument would also bar my consideration of Mr. Vander Boegh's claim that WESKEM's August 2001 proposal to move the Complainant's office was a Part 708 retaliation.

I reject these arguments. In a recent Part 708 decision, the Hearing Officer discussed the relevant regulatory language, and whether and under what circumstances actions more than ninety days old can be considered as retaliations if the complainant only came to regard them as such at a later date. He found that the complainant should be allowed some time to recognize a retaliatory action for what it is. *Steven F. Collier (Case No. VBH-0084),* 28 DOE ¶ 87,036 at 89,257 (2003) (*Collier*).

In the present case, the personnel actions at issue - rejecting as "too expensive" plans to improve the individual's office space, a proposal to relocate his office, and memoranda allegedly imposing restrictions on the individual's activities - certainly were not viewed as neutral or innocent employment actions by Mr. Vander Boegh at the time that they occurred. However, these personnel actions are not so overtly punitive in nature that I find that a reasonable person "should have known" that they were Part 708 retaliations at the time that they took place. Additional analysis is therefore necessary. I believe that Section 708.14(a) of the regulation requires me to consider the evidence in the record, especially evidence as to Mr. Vander Boegh's state of mind, in order to determine when he knew or should have known that these were possible Part 708 retaliations, and to measure the ninety day filing requirement from that time.

I have examined the record, and conclude that there is no evidence indicating that Mr. Vander Boegh identified these four personnel actions as Part 708 retaliations prior to the filing of his whistleblower complaint in January 2002. With respect to the March 5, 2001 Watson memorandum, Mr. Vander Boegh's March 27, 2001 response to Mr. Watson makes no reference to the memorandum as the kind of personnel action adverse to him and in response to protected activity that would constitute a Part 708 retaliation. Rather, Mr. Vander Boegh seems to consider the memorandum part of an ongoing dialogue and he focuses on responding to the "many inaccuracies and innuendo" that he sees in the memorandum. Nor can I find any instance prior to his January 2002 complaint where Mr. Vander Boegh characterized the BJC/WESKEM decision to halt construction on his new office space as a Part 708 retaliation. In an email responding to WESKEM's proposal to relocate his office,

Mr. Vander Boegh states that such a move would negatively affect his ability to perform his duties as a landfill manager, but he does not characterize the move as a penalty or accuse WESKEM of retaliatory activity. Nor is there any contemporaneous evidence that he viewed the August 1, 2001 memorandum of Steven Davis as a retaliation. At the hearing, Mr. Vander Boegh testified that when he read this memorandum, he viewed the protocols set forth therein as an attempt by BJC to prevent him from reporting landfill problems directly to the DOE. TR at 726-728. He did not testify that he immediately viewed these protocols as a retaliation for protected disclosures that he had made earlier that year. By contrast, in his January 4, 2002 Part 708 Complaint, Mr. Vander Boegh clearly acknowledges his belief that he has experienced numerous retaliations for his protected activities:

> This Employee Concerns [Form] is filed, due to numerous attempts to conceal program deficiencies by the M&I Contractor BJC. It has also become necessary to further document numerous attempts to retaliate against the Landfill Manager for exposing Landfill issues of risk through the chain of command. Most notably were actions by my employer and BJC after regulatory deficiencies were presented to DOE on February 6, 2001. WESKEM disciplined the Landfill Manager on March 6, 2001.

Employee Concerns Reporting Form, p. 2, Vander Boegh Hearing Exhibit X.3/ Accordingly, the weight of the evidence indicates that Mr. Vander Boegh did not actually recognize adverse personnel actions as retaliations for protected activity until shortly before he submitted his complaint. Nor do I find that a reasonable person necessarily would have recognized these adverse actions as Part 708 retaliations prior to December 2001. I therefore find that my consideration of these alleged retaliations is not barred by the ninety day limitation of 10 C.F.R. § 708.14(a), and will proceed with my analysis.

3/ As indicated below, the factual record indicates that the Complainant was disciplined at a meeting on March 5, 2001, not March 6, 2001.

C. Mr. Vander Boegh's Protected Disclosures Were a Contributing Factor to Alleged Acts of Retaliation Found in the ROI

Under 10 C.F.R. § 708.29, Mr. Vander Boegh must also show that his protected disclosures were a *contributing factor* with respect to a particular adverse personnel action taken against him. *See Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994). A protected disclosure may be a contributing factor to an adverse personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) *citing McDaid v. Dep't of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990). *See also Russell P. Marler, Sr.*, 27 DOE ¶ 87,506 at 89,056 (1998).

I conclude that Mr. Vander Boegh has established by a preponderance of the evidence that his protected disclosures were contributing factors to the retaliations he alleges. I base this conclusion on a finding that there is both constructive knowledge and proximity in time between the protected disclosures made by Mr. Vander Boegh and his allegations of retaliation. With respect to constructive knowledge of the disclosures, Mr. Vander Boegh made his February 2, 2001 disclosure to Mr. Davis, the BJC's Project Manager for Waste Disposition. His February 16 and March 4, 2001 disclosures were to WESKEM and BJC managers concerned with waste disposition. ROI at 10. Clearly, the WESKEM and BJC managers and employees who allegedly retaliated against Mr. Vander Boegh can be presumed to have had actual or constructive knowledge of these disclosures in the absence of a clear and convincing evidentiary showing to the contrary. With regard to timing, the disclosures took place in February and March 2001, and the alleged retaliations taken against Mr. Vander Boegh by WESKEM and/or BJC officials prior to the filing of his Part 708 complaint took place during the period March 5, 2001 through December 8, 2001. This is a period of approximately nine months between Mr. Vander Boegh's most recent protected disclosure and the latest alleged retaliation that occurred prior to the filing of his Part 708 complaint. A nine month period, especially where there are allegations of persistent retaliatory activity, is certainly a reasonable period of time within which to presume that the disclosures were a contributing factor to alleged retaliations. *See Luis P. Silva*, 27 DOE ¶ 87,550 (2000) (nine months between disclosure and alleged retaliatory action); *Barbara Nabb*, 27 DOE ¶ 87,519 (1999), *aff'd in relevant part,* 27 DOE

¶ 87,555 (2000) (more than seven months between alleged disclosures and alleged retaliatory actions).

The alleged retaliations that occurred subsequent to January 4, 2002, are proximate in time to Mr. Vander Boegh's pending Part 708 action filed on that date. This Part 708 action is protected activity, and I deem it to be a contributing factor under Part 708 to personnel actions adverse to him that occurred in 2002.

Accordingly, with respect to each of the personnel actions discussed below, I will first determine whether Mr. Vander Boegh has shown by a preponderance of the evidence that the personnel action took place and meets the criteria for a Part 708 retaliation. If I make this finding in the affirmative, I will then determine whether WESKEM or BJC has shown, or together have shown, by clear and convincing evidence, that the protected disclosures were not a contributing factor to the adverse personnel action or that they would have taken the same action in the absence of the protected disclosure.

D. Mr. Watson's March 5, 2001 Memo was a Retaliation

Mr. Vander Boegh contends that Mr. Watson's March 5 Memo was intended to discipline him and to restrict his protected activity at a time when he had been tasked with developing a list of landfill deficiencies. Post Hearing Brief at 3. In the days proceeding the issuance of the memo, Mr. Watson was aware that Mr. Vander Boegh was developing such a list. Vander Boegh Hearing Exhibit E consists of a March 1, 2001 email exchange between Gregory Shaia, a BJC deputy waste project manager, and Mr. Vander Boegh. Mr. Watson and Mr. Fletcher of WESKEM also were recipients of these emails. In the initial e-mail, Mr. Shaia requests that

> WESKEM develop a comprehensive list of landfill deficiencies. This list should include permit or other regulatory or agreement citations indicating why said item is a deficiency or has non-compliance vulnerability. I further request that this list include a proposed solution for each item listed.

In his response, Mr. Vander Boegh indicates that he will prepare a detailed response by March 6.

> Your action item is noted and appreciated. However, this will require a more detailed response than an e-mail. I will provide by COB Tuesday, bullets to address the

> obvious deficiencies. A word of caution, these involve programmatic deficiencies that go back to the permit process in 1992.

Vander Boegh Hearing Exhibit E. On Sunday, March 4, 2001, Mr. Watson emailed the Complainant the following message:

> I just finished reading the request from Greg Shaia for the list of landfill concerns. I want a concise list and path forward on each item by COB Tuesday, March 6, 2001. Please list the items in a table format and keep the problems and path forward to less than 40 words each. We will discuss at length on Monday, between you and I. Please be available to meet in my office at 9 am. Until then, please focus on this list and refrain from lengthy discourse by e-mail to anyone. WESKEM has to focus on the problems and provide a path forward.

March 4 Email from Watson to Vander Boegh, Vander Boegh Hearing Exhibit I. At the Monday meeting, Mr. Watson presented the Complainant with the March 5 Memo and read it to him. Entitled "Expectations of WESKEM's Landfill Manager", the stated objective of the memo is to assign priorities to Mr. Vander Boegh's activities as landfill manager. Three sections of priorities are listed in three paragraphs: (1) the priority to operate the landfill in regulatory compliance; (2) the priority to "keep WESKEM's interest at heart when operating the landfill, working with subordinates and superiors, and procuring needed supplies for the landfill"; and (3) the priority to WESKEM's client, BJC. In these paragraphs, Mr. Watson gives a number of instructions to Mr. Vander Boegh. In paragraph (1), he is told that his priority to operate the landfill in full regulatory compliance "does not allow the use of regulatory leverage against WESKEM, LLC, its employees or customers." He is directed to "contact regulatory agencies only as is required to fulfill your position as landfill manager and only with the foreknowledge of Bechtel Jacobs Company's environmental compliance group and [WESKEM's Subcontractor Technical Representative]." Under paragraph (2), he is instructed that "[a]ll communication from you to other WESKEM operations should be through your organization to me or other managers reporting to me . . . ." He is told to avoid overtime and that

> The time you spend issuing email is excessive. Please utilize e-mail communication judicially. I expect a list of landfill issues that is concise, to the point, and

> timely to be updated weekly and provided to me every Monday morning.

In paragraph (3), he is instructed that "[a]ny action on your part that undermines our client [BJC] is wrong." Ad. Record, pp. 14-15. The Complainant characterizes this document as a "reprimand memo for protected activity" and asks that it be "expunged from the Complainant's personnel file." Complainant's Post Hearing Brief at 11.

WESKEM argues that the March 5 Memo cannot be viewed as a adverse personnel action because it is not disciplinary in nature. According to WESKEM, the memo's entire purpose was to get the Complainant to focus on his job so that work could be performed in a timely fashion and the landfill could receive a permit to reopen. It cites the March 4, 2001 email from Mr. Watson to Mr. Vander Boegh urging him to focus on creating a concise list of landfill issues requested by BJC manager Gregory Shaia, and asserts that the March 5 Memo was a further effort in that area.

> Greg Shaia's request ultimately led to the delivery of the March 5 memorandum. What must be abundantly clear is that the memorandum was written not in response to any protected disclosure made by complainant Vander Boegh, but directly related to the ongoing work of WESKEM. WESKEM was trying to service the needs of its customer, Bechtel Jacobs. Dan Watson was charged with that obligation. Dan Watson was trying to get his employee and landfill manager to concentrate and focus on the issues. Accordingly, it is submitted that a legitimate business interest existed for the authorship of the memorandum and that interest is a complete defense to any allegation of retaliation by complainant Vander Boegh.

WESKEM Post Hearing Brief at 16. I cannot accept the assertion that the March 5 Memo was issued solely for the purpose of offering guidance and encouragement to Mr. Vander Boegh in responding to Mr. Shaia's request. Mr. Watson's March 4 email to the Complainant had already provided detailed instructions and a deadline for this project. In addition, the factual record of this proceeding contradicts WESKEM's assertion. The ROI reports that Mr. Watson told Mr. Fred Brown, the Complaint Investigator, that the March 5 memo stemmed from an ongoing request by the complainant for additional office space, and that he wrote the memo to direct the Complainant to focus on his duties as Landfill Manager, and also to remind the complainant that he must keep WESKEM and BJC informed

when he was meeting with or providing information concerning the Landfill to DOE or the Kentucky regulatory authorities. ROI at 14-15. The March 5 Memo itself, with its specific prohibition against the Complainant's use of "regulatory leverage", its directive that he contact regulatory agencies only with the "foreknowledge" of BJC and WESKEM, and its admonition for him to "limit your communication" with WESKEM's client BJC, reveals that its purpose was to restrain the Complainant's communications with BJC and Kentucky officials rather than to focus his attention on a specific assignment, as WESKEM contends.

WESKEM also asserts that the March 5 Memo cannot be viewed as retaliatory because its statements concerning the Complainant's duties and responsibilities are "accurate and truthful." It contends that at the Hearing, the Complainant essentially agreed with all of the memo's statements in this regard. WESKEM Post Hearing Brief at 16-20, citing TR at 180-186. I disagree. While the Complainant agreed with the memo's general statements concerning his duties, he specifically disagreed with the memo's statement that "the time you spend issuing e-mail is excessive." TR at 184. Moreover, he found the content and tone of the letter to be threatening.

> I took it as a threatening . . . letter due to the fact that everything in this letter is what's in the contract that we are obligated to follow. And it's in the regulations. So, there's only one reason I understood this letter was written, and that is to start discipline action against me.

TR at 187. I agree that the memorandum was disciplinary in nature and effectively warned the Complainant that he was violating duties if he communicated excessively with BJC officials or had contacts with state regulators without the foreknowledge of WESKEM and BJC managers. I therefore am not convinced by WESKEM's arguments that this memo is not an adverse personnel action.

For the reasons stated above, I find that the Complainant has met his evidentiary burden of showing that the March 5 Memo constituted a Part 708 retaliation. I concur with the ROI's preliminary finding that this memo is clearly disciplinary in its tone and directs the Complainant to refrain from certain conduct, notably excessive e-mail messages and unnecessary communications with KDWM and BJC, in order to fulfill his proper role as a landfill manager employed by WESKEM. *See* ROI at 12-13.

Nor has WESKEM shown by clear and convincing evidence that it would have issued this memo in the absence of those disclosures. In its Post Hearing Brief, WESKEM contends that Mr. Watson could not have been motivated by the Complainant's protected activity when he issued this memo because he was as yet unaware of the leachate issues raised by Mr. Vander Boegh. I do not find that Mr. Watson's testimony is particularly persuasive concerning this alleged lack of knowledge. Although he testified that he did not know of the Complainant's protected disclosures concerning leachate storage issues at the time that he wrote the memo [TR at p. 488], his subsequent testimony greatly qualifies this denial. Rather than testifying that he never heard of leachate storage issues at that time, he stated that he had not "focused on it". TR at p. 488.

> There were so many blooming lists of problems at the landfill, that this is just one of several. And it just didn't appear to be -- I never took it to be a problem.

TR at 488. Under cross examination, Mr. Watson acknowledged having read his copy of the March 4 email from Mr. Vander Boegh to Mr. Buckmaster on leachate issues. He acknowledged that he was working that Sunday and may have read it on that date, prior to writing the March 5 Memo to the Complainant. TR at 505. He continued to maintain at the Hearing that he did not fully understand the issue:

> I knew that there were a list of problems and leachate problems were on that list of problems. But I didn't know about the seriousness or what exactly was associated with [the] leachate problem.
>
> . . . At the time I understood that we had a [leachate] capacity problem. I didn't understand that it was a permit issue.

TR at 506. In addition to the March 4 email from the Complainant, Mr. Watson also had been copied on the earlier February 16, 2001 email warning that a critical amount of leachate had accumulated, and on the February 2, 2001 email that identified leachate storage capacity as a critical issue in obtaining the Feb. 2001 Permit. Accordingly, I conclude that WESKEM has not rebutted the assumption that Mr. Watson was aware of or affected by Mr. Vander Boegh's protected disclosures concerning leachate storage problems at the time that he wrote his March 5 memo.

Accordingly, I will provide the Complainant with relief from this retaliation. Based on the testimony of Mr. Watson at the Hearing, WESKEM asserts that the March 5 Memo is not in Mr. Vander Boegh's personnel file. WESKEM Post Hearing Brief at 20. Nevertheless, I will direct WESKEM to review the Complainant's personnel file, and to remove the March 5 Memo if they find it there. I will also direct WESKEM to issue a written statement to the Complainant declaring that the March 5 Memo has been rescinded.

E. The WESKEM/BJC Decision to Halt Construction of an Office Trailer for the Complainant was a Retaliation

The Complainant contends that during March 2001, BJC canceled plans to build an office/document center trailer (hereafter the "office trailer") at the site of the Complainant's landfill. At the Hearing, he testified that the proposal to modify the U Landfill by constructing the office trailer and other buildings had been developed by BJC when he was a BJC employee [TR at 61], and the permit for these proposed improvements allowed construction to begin on February 1, 2001. He estimated that BJC completed the construction of a storm shelter and a shower trailer by April 1, 2001. TR at 50. At the Hearing, the Complainant testified that the office trailer would have increased his office space significantly. TR at 52. He stated that BJC developed the proposal because they were aware of a deficiency in office space at the U Landfill. TR at 61-62. He testified that he was not informed of any reason why the office trailer was not constructed. TR at 51.

In support of these assertions, the Complainant introduced a copy of the Modification proposal submitted by the DOE to the KDWM. Vander Boegh Hearing Exhibit D. The copy indicates that the Modification proposal was received by the KDWM on August 7, 2000. It provides for the construction of "an office/document center trailer" to be located east of the existing personnel building and "approximately 12' x 40' for future offices, conference room, and document storage." Modification proposal at 1. The document includes a drawing indicating the location of the proposed trailer. On the last page, the document is stamped "as approved February 1, 2001." *Id.* The complainant also introduced the testimony of Mr. Roger Alcock, a union worker at the U Landfill. He confirmed that there were plans to build an office trailer at the U Landfill. He testified a pad for this trailer was constructed. TR at 446. He stated that he had spoken to Mr. Watson and was told that the office trailer was not being built because it would cost too much

money. He testified that Mr. Watson gave him an inflated estimate for the cost of the office trailer. TR at 447.4/

I find that the Complainant has met his evidentiary burden of showing by a preponderance of the evidence that BJC and/or WESKEM took adverse personnel action when they canceled their plan to construct the office trailer at the U landfill. The evidence indicates that the plans to construct the office trailer did exist, and that preliminary site work for the office trailer was completed. The project was abandoned by BJC and/or WESKEM in February and March 2001, just after Mr. Vander Boegh made protected disclosures. The decision not to build the office trailer clearly is adverse to Mr. Vander Boegh, as it would have increased his office space. Not implementing an approved plan that would improve an employee's working conditions clearly is an adverse personnel action as defined in Part 708. Accordingly, the burden shifts to BJC and WESKEM to show by clear and convincing evidence that they would have canceled the construction in the absence of Mr. Vander Boegh's protected disclosures.

During the investigation and at the Hearing, BJC and WESKEM both attempted to show that their actions in this matter were not retaliations under Part 708. BJC contends that it did not retaliate against Mr. Vander Boegh because it made a decision prior to February 1, 2001 to let WESKEM provide the office trailer to be built at the U Landfill. At the Hearing, Mr. Stephen Davis, BJC's Project Manager for Waste Disposition, testified concerning this matter. He acknowledged that BJC prepared the Modification proposal, including the office trailer and other structures, that

---

4/ The available evidence indicates that sometime in late February 2001, Mr. Watson stated to Mr. Vander Boegh that the proposed costs for constructing the office trailer were too high. ROI at 14. This statement appears to have been made before the Complainant's March 4, 2001 protected disclosure, but there is no indication that it occurred prior to his February 2 and February 16, 2001 disclosures. However, Mr. Watson apparently did not inform the Complainant at that time that the trailer would not be built. A contemporaneous email and telephone memorandum by WESKEM employee Cindi Wahl indicates that on March 21, 2001, the Complainant informed Ms. Wahl that WESKEM was installing a new trailer at the U Landfill "in the near future," and that he had spoken to Mr. Watson on March 20, 2001 about installing a bathroom in the trailer. A. Record at 00603-00604.

the DOE then submitted to the KDWM for approval. He also acknowledged that BJC built a shower and change trailer for union workers, and a storm shelter at the U Landfill, both of which were included in the Modification proposal. TR at 633-636.

Mr. Davis testified that BJC submitted the construction proposal for the office trailer to the DOE with the understanding that WESKEM would finance its construction. He testified that WESKEM indicated to him that it would pay for construction of the office trailer at some point in time between its receipt of the subcontract to manage the U Landfill and the Modification proposal being submitted to the DOE in August 2000. TR at 639.

> I recall it was prior to this letter going in. Again, I can not remember the exact date, but the fact that there is a dimension here for that office trailer must have indicated at some point, they decided on that size trailer.

TR at p. 639. In his testimony, WESKEM manager Dan Watson confirmed this account, stating that he knew "we were going to do it out of the monies with WESKEM, but it became way to expensive." TR at 500. Based on this testimony, I conclude that prior to the Complainant's protected disclosures, WESKEM and BJC had an agreement whereby WESKEM had agreed to finance and construct the proposed office trailer at the U Landfill. Accordingly, BJC has shown by clear and convincing evidence that WESKEM rather than BJC planned to construct the office trailer.

WESKEM contends that its decision not to construct the proposed office trailer was based entirely on cost, and therefore its decision not to construct the trailer would have been the same if there had been no protected disclosures. Mr. Watson testified that WESKEM purchased an inexpensive, used trailer with the intention of remodeling it as an office/document center trailer for the U Landfill.

> We inspected [the trailer], we looked at it, thought about some of the modifications associated with it. And we purchased it for 2,000 dollars.

TR at 478-479. However, Mr. Watson testified that "I could not come to terms under working with [the Complainant] on the issue of the office trailer as to what the trailer would be." He stated that Mr. Kerry Stone, an employee at the U Landfill supervised by the Complainant, sent him a memo outlining several different

improvements. Mr. Watson stated that he authorized Mr. Stone to get estimates for these improvements, which "were in the neighborhood of twenty thousand dollars or so." TR at 479. Mr. Watson testified that WESKEM then abandoned the project of converting the trailer to office space because these estimated expenses were deemed to be "very, very expensive." He explained that WESKEM was not to be reimbursed by BJC or the DOE for these expenses, and twenty thousand dollars would amount to half of WESKEM's annual profits on its operation at the U Landfill. TR at 480.5/ He said that WESKEM then decided to use the unrenovated trailer to keep industrial hygiene equipment in an air conditioned environment so it would not expire. At that time they moved it to the Paducah Plant, where it continues to be used for storage purposes. TR at 481.

WESKEM has not shown by clear and convincing evidence that it would have made the decision to abandon the construction of an office trailer at the U Landfill in the absence of the Complainant's protected disclosures. WESKEM acknowledges that it intended to pay for the construction of the office trailer at the time that the proposal was first submitted by the DOE to the KDWM. WESKEM has not shown why or to what extent the cost estimates provided by Mr. Stone were out of line with its previously approved projected costs for the proposed office trailer. It therefore has not shown convincingly that its decision to abandon reconstruction of the trailer was based on unexpectedly high costs for the project. Under the standards of proof set forth in Part 708, I conclude that WESKEM has not demonstrated by clear and convincing evidence that its decision to abandon construction of the office trailer would have occurred in the absence of the Complainant's protected disclosures.

Accordingly, I will provide relief to the Complainant for this retaliation. I will direct WESKEM to proceed with this renovation based on the projected costs provided by Mr. Stone.

F. WESKEM retaliated against the Complainant when it proposed to Relocate his Office to the Paducah Plant Site

The Complainant contends that following his protected disclosures, a WESKEM official proposed that his office be relocated to the Paducah Plant, a distance of three miles from the U Landfill. He

---

5/ In later testimony, he refers to this $20,000 as thirty to forty percent of the profit from the landfill. TR at 496.

contends that this proposed relocation would have made the performance of his duties as Landfill Manager more difficult, negatively affecting the terms and conditions of his employment. Vander Boegh Post Hearing Brief at 4.

The record indicates that in early August 2001, WESKEM Operations Manager Jeff Fletcher orally informed the Complainant that WESKEM was proposing to relocate his office to the Paducah Plant. In an August 2, 2001 email to Mr. Fletcher, the Complainant indicated that this move would seriously affect his ability to manage the U Landfill. Vander Boegh Hearing Exhibit J. In an August 3, 2001 email to Mr. Don Seaborg of the DOE, he repeated these objections to the move.

> I have been asked to vacate the landfill office and I have asked Jeff Fletcher for an explanation. His supervisor is requesting this move. I have no problem with a secondary in plant satellite office, but a land fill manager can't manage a contained landfill from the plant.
>
> My goals have always been to resolve conflicts not be the center of conflicts and my record over the past few months especially should account for that. I feel I am being attacked on all fronts, due to a lack of understanding of others (not DOE).

Vander Boegh Hearing Exhibit K. At the Hearing, the Complainant described how the proposed relocation would have affected his ability to perform his duties as a Landfill Manager. He stated that as one of two employees licensed to monitor access to the U Landfill, it would have been very difficult to perform his supervisory responsibilities at the new location. He testified that he would have to spend a great deal of time traveling back and forth between the U Landfill and the Paducah Plant. TR at 92.

Although this relocation proposal was later withdrawn by WESKEM, the Complainant asserts that a threatened action to adversely affect working conditions is by itself an actionable retaliation. He argues that

> the job detriment need not be actual but may be potential and threatened. The threats themselves operated as a restraint on the Complainant's ability to perform his job duties and serve as further evidence of the hostility

> that the Respondents bore to the Complainant for his protected activity.

Vander Boegh Post Hearing Brief at 11.

Part 708 specifically defines "retaliation" to include intimidation, threats or "similar action" concerning conditions of employment. 10 C.F.R. § 708.2(2). I conclude that anyone familiar with Mr. Vander Boegh's job duties would have understood that relocating his office away from the U Landfill would interfere with his day-to-day management and make his conduct of those duties more time consuming and difficult. Accordingly, I find that the Complainant has met his evidentiary burden of showing by a preponderance of the evidence that when WESKEM announced its intention to relocate his office to the Paducah Plant, it committed a Part 708 retaliation against him.

In response, WESKEM argues that its proposal to relocate Mr. Vander Boegh to the Paducah Plant was based on legitimate business interests. It contends that Mr. Fletcher requested the move shortly after he became General Manager for WESKEM, and that he had a legitimate interest in having his front line managers easily accessible to him. At the Hearing, Mr. Fletcher testified that all of his other front line managers were at the Paducah Plant and "I was just wanting him to be closer to me so that I would have access when I needed him." TR at 537. He denies that there was any retaliatory motivation for his action. TR at 538.

WESKEM's explanations do not establish by clear and convincing evidence that Mr. Fletcher would have directed the Complainant to relocate his office in the absence of the Complainant's protected activity. WESKEM has not explained why Mr. Fletcher's legitimate business interest in having the Complainant easily accessible to him would override Mr. Fletcher's business interest in having the Complainant, a landfill manager, based primarily at the site that he is managing. Nor am I convinced that Mr. Fletcher's inexperience as WESKEM's General Manager is a convincing explanation for his relocation directive to the Complainant. Although Mr. Fletcher was appointed Operations Manager shortly before he directed the Complainant to relocate, he had been employed by WESKEM as Operations Manager since February 2001, and had interacted with Mr. Watson and Mr. Vander Boegh during the intervening period. Nor am I convinced by Mr. Fletcher's claim that his relocation directive was entirely untainted by retaliatory intent toward the Complainant. In fact, Mr. Fletcher reviewed Mr. Watson's earlier March 5 Memo to the Complainant prior to its

being given to him. TR at 535-536. I therefore find that Mr. Fletcher was either aware of or negatively influenced by WESKEM or BJC officials who were aware of the Complainant's protected disclosures. I also am unconvinced that he was unaware of the adverse impact on the Complainant that his proposed relocation would cause, and that this was not a factor in his decision to make the proposal.

Finally, WESKEM argues that it was not unreasonable for Mr. Fletcher to request this relocation because in 1997, while employed by another contractor, Mr. Vander Boegh had managed the U Landfill successfully from an even more remote location than the Paducah Plant. *See* Complainant's testimony, TR at 166-67. This assertion is beside the point. The issue is not whether the Complainant *could* manage the U Landfill from a remote location, but whether the conditions of his employment would be adversely affected by moving his office away from the landfill.

Accordingly, I will provide relief to the Complainant for this adverse proposal concerning his working conditions. I will direct that WESKEM shall not relocate the Complainant's primary office to a location outside the U Landfill without the Complainant's express consent for one year from the date of this Decision.

G. BJC's Change to the CERCLA White Paper Was Not Retaliatory

Mr. Vander Boegh contends that in July 2001, BJC changed some key language in the final version of a white paper on CERCLA waste acceptance. The Complainant states that he and three other individuals who had co-authored the white paper had no opportunity to review this change before the white paper was issued, even though BJC continued to list them as the authors of the white paper. At the Hearing, co-author Randall Russell, vice president of an environmental engineering firm, testified that he also was upset by BJC's failure to consult the authors concerning this change. TR at 459. I conclude that the Complainant has shown by a preponderance of the evidence that BJC adversely affected the conditions of his employment when it made this change without consulting him.

BJC contends that its action had nothing to do with Mr. Vander Boegh's protected activity. In a contemporaneous email to Ms. Forsee, another co-author, BJC Project Manager Stephen Davis stated:

> I agree with the comment [that the final draft of the white paper] as authored should not have been further revised by legal without the authors approval. Unfortunately, we have little influence on how a document is written after it has legal review. Additionally, I was not aware of this final change. Bottom line it should have received concurrence from the authors.

August 2, 2001 email from Mr. Davis to Ms. Forsee, BJC Hearing Exhibit 5.

As the above circumstances indicate, it appears that the legal division of BJC made a revision to the white paper prior to its issuance without consulting the document's four authors. I cannot see in these circumstances any indication of a specific intent to retaliate against Mr. Vander Boegh. Accordingly, I find that BJC has met its burden of showing by clear and convincing evidence that its legal department would have modified the same language in the report in the absence of the Complainant's protected disclosures.

H. BJC Manager Stephen Davis' August 1, 2001 Memo Was Not Retaliatory

In his filings in this proceeding, the Complainant refers to a memorandum dated August 1, 2001 from BJC manager Stephen Davis regarding permit modification roles and responsibilities (the Davis Memo). In his Pre-Hearing Brief, he contends that the March 5 Memo prohibited him from reporting any safety violations "except through certain stifling procedures" and "some of these obligatory procedures" were repeated in the Davis Memo. Vander Boegh Pre-Hearing Brief at 2. In his Post-Hearing Brief, the Complainant states that the Davis Memo delineates a "protocol, which required Bechtel Jacobs participation in reports to the DOE or the state." The Complainant contends that Mr. Davis stated at the Hearing that this protocol was mostly his own "philosophy." Vander Boegh Post Hearing Brief at 9.

The Complainant appears to be arguing that the Davis Memo is an attempt to impose arbitrary and "stifling" procedural restrictions on his contacts with state authorities and the DOE. At the Hearing, he testified that he read the Davis Memo as discouraging him from going directly to the DOE with reports of regulatory or environmental violations at the landfill. TR at 728.

My review of the Davis Memo is that it is almost solely a statement of company procedures and policy. Entitled "Landfill Permit R&R

[Roles and Responsibilities]" and addressed to the Complainant and Rebecca Ann Forsee, a WESKEM employee, it states in pertinent part:

> Let me reiterate the statements I made in our status meeting yesterday about the Landfill permit roles and responsibilities. Permit interpretations, updates, revisions, verbal discussions and written correspondence with the state regulators, and other subjects concerning the permit *requires* the involvement of STR [the BJC subcontractor technical representative], regulatory compliance, and the landfill operator.

A. Record at p. 819 (emphasis in original). The Davis Memo states that it "reiterates" a previous oral statement and emphatically "requires" the memo's recipients to "involve" BJC and WESKEM officials in any of their contacts with state regulators. As one of those recipients, the memo is clearly seeking to discourage Mr. Vander Boegh and Ms. Forsee from any private contacts with state regulators. However, to the extent that established company policy prohibits such contacts, a memorandum restating that policy cannot be seen as an adverse personnel action. Under Part 708, a DOE contractor certainly is permitted to state its official policies in neutral terms, and without threats, to its employees or subcontractor employees.

As discussed above with regard to the March 5 Memo, Mr. Vander Boegh acknowledges that he must report his contacts with the state regulators to WESKEM and BJC officials. Unlike the March 5 Memo, the Davis Memo contains no implied criticism of the Complainant's "regulatory leveraging" and "excessive" use of emails. The Complainant has not established that any of the requirements stated in the Davis Memo go beyond previous statements of BJC or WESKEM policy, while BJC has presented testimony indicating that this memorandum merely restates the company's policies and does not impose additional restrictions on the Complainant. Accordingly, I conclude that the Complainant has not met his burden of showing that the Davis Memo constituted an adverse personnel action against him.

I. Actions by BJC Employee Kevin Barber Toward the Complainant and the Response of BJC Management Are Not Retaliations that Require Relief

The Complainant contends that following his protected disclosures he was repeatedly confronted by threats and intimidation from BJC and WESKEM employees. In addition to the allegations discussed

above, Mr. Vander Boegh contends that on two specific occasions he was confronted by threats and intimidation from Mr. Kevin Barber, BJC's Subcontractor Technical Representative for its mixed waste treatment project. He states that the first occasion was at a regular weekly meeting on October 16, 2001, when Mr. Barber suggested that he would no longer be recognized as the landfill manager and accused the Complainant of not getting work done. Vander Boegh Post Hearing Brief at 4-5. The Complainant contends that he delivered a memorandum documenting the alleged harassment and intimidation to BJC Project Manager Steve Davis the following day. TR at 126. This memorandum describes the incident as follows:

> Mr. Barber intimated that I had apparently incorrectly prepared the WESKEM disclosure statements prior to the contract date of 2/28/01. He further insisted that BJC legal counsel would be correcting my error. . . . There was an inference that [the Complainant] would no longer be recognized as "key personnel" as required by KDWM. During later discussions regarding leachate disposal arrangements . . . , Mr. Barber interrupted and proceeded to make the statements that "if [the Complainant] could not begin work by Friday, that wouldn't be anything new since I was noted for not getting any work done anyway."

Vander Boegh Hearing Exhibit T.

A second instance of aggressive behavior by Mr. Barber toward the Complainant was documented at the Hearing. DOE employee Mr. Mitch Hicks, the PDGP's health physicist, testified that he was asked by the Complainant to attend a weekly landfill meeting for BJC and its subcontractors on March 5, 2002. He said that an altercation began after Mr. Vander Boegh complained that he had not been kept in the loop on documents that were being circulated that would require his review. He then recounted the following:

> The response was [BJC Project Manager Steve Davis] said that [he] thought we had this problem solved. [The Complainant's] supposed to be kept in the loop on the documents that are going forward. He then turned to Mr. Kevin Barber . . . and berated him a little bit about it, that, I thought we had this problem solved. And Kevin got a little bit upset about that. As a matter of fact, he kind of blew his stack with [the Complainant] while we were there. And later on, Steve asked Gary and Kevin Barber to please leave the meeting.

TR at 312-313.

The Complainant contends that a third incident involving Mr. Barber occurred on March 13, 2002, when several parties, including the Complainant and Mr. Barber, participated in a conference about landfill issues. During this discussion, the Complainant contends that Mr. Barber suggested that the Complainant leave the conference, saying "there's the door." He asserts that Mr. Fletcher of WESKEM reported this incident to Mr. Davis of BJC, but that BJC took no corrective action. Complainant's Response to Hearing Officer's January 6, 2003 Order of Discovery at 3. At the Hearing, Mr. Barber confirmed that he made this statement to the Complainant at that meeting. TR at 603.

These three incidents, as documented by the Complainant, establish conduct by one BJC employee, Mr. Barber, that certainly was aggressively hostile towards the Complainant on three specific occasions. I find that such actions reasonably may be deemed to constitute harassment and intimidation of the Complainant for his protected activity under Part 708. Accordingly, I find that Mr. Vander Boegh has met his evidentiary burden on this issue.

However, in this instance it is not necessary for me to analyze whether BJC has shown, by clear and convincing evidence, that Mr. Barber would have taken these actions against Mr. Vander Boegh in the absence of his protected disclosures. As discussed below, based on extensive testimony and other evidence presented by BJC at the Hearing, I find that BJC has established that it has aggressively counseled Mr. Barber concerning the inappropriateness of his actions toward the Complainant, and has ensured that this type of behavior has not recurred since March 2002. Accordingly, there is no present need for me to provide Part 708 relief to the Complainant concerning this issue.

Determining appropriate Part 708 relief for Mr. Barber's actions requires me to consider to what extent BJC management was aware of that conduct and whether they effectively intervened to ameliorate it. In this regard, the Complaint Investigator stated that he found no indication that there was any attempt by BJC management in October 2001 to rectify the complainant's perception that he was being harassed by Mr. Barber. ROI at 13. However, through testimony at the Hearing and by its exhibits, BJC has established that it did make ongoing efforts to resolve what it believed to be an ongoing personality conflict between Mr. Barber and Mr. Vander Boegh.

The record now indicates that immediately following receipt of the Complainant's October 17, 2001 memorandum by BJC management, WESKEM General Manager Jeffrey Fletcher and Mr. Davis of BJC agreed to hold a coaching and counseling session with Mr. Vander Boegh and Mr. Barber. The Complainant testified that this meeting lasted more than one and one half hours, and that "Jeff Fletcher interceded on a couple of heated discussions." TR at 128. He also stated that he and Mr. Barber were told to work on their relationship, and that he interpreted statements made by Mr. Davis to Mr. Barber as a disciplinary counseling of Mr. Barber. TR at 260.

As noted above, at the March 5, 2002 meeting where Mr. Barber "blew his stack" at the Complainant, Mr. Davis asked both individuals to leave the meeting. There is not enough evidence of the Complainant's conduct at this meeting to ascertain whether Mr. Davis acted fairly in asking both individuals to leave, but he clearly did not tolerate Mr. Barber's outburst. Mr. Hicks further testified that after the Complainant and Mr. Barber left the meeting, Mr. Davis indicated to those remaining that there was a personality conflict between Gary Vander Boegh and Kevin Barber. TR at 313.

With respect to the March 13, 2002 meeting, Mr. Barber testified that he was upset with the Complainant because he was not sticking to the agenda of the meeting. TR at 603. Mr. Cliff Blanchard, a consulting engineer with Tetratech, Inc., confirmed this account (TR at 439) although he also testified that he thought that asking the Complainant to leave the meeting was unjustified. TR at 434. After Mr. Barber reported to Mr. Davis that he may have made an inappropriate remark to the Complainant, Mr. Davis asked Mr. Barber to send him an email message summarizing the meeting. TR at 607, 662; BJC Hearing Exhibit 4. Mr. Davis testified that after receiving this message, he and Mr. Barber's functional manager at BJC held a second coaching and counseling session with Mr. Barber, who was told to improve his working relationship with Mr. Vander Boegh. TR at 663-664. Mr. Davis stated that he believes there has been a significant improvement in Mr. Barber's relationship with the Complainant since that time. 664-665.

In light of BJC's efforts to intervene on behalf of the Complainant, I agree with BJC's assertion that Mr. Barber's instances of agressive conduct toward the Complainant have been remedied. BJC Post Hearing Brief at 21. I also note that Mr. Barber is no longer employed by BJC. *Id. at n.* 5.

J. BJC's Presentation to the DOE of a Proposed Subcontract Change Affecting the Complainant Was a Retaliation

The Complainant contends that in March 2002, the DOE adopted a proposal that would have changed his job position or resulted a demotion. Although the DOE later abandoned the proposal prior to implementing it, the Complainant asserts that BJC's role in developing and recommending the proposal constituted a retaliation. At the Hearing, the Complainant testified that in March 2002, he spoke by telephone with Mr. Harvey Rice, the program manager for the DOE's Oak Ridge environmental management division. He testified that during this conversation, Mr. Rice stated that BJC was proposing contract changes to the DOE that would effectively remove the Complainant's position of Landfill Operator from WESKEM and transfer it to BJC. The Complainant stated that since Mr. Barber was a BJC employee, he believed that Mr. Barber would replace him as Landfill Manager of the U Landfill. He memorialized his conversation with Mr. Rice in an email to his attorney. Vander Boegh Hearing Exhibit V. TR at 135-139. In his testimony at the Hearing, Mr. Rice confirmed that at a March 2002 meeting, BJC presented a proposal to the DOE that involved changing the Complainant's job position at the U Landfill. TR at 373-374. On March 26, 2002, BJC manager Steve Davis sent an email to the DOE's Paducah site manager Don Seaborg summarizing this meeting. He stated that the meeting had been attended by himself, WESKEM manager Jeff Fletcher, Mr. Rice, Mr. Seaborg, and others. Mr. Davis summarized the options presented by BJC and the decision reached by BJC and the DOE, as follows:

> **A discussion was conducted concerning the landfill management and operations protocol. The current protocol and three options were discussed. It was stated the current protocol is not working very well. The options discussed include: a) BJC as manager with licensed landfill managers assigned to the Waste Project with support by WESKEM as field operator, b) WESKEM performing full management and operation with BJC providing baseline controls and reporting, and c) BJC self-performing all work. DOE decided to implement Option a) above. ACTION: BJC will work with DOE and WESKEM to facilitate the change over as soon as possible. Davis has the responsibility to lead the effort.**

Email submitted by Complainant's Hearing witness Mitch Hicks, identified as "Hicks Exhibit A". DOE employee Mitch Hicks also testified that Mr. Rice informed him of this proposal. TR at 314-

15. In a March 28, 2002 email to Rufus Smith, Employee Concerns Manager for the DOE's Oak Ridge Operations Office, Mr. Hicks presented the following description of Option (a) and its effect on Mr. Vander Boegh, as related to him by Mr. Rice:

> DOE legal has stated to Harvey Rice (DOE Waste Management), that the subcontractor, WESKEM (Vander Boegh's employer), should not be acting as the landfill manager. The position of the landfill manager under Kentucky law requires the ability to redirect resources, which is the function of BJC, according to DOE legal.
>
> This was considered during the landfill meeting, and DOE Paducah site manager Don Seaborg . . . decided to authorize BJC to become the official landfill manager, with WESKEM remaining as the operator of the facility.
>
> Mr. Vander Boegh (according to Harvey Rice) is to be offered another position within WESKEM at the same pay and benefits that he is currently receiving. Or, he can stay at the landfill as an Operator (not as landfill Manager) at less pay. I'm sure that Mr. Vander Boegh will not like either option.

Hicks Hearing Exhibit A. In his filings in this proceeding, the Complainant contends that these actions constituted a threat by BJC to demote and replace the Complainant from his position as Landfill Manager. Complainant's Post Hearing Brief at 13.

I agree that BJC's actions in this proposed subcontract change appear to constitute a Part 708 retaliation. By presenting a recommendation to the DOE that would result in Mr. Vander Boegh losing his job title and authority, and having to chose between a job transfer and a pay reduction, BJC certainly took an adverse action against the individual that threatened the conditions of his employment. 10 C.F.R. § 708.2. Although the Davis email indicates that other options were presented to the DOE at this meeting, the DOE site manager's decision to select option (a), with its negative impact on the Complainant, relied on the knowledge and experience of the contractors and was influenced by the presentation and discussion of each option by Mr. Davis and Mr. Fletcher. Accordingly, I conclude that the Complainant has met his evidentiary burden of showing by a preponderance of the evidence that BJC took retaliatory action against him in its communications with the DOE regarding changing the Complainant's position at the U Landfill.

I find that BJC has not established by clear and convincing evidence that it would have provided the same advice to the DOE on this subject in the absence of the Complainant's protected disclosures. BJC contends that the option that it presented at the March 26, 2002 meeting that was adopted by the DOE was not detrimental to Mr. Vander Boegh. At the Hearing, Mr. Davis testified that if that option had been implemented with a licensed Landfill Manager employed by BJC, he expected that the Complainant would continue to be the landfill manager because of his rights under the workforce transition roles. TR at 670-671. It contends that this view of the Complainant's rights was confirmed by WESKEM's Preventive Maintenance Manager, Mr. George Johnson (TR at 580) and by the Complainant (TR at 237). I cannot accept this contention. Although BJC has shown that it is likely that the Complainant would have transitioned back to BJC if his job title had been transferred there, it has not been established that BJC and WESKEM officials were aware of this outcome at the time of the March 26, 2002 meeting. Mr. Rice, who attended the meeting by telephone was quite specific when he contemporaneously informed Mr. Hicks that under the adopted proposal Mr. Vander Boegh would be offered another position within WESKEM at the same pay and benefits that he is currently receiving, or could stay at the landfill as an Operator (not as landfill Manager) at less pay. March 28, 2002 email from Mr. Hicks to Rufus Smith. At the Hearing, Mr. Rice testified that he had no knowledge whether BJC ever considered the option of transferring the Complainant back to BJC.

> I think one possible solution to the modifying of the contract and getting the title to match the regulations was to move [the Complainant] back to Bechtel Jacobs as a Bechtel Jacobs employee. But I don't know if Bechtel Jacobs really seriously considered that or not.

TR at 375. Accordingly, I find that BJC has not shown by clear and convincing evidence that it made its proposal to the DOE in March 2002 with the understanding that it would have no negative impact on the terms and conditions of the Complainant's position of Landfill Manager. I conclude that its proposal was a Part 708 retaliation.

I will therefore direct BJC to refrain from recommending any changes with respect to the Complainant's job position for a period of one year from the date of this Decision without the express consent of the Complainant.

K. WESKEM's Below Average Rating of Mr. Vander Boegh in Certain Categories of his 2001 Performance Review Was a Retaliation

The Complainant disagrees with the performance review that he received from WESKEM after his protected activity in February and March 2001. Specifically, he objects to low ratings in certain categories such as teamwork and creativity and to the overall review of "Fully Satisfactory", which he refers to as "average". Vander Boegh Post Hearing Brief at 5, *referring to* WESKEM Performance Appraisal for Gary Vander Boegh covering the period 01/01 through 12/01 (hereafter referred to as the "WESKEM Appraisal"). He asserts that his immediately preceding performance appraisals were more favorable. As support for this assertion, he has submitted two performance appraisals conducted by BJC for the years 1998 and 1999.6/ The Complainant concludes that he has suffered an adverse action because his personnel file now contains a performance appraisal that is unduly critical of him. Vander Boegh Post Hearing Brief at 11.

My review of these performance appraisals indicate that the Complainant's factual assertions are accurate. While neither of the BJC appraisals gives the Complainant an overall rating, both are complimentary of him. The 1998 BJC Appraisal notes under the heading "Strengths" that "Gary produces quality work. He is a team player. He provides initiative and leadership to perform work." The 1999 BJC Appraisal states that the Complainant has "met his goals over the past year." It states that

> **Gary's strengths are his understanding of the regulations and his permit conditions. He understands what it takes to accomplish work safely and in a timely manner.**

1999 BJC Appraisal at 3. Neither of these appraisals identifies any weaknesses or deficiencies concerning the Complainant's abilities. Under the heading "Actions for Performance Enhancement," both of the BJC appraisals repeat the Complainant's concern that his office space at the landfill is congested. The 1999 BJC Appraisal also notes that the Complainant will assume a new responsibility with WESKEM to manage wastewater, and that he "will need mentoring/training by WESKEM in order to properly manage wastewater." 1999 BJC Appraisal at 3.

6/ WESKEM was the Complainant's employer in 2000, but it did not issue an evaluation of his performance for that year. *See* Testimony of WESKEM Project Manager Dan Watson, TR at 490.

By contrast the WESKEM Appraisal contains ratings that are critical of the Complainant's abilities. The appraisal was completed by Mr. Fletcher, and contains numerical scores for statements about the Complainant's performance. The following statements were assigned a numerical score of three by Mr. Fletcher, indicating that the Complainant "needs improvement."

> Foresees needs and takes action to fulfill them.
> Demonstrates ability to make decision with minimal direction.
> Ability to base decisions on fact rather than emotion.
> Willingness to work harmoniously with others in getting job done.
> Knows how to express opinions and ideas in ways that are respectful of others.
> Builds on others ideas and doesn't shoot them down.
> Accepts constructive criticism.
> Actively listens, asks open-ended questions and genuinely hears what the other person is saying.
> Ask questions to see if others understand what he/she says.

WESKEM Appraisal at 2. Under managerial comments, Mr. Fletcher included the following critical analysis and suggestions:

> Areas for improvement include ownership of issues and taking actions to resolution, developing relationships and working with others harmoniously, and actively listening to the ideas of others. Seek out training seminars and read books to develop these leadership skills.

WESKEM Appraisal at 4.

The low numerical scores and the written criticism contained in the WESKEM Appraisal clearly constitute an adverse action by WESKEM affecting the Complainant's employment. Mr. Vander Boegh's protected disclosures occurred near the beginning of the evaluation period covered by the WESKEM Appraisal, and the appraisal itself was written during the pendency of the Complainant's Part 708 complaint. I therefore conclude that the Complainant has met his burden of showing by a preponderance of the evidence that the WESKEM Appraisal is an adverse personnel action that constitutes a Part 708 retaliation.

WESKEM asserts that its overall rating of the Complainant as "fully satisfactory" cannot be regarded as a retaliation. It also contends that the WESKEM and BJC appraisals cannot be compared because BJC used an "entirely different form and procedure for its evaluation of employees." WESKEM Post Hearing Reply Brief at 5-6. It refers to the testimony of its general manager, Mr. Watson, who stated that he hates "grade inflation" and that he told everybody at the site that a numerical score of five was a person doing their job in a fully satisfactory manner. TR at 491. With respect to the Complainant's appraisal he stated that he would not be surprised if there were scores of three on the appraisals for performance relating to cooperation and teamwork. *Id.* Mr. Fletcher, the supervisor who conducted the WESKEM Appraisal, testified that his appraisal of the Complainant was "about an average review overall." TR at 542. He also testified that in his opinion, "a couple of [the Complainant's] weaknesses are in personal skills and communication skills." TR at 540.

I find that WESKEM has not met Part 708's clear and convincing evidentiary standard with regard to the below average ratings and written criticisms contained in the WESKEM Appraisal. Under the evidentiary standard set forth at Section 708.29, WESKEM must show by clear and convincing evidence that the WESKEM Appraisal would have been the same in the absence of his protected activity. It is therefore crucial for WESKEM to show both that the ratings and statements were accurate, and that the Complainant was treated similarly to other employees with similar performance problems. That full consideration of WESKEM's general employment practices is required is fully consistent with OHA precedent in this area. See Thomas Dwyer, 27 DOE ¶ 87,560 at 89,337 (2000); Roy Leonard Moxley, 27 DOE ¶ 87,546 at 89,241 (1999); and Morris J. Osborne, 27 DOE ¶ 87,542 at 89,209 (1999). As indicated in those determinations, the standard in the clear and convincing area is not whether it was *reasonable* for WESKEM to have taken its adverse personnel actions regarding the Complainant. The standard is whether WESKEM *actually would have taken* these actions absent his protected disclosures.

As a preliminary matter, WESKEM has not shown by clear and convincing evidence that the WESKEM Appraisal's criticism of the Complainant was accurate. The two BJC appraisals received by Mr. Vander Boegh in 1999 and 1998 do not indicate any previous problems by the Complainant's employer with his job performance, and especially not in the areas identified by the WESKEM Appraisal. The 1998 BJC Appraisal actually commends the Complainant for being a "team player" and for providing "initiative to perform work".

Both of these areas are rated as needing improvement in the WESKEM Appraisal. WESKEM has provided no evidence indicating that the Complainant's job performance deteriorated significantly in these areas following his transition to WESKEM, and little specific evidence to support the testimony of Mr. Watson and Mr. Davis that they believed that the Complainant needed to increase his ability to cooperate with others in performing his job duties.

Nor has WESKEM met its evidentiary burden of showing that other WESKEM employees with similar performance problems received similar ratings and criticism in their appraisals. Mr. Watson's general statements about discouraging grade inflation in employee evaluations are insufficient in this regard.

In light of the failure to provide convincing evidence indicating that the Complainant's ratings were accurate, and in the absence of specific evidence concerning WESKEM's practices for evaluating other employees, I conclude that WESKEM has not met its evidentiary burden concerning this issue. Accordingly, I will direct WESKEM to remove the WESKEM Appraisal from Mr. Vander Boegh's personnel file.

L. Complainant's Allegation that He Continues to be Underpaid in Comparison to other WESKEM Managers or Landfill Managers is not a Retaliation

The Complainant contends that he has suffered from an "inequitable salary" from before the time of his protected activity until the present. He states that organizational charts show that the Complainant was considered the equivalent of a project manager from the time that he was transitioned from BJC to WESKEM, and that project managers receive significantly greater compensation than does the Complainant. Vander Boegh Post Hearing Brief at 3, 10. Vander Boegh Hearing Exhibits A and B. He argues that an organizational chart issued after his protected disclosures put another employee between himself and his previous immediate supervisor, effectively demoting him "at least two levels from the project manager status." *Id.*, Vander Boegh Hearing Exhibit C. He states that this reorganization is a reason why he currently is being paid less than employees with similar duties. He also asserts that testimony at the Hearing proves that he was paid significantly less than the landfill manager at the Oak Ridge site. He argues that the increased disparity in total salary between the Complainant's salary and those of similarly-situated employees caused by identical percentage salary increases is also an adverse action. *Id.* He contends that WESKEM has not shown that employees

with similar duties and responsibilities are paid at the low salary level of the Complainant. *Id.* at 14.

WESKEM asserts that it agreed to pay the Complainant the same salary for the same job classification and duties as he was paid by BJC before the Complainant accepted employment with WESKEM. WESKEM also states that since his employment with WESKEM, the Complainant has received two substantial pay increases. WESKEM asserts that the Complainant is WESKEM's only Landfill Manager. Rebuttal Brief of WESKEM at 1-4.

The Complainant has not raised issues concerning his salary that are appropriate for remedial action in this proceeding. As noted above, in a January 7, 2003 letter to the parties, I stated that the remedies available under Part 708 are aimed at restoring employees to the employment position and situation that they occupied before Part 708 retaliations took place. At that time, I
rejected Mr. Vander Boegh's contention that he be awarded an equitable salary, and stated that Part 708 did not provide a remedy for longstanding salary differences that predated an individual's protected disclosures. Mr. Vander Boegh's contention that there is an "increased discrepancy" between his salary and that of other managers that can be addressed in this proceeding is another attempt to redress these longstanding differences. Mr. Vander Boegh does not contend that the raises he has received from WESKEM are smaller percentage raises than those received by other WESKEM employees. Rather, he argues that his base salary is lower, so that his raises are not keeping pace with those of higher paid employees. I find that WESKEM's decision to raise his salary and the salaries of his co-workers by a certain percentage of base pay is not a retaliatory action for his protected disclosures.

V. Conclusion

Based on the analysis presented above, I find that Mr. Vander Boegh made three disclosures protected under Part 708, and that one or more of these protected disclosures were contributing factors to adverse personnel actions taken by WESKEM and BJC against him. However, I find that Mr. Vander Boegh has not met his evidentiary burden of showing that WESKEM's salary determinations regarding the Complainant constitute Part 708 retaliations. Furthermore, I find that WESKEM has not shown by clear and convincing evidence that it would have issued the March 5 Memo, halted the construction of an office trailer at the U Landfill, proposed to relocate the Complainant's office, or issued the WESKEM Appraisal to the Complainant in the absence of his protected activity.

I find that BJC has shown by clear and convincing evidence that it would have revised the CERCLA white paper and issued the Davis Memo in the absence of Mr. Vander Boegh's protected disclosures. BJC also has established that no Part 708 relief is necessary for BJC employee Kevin Barber's actions toward the Complainant. However, BJC has not shown by clear and convincing evidence that it would have proposed a subcontract change notice to the DOE negatively affecting the Complainant's position as landfill manager in the absence of his protected activity.

Accordingly, Mr. Vander Boegh is entitled to the remedial action ordered below.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Mr. Gary S. Vander Boegh (the Complainant) under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) WESKEM, LLC (WESKEM) immediately shall review the Complainant's personnel file, and shall remove from it the March 5, 2001 Memorandum to the Complainant from Dan Watson, WESKEM Paducah Project Manager entitled "Expectations of WESKEM's Landfill Manager" (the March 5 Memo), if it is found there. WESKEM also shall issue immediately a written statement to the Complainant declaring that the March 5 Memo is rescinded.

(3) WESKEM immediately shall proceed with the construction of an office/document center trailer at the C-746-U Landfill. It shall use either the trailer that it purchased for that purpose or its equivalent, and renovate that trailer in a manner consistent with the proposals and cost estimates provided to Paducah Project Manager Dan Watson by WESKEM employee Kerry Stone in early 2001.

(4) WESKEM shall not relocate the Complainant's primary office to any location outside the C-746-U Landfill without the Complainant's express consent for one year from the date of this Decision and Order.

(5) Bechtel Jacobs Company, LLC (BJC) shall refrain from recommending any changes with respect to the Complainant's job position for a period of one year from the date of this Decision without the express consent of the Complainant.

(6) WESKEM immediately shall remove from the Complainant's personnel file its Performance Appraisal for the Complainant covering the period 01/01 through 12/01.

(7) The Complainant shall produce a report that provides information on his litigation expenses. The Complainant's report shall be calculated in accordance with the Appendix.

(8) WESKEM and BJC shall pay the Complainant's litigation expenses. The amount of this payment shall be in accordance with the report specified in paragraph (7) above.

(9) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the Complainant relief unless, within 15 days of receiving this decision, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: July 11, 2003

APPENDIX

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order: reinstatement; transfer preference; back pay; and reimbursement of reasonable costs and expenses; and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36.

As discussed in my initial agency decision in this matter, Mr. Vander Boegh is entitled to remedial action from the WESKEM, LLC (WESKEM) and Bechtel Jacobs Company, LLC (BJC). A portion of this remedial action consists of reimbursing Mr. Vander Boegh for litigation expenses that he incurred. Accordingly, in order to implement this remedy, I have here provided clarifications concerning the nature and extent of certain benefits that Mr. Vander Boegh is entitled to received. I direct Mr. Vander Boegh to make certain calculations and provide them to the other parties within 30 days of the date of this order. Finally, I have provided for a negotiation period between the parties and a final report on remedial calculations. In the event of an appeal, the parties shall follow the negotiating and reporting steps set forth below unless those requirements are specifically stayed by an appropriate official.

A. Mr. Vander Boegh's Calculations

Within 30 days of this order Mr. Vander Boegh shall provide WESKEM and BJC with the following information,

> **A calculation of attorney fees and out of pocket litigation expenses incurred by Mr. Vander Boegh with respect to this Part 708 complaint. Mr. Vander Boegh and his legal counsel shall provide reasonable information supporting their claims for fees and out of pocket litigation expenses.**

B. Negotiation Period

The parties will have ample time up to sixty days from the date of this order to discuss and negotiate any disputes regarding the calculations. During that period I expect that both parties will

provide reasonable information to facilitate the other party's understanding of calculations.

C. Final Report

Seventy days from the date of this order Mr. Vander Boegh shall provide a report to WESKEM, BJC, and the Office of Hearings and Appeals with a summary calculation. Mr. Vander Boegh shall describe in detail any matters that remain in dispute. WESKEM and BJC will have 15 days from the date of that report to provide a response.

April 9, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Names of Petitioners: Franklin C. Tucker

Date of Filing: February 2, 2005

Case Numbers: TBH-0023

This Initial Agency Decision concerns a whistleblower complaint filed by Franklin C. Tucker (the Complainant) against his previous employer, BWXT Y-12, L.L.C. (BWXT) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. BWXT is the manager of Y-12, part of the National Nuclear Security Administration's Nuclear Weapons Complex.

The Complainant filed the complaint of retaliation against BWXT with the Oak Ridge Operations Diversity Programs and Employee Concerns Office on October 20, 2003.[1/] In the complaint, the Complainant contends that he made protected disclosures to officials of BWXT and the DOE, and that BWXT took four adverse personnel actions against him in retaliation for these disclosures. BWXT admits that the Complainant made protected disclosures and that the four personnel actions occurred. However, BWXT argues that it would have taken those four actions absent the Complainant's protected disclosures. Later in this decision, I find that BWXT has shown by clear and convincing evidence that it would have taken the personnel actions against the Complainant absent his protected disclosures.[2/]

[1/] When this matter was sent to the Office of Hearings and Appeals by the Oak Ridge Operations Office Diversity Programs and Employee Concerns Manager his letter indicated that the complaint was filed with his office on November 25, 2003. I do not see that date on any of the filings made by the Complainant. The original complaint was dated September 23, 2003, by the Complainant and received on October 20, 2003, by the Office of Diversity Programs and Employee Concerns. Therefore, I will use the October 20, 2003 date in this Decision.

[2/] The Complainant seeks as restitution for the alleged retaliations that he be reinstated as a BWXT employee and be compensated for harassment. He also requests that the Shift Manager be relieved

(continued...)

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an independent fact-finding by an investigator from the Office of Hearings and Appeals (OHA), a hearing by an OHA Hearing Officer, and an opportunity for review of the hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Factual Background

The Complainant worked for BWXT and its predecessor, Martin Marietta, in Oak Ridge, Tennessee, from April 1991 until he was placed on long-term disability in January 2003. The Complainant worked in various positions first as a security inspector, then as a laboratory technician, and finally as a chemical operator. On September 30, 2001, the Complainant, while working as a chemical operator, communicated a safety-related concerns to a management official.

In early November 2001, the Complainant received counseling for sleeping while on duty. In February and March 2002, the Complainant was not interviewed for two positions for

---

[2/] (...continued)
of his position. The Part 708 regulations allow the following relief (1) reinstatement, (2) transfer preference, (3) back pay, (4) reimbursement of your reasonable costs and expenses, or (5) such other remedies as are deemed necessary to abate the violation and provide the Complainant with relief. *See* 10 C.F.R. § 708.36(a). Thus, much of the relief the Complainant asks for is not within my ability to grant.

which he applied at BWXT. On May 17, 2002, the Complainant received a "pattern absence" letter. On June 14, 2002, the Complainant left work on two weeks of medical leave authorized by the BWXT medical department. This short-term medical leave was extended through January 2003 for reasons that are not clear from the record. In November 2002, the Complainant told the medical department that his personal physician had released him to return to work. Following a medical leave of longer than two weeks, an employee's physical and mental health are reviewed by BWXT's medical department before he is permitted to return to work. The Certified Physician's Assistant, in consultation with the Staff Clinical Psychologist, determined that in view of the Complainant's medical condition certain restrictions on his work assignments were appropriate. These restrictions required that the Complainant not engage in prolonged or strenuous exertion, not use a ladder over four feet, and not work at an unprotected elevation.

A medical case review meeting was held January 8, 2003. The attendees were the Certified Physician's Assistant, Staff Clinical Psychologist, the Complainant's supervisors, and the Labor Relations Representative. The medical case review meeting was held to determine if the Complainant could return to his prior position with the restrictions imposed by the medical department. At the medical case review, BWXT determined that the Complainant could not be permitted to return to work as a chemical operator with his work-related restrictions.

C. Procedural History

On October 20, 2003 the Complainant filed this whistleblower complaint with the Oak Ridge Operations Office of DOE under Part 708. Pursuant to the Part 708 Regulations, the matter was referred to the Office of Hearings and Appeals for an investigation on April 27, 2004. The OHA Director appointed an Investigator on May 5, 2004, and on February 2, 2005, she issued a Report of Investigation (ROI) concerning the complaint.

In the ROI, the Investigator conducted an initial factual and legal analysis of the Complainant's claims and made some preliminary determinations concerning possible protected disclosures and adverse personnel actions. Following the issuance of the ROI, I was appointed the Hearing Officer in this matter. A Hearing was held on August 16, 2006. At the Hearing, the Complainant was given the opportunity to introduce evidence that BWXT took adverse personnel actions against him by (1) sending him to an informal coaching session for sleeping while on duty, (2) not interviewing him for two jobs he applied for within BWXT, (3) issuing him a May 17, 2001 pattern absence letter, (4) placing

him on long-term disability.[3/] Conversely, BWXT had the opportunity to demonstrate by clear and convincing evidence that it would have taken the above actions absent the Complainant's reporting of safety-related concerns.

II. Legal Standards Governing This Case

A. The Complainant's Burden

Under Part 708, the Complainant has the burden to establish by a preponderance of the evidence that he made a protected disclosure and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993). In the present case, BWXT admits that the Complainant made protected disclosures and that it took the four personnel actions described by the Complainant. Hearing Transcript (Tr.) at 12. Later in this decision, I will review the evidence that I find demonstrates that the temporal proximity between the September 2001 protected disclosures and 2001 and 2002 personnel actions indicates the disclosures were a contributing factor to the personnel actions.

B. BWXT's Burden

Section 708.29 provides that once the employee has met his burden, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure." 10 C.F.R. § 708.29. BWXT argues it would have taken the same personnel actions against the Complainant absent the protected disclosures. BWXT makes specific arguments with respect to each of the adverse personnel actions.

With regard to the first action, BWXT asserts that all employees that are believed to have been sleeping while on duty receive, at a minimum, coaching and counseling to discuss the concerns associated with sleeping while on duty. The Complainant argues that he was not sleeping while on duty. With regard to the second personnel action, BWXT admits that the Complainant applied for two jobs. However, BWXT argues that the Complainant was not qualified for those jobs and, therefore, was not interviewed. The Complainant responds that he was qualified for the job positions for which he applied and should have been interviewed for those positions.

[3/] In addition, the Complainant claims that BWXT allowed a fellow employee to harass him and to circulate rumors that he was a "snitch for DOE." The Complainant's supervisors testified that BWXT attempted to keep the two employees separated within the confines of the work environment. It is not BWXT's role or responsibility to ensure that employees get along. I believe that BWXT took appropriate steps to minimize the problem.

With respect to the third personnel action, BWXT argues that the Complainant did have a pattern of excessive absences from work. The Complainant responds that his absences from work did not show a pattern, especially if his vacation days were not considered as absences. Finally, BWXT argues that at the end of his medical leave the Complainant was too ill to return to his position. The Complainant stated that he should have been allowed to return to work. The Complainant believes if the restrictions kept him from his position as a chemical operator, BWXT should have been able to find another position for him. He claims that there were employees with far worse restrictions than his who worked for BWXT.

III. Hearing Testimony

At the Hearing, testimony was received from fourteen witnesses. The complainant testified and presented the testimony of two of his former co-workers, Mark Korly and Carl Smith. BWXT presented the testimony of : Les Reed, the division manager for environment safety and health for BWXT Y-12 at the time of the allegations; Ben Davis, operations manager for special materials; Earl Dagley, shift manager; Karl Vincent, chemical supervisor and the Complainant's direct supervisor; Janet Sexton, labor relations representative; Diane Grooms, staffing manager; Pat Fortune, department manager for the assembly and disassembly organization; Gary Bowling, general foreman in the garages and the fleet; Tonya Warwick, certified physician assistant in the medical department; Dr. Russ Reynolds, staff clinical psychologist; and Steve Laggis, manager of the special materials organization.[4/] The Hearing testimony summarized below concerns the complainant's alleged disclosures and the four adverse personnel actions.

A. Division Manager for Environment, Safety, and Health

Les Reed, BWXT's Division Manager for Environment, Safety, and Health (Division Manager) testified that he first spoke with the Complainant in September 2001, when the Complainant called him. Hearing Transcript (Tr.) at 18. Soon after that conversation, he met with the Complainant. Tr. at 19. The Division Manager listened and took notes while the Complainant described his safety concerns. Tr. at 19. One safety concern related to a violation of the lock and tag-out procedure. Tr. at 20. The second concern was about ongoing work on a roof repair. Tr. at 20. The Complainant was concerned that water might enter and cause a safety concern. The final specific issue concerned the availability of proper respirators. Tr. at 22.

[4/] All the job descriptions relate to the time during which the Complainant has alleged that he was retaliated against. Many of these employees have changed job titles since then; one has retired.

The Division Manager testified that the Complainant raised other concerns that appeared to fall into two categories. The first category was suggestions to improve efficiency of operations. Tr. at 20. The second category regarded the safety counsel which did not afford the Complainant an opportunity to participate because it did not meet during his shift. Tr. at 21.

The Division Manager stated that he toured the facility fairly soon after meeting with the Complainant. He testified that the Complainant's safety concerns had either been addressed or did not present an imminent safety hazard. Tr. at 23. Had the concerns been immediate, the Division Manager testified that he would have had the problem corrected immediately. Tr. at 24.

The Division Manager testified that he was contacted later in October 2001 by the Complainant regarding rumors being circulated by another employee that the Complainant had been talking to the Division Manager about safety issues. Tr. at 31. The Division Manager offered to arrange a meeting between the Complainant, the other employee and an uninterested third party. Tr. at 31-32. The Division Manager stated that the Complainant declined his offer. Tr. at 32.

B. Operations Manager for Special Materials

Ben Davis, BWXT's Operations Manager for Special Materials (Operations Manager) testified that the Complainant frequently submitted "I care / We care" safety suggestion memoranda. Tr. at 56. He stated that employees were encouraged to submit these memoranda by being issued a meal ticket if they submitted one. Tr. at 56-57. He was responsible for authorizing the meal ticket and remembered presenting more meal tickets to the Complainant than any other operator in his group. Tr. at 57.

On October 5, 2001, the Operations Manager escorted the Division Manager on his tour of the facility. Tr. at 57. He arranged for a meeting room for the Division Manager , the Complainant, and two other workers. Tr. at 57.

The Operations Manager testified that in late October 2001, a maintenance coordinator saw the Complainant asleep at his duty station. Tr. at 61. The Operations Manager stated that the Complainant was coached and counseled about the situation on November 2, 2001. Tr. at 62. The Operations Manager testified that a coaching and counseling session is a discussion with the employee and is the lowest level of discipline. Tr. at 62.

The Operations Manager stated that the Complainant was often absent before or after weekends or other breaks. Tr. at 67. He perceived this as a clear pattern of absence abuse.

Tr. at 67. Vacation is not considered when determining a pattern of absence. Tr. at 76. The Complainant was issued a "pattern absence" letter in May 2001.

The Operations Manager testified that when the Complainant tried to return to work after being on short-term disability leave, the medical office placed restrictions on his work. Tr. at 68. The restrictions provided that the Complainant was not allowed to take part in prolonged strenuous work, climb ladders, or work on elevated surfaces. Tr. at 68. The Operations Manager testified that the use of ladders or stairs was required in most of the functions his group performed. Tr. at 68. The Operations Manager testified that the work area has many mezzanines and significant heat stress in most areas. Tr. at 68. The Complainant asked the Operations Manager about specific jobs to which he could have been assigned. Tr. at 80. The Operations Manager reiterated that most of the jobs would have ladders or stress associated with them. Tr. at 80. The Operations Manager testified that the medical review board is an independent panel that evaluated whether the Complainant could return to his previous position or to another position. Tr. at 70.

Finally, the Operations Manager testified that he did not talk to any of the hiring managers about the two jobs the Complainant applied for. Tr. at 66-67.

C. Shift Manager

Earl Dagley, the Complainant's Shift Manager, testified that the Complainant was required to drive a fork lift, lift bags that weighed up to 100 pounds, and climb ladders. Tr. at 95-96. He characterized the Complainant's job as strenuous, especially because of the heat in the area and safety equipment that had to be worn. Tr. at 96. The Complainant brought safety concerns to him in the form of "I care / We care" memoranda. Tr. at 96. The Complainant was commended for raising the safety concerns by being given a meal ticket. Tr. at 97.

1. Counseling for Sleeping while on Duty

The Shift Manager testified that a member of management approached him on October 17, 2001, to say the Complainant was asleep. Tr. at 97-98; BWXT Ex. 7 at 1. The Shift Manager went to see the Complainant, who was standing when he arrived. Tr. at 98. He stated that the Complainant's eyes appeared to be red. Tr. at 98. He called labor relations and was advised to have a coaching and counseling sessions with the Complainant. Tr. at 100. Two weeks after the incident, the Complainant was coached and counseled to stay alert on the work site. BWXT Ex. 7 at 1. The Shift Manager testified that the Complainant did not lose any money or job opportunities because of the coaching and counseling session. Tr. at 102.

2. Not Being Interviewed after Two Job Applications

The Shift Manager testified that he was aware the Complainant applied for other jobs at BWXT. Tr. at 103. Neither of the hiring managers called him in connection with either of the jobs the Complainant had applied for. Tr. at 103.

> [T]here was a gentleman, I do not know if he was part of the interview process for them or not. Dennis Nabors. Mr. Nabors told me that Mr. Tucker had bid on a job for them and he was close to getting interviewed. Asked me what I thought about Mr. Tucker. I said he was a fair employee.

Tr. at 103-04

3. Pattern Absence Letter

The Shift Manager testified that during 2001, he met with a Labor Relations employee to discuss employees with large numbers of absences. Tr. at 104. He was given a list of the individuals with poor attendance records. Tr. at 104. Included on that list was the Complainant. Tr. at 104. At that time, the Shift Manager counseled the Complainant that his attendance had to improve. Tr. at 105.

In May 2002, the Shift Manager requested that Labor Relations determine if there was a pattern to the Complainant's absences. Tr. at 105. Labor Relations determined there was a pattern and on May 17, 2002, issued a letter to the Complainant regarding the pattern of his absences. Tr. at 106; BWXT Ex. 8. The letter carried no monetary penalty. Tr. at 106. However, the Complainant was required to obtain a doctor's excuse to take sick leave. At least one other employee in the Complainant's group received a similar letter. Tr. at 106.

4. Being Placed on Long-Term Disability

The Shift Manager testified that he attended the January 2003 medical case review meeting regarding the Complainant. Tr. at 108. At the meeting, the impact of the Complainant's medical restrictions on his ability to return to his job was discussed. These restrictions directed that the Complainant not do strenuous labor, climb a ladder, or work on elevated platforms. The restriction also specified that the Complainant initially could only work a four-hour day. The restrictions indicated that the Complainant might be able to work up to a twelve-hour day. Tr. at 109. The Shift Manager testified that he did not believe that anyone could work in his group with the restrictions imposed on the Complainant. Tr. at 110. He stated that he only had one vote in the group and was the only one who would have been aware that the Complainant had reported health and safety matters. Tr. at 112.

D. Chemical Supervisor

Karl Vincent, a Chemical Supervisor, was the direct supervisor of the Complainant. Tr. at 126. He knew that the Complainant applied for two jobs outside their group. Tr. at 127. He did not speak to the hiring managers about the hiring decision. Tr. at 128. He never saw the Complainant asleep while on duty. Tr. at 130. He testified that the Complainant was a good employee. Tr. at 130.

The Chemical Supervisor testified about the Complainants' work restrictions. He stated that most of the medically mandated work restrictions under which people work at the plant are specific. Tr. at 139. In his view, the Complainant's restrictions were much broader than most. Tr. at 140.

E. The First Co-Worker

The first co-worker, Mark Corly, testified that he worked with the Complainant for a while. Tr. at 141. It was well known that the Complainant liked to write "I care/We care" memoranda and that he often pointed out safety violations. Tr. at 141. The co-worker testified that he was aware that the Complainant was asked to report safety violations to the DOE. Tr. at 141. He testified that the Complainant was not a "sloppy" operator nor would he violate procedures. Tr. at 144.

F. The Second Co-Worker

The second co-worker, Karl Smith, testified that he and the Complainant worked on the same shift. Tr. at 145. He stated that they were working the same piece of equipment on the day the Complainant was found sleeping while on duty. Tr. at 146. Usually two people were responsible for running that equipment, but that day the co-worker left to get some pizza at a party being held in their department. Tr. at 146. The co-worker testified that the area where the equipment is located is a high traffic area. Tr. at 146-47. He testified that he had not seen the Complainant asleep, nor did he see the Shift Manager in the area that day. Tr. at 147. The co-worker testified that everyone in the building was at the party. Tr. at 146-48. He stated that he was not aware on the day of the incident that the Complainant had been sleeping while on duty. Tr. at 148.

He testified that the Complainant often wrote "I care/We care" memoranda. Tr. at 149.

G. Labor Relations Representative

During 2001 and 2002, Janet Sexton, Labor Relations Representative, was responsible for applying and interpreting the two bargaining unit contracts with the union. Tr. at 153. She

was also responsible for enforcing Human Resources policies and procedures, discipline procedures, attendance procedures, addressing grievances, and arbitrations. Tr. at 153. As part of her job, she was responsible for administering BWXT's absence and discipline policy. Tr. at 153.

1. Counseling for Sleeping while on Duty

The Labor Relations Representative testified that she was first contacted in October 2001 regarding the Complainant's sleeping while on duty. Tr. at 153-54. She was asked for guidance as to how to handle the situation. Tr. at 154. She testified that sleeping while on duty is prohibited by the company handbook. Tr. at 154. According to the handbook, an individual found sleeping while on duty could be terminated. BWXT Ex. 11 at 2. She testified that the usual discipline for sleeping while on duty is a written reminder up to a day off and 12 months of probation. Tr. at 155; BWXT Exs. 14 & 15. The Labor Relations Representative stated that the Complainant received no discipline for sleeping while on duty. Tr. at 157. She testified that coaching and counseling are an informal corrective action. Tr. at 157. His pay was not reduced. Tr. at 159. Because he was coached and counseled only, the sleeping while on duty was not entered into his personnel file. Tr. at 159. The Labor Relations Representative was aware of two other situations where an employee was found sleeping while on duty and was only coached and counseled. Tr. at 160.

2. Pattern Absence Letter

The Labor Relations Representative stated that the next time she was involved in a personnel issue related to the Complainant was in May 2002. Tr. at 163. She testified that the Shift Manager called her because the management suspected the Complainant had an attendance issue. Tr. at 163. The Labor Relations Representative explained what a pattern absence is and why it is a problem. Tr. at 163-64.

Q. And what was the issue?
A. The issue was suspicion of patterned absence. Absences at work, and Mr. Dagley had called me. He had consulted with management, and called and would like, wanted labor relations to look into the issue to verify attendance issue or the absenteeism issue.
Q. And did you look into it?
A. Yes, Sir, I did.
Q. And what did you find?
A. We found that Mr. Tucker's a 12 hour shift worker. We found evidence of a patterned absence which is days absence connected to either holidays, SDO's, those days off.

Q. What's an SDO?
A. SDO is scheduled day off for a shift worker.
Q. And when you say an absence, you're talking about a sick day.
A. Yes, Sir
Q. So a patterned absence is a sick day that is adjacent to a scheduled day off?
A. Correct.
Q. Weekend? Holiday, vacation also?
A. Yes, Sir.
Q. And why does the company have a problem with that?
A. The company has a problem with that, first of all, it's outlined in our attendance, absence and attendance monitoring procedure that a patterned absence, the company has a problem with it because in a production area, you cannot plan work if a person has a long scheduled time off, unplanned, it makes a long absence. If you have a person that takes off on Friday and Monday and has the weekend scheduled there, or especially with a shift worker, if you have someone that has seven scheduled days off, and then there's a day off before and a day off after, that creates a long absence.
Q. But people get sick from time to time. What's wrong with people taking off, taking advantage of the sick leave policy?
A. No one's saying anybody cannot take advantage of a sick leave policy, but on an issue , when there's a suspicion of a patterned absence, it does have to be addressed.
Q. You used the word suspicion. Can you explain that?
A. Suspicion is when you review the record in its totality and you see mapped out without much doubt a continued pattern of an absence always on a certain time, and not any other date.

Tr. at 163-65. She testified that she reviewed the Complainant's attendance sheet. Tr. at 166.

A. Yes, this is my data collection and what I've prepared for this to show Mr. Tucker's absenteeism record for a 12 hour shift worker. The first H there, of course, is a holiday. But the M's stand for the midnight shift, which is the term the hourly use, which is a 7:00 a.m. to 7:00 p.m. And the yellow, the days highlighted in yellow are scheduled days off. Full scheduled shifts off.
Q. So that's the SDO's you were talking about earlier?
A. Yes, Sir.
Q. And that would include holidays, weekends, and vacations?

A. No. These are only scheduled days off. This doesn't include any vacation.

Q. Go ahead.

A. And the 12 hour shift workers, they do not get to celebrate weekends, this is scheduled days off. The AA shift, the 7:00 a.m. to the 7:00 p.m. And the X's across these labeled days are days absent. Disability absences. Short term disability absences.

* * *

A. For the year 2001, you start in January, and you see an absence on the 10th and 11th and then you have seven scheduled days off. So you have an absence before your SDO, seven. You go in to the month of February, it's the same. The pattern continues. Absence on the 18th and 19th, and then scheduled days off.

The month of March continues, three days off. Sick days off, and then seven scheduled days off and then you go into the midnight shift with four sick days.

The month of April, the same.

Q. So - -

A. And then the month of May is the only month that there's a lot of absences there, but the month of May, I think the 30th of May was the only day that we identified that wasn't linked to a pattern.

Tr. at 166-68. She testified that only one day of all of the Complainant's absences in 2001 was not part of the patterned absence. Tr. at 170. The Labor Relations Representative testified that the Complainant's pattern was to take leave prior to and / or after a holiday or scheduled day off. She testified that the Complainant's pattern demonstrated excessive leave compared to other employees. Tr. at 171. She recommended that the Complainant be issued a pattern absence letter, requiring the employee to have a doctor's verification when he is absent for the absences to be paid. Tr. at 170-71.

3. Placing the Complainant on Long-Term Disability

The Labor Relations Representative testified that she was present at the medical case review meeting on January 8, 2003, when the committee reviewed the need for work restriction to be placed on the Complainant. Tr. at 181. She stated that she has attended many medical case reviews. Tr. at 191. She testified that at the meeting the Complainant's manager indicated he did not believe his group could find work for an employee with the Complainant's medical restrictions. Tr. at 188.

H. Staffing Manager

Diane Grooms, BWXT's Staffing Manager, is responsible for supervising the hiring process. Tr. at 196. The Complainant applied for two jobs in early 2002. Tr. at 196. She testified that the person responsible for the actual hiring decision came to her and asked for a copy of the applicant's resume which she retrieved from the employee's personnel file. Tr. at 197. BWXT submitted into the record the Complainant's 2002 resume. BWXT Ex. 22. She explained that an applicant is responsible for confirming that the resume on file is updated. Tr. at 198.

The Staffing Manager testified that when the Complainant applied for the two jobs, his bids were sent to the hiring organizations along with his resume. The hiring organization determined that the Complainant's resume indicated he did not to meet the minimum requirements of the job postings. Tr. at 199. He was not given an interview for either position. Tr. at 199. The Staffing Manager testified that the hiring manager made the decision not to interview the Complainant. Tr. at 199. She stated that the experience listed on the Complainant's resume, while similar to the requirements for each of the jobs, nevertheless did not actually meet the minimum requirements of either position. Tr. at 200. "And the chemical operator experience and the other experience listed on your resume is not what was deemed a minimum requirement on the assembly person A and B position." Tr. at 200. "Under the necessary qualifications . . ., it says it requires three year of on the job training in assembly operations in the Y-12 plant. . . . [Y]ou do not meet the minimum qualifications according to the resume that was on file." Tr. at 202.

I. Assembly/Disassembly Department Manager

Pat Fortune, The Assembly / Disassembly Department Manager, was responsible for hiring for the first of the two positions that the Complainant applied for in early 2002. Tr. at 206. She was the final decision maker as to who would be interviewed and who would be given the position. Tr. at 206. After reviewing the job description and the Complainant's resume, she did not believe that he met the minimum requirements and stated the Complainant was therefore not interviewed for the position. Tr. at 207. She stated that she did not talk to the Complainant's managers regarding his application for the position. Tr. at 208. She stated that she did not know who his managers were. Tr. at 208. She stated that hiring decisions considered seniority and experience factors but, in order to interview, an individual must meet the minimum qualifications. Tr. at 209.

J. General Foreman

Gary Bowling, a General Foreman, was responsible for hiring for the second of the two positions that the Complainant applied for in early 2002. The General Foreman was

responsible for supervising the garages in early 2002. Tr. at 212. He testified that the Complainant's resume did not indicate that he had the minimum requirements of six years practical experience as a mechanic. Tr. at 213. He testified that although the Complainant is a certified mechanic, that does not necessarily mean he has six years of practical experience. Tr. at 215. He stated that he did not speak to the Complainant's managers about his applying for a job at the garage. Tr. at 214.

K. Certified Physician's Assistant

Tonya Warwick, a Certified Physician's Assistant, is responsible for evaluating employees for occupational illnesses and injuries, and prior to returning to work after a significant medical leave. Tr. at 218. She and the Staff Clinical Psychologist evaluated the Complainant in December 2002. Tr. at 218. She testified that the restrictions on the Complainant's work involved no prolonged or strenuous exertion, no use of a ladder over four feet, and no work at an unprotected elevation. Finally, he could only work four hours a day for the first one to two weeks after his return. Tr. at 219. The restrictions were based on an interview with the Complainant, information from his personal physician, and her physical exam. Tr. at 221.

The Certified Physician's Assistant testified that the Complainant's personal physician stated that he could return to work. However, she testified that BWXT's medical department does not always follow a personal physician's recommendation. Tr. at 224. She believes that an outside doctor does not know the details of the job requirements. Tr. at 225.

The Certified Physician's Assistant also participated in the medical case review held on January 8, 2003. Tr. at 220. She did not remember any discussion of the Complainant's having reported health and safety issues. Tr. at 221.

L. Staff Clinical Psychologist

The Staff Clinical Psychologist, Russ Reynolds, testified that he has participated in many return to work evaluations. Tr. at 227. In these evaluations, he has to understand the person's job responsibilities and do a functional assessment of the person's fitness to perform those duties. Tr. at 227. He focuses on the emotional, psychological, and psychiatric fitness. Tr. at 227. He reviews medical files to evaluate whether work restrictions are necessary for an individual. Tr. at 228.

The first step in returning to work when a person has been out of work for more than two to four weeks is a written release from their personal physician. Tr. at 228. The Staff Clinical psychologist testified that in half the return to work situations, BWXT follows the

personal physician's recommendation. Tr. at 229. The medical department does not always follow the personal physician's recommendations because the personal physician is not in a position to assess the person's job responsibilities. Tr. at 229.

The Staff Clinical Psychologist stated that the Complainant came to see him on June 14, 2002. The Complainant was concerned about the way he was feeling. Tr. at 230. The Staff Clinical Psychologist believed the Complainant was clinically depressed. Tr. at 230. He suggested and the Complainant agreed that the Complainant should not be at work. Tr. at 230. He authorized two weeks of medical leave in order for the Complainant to be able to consult with his personal physician. Tr. at 231.

The Staff Clinical Psychologist was involved in the Complainant's fitness to return evaluation in December 2002. Tr. at 231. He testified that the Complainant told him that he had pressured his doctor to allow him to come back to work. Tr. at 234. The Staff Clinical Psychologist believed that the Complainant was no better, and perhaps worse, than he had been prior to his going on medical leave. Tr. at 234. The Staff Clinical Psychologist was concerned, after hearing the Complainant's current symptoms, that the Complainant would not be able to tolerate working as a chemical operator because of the physical exertion required in the job. Tr. at 235.

The Staff Clinical Psychologist testified that the Complainant did well on a test of concentration and memory. Tr. at 236-37. However, the Staff Clinical Psychologist was concerned because the Complainant continued to complain about not being able to sleep. Tr. at 237-38.

The Staff Clinical Psychologist and the Certified Physician's Assistant met and agreed on the restrictions to be placed on the Complainant's return to work. Tr. at 240. Then they both participated in the medical case review on January 8, 2003. Tr. at 240. In these meetings, he and the Certified Physician's Assistant meet with the employee's management, Labor Relations, and someone from Human Resources. Tr. at 240. The purpose of the meeting is to discuss employees' functional status. Tr. at 241. In the case of the Complainant, the decision was that management could not accommodate his restrictions. Tr. at 241. The Staff Clinical Psychologist did not remember any mention of the fact that the Complainant had raised health and safety concerns in the past. Tr. at 242.

M. Manager of Special Materials Organization

Steve Laggis, the Manager of Special Materials Organization (Manager), testified that the Complainant worked in the Special Materials Organization. Tr. at 249. He first spoke with the Complainant in July 2001, when the company was conducting a rolling safety focus. Tr. at 249. He had a meeting in October 2001 with the Division Manager for Safety and

Health regarding issues raised by the Complainant. Tr. at 250. The Manager stated he was aware of a number of the issues. Tr. at 250. He believes that at the time he met with the Division Manager for Safety and Health, all of the issues were either resolved or "on his radar screen" to be resolved. Tr. at 252.

The Manager stated that he was told the Complainant had been found sleeping while on duty in October 2001. Tr. at 252. He told the Shift Manager to contact Labor Relations for guidance. Tr. at 253. He knew that the Complainant was coached and counseled as a result of the incident. Tr. at 253.

The Manager testified that he was unaware that the Complainant had applied for two other positions. Tr. at 253. He was not contacted by either hiring manager for the positions. Tr. at 253.

The Manager stated that the only time he spoke with anyone outside of his organization about the Complainant was in regard to the Complainant's attendance. Tr. at 253. At that time, he spoke with the Labor Relations Representative who indicated that there was a pattern to the Complainant's absences. Tr. at 254.

The Manager participated in the Complainant's medical case review on January 8, 2003. Tr. at 255. The medical case review is an opportunity for him to hear the medical staff's opinions. Tr. at 255. It is also an opportunity to have an independent evaluation. Tr. at 257. There was no discussion during the medical case review that the Complainant had raised safety and health concerns. Tr. at 257. It was his decision as to whether the Complainant could return to work with the restrictions specified by the medical department. Tr. at 255.

N. The Complainant

1. Counseling for Sleeping while on Duty

The Complainant contends that it would be impossible to sleep where he was accused of sleeping. There were doors and hallways. Tr. at 71, 131, 146-47, 279. He testified that many people were in the area where he was working because of the pizza party, so it was too noisy and crowded for him to have slept. Tr. at 72. He also testified that he was not alone at his post long enough to have slept. Tr. at 280. Further, he testified that had a supervisor seen him asleep, the supervisor would have woken him. Tr. at 73. Alternatively, the supervisor would have warned the Complainant's first line supervisor because a malfunction in the machine he was monitoring could have catastrophic results. Tr. at 131. Finally, he asserts the Shift Manager could not have seen that his eyes were red because he always wore tinted safety glasses. Tr. at 148, 279.

2. Pattern Absence Letter

The Complainant testified that if his vacation days were removed from his absence information, there would not be a pattern of absences. Tr. at 282. He also claimed that most of his absences were for Family Medical Leave (FMLA) and could not be counted in determining whether he had a patterned absence. Tr. at 136. He testified that he had a great deal of FMLA leave. Tr. at 136. He claimed he cannot be coached or counseled for FMLA.[5/] Tr. at 183. In addition, he testified that other employees were absent more often than he was. Tr. at 282.

3. Not Being Interviewed after Two Job Applications

The Complainant testified that he was qualified for the two positions for which he applied. The first position was in the assembly and disassembly department. Tr. at 200-01. The Complainant testified that his experience as a laboratory technician qualified him for the position. Tr. at 200. He testified he was interviewed for the assembly position in 1997. Tr. at 208.

Regarding the second position as a mechanic in the garage, he testified that he is a certified mechanic and, therefore, was qualified for the position. Tr. at 204, 214-15. He testified that it should have been apparent he had experience as a mechanic because he was a certified mechanic. Tr. at 214-15.

4. Being Placed on Long-Term Disability

Finally, the Complainant testified that he should not have been placed on long-term disability. Tr. at 284. He argued that there were employees with far greater restrictions who were accommodated by BWXT. Tr. at 246, 285. He also contended that the restrictions were temporary. Tr. at 79, 189. The Complainant testified that there were many jobs in his department he could have done, such as taking readings, running the [reactors], and loading and unloading. Tr. at 80. He believes he should have been permitted to return because it would have taken time for his security clearance to be reinstated. Tr. at 190-91. He claimed that by the time his security clearance was reinstated, the work-related restrictions would have been removed. Tr. at 190-91.

The Complainant tried to find a job outside his department prior to going on medical leave. Tr. at 283.

[5/] The Labor Relations Representative agreed that the Complainant could not be coached or counseled for FMLA leave. However, she stated it can be used when determining whether there is a pattern in an individual's absences. Tr. at 185.

> Hey, I bid out. I bid out on assembly. Now you have seen my resume. College education, certified in half a dozen different things, and there's no way that I shouldn't have been eligible for that job. None whatsoever.
>
> Had been interviewed before for it. The only reason I didn't get it then was people above me in seniority had taken the job. But this time, they didn't interview me. . . .
>
> Now the garage mechanic. Yeah. I didn't have on there I had six years' experience. But I was a certified mechanic and a certified motorcycle mechanic. That right there in itself should tell you that you do not get your certifications unless you do a little hands on work.
>
> I could not even get an interview. So I guess a man has to be just an out and out genius. But I guarantee you if you go and pull the two people who did get the jobs information, that neither of them are certified mechanics either.
>
> So what it boils down to is, hey, them not letting me come back to work. Granted with the disease I have now, who knows if I could have worked and we'll never know. That's just plain and simple.
>
> I tried to come back to work. I made an effort at it. But like I said, I was blocked. And I find it just unusual the way I was blocked because the time that I'd been in that building, I had never seen a medical review ever used before.

Tr. at 283-84. He disputed that he pressured his personal physician to release him to return to work. Tr. at 245.

IV. Analysis

A. The Complaint was Timely Filed

In its submissions, BWXT contends that the individual's complaint of retaliation was not timely filed. Part 708 provides that "[y]ou must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a). The complaint was filed on October 20, 2003. The Complainant was placed on long-term disability on January 8, 2003.

In a 2003 decision, a Hearing Officer discussed the relevant regulatory language, and whether and under what circumstances complaints filed more than ninety days after a

retaliation can be considered as timely filed under Part 708. He found that the complainant should be allowed sufficient time to recognize that a personnel action taken by management was indeed retaliatory in nature. *See Steven F. Collier* (Case No. VBH-0084), 28 DOE ¶ 87,036 at 89,257 (2003); *see also Gary S. Vander Boegh*, 28 DOE ¶ 87,040 at 89,283-84 (2003)(certain personnel actions, while not regarded as neutral in their impact by the complainant, were not so overtly punitive in nature that a reasonable person "should have known" that they were Part 708 retaliations at the time that they took place). This is because employees often are not familiar with the way that personnel decisions are made and find it difficult to determine whether a negative action concerning a request is retaliatory and when a lengthy delay in providing a promised benefit becomes a determination to deny that benefit.

In the present case, the severity of the personnel actions raised by the Complainant escalated over time. I must determine at what point after the January 8 action the Complainant, as a reasonable person "should have known" that the action taken against him were a Part 708 retaliation. I must consider the Complainant's state of mind in order to determine when he knew or should have known that a Part 708 retaliation had taken place, and to measure the ninety-day filing requirement from that time.

During questioning by the attorney for BWXT, the Complainant stated that prior to filing the written statement on October 20, 2003, he met with a number of people at DOE trying to resolve the situation. Tr. at 261. During January 2003, he "went to the Federal Building" to rectify the situation and get his job back. Tr. at 261. Section 708.14(d) of the regulation states that

> [i]f you do not file your complaint during the 90-day period, the Head of Field Element or EC Director (as applicable) will give you an opportunity to show any good reason you may have for not filing within that period, and that official may, in his or her discretion, accept your complaint for processing

10 C.F.R. § 708.14(d). I therefore believe that because the actions increased over time the Complainant was not fully aware that BWXT's unwillingness to allow him to return to work constituted a retaliation until the summer of 2003.

The record indicates that BWXT did not raise the timeliness issue with the Employee Concerns Manager when notified of the filing of the complaint, 10 C.F.R. §708.16(a), and at no time during the investigation was the issue raised. Instead, BWXT did not raise this issue until just prior to the hearing. Accordingly, I find that the complaint was timely filed in accordance with the provisions of 10 C.F.R. § 708.14 and will consider the merits of the complaint.

B. Whether the Complainant Has Met the "Contributing Factor" Test

Under 10 C.F.R. § 708.29, the Complainant must show that his protected disclosures were a *contributing factor* with respect to a particular adverse personnel action taken against him. *See Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994). A protected disclosure may be a contributing factor to an adverse personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) *citing McDaid v. Dep't of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990). *See also Russell P. Marler, Sr.*, 27 DOE ¶ 87,506 at 89,056 (1998).

I conclude that the Complainant has established by a preponderance of the evidence that his protected disclosures were contributing factors to the personnel actions. I base this conclusion on a finding that there are both knowledge and proximity in time between the protected disclosures made by the complainant and his allegations of retaliation.

With respect to knowledge of the disclosures, the Complainant made many disclosures to his supervisors, including meeting with the Division Manager in September 2001. Clearly, the Complainant's supervisors, who were responsible for the actions taken against him, had actual knowledge of these disclosures. Indeed, BWXT admits that the Complainant's supervisors had actual knowledge of the disclosures the Complainant repeatedly made.

With regard to timing, the most obvious of the disclosures took place in September 2001. The first alleged retaliation taken against the complainant occurred in October 2001, with him being coached and counseled for sleeping while on duty. I conclude the disclosures were a contributing factor to an alleged ongoing retaliation. See *Jimmie L. Russell*, 28 DOE ¶ 87,002 at 89,014 and 89,025-26 (2000) (protected disclosure found to be contributing factor when it occurred proximate in time to the beginning of an ongoing retaliation).

Accordingly, with respect to the alleged retaliations, I have determined that the Complainant has shown by a preponderance of the evidence that adverse personnel actions took place and meet the criteria under Part 708.

C. BWXT's Showing

Given that the Complainant has made his showing, BWXT must demonstrate by clear and convincing evidence that it would have taken the same personnel actions absent the protected disclosures. *See* 10 C.F.R § 708.29. As discussed below, I find BWXT has made that showing.

1. Counseling for Sleeping While on Duty

While the Complainant denies that he was sleeping while on duty, the weight of the testimony and evidence persuades me that BWXT was justified in coaching and counseling the Complainant for sleeping while on duty. The coaching and counseling the Complainant received is the lowest level of discipline possible. Tr. at 157; BWXT Ex. 13 at 2. There was testimony by the Labor Relations Representative that coaching and counseling is not actually discipline. Tr. at 157. The coaching and counseling were not made part of the Complainant's employment record. BWXT showed that the Complainant received less discipline than most employees found sleeping while on duty. I believe BWXT took the same action against the Complainant for sleeping while on duty that it would have taken absent his disclosures.[6/]

2. Not Being Interviewed for Two Job Applications

The Complainant did not receive interviews for two jobs that he applied for in early 2002. BWXT provided significant evidence that the Complainant did not have the requisite experience on his resume for either position.

The evidence indicates that both job postings specified the specific necessary qualifications. BWXT Exs. 20, 21. The evidence further indicates that the Complainant's resume on file at the time he applied for both positions did not contain the necessary qualifications. BWXT Ex. 22. I found the testimony of the Staffing Manager and the two persons responsible for choosing who would be interviewed convincing. All three testified that they did not believe the Complainant's resume showed he had the minimum qualifications for the positions. Tr. at 199, 207, 212.

Further, the Staffing Manager and the two people responsible for deciding who to interview and hire all confirmed that they did not know that the Complainant had made protected disclosures and they did not speak to anyone in the Complainant's management team. Therefore, I find there is a clear and convincing demonstration that the Complainant's lack of experience made him unqualified for either position. Therefore, I am convinced he would not have been interviewed absent the protected disclosures.

3. Pattern Absence Letter

The Complainant received a pattern absence letter on May 17, 2002. BWXT has shown that pattern absence letters were routinely issued to employees. The evidence indicated that

---

[6/] In any event, since there is nothing in the Complainant's permanent record to show that he was coached and counseled, Tr. at 157, there is no remedy that we can provide.

the Complainant's pattern of absences were more severe than some employees that received such a letter. The Labor Relations Representative reviewed the Complainant's absence chart and convinced me that a very definite pattern of absences prior to a holiday, scheduled day off or weekend could be seen in the Complainant's absences. BWXT presented 31 examples of pattern absence letters that had been presented to other employees. The Labor Relations Representative's testimony convinces me the Complainant had a pattern of absences and that BWXT would have issued the pattern absence letter to the Complainant absent his protected disclosures.

4. Being Placed on Long-Term Disability

BWXT placed the Complainant on long-term disability when they were unable to find a position for him with the work restrictions placed by the BWXT medical department on his return. BWXT showed that the medical department had reasonable concerns about the Complainant's ability to do strenuous work. The Complainant admitted to the Staff Clinical Psychologist that he had pressured his personal physician into releasing him to work. The Complainant now denies that he made this statement, but I found the Staff Clinical Psychologist more convincing on this matter. The Staff Clinical Psychologist further testified that the Complainant had symptoms that concerned him, such as night sweats which keep him from sleeping and causing him to be extremely fatigued during the following day.

The Complainant argues that he should have been allowed to return to work with the work restrictions specified by the medical department. The Complainant argues there are jobs that he could perform with his work restrictions.

The Complainant believes many people work at BWXT with more restrictions than his. BWXT presented evidence that the restrictions under which he would have had to work would have made it impossible for him to work as a chemical operator. The Complainant attempted to find another position with BWXT but could not. He does not argue that the company was required to find a position for him or had done that in the past. Therefore, I find that BWXT has shown by clear and convincing evidence that it would have taken the same action absent the Complainant's protected disclosures.

V. Conclusion

The Complainant made protected disclosures by reporting safety and health violations. The Complainant has shown by a preponderance of the evidence that BWXT took adverse personnel actions against him and that his protected disclosures were a contributing factor in those actions. However, BWXT has shown by clear and convincing evidence that it would have taken the personnel actions absent his protected disclosures.

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

It is Therefore Ordered That:

(1) The complaint for relief under 10 C.F.R. Part 708 submitted by Franklin Tucker, OHA Case No. TBH-0023, is hereby denied.

(2) This is an initial agency decision, which shall become the final decision of the Department of Energy unless, within 15 days of issuance, a notice of appeal is filed with the Office of Hearings and Appeals, in which a party requests review of this initial agency decision.

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: April 9, 2007

October 27, 2005

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: **Clint Olson**

Date of Filing: **April 12, 2005**

Case Number: **TBH-0027**

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Clint Olson (also referred to as the complainant or the individual) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant is an employee of BWXT Pantex (BWXT), the Management and Operations Contractor at the DOE's Pantex Plant in Amarillo, Texas. From July 1999 until November 2004, he was employed as a counter-intelligence officer (CIO) at the plant. On March 15, 2004, he filed a complaint of retaliation against BWXT with the Manager of the Employee Concerns Program (Employee Concerns Manager) at the DOE's National Nuclear Security Administration Service Center (NNSASC). In his complaint, the individual contends that he made certain disclosures to officials of BWXT and the DOE, and that BWXT retaliated against him in response to these disclosures.

I. Summary of Determination

In this Decision, I first provide background information concerning the Part 708 program,. I then discuss the filing and the development of the issues raised in the individual's Part 708 Complaint, focusing on the Office of Hearings and Appeal's Report of Investigation and the parties' subsequent efforts to frame issues for the Hearing. I then present the relevant testimony provided at the Hearing. Next is my analysis of this complaint, beginning with a discussion of the legal standards governing this case. With regard to the issues raised in this proceeding, I first find that the Complainant's filing of his Part 708 complaint was timely. I then find that the Complainant made at least two

protected disclosures that are proximate in time to BWXT's decision not to grant comparative salary increases to his working group (the adverse personnel action). I further find that the Complainant has shown by a preponderance of the evidence that BWXT's decision not to grant the comparative salary increases in March and April 2002 constitutes a retaliation against him under Part 708. Under these circumstances and in light of the DOE's strong commitment to defending whistleblowers against adverse personnel actions, Part 708 imposes the significant requirement that BWXT show by clear and convincing evidence that, in the absence of the Complainant's protected disclosures, it would have taken the same personnel action against the Complainant.

Ultimately, I find that BWXT failed to establish by clear and convincing evidence that it would not have granted the comparative salary increases in 2002 in the absence of the Complainant's protected disclosures. Accordingly, I find that BWXT should be required to take restitutionary action.

II. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect such "whistleblowers" from adverse personnel actions by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not take any adverse personnel action against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; or a substantial and specific danger to employees or to public health or safety. See 10 C.F.R. § 708.5(a)(l), (2). Employees of DOE contractors who believe that they have made such a disclosure and that their employer has taken adverse personnel actions against them may file a whistleblower complaint with the

DOE. As part of the proceeding, they are entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they are entitled to an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. History: The Individual's Part 708 Complaint and the Identification of Relevant Issues for the Hearing

The Complainant filed his Part 708 complaint with the Employee Concerns Manager at the NNSASC in March 2004.1/ On January 5, 2005, the Employee Concerns Program Manager forwarded the complaint and other filings tendered by BWXT to the OHA Director. The OHA Director appointed an Investigator on January 11, 2005, and on April 12, 2005, she issued a Report of Investigation (ROI) concerning the complaint.

In the ROI, the Investigator conducted an initial factual and legal analysis of the complainant's claims and made some preliminary determinations concerning possible protected disclosures and adverse personnel actions that may have been retaliatory. Following my appointment as Hearing Officer in this matter on April 14, 2005, I directed the complainant and BWXT to submit briefs focusing on the findings and conclusions in the ROI that they intended to dispute at the Hearing.2/ At a June 20, 2005 telephone conference call, the complainant's counsel indicated that

---

1/ On June 22, 2004, the Employee Concerns Manager dismissed the complaint on the grounds that it failed to meet the requirements of the Contractor Employee Protection Program. The Complainant appealed this dismissal to the OHA, and in an August 2004 decision, the OHA granted his appeal and remanded his Part 708 complaint to the Employee Concerns Program Manager for further processing. *Clint Olson (Case No. TBU-0027)*, 29 DOE ¶ 87,002 (2004).

2/ In this regard, I noted that while the ROI has made certain findings, I would be conducting an independent review of the issues. In making my findings, I stated that I would be most convinced by the best available evidence. April 14, 2005 letter to the parties at 2.

he did not intend to pursue some of the alleged protected disclosures and alleged retaliations discussed in the ROI and agreed to their dismissal. In light of the agreements reached during that conference call, I issued a June 22, 2005 letter to the parties indicating that the Hearing in this matter would address the following protected disclosures:

> The complainant's alleged disclosures concerning the security incident that occurred at Pantex in 2002 with regard to a missing classified hard drive (referred to in the ROI as the 2002 Incident). Specifically, the complainant's first alleged protected disclosure occurred on or about February 28, 2002 when he allegedly conveyed his belief to his supervisor at that time (the former Senior CIO) that BWXT personnel were grossly negligent in the handling of a classified hard drive and that BWXT's [Security Incident Report] contained false statements regarding the destruction of the classified hard drive. The complainant's second alleged protected disclosure occurred on or about March 4, 2002 when he allegedly told BWXT's Safety, Security & Planning Manager at that time (the former SS&P Manager) that contrary to BWXT's [Incident] Report, no evidence existed which confirmed the destruction of the classified hard drive and explained to her that providing a false report regarding the destruction of the hard drive would violate federal law.

In my letter, I dismissed the other alleged disclosures.

Hereinafter, the February 28, 2002 and the March 4, 2002 alleged disclosures will be referred to collectively as the February 2002 disclosures. With regard to alleged retaliations, I stated that the Hearing would address only the complainant's allegation that BWXT retaliated him by taking no action on a pending request made by the former Senior CIO for comparative salary increases for employees in BWXT's Counterintelligence Unit (CIU).3/

3/ Testimony at the Hearing also addressed the timeliness of the individual's filing of his Part 708 Complaint. In its Reply brief, BWXT contended that the complaint was not timely filed because the individual should have known no later than the summer of 2002 that the former Senior CIO's request for a comparative salary increases for the CIU had been rejected by

(continued...)

III. Hearing Testimony

At the Hearing, testimony was received from twelve witnesses. The complainant testified and presented the testimony of BWXT's former Senior CIO Curtis Broaddus (the complainant's supervisor), the DOE's former SS&P Manager at Pantex, a Special Agent with the Federal Bureau of Investigation (FBI), the Chief of the Office of Defense Nuclear Counterintelligence (the Defense Nuclear CI Chief), BWXT's former Human Relations Compensation and Employment Manager John T. Merwin (the former HR Compensation Manager), and BWXT's current Compensation Manager Richard E. Frye. BWXT presented the testimony of BWXT's current Senior CIO Darlene Holseth, the DOE's Assistant Site Manager, Safeguards & Security, for the Pantex Site Office (the DOE Assistant Site Manager), BWXT's Division Manager for Safeguards & Security Alexander Sowa (BWXT's current S&S Manager), BWXT's former General Manager Dennis Ruddy, and BWXT's current General Manager Michael Mallory. The Hearing testimony summarized below concerns the complainant's alleged disclosures and the alleged retaliation. Testimony concerning the issue of timeliness of the individual's filing of his Part 708 Complaint is discussed in the section of my analysis dealing with that issue.

A. The Complainant's Witnesses

1. The Complainant

The complainant testified that he started working at Pantex as a security police officer in 1992. From July 1999 until November 2004, he worked at the Pantex facility in the CIU and completed his CIO training in 2001. TR at 276-277, 291.4/ He testified that the CIU regularly received incident reports prepared by BWXT Security concerning security infractions at the Pantex facility. The CIOs reviewed these reports to see if they raised any counterintelligence issues. TR at 283.

3/ (...continued)
BWXT management. Counsel for the complainant responded that he intended to present evidence that the individual did not learn that the request for comparative salary increases had been rejected until 2004. In a June 24, 2005 email to the parties, I permitted testimony at the Hearing on this issue.

4/ The complainant testified that he now works in BWXT's Classification Department at the Pantex facility. TR at 290.

a. The February 2002 Protected Disclosures

The complainant stated that in February 2002, he and another CIO reviewed a Security Incident Report that discussed a missing classified hard drive (hereinafter the "Incident Report").5/

The Incident Report contains a one page "Inquiry Summary Report" that provides a description of the security incident and the investigation by BWXT Security, and presents BWXT Security's conclusions concerning the security incident (the Incident Report Conclusion). The Incident Report Conclusion states that an "Accountable Secret RD hard drive containing Sigmas 1 and 15 was destroyed without proper documentation or witness." The Incident Report Conclusion states that in early February 2002, BWXT Security officials conducted an inquiry to confirm the location of the hard drive. The Security officials were told by the user of the hard drive that he gave it to his supervisor for destruction several months earlier. The subsequent investigation and the conclusions of BWXT Security are described as follows:

> **Repositories were re-checked to confirm that the hard drive had not been misplaced or overlooked. Signed statements were received, stating that although [the hard drive user] was aware of [Secret Accountability System] handling and destruction procedures for accountable matter, it had simply slipped his mind and the hard drive had been included with others for destruction. Some time after August 2001, several classified hard drives had been picked up by Electronics for disassembly; then taken to the Data Center for degaussing.**
>
> **During the investigation, records were retrieved to support the degaussing and to confirm proper destruction methods for classified information had been applied. It was determined that no compromise of classified information had occurred.**

Incident Report Conclusion, included in complainant's June 14, 2005 submission of documents at p. 00006.

At the Hearing, the complainant testified that when he and the other CIO reviewed the Incident Report in February 2002, they

---

5/ A copy of this report was submitted by the complainant's counsel.

concluded that the facts in the Incident Report did not support the report's conclusion that the missing classified hard drive had been destroyed. They immediately decided to bring their concern that the Incident Report Conclusion was inaccurate to the attention of their supervisor. The complainant testified

> At first I was kind of timid to go in [to the complainant's supervisor's office], because we had two Headquarters people there. But myself and [another CIO] looked at this Security Incident Report and thought that there was some anomalies with it, so we took it to [the complainant's supervisor] and said "we've got some anomalies with this incident. It's closed out already by [BWXT] Security, but to me there looks like there's some misleading statements involved with this incident."

TR at 279-280.6/ Specifically, the complainant reported to his supervisor that "there's no proof that his hard drive was destroyed. The numbers do not match." He stated that none of the identifying numbers on the missing hard drive matched any of the numbers on the list of hard drives that were listed in the Incident Report as having been destroyed. TR at 285.

The complainant also pointed out to his supervisor that any computer hard drive with Secret Accountability System data is required to have a "fluorescing yellow or other sticker about three inches-by-three inches placed on it" which is "very, very visible." TR at 286-287. The Incident Report stated that hard drive user's supervisor did not recall seeing any Secret Accountability System material in the batch of hard drives that he turned in for destruction. The complainant concluded that there's no way to know if the classified hard drive was destroyed. TR at 287.

The complainant also pointed out to his supervisor that the only piece of evidence that the missing hard drive was destroyed was an unconvincing statement made to BWXT Security by the hard drive user's supervisor. That supervisor had asserted that because the missing classified hard drive could not be located in the "two places that I keep these hard drives," that he felt "quite sure" that the hard drive was in the group that he sent to be destroyed.

6/ The complainant's supervisor testified that this meeting probably took place on Friday, February 22, 2002, the day that the Incident Report was issued, and a copy was sent to the CIU. TR at 231 and 242.

TR at 300-301 *citing* supervisor's statement in the Incident Report. Finally, the complainant pointed out to his supervisor that there was no evidence for the destruction of the classified hard drive because security procedures requiring media custodians to witness the degaussing of classified hard drives had not been followed by BWXT's Data Center. TR at 306-307.

The complainant testified that during the February 2002 meeting in which the disclosures were made, two DOE officials were present in the complainant's supervisor's office, and that they took part in the conversation. TR at 288-289. The complainant stated that his supervisor reviewed the Incident Report and agreed with the complainant's conclusion that there was insufficient evidence to support the Incident Report's conclusion that the classified hard drive had been destroyed. The complainant stated that the three CIOs developed a plan of action to conduct a preinquiry to ascertain if the missing classified hard drive raised any counterintelligence issues. TR at 280. Specifically, he testified that the CIU opened its preinquiry in order to look at the possibility of a foreign nexus concerning the missing classified hard drive. Opening a preliminary inquiry enabled the CIU to pull records and see if the user of the missing hard drive or his supervisor reported any foreign contacts or were involved with any joint-operation working groups with other countries under the Mutual Defense Agreement. TR at 295-296.

Shortly after opening this preinquiry, the complainant indicated that he and his supervisor met with the former SS&P Manager and talked to her about the matter. He stated that at this meeting, he told the former SS&P Manager that the Incident Report Conclusion's findings that the hard drive was destroyed and that there was no possible compromise of classified information were misleading. TR at 281 and 289. He stated that the SS&P Manager sent an email to him the following day, March 5, 2002. The former SS&P Manager's email reads in part:

> A meeting was conducted Monday afternoon to discuss the hard drive situation which occurred during the Aug-Oct timeframe of last year. I briefed [former General Manager Ruddy] and [General Manager Mallory] after that meeting. The BWXT process as a whole is broken and this meeting is needed to follow up on corrective actions and determine if other actions are necessary.

March 5, 2002 Email from the SS&P Manager to the complainant, attached to complainant's June 14, 2005 submission at p. 00013.

b. The Alleged Retaliation

The complainant testified that prior to February 2002, he was expecting either comparative salary increases and/or promotions for persons working in the CIU at Pantex. He stated that the complainant's supervisor had informed members of the CIU of statements made by the former BWXT General Manager about increasing compensation levels for the CIU. The complainant's supervisor told the complainant that he met with BWXT's former General Manager Ruddy and with the former Defense Nuclear CI Chief during her visit to the Pantex facility in early January of 2002, and that he used the opportunity of this meeting to raise the issue of comparative salary increases for the CIU. TR at 309. The complainant was told that at this meeting, the former BWXT General Manager stated that he would work on providing raises or promotions for employees in the CIU. TR at 309.

The complainant also testified that he was aware of a follow up letter from the Defense Nuclear CI Chief to the former BWXT General Manager thanking him for the meeting and thanking him for working out the salary issues with the Pantex CIU. TR at 309.

> **I greatly appreciate your support for the [complainant's supervisor] and the Pantex Counterintelligence Program. And I also appreciate your support in rectifying the salary shortfalls we discussed. We at Headquarters are prepared to provide the dollars to support increases just as soon as we get the word.**

January 13, 2002 letter from the Defense Nuclear CI Chief to the former BWXT General Manager, attached to the complainant's June 14, 2005 submission at p. 00003. The complainant indicated that in late 2001 and early 2002, the BWXT Office of Human Resources had asked the complainant's supervisor to go out and collect salary data from other DOE complexes to justify the comparative salary increases that he was requesting. He stated that they informed the complainant's supervisor that any raises for the CIU had to be deferred until the following year because the budget already was finalized. TR at 324-325. The complainant also stated that he was told that the BWXT official who was working on the CIU's comparative salary increases had been terminated, and the comparative salary increases were delayed until the new official could study the issue. TR at 315.

The complainant testified that he did not file a Part 708 Complaint prior to March 2004 because throughout this period the CIU

employees were told that the complainant's supervisor was still working on the raise issue. TR at 314. When he was asked what precipitating event caused him to file his Part 708 Complaint in March 2004, the complainant referred to a December 2003 meeting with General Manager Mallory and the complainant's supervisor that involved an issue that he is not currently pursuing as part of his Part 708 Complaint. TR at 318.

The complainant testified that during the period from 2002 through 2004, he received annual cost-of-living and merit pay increases, but that these raises did not address the CIU's compensation disparity with other DOE facilities. TR at 311-314. He stated that more than two years later, in the middle of 2004, BWXT's current Compensation Manager conducted a comparative analysis of CI salaries in different DOE facilities and identified an obvious disparity in the salaries being paid to employees of the Pantex CIU. TR at 310.

2. The Complainant's supervisor

a. The February 2002 Protected Disclosures

The complainant's supervisor testified that in February 2002, he was conducting a program review with two visitors from the DOE Office of Counterintelligence when the complainant and another CIO at the Pantex CIU came into the office. He stated that they told him that they had reviewed the Incident Report concerning the missing classified hard drive and that they had concerns about the destruction of the classified hard drive. TR at 224. The complainant's supervisor testified that the complainant detailed a couple of things.

> He said, "they've lost complete control of that drive." He said, "And there's no evidence that the drive has been found at all." And he said, "Additionally, . . . the statements that are being made by Security relating to the destruction of that drive, aren't right. There's no way they could have made those assumptions."

TR at 227. He stated that the complainant and the other CIO pointed out to him that the facts in the Incident Report did not support the statement in the Incident Report Conclusion that "no compromise of classified information had occurred." TR at 227-228.

The complainant's supervisor testified that he shared the complainant's concerns. He stated that because the classified

hard drive contained Secret Accountability System material, it was labeled with a special sticker and required a special chain of custody and special destruction processes. TR at 232-234. He stated that both the user of the hard drive and his supervisor knew the rules

> and yet they didn't follow the rules with some very highly classified data.

TR at 234. The complainant's supervisor stated the incident involving the missing hard drive indicated that the user of the classified hard drive and his supervisor had failed to follow security procedures. He also believed that the Incident Report Conclusion

> would lead people to believe that there was direct evidence that the drive was destroyed, and that direct evidence has, to my knowledge, never been developed.

TR at 239. He said that he disclosed his beliefs about the actions of these BWXT employees to the two DOE officials who were present in his office on February 22, 2002. TR at 239-240. He also contacted DOE Headquarters and notified an official there that he was opening a Preliminary Inquiry regarding the incident. TR at 241. The complainant's supervisor stated that in the next several days he informed several BWXT officials, an official of the FBI, and the DOE's Assistant Manager for Safeguards & Security at the Pantex Site that he believed that BWXT employees had failed to protect the classified hard drive and that the finding in the Incident Report Conclusion that the classified hard drive had been destroyed was unsupported. TR at 244-246.

He testified that the complainant and he met with BWXT's former SS&P manager. He stated that she had been put in charge of doing a "lessons learned" review of what had happened in the breakdown of the system. He stated that they told the former SS&P manager that there was no evidence to support that the classified drive had ever been destroyed, that there was a failure to protect and account for the classified hard drive, and that the findings in the Incident Report Conclusion were unsupported. TR at 251-252.7/

7/ The complainant's supervisor also indicated that on March 19, 2003, the CIU put its investigation of the 2002 incident in abeyance because it had determined that their was no evidence

(continued...)

b. The Alleged Retaliation

Regarding the issue of comparative salary increases for the CIU at the Pantex facility, the former BWXT Senior CIO stated that he attended a meeting in about November 2001 attended by the former BWXT General Manager and the Defense Nuclear CI Chief. He stated that at this meeting, the Defense Nuclear CI Chief told former General Manager Ruddy that the CI program at Pantex was direct-funded and that she would provide the funding to bring the salaries of the four BWXT CIU employees up to a comparable level with CIUs at other DOE facilities. He stated that the General Manager then said to her:

> **It's direct-funded. This is a no-brainer. I'll have one of my people get with you.**

TR at 252.

The complainant's supervisor testified that after he disclosed his concerns about the 2002 incident and the Incident Report, it became "harder and harder to get things done." He indicated that his ongoing project to increase salaries for the CIU suddenly stalled. He said that he had been asked by BWXT's former HR Compensation Manager to get points of contact at different DOE sites so that HR could make salary comparisons. At some point after the disclosures were made, he was informed by the HR Compensation Manager that there would be no raises for the CIU at that time, and that he did not believe that such raises would be made in the future. TR at 259.

3. The DOE's former SS&P Manager at Pantex

The DOE's former SS&P Manager at Pantex testified that she does not recall whether she met with the complainant and the complainant's supervisor concerning the 2002 Incident.

> **I went back and looked and saw an appointment, but I do not remember physically meeting with them. . . .**

7/ (...continued)
of a foreign nexus in the loss of the classified hard drive. TR at 257. He stated that he put the CIU case in abeyance in order to allow BWXT Security to continue to do its job, and because "at that time [the CIU] did not know what their final conclusion was going to be." TR at 254.

> There was a meeting on the hard drive and there were lots of people there, and it very well could be that [the complainant and the complainant's supervisor] were in that meeting, and that may be the meeting in question. But I just don't remember who all was in that meeting.

TR at 593. She stated that other individuals involved with the 2002 Incident were aware of the concerns expressed by the complainant and the complainant's supervisor, and repeated these concerns to her. She testified that she was aware in March 2002 that the complainant and the complainant's supervisor were concerned that there was no evidence of destruction of the classified hard drive, but that

> I don't know that they personally told me whether they had that question.

TR at 594.

The DOE's former SS&P Manager testified that she recalled briefing former BWXT General Manager Ruddy and current General Manager Mallory about the 2002 Incident, but that she did not mention the specific concerns of the complainant and the complainant's supervisor to them. TR at 595.

4. The FBI Special Agent

The FBI Special Agent testified that he has been with the FBI for seven years and has been assigned to the Pantex facility since October 2003. TR at 153-154. He stated that when he arrived at the FBI's office in Amarillo, Texas, he reviewed a copy of the Incident Report that had been sent there by the DOE's Assistant Security Manager at Pantex. He stated that when he reviewed the report, he had "some concerns as to the accountability of the classified hard drive." TR at 155. He stated that his FBI office opened an investigation of the matter to determine if classified material had been mishandled, whether there was a possibility of espionage, and whether there would be any criminal prosecution under 18 U.S.C. § 793. TR at 157.

He stated that the decision to open an investigation after reviewing the Incident Report was based on his determination that "there's no document that shows definitively that this hard drive was one of the hard drives that was destroyed." TR at 158.

He testified that the FBI's investigation focused on whether the hard drive was accounted for and whether there was negligence in handling it. He stated that the FBI issued a declassified conclusion that he described as follows:

> The investigation yielded no evidence that proved or disproved the destruction of the Number 492 hard drive, nor could it definitively eliminate all of the possibilities that might explain the inability to account for the Number 492 hard drive.
>
> So basically what this says here is we found no evidence to confirm the destruction of the hard drive, nor did we uncover evidence to the contrary, that it had not been destroyed. Therefore, we have no reason to conclude anything other than the Inquiry Report, other than that it was destroyed.

TR at 160. He stated that the FBI's finding differed from the finding in the Incident Report Conclusion because it acknowledged the possibility that "something else" could have happened to the classified hard drive. TR at 161.

The FBI Special Agent testified that the FBI routinely looks at incidents of security concern involving classified information to see if there has been a violation of law. TR at 167-168. In this instance, he stated that the FBI did not make any referrals for prosecution based on allegations of willful misconduct committed by those who were involved with the loss of the hard drive. TR at 168. He also indicated that the FBI found no evidence of a foreign nexus or gross negligence in the matter. TR at 168-169.

5. The Defense Nuclear CI Chief

The Defense Nuclear CI Chief testified that she has held her current position for four years, and that previously she served as the Deputy for CI at the DOE. She stated that the Office of Defense Nuclear CI has under its purview a number of field sites, which includes the CI program at Pantex. She stated that she knows both the complainant's supervisor and the complainant. TR at 180.

a. The February 2002 Protected Disclosures

The Defense Nuclear CI Chief stated that on February 22, 2002, at the request of the complainant's supervisor, Defense Nuclear CI headquarters opened a pre-inquiry into the hard drive matter.

> Because it was a missing piece of classified material, we wanted to determine if there was a foreign nexus. The foreign nexus is what we need to understand or discover in order to open a counterintelligence investigation. So, working closely with my deck officer, . . . [the complainant's supervisor] was instructed to go ahead and look and see if there was a foreign nexus. And he reviewed it to see if there was. Discovering nothing, we closed the case on March 19, 2002, or closed the preliminary look, not a full case.

TR at 187. She stated that because she was aware that the FBI had been informed of the hard drive matter, she wrote a letter to the head of counterintelligence at the FBI informing them that "we see no foreign nexus on this matter; no further actions." TR at 188.8/

She said that initially, the chief issue raised about the hard drive matter was the manner in which it was reported directly to the DOE by the Pantex CIU and Defense Nuclear CI.

> . . . it caused some concern [to BWXT] about [the Pantex CIU] reporting it up through the chain, through me to Headquarters. There seemed to be some concern on [the former BWXT General Manager's] part of why they had to do that . . . .

TR at 191. She stated that she believed that it was appropriate for the complainant's supervisor to report to her his concerns about a missing classified hard drive.

> Whenever you have missing, unaccounted-for classified information, you want to make sure that it didn't go out the door because you had a foreign visitor in last week . . . [or that] the pool of employees who may have had some contact with this thing haven't come across our screen, or the other CI concerns.

8/ She testified that when the FBI opened a preliminary investigation of the hard drive incident in 2003, Defense Nuclear CI opened a case just to track it. This case was closed when the FBI ended its preliminary investigation. TR at 202.

TR at 208. She stated that the complainant's supervisor may have mentioned the complainant as someone who was working on this matter, but "I don't have any recall of it." TR at 209.

The Defense Nuclear CI Chief indicated that she learned "several months later" that the complainant's supervisor had concerns about the [BWXT] review of the 2002 Incident. TR at 191. She stated that he had concerns about the findings presented in the Incident Report Conclusion and that he advised BWXT Security to have it changed.

> **They had an emphatic statement that there was no compromise of classified information, and I think they changed it to the probability that compromise occurred is remote.**

TR at 210-211.

b. The Alleged Retaliation

She stated that in November 2001, she met with BWXT's former General Manager Ruddy and at that meeting she discussed with him the need for comparative salary increases for employees of BWXT's CIU.

> **I told him we were anticipating a counterintelligence inspection in the next year, and there were some concerns about salary parity on a couple of the employees. I told him that if he would look into the matter, I would be willing to provide additional funds if we determined that they were not paid to a level that was comparable or appropriate.**

TR at 182. She stated that BWXT's former General Manager Ruddy responded positively.

> **And he said he would be willing to look into it, but it would make it easy if I was willing to come forward with the money. And that was the end of the conversation on that matter.**

TR at 183.

The Defense Nuclear CI Chief stated that in January 2002, she sent a letter to former General Manager Ruddy discussing comparative salary increases for the CIU employees that the DOE would fund. TR at 185, *citing* "the January 13, 2002 Letter." She testified that she was later notified by the DOE that her proposal to raise the salaries was not appropriate. TR at 185.

6. The Former BWXT HR Compensation Manager

BWXT's former HR compensation manager testified that he held that position from April 2001 until April 21, 2003. He stated that part of his job was to review salary analyses. He stated that the complainant's supervisor contacted him in about May or June of 2001 and said that he felt that levels of compensation in the CIU were below standard. TR at 344. The HR compensation manager stated that he replied that he would have to do some investigation of the CIU's comparative standing, and that currently there was no money available for comparative salary increases. TR at 344. He stated that in the next four or five months, he and the complainant's supervisor looked at compensation for CIUs at Hanford, Savannah River, Los Alamos, and Sandia. TR at 345. He testified that

> **My determination when looking at these numbers that my compensation people put in front of me was that there was room for a ten to fifteen percent adjustment for [the complainant's supervisor]. And I don't recall [for the complainant].**

TR at 345. The former HR compensation manager stated that he was contacted by NNSA's Counterintelligence Headquarters officials three or four times by telephone encouraging him to provide more compensation for the Pantex CIU, although they were reluctant to share comparative salary data with him. TR at 346. He said that in the late Fall of 2001, he informed BWXT's Deputy for HR as well as BWXT's Manager and Deputy Manager that with regard to the Pantex CIU "there's room for increase [in salaries] to bring them more in line with the rest of these [DOE CIUs], based on our philosophy," but that the problem was, at that period of time there was no money available. TR at 351. Around the same time, he also remembers a visit from the Defense Nuclear CI Chief, who said that the DOE could provide the money for comparative salary increases for the CIU. TR at 346-347 and 356. He stated that the DOE loads the money for BWXT in the January timeframe, and that it "was [BWXT's] intention at the time to give those raises." TR at 356. He indicated that BWXT's former General Manager Ruddy initially supported the comparative salary increases for the Pantex CIU, but that he put a halt to any such increases for the CIU in early 2002. TR at 356-357. He stated that he was in General Manager Ruddy's office in early 2002 to inform him that HR was getting ready to "load some increases and some promotional monies."

> **And I remember bringing up the Counterintelligence Group, and [the former BWXT General Manager] was rather colorful**

> in his response. And I won't go into any details as to the kinds of vernacular, but he wanted it stopped dead in the water because of a hard-drive issue, a hard-drive investigation.

TR at 358. He further testified that General Manager Ruddy

> made the comment that he thought it, the [hard drive] investigation was getting – Careful with my words here. - out of control with regards to how he perceived things, and as a result, he was going to work to ruin [the former Senior CIO].

He recalled that the former BWXT General Manager stated on a couple of occasions that increased compensation for the CIU was "not going to happen". TR at 358. He stated that in the March-April 2002 timeframe, General Manager Ruddy asked him if he was required to accept the offer of the Defense Nuclear CI Chief to provide additional monies for the salaries of the Pantex CIU. The former HR compensation manager stated that he told him that it was highly unusual for the DOE

> to look at a contractor and to determine what those salary determinations should be, because we make those salary determinations based on salary studies, and [they] are determinations based across the [DOE] complex.

TR at 366. Nevertheless, he testified that he told the former BWXT General Manager that "it is probably politically astute to make payment and move forward." TR at 366. The former HR compensation manager also stated that General Manager Ruddy told him at about that time that "he wanted [the complainant's supervisor] gone" and that it was the job of the HR manager to get rid of him. TR at 359. The former HR compensation manager replied that he would be willing to search for other positions for the complainant's supervisor across the DOE complex. TR at 359.

7. BWXT's Compensation Manager

BWXT's Compensation Manager testified that he first worked at the Pantex facility in March 2004 when he was hired for his current position. He stated that almost immediately he was asked by the BWXT's current General Manager Mallory to do a comparative salary analysis for the Pantex CIU. TR at 394, 409 and 425. He stated that it took him about two months to conduct this analysis. TR at

426. He indicated that after conducting the analysis, he concluded that the complainant's salary and the other CIU employee salaries were "behind market of the ones that we looked at." TR at 410. He explained that

> When you do a salary band . . . for a certain grade level, you have a range that you can pay within that. And that range is considered to be within market, so the market midpoint is sitting in the middle of that. And typically 20 percent either side of that is deemed acceptable or normal. So you can pay within that salary range or that salary band at that point.

TR at 410-411. He testified that the complainant's salary was 22.8 percent behind the market average in the survey that he conducted. TR at 413. The market average for the complainant's position was $6,965 per month. TR at 585. He stated that he did a complete survey for the three different positions in the Pantex CIU, and that all three were below market. TR at 418-419.

The Compensation Manager testified that in May 2004, he presented the results of the survey to the General Manager Mallory along with the recommendation "to go forward with [comparative salary] increases for the Counterintelligence group." TR at 427. General Manager Mallory approved the implementation of this plan, which was to provide initial comparative salary increases and promotions for the three individuals in the CIU in May 2004, and to continue to provide incremental comparative salary increases on an annual basis for the next three years. TR at 429. Pursuant to this plan, the complainant received an initial comparative salary increase of seven percent on May 24, 2004. TR at 430. The Compensation Manager stated that this seven percent increase "was based on the market adjustment from the information that we provided [from the comparative salary analysis]." TR at 422. The complainant's supervisor received an initial comparative salary increase of three percent on May 24, 2004. TR at 430. Because both the complainant and the complainant's supervisor left their positions at the CIU prior to January 2005, they did not receive the next scheduled comparative salary increase for CIU employees that took place in that month. TR at 431-432.

The Compensation Manager testified that it was not common for this office to conduct an equity analysis for job classifications to the level of detail of his analysis for the CIU positions because "we have market surveys that we rely on for all the information." TR at 587. He also stated that there were no DOE site procedures or

other requirements that compelled BWXT to provide an equity analysis for a particular job at the Pantex facility. TR at 588.

The Compensation Manager stated that he reviewed the complainant's records to see if he received his annual merit pay increases in recent years. He found that in 2000, the complainant received a 7.4 percent increase, in 2001 he received 6.1 percent, in 2002 he received 4.37 percent, in 2003 he received 4 percent. TR at 422. He stated that with respect to these increases, the complainant received at least the average increase for the Pantex site. TR at 423.

B. BWXT's Witnesses

1. BWXT's Current Senior CIO

BWXT's current Senior CIO testified that she has had more than twenty years of experience in intelligence work, and has served as the Senior CIO at Pantex since November 2004. TR at 441-442. She stated that she recently reviewed the CIU's file on the 2002 classified hard drive incident, and described it as follows:

> It was a security incident where a security inquiry was conducted because there was a hard drive that did not have the appropriate documentation that it was or was not destroyed.

TR at 442-443. She stated that in February 2002, the CIU made an initial review of the incident, and after about five weeks this preliminary inquiry was closed when the complainant's supervisor determined that there was no foreign national involvement. TR at 443. She states that the CIU file indicates that the complainant's supervisor briefed the FBI's Supervisory Special Agent in Amarillo about the matter. *Id.* She stated that when the FBI later opened an inquiry into the incident, the CIU followed standard procedure "to monitor and assist [the FBI] in their investigation." TR at 444-445. She testified that the CIU file's only reference to a foreign nexus was "that we were looking into it," and that the file contained no information of theft or other criminal violations. TR at 447. She stated that incidents investigated by the CIU involve either "typically minor" security issues, slightly more serious security infractions, or security violations, where there is a reasonable expectation that classified information may have been compromised. She stated that "beyond that would be criminal behavior [under the] Espionage Act." TR at 448-449. With regard

to the 2002 classified hard drive incident, she stated that the incident involved security infractions.

> Well, my opinion it was a paperwork issue. There was a problem with paperwork; that as far as I have been able to determine, it is not something that was consistently wrong at, at that location. . . . but [the classified hard drive] was unaccounted for. So, infractions were issued to the people who were supposed to have logged in whatever happened to the hard drive.

TR at 450. She concluded that there was nothing in the CIU file to lead someone with counterintelligence training to believe that a criminal act had occurred with respect to the missing hard drive. TR at 453. She also stated that there was no evidence that the two individuals who received security infractions were guilty of gross negligence. TR at 471.

> Gross negligence is something that tends to be a lot more willful. For instance, the hard drive that was missing from Los Alamos, we know that it held very high-level, top-secret information . . . and somebody clearly took it home. . . . That was something that they did on purpose. This appears to be an administrative error, like leaving your safe drawer open.

TR at 486-487.

However, she stated that the possibility exists that the classified hard drive was lost and not destroyed.

> Anything is possible. The probability is that these are a couple of people who forgot to fill out paperwork. However, I don't have the hard drive in front of me. I cannot say definitively that it was not lost.

TR at 457. She therefore agreed that it was reasonable to conclude at the time that the Pantex CIU opened its review that a criminal act *may* have occurred. *Id.* She also stated that the Incident Report Conclusion was inaccurate when it stated that the incident involved no loss or compromise of classified data, because there is no documentation indicating that the hard drive was destroyed. TR at 459.

> I disagree completely with the statement that no loss occurred, or whatever she said in there, to say

> definitively [the hard drive] was destroyed. I mean, there is no way to prove that. You have the testimony of the people given the infractions.

TR at 484. She also stated that the Incident Report Conclusion was inaccurate because under "Determination of Inquiry", it checked a box for "Loss compromise did not occur" when it should have checked "Probability of compromise is remote." TR at 474-475. However, she did not believe that these inaccuracies rose to the level of willful false statements under the Intelligence Act. TR at 476. She also did not believe that either the complainant or the complainant's supervisor, given their CI training and experience, would have reasonably believed that a security violation occurred. TR at 479.

The current Senior CIO testified that the CIU file on the 2002 Incident indicated that the complainant's supervisor made notes of several meetings that he had with BWXT officials concerning issues raised by the Incident Report. Notations on March 1, 2002 indicated that former General Manager Ruddy and current General Manager Mallory were unavailable, and that the complainant's supervisor briefed a BWXT Division Manager and told him that the Incident Report provided no evidence of destruction of the classified hard drive, and that the CIU would treat it as a missing classified document. She stated that later, that day, the file indicates that the complainant's supervisor briefed General Manager Mallory and informed him that the Office of Defense Nuclear Counterintelligence and the FBI would be notified of the incident. TR at 461. She further indicated that the DOE's Assistant Site Manager for Safeguards & Security at Pantex was briefed and agreed to work the case from the security side. TR at 461. She testified that the CIU file indicates that on March 4, 2002, the complainant's supervisor first met with former General Manager Ruddy and informed him that the CIU had concluded from the Incident Report that there was no evidence of destruction of the hard drive. TR at 463. Later that day, the complainant's supervisor met again with former General Manager Ruddy as well as General Manager Mallory, and the former head of BWXT Security and briefed them "on the entire case to date." 462-463.

The current Senior CIO testified that the complainant's supervisor followed procedures in reporting the hard drive incident. However, she stated that she would have urged BWXT Security or DOE Security to make the report to the FBI.

> This was a security incident, and would appropriately have been referred to the FBI from the security apparatus at this facility as opposed to Counterintelligence.

TR at 464. She added that if she had been in the complainant's supervisor's position and security had refused to inform the FBI, then "I would have done it anyway." TR at 464-65.

2. The DOE's Assistant Site Manager for S&S at Pantex

The DOE's Assistant Site Manager for S&S at Pantex testified that he had thirty years of experience in safeguards and security at various DOE sites. He stated that in early 2002, during a BWXT self assessment, a classified hard drive was found to be missing. BWXT notified the DOE immediately and proceeded to investigate the incident. He indicated that about 30 to 45 days later, BWXT Security sent him the Incident Report, which he sent to DOE Headquarters. He also provided notification to the FBI. The Assistant Site Manager stated that he evaluated the Incident Report and thought that the finding that the classified hard drive was destroyed was overstated. TR at 495. He stated that

> The bottom line was that BWXT personnel failed to follow proper procedure in the destruction of the hard drive. As we reviewed that independently, we came to the same conclusion, as did the FBI in their review of the case.
>
> There is a procedure that requires individuals very prescriptively to follow a destruction path for a classified matter, in this case the hard drive. That path, that set of procedures was not followed. The [user of the hard drive] turned his hard drive over to [his supervisor] for destruction. There was no paperwork or change of accountability from that individual to the second individual.
>
> [The supervisor] then, along with a number of other drives, had those drives destroyed by a technician, and there were violations of procedures on both individuals' parts. They failed to follow procedures, and both were assessed by BWXT security infractions for their failure to follow procedures.

TR at 496-497. The Assistant Site Manager stated that he thought that the issuance of security infractions was the appropriate response in this case, and that he saw no information in the

Incident Report to suggest that either of these individuals raised a concern about a foreign nexus or committed gross negligence. TR at 498.

The Assistant Site Manager stated that the DOE "took some issue" with the Incident Report Conclusion's finding that there was no potential for the disclosure of classified information in this incident. TR at 499. He stated that the DOE questioned BWXT Security on the findings in the Incident Report Conclusion. TR at 500.

He stated that it was appropriate for BWXT, the DOE and the FBI to conclude that the drive had been destroyed because there was no evidence of "anything else occurring."

> It was that they just had no evidence; that there isn't noticed evidence that indicates something else happened with this hard drive other than it was destroyed, the procedures were violated and [it] was destroyed.

TR at 513.

The Assistant Site Manager stated that the only evidence for the destruction of the classified hard drive were the statements of the hard drive's user and his supervisor. TR at 538. He testified that the serial number of the missing classified hard drive did not show up either on the list maintained by the supervisor or on any of the degaussing documents. TR at 537. He stated that BWXT attempted without success to connect the degaussed computer platters in their possession to the missing classified hard drive.

> The manufacturer of the cases of the hard drives was contacted in an attempt to associate the platters with the case parts. Additionally, the platters were sent to the cyber forensic laboratory to determine if there was any readable material left on the platters.

TR at 530.

3. BWXT's current S&S Manager

BWXT's current S&S Manager testified that he has worked in security at the Pantex site since 1992 and was the Deputy Manager for Safeguards and Security at the time of the 2002 Incident. TR at 543-545. With regard to the missing classified hard drive, he stated that the problem arose when the user of the hard drive turned

it over to his supervisor without the proper paperwork and without identifying it as "accountable" media. TR at 547.

BWXT's current S&S Manager stated that in 2004, General Manager Mallory asked him to perform an independent review of the Incident Report and to give him the results. TR at 551. He stated that after reviewing the report, he recommended that the conclusion "Loss/Compromise did not occur" be changed to "Probability of compromise is remote." TR at 551-552. He stated that this change was appropriate because it was not possible to "conclusively prove" that the disks that had been degaussed by BWXT in the Fall of 2001 included the missing hard drive.

> Because it was degaussed, and no technology exists to read those disks, while [I am] 99.5 percent certain it occurred, as inquiry officials felt it occurred, we couldn't prove it one hundred percent because we can't read the degaussed disk and say, "Here's [the missing] disk."

TR at 552.9/ He stated that although he recommended changing the conclusion of the Incident Report Conclusion, he did not believe that the Incident Report and the Incident Report Conclusion contained any willful false statements. TR at 552-553. He testified that he did not re-interview the hard drive user or his supervisor because "they were retired, gone, and the FBI was working the case." TR at 558. He stated that he relied completely on the signed statements of these individuals that were in the report. TR at 560. The statement of the supervisor contains the following assertions:

> This being a special marked hard drive, I should have noticed the [Secret Accountability System] marking and handled it as directed in the disposal of [Secret Accountability System] controlled material. I DO NOT REMEMBER seeing this special marking. If [the hard drive user] gave it to me, and I am sure that he did, it was handled as described above. Toward the end of 2001, I had some 40 to 50 hard drives destroyed. I feel quite sure it was in this group.

9/ When asked to clarify what he meant by 99.5 percent certain, he stated "I'm comfortable that the drive was destroyed. That probably is a good way to put it." TR at 568.

Statement of Hard Drive User's Supervisor contained in Incident Report (emphasis in the original).

Finally, he stated that in January 2005, after the FBI concluded its investigation of the matter, he directed that the conclusion of Incident Report Conclusion be changed to fit his recommendation. TR at 578.

4. BWXT's former General Manager Ruddy

Former General Manager Ruddy testified that from February 1, 2001 until January 31, 2003, he was the president and general manager of BWXT, the managing contractor for the Pantex site. TR at 31-34. He stated that during his entire tenure on the site, the complainant's supervisor was his chief counterintelligence officer. TR at 34.

a. The February 2002 Protected Disclosures

With regard to the 2002 Incident, he testified that the missing hard drive raised an issue of accountability for classified information rather than the compromise of classified information.

> And there were quite a few corrective actions put in place to increase the rigor and the accountability of the process, but I think all the evidence, when it was put together, concluded that the issue was an accountability issue and not a compromise issue.

TR at 62. Former General Manager Ruddy recalls that he met with the complainant's supervisor in early March 2002 regarding the hard drive issue, but that his recollection of the meeting "is very vague." TR at 47. He stated that he had been told by "the Government" that a CI investigation of the incident had been opened, and he remembers that he gave the complainant's supervisor some feedback about his expectation that he be notified of CI investigations. TR at 48-49. Former General Manager Ruddy testified that he is certain that the complainant's supervisor explained to him why he felt it was important to open the investigation, but that "really wasn't the important issue."

> I never questioned whether or not a CI investigation should be opened, but just the fact that it had been opened and I wasn't aware of it.

TR at 105. He stated that if he had been absent from Pantex, then the complainant's supervisor should have informed BWXT's assistant general manager on the day that he opened the investigation. TR at 110.

b. The Alleged Retaliation

With regard to the issue of comparative salary increases for the CIU, former General Manager Ruddy recalled meeting with the Defense Nuclear CI Chief in about November 2001 and that during that meeting she made a qualitative statement that the salaries of the CI employees at Pantex were not in sync with the rest of the counterintelligence community. TR at 71. He stated that

> If I had been convinced by information that she provided me that they were seriously out of line, then we would have gone back and, looked at our process by which we slotted those positions to make sure that they were slotted correctly.

TR at 83-84. He stated that any adjustment in salaries would have been incremental, and that he could not recall any instance where an employee of BWXT received more than a fifteen percent raise at one time. TR at 84-85.

He stated that BWXT did not have a general standard of how it wanted the salaries of its employees to compare to what was paid elsewhere. He stated that BWXT performed analyses based on how competitive it was in getting people in various positions and that this standard varied "according to our success in hiring folks and retaining folks." TR at 75.

He testified that when in March 2002 the Defense Nuclear CI Chief sent a letter to Pantex indicating that the DOE would support specific raises for BWXT employees in the Pantex CIU, he referred it to the DOE's site office manager who "took immediate action to have the letter withdrawn."

> . . . he thought it was highly inappropriate, a conclusion that I shared, and it was not the purview of that office or any other office to direct individual salaries.

TR at 36-37. He stated that managing and operating contractors had a responsibility for conducting a process that insured fair compensation to their employees, and that accepting guidance from

the Government would undermine that process and could lead to other groups "petitioning their customer for some special consideration." TR at 108.

5. BWXT's current General Manager Mallory

BWXT's General Manager Mallory testified that he started working at Pantex in February 2001 as BWXT's Deputy General Manager, and has been the General Manager since February 1, 2003. TR at 112-113. He stated that he could not recall whether he met with the complainant's supervisor in March 2002 concerning the hard drive incident. TR at 137. He stated that during the time that he was Deputy General Manager, the complainant's supervisor did not report to him, although he would occasionally attend the Deputy General Manager's staff meetings. TR at 136.

a. The February 2002 Protected Disclosures

He stated that when the classified hard drive incident occurred in February and March 2002, he was not informed directly.

> I don't remember anybody coming to me directly. And I wouldn't have expected them to come to me, because Security, Counterintelligence, none of that reported to me. But certainly as Deputy General Manager, I wanted to know what was going on. And to the best of my recollection, when we heard that there were hard drives unaccounted for, that certainly got my attention.

TR at 121. He stated that the problem was reported in a timely manner to DOE Headquarters, and that BWXT Security completed its evaluation "in a relatively short period of time, less than a week." TR at 132. He stated that the evaluation concluded that it was an administrative issue and that there had been no loss of information.

> That's the reason we filled the report out the way we did, that there had been no loss of information; that we had a situation where they did not follow procedures, and took the drives apart before they could match the specific disks up to a drive. But they had all the different pieces. They's all added up to the right total, and that's why they were coming to that conclusion. And that was the way it sat for several years.

TR at 132. General Manager Mallory testified that he had no recollection of the complainant's supervisor meeting with him on this issue in late February or early March of 2002. TR at 136, 137.

General Manager Mallory stated that he recalled meeting with the complainant's supervisor about concerns over the hard drive incident in late 2003 or 2004. He indicated that at that time the complainant's supervisor expressed the concern that the Incident Report Conclusion

> may have stated too strongly that there had been positively no loss of information.

TR at 116. He described the complainant's supervisor's concern as follows:

> Because the hard drives had been in a vault, but theoretically accessible to someone for a period of time, and since we could no longer take the specific disks and connect them to a specific hard drive because they had been taken apart before the serial numbers had been written down, as best I can remember, [the complainant's supervisor] felt that we had come to too strong a conclusion, and that there was another box on the form that could have been checked that would have said – I'm going to paraphrase here - that it was improbable that there was a loss of information, but it wasn't impossible.

TR at 116. He stated that at that meeting he directed BWXT's S&S Manager to review the matter and that BWXT Security later acted to change the Incident Report's conclusion.

> Since we couldn't match hard-drive case and disks up because they'd been taken apart improperly, to state that there was no compromise of classified information was too strong. And that's why we changed the outcome of the report.

TR at 145.

b. The Alleged Retaliation

On the issue of comparative salary increases for BWXT's CIU, General Manager Mallory stated that he was aware that in 2002 the DOE's site manager at Pantex had taken issue with the efforts of the Defense

Nuclear CI Chief to raise the salaries of the Pantex CIU, and that the site manager sent an e-mail to DOE Headquarters stating that her efforts were inappropriate. TR at 127. He then stated that

> The issue just kind of went away. I don't remember anything after that.

TR at 127. He testified that at a meeting with the complainant's supervisor in 2004, the complainant's supervisor stated that the employees in the CIU were underpaid. TR at 128-129. He stated that at that meeting he directed his HR Manager to look into the matter, and that they conducted "a very thorough study and inquiry." TR at 129. He said that the result indicated that the employees of the CIU were

> probably not underpaid from a salary bracket standpoint, but they are certainly low in the salary bracket compared to places in other parts of the United States.

Id. He stated that the HR Manager told him that

> "We don't have to give them a raise, but it wouldn't be unwarranted to get them higher in their salary bracket."

TR at 129-130. Based on this recommendation, General Manager Mallory testified that he authorized raises for the four employees of the CIU. TR at 130.

IV. Legal Standards Governing This Case

A. The Complainant's Burden

Once it is determined that the complainant has met the procedural requirements for submitting a Part 708 complaint, he must then establish by sufficient evidence that relief is warranted. Specifically, it is the burden of the complainant under Part 708 to establish

> by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing

> evidence that it would have taken the same action without the employee's disclosure, participation, or refusal.

10 C.F.R. § 708.29.

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both the complainant and by BWXT. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

B. The Contractor's Burden

If I find that the complainant has met his threshold burden, the burden of proof shifts to the contractor. BWXT must prove by "clear and convincing" evidence that it would have taken the same personnel actions regarding the complainant absent the protected disclosures. "Clear and convincing" evidence is a more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". *See Hopkins*, 737 F. Supp. at 1204 n.3. Thus if the complainant has established that it is more likely than not that he made protected disclosures that were a contributing factor to an adverse personnel action taken by BWXT, the contractor must convince me that it clearly would have taken this adverse action had the complainant never made this protected disclosure.

V. Analysis

A. The Complaint Was Timely Filed

In its submissions, BWXT contends that the individual's complaint of retaliation was not timely filed. It notes that the Part 708 regulation provides that

> You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation.

10 C.F.R. § 708.14(a). As noted above, the complainant filed a complaint of retaliation against BWXT with the Employee Concerns Manager at the NNSASC on March 15, 2004. In his original complaint,

the complainant described efforts by his supervisor and the Defense Nuclear CI Chief to get BWXT's former General Manager Ruddy to agree to comparative salary increases for BWXT's CIU. He stated that BWXT management was "very unhappy" when in February 2002 the BWXT CIU reported its concerns about the 2002 Incident to Headquarters CI and to the FBI. Following the 2002 disclosures, BWXT's management changed its position and acted negatively on the pending issue of comparative salary increases for the BWXT CIU. Complaint at 2.

In its Reply Brief in this proceeding, BWXT contends that the complainant knew as early as the summer of 2002 that his supervisor's efforts to secure comparative salary increases for the CIU (including the salary of Complainant) had failed. It therefore contends that there is no reasonable basis for the complainant to wait until March of 2004 to submit a Part 708 Complaint concerning this alleged retaliation. BWXT Reply Brief at 1.

I reject this argument. In a 2003 decision, a Hearing Officer discussed the relevant regulatory language, and whether and under what circumstances actions more than ninety days old can be considered as retaliations under Part 708. He found that the complainant should be allowed sufficient time to recognize that a personnel action taken by management was indeed retaliatory in nature. *See Steven F. Collier (Case No. VBH-0084),* 28 DOE ¶ 87,036 at 89,257 (2003); *see also Gary S. Vander Boegh*, 28 DOE ¶ 87,040 at 89,283-84 (2003)(*Vander Boegh*)(certain personnel actions, while not regarded as neutral in their impact by the complainant, were not so overtly punitive in nature that a reasonable person "should have known" that they were Part 708 retaliations at the time that they took place). This is because employees often are not familiar with the way that personnel decisions are made and find it difficult to determine whether a negative action concerning a request is retaliatory and when a lengthy delay in providing a promised benefit becomes a determination to deny that benefit.

In the present case, the personnel action raised by the complainant - no comparative salary increases provided by BWXT to its CIU employees in 2002 and 2003 - was not so overtly punitive towards the complainant that a reasonable person "should have known" immediately that it was a Part 708 retaliation. Additional analysis is therefore necessary. Section 708.14(a) of the regulation requires me to consider the evidence in the record, especially evidence as to the complainant's state of mind, in order to determine when he knew or should have known that a Part 708 retaliation had taken

place, and to measure the ninety day filing requirement from that time.

Contrary to BWXT's contention, the complainant's May 24, 2005 Response to the ROI makes no assertion concerning when the complainant realized that BWXT management had decided to take no action on the raises. *See* Complainant's May 24, 2005 Response at 5. In his testimony at the Hearing, the complainant stated that throughout 2002 and 2003 he was told by his supervisor that he was still working with BWXT's Office of Human Resources on the raise issue. He testified that the BWXT Office of Human Resources offered his supervisor a number of reasons for its delay in acting on the requested raises, including the need to collect comparative salary data to justify the increases, the need to defer any raises until the next fiscal year for budgetary reasons, and administrative confusion caused by BWXT's dismissal of the former HR Compensation Manager. TR at 314-315.

The complainant's supervisor testified that following the disclosures concerning the 2002 Incident, he was told by the former HR Compensation Manager that the CIU would receive no comparative salary increases at that time, and that he did not believe that there would be such salary adjustments in the future. TR at 259. However, he did not testify that he shared this information with the complainant. The complainant's testimony indicates that until early 2004 he was told by his supervisor that he was still working on obtaining comparative salary increases for the CIU, and that the process had been delayed by the departure of the former HR Compensation Manager. TR at 314. This departure occurred in April 2003. TR at 342.

The former HR compensation manager testified that in the March-April 2002 timeframe, the former BWXT General Manager stated that he wanted efforts to increase salaries for the CIU "stopped dead in the water." TR at 358. Nevertheless, the former HR compensation manager stated that he continued to push the issue of comparative salary increases for the CIU with BWXT's General Manager and Deputy General Manager until they responded in very direct terms and said, "The issue is dead." TR at 375. However, even after this happened, he told the complainant's supervisor that he would continue "pushing the issue, and try to take a logical approach," but that "some of these decisions are just above my pay rate." TR at 375-376. He stated that "after the mid-February/mid-March time frame," he believed that the complainant's supervisor knew that the former HR compensation manager was powerless to do anything about increasing salaries for the CIU. TR at 376. He stated that he may have had

some conversations with the complainant's supervisor in 2003 regarding comparative salary increases for the CIU, but that his response was that the complainant's supervisor needed "to take this matter up with your boss." TR at 381.

The former HR compensation manager stated that it was not until early 2004, after he had left his position at BWXT's HR and before he returned to BWXT in another capacity, that he disclosed to the complainant's supervisor how former General Manager Ruddy had refused to approve comparative salary increases for the CIU. TR at 371, 387-388.

Based on this testimony, there is no indication that the individual should have realized that his failure to receive a comparative salary increase was a retaliatory act more than ninety days prior to the filing of his Part 708 Complaint. I find that it was reasonable for the complainant to accept the explanations offered to him by his supervisor in 2002 and 2003 that BWXT's Office of Human Resources was still considering comparative salary increases for the CIU and that the increases had been delayed for legitimate administrative reasons. The testimony of the complainant's supervisor and the former HR Compensation Manager indicates that although the supervisor was aware that the process had stalled in early 2002, he continued to receive some assurances that it remained in consideration after that time, and that he did not learn of former General Manager Ruddy's 2002 decision to deny consideration of comparative salary increases for the CIU until early 2004.

Moreover, BWXT has failed to bring forward convincing evidence for its position on this issue. It has not provided evidence that the complainant or his supervisor were told that BWXT had definitively rejected comparability raises for employees in the CIU. In his testimony, former General Manager Ruddy stated only that he thought it was inappropriate for the Defense Nuclear CI Chief to suggest specific raises for employees in BWXT's CIU. TR at 36-37 and 108. He indicated that any comparative salary increases should be based on BWXT's own analyses. TR at 44. He further stated that at no time did he direct the former HR Compensation Manager to cease looking at a salary review for the CIU. TR at 45.

Accordingly, I find that the individual's March 2004 filing of his Part 708 Complaint was timely filed in accordance with the provisions of 10 C.F.R. § 708.14(a).

B. The Complainant Made Protected Disclosures

As noted above, in order for the information that the complainant disclosed to his supervisor and to DOE officials to constitute a protected disclosure under Part 708, the complainant must reasonably believe that the information reveals one of the following:

> **(1) A substantial violation of a law, rule, or regulation;**
>
> **(2) A substantial and specific danger to employees or to public health or safety; or**
>
> **(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority . . .**

10 C.F.R. § 708.5(a)(l), (2) and (3). Throughout this proceeding, the complainant has contended that his disclosures regarding the 2002 Incident were protected because they revealed substantial violations of law under 10 C.F.R. § 708.5(a)(1). Specifically, he asserted that the BWXT employees who handled the classified computer hard drive were grossly negligent when they ignored required procedures for recording the hard drive for collection and destruction. He also asserted that the BWXT's Inquiry Official committed gross negligence or made false statements when she concluded in the Incident Report Conclusion that the classified hard drive had been accounted for and that no compromise of classified information had occurred.

After reviewing the testimony and other evidence in the record of this proceeding, I find that it is not necessary to examine the motives and intent of the Inquiry Official and the BWXT employees who handled the classified hard drive in order to find that the complainant's disclosures are protected under Part 708. As discussed below, I find that the missing classified hard drive contained highly restricted classified nuclear information. The complainant disclosed on two occasions that the findings contained in the Incident Report Conclusion were inaccurate, and that this hard drive and its information could not definitely be identified as having been destroyed. His disclosure that BWXT had failed to properly account for this information was the disclosure of "a substantial and specific danger to employees or to public health and safety" protected under Part 708.

1. The Complainant Made Disclosures Concerning the Classified Hard Drive on Two Occasions

The complainant testified that after he and another CIO reviewed the Incident Report in February 2002, he shared his concerns with his supervisor and two DOE counterintelligence officers. Specifically, he told them that he believed that there was insufficient evidence to support the Incident Report Conclusion's findings that the classified hard drive had been destroyed and that there was no compromise of classified data. The complainant also indicated that on March 4, 2002, he and his supervisor met with the former SS&P Manager to discuss the Incident Report, and he shared the same concerns with her. TR at 281 and 289.

The complainant's supervisor testified that both of these meetings took place as the complainant described them. He stated that at the March 4, 2002 meeting, both he and the complainant told the former SS&P manager that there was no documentation confirming that the classified hard drive had been destroyed. TR at 251-252. The former SS&P Manager testified that she cannot recall meeting with the complainant and his supervisor about the 2002 Incident. However, she acknowledges her records indicated that she had an appointment with them. She does recall that she was aware that both the complainant and his supervisor were concerned that there was no evidence confirming the destruction of the classified hard drive. She also stated that other individuals involved with the 2002 Incident were aware of the concerns expressed by the complainant and his supervisor, and that they repeated these concerns to her. TR at 593-594.

Based on this testimony, I conclude that the complainant reported his concerns about the missing classified hard drive to his supervisor and to two DOE counterintelligence officers in February 2002 and to the DOE's former SS&P Manager at Pantex in March 2002.

2. The Individual Accurately Disclosed that the Missing Classified Hard Drive Had Not Been Accounted for by BWXT Security

The testimony of several witnesses at the Hearing supports the accuracy of the complainant's contention that BWXT security had not accounted for the missing hard drive, and had inaccurately concluded that there was no possiblity that classified data on the hard drive had been compromised. The complainant's supervisor testified that he shared the complainant's concern that the classified hard drive had not been accounted for by BWXT Security and opened a preliminary inquiry regarding the incident. TR at 251-252. The FBI Special

Agent stated that his decision to open an investigation after reviewing the Incident Report was based on his determination that there was no documentary evidence showing that the missing classified hard drive was one of the hard drives that was destroyed. TR at 158. BWXT's current Senior CIO at Pantex testified that she had recently reviewed the CIU's file on the 2002 Incident and agreed that there is no documentation verifying that the hard drive had been destroyed. TR at 459. The DOE's Assistant Site Manager also testified that there was no data or documentary evidence such as serial numbers to support the conclusion that the missing classified hard drive had been destroyed. He agreed that the only support for the Incident Report's Conclusion that the missing classified hard drive had been destroyed was the statement of the hard drive's user and the statement of his supervisor. TR at 537-538.

3. The Complainant's Disclosures Revealed a Substantial and Specific Danger to Public Health and Safety

At the Hearing, Counsel for BWXT argued that the 2002 Incident involved nothing more than "a failure to follow procedures on the destruction of this hard drive." TR at 606. He contended that as such it does not rise to the level of a protected disclosure under Part 708.

> The fact that someone didn't lock out his safe; the fact that someone may have left an STU phone key in, or may not have signed the proper paperwork, which is the incident here, are not the sort of matters that were meant to be considered as protected disclosures under [Part] 708.

TR at 608-609. At the Hearing and in BWXT's June 15, 2005 Reply Brief, Counsel for BWXT asserted that one of the DOE's principal purposes for amending its regulations in 1999 to require "substantial" disclosures under Part 708 was to eliminate from consideration under Part 708 those complaints that dealt with minor, insubstantial or de minimus matters. TR at 608, BWXT Reply Brief at 7. He quoted the following portion of the January 1998 Notice of Proposed Rulemaking that discussed this issue:

> [T]he Senate Report accompanying the Civil Service Reform Act of 1978 explained that general criticisms or complaints, or those of a non-substantial nature were not intended to be covered. The Report stated that 'the Committee intends that only disclosures of public health and safety dangers which are both substantial and

> ***specific*** **are to be protected.' Thus, for example, general criticism by an employee of the Environmental Protection Agency that the Agency is not doing enough to protect the environment would not be protected under this subsection. (S. Rep. No. 969, 95th Cong., 2nd Sess. 21 (1978). (emphasis added)**

BWXT Reply Brief at 8 *citing* 63 Fed. Reg. 373 (January 3, 1998).

Some of the testimony at the Hearing supports a de minimus characterization of the 2002 Incident. Several of BWXT's witnesses characterized the issue of the missing hard drive as a "procedural" or "paperwork" issue, indicating that they believed it involved only the failure to properly document the destruction of the missing hard drive and not the actual compromise of classified information. *See* testimony of BWXT's current Senior CIO (TR at 450), the DOE's Assistant Site Manager for S&S at Pantex (TR at 496), BWXT's current S&S Manager (TR at 37), Former General Manager Ruddy (TR at 62), and BWXT's General Manager Mallory (TR at 132).

Nevertheless, BWXT's efforts to characterize the complainant's disclosures as raising only procedural issues are misplaced. The proper focus of my inquiry is whether the disclosures raise a substantial and specific danger to health and safety. While it may appear probable that the missing hard drive was destroyed by BWXT and that the files simply lack the required documentation to confirm that destruction, there also is a real possibility that the missing hard drive was not destroyed. This real possibility that the classified hard drive had been compromised was acknowledged by several witnesses at the Hearing, including the complainant's supervisor (TR at 232-234), the FBI Special Agent (TR at 161), the Defense Nuclear CI Chief (TR at 208), BWXT's current Senior CIO (TR at 457), and DOE's Assistant Site Manager for S&S (TR at 499). BWXT's current S&S Manager testified that BWXT could not "conclusively prove" that the missing hard drive had been destroyed, and that therefore he amended the findings in the Incident Report Conclusion from "Loss/Compromise did not occur" to "Probability of compromise is remote." TR at 551-552.

I therefore find that in his disclosures, the complainant identified the real possibility that the classified hard drive had not been destroyed and that its contents may have been compromised. I also find that evidence provided at the Hearing establishes that the dangers to public health and safety raised by the possible misappropriation of classified hard drive were both specific and

substantial. The Incident Report states that the hard drive contained Sigmas 1 and 15 classified material. The record supports the finding that this Sigma 15 material, in particular, was highly restricted and included classified nuclear information. In his testimony, BWXT's former General Manager Ruddy stated that he was familiar with Sigma 15 data and agreed that it was "very important or highly restricted classified data." TR at 59. The DOE Assistant Site Manager testified that Sigma 15 data "is secret restricted data, and as such, it is highly classified." TR at 518. The FBI Special Agent agreed that the Sigma 1 and 15 information should be considered potentially dangerous if it got into the wrong hands.

> The fact that it's secret information; the fact that it contains nuclear information - without getting into specifics and a lot of that I don't know anyway - any time something like that would occur, we would be concerned . . . that secret information is potentially out there where it shouldn't be. . . . If it's got nuclear-related information, it's even more concerning.

TR at 177.

Testimony at the Hearing indicated that the Complainant's disclosures prompted additional actions to ensure the safety and security of the public that were necessary and appropriate. Both the Pantex CIU and the FBI conducted preliminary investigations to ensure that no foreign nexus existed with respect to the missing hard drive. The Defense Nuclear CI Chief indicated that she believed that it was appropriate for the Pantex CIU to investigate this issue [TR at 23], as did BWXT's current Senior CIO. TR at 457.

Finally, the fact that the missing classified hard drive raised a substantial issue of public safety and security is supported by BWXT's continuing efforts to resolve the issue and link the degaussed platters in its possession with the missing hard drive. The DOE's Assistant Site Manager for S&S at Pantex testified that BWXT contacted the manufacturer of the hard drive to see if additional means of identification existed, and that it sent the degaussed platters to a cyber forensic laboratory to determine if they contained any readable information that could be used for identification. TR at 37.

In light of this evidence, I reject BWXT's argument that its failure to document the destruction of the classified hard drive raised nothing more than a housekeeping issue of failing to complete the proper paperwork. TR at 608. In fact, the individual disclosed

significant information when he reported that BWXT Security was inaccurate in finding that the missing hard drive had been destroyed. The complainant's disclosures resulted in investigations by the Pantex CIU and the FBI to ensure that the missing hard drive had not been vulnerable to appropriation by foreign nationals, and in subsequent efforts by BWXT to locate and identify the hard drive. I find that the complainant's disclosures that highly restricted nuclear information remained unaccounted for at the Pantex facility revealed a substantial and specific danger both to Pantex employees and to general public's health, safety and security, and therefore are clearly the type of disclosures that are protected under Part 708.

C. The Complainant's Protected Disclosures Were a Contributing Factor to the Alleged Act of Retaliation

Under 10 C.F.R. § 708.29, the complainant must also show that his protected disclosures were a *contributing factor* with respect to a particular adverse personnel action taken against him. *See Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994). A protected disclosure may be a contributing factor to an adverse personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) *citing McDaid v. Dep't of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990). *See also Russell P. Marler, Sr.*, 27 DOE ¶ 87,506 at 89,056 (1998).

I conclude that the complainant has established by a preponderance of the evidence that his protected disclosures were contributing factors to the retaliation he alleges. I base this conclusion on a finding that there are both constructive knowledge and proximity in time between the protected disclosures made by the complainant and his allegations of retaliation.

With respect to constructive knowledge of the disclosures, the complainant made his disclosures to his supervisor in late February 2002, and to the DOE's former SS&P Manager at Pantex in early March 2002. The complainant's supervisor stated that he immediately conveyed these concerns to several BWXT officials, including former General Manager Ruddy. Clearly, the former BWXT General Manager can be presumed to have had actual or constructive knowledge of these disclosures in the absence of a clear and convincing evidentiary showing to the contrary.

With regard to timing, the disclosures took place in February and March 2002, and the alleged retaliation taken against the complainant, *i.e.* failing to grant him a comparative salary increase, began shortly thereafter in March or April 2002, and lasted at least until May 2004, when a comparative salary increase of seven percent was provided to the complainant. TR at 429-430. A reasonable person could conclude that the alleged retaliation was caused by the protected disclosures, because the alleged retaliation began shortly after the disclosures were made and continued for a considerable period. The disclosures were thus a contributing factor to an alleged ongoing retaliation. *See Jimmie L. Russell*, 28 DOE ¶ 87,002 at 89,014 and 89,025-26 (2000) (protected disclosure found to be contributing factor when it occurred proximate in time to the beginning of an ongoing retaliation).

Accordingly, with respect to the alleged retaliation, I will first determine whether the complainant has shown by a preponderance of the evidence that an adverse personnel action took place and meets the criteria for a Part 708 retaliation. If I make this finding in the affirmative, I will then determine whether BWXT has shown, by clear and convincing evidence, that the protected disclosures were not a contributing factor to the adverse personnel action or that they would have taken the same action in the absence of the protected disclosure.

D. BWXT's Failure to Provide a Comparative Salary Increase to the Complainant was a Retaliation

The complainant contends that in March or April 2002, BWXT reversed its previous position and refused to accept an offer from the DOE to provide funds for comparative salary increases to BWXT's CIU. At the Hearing, he testified that his supervisor had told him that at BWXT General Manager previously had stated that he would work on providing raises for the CIU. TR at 309.

1. BWXT's Jurisdictional Objections to the Complainant's Alleged Retaliation

In its filings in this proceeding and at the Hearing, BWXT argues that the failure to provide comparative salary increases to the CIU in 2002 and 2003 is not a retaliation under Part 708. It makes both legal arguments and a factual argument in this regard. In its Pre-Hearing Brief in this proceeding, BWXT contends that comparability salary adjustments constitute terms and conditions of the complainant's employment. BWXT cites 10 C.F.R. § 708.4(e), which

provides that complaints dealing with "'terms and conditions of employment' within the meaning of the National Labor Relations Act" are not covered by Part 708, "except as provided in Section 708,5." It argued that

> **the Complainant has been unable to establish any cognizable act of retaliation that would bring this complaint within the scope of 708.5. Therefore, Complainant may not address any matter that deals with the "terms and conditions of his employment." Since the matter of salary structure for CI officers is asserted in his complaint, we contend that this constitutes part of the classic "terms and conditions of employment" addressed in 708.4(e). Accordingly, OHA lacks jurisdiction to hear this complaint.**

I reject BWXT's argument. Section 708.5 addresses what constitutes a *disclosure* under Part 708, and it does not define the scope of potential *retaliations* from which a complainant may seek redress. Section 708.4's reference to "terms and conditions of employment" in the context of Section 708 means that a *disclosure* involving the employee's terms and conditions of employment does not invoke protections under Part 708 unless it simultaneously involves matters listed under Section 708.5, such as a substantial and specific danger to employees or to public health or safety. In the present case, I have found that the Complainant has made disclosures protected under Section 708.5, and therefore may be protected from subsequent adverse personnel actions that are found to be retaliatory. Accordingly, I find that the fact that the Complainant's alleged retaliation deals with a "term or condition of employment" does not exclude that alleged retaliation from coverage under Part 708.

Next, BWXT argues that the complainant has received merit pay increases from 2002 until the present that were similar to those received by other BWXT employees at Pantex. In this regard, BWXT's Compensation Manager testified that in 2000, the complainant received a 7.4 percent increase, in 2001 he received 6.1 percent, in 2002 he received 4.37 percent, and in 2003 he received 4 percent. TR at 422. He stated that with respect to these increases, the complainant received at least the average increase for the Pantex site. TR at 423. At the Hearing, Counsel for BWXT further contended that the comparative salary increases for employees of BWXT's CIU are discretionary and cannot be considered the basis for a retaliation under Part 708. TR at 609-610. In this regard,

BWXT's Compensation Manager testified that it was not common for his office to conduct an equity analysis for job classifications to the level of detail of his analysis for the CIU positions because "we have market surveys that we rely on for all the information." TR at 587. He also stated that there were no DOE site procedures or other requirements that compelled BWXT to provide an equity analysis for a particular job at the Pantex facility. TR at 588. BWXT therefore contends that because comparative salary increases are discretionary and not generally provided to employees, the failure to provide such increases cannot form the basis for an alleged retaliation.

I reject this argument. Discretionary benefits provided to an employee by his employer can provide the basis for a retaliation under Part 708 if the benefit is withheld or withdrawn because of the employee's protected disclosure. Retaliation is broadly defined under Part 708 to include any negative actions taken against an employee's "compensation, terms, conditions or privileges of employment." 10 C.F.R. § 708.2. If an employer makes a commitment to provide a benefit to an employee, and then fails to provide the benefit because of the employee's protected disclosure, the employee can seek relief from that action under Part 708. *See Vander Boegh*, 28 DOE at 89,287 (failure to implement an approved plan to improve an employee's working conditions found to be an adverse personnel action under Part 708). Accordingly, if the complainant has established by a preponderance of the evidence that BWXT was preparing to provide him with a comparative salary increase in early 2002, and that it changed its position as a result of his protected disclosure, the complainant is entitled to relief for that adverse action under Part 708.

2. The Record Supports the Complainant's Contention that BWXT Had Committed to Provide a Comparative Salary Increase to the CIU and Later Reversed that Position

There is considerable evidence in the record to support the complainant's contention that BWXT reversed its decision to provide his group with comparative salary increases following his protected disclosures. At the Hearing, the complainant's supervisor testified that at a November 2001 meeting, the Defense Nuclear CI Chief had told former General Manager Ruddy that the CI program at Pantex was direct-funded and that she would provide the funding to bring the salaries at the Pantex CIU up to a comparable level with CIUs at other DOE facilities. He stated that the General Manager then said to her:

> It's direct-funded. This is a no-brainer. I'll have one of my people get with you.

TR at 252. The complainant's supervisor testified that after he disclosed his concerns about the 2002 incident and the Incident Report, it became "harder and harder to get things done." He indicated that his ongoing project to increase salaries for the CIU suddenly stalled. He said that he had been asked by BWXT's former HR Compensation Manager to get points of contact at different DOE sites so that HR could make salary comparisons. At some point after the disclosures were made, he was informed by the HR Compensation Manager that there would be no raises for the CIU at that time, and that he did not believe that such raises would be made in the future. TR at 259.

In her testimony, the Defense Nuclear CI Chief confirmed the complainant's supervisor's account of the November 2001 meeting, and stated that BWXT's former General Manager Ruddy had responded positively to her offer to provide additional funds for comparative salary increases for BWXT's CIU.

> And he said he would be willing to look into it, but it would make it easy if I was willing to come forward with the money. And that was the end of the conversation on that matter.

She stated that in January 2002, she sent a letter to former General Manager Ruddy concerning the offer to fund comparative salary increases. This letter stated in part:

> I greatly appreciate your support for the [complainant's supervisor] and the Pantex Counterintelligence Program. And I also appreciate your support in rectifying the salary shortfalls we discussed. We at Headquarters are prepared to provide the dollars to support increases just as soon as we get the word.

January 13, 2002 letter from the Defense Nuclear CI Chief to the former BWXT General Manager, attached to the complainant's June 14, 2005 submission at p. 00003. The record also indicates that in a March 27, 2002 letter to the Contracting Officer, Office of Amarillo Site Operations, she asked that immediate action be taken to raise the salaries of members of BWXT's CIU, including the complainant. That letter provides, in part

> It has come to my attention that ODNCI [Office of Defense Nuclear CI] personnel under BWXT at the Pantex Plant are under-compensated in comparison with others doing like work within ODNCI. Per recommendation made in the referenced discussion, I am writing to ask for your assistance in correcting that.
>
> . . . I have made a comparison between [compensation provided for job categories in BWXT's CIU] and that provided other ODNCI personnel in those same categories, at other NNSA sites (factoring in reasonable variations mentioned previously). Based on that comparison, and with the knowledge that our Pantex people have benefitted from recent Pantex initiated increases, I ask that you take action to immediately effect the following adjustments to their current pay:
>
> . . . CIO [the complainant's position] - increase by fifteen percent
>
> . . . I trust that BWXT Pantex shares my interest in external equitability for compensation provided to ODNCI program personnel. My office directly funds the ODNCI program at Pantex, including salaries, and we will ensure the availability of funds to sustain these changes.

March 27, 2002 letter from the Defense Nuclear CI Chief to the Contracting Officer, Office of Amarillo Site Operations, attached to the complainant's June 14, 2005 submission at p. 00018.

BWXT's former HR compensation manager testified that beginning in May or June 2001, he began looking at the salaries for BWXT's CIU, and that over the next four or five months, he and the complainant's supervisor looked at compensation for CIUs at Hanford, Savannah River, Los Alamos, and Sandia. TR at 345. He testified that

> My determination when looking at these numbers that my compensation people put in front of me was that there was room for a ten to fifteen percent adjustment for [the complainant's supervisor]. And I don't recall for [the complainant].

TR at 345. He said that in the late Fall of 2001, he informed BWXT's Deputy for HR as well as BWXT's Manager and Deputy Manager that with regard to the Pantex CIU "there's room for increase [in salaries] to bring them more in line with the rest of these [DOE

CIUs], based on our philosophy," but that the problem was, at that period of time there was no money available. TR at 351. Around the same time, he also remembers a visit from the Defense Nuclear CI Chief who said that the DOE could provide the money for comparative salary increases for the CIU. TR at 346-347 and 356. He stated that the DOE loads the money for BWXT in the January timeframe, and that it "was [BWXT's] intention at the time to give those raises." TR at 356. He indicated that the former BWXT Manager initially supported comparative salary increases for the Pantex CIU, but that he put a halt to any such increases for the CIU in early 2002. TR at 356-357. He stated that he was in former General Manager Ruddy's office in early 2002 to inform him that HR was getting ready to "load some increases and some promotional monies."

> And I remember bringing up the Counterintelligence Group, and [the former BWXT General Manager] was rather colorful in his response. And I won't go into any details as to the kinds of vernacular, but he wanted it stopped dead in the water because of a hard-drive issue, a hard-drive investigation.

TR at 358. He further testified that the former BWXT General Manager

> made the comment that he thought it, the [hard drive] investigation was getting – Careful with my words here. - out of control with regards to how he perceived things, and as a result, he was going to work to ruin [the former Senior CIO].

He also recalled that the former BWXT General Manager stated on a couple of occasions that increased compensation for the CIU was "not going to happen". TR at 358. He stated that in the March-April 2002 timeframe, the former BWXT Manager asked him if he was required to accept the offer of the Defense Nuclear CI Chief to provide additional monies for the salaries of the Pantex CIU. The former HR compensation manager stated that he told him that it was highly unusual for the DOE

> to look at a contractor and to determine what those salary determinations should be, because we make those salary determinations based on salary studies, and [they] are determinations based across the [DOE] complex.

TR at 366. Nevertheless, he testified that he told the former BWXT Manager that "it is probably politically astute to make payment and move forward." TR at 366.10/

Finally, BWXT's current Compensation Manager testified that almost immediately after he arrived at the Pantex facility in March 2004, he was asked by the current BWXT General Manager to do a comparative salary analysis for the Pantex CIU. TR at 394, 409 and 425. He stated that it took him about two months to conduct this analysis. TR at 426. He indicated that after conducting the analysis, he concluded that the complainant's salary and the other CIU employee salaries were "behind market of the ones that we looked at." TR at 410. He testified that the complainant's salary was 22.8 percent behind the market average in the survey that he conducted. TR at 413.

The Compensation Manager testified that in May 2004, he presented the results of the survey to the current BWXT General Manager along with the recommendation "to go forward with increases for the Counterintelligence group." TR at 427. The BWXT General Manager approved the implementation of this plan, which was to provide initial comparative salary increases and promotions for the three individuals in the CIU in May 2004, and to continue to provide incremental comparative salary increases on an annual basis for the next three years. TR at 429. Pursuant to this plan, the complainant received an initial comparative salary increase of seven percent on May 24, 2004. TR at 430. The Compensation Manager stated that this seven percent increase "was based on the market adjustment from the information that we provided [from the comparative salary analysis]." TR at 422. Because the complainant left his position at the CIU prior to January 2005, he did not receive the next scheduled comparative salary increase for CIU employees that took place in that month. TR at 431-432.

I find that the Complainant has met his evidentiary burden of showing by a preponderance of the evidence that BWXT management took adverse action against him when it reversed its previous commitment and rejected the proposals for comparative salary increases for BWXT's CIU in 2002. The evidence indicates that the issue of comparative salary increases for BWXT's CIU had been considered by

---

10/ At the Hearing, the Defense Nuclear CI Chief stated that she was notified by the DOE that her March 2002 proposal to raise salaries for BWXT's CIU was inappropriate and had been rejected. TR at 185.

BWXT during the latter half of 2001, and that BWXT intended to raise those salaries in 2002 provided that funding was available. According to the former HR compensation manager, the plans to raise those salaries were halted in March 2002 at the specific directive of Former General Manager Ruddy because of the CIU's investigation of the missing classified hard drive. The evidence also indicates that former General Manager Ruddy ignored the advice of the former HR compensation manager when he later rejected the specific proposal by the Defense Nuclear CI Chief for DOE-funded comparative salary increases for BWXT's CIU. Accordingly, I conclude that the decision of former General Manager Ruddy to cancel plans for comparative salary increases for BWXT's CIU and later to reject the proposal for comparative salary increases offered by the Defense Nuclear CI Chief clearly are adverse personnel actions as defined in Part 708.

E. BWXT has not Shown by Clear and Convincing Evidence that it would have taken these Actions in the Absence of the Complainant's Protected Disclosures

Accordingly, the burden shifts to BWXT to show by clear and convincing evidence that it would have acted in March and April 2002 to cancel plans for comparative salary increases for BWXT's CIU and to reject a similar salary proposal from the Defense Nuclear CI Chief in the absence of the complainant's protected disclosures.

At the Hearing, BWXT's former General Manager Ruddy testified that he recalled a 2001 conversation with the Defense Nuclear CI Chief in which she stated that salaries being paid to BWXT's CIU were seriously out of line, and that he asked her to provide information on this issue. TR at 83-84. He identified the former HR Compensation Manager as the individual who "was pivotal in the administration of our performance evaluation and salary administration programs." TR at 43. However, he could recall no conversations with the former HR Compensation Manager on the subject of comparability raises for employees in BWXT's CIU. TR at 44-45. He testified that he rejected the proposal of the Defense Nuclear CI Chief to fund specific comparative salary increases for BWXT's CIU on the grounds that it was inappropriate. He stated that managing and operating contractors had a responsibility for conducting a process that insured fair compensation to their employees, and that accepting guidance from the Government would undermine that process and could lead to other groups "petitioning their customer for some special consideration." TR at 108.

He also stated that any comparability adjustment in salaries for BWXT's CIU approved by him would have been incremental, and that he

could not recall any instance where an employee of BWXT received more than a fifteen percent raise at one time. TR at 84-85.

The testimony of BWXT's former General Manager Ruddy does not convince me that BWXT would have failed to provide comparative salary increases to its CIU employees in the absence of the complainant's protected disclosures. While he provides a plausible explanation for rejecting the offer of the Defense Nuclear CI Chief to raise those salaries, it is not convincing in light of the testimony provided by the former HR Compensation Manager. As noted above, that individual testified that former General Manager Ruddy initially supported increasing salaries for BWXT's CIU employees, but that he later emphatically rejected an internal BWXT proposal for increasing those salaries because he was upset about the CIU's activities concerning the classified hard drive. The former HR Compensation Manager also stated that Former General Manager Ruddy rejected his advice when he later rejected the Defense Nuclear CI Chief's proposal. Former General Manager Ruddy cannot recall these conversations with the former HR Compensation Manager, although he acknowledged that he was "pivotal" in administering salaries at BWXT. Accordingly, under the standards of proof set forth in Part 708, I conclude that BWXT has not demonstrated by clear and convincing evidence that the decision by its former General Manager Ruddy to reject proposals for comparative salary increases for BWXT's CIU employees would have occurred in the absence of the Complainant's protected disclosures.

F. The Complainant is entitled to Relief under Part 708

I therefore will provide relief to the complainant for this retaliation. I will direct BWXT to provide the complainant with the fifteen percent comparative salary increase that he would have received if the Defense Nuclear CI Chief's proposal had been accepted. This comparative salary increase will be retroactive to May 1, 2002 and continue until the complainant's departure from his CIO position in November 2004. However, it will be offset by the seven percent comparative salary increase that he received on May 24, 2004. I also will direct BWXT to provide the complainant with interest on this retroactive salary increase and to reimburse the complainant for his reasonable litigation expenses.

VI. Conclusion

Based on the analysis presented above, I find that the complainant made two disclosures protected under Part 708, and that one or more of these protected disclosures were contributing factors to adverse

personnel actions taken by BWXT against him. Furthermore, I find that BWXT has not shown by clear and convincing evidence that it would have rejected proposals in 2002 to provide a comparative salary increase to the complainant in the absence of his protected activity.

Accordingly, the complainant is entitled to the remedial action ordered below.

It Is Therefore Ordered That:

(1) The Request for Relief filed by the complainant under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) BWXT shall make payment to the complainant of a sum equal to the fifteen percent comparative salary increase that he would have received if the Defense Nuclear CI Chief's March 2002 proposal had been accepted and implemented. This increase will be calculated on a monthly basis for the period from May 1, 2002 until the complainant's departure from his CIO position in November 2004. However, this comparative salary increase will be offset by the seven percent comparative salary increase that he received in the months following May 24, 2004. BWXT also shall pay interest on this monthly salary adjustment at the rate of one percent simple interest per month from the date that the money would have been received until the date that the money is actually paid to the complainant.

(3) The complainant shall produce a report that provides information on his litigation expenses. BWXT shall produce a report that provides information on the salary adjustment and interest calculation ordered in paragraph (2) above. These reports shall be completed in accordance with the Appendix.

(4) BWXT shall pay the complainant's litigation expenses. The amount of this payment shall be in accordance with the report specified in paragraph (3) above.

(5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the complainant

relief unless, within 15 days of receiving this decision, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: October 27, 2005

APPENDIX

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order: reinstatement; transfer preference; back pay; and reimbursement of reasonable costs and expenses; and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36.

As discussed in my initial agency decision in this matter, the complainant is entitled to remedial action from BWXT in the form of a retroactive salary adjustment with accrued interest. A portion of this remedial action consists of reimbursing the complainant for litigation expenses that he incurred. Accordingly, in order to implement this remedy, I am directing the complainant and BWXT to make certain calculations and to serve them on each other within 30 days of the date of this order. I then have provided for a negotiation period between the parties and for the filing of final reports on remedial calculations. In the event of an appeal, the parties shall follow the negotiating and reporting steps set forth below unless those requirements are specifically stayed by an appropriate official.

A. The Complainant's Calculations

Within 30 days of this order the complainant shall provide BWXT with a calculation of attorney fees and out of pocket litigation expenses incurred by the complainant with respect to this Part 708 complaint. The complainant and his legal counsel shall provide reasonable information supporting their claims for fees and out of pocket litigation expenses.

B. BWXT's Calculations

Within 30 days of this order, BWXT shall provide the complainant with a calculation of the monthly salary adjustment [May 2002 through November 2004]. It also shall calculate the simple interest that has accrued using a rate of one percent a month.

C. Negotiation Period

The parties will have ample time up to sixty days from the date of this order to discuss and negotiate any disputes regarding these calculations. During that period I expect that both parties will

provide reasonable information to facilitate the other party's understanding of the calculations.

D. Final Report

Seventy days from the date of this order the complainant and BWXT shall provide reports containing a summary calculation to each other and to the Office of Hearings and Appeals. The complainant and BWXT shall describe in detail any matters that remain in dispute. The parties will have 15 days from the date of that report to submit responses to these final reports.

November 7, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Curtis Broaddus

Date of Filing: April 29, 2005

Case Number: TBH-0030

This Decision concerns a whistleblower complaint that Mr. Curtis Broaddus (the complainant) filed under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant is an employee of BWXT Pantex (BWXT), the management and operations contractor at the DOE's Pantex Plant in Amarillo, Texas. The complainant contends that he made a number of disclosures that are protected under Part 708, and that BWXT retaliated against him for making those disclosures. According to the complainant, BWXT reprisals against him included the withholding of salary increases, disparaging remarks, verbal threats, unwarranted reprimands, improper releases of personal information, reassignment of some of the responsibilities associated with his position, and reassignment of line of management reporting, that is, changing his status from a direct report to the manager to one who reports to the deputy manager. As relief from these alleged retaliations, the complainant seeks back pay, reinstatement to his former position or, in the alternative, preference to transfer to another suitable position, and reimbursement of all reasonable costs and expenses, including attorney fees. After considering all the submissions by the parties and all the testimony received at the hearing held on this matter, I have concluded that the complainant has not made a disclosure protected under Part 708 and, therefore, is not entitled to relief.

I. Background

A. The Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that

they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1), (3). Employees of DOE contractors who believe that they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an evidentiary hearing before an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

1. The Report of Investigation

On August 13, 2004, the complainant filed a whistleblower complaint with the Office of Employee Concerns at the National Nuclear Security Administration (NNSA) Service Center in Albuquerque, New Mexico. After receiving comments from BWXT in response to the complaint, that office transmitted the complaint to the OHA, together with the complainant's request that the OHA Director appoint an investigator to examine his allegations, and a hearing officer to conduct an administrative hearing regarding the complaint.[1]

After interviewing numerous witnesses, including attorneys representing the complainant and BWXT, and reviewing documents submitted by both parties, the investigator issued her Report of Investigation on April 29, 2005.[2] In that Report, the investigator addressed each of 14 protected disclosures the complainant alleged he had made and each of ten acts of retaliation he alleged BWXT had perpetrated. She declined to investigate a number of the issues the complainant raised, explaining that, in her opinion, they were not actionable under Part 708.

---

[1] The OHA Director assigned this case and a companion case, regarding a Part 708 complaint filed by the complainant's subordinate, Clint Olson, to the same investigator. While recognizing that some of the issues were common, the investigator issued discrete Reports of Investigation for Mr. Broaddus and Mr. Olson.

[2] In making his or her findings in an initial agency decision, the hearing officer may rely upon, but is not bound by, the report of investigation. 10 C.F.R. § 708.30(c).

As for those concerns that she did investigate, the investigator found that the disclosures that the complainant alleged he made fell into three groups. The first group concerned BWXT's handling of the discovery that a computer hard drive that may have contained classified information was not accounted for (the 2002 Incident). The investigator concluded that the complainant had indeed made disclosures about his concerns regarding the 2002 Incident, but he had not established by a preponderance of evidence that he reasonably believed that his disclosures revealed a substantial violation of law, rule, or regulation. The second group of alleged protected disclosures concerned claims that BWXT was abusing or misusing the Personnel Assurance Program (PAP) when it temporarily suspended the complainant's PAP certification. The investigator determined that none of the complainant's disclosures in this area were "protected disclosures," some because they lacked sufficient specificity to have been interpreted by the listener as disclosures, and others because the facts in the record did not support his claims of impropriety and retaliation. As for the third area of alleged protected disclosures, which consisted of a letter from the complainant's attorney to the president and chief executive officer of BWXT's parent company, the investigator found that the information contained in the letter was too general and too vague to constitute a protected disclosure for the purposes of this proceeding.

The investigator then assessed each of BWXT's alleged actions that the complainant contended were retaliations against him for making disclosures protected under Part 708. Because I have concluded that Mr. Broaddus has not made a disclosure protected under Part 708, her determinations regarding his allegations of retaliations are not relevant to my decision here, and I will not address that portion of the Report of Investigation.

2. Motion to Dismiss

I asked the parties to brief two jurisdictional matters in advance of the hearing: whether the complaint was filed beyond the 90-day deadline established in 10 C.F.R. § 708.14, and whether the Department of Labor has addressed the same issues as Mr. Broaddus has raised in this complaint in such a manner that the complaint should be dismissed, as provided in 10 C.F.R. § 708.15. In its prehearing brief, BWXT argued that both matters were appropriate grounds for dismissing Mr. Broaddus's complaint.

It is well settled that a Motion to Dismiss in a 10 C.F.R. Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact on a more complete record. *Sandia Corp.,* 27 DOE ¶ 87,533 (1999); *Lockheed Martin Energy Systems, Inc.*, 27 DOE ¶ 87,510 (1999) (*Lockheed*); *EG&G Rocky Flats*, 26 DOE ¶ 82,502 (1997) (*EG&G*). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely ordered it. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994). To be successful, the movant, in this case BWXT, must show that the "complaint is untimely" or that the complainant filed a complaint under Part 708 and also pursued a remedy "under State or other applicable law with respect to the same set of facts." 10 C.F.R. § 708.17(c)(1),(3). Under the circumstances presented to me before the hearing, BWXT did not meet that burden. I could not find clear and

convincing grounds for dismissal. Both bases for dismissal depended on facts that were not sufficiently developed to support granting the motion for dismissal.[3]

Moreover, even after considering the additional, conflicting evidence produced at the hearing concerning the timeliness of Mr. Broaddus's complaint, I cannot find that there are clear and convincing grounds for dismissing his complaint for lack of timeliness. I therefore deny BWXT's motion to dismiss Mr. Broaddus's complaint. Without deciding whether his complaint was in fact filed in a timely manner, I will assume so for the sole purpose of permitting the analysis of the elements of the complaint set forth below.

3. Scope of the Hearing

At the prehearing conference, counsel for Mr. Broaddus stated that he would be focusing his efforts on only one group of protected disclosures that had been alleged in the complaint: those that the complainant made regarding the allegedly improper handling of, and investigation into, the destruction of a classified hard drive in 2002. He further stated that he would not be addressing the other alleged protected disclosures enumerated in the complaint. I permitted the complainant to address a second set of alleged protected disclosures, those related to alleged misuse of the Personnel Assurance Program, at the hearing. Tr. at 16. Such testimony was not received. I will therefore not address any allegations of protected disclosures, other than those that the complainant made regarding the allegedly improper handling of, and investigation into, the destruction of a classified hard drive in 2002.

At the start of the hearing, I dismissed all allegations of retaliation except for the following six: (a) BWXT's withholding of salary increases from Mr. Broaddus; (b) verbal threats that Dennis Ruddy, BWXT General Manager, made to the complainant; (c) a formal reprimand for an on-site traffic violation; (d) improper disclosure of private information during a Potentially Disqualifying Information meeting; (e) reassignment of the complainant's responsibilities under the Human Reliability Program; and (f) a change in line of reporting such that the complainant no longer reported directly to the General Manager but rather to the Deputy General Manager. Tr. at 16.

---

[3] BWXT also argued that dismissal was appropriate because the complainant had failed, in its estimation, to establish *prima facie* (i) that he made a protected disclosure, BWXT Prehearing Brief at 9-11, (ii) that he reasonably believed his disclosure related to a substantial violation of a law, rule, or regulation, *id.* at 11-15, and (iii) that BWXT's alleged actions constituted retaliations cognizable under Part 708. *Id.* at 15-18. These arguments for dismissal fail as well for the same reason. A Part 708 hearing is the appropriate vehicle for full development of facts that may have been only partly unearthed during the investigation stage.

4. Witnesses at the Hearing

The following witnesses appeared at the hearing on behalf of the complainant:

Curtis Broaddus, the Complainant, Senior Counterintelligence Officer for BWXT from 1998 to November 2004

Bradley Beman, a Special Agent of the FBI, assigned to the Pantex site from October 2003 through the date of the hearing

Catherine Sheppard, Chief of the NNSA's Office of Defense Nuclear Counterintelligence in Washington, D.C.

Don Clinton Olson, a subordinate of Mr. Broaddus who worked in the BWXT Office of Counterintelligence from July 1999 to November 2004

John Merwin, Compensation Benefits and Employment Manager for BWXT from April 2001 to April 2003

Richard Frye, Compensation Manager for BWXT from March 2004 through the date of the hearing

Darlene Holseth, Senior Counterintelligence Officer for BWXT from November 2004 through the date of the hearing

Roxanne Steward, Former Manager of BWXT's Safety, Security and Planning Department

Sharon Armontrout, Personnel Assurance Program (later Human Reliability Program) Coordinator for BWXT

The following witnesses appeared at the hearing on behalf of BWXT:

Dennis Ruddy, General Manager of BWXT from February 2001 to January 2003

Mike Mallory, Deputy General Manager of BWXT from February 2001 to January 2003 and General Manager from February 2003 through the date of the hearing

Gary Wisdom, DOE Assistant Site Manager for Safeguards and Security at Pantex

Alexander Paul Sowa, Deputy Manager of BWXT's Safeguards and Security Division from February 2001 through the spring of 2003, and Manager of that division from the spring of 2003 through the date of the hearing

II. Findings of Fact

In this section, I will lay out the evidence received in this proceeding that has permitted me to determine facts, events and circumstances surrounding Mr. Broaddus's alleged disclosures. Although I also received evidence concerning BWXT's alleged acts of retaliation, I will not address this evidence. Because I find that Mr. Broaddus did not make a disclosure that was protected under Part 708, I need not consider actions taken allegedly in retaliation for a protected disclosure.

A. The Disclosures to BWXT and DOE Officials

Mr. Broaddus testified at the hearing that he made a series of disclosures to BWXT managers regarding the 2002 Incident, that is, BWXT's discovery and subsequent investigation of the unaccountability of a classified hard drive. According to his testimony, he first notified NNSA's Defense Nuclear Counterintelligence Office in Washington, D.C., that he was opening a preliminary inquiry. Tr. at 241. Unable to reach BWXT General Manager Dennis Ruddy after he had reviewed the incident and the ensuing security infraction report, dated February 22, 2002, Mr. Broaddus spoke with Gary Wisdom of DOE Security, an FBI contact, and Carl Durham, the manager of the BWXT Engineering Department. Tr. at 244-45. He expressed his concerns to them, specifically that he had reached the following conclusions: (1) that there had been gross negligence in failing to protect the hard drive, (2) that BWXT Security had made certain statements in the report that were not factually accurate, in that they indicated that the hard drive had been destroyed when it was not clear that it had in fact been destroyed, and (3) that the gross negligence and the factual inaccuracies were violations of law. Tr. at 245-46, 249.[4] On the day Mr. Ruddy returned to the office, according to Mr. Broaddus's testimony, he met first with Mr. Ruddy alone to brief him. Later the same day Mr. Broaddus met with Mr. Ruddy, Mr. Mallory, and John Noon, the Manager of BWXT's Safeguards and Security Division, and set forth his concerns. Tr. at 248-50. A few days later, Mr. Broaddus also met with Roxanne Steward, and expressed his concern that there could be a violation of law arising from the same matters he raised with the other managers. Tr. at 251-52.

Mr. Broaddus stated, both during his investigation and at the hearing, that the law that he believed was being violated was 18 U.S.C. § 793(f), which reads, "Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or

---

[4] The Report of Security Incident/Infraction states in pertinent parts: "Nature of incident: Accountable Secret RD hard drive containing Sigmas 1 and 15 was destroyed without proper documentation or witness." and "Details of incident: . . . . During the investigation, records were retrieved to support the degaussing and to confirm proper destruction methods for classified information had been applied. It was determined that no compromise of classified information had occurred." Exhibit W.

destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer shall be fined under this title or imprisoned not more than ten years, or both." *See, e.g.*, Tr. at 236-37.

Mr. Olson testified that summaries of Mr. Broaddus's meetings with Mr. Ruddy, Mr. Mallory, Mr. Noon, and Ms. Steward appeared in the BWXT Counterintelligence Office's file concerning this matter. Tr. at 333-40. He also testified that he was present at the meeting between Mr. Broaddus and Ms. Steward, during which he told Ms. Steward that they were concerned that the security incident report's conclusion that there was no compromise of classified information constituted "false and misleading statements . . . that could be [a] violation of law." Tr. at 281, 290.

Mr. Ruddy testified at the hearing that he first learned that BWXT's Counterintelligence Office had opened an investigation into the 2002 Incident from a source in the federal government. Tr. at 42. He stated that he was dissatisfied with the communication he was receiving from the Counterintelligence Office, because he had expected that he would first learn of such an investigation from that office, rather than from an outside source. Tr. at 42-43, 91, 105, 109, 110. He also stated that he made that expectation known to Mr. Broaddus. Tr. at 43. He recalled meeting with Mr. Broaddus only once regarding this matter. While he did not recall the content of the discussion at that meeting nor whether others were in attendance, he did recall that Mr. Broaddus "communicated to me, in my mind a little belatedly, that he had opened a CI investigation in the matter. . . . The issue was not whether he had opened an investigation. The issue in my mind at that point was that he had not communicated that to me." Tr. at 48-49.

Ms. Steward could not recall meeting with Mr. Broaddus and Mr. Olson regarding their concerns over the 2002 Incident. Tr. at 592. She did, however, state that in March of 2002 she was aware of their concerns, but she was unsure whether she learned of them from Mr. Broaddus and Mr. Olson directly, or from others. Tr. at 594.

At the hearing, Mr. Mallory testified that he first met with Mr. Broaddus regarding the 2002 Incident in late 2003 or 2004. Tr. at 115. By that point, he had become the General Manager of BWXT at Pantex, the 2002 Incident had been considered by a number of agencies including the FBI and, on the basis of internal recommendation, BWXT had determined it would change the conclusion of its own incident investigation from one that stated that no information had been lost to one that stated that any loss of information was highly improbable. Tr. at 116-17. He had no recollection of meeting with Mr. Broaddus in February or early March of 2002. Tr. at 136. He recalls first becoming aware of Mr. Broaddus's concerns regarding the 2002 Incident in August or September of 2002. Tr. at 114.

Catherine Sheppard testified that Mr. Broaddus had notified NNSA's Defense Nuclear Counterintelligence Office that "there had been a report of a missing hard drive." Tr. at 187. As a result, that office opened a file on the matter on February 22, 2002, the date

the report was issued. Ms. Sheppard's office conducted a preliminary inquiry into the facts surrounding the destruction of the hard drive "to determine if there was a reason to truly open a Counterintelligence investigation in this matter." Tr. at 187. She explained that, in order to open such an investigation, an inquiry must be conducted to determine whether there was a loss of classified information, and whether there was a foreign nexus. Tr. at 189. After reviewing the facts, her office determined that there did not appear to be a loss of classified information, but rather an accountability problem. *Id.* Furthermore, it found that no foreign nexus existed, and closed the preliminary inquiry on March 19, 2002. Tr. at 188. In her interview with the investigator, Ms. Sheppard confirmed that Mr. Broaddus had complained to her that BWXT had failed to protect classified information in connection with the 2002 Incident. Report of Investigation at 8.

It is clear from the summary of this evidence that there are factual inconsistencies regarding the circumstances in which Mr. Broaddus disclosed his concerns about the possible mishandling of a classified hard drive and possible misstatements contained in a BWXT security incident report. Nevertheless, there is sufficient evidence to support a finding that Mr. Broaddus disclosed those concerns to his superiors at BWXT (Mr. Ruddy) and at the NNSA (Ms. Sheppard). I will next address whether he reasonably believed the concerns he disclosed to these individuals revealed a "substantial violation of law, rule or regulation," a requisite condition for the disclosures to be considered protected under 10 C.F.R. § 708.5(a)(1).

B. Reasonable Belief that Disclosures Revealed a Substantial Violation of Law, Rule or Regulation

In many documents and at many points during the hearing, Mr. Broaddus has asserted his belief that his disclosures to BWXT managers and to the NNSA revealed violations of law. He has maintained throughout the proceeding that BWXT's "failure to protect classified information" and "failure to accurately report the compromise of classified information" represent substantial violations of law, rule, or regulation. *E.g.*, Complaint at Paragraph 33(D). He testified that he believed gross negligence was the cause for the mishandling of the hard drive's destruction. Tr. at 245. He further testified that there was no factual basis for the conclusion in BWXT's security incident report that the hard drive had in fact been destroyed rather than lost. Tr. at 236-38. Mr. Broaddus testified that the mishandling of the hard drive and the incorrect conclusion in the report are violations of 18 U.S.C. § 793(f)(1) and (2). Tr. at 235-36. He maintained this position even though both the NNSA Defense Nuclear Counterintelligence Office and the FBI closed their investigations, concluding that no violations of law occurred. Tr. at 268, 271. As an explanation for arriving at a different conclusion than the FBI, Mr. Broaddus stated, "The FBI actually was able to look into the, the situation at more depth than I did. They had more authority to go look deeper than what I did. My conclusion was based on what I knew at that time, and what I know to date." Tr. at 272.

Other witnesses at the hearing testified regarding whether those actions constituted violations of that statutory provision. Darlene Holseth, who succeeded Mr. Broaddus as BWXT's senior counterintelligence officer at Pantex, provided background on the scope

of concerns of a counterintelligence office. She testified that counterintelligence's concerns are espionage, sabotage, assassination, and international terrorist activities. Tr. at 468. If, in investigating an incident, the counterintelligence staff believes there is foreign nexus or a criminal act has occurred, then it is referred to the FBI or other investigatory agencies. *Id.* Ms. Holseth stated that the counterintelligence file on the 2002 Incident made no reference to foreign nexus other than that they were "looking into it," and no reference to a criminal violation. Tr. at 447. After reviewing that file, she concluded that a person in her capacity could not reasonably believe that a criminal act or violation of the federal espionage act had occurred. Tr. at 470. She stated that she had seen no evidence of gross negligence on the part of the individuals who were cited for security infractions as a result of the 2002 Incident. Tr. at 471. It appeared to her instead that the hard drive was in fact destroyed, but that the paperwork documenting the destruction had not been completed. Tr. at 455. Ms. Holseth was also asked to comment on the conclusions the responsible official reached in the Inquiry Summary Report concerning this incident. Specifically, she was referred to portions of the report and summary, in which the official concluded that no compromise of classified information had occurred and that no violation of law appeared to have occurred. Tr. at 472-74. When asked whether there could be a reasonable argument that those statements of the official constituted willful false statements from a counterintelligence perspective, Ms. Holseth responded that they could not, because those statements were opinions. Tr. at 475-76. She also pointed out that the 2002 Incident was determined to have been caused by security infractions rather than by security violations, and stated she was unaware of any infractions leading to criminal cases in her five-year experience with the DOE. Tr. at 478. In light of her training and experience as a counterintelligence officer, and the fact that Mr. Broaddus never mentioned any violation of a statute in his numerous entries in the counterintelligence file regarding the 2002 Incident, her opinion was that Mr. Broaddus could not reasonably have believed that a violation of law occurred. Tr. at 479-80.

Bradley Beman, an FBI employee assigned to the Pantex site in October 2003, testified that his office looked into the facts concerning the 2002 Incident to determine whether any criminal prosecution should follow the mishandling of the hard drive, under the Espionage Statutes at 18 U.S.C. § 793. Tr. at 154-57. The FBI's concern was that the responsible official concluded that the hard drive's destruction was confirmed, but that there was no supporting documentation definitively showing that the hard drive had been destroyed. Tr. at 158. The FBI ultimately concluded that, while there was no documentation that the hard drive had been destroyed, there was no evidence to the contrary, and "[t]herefore, we have no reason to conclude anything other than the Inquiry Report, other than that it was destroyed." Tr. at 161. The FBI made no referral for prosecution, not finding any evidence of foreign nexus or gross negligence. Tr. at 168-69, 171.

Catherine Sheppard testified, as discussed above, that the Defense Nuclear Counterintelligence Office opened a preliminary inquiry of the 2002 Incident. Finding no evidence of loss of classified material, no gross negligence and no foreign nexus, the

office closed its inquiry, ascribing the cause of the problem to lack of proper accountability measures.

Alexander Paul Sowa testified that he has extensive experience in security matters, including many years as the manager of Pantex's security force, following a military career that included infantry, military police and counter-terrorism experience. After he became manager of BWXT's Safeguards and Security Division in the spring of 2003, he held a meeting with Mr. Broaddus and Mr. Mallory regarding the 2002 Incident. Tr. at 551. Mr. Mallory, as general manager, asked Mr. Sowa to conduct an independent review of the February 2002 inquiry into that incident. In his interview with the OHA investigator, Mr. Sowa stated that Mr. Broaddus did not express any concern that BWXT had violated any law, including any espionage law codified in Title 18 of the United States Code. Report of Investigation at 10. After completing his review of the inquiry and the ensuing security incident report, Mr. Sowa recommended to Mr. Mallory that the report's conclusion that "Loss/Compromise did not occur" be changed to "Probability of compromise is remote." Tr. at 551. He made this recommendation because BWXT could not establish with 100% certainty that the particular hard drive at issue had in fact been degaussed, though he was "99.5% certain it occurred." Tr. at 553. When questioned by counsel at the hearing, Mr. Sowa stated that there was nothing he found in his review of the incident that would indicate the existence of foreign nexus or involvement in the matter or gross negligence in the handling of the hard drive destruction. Tr. at 564. He also stated that he found no indication that the BWXT security incident report contained willful false statements. *Id.* When asked, based on his experience in counterintelligence, whether he could reasonably believe that a trained counterintelligence professional would have interpreted any of the actions associated with the 2002 Incident as criminal violations, Mr. Sowa responded, "No." Tr. at 563.

Gary Wisdom testified that he has 30 years of experience in safeguards and security matters, including counterintelligence. Tr. at 493. His office, the DOE Office of Safeguards and Security at the Pantex site, received and evaluated BWXT's security incident report concerning the 2002 incident. Tr. at 494-95. Its review of the report, which was independent of BWXT or any other agency, led it to conclude that the content and the analysis of the report was good, but the conclusion was overstated in stating that there was no possibility that disclosure of classified information had occurred. Tr. at 495, 499. His office concluded that "BWXT personnel failed to follow proper procedure in the destruction of the hard drive." Tr. at 495. Mr. Wisdom testified that he felt BWXT had properly identified the severity of the security concern as an incident of security infraction rather than security violation. Tr. at 497. He further testified that he did not find any evidence of foreign nexus or gross negligence involved in the 2002 Incident. Tr. at 503. Defining "gross negligence" as requiring willful disregard, he believed that the individuals charged with security infractions failed to follow procedures, but did not act in a manner that demonstrated willful disregard or negligence. Tr. at 510. He stated that the report's overstated conclusions did not constitute willful false statements on the part of the responsible official. Tr. at 504. The following exchange then took place:

> Q. Would someone with a background in security or counterintelligence matters, in your opinion, have reasonably arrived at a conclusion that a violation of law had occurred?
>
> A. There's no violation of law. I cannot understand why anyone would, would think that.

Id. Finally, when asked whether, during his oversight of handling of the 2002 Incident between February 2002 and the day he was testifying, anyone at Pantex had described the matter as involving a "serious potential violation of law," Mr. Wisdom answered, "No." Tr. at 527-28.

III. Analysis

A. Legal Standards Governing This Case

The obligations on each of the parties to this proceeding are established in the governing regulations. First, the employee who files the complaint has the burden of establishing by a preponderance of the evidence (1) that he or she made a disclosure, participated in a proceeding, or refused to participate, as described in § 708.5 of the regulations, and (2) that that action was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. If the employee meets this burden, the burden then shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal. *Id.* Accordingly, in the present case, if Mr. Broaddus establishes that he made a protected disclosure, and that disclosure was a factor that contributed to any of the retaliations he alleges BWXT has made, he is entitled to relief unless BWXT convinces me that it would have taken the same actions even if he had not engaged in any activity protected under Part 708.

It is therefore my task, as the hearing officer, to weigh the sufficiency of the evidence presented by Mr. Broaddus and BWXT in this proceeding. Preponderance of the evidence, the burden applied to Mr. Broaddus's evidence, has been defined as proof sufficient to persuade the finder of fact that a proposition is more likely true than not. McCormick on Evidence, § 339 at 439 (4th Ed. 1992). Clear and convincing evidence, which BWXT must provide in order to prevail against those claims for which Mr. Broaddus has met his burden, has been described as that evidence sufficient to persuade a trier of fact that the truth of a contested fact is "highly probable." *Id.*, § 340 at 442. This latter burden is clearly more stringent than the former.

Some additional terms contained in § 708.29 require amplification. Section 708.5, referred to above, defines what constitutes employee conduct that is protected from retaliation by an employer. The portions of that provision that are pertinent to Mr. Broaddus's complaint require that an employee file a complaint that alleges that he has been subject to retaliation for disclosing, to a DOE official or his employer, information that he reasonably believes reveals a substantial violation of a law, rule, or regulation.

10 C.F.R. § 708.5(a)(1). We have found, in earlier cases, that a complainant's reasonable belief should be assessed objectively. *See, e.g., Frank E. Isbill*, 27 DOE ¶ 87,529 at 89,152 (1999). The complainant must show that his disclosure described a matter that a reasonable person in his position with his level of experience could believe revealed a substantial violation of law, rule, or regulation. *Id.*

B. The Disclosures

10 C.F.R. § 708.5 defines the type of employee activity that is protected from retaliation by an employer. In pertinent part, it provides that "you may file a complaint alleging that you have been subject to retaliation for (a) disclosing to a DOE official . . . [or] your employer . . . information that that you reasonably believe reveals (1) a substantial violation of a law . . ." In addition, 10 C.F.R. § 708.29 states that the complainant has the burden of establishing, by the preponderance of the evidence, that his disclosures meet the requirements established in 10 C.F.R. § 708.5. Therefore, if Mr. Broaddus has shown that his disclosures regarding the 2002 Incident meet those requirements, he will have established that he should be protected from any resulting retaliation taken against him by BWXT.

Mr. Broaddus has clearly shown by a preponderance of the evidence that he made disclosures concerning the 2002 Incident to a DOE official or to his employer. Both Mr. Broaddus and Ms. Sheppard, a DOE official, testified that Mr. Broaddus disclosed his concerns to her. Mr. Broaddus testified that he disclosed his concerns to Mr. Ruddy, Mr. Mallory, Mr. Durham, Mr. Noon and Ms. Steward, all members of BWXT management, and to Mr. Wisdom of DOE. Mr. Olson testified that he was present at a meeting in which Mr. Broaddus related his concerns to Ms. Steward. Mr. Ruddy, Mr. Mallory, and Ms. Steward could not recall whether Mr. Broaddus had communicated his concerns directly to them, but each acknowledged that he or she was aware of those concerns. In any event, Mr. Broaddus has established that he made a disclosure regarding the 2002 Incident to Ms. Sheppard.

A great deal of testimony at the hearing reflected the opinions of security and counterintelligence professionals about whether the 2002 Incident involved a substantial violation of 18 U.S.C. § 793(f).[5] In his complaint, Mr. Broaddus alleged that that statute

[5] In his complaint, Mr. Broaddus also claimed that he disclosed to "his employer that compliance with [its] expectation to notify [it] of investigations prior to outside agencies violated . . . § 811 [of the] Intelligence Authorization Act" of 1995. Complaint at Paragraph 33(A). He contended that in February 2004 he refused to brief Mr. Mallory, then BWXT General Manager, about an FBI investigation arising from the 2002 Incident because he believed that he might be subjected to criminal prosecution if he did. Complaint at Paragraph 33(L). Interviews conducted during the investigative stage of this proceeding yielded inconclusive evidence regarding whether Mr. Broaddus could have reasonably believed that compliance with BWXT management's request for information constituted a violation of § 811. ROI at 11-12. Mr. Broaddus did not develop any additional evidence at the hearing or in his submissions to me that supported this claim. I find that Mr. Broaddus has not met his burden of establishing by a preponderance of the evidence that he reasonably believed his disclosures relating to the 2002 Incident revealed a substantial violation of § 811 of the Intelligence Authorization Act of 1995.

was violated because there was gross negligence in the potential loss of classified information when the classified hard drive's destruction was not properly documented, and because the ensuing security incident report willfully concealed that a potential loss of classified information may have occurred. The issue before me at this juncture is whether Mr. Broaddus reasonably believed his disclosures revealed a substantial violation of law.

Mr. Broaddus testified that he believed gross negligence was the cause for the mishandling of the hard drive's destruction, in violation of 18 U.S.C. § 793(f)(1). He also testified that there was no factual basis for the conclusion in BWXT's security incident report that the hard drive had in fact been destroyed rather than lost, and that that conclusion constituted a violation of 18 U.S.C. § 793(f)(2). Although Mr. Broaddus has consistently asserted these beliefs since he filed his complaint in August 2004, he has not offered any convincing support. When questioned how he maintained that belief even after he learned that the FBI had determined that no violations had occurred, he responded that the FBI may have had access to more information than he did. He did not dispute the FBI's conclusion in any way. His failure to articulate a rationale for personally believing that violations of law occurred raises doubt in my mind as to the credibility of his belief. Moreover, there is evidence that Mr. Broaddus's contemporaneous notes to the counterintelligence file concerning the 2002 Incident contain no mention of violation of law. The absence of reference to violation of law in contemporaneous notes that otherwise appear to be detailed and complete leads me to question whether Mr. Broaddus truly held such a belief at the time he created those notes. Indeed, he may well have imposed that belief onto his disclosures at a later stage of this proceeding.

Additional evidence gathered at the hearing supports a conclusion that Mr. Broaddus's alleged belief that violations of law had occurred was not reasonable. The NNSA Defense Nuclear Counterintelligence Office closed its preliminary inquiry into the matter without opening an investigation, because it found neither foreign involvement nor the gross negligence necessary to support a criminal violation. The FBI investigation into the matter was closed for similar reasons. Finally, Ms. Holseth, Mr. Sowa, and Mr. Wisdom testified they did not believe there was a substantial violation of 18 U.S.C. § 793(f) involved in the 2002 Incident. Each of these individuals has a solid background in counterintelligence, and Ms. Holseth succeeded Mr. Broaddus as senior counterintelligence officer. Each of them further expressed his or her opinion that under the circumstances of the 2002 Incident, a trained counterintelligence professional could not reasonably have believed that a criminal violation had taken place.[6]

---

[6] Mr. Broaddus focuses on the fact that the conclusion of the security incident report was ultimately changed from "Loss/Compromise did not occur" to "Probability of compromise is remote." Although this modification demonstrates that BWXT later acknowledged a possibility, however remote, that the security of the classified information may have been compromised, this modification of the report is not evidence either that gross negligence may have occurred or that false or misleading statements were made, within the purview of 18 U.S.C. § 793(f).

As discussed above, hearing officers have applied an objective standard when considering the reasonableness of a complainant's belief. The *Isbill* case stated that the complainant must show that his disclosure described a matter that a reasonable person in his position with his level of experience could believe revealed a substantial violation of law, rule, or regulation. *Frank E. Isbill,* 27 DOE ¶ 87,529 at 89,152 (1999). While Mr. Broaddus testified to his reasonable belief, other persons with similar experience, particularly Ms. Holseth, testified that such a belief would not be reasonable. Applying the preponderance-of-the-evidence standard of 10 C.F.R. § 708.29 to the evidence received on this matter, I find that Mr. Broaddus has not met his burden. He was right to insist that the Security Infraction Report concerning the missing hard drive was incorrect as originally filed. That matter received additional attention and the report was ultimately modified. Nevertheless, Mr. Broaddus has not demonstrated that it is more likely than not that he reasonably believed that his disclosures revealed a substantial violation of law.

Because Mr. Broaddus has not met his burden of establishing that he reasonably believed his disclosures revealed a substantial violation of law, his disclosures do not comport with the description of protected activity under 10 C.F.R. § 708.5. Therefore, I find that Mr. Broaddus has not engaged in activity protected from retaliation under that provision of the Part 708 regulations.

IV. Conclusion

As set forth above, I have concluded that the complainant has not met his burden of establishing by a preponderance of the evidence that he engaged in an activity protected under 10 C.F.R. Part 708. After a thorough review of the evidence offered in this proceeding, I find that although Mr. Broaddus made disclosures to at least one DOE official and to his employer, he did not reasonably believe that his disclosures revealed a substantial violation of law, rule, or regulation. Consequently, he has failed to establish the existence of any violations of the DOE's Contractor Employment Protection Program for which relief is warranted. Accordingly, I have determined that Mr. Broaddus is not entitled to the relief he has requested in his complaint.

It Is Therefore Ordered That:

(1) The request for relief filed by Curtis Broaddus under 10 C.F.R. Part 708 on April 29, 2005, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date November 7, 2006

November 2, 2007

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: **Casey von Bargen**

Date of Filing: **May 21, 2007**

Case Number: **TBH-0034**

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Casey von Bargen (also referred to as the complainant or the individual) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant was an employee of COMPA Industries, Inc. (COMPA), a subcontractor of Sandia Corporation (Sandia) which manages the Sandia National Laboratories (SNL) in Albuquerque, New Mexico for the DOE. On June 2, 2003, he began employment at the SNL facility as a safety engineer. On September 20, 2004, the complainant was terminated from his position. In November 2004, he filed a complaint of retaliation against Sandia with the Employee Concerns Manager of the National Nuclear Security Administration (NNSA) Service Center. In his complaint, the individual contends that he made certain disclosures and that Sandia retaliated against him in response to these disclosures.

I. Summary of Determination

In this Decision, I first provide background information concerning the Part 708 program. I then discuss the filing and the development of the issues raised in the individual's Part 708 Complaint, focusing on the Office of Hearings and Appeal's Report of Investigation and the parties' subsequent efforts to frame issues for the Hearing. I then present the relevant testimony provided at the Hearing. Next is my analysis of this complaint. With regard to the issues raised in this proceeding, I first find that the complaint was timely filed. Second, I find that the complainant made two protected disclosures prior to the alleged

retaliations that he claims. I then find that Sandia's decision to terminate the complainant from his position at SNL meets the Part 708 criteria for a retaliation but that Sandia's refusal to assist the complainant in finding a transfer position at Sandia does not meet those criteria. I next find that the complainant's termination by Sandia occurred proximate in time to the complainant's protected disclosures and that therefore the complainant has shown by a preponderance of the evidence that his termination from SNL constitutes a retaliation against him under Part 708. On the basis of that finding, Part 708 imposes the significant requirement that Sandia show by clear and convincing evidence that, in the absence of the complainant's protected disclosures, it would have taken the same personnel action against the complainant.

Ultimately, I find that Sandia has established by clear and convincing evidence that it would have terminated the complainant's employment at SNL in the absence of the complainant's protected disclosures. Accordingly, I find that the complainant is not entitled to any relief under Part 708.

II. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The purpose of this program is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices by protecting such "whistleblowers" from adverse personnel actions by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, protection against adverse personnel actions taken in retaliation against an employee for disclosing, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; or a substantial and specific danger to employees or to public health or safety. See 10 C.F.R. § 708.5(a)(l), (2). Employees of DOE

contractors who believe that they have made such a disclosure and that their employer has taken adverse personnel actions against them may file a whistleblower complaint with the DOE. As part of the proceeding, they are entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they are entitled to an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. History: The Individual's Part 708 Complaint and the Identification of Relevant Issues for the Hearing

The complainant filed his Part 708 complaint with the Employee Concerns Manager in November 2004. In June 2005, the complaint was referred to the OHA for an investigation followed by a hearing. The OHA Director appointed an Investigator on June 21, 2005. On May 30, 2006, the Investigator issued a decision denying Sandia's Motion to Dismiss the complaint. *Von Bargen, Casey (Case No. TBZ-0034)*, 29 DOE ¶ 87,009 (2006). On May 21, 2007, the Investigator issued a Report of Investigation (ROI) concerning the complaint.

In his November 2004 complaint, the individual contended that after reporting safety concerns to Sandia officials, Sandia refused to assist him in transferring to another division at SNL and then terminated his employment. November 2004 complaint at 1, 9. In the ROI, the Investigator conducted an initial factual and legal analysis of this complaint, and made some preliminary determinations concerning protected disclosures and adverse personnel actions.

The ROI finds that the complainant worked as a Sandia contractor employee at SNL in the position of a safety engineer. His duties included reviewing safety plans provided by Sandia contractors, inspecting safety equipment, and investigating safety concerns. ROI at 2.

1. ROI Findings on Disclosures

The ROI indicates that the complainant made the following two disclosures relating to an April 21, 2004 incident during which a Sandia contractor employee received a shock while working on an overhead fluorescent lighting fixture:

> **(1) in June 2004, the complainant told Carla Lamb, who at the time was the Facilities Environmental, Safety and Health (ESH) Coordinator, that locking light switches in the off position does not safely cut off power to 277 volt fluorescent lighting systems. Specifically, he told her that 29 C.F.R. § 1910.147 does not allow control devices [such as light switches] to be used as a Lock-Out Tag-Out (LOTO) point. The complainant also communicated the substance of his conversation with Ms. Lamb to his supervisor, Mr. Johnny Vaughan, in a September 14, 2004 e-mail; and**
>
> **(2) The complainant also reported to SNL management that the contractor whose employee received the shock, and 13 other contractors, did not have site-specific safety plans on file at SNL.**

ROI at 3-5.

2. ROI Findings on Retaliation

The ROI indicates that Sandia, in consultation with COMPA, took an adverse personnel action affecting the complainant when it terminated his employment at SNL on September 20, 2004. *See* ROI at 5. The ROI finds that Mr. Vaughan was the individual who made the decision to terminate the complainant. The ROI finds that Mr. Vaughan indicated that his decision to terminate the complainant was based on the complainant's poor performance at SNL. The ROI refers to a September 24, 2004 memorandum in which Mr. Vaughan explained why he believed that the complainant's workplace performance merited termination. The memorandum indicates:

> **1. That the complainant does not work well with others to arrive at solutions to problems, and reacts with a negative attitude to anyone who might suggest another way to get to the same level of safety;**
>
> **2. That when the complainant reported safety-related issues as part of his job, he expected immediate responses, and interpreted any less-than-immediate responses as "indicative of SNL's lackluster attitude toward safety ..."**

> 3. That on September 14, 2004, the complainant presented data on occupational injury and illness to a meeting of the Metal Trades Council-represented employees and the Joint Union Mgt. Council in a very condescending and unprofessional way; and
>
> 4. That the complainant frequently circumvented the work assignment system at SNL and became angry when required to repeat work when it was formally assigned to him. He reacted with insults when asked to follow the work assignment system, "calling it stupid";

ROI at 7-8 *citing* Mr. Vaughan's September 24, 2004 memorandum. The ROI also states that in an interview with the investigator, Mr. Vaughan asserted that the complainant was terminated because he seemed distracted and unhappy at SNL, because he was not a team player, and because he directed his anger at certain, female SNL employees to the extent of making sexual harassment allegations against them. ROI at 8.

Following my appointment as Hearing Officer on May 21, 2007, I directed the complainant, Sandia and COMPA to submit briefs focusing on the findings and conclusions in the ROI that they intended to dispute at the Hearing.1/ In its brief, Sandia disputes the ROI's finding that the complainant made protected disclosures. In addition, Sandia and COMPA both contend that even if the complainant made protected disclosures, they were not a contributing factor in their decision to terminate his employment. Further, they assert that the decision to fire the complainant was based on legitimate business reasons unrelated to any protected activity. Accordingly, the Hearing focused on the complainant's alleged disclosures relating to safety concerns, and on Sandia and COMPA's contention that the complainant's employment at SNL was terminated in September 2004 for reasons unrelated to any protected disclosures.

1/ In this regard, I noted that while the ROI has made certain findings, I would be conducting an independent review of the issues. In making my findings, I stated that I would be most convinced by the best available evidence. May 23, 2007 letter to the parties at 3.

III. Hearing Testimony

At the Hearing, testimony was received from twelve witnesses. The complainant testified and presented the testimony of Miriam Minton, a safety engineer with SNL's Environmental Safety and Health (ES&H) support group, and Al Bendure, a manager of Industrial Hygiene and Safety Programs at SNL. Sandia presented the testimony of Don Kerekes, a lighting systems technician, Diane Nakos, a consultant in Sandia's equal employment opportunity (EEO) department, Anthony Chavez, the Manager of SNL's Business Support Operations Department, Carla Lamb, the Facilities ES&H coordinator, Greg Kirsch, a safety engineer with the Safety Engineering Group, Gwen Germany, an analyst in the EEO department, Ann Jensen, an industrial hygienist with the ES&H support group, and Johnny Vaughan, the manager of the ES&H support group. COMPA presented the testimony of its president, Edna Lopez. 2/

As indicated in my analysis below, I find that the complainant's disclosures concerning LOTO requirements for the 277 volt lighting systems at SNL constitute protected disclosures under Part 708 that were made proximate in time to his termination. I also find that Sandia has shown, by clear and convincing evidence, that it would have terminated the complainant based on his performance and behavior in the workplace. Accordingly, my summary of relevant testimony will focus chiefly on the complainant's LOTO disclosures and his performance and workplace behavior.3/

A. The Complainant's Witnesses

1. The Complainant

The complainant testified that he has a bachelor of science degree in loss control management, industrial safety and environmental health. TR at 12. He stated that he has worked in the safety field since 1983. TR at 20. He testified that he was hired by

---

2/ The job titles refer to the positions held by these individual's during the 2003-2004 time frame.

3/ Because I find that the complainant's LOTO disclosures are protected under Part 708, there is no need for me to address in this decision whether his disclosures concerning the lack of approved safety plans for SNL contractors also are protected under Part 708.

Sandia to work as a safety engineer. He stated that he was a subject matter expert on safety-related topics.

> Our job is to cover a lot of different safety requirements. Essentially what we do is if we find something that we don't feel is our level of expertise, we go find somebody that is. I mean, we had different people in our group that were considered to be the most knowledgeable on related topics.

TR at 51. He stated that he is not a licensed electrician, and that he initially was unfamiliar with the workings of fluorescent lights and ballasts, particularly the Microlite 277 volt system. He stated that he did not initially realize that the light switch for the Microlite 277 volt system was a control volt relay into the lighting panel and that the wall switch would not completely shut off the power to the light fixture. TR at 52. After an employee received a shock while performing ballast replacement on a lighting panel on one of these systems in April 2004, he did additional research to understand the appropriate LOTO procedures for 277 volt systems. The complainant stated that he learned that while it is acceptable safety practice to deactivate a 120 volt lighting system by placing a LOTO device in the light switch, the manufacturer indicates that LOTO on a 277 volt lighting system should take place at the electrical panel. This procedure is utilized because the wall switch does not stop power from partially flowing to the lighting system. TR at 12-17.

a. The Complainant's Disclosures Concerning LOTO Procedures

The complainant testified that he raised the issue of LOTO procedures for the Microlite 277 volt lighting systems at SNL on June 17, 2004 with Ms. Lamb. He told her that the applicable Occupational Safety and Health Administration (OSHA) safety regulation at 29 C.F.R. § 1910.147 does not allow light switches to be used to perform LOTO in 277 volt lighting systems. He testified that an OSHA interpretation of Section 1910.147 issued to Mr. David Teague on July 15, 2003 indicated that it is not permissible to use control devices such as switches as a means of locking out electrical systems. TR at 19.

The complainant stated that when he advised Ms. Lamb of the OSHA requirements for LOTO on a 277 volt light system, he also told her that he had discussed this matter with Mr. Brian Drennan at SNL, and that SNL's Electrical Safety Committee wanted to have a meeting to discuss the proper LOTO on a 277 volt lighting system. The

complainant testified that Ms. Lamb then made the following statement to him.

> We are just going to violate the standard, there's not going to be any meeting and this is going to be the end of it. The only reason that it will go further is if you make it an issue.

TR at 19.

The complainant stated that after his conversation with Ms. Lamb, he raised this issue with Mr. Gary Bultman, who he identified as the high voltage electrical supervisor at SNL. He stated that he also raised the issue with Mr. Herman Gomez, the supervisor at SNL who was overseeing the work on the 277 volt lighting systems. He stated that he told Mr. Gomez

> Look, Herman. They are taking shortcuts on this stuff. We need to make sure that people are protected properly. The way it's supposed to be done is you go back to the electrical panel that actually controls the lighting panel and do the Lock-Out-Tag-Out....

TR at 24. The complainant stated that SNL continued to practice unsafe LOTO procedures for the 277 volt lighting systems through the summer of 2004. In a September 14, 2004 e-mail, Ms. Lamb indicates that SNL's "relamping/ballast folks" have been told that wherever lamp fixtures at SNL contain a fuse that deactivates the lamp's ballast, removing the fuse will serve as SNL's means of deactivating the lighting panel for purposes of replacing the ballast or other maintenance. September 14, 2004 e-mail from Ms. Lamb to Mr. Vaughan, Sandia Exhibit 5A. The complainant stated that this method for deactivating the lighting panels was not a safe method.

> If I remember correctly, [the technician who got shocked in April 2004] removed a fuse from the system. Yet, there was a wire adjacent to that that was hot. That's why he was shocked. If you do a proper Lock-Out-Tag-Out, go back to the electrical panel and do the Lock-Out-Tag-Out so there's no current shooting through the wires associated with the light fixtures.

TR at 26-27. The complainant stated that he sent Mr. Vaughan an e-mail expressing his disagreement with Ms. Lamb's instructions. This e-mail, dated September 14, 2004, reads as follows:

> **Johnny,**
> **This is rather interesting. The original issue was performing LOTO on control devices which is prohibited by 29 C.F.R. 1910.147. When I told Carla Lamb that the previous mentioned was an OSHA requirement, that there was an OSHA Letter of Interpretation prohibiting the use of a control device as a LOTO point and that the Electrical Safety Committee wanted to meet and discuss it, I was told by Carla "Well, we are just going to violate the standard, there is not going to be any meeting, and this is going to be the end of it." I found it rather bizarre that someone that is an ESH Coordinator would put someone's life at risk from electrocution, which is why I came to see you and you wrote the email response back on June 17th.**

September 14, 2004 e-mail from complainant to Mr. Vaughan, attached to Complainant's November 19, 2004 Part 708 Complaint. The complainant testified that on the same e-mail string as Ms. Lamb's instructions, there is an e-mail from Mr. John J. Thayer that confirms the complainant's concerns with using light switches and fuses to disconnect lighting fixtures for repair and maintenance. This e-mail reads in part:

> **My recommendation is that all fixture LOTO's be done at the circuit breaker level where possible, as this is the safest method. From talking with Greg Anderson, Facilities Maintenance, it is common practice to replace ballasts by removing the fixture fuse to the ballast; this is questionable, but it does disconnect the power conductors. Fuses are required in our SNL Standard 16501 for fluorescent fixtures. If this is the case, only unfused fixtures would be an issue requiring shutdown of the entire circuit at the circuit breaker. Low voltage controlled lighting fixtures without fuses must always be shut down at the circuit breaker, regardless of the type of switch used.**

June 17, 2004 e-mail from John J. Thayer, the electrical engineer who represented Sandia's Facilities Division on SNL's Electrical Safety Committee 4/, regarding "Light Switch LOTO", Sandia Exhibit 5B.

4/ *See* testimony of Ms. Lamb, TR at 223.

The complainant testified that he considered proper LOTO procedures for the 277 volt lighting system to be a "very serious" safety matter.

> **It doesn't take a lot of electricity to kill somebody. If there's one person who has already been shocked on it. If you don't do Lock-Out-Tag-Out properly, you can be killed by it. To me this is very serious. I have been in the safety field since 1983 in various forms of safety, and [Ms. Lamb's comments] to me meant it's time for me to go to [Human Resources] to talk about this.**

TR at 20. The complainant also testified that he received an e-mail from Microlite, the manufacturer of the 277 volt lighting system, that stated that LOTO for these lighting panels should take place at the electrical panel that controls the lighting.5/

b. The Complainant's workplace behavior and performance

The complainant testified that when he was employed at the DOE's Hanford site in about 1994, he became sensitized to issues concerning inappropriate workplace behavior because a female manager, tried to pinch and touch him in inappropriate ways. He stated that, as a result of this behavior, he quit his job at Pantex and transferred out of the area. TR at 36-37. He stated that he later worked at the DOE's Pantex plant in Amarillo, Texas. He testified that while working at Pantex, he was bothered by a female employee who

> **seemed to think it was acceptable to come and hang out in my cubicle and make comments, things that I just thought, "Just go away. If it's business related I will be more than happy to talk to you about it."**

TR at 37.

The complainant testified that when he worked at SNL as a general safety engineer, his supervisor was Mr. Vaughan, but that he also was supplying safety information to staff members of Sandia's Facilities Division, and that operation was headed by Ms. Lamb. TR

5/ These E-mail messages, dated June 1, June 3, and July 20, 2004 between Mr. Steve Jaskowiak at microlite.net and the complainant, are attached to the complainant's November 19, 2004 Part 708 Complaint.

at 50. He stated that his working group supplied expert advice to Ms. Lamb on health and safety issues.

> Essentially what we do is if we find something that we don't feel is our level of expertise, we go find somebody that is. I mean, we had different people in our group that were considered to be the most knowledgeable on related topics.

TR at 51. He stated that his area of expertise was safety related to facilities maintenance, while Mr. Kirsch handled construction safety issues and Ms. Jensen covered industrial hygiene. TR at 53.

The individual testified that while he was working at SNL, he had three angry outbursts while he was making personal telephone calls from his work cubicle during his lunch hour. TR at 72-75. He stated that on one of these occasions, he apologized to people working nearby because he had used profanity. TR at 73. He stated that he could not recall referring to his Sandia facilities customers as idiots after speaking to them on the telephone, although he admitted that he may have "muttered something under by breath" following telephone conversations. TR at 74.

The individual stated that in early 2004 he filed a complaint against a female co-worker in the safety group who interacted with him on hygiene and safety issues. TR at 78. He stated that he was uncomfortable with the way that she pressed against him when he showed her information on his computer screen. TR at 78. He stated that on another occasion, he was uncomfortable when she touched the back of his neck to illustrate where a co-worker had received a mosquito bite. TR at 79. He stated that after that incident, he began to view her repeated greetings and efforts at communication as a form of abuse.

> We did that [exchanging greetings] a few minutes ago. Why are you having to do it again? To me, it was about power and control. I mean, it was definitely more than once, and finally I was to the point where I said – it creeped me out. I had chest pains. I thought I was going to be retaliated against because of this. I just wanted her to leave me alone.

TR at 80. He stated that he discussed this situation with Ms. Lopez, and that the two of them visited Ms. Nakos at Sandia's EEO on January 20, 2004. TR at 82-83. He stated that after Ms. Nakos investigated his complaints against this female co-worker,

she had another meeting with him and Ms. Lopez where she stated that the co-worker's behavior did not rise to either an EEO violation or an ethics violation. TR at 84.

The complainant testified that around July 6, 2004, he and Ms. Lopez met again with Ms. Nakos at the Sandia EEO because the complainant wanted to report some problems that he was having with Ms. Lamb. TR at 88. He stated that at this meeting he discussed Ms. Lamb's alleged statement to him on June 17, 2004, that he should violate OSHA LOTO requirements, along with other statements from Ms. Lamb that he considered to be inappropriate. TR at 89. He testified that she had come to the office area where he worked and stated "I need a man" because she needed someone to fix the chair in her office.

> I felt it was inappropriate. If somebody wanted help in getting a chair fixed, they should have come out and said, "Can you help me fix my chair." I thought it was over the top to say "I need a man." Because I know if I walked up to one of these women in the workplace and said, "I need a woman," I think that would probably be looked at as inappropriate.

TR at 90. The complainant testified that he also reported that Ms. Lamb once asked him "where do you live?", which he considered inappropriate. He stated that

> In general, she was kind of a difficult person to deal with. She always wanted a lot of attention. She needed to be the center of attention. . . . it was when you went to talk to her about a safety issue that could take place in seven or eight minutes you would be there a half hour, 45 minutes with her talking about herself.

TR at 92. He also recalled that on a couple of occasions, she made what he considered to be inappropriate comments related to female physiology. TR at 93-95. He stated that after Ms. Nakos investigated his complaints, Ms. Nakos had a follow-up meeting with the complainant and Ms. Lopez where she informed them that nothing Ms. Lamb had done rose to the level of an EEO or Sandia ethics violation. TR at 98. He stated that he did not challenge Ms. Nakos' conclusions at this meeting.

> I was rather stunned. After the fact, when I read through the documentation, apparently all you have to do is say, "No, I didn't do it," and everything is fine.

TR at 99.

The complainant stated that on July 26, 2004, he and Ms. Lopez again went to Sandia EEO concerning a problem that he was having with the industrial hygienist in his working group, Ms. Jensen. TR at 99, 108. On this occasion, they met with EEO counselor Gwen Germany. TR at 108.

The complainant acknowledged that he and Ms. Jensen worked closely together on different aspects of the same occurrence or safety issue, and that they occasionally would be involved in joint inspections of Sandia facilities. TR at 103. He stated that initially he got along with Ms. Jensen "for the most part" because "I am pretty tolerant of people." However, in his meeting with Ms. Germany, he stated to Ms. Germany that at least half a dozen times, Ms. Jensen clasped her hands around his forearm or touched his shoulder when she spoke to him. TR at 101. He stated that

> Finally, one day I said, "Ann, I really don't like people touching me," and her response was to turn to me, grab me by the forearm and say, "I am just a touchy-feely sort of person." I thought wow, if a woman told a man they didn't like being touched and they did that, I wonder what the response would be.

TR at 102. He also stated that she made an inappropriate comment when she announced that she was leaving for a doctor's appointment. TR at 103. He testified that on August 3, 2004, he had a follow-up meeting with Ms. Germany and that she told him that none of Ms. Jensen's actions rose to the level of an EEO violation or a Sandia Ethics violation. TR at 114.

2. Miriam Minton

Ms. Minton testified that she worked as a safety engineer at the Facilities support group for about three years before leaving in early 2004. TR at 136, 138. Ms. Minton stated that she was not aware of the LOTO issues raised by the complainant, and that she left before the April 2004 electrical accident. TR at 148-149.

Ms. Minton testified that the complainant had been hired to perform the safety engineering tasks in the maintenance area, while she and another engineer devoted more time to construction matters. TR at 136. She stated that part of her reason for leaving was "personality conflicts" with Ms. Lamb. TR at 136.

She stated that there were a couple of times where she and Ms. Lamb disagreed on how to read a safety policy,

> and if I ever felt like it needed to be pushed forward, I would go to the subject matter expert. . . . Or I would go to my management. Because it didn't just stop with me. If I felt there was a safety issue I would go to the manager and bring in the safety matter expert and we would come together as a group and say, "Okay, how are we going to handle this?"

TR at 154.

Ms. Minton testified that as a safety engineer assigned to maintenance operations, the complainant did a lot of job site hazard evaluations. TR at 142. She stated that her routine was to arrange for a maintenance worker to walk the site with her so that she could learn exactly what the job entailed. She testified that the complainant preferred to have his own key and to perform the job site inspections by himself.

> It seemed like Casey wanted to do it his way and not the way we had always done it. There were some times where it seemed like he wanted to work on the things that he was interested in and not what we were actually needing help on.

TR at 143. She testified that on at least two or three occasions, she heard the complainant lose his temper while on the telephone, then slam down the receiver and cuss the person to whom he had been speaking. TR at 144. Ms. Minton testified that the complainant always seemed uncomfortable around a large group of people. She stated that she believed that he made an effort to be an effective team member, but that it was difficult for him. TR at 146. She stated that he tried to contribute to assisting with the workload of the Facilities Support Group, but that his effort "did not take up the slack that we thought it would." TR at 147. She believed that this was because the complainant

> tended to focus on the things that he wanted to do. He was interested in doing emergency management and instead of asking us if we needed help on additional things, he started ramping up on trying to get his niche in emergency management and emergency response.

TR at 147.

3. Al Bendure

Mr. Bendure testified that in 2004, he was the manager of Industrial Hygiene and Safety Programs at SNL. He stated that in the late summer of 2004, the complainant talked with him about a transfer from the Facilities Support Group to Industrial Hygiene. Mr. Bendure stated that he spoke to Mr. Vaughan about this conversation and then sent an e-mail to the complainant that he needed to "work on this" with Mr. Vaughan. TR at 160-161.

Mr. Bendure stated that some people who worked for Ms. Lamb had problems working for her and that there was a fair amount of turnover in the department due to her. TR at 161. He stated that he recalled that the complainant had told him in 2004 that he had made complaints about women that he worked with in his current position. Mr. Bendure testified that he did not recall telling the complainant that the actions of these female coworkers constituted harassment or suggesting that he contact Sandia's EEO. TR at 162.

Mr. Bendure testified that his experience with Ms. Jensen is that she is "a top-notch industrial hygienist, very professional, forthright" and that no one other than the complainant ever accused her of sexual harassment. TR at 163.

B. Sandia's Witnesses

1. Johnny Vaughan

Mr. Vaughan testified that in 2004, he was the manager of the ES&H support group and the individual's supervisor. He stated that the ES&H group provided multi-disciplinary environmental, safety and health subject matter experts to the line organizations at SNL. TR at 347.

a. *Testimony Concerning LOTO Procedures*

Mr. Vaughan testified that Ms. Lamb and other Sandia electrical experts had used the light switch to deactivate power to the lighting panels, but that once they were made aware of the OSHA requirements in this area, the practice stopped.

> [Ms. Lamb] discussed the light switch [in her hearing testimony]. That was one element and it was low voltage control, but once we got that, everybody that got involved agreed. Lights – that light switch, low voltage

> in this application, is not acceptable and does not meet Lock-Out-Tag-Out and we are not going to continue to do that.

TR at 389. Mr. Vaughan testified that the purpose of LOTO is to prevent and eliminate the risk associated with an employee coming into contact with electricity, and that Sandia always has established procedures and followed a process aimed at preventing electrical shocks. He stated that, with regard to the employee who received a shock while replacing fluorescent light ballasts in April 2004, even if the breaker connection to the those lights had been deactivated and locked out, the employee would have received a shock because "there was a stray wire up there that [was not powered through the lighting system and] could very well have remained energized." TR at 403.

Mr. Vaughan testified that following this accident, Sandia reviewed its practices for cutting power to fluorescent lighting systems at SNL with the goal of finding a method for depowering the lighting ballasts that was acceptable to the DOE. He stated that the string of e-mails entitled "Re: Light Switch LOTO" indicated that until they came up with an approved fixture or alternative method for cutting power to the fluorescent lamp ballasts,

> that we would just have [the power] locked out at the breaker box, not at the switch. No one ever said that that switch, when we found out that [it] was a low voltage item, control item, that that was adequate. No one ever said that.

TR at 407-408, *see also* Sandia Exhibit 5A-D. Mr. Vaughan stated that after Sandia stopped work on the ballasts because of the April accident,

> we never used that switch from that date forward. We found alternatives but we didn't develop the little locking device - I'm not sure exactly when that went in. But until that went in we went back to the breaker box.

TR at 408.

Mr. Vaughan stated to the complainant at the Hearing that he could not understand why the complainant was disagreeing with Sandia's actions in this area.

> I felt we were aggressively, with the experts at Sandia, addressing the safety and health issues to ensure the worker was protected. If that meant going back to the breaker we went back to the breaker. I didn't understand why going back to the breaker, which was some of the things we put in place, or removing the fuse, but nothing had to do with the switches and that seemed to be the focus of your concern, the switches, using the switches for Lock-Out-Tag-Out, as I recall.

TR at 414.

Mr. Vaughan testified that Sandia initially believed that pulling the fuse from fluorescent lighting ballasts was a means of deactivating the power to the ballasts that did not require OSHA mandated LOTO. He stated that OSHA does not require Lock-Out-Tag-Out procedures where you can simply unplug an electrical device for servicing. He testified that removing the in-line fuse from a lighting ballast is similar to disconnecting the power cord from an electrical device, and that he believed that this method of cutting the power to lamp ballasts was an acceptable alternative to LOTO procedures at the breaker box. TR at 388-389.

He stated that Sandia and Mr. Ralph Fevig at the DOE ultimately agreed that power to the fluorescent lighting ballasts could be disconnected by removing the fuse, but that in order to comply with OSHA requirements, the fuse had to be tagged out.

> At that point they made a little plastic thing that would go in this end [of the fuse] so nobody could put the fuse back in until you took it off.

TR at 405. He stated that the dialogue on this issue between Mr. Fevig and Sandia "was not really are we protecting the worker, but it was what's the interpretation of OSHA." *Id.* Mr. Vaughan testified that Sandia and the DOE reached their agreement on the appropriate LOTO for the fuses in fluorescent lamp ballasts sometime after March 2005. TR at 409.

b. Testimony Concerning the Complainant's Workplace Behavior and Performance Issues

Mr. Vaughan testified that in February 2004, he began to get reports that the complainant "didn't like the structure and the formality required to work in Facilities." TR at 352. He stated

that the complainant was tasked to review safety plans after they had been provided by the subcontractor to the Facilities division. However, the complainant was getting the plans for review directly from the subcontractor and then objecting to reviewing the plans again when they were submitted to the Facilities. TR at 352-353.

Mr. Vaughan testified that in January 2004, the complainant came to his office and complained about being physically harassed by a female co-worker. Mr. Vaughan stated that this matter was "certainly beyond my expertise" and referred him to Sandia's EEO. He stated that he had no complaints from other employees about this female co-worker. TR at 355-356.

He testified that the co-worker quit as a result of the complainant's allegations.

> I came in one morning and I went to my mailbox, which was outside my office, and inside my mailbox was her phone, her pager, her badge, and a handwritten note saying that she couldn't take being accused like this. She had never experienced anything like this before in her life, and she got the feeling that even when people looked at her that they were thinking dirty old woman or something. If you knew [the coworker], it was just devastating for her, and she resigned.

TR at 357-358. He stated that he did not believe that Sandia policy allowed him to reveal her expressed reasons for leaving, so he explained at a meeting of his work group that she had another employment opportunity. TR at 358. He also stated that communicating her reasons for leaving would have created more anguish and hostility in the workplace, and his job was "to create cohesion and teamwork." He stated that the complainant attended this meeting, and reacted with a "gloat of satisfaction" when he announced that she had left. TR at 359.

Mr. Vaughan stated that in March 2004, the complainant came into his office and announced, using a derogatory epithet for women, that he had "just got rid" of one female co-worker and was not going to "take this stuff" from another one. TR at 359. He stated that the complainant told him that he was having problems with Ms. Lamb.

> and he was saying she was asking him questions like, "Casey, where do you live?" "Casey, what are you doing this weekend?" Spread over some period of time. Then

> there was "I need a man" and [it] turned out her chair was broken and she wanted him to work on it.

TR at 359. Mr. Vaughan testified that the complainant asked him to speak to Ms. Lamb and instruct her that any dialogue with the complainant "will stick to business". Mr. Vaughan stated that

> I did, in fact, follow up with Carla and had some dialogue that I said basically that Casey had taken exception with some of the discussion that was not work-related and that just try to be conscious, and that's again, not really in Carla's nature, so to speak. She is another one of those fairly flamboyant people. I don't know if I would say flamboyant, but she is a people person. So she likes to have, you know, not all work. You know, we mix, like the average person, and again, that's my judgment. The average person you can talk about what you did this weekend and you can talk about what we need to do today to get the job done. That was the kind of person she was.

TR at 360. He stated that after his March 2004 conversation with the complainant about Ms. Lamb, he was told by another of the complainant's co-workers that several people in the Facilities Support Group felt threatened by the complainant's angry outbursts during or after his telephone conversations. TR at 361.

Mr. Vaughan stated that on April 26, 2004, the complainant again came to speak to him about Ms. Lamb. The complainant told him that she had "horned in" on a conversation that he had been having about the effects of blood sugar with a discussion of female hormonal cycles that he found extremely offensive. TR at 362.

Following this meeting, he met with the complainant's employer, Ms. Lopez, to try to get a better understanding of what his working group and the complainant could do "to make this relationship work."

> I felt Casey had a background on resume and stuff where he could contribute to Sandia, but if everything that was said was going to be taken with such sensitivity, there was no way that I could create the work force that would be compatible with the comfort zone that Casey was exhibiting at that point and get work done.

TR at 363.

Mr. Vaughan stated that on May 3, 2004, he met separately with the complainant and Ms. Lamb about their working relationship, which he believed had become a problem.

> I decided okay, we are at this juncture and [it] doesn't look like it's working for me, for Carla, for the corporation, the people. We are spending all out time, and I felt as a group it was becoming totally distracted. And in the business that we are in, we can't afford people to be distracted. All I need is somebody to mess up on a confined space or electrical safety job review or something and people's safety is at risk. And that's my responsibility.

TR at 364. He said that he told the complainant that he had to follow the processes that were in place, and that meant that "Carla is going to tell us what we need to do." TR at 364. He testified that he discussed with Ms. Lamb the need to censor herself around the complainant, and that she was struggling with this. He stated that Ms. Lamb reported to him that the complainant was avoiding her and that would not work because she needed to discuss issues with the Facilities Support Group as a team. TR at 365.

Mr. Vaughan testified that the complainant began to approach him frequently with suggestions for assignments, rather than interact with Ms. Lamb and accept assignments from her. Mr. Vaughan stated that the complainant needed to be in contact with Ms. Lamb about work assignments because he was not knowledgeable about the work direction and priorities in the Facilities Division. TR at 411-412.

Mr. Vaughan testified that in July 2004, he was kept informed when the complainant and Ms. Lopez met with Ms. Nakos and Ms. Germany concerning the complainant's problems with Ms. Lamb. Then, on August 3, 2004, Mr. Vaughan stated that he met with Ms. Nakos and Ms. Germany after he learned that the complainant had raised allegations of sexual harassment against another person in the Facilities Support Group, Ann Jensen. TR at 366. Mr. Vaughan stated that he had this meeting was to explore his options as a manager.

> To be honest with you, I was beginning to feel as though I had a performance problem and my hands were tied. I was trying to understand how do we bring this resolution where we are meeting the EEO things and that I can deal

> with a performance problem without it being construed as harassment over some EEO allegations.

TR at 367. Mr. Vaughan stated that on September 10, 2004, he contacted Ms. Germany to ask when the EEO would complete its investigation of the complainant's allegations against Ms. Jensen. TR at 368. On September 14, 2004, he again contacted Ms. Germany to report that Ms. Jensen was very upset by the complainant's allegations, which she believed were false, and had told him that she would quit Sandia because she could no longer work in close proximity to the complainant. TR at 369.

Mr. Vaughan stated that no one had ever complained about Ms. Jensen's behavior previously, and that she was a highly valued employee who he could not afford to lose.

> With her expertise and her abilities combined with the excellent working relationship she had, not only with the people that were in Facilities but with the other team, it would have been devastating, yet another blow to a team I am tying to make.

TR at 369.

Mr. Vaughan stated that he is the chairman of Sandia's Joint Union Management Safety Committee, and that when this committee met on September 14, 2004, the complainant was assigned to provide a status report on developments since the last meeting with respect to on-the-job injuries, contributing factors, and safety lessons learned. He stated that the complainant made the comment at this meeting that some workers were probably injured away from work and are just trying to get workmen's compensation to cover it. Mr. Vaughan testified that such a comment was inappropriate and damaging to the working relationship between union representatives and safety representatives. TR at 371.

Mr. Vaughan stated that the complainant wanted to spend too much time helping out at the emergency operations center, but that was not his job assignment.

> I guess obviously, he wasn't happy with his job. And he says so in his briefs, you know. He was distracted, he was unhappy. He expressed it to [Ms. Lopez], he expressed it to me. I was just wondering, okay, we have someone who is disruptive of the team that I am trying to provide service. We have someone who is unhappy. They

> don't like where they are working. We have tried to do [some] things that we thought might be able to be a working relationship for both of us, or all three of us, including contractor management, and it wasn't coming together. It was getting worse. It was digressing.

TR at 376. Mr. Vaughan stated that he believed that it would be inappropriate for Sandia to transfer the complainant to another assignment at SNL because the complainant was the employee of a Sandia contractor.

> I don't work to accommodate contractors like I do [Sandia] employees. . . . we have fluctuating needs of business, and that's where we use contractors to supplement the needs of the business. So far as I am not the employer, I wouldn't be doing professional development, and this was something [the complainant] felt he wanted as professional development and he didn't like the area that he was working in.

TR at 377. Mr. Vaughan stated that he believed it was not common for contract employees of Sandia change job assignments by making contacts within the Sandia organization. TR at 378.

Mr. Vaughan testified that aside from the complainant, he was involved in the termination of two other employees at SNL. One was a Sandia employee and the other a Sandia contractor employee. With regard to the former, he stated that

> The termination of a [Sandia] employee takes on all of the legal ramifications with Sandia as the employer. Associated with that, there's a lot more, I would say, responsibility to accommodate, to look at opportunities for reassignment, to look at all of the things we might do to try to turn this around.

TR at 380. He stated that the Sandia contractor employee had worked as a radiation technician and suffered from narcolepsy. Mr. Vaughan stated that this technician fell asleep and rolled into a contamination area. He was fired because he failed to report that he had fallen in a contamination area. TR at 384. Mr. Vaughan testified that he knew of no Sandia or contract employees who had been fired for reporting a safety issue. *Id.*

Mr. Vaughan offered the following explanation for terminating the complainant from his position at SNL.

> It just seemed there were two major issues that there was no way to overcome. One was a lot of his co-workers found him intimidating. There was nothing I could do to change that. That's just the way he was. Number two is the inability to work with the people who were directing and controlling the work. In this case it was Carla, and not able to get along with the team.

TR at 385. Mr. Vaughan testified that the complainant disclosures about LOTO issues and safety plans for contractors had nothing to do with his termination.

> There was nothing associated with those items that had to do with the cause or the reason for termination. Absolutely nothing associated with those.

TR at 392.

2. Carla Lamb

Ms. Lamb testified that as the Facilities ES&H coordinator, her job made her the team lead for Sandia's matrix support team in responding to ES&H concerns and events. She stated that the Facilities organization is responsible for all of the construction and maintenance work at Sandia, and the matrix support team is designed to make ES&H experts available to Facilities personnel.

> So we have two safety engineers, two industrial hygienists, one [radiation] technician, [and] two environmental folks matrixed from the ES&H group . . . over to Facilities.

TR at 210. She stated that the complainant was one of the safety engineers in the matrix support team. TR at 211.

a. *Testimony Concerning LOTO Procedures*

Ms. Lamb testified that the April 2004 electrical accident involved a contract employee who was replacing the ballasts in 277 volt fluorescent lamps at SNL.6/ She stated that following this

---

6/ She explained that fluorescent lamp ballasts transform electrical current into the form needed to operate fluorescent

(continued...)

accident, a LOTO issue arose over the proper way to shut down the 277 volt lighting systems. She testified that

> One of the maintenance people went over to do some LOTO and said that he didn't have the right LOTO mechanism for the switch. It had a toggle type switch instead of a regular light switch that you normally see, so he went back to his team lead and asked for a new mechanism to do that. It was my understanding from the team lead that he went and talked to the systems engineer and to [the complainant] in Safety as the person supporting maintenance, could they get us the right lock-out mechanism.

TR at 222. She stated that while they were responding to this request, Mr. Thayer, the systems engineer, stated that

> we shouldn't be depending on the light switch to turn off the circuit to the light because [OSHA] says that you will not lock and tag or use the control voltage when you are working on a system.

TR at 222.

Ms. Lamb testified that no one at Sandia had realized until then that the OSHA requirement against using control devices for LOTO applied to light switches in certain fluorescent systems. TR at 222. She stated that once Mr. Thayer announced this requirement, Sandia began to work on developing other means of cutting power to the fluorescent lighting. They proposed to the DOE that for purposes of replacing lamp ballasts, pulling out the in-line fuses to the ballasts would be an acceptable method of cutting power because it would be a variation of the "cord and plug" method that is acceptable under OSHA rules. TR at 223-224. She stated that the DOE eventually accepted this proposal, but added the requirement that the fuses be tagged out when they are removed. TR at 224.

Ms. Lamb testified that the complainant was a part of the give and take and exploration to develop the best way to cut power to the fluorescent lights that met OSHA requirements. TR at 226. She stated that she was not directly involved in this dialogue, but

---

6/ (...continued)
bulbs. TR at 221.

understood that "everything was moving forward" with a plan based on removing in-line fuses. TR at 226-227.

Ms. Lamb testified that it came to her attention that the complainant still felt that there was a problem; that it wasn't being resolved appropriately. TR at 226. She stated that she had spoken to Greg Anderson, her team lead for Sandia subcontractors, and that Mr. Anderson reported that the complainant had issues with Sandia's approach of removing in-line fuses. She testified that she understood from her conversation with Mr. Anderson that Sandia had

> met with the contractors [and told them] that we would use the fuses, that we would not lock and tag at the switch, depending on the 110 circuit, so we were no longer depending on 277 [control circuits], and they were resolving the issue whether that would be treated with cord and plug. That is how I remember that issue.

TR at 238. She stated that based on her conversation with Mr. Anderson, she went to talk to the complainant about LOTO for the 277 volt fluorescent lights. TR at 238. She stated that she explained to the complainant that in addition to performing LOTO on the light switch

> on the 277 [volt lighting system], they would also ensure there was an in-line fuse [to disconnect] or bring in a qualified electrician to go to the panels.

TR at 227. She stated that during this conversation, the complainant kept insisting that she take the issue of appropriate LOTO on the 277 volt lighting system to Sandia's Electrical Safety Committee. She testified that she finally said to him

> You know, you want to take it to the Electrical Safety Committee, go on, take it to the Electrical Safety Committee, but I don't feel the need to do that. If you need to take it to them, feel free. Go ahead. If they want to come and tell us that we need to do something different, that's fine, but I am not going to take that step. I don't think we need to do that. We are working in a safe manner, you know.

TR at 229. Ms. Lamb testified that everybody felt comfortable that pulling an in-line fuse was a safe solution, and that the only question was whether the DOE would agree that pulling a fuse was

a "cord and plug" disconnection acceptable under OSHA regulations. TR at 229.

b. Testimony Concerning the Complainant's Workplace Behavior and Performance Issues

Ms. Lamb testified that as the Facilities ES&H coordinator, she was responsible for organizing a response to ES&H concerns or events. She stated that she functioned as the team lead for the Facilities Support Group, which consisted of two safety engineers, two industrial hygienists, one radiation technician, and two environmental experts matrixed from the ES&H group over to Facilities. TR at 209-210.

She stated that in 2003 and early 2004, she had been occupied with issues of safety engineering and industrial hygiene, and had not had a lot of contact with the complainant who, as the safety engineer supporting maintenance, interfaced chiefly with the team leads at the Facilities Division. TR at 211-212. She stated that "it seemed kind of awkward sometimes with Casey" and that "I remember at one point thinking that I needed to be friendlier and talk to him more." TR at 212. She testified that because she was often overseeing the work of Ms. Jensen, who sat across from the complainant, she made an effort "to stop and say hello [to the complainant], try to be friendlier, try to talk more." TR at 213. She stated that this approach "didn't seem to really make a difference" and because she had good feedback from the team leads about the complainant, "I just decided it would be more of a hands off kind of situation . . . ." TR at 213.

Ms. Lamb testified that Ms. Jensen was finding it difficult to interact with the complainant. She stated that previously Ms. Jensen and Ms. Minton would team up and inspect spaces together, but that "we were having problems with Ann [Jensen] and [the complainant] kind of teaming on the process."

> Just everything seemed really bad, so I went to talk to Johnny [Vaughan]. I said, "Johnny, can you help us? Can you help us figure out what we need to do here? How can we make this better?"
>
> At that time I learned that Casey had made complaints about his interfaces with me, and with Ann. So I tried to talk to him, he tried to talk to Casey, but Casey went and talked to Johnny that he wasn't happy with the

> interface, I wasn't happy with the interface, Ann wasn't happy with the interface. It wasn't going smoothly.

TR at 215. Ms. Lamb stated that she never "did anything that I would feel was sexual in nature to Casey." TR at 215. She recalled a conversation with the complainant about blood sugar where she referred to PMS symptoms affecting blood sugar.

> The conversation [with the complainant] kind of stopped right there so - like somehow I felt like maybe I had said something that I shouldn't have. So we never had a conversation about blood sugar or exercise again. That's the only time. I just remembered it because it seemed kind of like it ended sort of strange.

TR at 216. She stated that she told Mr. Vaughan two weeks after his May 2004 efforts to improve their interactions, that her ability to communicate with the complainant was "getting worse and not better; that we just weren't communicating." TR at 249.

3. Don Kerekes

Mr. Kerekes testified that he works as a lamper performing maintenance and repair work on the lighting systems for Sandia six and a half years. He stated that he is an apprentice electrician. TR at 167. He stated that when he came to work at Sandia, he followed a LOTO procedure that involved turning off the light switch and putting a device on the switch that locks the switch in the off position. TR at 168. He stated that within six months of starting work a Sandia, he reported to his manager that there were light switches at Sandia that he could not lock out with the device. TR at 169. He stated that his manager reported to him that Sandia was considering various options, such as making devices that would fit the various light switches in use at Sandia. TR at 170. He stated that he finally was instructed to use one of two options.

> If there's a fuse in the fixture, I was allowed to lock out there. If there wasn't, and I couldn't do it at the switch, we had to go to the breaker.

TR at 171.

Mr. Kerekes testified that all of the buildings constructed at Sandia within the last twenty years use 277 volt lighting. TR at 172. He stated that he performs the same LOTO procedures on both

the 277 volt lighting and the older 120 volt lighting systems. He stated that he uses the toggle switch LOTO device on both the 120 and 277 volt systems, but that in addition

> **we are checking for zero voltage before we cut anything or put ourselves in danger, so I am wearing my [personal protective equipment] while I am doing the voltage checking.**

TR at 173.

4. Diane Nakos

Ms. Nakos testified that from 1992 until July of 2005, she worked as a consultant in Sandia's EEO and AA Department. TR at 174-175. She stated that she met with the complainant and his employer, Ms. Lopez, in January 2004, because the complainant was concerned about a female employee in his work area who "was maybe brushing up against him more often that he felt comfortable." TR at 176. She stated that the complainant also expressed a concern that the female co-worker had touched him to illustrate where a friend of hers was bitten by a bug. TR at 177. She stated that she told the complainant that she had a lot of experience and training in policy violations concerning harassment, and that "in my view the allegations did not rise to the level of violation." TR at 179. She stated that she agreed to meet with the female co-worker and have a discussion with her about the behavior. *Id.* She stated that when she spoke to the female co-worker

> **she was stunned, she was really devastated. She was mortified to think that her behaviors could be interpreted in any way as being remotely of a sexual nature. She was very upset and confused as to why her behavior would be construed that way.**

TR at 180.

Ms. Nakos testified that in July 2004, she again met with the complainant and Ms. Lopez. She stated that the complainant raised some safety concerns regarding LOTO "that I felt were more appropriately addressed through his management team." TR at 182. She stated that he also raised concerns about inappropriate comments made by Ms. Lamb. She stated that none of the alleged comments made by Ms. Lamb appeared to violate any EEO or Sandia Ethics standards of behavior. She testified that

> But at the end of the second interview, I did get the sense that he had difficulties working with the women in the organization. It started to form a pattern and the allegations were such that some of the comments were what I would deem more as standard office - you know, where are you going this weekend, what did you do this weekend. Those kinds of things are fairly standard in the workplace.

TR at 185.

Ms. Nakos stated that on August 3, 2004, she met with Mr. Vaughan and Ms. Germany because the complainant had now made complainants about three female co-workers, and they needed to assess the situation. She stated that customarily EEO consultants would ask a supervisor to wait until the results of an investigation are completed before they take action. TR at 187.

She stated that they discussed concerns raised by some of Mr. Vaughan's staff concerning his refusal to be a team player.

> And that was important, I think, because the workload was increasing, and they needed people to work in teams better. And I believe that Mr. von Bargen was refusing to do that, wanting to work on his own and not really interested in working with others.

TR at 187. She stated that she could not recall if the meeting resulted in any consensus for action. TR at 187.

5. Anthony Chavez

Mr. Chavez testified that in 2003 and 2004 he was Sandia's project manager for service contracts at SNL. TR at 197. He stated that Sandia had about fifty service contracts and that Sandia management understood that not all of these contractors had approved safety plans for the work they were performing at SNL. He testified that the complainant was assigned that task of determining which contractors had safety plans. TR at 199.

Mr. Chavez stated that he worked with Ms. Lamb when she was the Facilities ES&H coordinator and that he believed that she was knowledgeable about electrical safety and concerned about safety issues. TR at 199-201.

He stated that he generally was able to have discussions of safety issues with the complainant, but that when the complainant became red-faced and raised his voice, "I just tended to put it off and we would talk about it at a later date." TR at 202.

6. Greg Kirsch

Mr. Kirsch testified that he started working at SNL in 2002 as a contract safety engineer and is currently a Sandia employee. TR at 264-265. He stated that he worked with the complainant in the Facilities Support Group, and that the complainant was assigned maintenance safety activities while he and Ms. Minton focused on construction and service contracts. TR at 265-266.

He stated that on a few occasions he overheard the complainant having angry conversations on the telephone, and on one occasion he heard the complainant call someone who he was speaking to on the telephone a "[expletive deleted] idiot." TR at 268-270.

He stated that prior to the complainant's arrival the Facilities Support Group "was a good, cohesive team and we got a lot done and there was a lot of sense of team work and accomplishment." TR at 266. He stated that after the complainant went to the EEO in January 2004 about the behavior of a female coworker, he spoke with the female employee.

> And she basically said somebody had said some stuff that was not true and made the work environment impossible for her to stay there. And she was very uncomfortable and very teary and very upset.

TR at 268. He stated that he never observed this female coworker acting in a sexually aggressive manner. TR at 275. Mr. Kirsch testified that Ms. Jensen is very pleasant to work with and does not have a sexually aggressive personality. TR at 276.

With regard to Ms. Lamb, Mr. Kirsch testified that he advises her frequently on safety matters. He stated that they have frequent disagreements, and she often asks him to justify his position. TR at 277-278. He stated that Ms. Lamb is very committed to keeping people safe. TR at 281. He stated that he still has disagreements with Ms. Lamb on safety issues but has never felt that his position at SNL was jeopardized by those disagreements. He testified that "I moved up raising safety concerns." TR at 282.

He stated that after the complainant arrived, the mood of the Facilities Support Group shifted and became "uptight."

> You want it to flow, especially if you have a lot of extra work. And I think it affected kind of the teamwork. The intensity was different, you know. If you are worried about other people and their communication, that energy, it kind of takes away from what you are trying to get done, so I think from a teamwork standard it dropped off.

TR at 272. He stated that team camaraderie returned after the complainant was terminated. *Id.*

7. *Gwen* Germany

Ms. Germany stated that she has worked as an analyst at Sandia's EEO and AA department since 1992, performing consultations and investigations related to Sandia ethics policies and federal civil rights laws. TR at 292-293. She stated that on July 26, 2004, she met with the complainant, who discussed comments made to him by Ms. Lamb and Ms. Jensen that he found offensive. She stated that she had a telephone conference with Ms. Lopez, who told her that she hoped to move the complainant within the next couple of months. TR at 296-297. She stated that at a later, debrief meeting attended by the complainant and Ms. Lopez, she indicated to him that the comments of Ms. Lamb and Ms. Jensen did not rise to the level of either an EEO or a Sandia policy violation. TR at 302.

Ms. Germany testified that the complainant told her that he was trying to avoid Ms. Jensen and Ms. Lamb. TR at 298. She stated that in a September 8, 2004 telephone conversation with Mr. Vaughan

> Mr. Vaughan told me that Mr. von Bargen was doing everything in his power to not have interactions with [Ms. Lamb], and that a lot of things that should be going to [Ms. Lamb], Mr. von Bargen was actually bringing to Mr. Vaughan.

TR at 300. She stated that Mr. Vaughan also reported that Ms. Jensen had come to him and stated that she was getting nervous because of some of the complainant's reactions to her. *Id.* She stated that Mr. Vaughan told her that the complainant was not a "viable candidate" for transfer to another Sandia organization because of his "interpersonal behaviors" which included avoidance,

belligerence, and being withdrawn. TR at 301. She stated that she was not surprised when Mr. Vaughan terminated the complainant because of the personality issues that the complainant was having

> created a lot of disturbance within the work group to the impact of decreasing productivity within the group. Team work was affected, and based on what I knew of the situation, it seemed to all be pointed towards Mr. von Bargen and his behaviors, his reactions to people, and the fact that he did not seem to want to cooperate with others.

TR at 301.

8. Ann Jensen

Ms. Jensen testified that she is a Sandia contract employee working as an industrial hygienist with the Facilities Support Group since 1999. TR at 319-320. She stated that with maintenance and construction ES&H issues

> it was essential that you be a team working together, because it's a pretty fast pace to the edge of chaos kind of environment.

TR at 320. She stated that it was important for members of the team to consult with each other concerning ES&H issues. TR at 321.

Ms. Jensen testified that she worked out of a cubicle space that was across the corridor from the complainant's cubicle.

> So it's a pretty close environment, and as I mentioned, you can hear over the cubby walls, so there wasn't a lot of privacy. People oftentimes would take a cell phone and go outside if they wanted to have a private conversation. So I did, in fact hear [the complainant] on a couple of occasions on the telephone in an upset condition. And I can only remember one time when he was - it was a banking type of business - and he was really upset.

TR at 322.

Ms. Jensen stated that in late January, early February 2004, a recently hired female co-worker told her that someone had accused her of harassment and that this female co-worker "was in total and

complete distress." TR at 327. She stated that the co-worker eventually left and that it was an "immense loss" to the Facilities Support Group. TR at 327.

Ms. Jensen stated that when the complainant was hired, she looked forward to working closely with him, because industrial hygiene and safety experts in the Facilities Support Group constituted a "sub team within the larger team." TR at 327. She testified that she never intended to say anything inappropriate or personal in her efforts to be friendly with him. TR at 329. She stated that she once referred to him as a SNAG or Sensitive New Age Guy because someone had used that term to describe her husband and she considered it a complement. TR at 330.

Ms. Jensen testified that when she was asked to meet with an EEO interviewer, she was not aware that the complainant had accused her of harassing behavior. She was told that the interview was about tension in the workplace. TR at 330. She stated that she never made inappropriate comments to the complainant concerning a visit to her doctor. TR at 331. She stated that her working relationship with the complainant deteriorated.

> I can't give you a date or time, but there was a time, a specific time, when I was obviously irritating to him. Again, he and I were to have been a subset of the larger matrixed organization, and things that I was doing, saying, were obviously extremely - not just slightly but extremely - irritating to him.
>
> . . . I was in my 50's by then, and I had never, never experienced a work setting - I mean, I might have irritated people. I probably did. But I had never been in a situation where it was so overt, and I felt like our ability to work as a sub team - I mean it was not only compromised it just wasn't there. It wasn't happening.

TR at 332. She stated that it was impossible to "bounce ideas" with the complainant or to ask for his assistance with a task. ***Id.*** She testified that, towards the end, the complainant refused to make eye contact with her when they communicated. TR at 333. She testified that she sometimes touches a person's arm or shoulder when she is conversing with them, but that she recalled no instance where she touched the complainant after he told her not to do so. TR at 334. She stated that other than the complainant, no one has ever filed any sort of complaint against her. ***Id.***

C. COMPA's witness: Edna Lopez

Ms. Lopez testified that she is the President of COMPA, a company that supplies individuals for different government entities, and that it has about 180 employees working on contracts at SNL. TR at 313. She stated that she was present at a number of meetings with the complainant, Ms. Germany, Ms. Nakos and Mr. Vaughan. She stated that when Sandia officials would convey concerns or problems regarding the complainant to her, she would convey those concerns to the complainant in her capacity as his employer. TR at 314.

Ms. Lopez stated that in July 2004, she told the complainant that she thought that he should actively be seeking other employment. TR at 315. She testified that beginning in July, COMPA's recruiter began working with the complainant to place him in another position at Sandia or elsewhere. Ms. Lopez stated that she instructed the complainant to look at Sandia's website for job announcement and that the recruiter began to send him the job listings collected by COMPA. TR at 342.

Ms. Lopez testified that she was not surprised when Sandia terminated the complainant's contract. She stated that for several months her staff had been tracking various problems raised by Sandia regarding the complainant, and that this was unusual for one of her contract employees. TR at 315. She stated that in the complainant's case, she was notified that "his contract was just going to be terminated, that [Mr. Vaughan] no longer had work to support the contract." TR at 316. In a previous conversation with Mr. Vaughan, he rejected her suggestion that she make a written report on the complainant's problems in the workplace.

> **I mean, usually if we are having a situation with an employee and we write them up, it's almost like [termination] will happen within 30 days, because people don't change. But [Mr. Vaughan] said, "Well, let's wait."**

TR at 317. Ms. Lopez testified that unlike some employees who have been fired from SNL for security breaches or other serious infractions, she does not believe that the complainant is barred from seeking future employment at SNL, and that COMPA would be willing to submit his resume to Sandia for a future position at SNL. TR at 343-346.

IV. Legal Standards Governing This Case

A. The Complainant's Burden

Initially, in a Part 708 proceeding, the burden is on the complainant to establish

> **by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor.**

10 C.F.R. § 708.29.

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by the complainant. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

B. The Contractor's Burden

If I find that the complainant has met his threshold burden, the burden of proof shifts to the contractor. Sandia and COMPA must then prove, by "clear and convincing" evidence, that they would have taken the same personnel actions regarding the complainant absent the protected disclosure. "Clear and convincing" evidence is a more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". *See Hopkins*, 737 F. Supp. at 1204 n.3. Thus, if the complainant has established that it is more likely than not that he made a protected disclosure that was a contributing factor to an adverse personnel action taken by his employers, Sandia and COMPA must convince me that they clearly would have taken this adverse action had the complainant never made this protected disclosure.

V. Analysis

A. The Complaint Was Timely Filed

In its Initial Brief in this proceeding, Sandia asserted that the complainant's Part 708 complaint was not timely filed. Specifically, Sandia states that the filing date listed on the first page of the ROI is June 15, 2005, and that the ROI at page 2 contains the statement that "Mr. von Bargen filed this Complaint on June 15, 2005." Because the Part 708 regulations provide that a complainant has 90 days to file a complaint, and because the complainant was terminated by Sandia on September 20, 2004, Sandia contends that this complaint is untimely and the OHA does not have jurisdiction in this matter. Sandia's Initial Brief at 1. I find no merit to this argument. While the Part 708 regulations provide a ninety-day period for filing these complaints, the initial filing of a complaint is not with the OHA, but with the "Head of the Field Element at the DOE field element with jurisdiction over the contract." 10 C.F.R. § 708.10(b). The complainant's Part 708 complaint is signed and dated November 12, 2004, and an attached e-mail from the complainant to Ms. Eva Glow Brownlow at the DOE field office dated November 19, 2004, indicates that Ms. Brownlow already was reviewing the complaint on November 19th. The date of June 15, 2005, is the date on which the DOE field office forwarded the complaint to the OHA for an investigation and a hearing. *See* 10 C.F.R. § 708.21. Accordingly, I find that there is ample evidence to establish that this complaint was timely filed and was being reviewed by the DOE field office in November 2004, well within ninety days of the complainant's termination.

B. The Complainant Made a Protected Disclosure

As noted above, in order for the information that the complainant allegedly disclosed to Ms. Lamb and Mr. Vaughan in 2004 to constitute a protected disclosure under Part 708, the complainant must reasonably believe that the information reveals one of the following:

> **(1) A substantial violation of a law, rule, or regulation;**
>
> **(2) A substantial and specific danger to employees or to public health or safety; or**

> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority . . .

10 C.F.R. § 708.5(a)(l), (2) and (3). Throughout this proceeding, the complainant has contended that his June 17, 2004, disclosure to Ms. Lamb that light switch LOTO procedures at SNL violated OSHA safety regulations was protected because it revealed a substantial and specific danger to employees or to public health or safety under 10 C.F.R. § 708.5(a)(2). However, in order for his statement to Ms. Lamb to be a protected disclosure of a health and safety concern under Part 708, the complainant must have had a reasonable belief at the time that he made the statement that the LOTO practices on lighting systems at SNL constituted a "substantial and specific danger" to SNL employees. The complainant asserts that he had such a belief, and that it was based upon: (1) his research on current OSHA rulings concerning the use of control devices for LOTO; (2) his e-mail correspondence with a Microlite company representative concerning the proper way to cut off power to their 277 volt lighting system; and (3) his education and years of work experience as a safety engineer. As discussed below, my review of the testimony and other evidence in the record of this proceeding leads me to conclude that the complainant made a disclosure to Ms. Lamb on or about June 17, 2004, that was based on his reasonable belief that Sandia was improperly performing LOTO on light switches, and that these LOTO practices presented "a substantial and specific danger to employees or to public health and safety" protected under Part 708.

1. The Complainant Disclosed to Ms. Lamb and Mr. Vaughan that Sandia's Light Switch LOTO Practices Violated OSHA Safety Regulations

As the summary of his testimony at the hearing indicates, the complainant contends that on June 17, 2004, he informed Ms. Lamb that the applicable OSHA safety regulation at 29 C.F.R. § 1910.147 does not allow controlled devices such as light switches to be used to perform LOTO. In her testimony at the hearing, Ms. Lamb stated that she recalled having a conversation with the complainant where he "was still concerned that we were using the switch that was controlling the lighting panel" to perform LOTO on the 277 volt lighting system. TR at 277. I conclude from this testimony that the complainant did say to Ms. Lamb that the use of light switches for LOTO violated OSHA safety regulations.

I also find that the complainant's September 14, 2004 e-mail to Mr. Vaughan constituted the disclosure of a safety concern. In his e-mail, entitled "RE: Light Switch LOTO - regulatory requirements clarified", he refers to his June 17, 2004 conversation with Ms. Lamb and states that he told her that the OSHA safety regulations prohibit the use of a "control device", *i.e.*, a light switch, for LOTO. His e-mail then recounts her alleged rejection of his advice. While the primary purpose of the September 14, 2004 e-mail appears to be to inform Mr. Vaughan of Ms. Lamb's alleged rejection of the complainant's earlier safety disclosure, the facts discussed in the e-mail repeat the complainant's earlier statements that it is unsafe to use control devices for electrical LOTO.

I do not believe that the complainant has shown that he made the other alleged disclosures concerning lighting system LOTO that he discussed at the hearing. He did not attempt to corroborate the alleged statements that he made to Mr. Bultman or Mr. Gomez following his conversation with Ms. Lamb. Nor is there any support in the record for his assertion that he specifically stated to Ms. Lamb or Mr. Vaughan that he had safety concerns about Sandia's practice of cutting power to lamp ballasts by removing the in-line fuse. Accordingly, in my analysis below, I will examine whether the complainant reasonably believed on June 17 and September 14, 2004, that Sandia's practice of locking out light switches on Microlite 277 volt lighting systems constituted a substantial danger to the employees servicing light fixtures at SNL.

2. The Complainant Had a Rational and Reasonable Belief that the use of Light Switches to Perform LOTO on Microlite 277 Volt Lighting Systems was a Safety Concern

Based on the testimony and evidence at the Hearing, I find that the individual reasonably believed that his June 17, 2004, disclosure to Ms. Lamb and his September 14, 2004, disclosure to Mr. Vaughan provided information of a significant safety issue at SNL. The complainant stated at the hearing that he contacted a Microlite company representative by e-mail after the April 2004 accident and asked him how Microlite recommended that power to the lighting system be cut off for servicing. The Microlite representative, Mr. Steve Jaskowiak, replied by e-mail on June 3, 2004, and stated that power should be cut off by going to the electrical panel and turning off the breaker switch that is feeding power to the lighting panel being serviced. He specifically noted that turning off the "control voltage" to the lighting panel at the light switch will have "no effect on the actual [power] loads" running to the lighting

panel. E-mail from Mr. Jaskowiak to Complainant's November 12, 2004 Part 708 Complaint.

The complainant testified that he also discovered prior to his conversation with Ms. Lamb that, in 2003, OSHA had interpreted its LOTO regulation to forbid the use of light switches or other control devices to lock out electrical systems. This reading of OSHA requirements is supported by an e-mail that the complainant received from Mr. Thayer on June 17, 2004, and the hearing testimony of Mr. Vaughan. Accordingly, I find that when the complainant had his conversations with Ms. Lamb concerning light switch LOTO on the Microlite 277 volt lighting system, he had a reasonable belief that locking out the light switch would be ineffective in cutting power to the lighting panel.

Therefore, based on the testimony and evidence in the record, I find that the information known by the complainant at the time of his June 17, 2004 conversation with Ms. Lamb was sufficient to provide him with a reasonable belief that using light switch LOTO as a means of cutting power to the Microlite 277 volt lighting system was ineffective and considered a dangerous practice by OSHA.

3. The Complainant's June 2004 Disclosure to Ms. Lamb and His September 2004 Disclosure to Mr. Vaughan Revealed A Substantial and Specific Danger to Employees at SNL

The complainant has shown that he reasonably believed that light switch LOTO was an ineffective and therefore unsafe means of cutting power to the Microlite 277 volt lighting system. However, Sandia argues that the complainant's disclosure of this fact to Ms. Lamb and Mr. Vaughan did not reveal a substantial and specific danger to the safety of Sandia employees. It first contends that no substantial or specific danger can exist because at the time the complainant made his disclosures, Sandia had stopped using light switches for LOTO, and that it never resumed this practice.

I find this argument to be without merit. The record indicates that Sandia had temporarily halted the servicing of its lighting systems while it investigated the causes of the April 2004 accident. However, it is clear that at some point Sandia would resume the servicing of its lighting fixtures, and therefore the complainant's statements that Sandia's LOTO practice was unsafe procedure for servicing the 277 volt lighting system is protected under Part 708. A danger, by definition, generally involves an element of future

possibility and risk.7/ Moreover, the regulatory language does not state that the danger must be "imminent" or "immediate" as a means of restricting this aspect of the term's meaning. *See Curtis Hall*, 29 DOE ¶ 87,022 at 89,113 (2007). Sandia argues that at the time of the complainant's conversation with Ms. Lamb, Sandia already had established a policy of eliminating light switch LOTO from its safety procedures. I find that this contention is not supported by the record. As late as June 16, 2007, Mr. Cerutti, a Sandia manager, e-mailed the complainant and Mr. Vaughan that it was important that "the huge number of [light] switches that will be installed in the MESA complex will be ones that we can lock out at the individual switches." Light Switch LOTO e-mail string, Sandia Hearing Exhibit 5C. In his September 14, 2004, e-mail to Mr. Vaughan, the complainant states that he brought Ms. Lamb's resistance to ending light switch LOTO to the attention of Mr. Vaughan following his June 17, 2004, conversation with her, and that this resulted in Mr. Vaughan's June 17, 2004, e-mail to Ms. Lamb in which he stated that locking out light switches "does not provide the power isolation required by OSHA" and stated that "breaker isolation" or in some cases the removal of fuses should be used to cut power in the future. Sandia Hearing Exhibit 5A. The complainant's recollection of Ms. Lamb's resistance to ending light switch LOTO is supported by her hearing testimony.

> what I understood from the conversation was that Casey was still concerned that we were using the switch that was controlling the lighting panel, and I explained that we were not depending on that. If people also wanted to put the Lock-Out-Tag-Out switch on that, we thought that was the best practice.

TR at 227. Accordingly, Sandia has not shown that it had changed its policy to eliminate light switch LOTO prior to the complainant's June 17, 2004 conversation with Ms. Lamb. It is important to note

---

7/ "DANGER, the general term, implies the contingent evil (troubled by the *danger* that the manuscript will be lost - Carl Van Doren)(realizing that the buffalo in the United States were in *danger* of becoming extinct - Amer. Guide Series: N.H.)(the *dangers* of travel by air) (the *danger* of lowering one's standards) PERIL implies more strongly the imminence and fearfulness of the danger (the ship was in deadly peril of seizure by mutineers - C.C.Cutler)" *Webster's Third International Dictionary, Unabridged*, G&C Merriam Company, 1964 at 573.

that Sandia also would have to convince me that the complainant was aware that this LOTO practice had been changed.

Moreover, Sandia has not shown that it stopped using light switch LOTO when it resumed servicing its lighting systems following the April 2004 accident. Although Mr. Vaughan testified that the practice has stopped at Sandia [TR at 408], the statements of another Sandia witness contradict this testimony. Mr. Kerekes, a lighting technician, testified that he continues to use a toggle switch LOTO device to lock out the light switches at Sandia. TR at 173. Accordingly, I find that the complainant's disclosures concerning the dangers of light switch LOTO revealed a specific danger that concerned Sandia employees.

Finally, Sandia argues that the complainant's disclosure about light switch LOTO did not constitute a substantial danger to Sandia employees because Sandia did not rely exclusively on light switch LOTO to cut power to the Microlite 277 volt lighting panels. It stated that the longstanding practice of electricians at Sandia is to pull the in-line fuse to the lamp ballasts in the individual lighting panels prior to repairing or replacing those ballasts. Mr. Vaughan testified that it is now Sandia policy to either disconnect these fuses using a LOTO device or, where no in-line fuse exists, to lock out the power at the breaker box. However, in his testimony at the hearing, the complainant stated that he did not believe that pulling the fuse to the lamp ballast was an adequate safety practice, because electricity would continue to flow to other parts of the lighting panel and could expose a maintenance worker to the risk of shock. TR at 26-27. In his June 17, 2004 e-mail, Mr. Thayer stated that

> My recommendation is that all fixture LOTO be done at the circuit breaker where possible, as this is the safest method. From talking to Greg Anderson, Facilities Maintenance, it is common practice to replace ballasts by removing the fixture fuse to the ballast; this is questionable, but it does disconnect the power conductors.

Sandia Hearing Exhibit 5B.

I find that the complainant has established that he reasonably believed that there are dangers inherent in cutting off power to only a portion of a lighting unit when servicing that unit. I also find that it was reasonable for the complainant to believe that Sandia's practice of ineffective light switch LOTO coupled with

pulling the fuse within a lighting fixture created a substantial danger of injury to employees.

In light of the evidence discussed above, I find that the evidence in this proceeding indicates that the complainant reasonably believed that his June 17, 2004 disclosure to Ms. Lamb and his September 14, 2004 disclosure to Mr. Vaughan revealed a substantial and specific danger to the health and safety of Sandia employees, and therefore constitute the type of disclosures that Part 708 was designed to encourage and protect.

C. The Complainant's Alleged Retaliations

As discussed above, the ROI finds that Sandia took an adverse personnel action affecting the complainant when Mr. Vaughan terminated his employment at SNL on September 20, 2004. *See* ROI at 5. I agree that Sandia's decision to discharge the complainant from his position at SNL meets the definition of a "retaliation" as that term is defined in Part 708. *See* 10 C.F.R. § 708.2.

In his November 2004 complaint, the complainant also asserts that Sandia retaliated against him in the period immediately prior to his dismissal. He asserts that, at that time, Mr. Vaughan and other Sandia managers failed to assist him in transferring out of his position in the Facilities division to another position at SNL.

The complainant did not explain in his filings or at the hearing why he believed that Sandia would under normal circumstances assist him with a transfer to another Sandia position. Indeed, his closing argument does not refer at all to this alleged retaliation. In his testimony, the complainant did not identify any subcontractor employees who have been assisted by Sandia in transferring to other positions.

Although Sandia may sometimes assist subcontractor employees in transferring to different positions within Sandia, there is no evidence that such assistance with transfers is customarily provided. Indeed, there is some evidence from the hearing which indicates the contrary. In his testimony, Mr. Vaughan stated that he believed it was not common for subcontractor employees of Sandia to get assistance from Sandia managers to change job assignments within the Sandia organization, and that he did not consider it proper for the complainant to ask him for assistance with such a transfer. TR at 377-378. He testified that because Sandia was not the complainant's employer, he did not believe that he was

responsible for the complainant's "professional development" at SNL. TR at 377.

While there is no evidence that Sandia commonly assists its subcontractor employees in changing jobs, Ms. Lopez testified that the complainant's subcontractor employer, COMPA, is regularly engaged in seeking transfer or replacement positions for its employees. In this regard, Ms. Lopez testified that beginning in July 2004, she was counseling the complainant on locating a new position at SNL and that COMPA's recruiter was sending him job listings. TR at 342.

Accordingly, the complainant has not established by a preponderance of the evidence that Sandia's refusal to assist the complainant in transferring to another position at SNL constituted a Part 708 "retaliation."

D. The Complainant's Protected Disclosures Were a Contributing Factor to His Dismissal from SNL

Under 10 C.F.R. § 708.29, the complainant must also show that his protected disclosures were a *contributing factor* with respect to a particular alleged retaliation taken against him. *See Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994).8/ A protected disclosure may be a contributing factor to an adverse personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) *citing McDaid v. Dep't of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990). *See also Russell P. Marler, Sr.*, 27 DOE ¶ 87,506 at 89,056 (1998).

I conclude that the complainant has established by a preponderance of the evidence that his protected disclosures were contributing

---

8/ A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Luis P. Silva*, 27 DOE ¶ 87,550 at 89,263 (2000), *citing* 135 Cong. Rec. H747 (daily ed. March 21, 1989)(Explanatory Statement on Senate Amendment-S.20); *see also Stephanie A. Ashburn*, 27 DOE ¶ 87,554 (2000), *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)(applying the "contributing factor" test in a case under the Whistleblower Protection Act, 5 U.S.C. § 1201).

factors to his termination. I base this conclusion on a finding that there are both knowledge and proximity in time between the protected disclosures made by the complainant and Mr. Vaughan's decision to terminate his employment at SNL in September 2004.

With respect to knowledge of the disclosures, the complainant made his disclosures to Ms. Lamb on June 17, 2004 and to his supervisor on September 14, 2004. With regard to timing, the disclosures took place in June and early September 2004, and the complainant's supervisor terminated his employment on September 20, 2004. This termination of employment clearly is an adverse personnel action and meets the criteria for a Part 708 retaliation. A reasonable person could conclude that the protected disclosures were a factor in Sandia's decision to terminate the complainant's employment because the termination occurred only a week after one protected disclosure and only about three months after the other disclosure. The disclosures were thus a contributing factor to the alleged retaliation. *See Jagdish C. Laul*, 28 DOE ¶ 87,006 at 89,050 (2000), *aff'd.* 28 DOE ¶ 87,011 at 89,086 (2001) (protected activity found to be contributing factor when it occurred proximate in time to a retaliation).

Sandia asserts that the complainant's protected disclosures have not been shown to constitute a contributing factor in his termination because it has shown that several other Sandia employees made similar safety disclosures and were not retaliated against, and because the complainant has admitted that Sandia had other reasons to take action against him. Sandia's Post-hearing brief at 8-11. I find that these contentions are just the type of argument that is appropriately considered when analyzing whether Sandia would have terminated the complainant in the absence of his protected disclosures. The complainant's showing that protected activity occurred proximate in time to his termination is sufficient for the complainant to meet the contributing factor test. I therefore will proceed to determine whether Sandia has shown, by clear and convincing evidence, that it would have taken the same action to dismiss the complainant in the absence of his protected disclosures.

E. Sandia has Shown by Clear and Convincing Evidence that it would have Terminated the Complainant's Employment in the Absence of his Protected Disclosures

In its closing argument, Sandia contends that it has presented substantial evidence to support its position that the complainant would have been terminated even in the absence of his alleged

disclosures. Sandia asserts that the complainant's continuing litany of behavior and attitude problems caused Mr. Vaughan to make the determination that the complainant's services were unsatisfactory and that he should be removed from his position. Referring to the points raised in Mr. Vaughan's September 24, 2004, memorandum, it contends that the testimony at the hearing demonstrated that the complainant demonstrated little ability to operate in accordance with the work processes in place at Sandia and to interact effectively with his co-workers. It asserts that the hearing testimony confirmed several of the criticisms contained in Mr. Vaughan's September 24, 2004, memorandum concerning the complainant. Sandia Closing Argument at 13. Sandia cites the complainant's inability to work as part of a team as a crucial factor in its decision to terminate his employment.

> His inability to work with others was not limited to one or even two co-workers with which he allegedly had some sort of personality conflict - rather he demonstrated a general inability to work with anyone on a regular basis. His possessive attitude toward his own work and solutions to the exclusion of that of others was demonstrated in his hostile reactions to suggestions or discussion. When Complainant raised concerns about sexual harassment to his Sandia assigned manager, Johnny Vaughan, Mr. Vaughan diligently pursued internal EEO processes. These complaints were thoroughly investigated and determined to be unfounded. Although the EEO department and Mr. Vaughan made extraordinary efforts to attempt to repair relations between Complainant and his colleagues, Complainant's own attitude made resolution impossible. His continuous refusal to work with his colleagues caused not only constant strife within his own department, but also negatively affected his Sandia customers in facilities with whom he was assigned to provide safety engineering services.

Sandia Closing Argument at 14. Based on my analysis of witness testimony at the hearing, I find that Sandia has clearly and convincingly shown that its decision to fire the complainant was based on his poor performance, caused by his inability to interact with his co-workers.

As indicated in the summary of testimony, several of the complainant's co-workers and customers reported that they were concerned that he displayed angry or unfriendly behavior in the workplace. Ms. Minton, Ms. Jensen and Mr. Kirsch testified that the

complainant displayed anger during and after certain telephone conversations, and Mr. Chavez stated that he would postpone safety discussions with the complainant on occasions when the complainant became red-faced and raised his voice.

An even more disruptive aspect of the complainant's behavior involved his interactions with female co-workers or customers. The hearing testimony establishes that the complainant reported to Sandia's EEO that he was bothered by the behavior or conversation of three female employees who he worked with on a regular basis. I am convinced by the testimony and witness demeanor of Ms. Jensen and Ms. Lamb that their comments or behavior towards the complainant were not intended in any way to harass or disturb the complainant. I further accept the testimony of Ms. Nakos and Ms. Germany that they investigated the complainant's concerns and could find no evidence that the three female employees had violated any EEO or Sandia ethics provision in their interactions with the complainant. Rather, it appears that the complainant has a sensitivity that can make him very uncomfortable when he is required to work closely with women. The testimony of Ms. Jensen and Ms. Lamb convinces me that the complainant's ability to work with them steadily deteriorated to the point where it became impossible for them to interact with the complainant in a normal manner. The testimony of Ms. Jensen, Mr. Kirsch, and Mr. Vaughan indicates that the other female coworker left her position at Sandia in reaction to the complainant's allegations that she had behaved improperly towards him.

Regarding his interactions with the complainant, Mr. Vaughan testified that the complainant expressed contempt for his former female coworker and for Ms. Lamb. He stated that on May 3, 2004, he met separately with the complainant and Ms. Lamb about their working relationship, which he believed had become a problem. He testified that he told the complainant at that time that he had to take direction from Ms. Lamb, but that the complainant continued to approach him frequently with suggestions for assignments, rather than interact with Ms. Lamb and accept assignments from her.

Mr. Vaughan testified that on August 3, 2004, he was informed by Ms. Nakos and Ms. Germany that the complainant had raised allegations of sexual harassment against a third co-worker, Ms. Jensen. He testified that, at this point, he felt that he had a serious performance problem with the complainant but did not know how to address the problem "without it being construed as harassment over some EEO allegations." TR at 367. On September 14, 2004, Mr. Vaughan stated that he was told by Ms. Jensen that she would quit Sandia because she could no longer work in close proximity to

the complainant. TR at 369. Mr. Vaughan testified that Ms. Jensen was a highly valued employee who he could not afford to lose. On September 20, 2004, Mr. Vaughan made the decision to terminate the complainant's employment.

I find that as of September 14, 2004, Mr. Vaughan clearly believed that Ms. Jensen and the complainant could no longer work together on the ES&H Customer Support team. Mr. Vaughan also was aware that the complainant had serious problems interacting appropriately with the support team's chief customer, Ms. Lamb. Under these circumstances, the removal of the complainant from his position at SNL was a necessary and appropriate response to the complainant's inability to interact in a positive manner with his co-worker and his chief customer.

While the record indicates that Mr. Vaughan was unhappy about the way in which the complainant argued about safety issues with Ms. Lamb and others, I find that his overriding reasons for removing the complainant from his position at SNL were independent of the complainant's disagreements concerning LOTO safety procedures. As he testified convincingly at the hearing, Mr. Vaughan believed that the complainant's intimidating attitude and his inability to work with Ms. Jensen and Ms. Lamb could not be changed, and that his interactions were distracting team members from their jobs and undermining the effectiveness of their work. I find that this belief was reasonable, based on Mr. Vaughan's testimony concerning his interactions with the complainant and with the complainant's co-workers. In addition, the record indicates that the complainant's inability to work with Ms. Lamb predates their June 17, 2004 disagreement concerning LOTO procedures. The record also indicates that the complainant's problems interacting with Ms. Jensen were unrelated to safety concerns. These problems were undermining the effectiveness of the ES&H Customer Support team, not the complainant's disclosures about unsafe LOTO procedures. I find that it was these problems that led Mr. Vaughan to conclude that the termination of the complainant's position was essential to the effective function of his ES&H team and to safety at SNL. *See* TR at 364 and 385. Accordingly, the complainant's conduct leading to his termination was completely unrelated to his Part 708 protected activity. *See Diane E. Meier, Case No. VBA-0011*, 28 DOE ¶ 87,004 at 89,042 (2000) (DOE contractor found not to have retaliated against a complainant because her removal from a project was due to "irreconcilable differences" with her co-worker that were unrelated to her protected activity).

Finally, the testimony of Mr. Vaughan convinces me that his decision to terminate the complainant's employment was generally consistent with his previous treatment of contract employees in his organization. This conclusion also is supported by the testimony of Ms. Lopez, who as COMPA's president and the complainant's direct employer, met and spoke frequently with Mr. Vaughan concerning the complainant's workplace issues.

In his closing argument, the complainant contends that the behavior that Sandia cites as grounds for his termination has been exaggerated. He states that he can recall losing his temper on the telephone on only a few occasions, that e-mails in the record of the proceeding indicate that he had positive working relationships with several Facilities managers at Sandia, and that the demeanor of his co-workers became negative only after he "reported issues, including safety violations, to Sandia Human Resources." Complainant's Post-Hearing Brief at 4-7. There is factual support in the record for some of these contentions. The complainant received positive feedback for his safety work from Mr. Chavez and other facilities managers, and Ms. Lamb acknowledged in her testimony that she received no complaints from these managers about the complainant's performance. However, even two or three instances of angry telephone conversations over a one-year period may have a negative effect on working relationships with co-workers. Moreover, the complainant's arguments and his testimony at the hearing do not refute the testimony of several Sandia witnesses that he had serious personality conflicts with female co-workers that were unrelated to protected activity and that were seriously disruptive of the mission of his team.

The complainant admits in his closing argument that he adopted a pattern of avoiding Ms. Jensen, and states that it is a reasonable reaction to the negative experiences with her that resulted in his making an EEO complaint. Complainant's Closing Argument at 5. He does not discuss his difficulties in dealing with Ms. Lamb in that document, although at the hearing he presented Ms. Minton's testimony that Ms. Lamb could be a difficult person to work with. My observation of the complainant's demeanor at the hearing also leads me to conclude that he is uncomfortable in the presence of Ms. Jensen and Ms. Lamb, and would have difficulty interacting with them effectively in a business setting.

I reject the complainant's position that his avoidance of Ms. Jensen was reasonable and therefore something that Sandia management could be expected to tolerate. As discussed above, I find that the evidence at the hearing establishes that neither Ms. Jensen nor

Ms. Lamb behaved in an inappropriate manner toward the complainant. Nor has the complainant refuted the testimony of Ms. Jensen that she and the complainant were expected in many instances to operate as a team to survey work sites together for safety and hygiene issues. Finally, the complainant has not refuted the evidence presented by Sandia that his practice of avoiding Ms. Lamb violated work assignment procedures for the ES&H support team and diminished his effectiveness in providing safety support to SNL facilities managers. Accordingly, I find that there is abundant evidence to support the complainant's termination by Mr. Vaughan based on poor performance in the workplace, most notably the complainant's lack of an effective working relationship with Ms. Lamb and Ms. Jensen.

I therefore find that Sandia has established by clear and convincing evidence that it would have terminated the complainant's employment at SNL in the absence of his protected disclosures.

VI. CONCLUSION

As set forth above, I have determined that the complainant has failed to establish the existence of a violation on the part of Sandia or COMPA for which he may be accorded relief under DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. I find that the complainant made protected disclosures under Part 708, and that such disclosures were a contributing factor in the alleged retaliation of terminating his employment at SNL. Notwithstanding, I find that Sandia has shown by clear and convincing evidence that it would have taken the same action even in the absence of the protected disclosures. Accordingly, I will deny the complainant's request for relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Mr. Casey von Bargen under 10 C.F.R. Part 708, OHA Case No. TBH-0034, is hereby denied.

(2) This is an initial agency decision, which shall become the final decision of the Department of Energy unless, within 15 days of

receiving this decision, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: November 2, 2007

November 19, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Joshua Lucero

Date of Filing: June 30, 2006

Case Number: TBH-0039

This Initial Agency Decision concerns a whistleblower complaint filed by Joshua Lucero (Lucero) against his former employer, Wackenhut Services, Inc. (WSI), under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. WSI is a contractor that provides services to the DOE's Office of Secure Transportation (OST). Lucero alleges that he engaged in activity protected by Part 708 and, as a result, was retaliated against by WSI.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The regulations governing the DOE's Contractor Employee Protection Program (CEPP) are set forth at Title 10, Part 708 of the Code of Federal Regulations. The CEPP regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. §§ 708.5(a)(1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE. Upon acceptance of jurisdiction over the complaint by the local DOE Field Office, the Complainant is entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), followed by a hearing and an Initial Agency Decision by an OHA Hearing Officer. If dissatisfied with the decision, a party may appeal the Hearing Officer's Decision to the Director of the Office of Hearings and Appeals (the OHA Director). 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

Lucero filed a whistleblower complaint with the DOE's National Nuclear Security Administration (NNSA) Service Center on July 6, 2005. After conducting a preliminary analysis of the allegations contained in this complaint, the NNSA Service Center forwarded it to the OHA. OHA received the complaint on January 9, 2006, and the OHA Director appointed an

investigator who conducted an investigation of the allegations in the complaint and issued a Report of Investigation (the ROI). Immediately following the issuance of the ROI, the OHA Director appointed me as Hearing Officer. I conducted a three-day hearing on January 9, 10, and 11, 2007, in Albuquerque, New Mexico. The transcript of the hearing will be cited as "Tr." The hearing was followed by an exchange of Post Hearing Briefs.

C. Factual Background

Lucero began working as a part-time van (escort vehicle) driver for the OST's Contractor Transportation Utilization Program (CTUP) program on October 27, 2003. The CTUP was formed to support the OST's nuclear courier program, which is responsible for transporting nuclear weapons and special nuclear materials. The CTUP was created to conserve resources by allowing contractors to operate transport and escort vehicles when the vehicles were not transporting nuclear weapons or special nuclear materials. Most of the CTUP employees, including all of its first tier managers, were former federal agents who had operated these vehicles in the past. All CTUP drivers were employed on an on-call basis and paid only for time spent on transport missions or training. Transport missions generally lasted from a few days to several weeks.

On December 6, 2004, Lucero filed a whistleblower complaint against WSI, under 10 C.F.R. Part 708, with the NNSA Service Center.1 Exhibit 18. On April 28, 2005, WSI and Lucero entered into a settlement agreement in resolution of the December 6, 2004 complaint. Exhibit 24. The April 28, 2005 settlement agreement precludes relief for any preceding adverse personnel actions.

On May 18, 2005, Lucero's supervisor, Douglas Turner, held a verbal counseling session with Lucero. Exhibit 27; Exhibit H6. Turner told Lucero that he had observed Lucero's work on the last trip and that Lucero "had done a good job." Exhibit 27 at 1. However, Turner advised Lucero of some problems with his performance, specifically, it noted that Lucero had been sleeping in his vehicle at a time when he was expected to be awake and alert and that Lucero had used a government vehicle for his personal use. Exhibit 27 at 1. Turner further advised Lucero that "he needed to be a team member and work with others to get the job done." Exhibit 27 at 1.

On June 13, 2005, Lucero was part of a convoy returning a number of tractor-trailers and vans to a storage facility. Lucero was driving one of the vans. As the tractor trailers and vans were

[1] The December 6, 2004 whistleblower complaint was based upon Lucero's assertion that he was retaliated against for an August 20, 2004, incident. On that date, Lucero reported that a coworker, Martin Abeita, intended to transport both alcohol and a firearm on an upcoming flight of an NNSA Aircraft. Exhibit 14. Approximately, one month prior to this incident, the DOE Office of Inspector General had issued an Inspection Report in which it found that two WSI employees transported handguns through the NNSA aviation facility in violation of DOE and FAA policies. Office of Inspector General Inspection Report: Unauthorized Handguns on National Nuclear Security Administration Aircraft at http://www.ig.energy.gov/documents/CalendarYear2004/ig-0654.pdf. Lucero was suspended, without pay, as a result of this incident. Tr. at 424. The December 6, 2004 complaint asserted that both Lucero's suspension and a Letter of Reprimand issued to him on October 1, 2004 occurred in retaliation for Lucero's reporting the firearm incident.

being parked, Lucero drove past the front of a tractor-trailer operated by Abeita. Abeita's vehicle was moving forward at the time. Abeita slammed on the brakes. After Abeita finished parking the tractor-trailer, he proceeded to the debriefing room where he verbally accosted Lucero.

On July 6, 2005, WSI issued a Letter of Counseling to Lucero. Exhibit 36; Exhibit A. The July 6, 2005, Letter of Counseling states, in pertinent part:

> On Monday June 13 at 1615 in the afternoon, you were involved in an unsafe driving act. Five other CTUP drivers witnessed the incident, which occurred at the Agent Operations Western Command parking lot. As Mr. Martine Abeita was pulling forward in a tractor/trailer so as to position it for parking in a designated spot, you drove through the narrow gap between the truck he was pulling forward in and a van driven by Laura Legacy. Your maneuver caused Mr. Abeita to slam on his brakes in order to keep from hitting your vehicle. The witnesses stated you were driving too fast for the parking area and showed no regard for the safety of others in the area.

Exhibit 36 at 1. Later that day, Lucero filed the present whistleblower complaint with the NNSA Service Center. Exhibit E.

On November 1, 2005, NNSA's Office of Business Services issued a letter to WSI officially requesting "WSI to stand down and discontinue over-the-road operations in support of the CTUP . . . effective . . . November 7, 2005." Exhibit 50 at 1. This stand down continued until January 25, 2006. During the stand down, OST made a number of changes to the CTUP's Standard Operating Procedures (SOP). Among the changes mandated by the OST were requirements that each of CTUP's drivers have (1) a Commercial Driver's License (CDL) with a Hazardous Material (HazMat) endorsement, and (2) a DOE "Q" Clearance. Exhibit 62. Lucero has been an insulin dependant diabetic since the age of four. Tr. at 27. The Federal agency that established the standards for the CDL, the Federal Motor Carrier Safety Administration, prohibits insulin dependant diabetics from obtaining or maintaining a CDL. 49 C.F.R. § 391.41(b)(3) Accordingly, Lucero has not driven for CTUP since the implementation of the revised SOP.

II. ANALYSIS

A. The Parties' Respective Burdens Under Part 708

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate as described in § 708.5, and that such act was a contributing factor to one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29; *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*). Once the complainant has met this burden, the burden shifts to the

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

B. Complainant's Burden

The Part 708 regulations specifically protect employees of DOE who participate in **"**an administrative proceeding conducted under this regulation." 10 C.F.R. Section 708.5(b).

1) Lucero's Protected Conduct

In the present case, it is self-evident that Lucero engaged in protected conduct when he filed whistleblower complaints under Part 708 in December 2004 and July 2005. *See* 10 C.F.R. Sections 708.5(a)(1) and (2); 708.5(b).

2) Adverse Personnel Actions

Lucero asserts that the following adverse personnel actions were taken against him by WSI employees during his tenure as a CTUP driver: (1) the issuance of the July 6, 2005, Letter of Counseling; (2) WSI's alleged failure to discipline Abeita for his conduct in the debriefing room on June 13, 2005; (3) WSI's verbal counseling of Lucero in May 2005; (4) Lucero being called up for a trip only to be sent home when he arrived for the trip; (5) WSI's alleged failure to fulfill all terms of the April 28, 2005, settlement agreement; (6) Lucero receiving fewer work assignments after he filed his Part 708 complaints; (7) a pattern of hostility towards Lucero, and (8) WSI's implementation of a DOE-mandated requirement that all CTUP vehicles be operated by drivers possessing a Commercial Driver's License (CDL).

(a) July 6, 2005 Letter of Counseling

The July 6, 2005, Letter of Counseling clearly constitutes an adverse personnel action under 10 C.F.R. Section 708. Citing *Spears v. Missouri Dep't of Corrections & Human Resources*, 210 F.3d 850, 852 (8th Cir. 2000) (*Spears*), and similar cases from the eighth circuit, WSI contends that Letters of Counseling or Reprimand do not constitute adverse personnel actions under Part 708. WSI's reliance upon these cases is clearly misplaced. *Spears* and the other cases cited by WSI involve civil rights actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq*. *See Spears*, 210 F.3d at 850. The present action is governed by the regulations set forth at 10 C.F.R. Part 708. Part 708 does not specifically define the term

"adverse personnel action." Instead, OHA looks to see if a given personnel action on the part of a DOE contractor falls with the scope of Section 708.2. Section 708.2 states, in pertinent part:

> *Retaliation* means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (*e.g.*, discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) . . .

10 C.F.R. Section 708.2. Clearly, the issuance of a Letter of Counseling is "an action . . . taken by a contractor with respect to employment." OHA Hearing Officers have consistently treated counseling, in both verbal and written form, as adverse personnel actions. *Gary S. Vander Boegh*, OHA Case No. TBH-0007, http://www.oha.doe.gov/cases/whistle/tbh0007.pdf (July 11, 2003) at 17 (finding contractor's contention that a letter of reprimand was not a adverse personnel determination to be without merit), *appeal dismissed*, Case No. TBA-0007, http://www.oha.doe.gov/cases/whistle/tba0007.pdf (OHA Director, February 22, 2007); *see also, e.g. Franklin Tucker*, Case No. TBH-0023, http://www.oha.doe.gov/cases/whistle/tbh0023.pdf (April 9, 2007); *aff'd*, Case No. TBA-0023, http://www.oha.doe.gov/cases/whistle/tba0023.pdf (OHA Director, July 2007) (treating counseling as an adverse personnel act); *John L. Gretencord*, Case No. VBZ-0033, http://www.oha.doe.gov/cases/whistle/vwa0033.htm (November 4, 1999), *aff'd*, Case No. VBA-0041, http://www.oha.doe.gov/cases/whistle/vba0041.htm (OHA Director, March 13, 2000), *petition for Secretarial review dismissed* (August 11, 2000). Moreover, Letters of Counseling are clearly considered to be adverse personnel determinations under the Federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled. *Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006) (Letter of Reprimand was an adverse personnel determination).

(b) WSI's Alleged Failure to Discipline Abeita for His Conduct in the Debriefing Room on June 13, 2005

Lucero alleges that WSI failed to discipline Abeita for his verbal abuse of Lucero which occurred in the debriefing room minutes after the June 13, 2005, parking lot incident and that the alleged failure to discipline Abeita was an adverse personnel action. However, Turner verbally counseled Abeita about his behavior towards Lucero in the debriefing room and informed Abeita that he would not be allowed to work until "he comes in for further counseling." Exhibit 33; Tr. at 331- 332. Because the record shows that Abeita was in fact disciplined for his conduct in the debriefing room, I find this contention is without merit.

(c) WSI's Verbal Counseling of Lucero for Visiting His Aunt's Home in Las Vegas, New Mexico, in a DOE Vehicle While on DOE Business

On May 18, 2005, Turner verbally counseled Lucero, for "sleeping in the vehicle when he should have been awake and alert" and for "the miss-use of a gov't vehicle." Exhibit 27. As I have discussed above, it is well settled that counseling constitutes an adverse personnel action.

(d) Lucero Being Called Up for a Trip Only to be Sent Home When He Arrived for the Trip

Lucero testified that Turner instructed him to report for duty on an unspecified date at 6:00 a.m. for a scheduled trip. Tr. at 69. Lucero testified that he did so and boarded a bus to the airport with his co-workers. Tr. at 69. Lucero testified that, at the airport, the WSI manager in charge of this trip, T.R. Sanchez, informed Lucero that no flight arrangements had been made for him. Tr. at 70. Lucero then contacted Turner, who told Lucero to go home. Tr. at 70. Turner testified:

> I told Mr. Lucero that there was a trip coming up, but I did not call him and tell him he was on the trip. And the next thing I knew was, I believe it was Mr. Sanchez called me, and Lucero was on a bus and thought he was on a trip. Well I talked to Mr. Lucero and apologized to him immediately, and said no he was not on the trip. I was sorry if he thought he was.

Tr. at 363. Essentially, this issue pits Lucero's word against that of Turner. Since, as I discuss below, Lucero's credibility has been convincingly impeached, I find he has not shown, by a preponderance of evidence, that he was scheduled for this trip.

Exhibit 97 is a letter dated April 2, 2003 from Gilbert G. Gallegos, the Chief of Police for the Albuquerque Police Department (APD), to Lucero stating that the APD was terminating Lucero's Employment. [2] Exhibit 6 is a partial copy of a Questionnaire for National Security Positions (QNSP) Lucero submitted as part of the background investigation conducted by DOE in order to determine his eligibility for a DOE security clearance. Lucero's answers to Section 22 of the QNSP clearly intentionally omitted the fact that he had been terminated for cause by the APD. Moreover, on June 23, 2004, Lucero filed a lawsuit against the APD contesting his termination. On July 18, 2005, he was deposed by the APD. During this deposition, Lucero was asked if he had ever been disciplined by WSI. Lucero answered in the negative. Exhibit 40 at 7. Lucero denied having been disciplined by WSI even though he had previously received two letters of reprimand and had been suspended as a result of the firearm incident. This evidence strongly impeaches Lucero's credibility. As a result, I have given little or no evidentiary weight to Lucero's testimony throughout this proceeding. Accordingly, I find that Lucero has not met his burden of producing a preponderance of evidence showing that he was scheduled and then removed from this trip.

---

2 During the present proceeding, the Contractor submitted a number of documents related to a lawsuit filed by Lucero against the APD alleging that Lucero had been wrongfully terminated. Lucero objected to the inclusion of these documents in the record, arguing that they are "irrelevant and prejudicial." Certain of these documents indicate that Lucero lied during a deposition and provided false or misleading information to DOE officials investigating his eligibility to obtain or maintain a "Q" level access authorization. Those documents are relevant because they unambiguously show Lucero's willingness to provide false or misleading information under oath. The documents that I am admitting into evidence contain evidence which reflects on Lucero's credibility and they appear in the record as Exhibits 6, 12, 40, 84, 85, 86, 87, 92, 93, 94, 95, 96, 97, and 98. Those documents that WSI has submitted as Exhibits 78, 79, 80, 81, 82, 83, 88, 89 , 90, 91, and 99, do not reflect on Lucero's credibility, and I have not relied upon them in reaching any of my conclusions or findings. I am, however, including them in the record, in order to provide a more complete record for consideration on any appeal.

(e) WSI's Alleged Failure to Fulfill All Terms of the April 28, 2005 Settlement Agreement

Lucero claims that the settlement of his December 6, 2004, whistleblower complaint required WSI to hold an all-hands meeting to insist that all WSI employee's stop harassing Lucero. Tr. at 33. However, enforcement of a settlement agreement is beyond the scope and jurisdiction of Part 708. Therefore, I will not consider this contention.

(f) WSI's Implementation of a DOE Mandated Requirement that all CTUP Vehicles Be Operated by Drivers Possessing a Commercial Driver's License

The record shows that OST changed the task order[3] to require that all drivers in the CTUP maintain a CDL. Lucero asserts that WSI convinced DOE to change the task order in order to render Lucero ineligible to receive future work assignments. In support of this contention, Lucero notes that Sanchez's son was the OST official responsible for oversight of the CTUP. Tom Kreider, a member of WSI's management team, testified that Sanchez frequently lobbied his son to adopt more stringent safety standards for the CTUP and that some of Sanchez's suggestions were ultimately adopted by OST. Tr. at 957.

Part 708 does not allow for a complaint to be filed against the DOE. *Ronald E. Timm*, Case No. VBU-0077, http://www.oha.doe.gov/cases/whistle/vbu0077.htm (October 25, 2001) (only acts of retaliation by entities in the contractor chain, not the DOE, are covered under Part 708). Accordingly, I have no jurisdiction to consider any allegations of retaliation by DOE or DOE officials. We need not rule on the issue of whether a contractor could be found to have retaliated against a whistleblower by convincing DOE to take a specific regulatory action that negatively affected the whistleblower, since Lucero has presented nothing other than suspicion on this issue, and thus failed to meet his burden of showing, by a preponderance of evidence, that WSI actually convinced DOE to change the task order.

(g) Lucero's Allegations that He Received Fewer Work Assignments

Lucero was paid on an hourly basis. Lucero worked only when he was called in to drive a van during sporadic transfers of DOE equipment. Lucero testified that, prior to filing his whistleblower complaints, he was being assigned to one or two trips per month. Tr. at 98-99. Lucero further testified that, after he had filed his whistleblower complaints, he was assigned to fewer trips. Tr. at 99. The only evidence in the record that Lucero received fewer work assignments after he made his protected disclosures is Lucero's testimony. Since, as I have discussed above, Lucero's credibility has been strongly impeached, I find that Lucero has not met his burden of proof on this issue.

(h) Lucero's Allegations of A Pattern of Hostility

The evidence in the record indicates a pattern of hostility towards Lucero on the part of WSI

[3] Under the Federal Acquisition Regulations, the term "'task order' means an order for services placed against an established contract or with Government sources." 48 C.F.R. Section 2.101.

managers and employees. A number of Lucero's coworkers testified that certain members of WSI management appeared to harbor a bias towards, or "have it out for," Lucero. Tr. at 224-225, 227, 234, 236 (George Martinez), 711-712, 714-15, 724 (Alan Payne), 857 (Bill Fuller) 959, 975 (Tom Kreider). Tom Kreider testified that Lucero was always the topic of conversation and was picked on. Tr. at 943, 959. Ken Kreider testified that Lucero was a frequent topic of conversation among the drivers and was often the subject of jokes. Tr. at 992. Ken Kreider testified that Lucero got written up for things other drivers did not get written up for. Tr. at 1005. Several drivers refused to travel with Lucero because they claimed he was an unsafe or inconsiderate driver. The testimonial evidence suggests that Lucero was the subject of social ostracization and was subject to an unusual level of management scrutiny which could be construed as rising to a level of intimidation proscribed by Part 708.

3) Lucero's Protected Conduct Was a Contributing Factor to Adverse Personnel Actions

Having established, by a preponderance of evidence, that he (1) had engaged in protected conduct under 10 C.F.R. § 708.5, (*i.e.* filing two Part 708 complaints) and (2) suffered adverse personnel actions (*i.e*. intimidation, written and verbal counseling), Lucero must also show, by a preponderance of evidence, that his protected conduct was a contributing factor to adverse personnel actions taken against him.

a) Temporal Proximity

In most whistleblower cases, it is difficult or impossible for a complainant to point to or find a "smoking gun" that proves an employer's retaliatory intent. Therefore, Congress and the courts, recognizing this difficulty, have found that protected conduct may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993), *citing McDaid v. Department of Hous. and Urban Dev*., 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, the courts have found that "temporal proximity" between protected conduct and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F.2d at 148.

Since Lucero engaged in protected conduct by the filing of a whistleblower complaint in December 2004, there was temporal proximity between his protected conduct and the May 18, 2005, verbal counseling, the July 6, 2005, letter of counseling and the pattern of hostility. As noted above, the December 2004 complaint proceeding was not settled until April 2005. Moreover, since Lucero also filed a complaint on July 6, 2005, temporal proximity existed between that protected conduct and the hostility that he endured subsequent to July 6, 2005. It is clear that the WSI managers who decided to take these adverse personnel actions had actual knowledge of his protected conduct. Therefore, the temporal proximity between Lucero's protected conduct and the three adverse personnel actions taken against him is sufficient to establish, by a preponderance of the evidence, that his protected conduct was a contributing factor to the July 2005 Letter of Counseling, the May 18, 2005, verbal counseling, and the pattern of hostility.

C. Contractors Burden: Whether WSI Would Have Taken Adverse Personnel Actions Against Lucero in the Absence of His Protected Conduct

I have found that the Complainant has shown, by a preponderance of evidence, that (1) he engaged in protected conduct, and (2) this protected conduct was a contributing factor to the July, 2005, letter of counseling, the May, 2005, verbal counseling, and the pattern of hostility. Therefore, the burden has been shifted to WSI to prove by clear and convincing evidence that the company would have issued the July 2005 Letter of Counseling, conducted the May, 2005, verbal counseling session, and that a pattern of hostility against Lucero would have existed even if Lucero had not engaged in protected conduct. 10 C.F.R. § 708.29. Clear and convincing evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F. Supp. at 1204 n.3. For the reasons set forth below, I find that WSI has shown that, by clear and convincing evidence, it would have conducted the May, 2005, verbal counseling session even if Lucero had not engaged in protected conduct. I also find that WSI has not carried its burden with regard to the July 2005 Letter of Counseling and pattern of hostility. I conclude, however, that there is no relief possible with regard to either of these personnel actions.

1. July 6, 2005, Letter of Counseling

On June 13, 2005, Lucero drove a van past the front of a tractor-trailer operated by Abeita that was moving forward at the time. Abeita suddenly applied the brakes of the tractor trailer he was operating. After the incident occurred, Turner gathered witness statements from five of the eight WSI employees present at the parking lot incident: Abeita, Sharp, Legacy, Schoonover, and Fuller. However, Turner did not contact the other three witnesses to the parking lot incident: Lucero, Tom Kreider and Ken Kreider. Lucero, and both Kreiders testified that Lucero had not operated his vehicle in an unsafe manner during the parking lot incident. Tr. at 945, 1022. On July 6, 2005, Lucero was called to a meeting in Turner's office and presented with a previously prepared Letter of Counseling. Turner testified that he did not allow Lucero an opportunity to be heard before being issued the July 6, 2005, Letter of Counseling because Lucero "did not indicate that he had a side." Tr. at 341, 344.

While Lucero likely operated a van in a less than safe manner during the parking lot incident, WSI's decision to issue the Letter of Counseling is troubling. WSI issued the Letter of Counseling by relying on one witness, Abieta, who obviously had a highly antagonistic relationship with Lucero, and another witness, Bill Fuller, who later testified that he didn't witness the incident for which Lucero was disciplined. Tr. at 843-44. Moreover, two of the other three eyewitnesses downplayed its significance. In a March 21, 2006, telephone conversation with the OHA Investigator, Schoonover indicated that while Lucero was going too fast and was not careful enough, he would not have filed an incident report because he did not believe that the incident was "that big a deal." Memorandum of March 21, 2006 Telephone Interview of Olin Schoonover. Troy Sharp also testified that he would not have filed a statement if he had not been pushed into doing so by Sanchez and a Mr. Cisco. Tr. at 1075 -1077. During his testimony and a telephone interview with the OHA Investigator, Sharp played down the importance of the parking lot incident. Tr. at 1086-1087. Memorandum of March 30, 2006

Telephone Interview of Troy Sharp. The remaining witness to the parking lot incident was Legacy, whose testimony revealed that she had a low opinion of Lucero. Tr. at 1175-1177.

Moreover, evidence in the record indicates that other CTUP employees who had operated their vehicles in a reckless manner had not been as severely disciplined. Tom Kreider testified that a CTUP driver drove a vehicle into a building. Tr. at 971-972. There is no evidence in the record that the driver was disciplined for this incident.[4] Sanchez and Martinez testified that Sanchez had tied empty wine barrels to the government vehicle he was operating. Because a wine barrel fell off while the vehicle was moving, the convoy in which the vehicle was traveling had to be stopped so that the wine barrels could be removed. Tr. at 237-238, 281. Sanchez testified that he was verbally counseled for this incident. Tr. at 282. Sanchez also testified that the incident eventually cost him a promotion.

WSI submitted evidence showing that it disciplined three other CTUP drivers for unsafe driving. Exhibit 7. However, the record shows that each of these employee's actions resulted in gross safety violations. The first employee was terminated for "operating a government vehicle around a safety barrier and into a swollen stream" and, in another incident, contributing to an accident which resulted in damage to a government vehicle. Exhibit 7 at 1. The second and third employees were suspended for one day without pay for concurring with the decision of the first employee to enter the swollen stream. Exhibit 7 at 3.

Accordingly, while I find that WSI has presented mitigating evidence, I am not persuaded that WSI has shown, by clear and convincing evidence, that it would have issued the July 6, 2005, Letter of Counseling if Lucero had not engaged in protected conduct. The clear and convincing evidence standard requires "a degree of persuasion much higher than 'mere preponderance of the evidence.'" *Collins Sec. Corp. v. Sec. & Exchg. Com'n*, 562 F.2d 820 (D.C. Cir. 1977). *See also*, *Hopkins V. Price Waterhouse*, 737 F. Supp. 1202, 1204 n.3 (D.D.C. 1990). Because WSI has not met the particularly heavy burden required by the clear and convincing evidence standard, I find that WSI's issuance of this letter constitutes retaliation under Part 708. However, the Letter of Counseling indicates that it would only be retained in Lucero's personnel file for a period of one year. Exhibit 36 at 1. Over two years have passed since the Letter of Counseling was issued. Accordingly, as Turner has testified, the Letter of Counseling has been removed from Lucero's personnel file. No further relief for this act of retaliation is available under Part 708.

2. The May 18, 2005, Verbal Counseling

In a verbal counseling meeting with Lucero, Turner noted that Lucero had done a good job and that Turner had observed Lucero "pitching in and helping on his last trip." Exhibit 27. Turner also noted that Lucero had driven a government vehicle to his aunt's home in Las Vegas, New Mexico, and had been observed sleeping in the passenger seat when he should have been alert and awake. Exhibit 27. Turner also informed Lucero that the "lead" in each vehicle could make driving hour assignment changes if he needed to for operational purposes. Finally, Lucero was

[4] Tom Kreider did testify that in the debriefing that took place at the conclusion of that trip, WSI managers did not mention the accident, but rather focused on the fact that Lucero had been first in line to check in at a motel on that trip. Tr. at 971-972.

counseled "to be a team member and work with others to get the job done." Exhibit 27.

Lucero admits that he drove a government vehicle to his aunt's home. Tr. at 189-191. WSI would have been remiss had it not counseled Lucero on this matter. Moreover, sleeping in a government vehicle when he was supposed to be awake and alert also merited counseling. By informing Lucero that the lead in each vehicle could make driving hour assignment changes if he needed to for operational purposes, Turner was obviously clarifying a misunderstanding that had occurred between Lucero and Payne. Turner's clarification was especially appropriate, because Lucero had been informed to the contrary by a lower level supervisor, Sanchez. Finally, there is ample evidence in the record that other employees, fairly or unfairly, perceived Lucero to be inconsiderate of his fellow employees. Turner's apparently evenhanded approach, where he informed Lucero that he had observed him "pitching in and helping" but noted there was room for improvement was reasonable and prudent. Accordingly, I find that WSI has shown that the verbal counseling session would have taken place regardless of Lucero's protected conduct.

3. Pattern of Hostility or Intimidation

The record shows that Lucero was less than an ideal employee. During his tenure at WSI, Lucero clearly conducted himself in an immature, selfish and emotionally volatile manner. Moreover, it is clear that Lucero, a much less experienced driver than most of the other CTUP drivers, often operated vehicles assigned to him in a rough and perhaps unsafe manner. These characteristics no doubt account for some of the conflict with some of his coworkers and management.[5]

While WSI has succeeded in showing that Lucero had earned some of the ill-will that existed between him and some of his coworkers and managers, it is also clear that Lucero's protected conduct changed his relationship with his peers and direct supervisors. WSI's Closing Argument Brief implicitly admits this to be true. It focuses on a number of incidents which WSI asserts illustrate that Lucero's own behavior is responsible for his failure to get along with his coworkers and managers. Specifically, Lucero's (1) abusive behavior towards Tom Seese, (2) reporting a firearm incident (*see note 1, supra*), (3) submission of a concern about a CTUP Manager being intoxicated on the job to DOE, (4) yelling at Sanchez, and (5) alleged treatment of a supervisor, Torres, in an inappropriate manner. WSI Closing Argument Brief at 6, 7, 14, 16. A discussion of each of these allegations is instructive.

WSI raises an incident in which Lucero charged Seese and screamed and yelled at him. However, there is no evidence that any disciplinary action was taken as a result of this incident, which occurred on June 20, 2005, two months prior to the firearm incident. WSI's suspension of Lucero for expressing his concerns about the possibility of a firearm being carried on an NNSA

---

[5] However, the evidence in the record also shows at least four of Lucero's coworkers thought he was a qualified driver. Tr. at 722 (Payne), 959 (T. Kreider), 1069 (K. Kreider) and 1238-1239 (Manzanares). Moreover, some of Lucero's coworkers vouched for him personally. Tr. at 244 (Martinez), 625, 632 (Cook). Torres testified that Lucero was not a problem employee. Tr. at 1230. Martinez noted Lucero responded well to suggestions and improved his driving. Tr. at 244.

aircraft is troubling. This incident does not reflect poorly upon Lucero, but rather reflects poorly on WSI management's attitude toward an employee who raised a reasonable safety concern. Similarly, WSI cites Lucero's reporting to a DOE Employee Concerns official that he had observed Donaldson in a state of intoxication in a hotel lobby while on a CTUP trip as a source of WSI employees' and manager's animosity towards Lucero. Once again, it is troubling that WSI would cite the reporting of a safety concern as evidence that Lucero gave his managers and coworkers good reason to dislike him. WSI also alleges that Lucero treated a WSI manager, Torres, in an inappropriate and disrespectful manner. However, Torres denied having words with Lucero when the alleged incident occurred. Tr. at 1218. In fact, Torres indicated that Lucero has always treated him with respect. Tr. at 1218.

Since the incident leading to the filing of the December 6, 2004 complaint, WSI management has subjected Lucero to an enhanced level of scrutiny and has done little or nothing to discourage Lucero's fellow employees from harassing Lucero. If motivated by intent to retaliate against, or to prevent future protected conduct, these actions would clearly violate Part 708, whose coverage explicitly includes "intimidation, threats, restraint, coercion, or other similar actions." While the ill will exhibited towards Lucero by WSI management and his coworkers no doubt resulted in some part from Lucero's own actions, the burden is upon WSI to show, *by clear and convincing evidence*, that this ill will would have occurred in the absence of Lucero's protected conduct. *See, e.g., Jagdush C. Laul*, 28 DOE ¶ 87,006 (2000), *aff'd*, 28 DOE ¶ 87,011 (2001). Since WSI has not met this particularly heavy burden, I find that WSI retaliated against Lucero for engaging in protected conduct.[6]

If Lucero were still employed by WSI, a remedy could be fashioned to abate the ongoing intimidation. However, since Lucero is no longer employed by WSI, such a remedy is unavailable. Moreover, since Lucero has failed to show that this retaliation resulted in any monetary loss on his part after April 28, 2005, the date on which WSI and Lucero entered into a settlement agreement resolving Lucero's December 6, 2004 whistleblower complaint, and because punitive damages are unavailable under Part 708, no relief can be awarded to Lucero for WSI's pattern of intimidation.

III. Conclusion

The Complainant Joshua Lucero has met his burden of proving that he engaged in protected conduct, and that this protected conduct was a contributing factor to adverse personnel actions taken against him by the Contractor. The Contractor has shown by clear and convincing evidence that it would have verbally counseled Lucero on May 18, 2005, even if he hadn't engaged in protected conduct. The Contractor has failed to meet its burden of showing that it would have issued the Letter of Counseling in the absence of the Complainant's protected conduct and failed to show that it's unfavorable treatment of Lucero would have occurred in the absence of his protected conduct. Accordingly, I find in the Complainant's favor on these issues. However, while Lucero has shown that his protected conduct lead to retaliation and intimidation by WSI, he has not set forth a claim for which relief may be granted.

---

[6] Had this finding been addressed under a preponderance of evidence standard, the outcome may have been different.

It Is Therefore Ordered That:

(1) The complaint filed by Joshua Lucero under 10 C.F.R. Part 708, OHA Case No. TBH-0039, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: November 19, 2007

March 15, 2007

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: **Curtis Hall**

Date of Filing: **June 22, 2006**

Case Number: **TBH-0042**

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Curtis Hall (also referred to as the complainant or the individual) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant was an employee of Bechtel National, Inc. (BNI), the prime contractor at the DOE's Hanford Site in Richland, Washington. From January 10, 2005 until July 28, 2005, he was employed as a Controls & Instrumentation (C&I) Engineer to work at the Waste Treatment Plant (WTP) being constructed at the Hanford Site. On October 20, 2005, he filed a complaint of retaliation against BNI with the DOE Office of River Protection, Employee Concerns Program Office (ORP) at the Hanford Site. In his complaint, the individual contends that he made certain disclosures to officials of BNI, and that BNI retaliated against him in response to these disclosures.

I. Summary of Determination

In this Decision, I first provide background information concerning the Part 708 program. I then discuss the filing and the development of the issues raised in the individual's Part 708 Complaint, focusing on the Office of Hearings and Appeal's Report of Investigation and the parties' subsequent efforts to frame issues for the Hearing. I then present the relevant testimony provided at the Hearing. Next is my analysis of this complaint, beginning with a discussion of the legal standards governing this case. With regard to the issues raised in this proceeding, I first find that the Complainant made at least two protected disclosures that are proximate in time to BNI's decision to select the

complainant for a Reduction in Force (RIF) at the WTP (the adverse personnel action). I therefore find that the complainant has shown by a preponderance of the evidence that BNI's decision to select the complainant for its RIF constitutes a retaliation against him under Part 708. On the basis of that finding, Part 708 imposes the significant requirement that BNI show by clear and convincing evidence that, in the absence of the complainant's protected disclosures, it would have taken the same personnel action against the complainant.

Ultimately, I find that BNI has failed to establish by clear and convincing evidence that it would have selected the complainant for its RIF in the absence of the complainant's protected disclosures. Accordingly, I find that BNI should be required to take restitutionary action.

II. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect such "whistleblowers" from adverse personnel actions by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not take any adverse personnel action against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; or a substantial and specific danger to employees or to public health or safety. See 10 C.F.R. § 708.5(a)(l), (2). Employees of DOE contractors who believe that they have made such a disclosure and that their employer has taken adverse personnel actions against them may file a whistleblower complaint with the DOE. As part of the proceeding, they are entitled to an investigation by an investigator appointed by the Office of

Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they are entitled to an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. History: The Individual's Part 708 Complaint and the Identification of Relevant Issues for the Hearing

The complainant filed his Part 708 complaint with the ORP in October 2005. In February 2006, following an unsuccessful effort by the complainant and BNI to mediate the complaint, the complainant requested that his complaint be referred to the OHA for an investigation followed by a hearing. The OHA Director appointed an Investigator on March 10, 2006, and on June 22, 2006, the Investigator issued a Report of Investigation (ROI) concerning the complaint.

In the ROI, the Investigator conducted an initial factual and legal analysis of the complainant's claims with regard to his employment with BNI, and made some preliminary determinations concerning possible protected disclosures and adverse personnel actions.

The ROI states that BNI is a large engineering-construction firm which develops, engineers, builds, manages and operates installations for customers internationally, and is a prime contractor at the DOE's Hanford Site in Richland, Washington. The 586-square-mile Hanford Site was established during World War II to produce plutonium for the nation's nuclear weapons defense and operated for four decades until the late 1980's. Since that time, the Hanford Site has been engaged in the world's largest environmental cleanup. Sixty percent by volume of the nation's high-level radioactive waste is stored at Hanford in 177 underground storage tanks that are aging and deteriorating. The Office of River Protection (ORP) was established by Congress in 1998 to manage the complex cleanup of waste that has become a threat to the Columbia River corridor. In December 2000, BNI was awarded a ten-year contract by ORP to design, build and commission the WTP at Hanford to immobilize the millions of gallons of chemical and radioactive waste through a process known as vitrification, whereby the waste will be mixed with molten glass and the resulting glass logs will be shipped to a federal repository for safe storage. ROI at 3.

The ROI finds that the complainant was hired by BNI on January 10, 2005, and began working on January 18, 2005, as a Controls & Instrumentation (C&I) Engineer at the WTP construction project. He was assigned to the Plant Wide Systems (PWS) group of C&I Engineering which is responsible for design, configuration and qualification testing of the integrated network control system and interconnected field devices that will track waste and materials as they are processed through the WTP. The C&I Manager is Stephen Anderson and the C&I PWS Supervisor is Peter Douglass. At the time the complainant began employment, there were approximately 25 engineers working in the C&I PWS group. *Id.*

The ROI finds that upon assuming his position as a C&I engineer, the complainant's primary function was to configure and test Foundation Fieldbus (FF) measuring devices to determine their compatibility with the WTP's planned control system.1/ The integrated control network system being developed for use in the WTP was designed by ABB (hereinafter the ABB control system). The ROI finds that the ABB control system was procured by BNI for use at the WTP under a $15 million contract awarded in 2001. ROI at 3.

The complainant's task leader was senior engineer Shaun Luper, who reported to group leader Todd Billings, also a senior engineer. Mr. Billings reported to C&I PWS Supervisor Peter Douglass, who also functioned as the complainant's official supervisor. Another PWS engineer, Brandon Gadish, who previously performed measurement device compatibility testing, was assigned by Mr. Luper to assist and mentor the complainant in assuming his compatibility testing duties. The complainant also was required to interact frequently with the ABB on-site engineer, Dave Thomas. As part of his compatibility testing duties, the complainant was assigned the task of writing a Device Test Guide to be used by other BNI engineers to perform this function. ROI at 4.

1/ FF is a communication technology that will link the WTP's integrated control network system to external measuring devices throughout the plant. Each of the numerous FF field devices must be configured and tested before being purchased on a large scale for installation. These FF measuring devices are generally comprised of transmitters, analyzers, indicators and control valves that measure and execute various process variables including pressure, temperature, flow, conductivity and radiation.

With regard to the complainant's alleged disclosures, the ROI finds that on April 1, 2005, Mr. Hall made statements to his BNI supervisors regarding safety concerns raised by the unreliability of the ABB control system, and that these disclosures appear to be protected disclosures under Part 708. However, the ROI also notes that BNI argues that the complainant did not have a reasonable basis for believing that the ABB control system raised a safety concern, particularly since the ABB system was not yet operational. ROI at 12.2/

With regard to the complainant's allegations of a Part 708 retaliation by BNI, the ROI investigator found that it is undisputed that BNI relieved the complainant of significant job duties after April 1, 2005, and selected him for a Reduction in Force (RIF) that resulted in the termination of his employment with BNI in July 2005. ROI at 15.3/ The ROI also notes that BNI claims that the complainant's supervisor sought to terminate the complainant as early as March 2005. ROI at 17. BNI later explained that in March 2005, BNI officials changed the Assignment Completion dates for the complainant and four other PWS engineers as a means of terminating their employment, but that this process was supplanted by the July 2005 RIF. Hearing Transcript (TR) at 47. The ROI investigator finds that BNI justified the complainant's selection for lay off on the basis of performance

---

2/ The ROI also discusses earlier alleged protected disclosures made by Mr. Hall to BNI personnel and finds that they do not appear to be protected disclosures under Part 708. ROI at 10-14.

3/ The ROI discusses other alleged retaliations raised by the complainant. These include (1) acts of harassment and intimidation by Mr. Gadish that were condoned by his supervisors; (2) the cancelling of a training opportunity for the complainant after it had been approved; (3) placing the complainant's name at the bottom of an organization chart; (4) requiring the complainant to perform work responsibilities at a desktop computer located at a PWS lab workbench; and (5) blacklisting of the complainant by Mr. Douglass when he applied for other positions with BNI. The ROI Investigator found that alleged retaliations (1) through (4) occurred prior to the complainant's April 1, 2005 protected disclosure, and that alleged retaliation (5) was unsubstantiated. ROI at 14.

deficiencies including lack of computer and interpersonal skills. ROI at 17, 18.4/

Following my appointment as Hearing Officer on June 23, 2006, I directed the complainant and BNI to submit briefs focusing on the findings and conclusions in the ROI that they intended to dispute at the Hearing.5/ In a September 19, 2006 e-mail to the parties, the complainant's counsel indicated that he did not intend to pursue some of the alleged retaliations raised by the complainant and discussed in the ROI and agreed to withdraw these allegations. Accordingly, the Hearing focused on the complainant's April 1, 2005 and April 15, 2005 disclosures concerning the ABB system and on the chief adverse action that Mr. Hall experienced after April 1, 2005, *i.e.*, his inclusion in a July 28, 2005 RIF of WTP employees.

III. Hearing Testimony

At the Hearing, testimony was received from fifteen witnesses. The complainant testified and presented the testimony of BNI software engineer Timothy Spicer. BNI presented the testimony of Peter Douglass, Todd Billings, Brandon Gadish, and David Thomas. BNI also presented the testimony of Stephen Anderson, who is the

---

4/ The ROI investigator notes that BNI submitted 4500 pages of investigatory materials and reports compiled by its Employee Concerns Program (ECP) concerning the complainant's issues. He stated that these materials may contain conclusive evidence and that "BNI will have an opportunity to present such evidence and to carry its burden under Part 708 at the hearing stage." ROI at 16-17. BNI has submitted significant documents from among these investigatory materials as Hearing Exhibits and has presented the testimony of BNI officials and employees who participated in the investigation. Accordingly, I will rely on the BNI Hearing exhibits and witness testimony in evaluating BNI's positions concerning the complainant's issues. I will not include the 4500 pages of materials generated by the ECP investigation in the record of this proceeding, or specifically address the conclusions of the ECP investigation.

5/ In this regard, I noted that while the ROI has made certain findings, I would be conducting an independent review of the issues. In making my findings, I stated that I would be most convinced by the best available evidence. June 23, 2006 letter to the parties at 2.

Discipline Engineering Manager for the control system discipline at the WTP, Tanya Zorn, who was a human resources interfacer in the Engineering Department of the WTP, and Patricia Talmadge, who is a Senior Quality Engineer for BNI with an area of expertise in control systems. In addition, BNI presented several witnesses from its Personnel and Human Resources area: Linda McKenney, BNI's Employee Relations Manager; Sheila Spellman, BNI's Human Resources Administrator for the WTP; Edward Rogers, BNI's Business Manager for the WTP; Cathy Tuttle, BNI's Manager of Human Resources at the WTP; and Thomas Stuart, BNI's Employee Concerns Manager at the WTP.6/ At the outset of the Hearing, counsel for the complainant and for BNI presented detailed opening statements aimed at providing an overview of their respective positions in this matter.

A. Opening Statement of the Complainant

The complainant's counsel argued that the hostility of the complainant's group leader and supervisor toward the complainant for his raising of safety issues in March and April 2005 was a significant factor in BNI's decision to include the individual in the July 2005 RIF. He stated that throughout March 2005, the complainant raised various safety issues with his task leader, Mr. Luper, and his group leader, Mr. Billings. He asserted that BNI officials met on March 24, 2005 for the purpose of discussing how to terminate the complainant's employment. The counsel asserted that the complainant's April 1, 2005 statement about the safety of the ABB control system created a flashpoint of hostility to the complainant. Following the April 1, 2005 statements, he states that BNI officials acted on the advice of the Human Resources Coordinator to bifurcate the complainant's safety issues from issues relating to his conduct and performance. This led Mr. Billings and Mr. Douglass to meet with the complainant concerning his safety issues on April 15, 2005. He asserts that the performance rating for the complainant that got him included in the initial RIF notice issued on April 21, 2005 was completed by Mr. Billings on about April 18, 2005. However, due to employee complaints, BNI directed that new ratings be conducted regarding the RIF. The final rating of the complainant that resulted in his being part of the RIF was completed in early July 2005.

6/ The job titles refer to the positions held by these individual's during the first half of 2005.

B. Opening Statement of BNI

In its Opening Statement, counsel for BNI stated that in February 2005, the WTP was seriously short of operating funds. BNI's business manager for the WTP, Mr. Rogers, concluded that a major layoff was required. Consequently, the complainant was one of about 350 WTP employees whose jobs were eliminated in July 2005. She stated that all employees of BNI have "assignment complete" dates, and that when the complainant was hired in January 2005, his assignment complete date was January 15, 2006. She stated that in late March 2005, BNI management decided in light of the budget situation that the complainant and four other grade 24 engineers should have their assignment complete dates moved up significantly. She stated that once it was decided to conduct a plant wide RIF, the complainant was included in those deliberations, and that he was selected for the RIF pursuant to evaluations that took place in mid-April and again in early July 2005. TR at 47.

Counsel for BNI acknowledged that the complainant made several statements to BNI management in February, March and April 2005 regarding the functionality of the WTP's control system. She stated that the complainant's April 1, 2005 allegations concerning the safety of the ABB system are unreasonable and that there is no evidence that the ABB system is unsafe. TR at 50. She asserted that BNI management was having problems with the complainant's inability to get along with his coworkers. TR at 48. She stated that as a result of the complainant's ongoing conflicts with his mentor, Brandon Gadish, and others, Mr. Douglass, Mr. Luper and Mr. Billings arranged a meeting with Linda McKenney in Employee Relations on March 24, 2005,

> **not because they are hoping on firing [the complainant]. They go to talk to Linda McKenney because they are seeking advice on what process should we use from an employee relations perspective because this person has behavioral issues. He's disruptive to our group.**

TR at 52. She stated that following the complainant's April 1, 2005 meetings with Mr. Billings and Mr. Douglass, BNI's Human Resources and Employee Concerns offices advised the complainant's supervisor to address his behavioral issues and his safety concerns separately, and that the behavioral issues were addressed in a meeting that took place with the complainant, Mr. Douglass, and Mr. Billings on April 14, 2005. TR at 53. In a meeting on April 15, 2005, Mr. Douglass and Mr. Billings met with the complainant and

asked him to identify his safety concerns.7/ She asserts that BNI concluded that

> Mr. Hall's problems with ABB were not about ABB. They were about the fact that he did not understand the programming that was necessary for ABB to talk to the equipment.

TR at 54-55. She contends that his disclosures had nothing to do with his being selected as one of 350 individuals who would be laid off at the WTP site. TR at 55.

As indicated in my analysis below, the two key issues for my determination in this matter are (1) whether the complainant has shown that the statements that he made on April 1, 2005 and repeated on April 15, 2005 concerning the impact of problems in the ABB system on environmental safety are protected disclosures under Part 708, and (2) assuming the complainant made a protected disclosure, whether BNI has shown that the complainant would have been terminated in the July 2005 RIF even in the absence of such a protected disclosure. Accordingly, my summary of relevant testimony will focus chiefly on those two issues. With regard to the latter issue, it is critical whether BNI has shown that the July 2005 evaluation of the complainant by Mr. Billings accurately and impartially rated the complainant's abilities for purposes of the RIF.

C. The Complainant's Witnesses

1. The Complainant

a. The Complainant's Professional Training and Work Experience

The complainant testified that initially he received a two-year degree in instrumentation controls at Columbia Basin College, and worked at the Hanford Site from 1985 until 1989. TR at 59. In 1989, he went back to school on a part-time basis during which he

---

7/ Counsel for BNI states that the specific concerns identified at that meeting all were reviewed and addressed by BNI. TR at 54. This proceeding does not concern whether BNI's response to the complainant's disclosures was reasonable. The only relevance of BNI's response is the extent to which it indicates whether the complainant reasonably believed that the disclosures indicated a significant danger.

also worked part-time as an instrument technician at facilities regulated by the Nuclear Regulatory Commission (NRC). TR at 61. In 2000, he completed his education when he received a Bachelor of Science degree magna cum laude from Washington State University in electrical engineering. TR at 59.

With regard to his work experience with nuclear control systems, he has worked a total of seven contract assignments at NRC-licensed powerplants in the capacity of an instrument technician and a compliance engineer. He stated that NRC-licensed plants are run for eighteen months and then shut down for a two-month maintenance period. During that period, the complainant was employed to run testing procedures for the plant's instrumentation. TR at 62. He testified that it is very important for both NRC-licensed powerplants and DOE run facilities to follow procedures and ensure that procedural compliance is met

> Because properly done, nuclear energy is very safe. That hinges upon following procedures and documentation and working to implement safety standards.

TR at 62.

The complainant stated that he considers himself to be experienced with the use of personal computers and has some computer programming skills. He stated that while at college, he wrote software programs in "Basic, Four-Tran, and C." TR at 69. He also stated that he was not hired by BNI to do computer programming or software design, but to perform configuration and functional testing for FF measuring devices. TR at 70.

He stated that in November 2004, he was interviewed by Mr. Billings and another BNI official for a position at the WTP, and later accepted BNI's employment offer. He stated that he was never given any indication of a time limit for the position that he accepted, and that the hiring document stated that the position was "long term." TR at 71.

He stated that he joined the Plant Wide Systems (PWS) engineering group at the WTP on January 18, 2005, and from that date through mid-February 2005, he completed a total of 35 BNI project documents and training modules, most of which involved procedures having to do with nuclear safety, "procedure compliance and quality assurance, which is strictly synonymous with nuclear safety." TR at 72. With respect to the ABB control system itself, he stated that he observed that there was no procedure to document to the DOE

the safety standards for FF instrument testing. He testified that he took the initiative to begin to write his own procedure for testing, and that his task leader, Mr. Luper, asked him to write a formal procedure for FF testing. TR at 75.

b. The Complainant's Two Concerns About the Safety of the ABB System

The complainant testified that he learned that the ABB system had been ordered for installation at the WTP in 2002, and that by 2004 there were issues involving the functioning of the ABB system. The complainant stated that he would go to the on-site ABB representative, Dave Thomas, with his questions about the ABB system because the complainant's assigned mentor, Mr. Gadish, lacked a practical background in the implementation of control systems. TR at 77-79.

The complainant testified that he believed that proper operation of the ABB control system is important to safety at the WTP because it maintains

> process variables at their set point: pressure, temperature level, flow, radiation – and it's the first line of defense for safety.

TR at 88-89. He stated that some of the waste to be processed at the WTP using the ABB control system would contain uranium or plutonium. TR at 93.

I. The Computer Lock-Up Concern

The complainant testified that the ABB control system was designed to be run on dedicated computers and would have its own software code. TR at 94. He stated that on February 22, 2005, the ABB system locked up on his computer.

> It was not a blue screen. It was a lockup freeze. And that has nuclear safety implications in a facility because it could freeze up and the operators would be looking at the screen and everything would appear to be okay but it wouldn't be okay.

TR at 94-95, 98. He then reported this event to Mr. Thomas, who "looked to be very distressed about it." TR at 100. He stated that he had to

> go down into the code and set down some of the software to clear up the frozen condition. . . . An operator wouldn't be able to do that.

TR at 100. He stated that another engineer in PWS, Mr. Jason Aldridge, told him in March 2005 that the Engineering 2 server which was on the ABB integrated control network had locked up on him. TR at 101, 125. The complainant explained that a lock-up cannot safely be addressed by rebooting the system because it could cause some of the valves the system's cooling and other processes to go into a state of emergency and shut down. TR at 104.

The complainant stated that in his work at NRC regulated power plants, he has had experience with four different distributed control systems, and that the ABB system is a hybrid of these systems. He stated that he helped to install, test, and start up a distributed control system at the Hanford Inlet nuclear plant. TR at 104. He stated that he never experienced a freeze-up while working with these four other systems, and that a freeze-up is a potentially dangerous proposition. TR at 105. The complainant testified that the WTP's process for testing and fixing the ABB system as it was being installed at the WTP was "very inadequate" because

> No one, to my knowledge, was documenting when the system froze up, how often it froze up, what caused it to freeze up.

TR at 105. He contended that the ABB control system did not meet the required safety specifications for a control system. TR at 105. He stated that he shared his concerns about the ABB system's unreliability on several occasions in March 2005 with his task leader, Mr. Luper.

> I spoke to Mr. Luper. He said, well, that's the system we got and we've got to make the best of it. And [he said that] I realize the Delta B [control system] is a better system but [the ABB System is] the one they purchased, you know, [Mr.] Billings and [Mr.] Douglass. And he was basically resigned to just going along with the system which is kind of rotten.

TR at 108.

ii. Concerns Related to ABB Communications with FF Measuring Devices

The complainant stated that he was assigned to conduct verification and validation testing of field measuring devices prior to their purchase in bulk for installation at the WTP. TR at 114-115. The complainant stated that in March 2005, he was unable to get the ABB control system to communicate with a field measuring device known as a Foxboro pressure transmitter. After the initial failure, he contacted Foxboro and asked the company to send him a second transmitter along with testing documentation.

> **I said, take another pressure transmitter, same model, and test it, and I want to see the documentation. And they tested it on two different [control] systems and it passed both systems without a problem. And we got the second transmitter shipped directly to me. . . . And we hooked it up to the ABB system, and the ABB system failed to communicate with it.**

TR at 139.8/ He stated that he worked with a BNI expediter and a responsible engineer (known as an RE) on this problem, and the expediter and the RE both suggested that BNI send the device to the Fieldbus Foundation, the independent foundation that sets FF standards and tests measuring devices, to determine whether the Foxboro transmitter was compliant with FF standards. The complainant stated that he agreed with this advice because the representatives of Foxboro and ABB were "pointing fingers at each other" and the Fieldbus Foundation, in his opinion, would provide a definitive test of whether the Foxboro pressure transmitter or the ABB system was noncompliant with industry standards.9/ TR at

---

8/ The complainant later testified that sometimes the Foxboro pressure transmitter would appear to be properly installed on the ABB system and then "drop off" the system within 24 hours. TR at 178.

9/ The complainant appears to assume that if either the ABB system or the field measuring devices require capabilities in excess of existing FF standards, their failure to conform to those standards is itself a safety concern. While that appears to be a plausible conclusion, there is very little in the record to support that assumption or to convince me that ongoing adjustments in communications standards are not

(continued...)

140. On about March 31, 2005, he suggested to Mr. Billings in an e-mail that the Foxboro pressure transmitter be sent to the Fieldbus Foundation for independent testing. The complainant stated that he believed that the problem rested with the ABB system rather than the Foxboro transmitter because he had observed a pattern of measuring devices that would not communicate consistently with the ABB system.

> **This is an ongoing problem with [the ABB] system. They've got another, different manufacturer of a control valve that wasn't imported in the [ABB] system. They had a Foxboro temperature transmitter that wasn't imported into the ABB system. And so it wasn't just that one transmitter that wouldn't work on the ABB system. And that showed me as an engineer that the common problem here was the ABB system.**

TR at 142.

c. The Complainant's Alleged Protected Disclosures

I. The Complainant's April 1, 2005 Disclosures

The complainant testified that Mr. Billings called a staff meeting for the morning of April 1, 2005. He stated that the meeting was attended by several BNI engineers, and that they discussed the Foxboro pressure transmitter issue. On the morning of the meeting, while he and Mr. Billings were walking to the meeting, Mr. Billings asked him what he thought was the source of the problem. The complainant told him that the Foxboro pressure transmitter tested good, so he thought that the ABB system was the problem. TR at 146-147. The complainant stated that at the meeting he explained that the Foxboro pressure transmitter had tested good on two other control systems, and that two of the engineers, Mr. Larry Odom and Mr. Shareet Amant, appeared ready to look at the ABB system as the problem. TR at 148-149. The complainant testified that after the meeting had gone on for ten or fifteen minutes, he passed out copies of a survey from a trade magazine for control systems whose readers rated the ABB last out of five systems being assessed. TR at 153. He stated that after a short discussion of the ABB, Mr. Billings asked to speak with him outside the meeting, where he told the complainant that he did not want to discuss the ABB system

---

9/ (...continued)
appropriate.

being the problem, and directed the complainant to return to his office. TR at 150-151.

The complainant testified that later that morning, Mr. Billings escorted him to a meeting with Mr. Billings and the complainant's supervisor, Mr. Douglass. TR at 164. He stated that Mr. Douglass was upset about his behavior at the earlier meeting, and said that the complainant should not bring up any issues about the ABB control system except to him. TR at 164-165. The complainant stated that he told Mr. Douglass about computer lock-ups involving the ABB system and about the measuring devices dropping off the ABB system. He told Mr. Douglass and Mr. Billings that these problems indicated safety concerns. TR at 165-166. The complainant stated that he felt that his job had been threatened by his disclosures that the ABB control system was the source of several operating problems.

> I asked [Mr. Douglass] if he was going to fire me, and he sat there and grinned. And I think that's the point where I told him that [I could] go to the DOE about it. And then I ended up going back to my cubicle.
>
> TR at 17. The complainant stated that about half an hour after this meeting, Mr. Billings "informed me that I would no longer be working on the ABB-Foxboro transmitter issue." TR at 168. The complainant stated that Mr. Billings instructed him to inform his contact at Foxboro to direct all e-mails concerning the ABB system to Mr. Billings. TR at 169.

ii. The Complainant's April 15, 2005 Disclosures

The complainant testified that on April 15, 2005, Mr. Douglass arranged a meeting attended by the complainant, Mr. Douglass and Mr. Anderson, the Discipline Engineering Manager for the WTP, to provide the complainant an opportunity to discuss his concerns with the ABB control system. The complainant testified that at the beginning of the meeting, Mr. Douglass stated that he asked Mr. Anderson to attend because Mr. Douglass had a "conflict of interest" regarding the ABB system. TR at 174. At that meeting, the complainant stated that he told Mr. Anderson about the lockups and the communication problem with measuring devices. TR at 176. The complainant stated that Mr. Thomas, the ABB representative, was assigned by Mr. Billings to handle the lock up issue that he had reported. The complainant testified that when Mr. Thomas questioned other WTP engineers about the issue, two of them

reported that the ABB system software had locked up on them. TR at 184.

d. Subsequent Information Supporting the Individual's Concerns

At the Hearing, the complainant testified that subsequent research by Foxboro regarding its pressure transmitter verified that the transmitter's inability to communicate properly with the ABB system was caused by the ABB system. The complainant stated that his position that the ABB system had caused the communication problem was supported by a June 2005 letter from Foxboro to Mr. Campbell at BNI. Complainant's Exhibit 26. TR at 153. That letter stated that "Todd Billings speculated that there was a mismatch between the code in the transmitter and the files sent on diskette with the transmitter [for loading into the ABB system]. We would like to assure Bechtel that there is no such mismatch." After Mr. Billings testified that Foxboro eventually had revised its software to make the transmitter compatible with the ABB system, the complainant asserted that the fact the Foxboro had been required to revise its software indicated that the ABB system was not properly designed to operate with all field measuring devices that meet the FF standards. TR at 1170-1174.

After hearing the testimony of Ms. Talmadge, BNI's Senior Quality Engineer, the complainant stated that he disagreed with her assessment that the WTP's function of processing waste rather than generating power would not raise a danger of serious safety incidents. He stated that the WTP will have to handle and move nuclear waste on a regular basis, while power plants

> don't move nuclear waste around except when they procure a plant. It is very limited.

TR at 1208. The complainant also rejected Ms. Talmadge's testimony that the testing being done by the complainant at PWS could not raise safety issues because the instruments will be retested before the WTP is put on line. He stated that the communication incompatibility between measuring devices and the ABB system might not be revealed through "a different type of test" at a later time. He also stated that he believed that the ABB system problems of lockups and communication failures with measuring devices would cause lengthy and costly delays in bringing the WTP on line, and that such delays presented a significant health and safety problem because of the ongoing leakage of untreated radioactive waste into the groundwater. TR at 1223-1224. He added that the system failure rate for the ABB system was far in excess of the contract

specifications for a nuclear control system, based on the problems that he had observed or been told about concerning the ABB system prior to April 1, 2005. TR at 1251-1253.

e. The Complainant's Job Performance Issues

The complainant stated that he disagreed with the Mr. Gadish's testimony that he was responsible for their workplace personality conflict. TR at 1189. With respect to his task leader, Mr. Luper, the complainant testified that he "had a pretty good working relationship" with him. TR at 1241. When asked about negative assessments of himself that Mr. Luper provided in a September 2005 interview with BNI officials (BNI Exhibit 203), the complainant stated that

> I said on the surface, that I felt that Shaun and I had a pretty good working relationship, but, you know, he may have had his own agenda. And that may have been the agenda of Mr. Billings and Mr. Douglass.

TR at 1242. The complainant stated that after he was notified in April 2005 that he would be part of the RIF, he was assigned to train his replacement, Mr. Scott Roselle, in the testing of FF devices. TR at 1235. He reported that he became friends with Mr. Roselle, and that they had a good working relationship. TR at 1235.

The complainant also stated that he disagreed with the testimony of Mr. Spicer, Mr. Thomas, Mr. Gadish and the cited assessment of Mr. Luper (BNI Exhibit 203) that he lacked basic computer skills.

> Well, I think the record proves I wrote the H-1 Foundation Fieldbus test guide, which has detailed steps on how to use the ABB software. And Mr. Luper complimented me on the writing of that test guide. So, I don't see how this can be true, when the fact is . . . that I wrote it, and my peers reviewed it and Mr. Anderson approved it.

TR at 1209.

2. Mr. Timothy Spicer, BNI Software Engineer

Mr. Spicer testified that in early 2005, he was assigned by Mr. Douglass to develop a safety plan for the PWS laboratory at the WTP. TR at 218. He testified concerning the need for better safety procedures at the laboratory, and cited that hazards posed by certain laboratory equipment, such as forced air canisters. TR at 222-223. He stated that Mr. Thomas, the ABB representative, had made one of the female programmers cry because he made her feel ignorant when she went to him for advice. TR at 227. He characterized Mr. Thomas as "a rough guy." TR at 229.

Mr. Spicer stated that he had observed Mr. Thomas and the complainant interact, and that he thought that Mr. Thomas was frustrated by the complainant's lack of basic computer skills. TR at 237. He testified that he observed the complainant on more than one occasion have trouble logging onto the system and selecting the correct domain. TR at 243. He also observed the complainant shut down his computer in an improper manner without logging off. TR at 241.

Mr. Spicer stated that he did not believe that any of the laboratory safety concerns that the complainant raised constituted serious safety concerns. TR at 232.

With respect to the ABB system, he stated that "ABB is a very difficult controller." TR at 239. He further stated that

> I've spent probably half my career in the nuclear industry. While any software PLC or DCS-based system has troubles – I mean, they all have their little quirks. So does Microsoft. I've been on several FAT [Factory Acceptance Tests], successful FAT tests, one with a very sophisticated robot just outside Denver where [the ABB system] performed flawlessly.

TR at 239-240.

D. BNI's Witnesses

1. Peter Douglass

a. The complainant's disclosures

Mr. Douglass stated that he was the complainant's supervisor during the complainant's 2005 employment at the WTP. TR at 493. He stated that on April 1, 2005, Mr. Billings reported to him that the complainant had made negative comments at a staff meeting concerning the ABB System. He stated that Mr. Billings was "notably upset" regarding the complainant's behavior and statements at the meeting. TR at 504. He stated that Mr. Billings told him that

> **The meeting was to try to resolve an issue with a transmitter which was communicating to the ABB system and there was a problem therein, and [the complainant] was making declarations about the entire ABB system being unsuitable for the nuclear facility, being unsafe, and he was adamant that ABB was at fault in this situation.**

TR at 505. Mr. Douglass testified that he did not believe that the complainant's criticism of the ABB system raised safety issues because the ABB control system does not perform safety functions, and because he believed that the complainant "was speaking without knowing all the background" concerning the ABB system. TR at 506. He stated that later that morning he had a meeting with the complainant and Mr. Billings. He testified that the complainant asserted that Mr. Billings had told him to leave the earlier meeting because he was bringing up quality and safety issues with the ABB system. TR at 508. He stated that he did not tell the complainant that his [Douglass'] career was dependent on the success of the ABB system.

Mr. Douglass testified that he told the complainant in the context of finding the proper ways to resolve safety issues or concerns regarding the control system, that

> **the safety or reliability of the control system is - you know, my career is dependent on that. I did not make any reference to it needing to be the ABB system - [that] it had to be ABB that was successful.**

TR at 510.

Mr. Douglass testified that he was on the BNI team that recommended that BNI procure the ABB system for use at the WTP. He stated that initially the team had recommended the Honeywell control system because it was more mature, but that they later endorsed the ABB system. TR at 511-512. He acknowledged that at a 2004 PowerPoint presentation to the Defense Nuclear Facility Safety Board, the WTP presentation stated that "Control systems are an important but frequently overlooked component of a safe facility." BNI Exhibit 268. He further testified that this statement referred "only in part" to the ABB control system, because there also were "safety instrumented systems" and a "programmable protection system" at the WTP that was dedicated to safety functions. TR at 512-517. He stated that the ABB system monitors the safety functions performed by these other systems. TR at 518.

Mr. Douglass stated that he met with Thomas Stewart, the Employee Concerns Manager, who told him that the complainant had "whistleblower potential" and advised him to investigate the complainant's statements about safety and keep them separate from the complainant's performance problems. TR at 520. He stated that on April 14, 2005, he met with the complainant concerning his workplace conflict with Mr. Gadish.

> In the meeting we went through all the items that I had identified [as] concerns. Curtis responded with all the problems he was having with Brandon and identified those items. And at the end of the meeting, I tried to talk to Curtis. You know, maybe there were other reasons or maybe the problems were maybe not all Brandon's and asked him to try to work out and try to work through some of the issues.

TR at 521.

Mr. Douglass testified that on April 15, 2005, he and Mr. Anderson, the WTP's Discipline Engineering Manager, met with the complainant to listen to his safety concerns. He stated that he later documented the concerns in an e-mail (BNI Exhibit 75). He stated that the complainant was asked to document his complaint that one of the Fieldbus devices that he was testing was getting a slow response. He also was asked to document the criteria used to evaluate control systems in the magazine survey cited by the complainant at the April 1, 2005 staff meeting. TR at 525. He stated that the complainant later informed him that each participant in the survey simply ranked the control systems on the basis of their personal criteria. TR at 525. Mr. Douglass stated

that he concluded from this information that the survey could not be used as evidence that the ABB system was considered unsafe by the survey participants. *Id.*

Mr. Douglass testified that in its final technical evaluation prior to the award of the plant-wide control system to ABB, BNI acknowledged that there was a certain amount of risk in procuring the ABB system because certain aspects of the system could not be fully evaluated at the time of purchase. TR at 549. He also agreed that data on the ABB system's compatibility with FF standards was not available and could not be evaluated at the time of purchase. TR at 553. He added that "the integrated engineering tools were not currently available and could not be evaluated at that time." TR at 558. He stated that the project team considered this to be an acceptable risk.

> The project team was well versed in the state of the Foundation Fieldbus at the time. We evaluated the risks and so we knew all the potential problems we were going to have with Foundation Fieldbus. So that issue was definitely discussed and the risk accepted.

TR at 554. He stated that the PWS group at the WTP is continuing to conduct testing on the ABB system's compatibility with FF measuring devices at the present time, and that it is "occasional work for one individual." TR at 590. He testified that there is still work to be done to insure that the FF measuring devices will function with the ABB system. *Id*.

b. Employment issues

Mr. Douglass testified that Mr. Gadish complained to him in March 2005 concerning the complainant's behavior towards Mr. Gadish in the workplace. He stated that he did not recall advising Mr. Gadish to submit a complaint to the WTP's Human Resources department. He stated that in March 2005 he, Mr. Billings and Mr. Luper met with Ms. McKenney, BNI's employee relations manager, concerning the conflict between Mr. Gadish and the complainant and that they discussed options. He stated that they discussed giving a verbal warning to the complainant, followed by a written warning and possible termination, but that a course of action was not finalized. TR at 498-504.

c. Rating and RIF issues

Mr. Douglass testified that a salary planning ranking was done for WTP employees around February 24, 2005, and he identified that document as the portion of the Complainant's Exhibit 13 designated "Hall Ex. 013-2." He stated that he prepared cards for each employee and numbered the cards as a ranking. Then Mr. Anderson would take the cards and develop the completed list. TR at 529. He stated that because the complainant had only been employed at the WTP for about six weeks, he was not included in the initial portion of the employee ranking process.

> **After we did the first ranking or ranked everyone, [Mr. Anderson] pulled the cards out for the people who were new to the job and said, we have to put these people in. [The complainant] would be one of those. And they were put in like in the low Bs basically so that it doesn't help them or hinder them.**

TR at 530.

Mr. Douglass testified that he first learned of the need for a RIF at the WTP in the last week of March or the first week of April 2005. TR at 530. He stated that he met with Mr. Meinert and Mr. Billings in early April to develop a list of employees to be included in the RIF, and that the complainant was included on this list. He stated that the complainant was selected for the RIF because

> **He hadn't been here on the project long, so we didn't have any in-depth knowledge that would be difficult to lose. The activities Curtis was working on weren't activities that were critical at the time. It was something that could be absorbed by others or done later. And we also had the performance problems with Curtis as well.**

TR at 532. He stated that when the complainant was informed that he was included in the RIF, the complainant asserted that he should be retained because his FF device testing would need to continue. TR at 535.

Mr. Douglass testified that prior to the expiration of the two month notification period for the RIF, the decision was made to go through the selection process again, using a standardized format. TR at 537. He testified that Mr. Billings completed the

standardized ranking form for the complainant, and that he then signed it. He stated that he did not instruct Mr. Billings how to rate the complainant, and that they did not talk about the complainant specifically during the second review process. TR at 537. Mr. Douglass stated that he believed that there was no connection between the statements regarding safety made by the complainant and the determination that he should be laid off. TR at 540.

2. Todd Billings

Mr. Billings stated that he was the lead engineer for the complainant's PWS working group. TR at 253. He stated that when the complainant joined the working group, he was on the team that interviewed the complainant, and that he recommended that the complainant be hired.

> I felt that his background in instrumentation and in other nuclear facilities might be beneficial to our project as well as his stated background in working with smart devices, the types of devices that communicate using a digital protocol with the control system.

TR at 265. He stated that the complainant was assigned to Mr. Luper as a task leader to assist with FF instrumentation testing. TR at 266.

a. The Complainant's disclosures

Mr. Billings stated that in March 2005, the complainant had reported that there were communication problems between the ABB system and the Foxboro pressure transmitter. TR at 298. He stated that he learned through Mr. Luper that the complainant concluded in late March 2005 that the ABB system was the source of these communication problems. *Id.* Mr. Billings stated that he told Mr. Luper that he thought that it was "too early in the investigative process to have reached that conclusion, although that was certainly one of the possibilities." TR at 299. He stated that at the April 1, 2005 staff meeting, the complainant explained that he had tested two Foxboro pressure transmitters and that they would not communicate properly with the ABB system. The complainant had handed out copies of a trade magazine article that gave a low rating to the ABB system, and he then made the statements that the ABB system was the cause of the problems with the Foxboro transmitter, and that the ABB system was not good for

use in a nuclear facility. TR at 304-306. Mr. Billings stated that he thought that the complainant's statements that the ABB system was inappropriate for use in a nuclear facility were clouding the discussion of the communication issue and taking over the meeting, so he sent him away. TR at 305-306. He stated that at a subsequent meeting with Mr. Douglass, he told Mr. Douglass that the complainant had undermined "myself and other members of our team that was working on the [ABB] system. . . ." TR at 309. He stated that he the complainant later joined the meeting with Mr. Douglass and himself and repeated the issues that he raised at the staff meeting. TR at 311.

Mr. Billings stated that he viewed the complainant's assignment of blame to the ABB system as a hindrance and removed him from the review of the communication problem involving the Foxboro transmitter. He stated that the complainant is the only person who has questioned the propriety of using the ABB system at the WTP. Mr. Billings stated that later that day he sent an e-mail to Ms. McKenney documenting this meeting [BNI Exhibit 72] because he believed that the complainant's behavior "violated some of the Bechtel covenants and needed to be categorized in that way":

> In addition, Mr. Hall had made a statement to the effect that he had enough evidence to go public as far as the implication being something about the ABB system. And to me that sort of raised the bar as far as what his intentions might be and that I needed to ensure that I was trying to document what I had observed that day and what I had been involved with.

TR at 313.

Mr. Billings stated that the communication problem between the Foxboro pressure transmitter and the ABB system was later revealed to be a problem with the Foxboro transmitter:

> Foxboro and ABB had collaborated to identify the problem. Foxboro had then relayed to us that the problem was in their transmitter, that they had an issue that was causing it to drop off the network, the Foundation Fieldbus Network. . . .

TR at 317-320, citing BNI Exhibits 51, 52 and 53. Later during questioning on this issue by complainant's counsel, Mr. Billings was asked to review a June 2, 2005 letter from Foxboro project manager Brian Haynes to BNI concerning BNI's problem with the

pressure transmitter. In the letter, Mr. Haynes stated that the complainant had identified the interoperability problem to Foxboro on March 16, 2005. BNI Exhibit 65. Mr. Haynes then discussed his finding that certain unique characteristics of the ABB system led to a data overload and the communication problem with the Foxboro pressure transmitter. BNI Exhibit 65. Mr. Haynes then stated that installing a secondary communication buffer on the Foxboro pressure transmitter appeared to resolve the problem, but he noted that such a buffer is not required by FF specifications. *Id*. Finally, Mr. Haynes stated that it was up to the Fieldbus Foundation that sets standards for FF devices to decide whether this additional capability required for interface between Foxboro's pressure transmitter and the ABB System would become part of its FF specifications. *Id.*

Responding to this letter in his testimony, Mr. Billings stated that the Foxboro pressure transmitter already had the necessary secondary buffer to handle the ABB system's continuous readings of all parameters, but that a previously undetected error in the software code of the Foxboro transmitter had made it inoperable:

> Foxboro had never tested that secondary communication buffer. The first time that this had come up was in our testing because in the way that we had configured the ABB system it had actually stressed the network a little bit more than Foxboro had during their testing process, and that's where this line of code that was causing the fault inside their transmitter was revealed. And they had to go in and modify that so that the secondary communication buffer which they had implemented actually worked.

TR at 384.

Mr. Billings stated that sometime in 2005, the start-up date for the WTP was "pushed out" until at least the "the 2012 time frame." TR at 259. Mr. Billings stated that the untreated waste currently at the Hanford site has created a "danger to the environment and potentially to people's health." He also agreed that the longer this waste goes untreated, the longer that danger persists. TR at 390.

b. Employment and RIF issues

Mr. Billings stated that when a conflict developed between the complainant and his assigned mentor, Mr. Gadish, Mr. Luper

unsuccessfully attempted to rectify it. TR at 283. He stated that in March 2005, he attended a meeting with Mr. Luper and Mr. Douglass and Employee Relations specialist McKenney concerning the complainant's conflict with Mr. Gadish. TR at 285-286. He stated that he also had been told by PWS supervising engineer Meinert that the hostile environment created by this conflict was affecting his team, and by ABB system representative, David Thomas, that the complainant was not taking instruction well and causing people in the laboratory environment "to sort of avoid being in there with him...." TR at 290-291. He said that firing the complainant was viewed as only a potential outcome by the attendees at the meeting, not the objective. TR at 286. Ms. McKenney told them that they needed to closely monitor the situation and clearly lay out expectations whenever the complainant was asked to do something. He stated that Ms. McKenney said that she would start a file associated with the concerns. TR at 291-292.

Mr. Billings testified that he removed the complainant from working on the Foxboro pressure transmitter problem

> Because I felt the Mr. Hall's biases, his stated biases, would prevent him from being objective and presenting all the information that was necessary on both sides, both between Foxboro and to Bechtel.

TR at 321. He stated that after the complainant was removed from the Foxboro pressure transmitter testing, the complainant continued to test other FF measuring devices and to write a guide for testing measuring devices. TR at 322.

Mr. Billings testified that prior to the April 2005 RIF announcement, the complainant had been rated 12 out of 17 in his peer group and given the grade of B. TR at 373 citing complainant's Exhibit 13. He stated that he could not recall participating in this rating of the complainant. After the RIF was announced in late March or early April, he gave input to Mr. Douglass and they provided BNI management with a list of employees to be included in the RIF. He stated that he included the complainant on the list because he had difficulty getting along with other members of the team and because while working on the Foxboro transmitter issue he displayed a lack of engineering judgment by concluding that the use of the ABB control system raised safety concerns. TR at 325-326. He stated that in early July 2005, he rated the complainant on a form provided by BNI and that Mr. Douglass signed the rating. TR at 327, BNI Exhibit 146. He stated that this evaluation was

> sort of a confirmatory action, you know, with a structured worksheet to the - some of the discussions that we had had previously with Mr. Douglass.

TR at 327-328. He stated that he did not know how the rating he provided was used by BNI Human Resources in selecting employees for RIF. TR at 328.

3. David Thomas

Mr. Thomas testified that he works for ABB as an engineer and in 2005 was assigned to the PWS laboratory at the WTP. TR at 396. The ABB system will be the main operator interface and control system for the WTP vitrification plant, encompassing mechanical handling, process control, and general operational control of the plant. TR at 397. He stated that the designated safety system at the WTP will not be the ABB system but the Trikonics system, which he described as "a backup system [that] monitors and controls important safety items." TR at 398.

Mr. Thomas stated that when the complainant reported to him that his ABB central processing unit (CPU) locked up, the complainant was unable to repeat the sequence of events that led to the lock-up. TR at 400-401. He stated that the complainant demonstrated a lack of computer skills:

> There was no proficiency. There was a definite learning curve necessary for him to be able to do the job.

TR at 401-402. Mr. Thomas stated that on or after April 15, 2005, he was tasked with investigating the complainant's assertion that PWS engineers had experienced computer lock-ups while using the ABB system. TR at 407. He stated that the first thing that he did was to gather the people who were using the ABB equipment frequently to get a summary of the issues that they were having. He described the ABB system at the laboratory as consisting of the following:

> . . . we had I believe at that time it would have been 15 ABB clients connected to the system and five ABB aspect system servers that were being used by miscellaneous engineers plus three . . . laptops that were being used for factory acceptance testing or equipment in the field.

TR at 408. He stated that the only problems that he recalled being reported to him were some blue screen issues involving a laptop. TR at 415. He described this problem as follows:

> The blue screens was an ongoing issue that we were addressing through Dell computers. That was a Dell laptop that was purchased. Although it was procured through ABB, it was a Dell laptop. [An ABB engineer] contacted Dell on several occasions regarding that problem. Dell had made one trip to site and replaced the CPU and fan, I believe.

TR at 410. Mr. Thomas believed that Dell had not fully resolved the problems with this laptop at the time that he reported his results to Peter Douglass on May 2, 2005. BNI Exhibit 80. Mr. Thomas then was asked to review BNI exhibit 201, which is an unsigned document purporting to be responses by PWS engineer Jason Aldridge to statements made by the complainant. These responses indicate that Mr. Aldridge's only problem involving a computer lock-up at the laboratory occurred when a Dell laptop "began to crash at various stages of boot-up and operating." BNI Exhibit 201. Mr. Thomas testified that he believed that this statement was consistent with what he had learned from Mr. Aldridge during his investigation. TR at 414. Mr. Thomas stated that he agreed with BNI's conclusion that the ABB system was reliable and safe for use at the WTP:

> The [ABB] system as it will be configured at the plant is totally different from the office environment. Reliability issues that were brought up here would, even if they did occur, a blue screen, would not impact plant safety. The Trikonics safety system is handling all safety issues. The operators had dual CPUs for their operating consoles. There's lots of redundancy in the system, lots of fallback options so to speak on how it's configured, how the system is distributed. The office environment that we were working under was loading all services and systems under one server, which would not be the norm.

TR at 419-420.

Mr. Thomas testified that he believed that control systems are an important part of plant safety. TR at 421. He stated that the ABB system would be responsible for the monitoring of radioactive materials. TR at 424-425. He agreed that a systemic problem in the ABB system could result in all of the computers in the WTP control room going blank. TR at 426.

After reviewing an unsigned interview purporting to be of PWS engineer Glenn Upton [Exhibit 202], Mr. Thomas recalled that Mr. Upton had experienced problems with the Dell laptop that he had previously discussed. TR at 435. Mr. Thomas disagreed with the statement attributed to Mr. Upton that a number of employees using the ABB system had experienced a crash or blue screen on their computers. TR at 436. Mr. Thomas stated that in conducting his investigation, he did not contact all of the ABB users to inquire if they had experienced lock-ups on their computers. TR at 436. He also stated that he is not aware that the ABB control system being installed at the WTP is used currently in any nuclear facility. TR at 445.

4. Patricia Talmadge, Bechtel's Senior Quality Engineer

Ms. Talmadge testified that she is a software quality and safety engineer who has worked for BNI since 2001. She stated in August and September 2005, at the request of WTP's Employee Concerns Program, she participated in the Quality Assurance surveillance of the WTP's controls and instrumentation equipment testing activities in the laboratory where the complainant had been working. This surveillance and the accompanying report (BNI Exhibit 269) were aimed at addressing safety concerns identified by the complainant. Ms. Talmadge concluded that the laboratory had no significant safety problems, and characterized the surveillance as a waste of taxpayer dollars. TR at 638, 649. Ms. Talmadge stated that the ABB is not a safety-related system and is not intended to be used for safety purposes at the WTP:

> We have nuclear engineers that conduct what we call [integrated safety management] meetings. They do the actual walkdowns of all the accident scenarios that could possibly occur per the design at the time and it evolves over time. And the control system strategy is based on the difference between a safety system and a non-safety system. And if you were crediting yourself with a safety function it belongs on the safety system.

TR at 609. When asked how BNI would address the hypothetical problem of a non-safety system that created numerous safety-related incidents, she responded that

> based on the severity of the hazard or the possibility of recurrence you put additional barriers in place and those barriers could be swapping equipment out, going to another supplier, changing your design if you have to.

> There's multiple, multiple things that you could do to mitigate that.

TR at 613.

With regard to the complainant's concerns about the ABB system, she testified that the test environment does not mimic an operational environment. TR at 614. She stated that her investigation found only one laptop issue involving the ABB system, and no server lock-ups. TR at 615-616.

Ms. Talmadge testified that in October 2005, BNI made the decision not to use FF devices as monitors for its safety control system (PPJ/Tricon):

> We cannot use Foundation Fieldbus on a programmable system. And that's due to some of the technical issues we have with the pulse jet mixer system. That type of technology will not be allowed on the [PPJ/Tricon] system because of the fact that we don't feel it's reliable and the signals do not transfer to the length we need them to.

TR at 626. She testified that the digital communication using FF standards is not reliable enough for the WTP's safety system. However, she stated that she had no safety reservations about the use of FF measuring devices with the WTP's integrated control system [ICN] which will use the ABB technology:

> The remaining part of the plant, the controls are closer together and it's not an issue. The issue would be when it's in the hot cells and I have to rely on that reliability. As far as any of the other [systems], PPJ is responsible for shutting the system down. It takes control from the ICN if there's a problem. The ICN is basically a monitoring system. It monitors, it tells the operators if there's alarms. It shows communications happening amongst non-safety equipment in the plant.
>
> The PPJ monitors and actually has control over safety equipment in the plant. So for safe shutdown everything is independent from each other and the PPJ is master.

TR at 627-628. She stated that the PPJ system would have its own monitors that would operate independently from the monitors for the ABB system. TR at 628, 634-638.

Ms. Talmadge stated that the complainant's manual of procedures for testing the communication of FF measuring devices with the ABB system erred in not being related to the formal process for certifying the equipment to become operational. TR at 642-646.

Ms. Talmadge testified that the WTP did not require the same level of nuclear safety protections that are required for nuclear power generating plants because there is little danger of a major release of radiation into the environment:

> We are not a nuclear facility in the sense of having a reactor or large critical events that occur or that could occur or that have occurred. A release of radiation is nominal in the majority of the cases of the accident scenarios in the plant. When there is a release, it's in a contained area which is considered a hotset basically. It's a hot environment.

TR at 611. She stated that the Safety Requirements Document for the WTP specifically provides that

> The control philosophy for a nuclear power generating station is not applicable for the RPP WTP project.

TR at 654, citing BNI Exhibit 273.

Under questioning by the complainant's counsel, Ms. Talmadge agreed that delays in treating radioactive wastes at the Hanford site are potentially bad for public safety. TR at 670. She also agreed that if operating problems with the ABB system delayed the WTP coming on line, that would "be a bad thing." TR at 671.

5. Stephen Anderson, former Discipline Engineering Manager for the WTP's Control System Discipline

Mr. Anderson testified that he started working at the WTP 2000 as the discipline control manager, and that his role was to develop an execution plan for constructing the WTP. TR at 720.

a. The Complainant's Safety Concerns

Mr. Anderson stated that at the April 15, 2005 meeting with Mr. Douglass and the complainant, he and Mr. Douglass gave the complainant an opportunity to document problems he observed with the ABB system. TR at 730-731. He stated that the complainant was

unable to replicate in a laboratory setting one of the problems that he claimed to have experienced with a FF device not interacting properly with the ABB system. TR at 731. He agreed with Mr. Douglass that the ABB system concerns reported by the complainant were all resolved in April 2005 and that the ABB system was suitable for the WTP. TR at 732.

He stated that the ABB system at the WTP was not responsible for "program protection", "although it did monitor program protection." TR at 733.

b. The Complainant's Salary Ranking

Mr. Anderson testified that WTP's 2005 salary planning program was conducted in late February and early March 2005. He stated that it consisted of a ranking exercise using input from his group's supervisors and fitting that input into the fixed percentages for each rating level. TR at 741. Mr. Anderson was shown a document entitled "2005 Salary Planning Program, Bechtel Systems Infrastructure, Inc." BNI Exhibit 276. He stated that he did not know the date of the document, but that the date of November 2005 printed on the document was not correct. He affirmed that it reflected the salary planning process that took place in February or early March 2005. Mr. Anderson was asked to explain why BNI Exhibit 276 lists the complainant with a B-minus rating while another 2005 salary ranking document [Complainant's Exhibit 013-2 lists him with a B rating. He stated that the B rating "would have been our input" into the ranking process. TR at 745. He stated that adjustments to these grades can take place "when all the disciplines are brought together and everybody has to meet these quotas." TR at 744. He stated that officials in human resources convene a meeting a discuss how to put the ratings together.

> Because what happens is a lot of people that are well-known on the project either good or bad and so people have input on those people. So sometimes there's adjustments. In addition to that, there are a number of people that did not get graded and they're inserted in this process during that review. When that happens somebody is inserted as an A and moves everybody down, somebody is inserted as a B, everybody below that gets pushed down. So they try to protect – at the margins you try to protect your people from that happening. But it does happen.

TR at 744.

c. The Complainant's Assignment Complete Update

Mr. Anderson stated that BNI maintains a document called the "register" that lists every employee's position number, who occupies the position, the date they started, and their projected release date. He stated that he maintains this register for the employees in his division at the WTP, and that he electronically enters any changes in an employee's projected release date. TR at 780-781. He testified that he would provide a mark-up of his changes in release dates to Tanya Zorn, who would manage the Assignment Complete process for the affected employees.

Mr. Anderson testified that in early 2005 the WTP was "near our peak [of staffing] and were starting to reduce down" through normal staff reductions. TR at 746. He stated that just prior to the announcement of the RIF, on March 29, 2005, the complainant's assignment complete date and that of some other engineers had been moved up to May 5,2005. TR at 749, Complainant's Exhibit 48. He stated that

> **The position that [the complainant] was occupying we predicted that it must not be a position that we would need to sustain for a long period of time.**

TR at 750. He stated that the ending of assignments for employees was a means "to keep our resources within . . . budget levels." *Id.*

Mr. Anderson stated that he has the "final input" for moving up an employee's assignment complete date, but that Mr. Douglass, as the complainant's supervisor, "would have had some input" in moving up the complainant's assignment complete date. TR at 750. However, Mr. Anderson testified that in this instance he had no "specific knowledge" that Mr. Douglass had any input into moving up the complainant's assignment complete date. TR at 780.

Mr. Anderson testified that when the RIF was announced, the complainant and the other employees who had received 30-day assignment complete notices got rolled into the RIF process. TR at 751. He stated that in a November 2005 memorandum to Mr. Robertson in Employee Concerns he wrote that a change in an employee's assignment complete date

> **is probably not a good indication that we wanted to terminate someone, only that we expected that some work**

> would be completed in the near term. Generally we did some long range forecasting of the reduction in positions based on schedule and budget considerations. Many times these reductions are less than accurate as they were not adjusted every month.
>
> I think a better indication of the status of performance would be the salary planning effort. There was an exercise in February or March '05 to indicate general performance of our engineers, designers and technologists for salary planning purposes.

BNI Exhibit 44, TR at 757. He stated that Mr. Douglass and Mr. Hall's group leaders had given him a B rating for this exercise. TR at 758.

d. The Complainant's Selection for the RIF

Mr. Anderson testified that the planning for the 2005 RIF at the WTP started in very early April. TR at 747. He stated that an employee's assignment complete date was considered in determining whether to include them in the RIF. TR at 775. He stated that he gave the complainant his RIF notice in late April 2005.

Mr. Anderson stated that in July 2005, BNI took a second look at the RIF. He stated that this involved an objective evaluation of all WTP employees using a standardized form, and that he had no input into the complainant's second evaluation. TR at 753.

6. Brandon Gadish, PWS engineer assigned as mentor to Complainant

Mr. Gadish stated that he has worked with the ABB system at the WTP laboratory since 2002, and had more than six months of experience with testing FF measuring devices when the complainant joined the laboratory workforce in 2005. He stated that the complainant was assigned to take over his FF device testing and that he was assigned to mentor the complainant. He stated that he provided the complainant with educational materials, but that the complainant rejected one-on-one training. TR at 793-795. He stated that he complained to Mr. Luper that the complainant had rejected training, and that Mr. Luper met with the complainant and Mr. Gadish to lay out boundaries and guidelines for their work duties. TR at 797-798.

Mr. Gadish stated that on March 10, 2005, he had an "in your face" argument with the complainant that led him to file an employee concern. Mr. Gadish admitted that he used an expletive and called the complainant an idiot during this encounter. TR at 806-808. He stated that he was not disciplined for this behavior. TR at 822-823.

7. Linda McKenney, former Employee Relations Manager at the WTP

Ms. McKenney testified that in 2005, she worked as an employee relations manager with HR at the WTP. She stated that she convened a March 24, 2005 meeting with Mr. Douglass, Mr. Billings and Mr. Luper concerning the conflict between the complainant and Mr. Gadish. After reviewing her notes of the meeting, she stated that at that meeting, no one stated that the complainant should be fired. TR at 850-852. BNI Exhibit 6. She stated that she recommended a formal verbal warning to the complainant regarding his behavior to Mr. Gadish. TR at 855-856. She testified that she later conducted an employee concerns investigation of Mr. Gadish's concern and learned from his co-workers that the complainant and Mr. Gadish were not speaking or interacting in the workplace. TR at 848-849.

Ms. McKenney stated when Mr. Billings sent her an e-mail complaining about his April 1, 2005 altercation with the complainant, she asked Ms. Spellman in HR to investigate. She stated that Ms. Spellman saw whistleblower potential in the statements that the complainant made to Mr. Billings and Mr. Douglass on April 1, 2005, and that she was comfortable with this assessment. TR at 857-858. She testified that on April 7, 2005, she had contacted Danette Brophy in the engineering, staffing and training department and instructed her that BNI policy required that the complainant could not be laid off while there were ongoing employee concern issues involving him. TR at 860.

She stated that her office did not classify the April 1, 2005 altercation between the complainant and Mr. Billings as an incident of misconduct by the complainant. She stated that there were no reports to her of any misconduct by the complainant occurring after her March 24, 2005 meeting with the complainant's supervisor. TR at 878-879.

8. Sheila Spellman, former Human Resources Administrator at the WTP

Ms. Spellman testified that she assisted Ms. McKenney in processing Mr. Gadish's employee concern regarding the complainant. TR at 882. She stated that she worked with Mr. Douglass and Mr. Billings to implement her recommendations to have a

> **discussion with the [complainant] about unprofessional behavior and how to talk to the [complainant] about learning the Bechtel covenants and following the covenants and interacting with his co-workers professionally.**

TR at 883-887. She stated that in an e-mail to Mr. Douglass, she wrote that the complainant has violated the Bechtel covenants because his behavior displays a lack of trust in his co-workers, that he does not welcome help from others, and that he displays a lack of teamwork. TR at 887. She stated that she understood that Mr. Douglass counseled the complainant on April 14, 2005 regarding these issues. TR at 889.

She testified that on April 6, 2005, Ms. McKenney asked her to respond to an e-mail from Mr. Billings about his April 1, 2005 altercation with the complainant. TR at 890, 900. BNI Exhibits 71 and 72. She testified that

> **I recognized that [the complainant] was bringing up issues that I identified at the time as quality issues. And I felt that they needed to be dealt with. We needed to know what they were. Is there any problem with the plant, with quality, safety, environmental issues that an employee is raising? That's something that we as a company are obligated to address and try to find out what they are.**

TR at 894. She stated that Mr. Billings' notes of the meetings indicated that the complainant would go public with his concerns if he was fired, and that this indicated that he might become a whistleblower. TR at 895. She stated that she discussed the complainant's situation with Mr. Stewart at Employee Concerns and that he advised that BNI needed to address the complainant's behavioral issues and his quality concerns separately. TR at 897. She stated that she learned on April 6, 2005 through Ms. McKenney that the complainant was listed to be laid off because his

Assignment Complete date had been moved up in late March. TR at 908-909. She stated that in late July 2005, she sent Ms. Tuttle in Human Resources a report on the complainant's situation. TR at 919.

9. Edward Rogers, Bechtel's Business Manager for the WTP

Mr. Rogers testified that he has worked for BNI for almost nine years and is BNI's Business Manager for the WTP. He stated that in February 2005, the WTP project was seriously short of operating funds. TR at 929-934. He stated that BNI concluded that its current "spend rate" was too high and looked at ways to reduce it. TR at 935. He stated that because of the need to review completed construction and planned construction to meet new seismic requirements, BNI made an immediate forced reduction in the field on craftsmen.

> That was followed up very closely by a forced reduction within the non-manual ranks both in construction and engineering and some of the other organizations.

TR at 935-936.

Mr. Rogers stated that all of the ratings of employees for the RIF were redone at the request of Ms. Tuttle, who was concerned about the criteria that was used:

> I believe we had used the rating originally from our salary, planning and rewarding for performance program that we have as kind of a bonus program. And she was concerned that that rating, the criteria used for the rating in those programs is slightly different than the rating criteria used for retention.

TR at 937. He stated that she also wanted a more standardized and formal process of employee rating. TR at 939.

10. Tanya Zorn, BNI Human Resources Representative in Engineering Department

Ms. Zorn testified that from January to July 2005, she worked as a human resources representative in the WTP's engineering staffing office, and was involved with moving and transferring employees and with workforce planning. TR at 945-947.

She testified that the complainant was hired as a "long term" employee, which meant that his position was expected to last more than twelve months. TR at 949-950. She stated that he also was an "at will" employee and could be terminated by BNI at any time for any reason. TR at 952-953. She stated that all WTP employees had assignment complete dates, and that these dates were based on the expected scope of work and changed frequently on the basis of project and staffing assessments. TR at 953-954. She stated that dates could be moved up for de-staffing purposes, and that normal de-staffing plans were reviewed by Ms. McKenney in HR for outstanding employee concerns. TR at 954-957. She stated that when employees are notified that they will soon reach their assignment complete date,

> it meant that the assignment at WTP was over. It did not necessarily mean that their career or their appointment with Bechtel was over. If the employee had notified us that he or she was mobile and could relocate to other projects and there were positions available on other projects, and they were selected, they could transfer to other Bechtel assignments.

TR at 958-959. She stated that she sent a list of five engineers that included the complainant with "assignment complete dates" of May 5, 2005 to Ms. McKenney in HR in late March 2005. TR at 955-960. Complainant's Exhibit 48. She stated that prior to March 29, 2005, the complainant's assignment complete date had been September 7, 2006. TR at 968. Ms. Zorn then testified that the May 5, 2005 assignment complete dates were never implemented with respect to any of the engineers:

> Just after I submitted this March 29th list there was some indication from our senior management that we would have to reduce our staff by a certain percentage. And so everything sort of got put on hold at that time to not give notifications until we can figure out what was going on. We knew we were going to have to reduce our staff by a bogey of 20 or 30 percent, if you will. And so engineering decided that rather than give notice of the assignment complete we would wait until we knew how deep our cut had to be to be funding compliant for the year. And we would roll the assignments complete into that larger reduction in force number. Eventually what happened was, rather than giving notification to these folks to go out and have their assignments completed on

> May 5th, their assignments were essentially extended out approximately two, almost three months.

TR at 968-969. She stated that the complainant's assignment complete was officially changed to June 16, 2005 on a project staffing assistant form dated April 12, 2005. TR at 973, BNI Exhibit 117. She stated that both the March 29, 2005 assignment complete date changes and the April 21, 2005 RIF selections relied on the salary planning rankings of employees within their peer groups that were completed in the February to March time frame. TR at 983-984. She stated that the complainant's ranking of 18 out of 24 employees in his peer group in the April 21 RIF selection reflected his B minus rating in the February/March 2005 salary ratings:

> In other words, [the complainant's rating] was equivalent to whatever the score was once everybody got considered, once Mr. Anderson' group got rolled into the bigger group and they came up with the master scores, if you will, that was what was used.

TR at 984-985.

Ms. Zorn testified that the positions filled by the lowest ranked employees were ended first under the Assignment Complete process because higher ranked employees had bumping rights over lower ranked employees.

> If there was a higher-rated individual holding a position that ended sooner than a lower-rated individual then the higher-rated individual would bump that person (the lower rated individual), and his or her employment would be extended for the position and end date and the lower-rated individual would either [be transferred to another BNI position] or their employment would end.

TR at 983.

Ms. Zorn testified that when the engineering group leaders and supervisors selected employees for the April 21 RIF notice, they relied on the employee ratings that already were established for the February/March salary ratings. She stated that "we didn't adjust ratings for the RIF." TR at 1002.

11. Kathy Ann Tuttle, Manager of Human Resources at WTP

Ms. Tuttle testified that she is an HR manager at the WTP working for Mr. Rogers, and that she never met the complainant during his employment at the WTP. TR at 1014-1016. She stated that on or about April 1, 2005, the decision was made to lay off employees through a RIF. TR at 1016. She stated that the goal was to reduce the workforce by 500 people in 90 days, with a 60-day notice to the affected employees. TR at 1018-1019.

She stated that initially supervisors were told where to get employee ratings and instructed to prepare their lists of employees for the RIF. TR at 1020. She testified that the supervisors

> **were to determine the scope of work that they were going to be able to do within the funding restrictions and the bogeys, the targets, that they were given. And then based on that scope of work, to make a determination of how many FTEs, full-time equivalents, they were going to need and what type of skill sets, define the skill sets for the positions for each discipline that they were staffing. And that they were to use the ratings from . . their salary planning ratings for the people in Grades 24 and below. And those had been done, I believe [in the] February and March time frame.**
>
> **And then that they were to look at the scope and the people they had, the skill sets, the individuals, determine how many of those from each skill set they needed to place into the positions that they had to perform the scope. And then the ratings would determine a totem ranking and they were to place the people in the positions from the top and we would release from the bottom if there were too many people in certain skill sets that there weren't enough positions for the number of people that we had. And then they were to develop that list and give it to Human Resources to run an adverse impact analysis.**

TR at 1023-1024. She stated that the initial selection process for the RIF led to questions and allegations that older employees had been negatively impacted. TR at 1022. She stated that BNI determined to take a second look at the selection process and to use standardized business assessments in each department and individual employee rating (IER) worksheets that used "very objective criteria." TR at 1028, citing BNI exhibit 277. She

stated that once the supervisors had rated their employees in different categories on the IER worksheets, these categories were weighted using spreadsheet software and rankings for peer groups of employees throughout the WTP were developed. TR at 1028-1035. She stated that some of the employee evaluation categories rated by supervisors received a greater weight in this spreadsheet ranking than did other categories:

> [The supervisor's rating] doesn't tell you how a peer group is totem ranked on the ratings because you have to put [the rating] in the worksheet and then the sections [of the rating] have weights applied to them. The way the weights are applied is that it's a higher weighting for individual skills and qualifications and value of contributions. It says here it's a 50 percent weight for the skills whereas the teamwork and leadership section . . . is weighted at 20 percent and the current state performance is at 30 percent.

TR at 1033. Ms. Tuttle stated that if the ratings assigned to an employee by his supervisor were consistently low, "it is reasonable to believe that [the employee] would fall in the lower totem rating." TR at 1057. She testified that, as a result of the rating that the complainant received from his supervisor, and the weights assigned to the categories of that rating by the spreadsheet software, the complainant was totem ranked 16th in his peer group of 19 Grade 24, Engineer III employees. TR at 1065-1066. She stated that BNI determined the number of employees in the peer group who were needed for future work at the WTP, and they then released employees from the bottom of the list until that number was achieved. TR at 1066. She stated that in the complainant's peer group, the employees ranked 14 through 19 received RIF notices. TR at 1094. BNI Exhibit 279.

12. Thomas Stewart, WTP's Employee Concerns Officer

Mr. Stewart testified that in July 2005, the complainant filed an employee concerns complaint alleging that his inclusion in the April 21, 2005 RIF was a retaliation for protected disclosures. He stated that on July 19, 2005, he met with the complainant for a couple of hours to discuss his concerns, and at that time the complainant asked that he not be released under the RIF. TR at 1270-1271. He stated that after a three-month complaint investigation, WTP's Employee Concerns found no nexus between the complainant's disclosures of alleged safety concerns and any adverse actions taken by BNI. TR at 1277-1279, BNI Exhibit 230.

With respect to BNI's decision to move up the complainant's Assignment Complete date, Mr. Stewart testified that his investigation found that in early March 2005, the PWS group at the WTP received word from the WTP's project controls group that it needed to eliminate a number of employees. He stated that by March 9, 2005, the C&I division headed by Mr. Anderson completed ratings for their employees "which were flowed up . . . to their management." TR at 1282-1283. He testified that Ms. Zorn helped him to establish that

> on or before March 29, the [Estimated Assignment Complete] had been submitted to Human Resources indicating that [the complainant] and others had been slated for estimate of completion, I believe around [May] 5th.

TR at 1281.

He stated that there is no nexus between the complainant's alleged disclosures on April 1 and April 15, 2005 and his inclusion in the RIF because BNI management had already decided to terminate the complainant prior to his disclosures:

> I am aware [that] in March [2005], prior to his management having any awareness of alleged . . . protected disclosures, they had made a decision that Mr. Hall and other co-workers were to be released. As we look at the subsequent re-rating and rankings that were done, at least two of them, Mr. Hall stayed essentially [in] the same position, even though there were deeper and deeper cuts being made into all of the organization.

TR at 1294.

> What I was told by my staff and Human Resources that the ratings and rankings stayed consistent throughout the process in regards to Mr. Hall's positioning. Therefore, I had no reason to assume anything negative had happened, he stayed about the same.

TR at 1301. Mr. Stewart stated that if the complainant had received a good rating in March 2005 and then his ratings had declined subsequent to his protected April 1, 2005 protected disclosure, "that would be an instant red flag to me." TR at 1309.

Mr. Stewart stated that he could not recall having reviewed Mr. Billings July 2005 rating of the complainant. TR at 1299.

IV. Legal Standards Governing This Case

A. The Complainant's Burden

Once it is determined that the complainant has met the procedural requirements for submitting a Part 708 complaint, he must then establish by sufficient evidence that relief is warranted. Specifically, it is the burden of the complainant under Part 708 to establish

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

10 C.F.R. § 708.29.

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both the complainant and by BNI. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

B. The Contractor's Burden

If I find that the complainant has met his threshold burden, the burden of proof shifts to the contractor. BNI must prove by "clear and convincing" evidence that it would have taken the same personnel actions regarding the complainant absent the protected disclosures. "Clear and convincing" evidence is a more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". *See Hopkins*, 737 F. Supp. at 1204 n.3. Thus if the complainant has established that it is more likely than not that he

made protected disclosures that were a contributing factor to an adverse personnel action taken by BNI, the contractor must convince me that it clearly would have taken this adverse action had the complainant never made this protected disclosure.

V. Analysis

A. The Complainant Made Protected Disclosures

As noted above, in order for the information that the complainant disclosed to his group leader, his supervisor and others on April 1, 2005 to constitute a protected disclosure under Part 708, the complainant must reasonably believe that the information reveals one of the following:

> (1) A substantial violation of a law, rule, or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority . . .

10 C.F.R. § 708.5(a)(l), (2) and (3). Throughout this proceeding, the complainant has contended that the disclosures he made to BNI officials concerning problems involving the future control system for the WTP were protected because they revealed a substantial and specific danger to employees or to public health or safety under 10 C.F.R. § 708.5(a)(2). Specifically, he asserted that the ABB control system software did not communicate or interact reliably with field measuring devices or with the operating programs in computer monitors. He stated that this assessment was based on his experience (1) in testing FF devices for use on the ABB system, (2) his own experiences and reports he received concerning frozen computer screens and computer system lock-ups involving the ABB system, (3) his knowledge that the ABB system was a new and largely untested technology, and (4) his personal research indicating that the ABB system was not well regarded by people working with control systems. As discussed below, my review of the testimony and other evidence in the record of this proceeding leads me to conclude that the complainant made disclosures to BNI officials on April 1 and April 15, 2005 that were based on his reasonable belief that there were serious problems with the interoperability of the ABB control system selected for use at the WTP with other digital programs, and

that these disclosures presented "a substantial and specific danger to employees or to public health and safety" protected under Part 708.

1. The Complainant Made Disclosures on April 1 and April 15, 2005 Concerning the ABB Control System

The complainant testified that on the morning of April 1, 2005, he stated to his group leader, Mr. Billings, that he thought that the ABB system's software had problems communicating with the Foxboro pressure transmitter. Later, at a staff meeting, he explained to Mr. Billings and several BNI engineers that the Foxboro pressure transmitter communicated effectively on two other control systems, and therefore he believed that the ABB system appeared to cause the communication problem. He stated that he then passed out copies of a survey from a trade magazine for control systems that rated the ABB last out of five systems being assessed. In his testimony at the Hearing, Mr. Billings essentially confirmed that the complainant made these statements. TR at 304-306.

At a meeting with his supervisor, Mr. Douglass and Mr. Billings later that morning, the complainant stated that he repeated his observations that he had made earlier about ABB system communication problems with the Foxboro transmitter and also stated his concern that the ABB system was causing computer lockups. He stated that these problems were safety issues. TR at 165-166. These statements by the complainant were confirmed by the testimony of Mr. Billings (TR at 311) and Mr. Douglass (*see* TR at 508). The complainant testified that on April 15, 2005, Mr. Douglass arranged a meeting attended by the complainant, Mr. Douglass and Mr. Anderson, the Discipline Engineering Manager for the WTP, at which the complainant repeated his concerns regarding the computer lockups and communication problems. Mr. Douglass and Mr. Anderson confirmed that they met with the complainant on that date to hear his concerns about the reliability of the WTP's future control system.

Based on this testimony, I conclude that the complainant reported his concerns about computer lockups and FF measuring device communication problems to his group leader and his supervisor on April 1, 2005 and to his supervisor and another BNI official on April 15, 2005. The complainant also stated his belief at these meetings that the ABB control system was the cause of these problems, and further that the ABB control system was unsafe and unreliable to be utilized in the WTP.

2. The Complainant Had a Reasonable Belief that the Interaction of the Control System Components with ABB System Software Was Not Sufficiently Reliable

Based on the testimony and evidence at the Hearing, I find that the individual reasonably believed that his April 1 and April 15, 2005 disclosures raised significant reliability issues related to plant safety. The complainant has a BS in electrical engineering and has worked a total of seven contract assignments at NRC-licensed powerplants as an instrument technician and a compliance engineer. This education and work experience has provided him with a basic understanding of the workings of control systems and how they communicate with measuring devices.

The complainant testified that on February 22, 2005, the ABB system software locked up on his computer. TR at 94, 95 and 98. He stated that in March 2005, Mr. Aldridge, another PWS engineer, reported to him that a server running the ABB system software had locked up on him. TR at 101, 125. The testimony of Mr. Thomas, the ABB representative, indicates that Mr. Aldridge's computer problem may have been the result of hardware or operating software problems on a Dell laptop computer.10/ Nevertheless, I believe that the complainant experienced at least one problem and heard of at least one other similar problem. The complainant convinced me that he believed that if the ABB system displayed a frozen screen while monitoring control functions, the operators might not immediately recognize an emergency situation such as a failure in the cooling system that could lead to a serious outcome. TR at 104.

The complainant testified that he also had a concern about the ability of FF measuring devices to communicate reliably with ABB system software. Specifically, he stated that after he encountered a communication problem when testing the Foxboro pressure transmitter on the ABB system, he contacted Foxboro to see if they could identify a problem with the transmitter. When Foxboro sent him a second pressure transmitter that it had pretested on two different control systems, and this second pressure transmitter also failed to consistently communicate with the ABB system, the complainant concluded that the transmitter was functioning properly and therefore he reached the conclusion that the ABB system was

---

10/ The only evidence on this issue appears to be an unsigned statement attributed to Mr. Aldridge and Mr. Thomas' recollection of his April 2005 conversation with Mr. Aldridge. TR at 414, BNI Exhibit 201.

causing the communication problem. TR at 139. He also testified that he was told by co-workers that, prior to his being hired in 2005, PWS engineers had experienced trouble importing data from other measuring devices into the ABB system, including a Foxboro temperature transmitter, and a valve control device made by another manufacturer. TR at 142. Accordingly, when the complainant discussed his concerns with his group leader and supervisor on April 1 and April 15, 2005, I find that he reasonably believed that the ABB control system software was unable to consistently communicate with the Foxboro pressure transmitter and other devices.

At the Hearing, Mr. Billings testified that subsequent research by Foxboro and ABB revealed that the Foxboro pressure transmitter had a problem that caused it to stop communicating with the ABB system. TR at 317-320. The problem in the Foxboro pressure transmitter was not identified until early June 2005, and does not in my opinion serve to refute that the complainant reasonably believed in April 2005 that there was a serious communication problem involving the ABB system software. Indeed, the June 2, 2005 letter from Foxboro to BNI makes clear that the ABB control system's characteristic of constantly reading all parameters of measuring devices requires an operable secondary buffer in the Foxboro pressure transmitter to prevent a malfunction. In its letter, Foxboro noted that

> Generally, other control systems do not operate in this manner because this approach is perceived as an unnecessary risk to system performance.

BNI Exhibit 65. Foxboro also pointed out to BNI that such a secondary buffer on its pressure transmitter is an "implementation detail" not required by the FF specifications for such devices, and not tested by the Foundation. *Id*. It appears from this letter that the complainant was reasonable in his conclusion that the ABB system raised unique challenges for communication with measuring devices designed to meet the uniform communication standards of the Fieldbus Foundation.11/

11/ Even if BNI is correct that the communication problem was caused by the Foxboro pressure transmitter, the individual's repeated disclosures concerning that communication problem [the complainant's initial March 2005 disclosure to Mr. Billings (TR at 298), the complainant's March 31, 2005 email to Mr. Billings (TR at 139), the complainant's April 1

(continued...)

Finally, the complainant testified that he believed that the trade magazine's random poll that rated the ABB system last out of five control systems provided additional evidence that other professionals in the field appeared to be having problems with the ABB system and that the ABB system could be the source of the Foxboro transmitter communication problem. TR at 153.

Based on the testimony and evidence in the record, I find that the information known by the complainant in April 2005 was sufficient to provide him with a reasonable belief that the ABB system was the source of computer lock ups and that there were measuring device communication problems that raised concerns about the reliability of the control system being designed to control processes at the WTP.

3. The Complainant's April 2005 Disclosures Revealed A Substantial and Specific Danger to Employees or to Public Health or Safety

The complainant has shown that he reasonably believed that there were flaws in the plant operating system that caused computer screen lock ups and the system had problems communicating with measuring devices. He testified that once the WTP began operations, these problems with the ABB control system could result in emergency situations. TR at 104. However, BNI argues that none of the disclosures made by the complainant reveal a substantial and specific danger to the safety of WTP employees or the public. It first contends that no substantial or specific danger can exist because at the time the complainant made his disclosures, ABB system was in a testing and design mode in the laboratory environment and did not control or monitor any operations involving hazardous materials. BNI Reply Brief at 2.

It further argues that any dangers posed by flaws in the WTP's control system are completely mitigated by the redundancies that will be built into the system, and by a separate safety system that will monitor functions at the WTP.

I find that BNI's arguments are without merit. I reject the position that Part 708 does not protect whistleblowers who identify a danger to public health and safety that is substantial and

---

11/ (...continued)
and April 15, 2005 meetings with Mr. Billings and Mr. Douglass] might still qualify as protected Part 708 disclosures.

specific, and that is likely to occur at some point in the future. A danger, by definition, generally involves an element of future possibility and risk.12/ Moreover, the regulatory language does not state that the danger must be "imminent" or "immediate" as a means of restricting this aspect of the term's meaning. In the present case, the ABB system had been selected as the control system for the WTP, which was under construction. At the time that the individual made his April 2005 disclosures, he stated that he believed that the WTP was scheduled to be completed and operational by 2008. TR at 1250. Other testimony indicates that sometime in 2005, the completion date was extended to 2012.13/ Regardless of whether the scheduled operation date for the WTP was 2008 or 2012 at the time that the individual made his disclosures, I find that the design and the procedures for the future operation of the WTP were sufficiently established in 2005 to enable the individual to identify a substantial and specific danger relating to the future operation of the WTP.

BNI also argues that the there is no significant risk that any malfunction in the ABB system would lead to an emergency involving harm to employees or to the public. As an initial matter, I find that witness testimony at the Hearing did not establish BNI's contention that the ABB system controls no plant functions but only monitors "non-safety related instruments and equipment." BNI Reply Brief at 7. No testimony contradicts the complainant's assertion that the ABB control system will be used to maintain as well as to monitor process variables such as pressure, temperature level, flow, and radiation for the vitrification processes that will take place at the WTP. TR at 88-89. In addition, Mr. Spicer testified that the ABB system is being tested to perform robotic processes

---

12/ "DANGER, the general term, implies the contingent evil (troubled by the *danger* that the manuscript will be lost - Carl Van Doren)(realizing that the buffalo in the United States were in *danger* of becoming extinct - Amer. Guide Series: N.H.)(the *dangers* of travel by air) (the *danger* of lowering one's standards) PERIL implies more strongly the imminence and fearfulness of the danger (the ship was in deadly peril of seizure by mutineers - C.C.Cutler)" *Webster's Third International Dictionary, Unabridged*, G&C Merriam Company, 1964 at 573.

13/ The testimony of Mr. Billings indicates "sometime in 2005" the start-up date for the WTP was "pushed out" until at least the "the 2012 time frame." TR at 259.

that will be used at the WTP. TR at 239-240. Finally, Mr. Thomas stated that the ABB system would be responsible for the mechanical handling of container and canister movement control and monitoring at the WTP. He stated that these containers and canisters would contain samples of radioactive materials "at different points within the process." TR at 424-425.

Nor do I agree with BNI's position that design redundancy and a separate safety system eliminate any significant risk caused by a malfunction of the ABB system. As summarized above, Mr. Douglass, Mr. Thomas, Ms. Talmadge and others testified that even if concerns raised by the individual were correct and the use of the ABB system as an operating WTP produced a computer screen lock-up or a failure to communicate with measuring devices, there would be no significant danger to employees or the public. They testified that the WTP's PPJ/Tricon safety control system will operate independently from the ABB system, and is designed to detect and respond to emergency situations when the WTP is in operation. They also indicated that the use of multiple computer consoles in the ABB system's control room will insure that any lock-up of a single computer screen will be promptly detected and will not jeopardize the operation of the system.

I find that it was reasonable for the individual to believe when he made his disclosures in April 2005 that the flaws that he identified in the ABB control system would have the potential to create a situation that plant operators and the contingencies designed into the PPJ/Tricon safety system might not be able to control in time to prevent injury to employees or a significant public health problem. In particular, I find that it was reasonable for the individual to believe that his concern that the ABB system could fail to reliably communicate with measuring devices that provide it with data on the temperature and pressure levels created by waste processing functions presented a substantial danger to employees and the public.

In light of the evidence discussed above, I reject BNI's argument that the complainant could not have reasonably believed that problems he identified with the WTP's ABB control system created a substantial and specific danger to employees or to public health and safety. In fact, the individual disclosed significant information when he reported specific problems in the ABB system relating to computer screen lock-ups and to communication problems with FF measuring devices. I find that the evidence in this proceeding indicates that the complainant reasonably believed that his April 1 and April 15, 2005 disclosures revealed a substantial

and specific danger both to WTP employees and to the general public's health and safety, and therefore constitute the type of disclosures that are protected under Part 708.

B. The Complainant's Protected Disclosures Were a Contributing Factor to the Alleged Act of Retaliation

Under 10 C.F.R. § 708.29, the complainant must also show that his protected disclosures were a *contributing factor* with respect to a particular adverse personnel action taken against him. *See Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994).14/ A protected disclosure may be a contributing factor to an adverse personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) *citing McDaid v. Dep't of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990). *See also Russell P. Marler, Sr.*, 27 DOE ¶ 87,506 at 89,056 (1998).

I conclude that the complainant has established by a preponderance of the evidence that his protected disclosures were contributing factors to the retaliation he alleges. I base this conclusion on a finding that there are both knowledge and proximity in time between the protected disclosures made by the complainant and his allegations of retaliation.

With respect to knowledge of the disclosures, the complainant made his disclosures to his group leader and his supervisor on April 1, 2005 and to his supervisor and BNI's Discipline Engineering Manager on April 15, 2005. The complainant's supervisor stated that he immediately conveyed these concerns to other BNI officials, including Ms. McKenney and Mr. Stewart.

14/ A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Luis P. Silva*, 27 DOE ¶ 87,550 at 89,263 (2000), *citing* 135 Cong. Rec. H747 (daily ed. March 21, 1989)(Explanatory Statement on Senate Amendment-S.20); *see also Stephanie A. Ashburn*, 27 DOE ¶ 87,554 (2000), *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)(applying the "contributing factor" test in a case under the Whistleblower Protection Act, 5 U.S.C. § 1201).

With regard to timing, the disclosures took place in early and mid-April 2005, and the alleged retaliation taken against the complainant, *i.e.* determining to include him in a July 28, 2005 RIF, took place in early July 2005.15/ A reasonable person could conclude that the protected disclosures were a factor in BNI's decision to RIF the individual because the RIF selection process began shortly after the disclosures were made and lasted only about three months. The disclosures were thus a contributing factor to the alleged retaliation. *See Jagdish C. Laul*, 28 DOE ¶ 87,006 at 89,050 (2000), *aff'd.* 28 DOE ¶ 87,011 at 89,086 (2001) (protected activity found to be contributing factor when it occurred proximate in time to a retaliation).

With respect to the alleged retaliation, I find that the complainant has shown by a preponderance of the evidence that his July 28, 2005 termination from employment is an adverse personnel action and meets the criteria for a Part 708 retaliation. I now will determine whether BNI has shown, by clear and convincing evidence, that it would have taken the same action to dismiss the complainant in the absence of the protected disclosures.

C. BNI has not Shown by Clear and Convincing Evidence that it would have dismissed the Complainant in the Absence of his Protected Disclosures

I find that BNI has established that the site-wide RIF that it conducted in 2005 was necessitated by a reduction in federal funding for the construction of the WTP and the need to adjust the design of the plant. Testimony of Mr. Rogers, TR at 931-935. It also has shown that the RIF reduced the workforce at the WTP site by about 500 people. Testimony of Ms. Cathy Tuttle, TR at 1018.16/ I therefore conclude that the purpose and scope of the RIF were legitimate. Accordingly, the issue that I will examine is whether BNI has shown by clear and convincing evidence that if would have RIFed the complainant absent the protected disclosures.

15/ As discussed below, I find that BNI has failed to show that a final decision to terminate the complainant was made before July 2005.

16/ BNI's Initial Brief that the complainant was "one of thousands at the Hanford site that was terminated in connection with the RIF" [Initial Brief at 13] therefore appears to refer to RIF selections at the entire Hanford site, not just at the WTP construction project.

1. BNI's Contentions Regarding Its Termination of the Complainant's Employment

BNI argues that the testimony of Ms. Zorn indicates that February 2005 salary planning ratings for the complainant's peer group were "an important consideration" for the assignment complete process. BNI Closing Argument at 22. BNI states that no later than March 29, 2005, the complainant and four other members of his peer group were "identified for termination" and their assignment complete dates were moved up to May 5, 2005. It contends that

> **because of a change in project priorities resulting from funding and seismic issues, the determination was made that Hall's skill set was no longer needed on the project and his end date was moved up to May 5, 2005 by March 29, 2005.**

Id. **17/ BNI then states that once it was determined that BNI would be required to engage in a large site-wide RIF at the WTP, all of the engineers on the Assignment Complete list were reviewed in connection with the RIF:**

> **BNI ceased the Assignment Complete process entirely and simply concentrated on the reduction in force procedure to accomplish the necessary destaffing requirements.**

BNI Closing Argument at 23. It states that the complainant and the four other employees on the Assignment Complete list "were ultimately identified for termination in connection with the RIF." ***Id.*** **BNI states that in early to mid-April 2005, Mr. Douglass, Mr. Billings and Mr. Meinert met to discuss the employees that they supervised and to identify the five employees to be slated for termination in the RIF. BNI states that**

17/ **In its July 31, 2006 Initial Brief in this proceeding, BNI asserted that BNI made its determination to select the complainant for a RIF "at the latest, on March 9, 2005." Initial Brief at 20.** ***See also*** **BNI's August 21, 2006 Reply Brief at 5 ("Hall's fate, as well as the fate of many other BNI employees, was sealed by early March 2005). I will treat the assertions made by BNI at the Hearing and in its closing argument as an alteration and clarification of its previous position.**

> The three supervisors wrote the names of the employees who were potential candidates for termination in connection with the reduction in force on a white board and discussed each employee. [BNI Exhibit 173]. The focus of the meeting, according to Billings, was to identify the employees who were contributing the least to the group, to find the weakest performers - those whose skills could be replaced in the future if necessary. *Id.* Billings explained that Hall's name was one of several that was discussed in connection with the reduction in force. *Id.* All were of the opinion that Hall was one of the weakest members of the group. Hall had not demonstrated strong computer skills, a strong understanding of control systems, leadership, or objectivity, making it difficult for his supervisors to assign him work. *Id.* Furthermore, his supervisors had observed his great difficulty in getting along with other members of the group. *Id.* The three supervisors agreed that Hall was one of the individuals to be slated for termination in connection with the reduction in force. *Id.*

BNI Closing Argument at 24. BNI states that as a result of this process, the complainant and the four other employees previously identified for the Assignment Complete termination were identified for the RIF termination. BNI asserts that when the April 2005 RIF determinations were reevaluated in June 2005, all employees at the WTP were reevaluated using a more objective tool - the WTP Individual Employee Rating Worksheet. *Id.*

> In the reevaluation, all employees at the WTP were re-rated and ranked against their peer groups. Their direct supervisors were responsible for filling out the worksheet and evaluating the employee in three areas - current/sustained performance; teamwork/leadership; and skills, qualifications, and value of performance. [BNI Exhibit 146]. In Hall's case, Billings completed his evaluation, but Douglass, as his manager, signed the worksheet. *Id.*

BNI states that after the managers rated the employees using this worksheet, the worksheets were forwarded to Human Resources where the scores were entered into a spreadsheet tool that weighted the scores. BNI contends that the use of this tool means that

> a supervisor cannot manipulate an employee's rating because he or she cannot know what effect the weighting will have on specific areas of the rating.

BNI Closing Argument at 25. BNI states that after this weighting was applied to the complainant's peer group of engineers, the complainant and the four other engineers identified for termination through Assignment Complete and the April 2005 RIF determination were once again identified for termination. *Id.*

BNI concludes that the testimony at the Hearing established that the complainant was a difficult employee who refused to take direction, was not a team player, was single-handedly eroding group morale, and that he had minimal skills for his position and especially poor computer skills. *Id.* at 26. For the reasons presented below, I find that BNI's assertions fail to establish by clear and convincing evidence that, in the absence of his protected disclosures, the complainant would have been included in the July 28, 2005 RIF based on workplace conflicts, poor performance or because he lacked necessary job skills.

2. BNI Has Not Shown that the Complainant's Workplace Conflict with Mr. Gadish Would Have Resulted in his Termination

The record indicates that on March 24, 2005, BNI officials convened a meeting to address the complaints made by Mr. Gadish concerning the complainant's behavior in the workplace. The meeting was convened by Employee Relations specialist McKenney and also was attended by Mr. Douglass, Mr. Luper and Mr. Billings. In his testimony, Mr. Billings stated that in addition to the complaint from Mr. Gadish, he also had been told by PWS supervising engineer Meinert that the hostile environment created by this conflict was affecting his team, and by ABB system representative, David Thomas, that the complainant was not taking instruction well and causing people in the laboratory environment "to sort of avoid being in there with him...." TR at 290-291. He stated that Ms. McKenney told them that they needed to closely monitor the situation and clearly lay out expectations whenever the complainant was asked to do something. He stated that Ms. McKenney said that she would start a file associated with the concerns. TR at 291-292.

While the complaints and concerns discussed at this meeting indicate that the complainant's supervisors had developed a negative view of his social skills and to some extent his workplace performance, they do not provide substantial support for finding

that the complainant would have been terminated on the basis of the concerns relating to his conflict with Mr. Gadish. Mr. Billings testified that firing the complainant was viewed as only a potential outcome by the attendees at the meeting, not the objective of the meeting. TR at 286. Ms. McKenney reviewed her notes of the meeting and testified that no one at the meeting stated that the complainant should be fired. She stated that they accepted her recommendation to deliver a formal verbal warning to the complainant regarding his behavior. TR at 850-856. Mr. Douglass testified that this verbal warning could if necessary be followed by a written warning and possible termination, but he stated that a course of action involving termination was not finalized at this March 2005 meeting. TR at 498-504.

This testimony indicates that the complainant would not have been terminated for the behavior that he exhibited to Mr. Gadish prior to this March 24, 2005 meeting, but that his supervisors agreed to warn the complainant about his behavior and to clearly set out their expectations for his future interactions with co-workers. Nor has BNI established that the type of behavior exhibited by the complainant in his conflict with Mr. Gadish generally resulted in the termination of an employee at the WTP. Accordingly, I find that BNI has not shown that the complainant's workplace conflict with Mr. Gadish would have resulted in his termination.

3. BNI Has Not Shown that It's February/March 2005 Ranking of the Complainant would have resulted in his Termination of Employment

BNI's basic argument is that the complainant and the same four co-workers were selected for lay off on three occasions in 2005, once through the Assignment Complete process and twice through the RIF process. It contends that these circumstances convincingly establish that in each instance, he and his coworkers were selected for lay off for legitimate business purposes. As discussed below, I do not believe that the evidence presented by BNI adequately substantiates this conclusion.

a. BNI Has Not Shown that its February 2005 Salary Ranking of the Complainant at the B-minus Level Reflected his Job Skills or Performance

At the Hearing, Mr. Douglass testified that because the complainant was recently hired, he did not attempt to evaluate his abilities and job skills for purposes of the February/early March 2005 reward for performance salary rankings. Rather, he stated that the

complainant and other new hires were inserted into the salary rankings "in the low Bs basically so that it doesn't help them or hinder them." TR at 530. Accordingly, there does not appear to have been an assessment by BNI officials of the complainant's job skills and job performance for purposes of this performance salary ranking.

BNI has established that it gave the complainant a B-minus rating and ranked him 18th out of 24 in his peer group during this February/March 2005 reward for performance rating process. An undated and untitled salary ranking document gives the complainant a B rating, a point rating of 6.7, and ranks him 12th out of 17 engineers. In a November 2005 e-mail, Mr. Douglass identified this document as the "peer rating" done on February 24, 2005. Complainant Ex. 13. At the Hearing, Mr. Anderson identified the document as his division's input into the plant-wide salary ranking process. TR at 745. Another undated document, entitled "2005 Salary Planning Program, Bechtel Systems Infrastructure, Inc.", lists the complainant with a B-minus rating and a point rating of 6. BNI Ex. 276. The peer ranking assigned to the complainant was 18 out of 24, and appears on the Assignment Complete list established by Mr. Anderson in late March 2005. The explanation provided by Mr. Anderson and Ms. Zorn for these changes is that such a reduction in grades and scores can occur when engineers from one division are rolled into a plant-wide peer group. Based on this evidence, I find that BNI has demonstrated that it gave the individual a B-minus rating and a peer group ranking of 18 out of 24 prior to his first protected disclosures on April 1, 2005. However, it has not shown that this rating and peer ranking was in any way related to his actual performance as an employee at the WTP.

b. BNI Has Not Shown that the Complainant's Selection for Termination by Assignment Complete was based on an Assessment of his Performance or Job Skills

With respect to the Assignment Complete process, BNI claims that the complainant was included in the group of engineers selected for Assignment Complete on March 29, 2005 on the basis of its February/early March 2005 reward for performance employee ranking and solely for legitimate business purposes. There is considerable testimony in the record supporting this position. Mr. Stewart testified that in March 2005 the WTP's project controls group had assessed its staffing needs and informed the C&I group headed by Mr. Anderson that it needed to reduce its staff by several

employees. TR at 1281. The testimony of Mr. Anderson indicates that he made the final decision in late March 2005 to terminate five C&I engineering positions by moving their assignment complete dates to May 5, 2005.18/ He stated that he informed Ms. Zorn, who on March 29, 2005 began the termination process by sending a memorandum to Linda McKenney in Human Resources. Complainant's Exhibit 84.

The testimony of Ms. Zorn indicates that the selection of employees for termination by Assignment Complete were made based primarily on the most recent employee rankings. She stated that the March 29, 2005 assignment complete selections relied on the reward for performance employee ranking of engineering employees by peer groups that was completed in the February to early March time frame. TR at 983-984. She also testified that because higher ranked employees in positions scheduled for an early termination date had the right to bump lower ranked employees, the employee whose positions were selected for Assignment Complete had to be the lowest ranked employees.

Documentary evidence also supports Ms. Zorn's testimony. Attached to her March 29, 2005 memorandum was a document entitled "Engineering Sort by Discipline, Grade, Performance." This document shows that although the complainant is ranked 18 out of 24 in his peer group, two of the peer group members who are ranked below him are not engineers. The employee ranked 19th is a technologist and the employee ranked 20th is a senior designer.

18/ Despite Mr. Anderson's testimony in this regard, other evidence indicates that changing an employee's Assignment Complete date generally is not an action which leads to termination. Mr. Anderson's own memorandum of November 2005 states that an employee's Assignment Complete date "is probably not a good indication that we wanted to terminate someone, only that we expected that some work would be completed in the near future." BNI Exhibit 44. Similarly, Ms. Zorn testified that Assignment Complete dates change frequently on the basis of project and staffing assessments, and that "[i]t did not mean that their career or their appointment with Bechtel was over" and possibly "they could transfer to other Bechtel assignments." TR at 953-954, 958-959. Thus, unlike the RIF initiated after the complainant's protected disclosures in April 2005, the record does not establish that the Assignment Complete process necessarily would have resulted in the complainant being terminated.

Complainant's Exhibit 84. Accordingly, the complainant ranking of 18 out of 24 in this peer group made him one of the five lowest ranking engineers and resulted in his selection for Assignment Complete.

Based on this testimony and evidence, I find that the complainant's selection for termination through the Assignment Complete process in late March 2005 relied on his ranking in the February/early March reward for performance employee rating. As discussed above, the complainant's actual performance and job skills were not assessed when he was inserted into the reward for performance ranking as a recently hired employee at the lower B level. Accordingly, BNI has not shown that the complainant was selected for termination by Assignment Complete based on his performance, or that his job performance would have placed him in the bottom third of employees in his peer group. The complainant appears to have been included in a staff reduction of engineering positions based on an arbitrary rating assigned to him as a new employee.

c. BNI Has Not Shown that It Would Have Terminated the Complainant by Assignment Complete

Finally, I find no merit in the assertion that because the complainant was selected for termination by Assignment Complete, BNI has established that it would have terminated him in the absence of his protected disclosures. The testimony of Mr. Anderson and Ms. Zorn indicates that the Assignment Complete process for the complainant and the other engineers scheduled for termination was halted shortly after Ms. Zorn sent her March 29, 2005 memorandum to Human Resources. The official assignment complete dates for the affected employees never were changed to May 5, 2005. Mr. Anderson stated that he made a decision to make all of the staff reductions required for his division at the WTP through the RIF process. Accordingly, I will examine whether BNI has established by clear and convincing evidence that it would have included the individual in its July 28, 2005 RIF in the absence of his protected disclosures.

4. Hearing Testimony Indicates that BNI Officials Considered the Complainant's Protected Disclosures in Selecting Him for the July 2005 RIF

Ms. Zorn testified that with respect to the selection process that resulted in the April 21, 2005 RIF notifications, BNI officials relied on the same February/March 2005 reward for performance

employee rankings that Mr. Anderson had used for his selecting C&I engineers for Termination by Assignment Complete. She stated that complainant's ranking of 18 out of 24 engineers in his peer group for the April 2005 RIF selection reflected his B minus rating in the February/March 2005 reward for performance ratings. TR at 978-1002. However, unlike the Assignment Complete process, the RIF selection process that occurred in April 2005 also involved evaluations of the complainant's performance and job skills by his supervising officials. Moreover, in early July 2005, the final selection for the RIF rejected use of the reward for performance rankings entirely and replaced them with a contemporaneous evaluation by employee supervisors. As discussed below, these April and July evaluations of the complainant's performance and job skills by his supervising officials appear to have been influenced by his protected disclosures.

The testimony of Mr. Douglass and Mr. Billings indicates that the complainant's supervisor and group leader discussed several aspects of the complainant's potential contribution to the WTP at their April meeting before selecting him for inclusion in the April 21, 2005 RIF notifications. BNI does not contest that this discussion took place. Mr. Douglass testified that the complainant was selected for the RIF at this April meeting because he was new on the project and was viewed as having no in-depth knowledge that would be difficult to lose, because the activities that he was working on were not activities that were critical at the time, and because of performance problems. TR at 532. The record of this proceeding does not provide strong support for Mr. Douglass' assertion that there was no anticipated need for the complainant's job skills and work activities. The complainant testified that after he was selected for the RIF, he was assigned to train another engineer who would remain at the PWS and continue to conduct FF testing. TR at 1235.

The April 2005 meeting involving the complainant's group leader and supervisor occurred very shortly after the complainant's April 1, 2005 disclosures to Mr. Douglass and Mr. Billings, which raises the likelihood that their assessments of the complainant may have been influenced by these disclosures. In fact, Mr. Billings testified that the complainant's position that the ABB system was the likely source of the communication problem between that system and the Foxboro transmitter was a significant consideration in selecting him for the RIF.

> Mr. Hall had demonstrated that he had some difficulties getting along with other members of the team and at that

> point he had also displayed what I guess I'd call a lack of engineering judgment in resolution of the Foxboro transmitter issue – those things combined together were limiting his ability to make useful contributions to the group going forward.

TR at 326.

The record in this proceeding indicates that the evaluation that led to the complainant's selection for the July 28, 2005 RIF was the IER Worksheet completed by Mr. Billings in early July 2005 and signed by Mr. Douglass on July 8, 2005. TR at 464, BNI Exhibit 146. At the Hearing, Mr. Billings confirmed that he rated the complainant using the worksheet and that his evaluation was

> sort of a confirmatory action, you know, with a structured worksheet to the - some of the discussions that we had had previously with Mr. Douglass.

TR at 327-328. The IER Worksheet completed by Mr. Billings awarded the complainant a total 66 out of a possible 145 points in the category of "Current/Sustained Performance"a total of 36 out of a possible 85 points in "Teamwork Leadership", and a total of 31 out of 70 in the category of "Skills, Qualifications & Values of Contributions". BNI Exhibit 146. Mr. Billings testified that he did not know how the rating he provided would be used by BNI Human Resources in selecting employees for RIF. TR at 328. However, he stated that he believed that employees with the lowest ratings were more likely to be selected for the RIF than employees with the highest ratings. TR at 465.

The IER Worksheet completed by Mr. Billings and signed by Mr. Douglass awarded the complainant less than half of the available points in all three of the categories for non-supervisory employees. In his closing argument, the complainant contends that he was rated the lowest of all engineers of his grade under the supervision of Mr. Douglass. Complainant's Closing Argument at 17. I have reviewed the other thirty eight IER Worksheets signed by Mr. Douglass (BNI Exhibit 142) and compared them to the IER Worksheet completed for the complainant. I find that the complainant received the very lowest rating of any of these employees, regardless of grade, in both the "Current/Sustained Performance" and the "Teamwork Leadership" categories, and that the complainant and one other employee received the lowest numerical rating in the "Skills, Qualifications & Values of Contributions" category. I conclude from this analysis that Mr. Billings gave the

complainant the lowest ratings of any of the employees that he graded on the IER Worksheet, and that these ratings also were the lowest numerical scores in these categories for all of the employees supervised by Mr. Douglass.

I reject BNI's assertion that a supervisor cannot manipulate an employees' rating because he or she cannot know what effect the subsequent weighting by HR will have on specific areas of the rating. Ms. Tuttle, the Manager of HR, testified that if the ratings assigned to an employee by his supervisor were consistently low, "it is reasonable to believe that [the employee] would fall in the lower totem rating." TR at 1057. She testified that, as a result of the ratings that the complainant received from his supervisor on his WTP IER Worksheet, and the weights assigned to the categories of that rating by the spreadsheet software, the complainant was totem ranked 16th in his peer group of 19 Grade 24, Engineer III employees. TR at 1065-1066. She stated that BNI determined the number of employees in the peer group who were needed for future work at the WTP, and they then released employees from the bottom of the list until that number was achieved. TR at 1066. She stated that in the complainant's peer group, the employees ranked 14 through 19 received RIF notices. TR at 1094. BNI Exhibit 279.

In light of this evidence, I conclude that BNI has not shown by clear and convincing evidence that it would have selected the complainant for the July 28, 2005 RIF in the absence of the protected disclosures that he made on April 1 and April 15, 2005. Mr. Billings' rating of the complainant placed him at the bottom of all three categories for non-supervisory employees on the IER Worksheet and gave him the very lowest ratings of any employees supervised by Mr. Douglass. These low ratings resulted in his final ranking of 16 in his 19 member plant-wide peer group, and his inclusion in the RIF. While Mr. Douglass, Mr. Billings and other BNI witnesses testified that the complainant exhibited some problems interacting with Mr. Gadish and may have lacked some computer skills, this evidence does not establish by clear and convincing evidence that the very low ratings that he was given by Mr. Billings and Mr. Douglass were accurate assessments of his performance, teamwork and skills.

In fact, the record indicates that Mr. Billings' opinion of the complainant's job performance was significantly influenced by the complainant's disclosures regarding the control system. Mr. Billings testified that his July 2005 rating of the complainant confirmed on a structured worksheet the assessment of the

complainant that took place at an early April 2005 meeting with Mr. Douglass. He stated that at that meeting the complainant's perceived lack of engineering judgment on the Foxboro transmitter issue was a significant factor in concluding that he should be selected for the RIF because his future contribution to the WTP would be limited. It therefore appears that the complainant's April 2005 disclosures regarding the ABB system significantly influenced Mr. Billings' and Mr. Douglass' decision to give the complainant ratings on his July 2005 IER worksheet that were the lowest of any given to Mr. Douglass' employees.

Finally, BNI has not shown that it evaluated the complainant at a consistently low level before and after his April 2005 protected disclosures. BNI asserts that the complainant and the same four engineers selected for termination by Assignment Complete in March 2005 also were selected for termination by RIF both in April 2005 and July 2005. However, I reject BNI's efforts to connect the complainant to this group of employees. Evidence in this proceeding establishes that the complainant, as a new employee, was arbitrarily inserted into the reward for performance employee ranking in February/early March 2005 and that this ranking served as the basis for the termination by Assignment Complete selections and the April 2005 RIF selections. There is no evidence that the complainant's job performance was ever evaluated prior to his April 1, 2005 protected disclosures. The other four engineers selected for termination by Assignment Complete presumably received reward for performance rankings based on their performance and would understandably continue to be evaluated near bottom of their peer group during the RIF selection process. However, the complainant's connection with this group appears to be based solely on his arbitrarily assigned reward for performance ranking, and does not indicate that he was consistently evaluated as a below average employee from February through July 2005.

I conclude that BNI has not shown that its highly negative assessment of the complainant would have occurred in the absence of his protected disclosures. The rating given to the complainant on the July 2005 IER Worksheet was the lowest rating signed by Mr. Douglass and resulted in the complainant being rated 16 out of 19 in his peer group, with employees rated 14 through 19 receiving RIF notices. (Testimony of Ms. Tuttle, TR at 1094, BNI Exhibit 279). I an not convinced that if the complainant had not antagonized his group leader and supervisor with his concerns about the operational problems with the control system, that he would have received this low rating and would have been selected for the RIF.

Under the standards of proof set forth in Part 708, I conclude that BNI has not demonstrated by clear and convincing evidence that the decision to select the complainant for its July 28, 2005 RIF would have occurred in the absence of the Complainant's April 2005 protected disclosures.

D. The Complainant is entitled to Relief under Part 708

I therefore will provide relief to the complainant for this retaliation. I will direct BNI to reinstate the complainant to a position at the WTP that is comparable to the one from which he was laid off. I further direct BNI to provide the complainant with the lost wages and other compensation that resulted from his being selected for the July 2005 RIF, and to reimburse him for reasonable legal fees and other expenses related to his Part 708 complaint.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Mr. Curtis Hall under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) Bechtel National, Inc. (BNI) immediately shall reinstate Mr. Hall into his former position of employment at the Waste Treatment Plant (WTP) being constructed at the DOE's Hanford Site in Richland, Washington. In the alternative, BNI may place Mr. Hall in a comparable position of employment at the WTP.

(3) Mr. Hall shall produce a report that provides information on his earnings since July 28, 2005 and his litigation expenses (reasonable legal fees and other expenses related to his Part 708 Complaint). Mr. Hall's report shall be calculated in accordance with the Appendix.

(4) BNI shall produce a report that calculates the lost wages plus interest payable to Mr. Hall. The BNI's report shall be calculated in accordance with the Appendix.

(5) The BNI shall pay Mr. Hall's litigation expenses. The amount of this payment shall be in accordance with the report specified in paragraph (3) above.

(6) The BNI shall pay Mr. Hall lost wages plus interest. The amount of this payment shall be in accordance with the report specified in paragraph (4) above.

(7) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting Mr. Hall relief unless, within 15 days of receiving this decision, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: March 15, 2007

November 5, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: David K. Isham

Date of Filing: June 19, 2007

Case Number: TBH-0046

David Isham filed a retaliation complaint (the Part 708 Complaint or the Complaint) under the Department of Energy (DOE) Contractor Employee Protection Program. 10 C.F.R. Part 708 (2007). As explained below, I have determined that the Complaint should be dismissed.

I. Background

A. The Complaint

Mr. Isham was employed by EG&G Technical Services (EG&G), a subcontractor of Bechtel BWXT Idaho, LLC (BWXT). Mr. Isham worked as a "Visual Examiner" on the Idaho Cleanup Project (ICP), where he inspected waste prior to its shipment to the Waste Isolation Pilot Project (WIPP) in New Mexico. A third firm, Washington True Solutions (WTS)/Central Characterization Project (CCP), characterized waste prior to shipment. A fourth firm, CH2M-WG Idaho, LLC (CWI), BWXT's successor on the ICP, represents BWXT in this matter.

EG&G terminated Mr. Isham on April 1, 2005. On May 10, 2006, Mr. Isham filed the Part 708 Complaint with the local employee concerns office. After initial processing, that office forwarded the Complaint to OHA.

In his Complaint, Mr. Isham alleged that he was terminated in response to a protected disclosure contained in his March 29, 2005, email to Christine Gomez, a CCP employee. Complaint at 3. In that email, he complained of being required to change his inspection reports. Also in his Complaint, Mr. Isham alleged

that Larry J. Walker, the CCP visual examiner "lead," told employees "to leave early on occasion", but Mr. Isham did not allege that he disclosed that matter prior to his termination. *Id.* at 5.

The OHA Investigator found that the March 29, 2005, disclosure concerning changes in inspection reports was a possible Part 708 protected disclosure. June 19, 2007 Report at 5. The OHA Investigator also found that Mr. Isham alleged a disclosure to Thomas Johnsen, a BWXT employee, that Mr. Walker was allowing employees to leave early; the OHA Investigator found that allegation to be a possible protected disclosure. *Id.* at 6.

The OHA Acting Director appointed me to serve as the Hearing Officer. I offered Mr. Isham several opportunities to provide further detail concerning his alleged protected disclosures.

B. Pre-Hearing Efforts to Identify the Alleged Protected Disclosure

1. July 5, 2007 Letter

In a July 5, 2007 letter to the parties, I noted that Mr. Isham's alleged protected disclosures lacked specificity. *See* 10 C.F.R. § 708.12(a)(2) (2007). I asked Mr. Isham to provide three examples of changes to the inspection reports and explain why he believed that those changes revealed a violation, danger, or impropriety that forms the basis of a protected disclosure. *See* 10 C.F.R. § 708.5(a) (2007). I also asked Mr. Isham to specify the date of his alleged disclosure to Mr. Johnsen concerning early departures.

In his response, Mr. Isham maintained that any changes made or directed by others rendered the reports "fraudulent." July 27, 2007 Response at 2. Mr. Isham did not provide the date of his alleged disclosure to Mr. Johnsen concerning early departures.

2. August 29, 2007 Letter

In an August 29, 2007 letter to the parties, I proposed to dismiss the Complaint. I noted that the governing regulations require that a complaint include a statement "specifically describing" the alleged protected disclosure. 10 C.F.R. § 708.12(a)(2) (2007). I stated that, if Mr. Isham objected to the proposed dismissal, he should provide specific information about the changes made in his reports, as well as a specific description of his disclosure to Mr. Johnsen. Finally, I stated

that Mr. Isham should respond to BWXT's arguments that Mr. Isham did not allege a protected disclosure.

In response to that letter, Mr. Isham stated that (i) Mr. Walker instructed him to delete the word "cylinder" or "cylindrical" and to substitute alternative terminology, (ii) other inspectors changed weights that he recorded, and (iii) visual examiners were experiencing "difficulties" in correcting graphite's density value. As for his allegation that he disclosed to Mr. Johnsen that Mr. Walker allowed employees to leave early, Mr. Isham did not provide further detail, except to say that he also made the disclosure to Tammy Hobbes, another BWXT employee.

3. October 1, 2007 Letter

In an October 1, 2007 letter to the parties, I found that Mr. Isham's allegations concerning the inspection reports did not rise to the level of protected disclosures. I stated:

> The foregoing alleged disclosures do not warrant further consideration. Mr. Isham does not allege that the substitution of alternative terminology for the words "cylinder" or "cylindrical" violated the characterization standards. Nor does he allege that the waste was ineligible for shipment to WIPP. In fact, Mr. Isham reported a "dose rate" for the object and certified that it was not a prohibited item. *See* September 7 Submission, Ex. F. Similarly, Mr. Isham does not allege that, when other examiners revised data prior to the finalization of a report, the revised values were inaccurate or less reliable. Finally, as an example of the "difficulties" he reported in correcting the density value for graphite, Mr. Isham cites his desire to start a fresh report, rather than continue to revise an existing report. As the foregoing indicates, Mr. Isham was unable to describe a reasonable belief that the information disclosed rose to the level of the type of violation, danger, or impropriety covered by Part 708.

October 1, 2007 Letter at 2. Accordingly, I stated that I would give no further consideration to the alleged inspection report disclosures. *See* 10 C.F.R. § 708.28(b)(5) (2007) (granting a hearing officer the authority to dismiss claims or defenses).

I also continued to question the specificity of Mr. Isham's alleged disclosure to Mr. Johnsen and Ms. Hobbes that Mr. Walker

allowed employees to leave early, and I cautioned that I had not ruled out the possibility of dismissal. I ordered pre-hearing affidavits from both parties, including an affidavit from Mr. Isham detailing what he disclosed about early departures, "including any statements he made concerning the number of occasions on which employees left early and, for each occasion, the identity of the employees who left early and how early they left ...." October 1, 2007 Letter at 4.

Mr. Isham filed an affidavit (Isham Affidavit 1), providing none of the requested detail about his alleged disclosure. Instead, he merely reiterated his allegation that he told Mr. Johnsen and Ms. Hobbes that Mr. Walker allowed employees to leave early. Aff. 1 at 2. Mr. Johnsen and Ms. Hobbes filed affidavits denying that Mr. Isham made the alleged disclosure. In his response (Isham Affidavit 2), Mr. Isham again did not provide the requested detail concerning his disclosure but requested Respondents' records concerning time and attendance.

II. Analysis

A complainant is required to include in his complaint a "statement specifically describing ... the disclosure" giving rise to the retaliation. 10 C.F.R. § 708.12(a)(2). A complaint may be dismissed where the complaint fails to allege facts which, if established, would constitute a protected disclosure. *See* 10 C.F.R. § 708.17(c)(2) (2007).

The Complaint did not comply with Section 708.12(a). In the Complaint, Mr. Isham did not allege that he disclosed that Mr. Walker was allowing employees to leave early, let alone specifically describe the disclosure.

Mr. Isham has not cured that deficiency by alleging a disclosure that is specific enough to be protected. I required that Mr. Isham submit an affidavit, stating "in detail what he told Mr. Johnsen and Ms. Hobbes, including any statements he made concerning the number of occasions on which employees left early and, for each occasion, the identity of the employees who left early and how early they left." October 1, 2007 Letter at 4. In the affidavit, Mr. Isham stated that he told Mr. Johnsen "that employees were being instructed to leave the work site early" and that he told Ms. Hobbes "that employees had been instructed to leave early on more than one occasion." Aff. 1 at 2, 3. In his supplemental affidavit, Mr. Isham stated that he told Mr. Johnsen and Ms. Hobbes that "employees were being directed and/or allowed to leave the work place early after

their time sheets had already been turned in for submission to the federal government." Aff. 2 at 3.

As the foregoing indicates, at most, Mr. Isham has alleged that he disclosed to Mr. Johnsen and Ms. Hobbes that Mr. Walker let more than one employee leave an unspecified amount of time early on more than one occasion. That leaves open the possibility that Mr. Isham disclosed that two employees left five minutes early on two occasions, a de minimus amount of time. *See generally Donald R. Rhodes*, 29 DOE ¶ 87017 (2006) (TBU-0058) (contractor change from 20-minute to 30-minute billing increments was *de minimis).* Thus, Mr. Isham's alleged disclosure is too general to support a reasonable belief that it reveals fraud or some other impropriety or that it involves some other protected activity.

Mr. Isham's other statements about early departures do not change that conclusion. First, in those statements, he does not discuss his alleged disclosure; instead, he simply refers to his underlying allegation that Mr. Walker allowed employees to leave early. Second, I question whether it is appropriate to rely on post-termination statements to characterize this disclosure. *Cf. Ellison v. Merit Systems Protection Bd*., 7 F.3d 1031, 1036 (Fed. Cir. 1993) ("[T]he test of the sufficiently of an employee's charges of whistleblowing . . . is the statement that the employee makes in the complaint . . ., not the employee's *post hoc* characterization of those statements") (citations omitted). In any event, those statements do not provide *post hoc* clarification of the alleged disclosure.

Mr. Isham's post-termination statements concerning his allegation that Mr. Walker allowed employees to leave early are inconsistent. In an April 26, 2005 letter to the Office of the Inspector General (OIG), Mr. Isham stated that employees left early on "several occasions" after time sheets had been submitted to the employer. April 26, 2005 Letter at 1. He later told the OIG that employees left an hour early every other week. April 28, 2005 OIG Form. In his Complaint, Mr. Isham stated that employees left early "on occasion," elaborating:

> It is more important to show the ability of the action than the actual action itself. Were we told to leave early on occasion? Yes, but what is more important is the power or the control that one can think he or she can do something that is not legal and is unethical!

Complaint at 5. In October 2007, in his first affidavit, Mr. Isham described the frequency as a "daily occurrence:" "I remember that this was a daily occurrence which would escalate as we neared the end of our shift. Employees would consistently leave at least 10 to 20 minutes early." Aff. 2 at 2. A week later, in his second affidavit, Mr. Isham stated that there was "at least one instance" in March 2005 in which three or more employees left early[1] and that records would show "a substantial number of other such occurrences." Aff. 2 at 4. Given the inconsistent and generally escalating nature of these post-termination allegations, they are unreliable and their use as a *post hoc* characterization of his alleged disclosure inappropriate.

As the foregoing indicates, Mr. Isham has not alleged facts which, if proven, would establish that he made a protected disclosure. Accordingly, the Complaint will be dismissed with prejudice. Based on this determination, I need not address other requests that the parties have made.

IT IS THEREFORE ORDERED THAT:

The Complaint filed by David Isham on May 10, 2006, be and hereby is dismissed.

Janet N. Freimuth
Hearing Officer
Office of Hearings and Appeals

Date:November 5, 2007

[1] Mr. Isham has alleged that he left early in March 2005 at Mr. Walker's direction and, therefore, would have been one of those employees. Nonetheless, Mr. Isham has not stated how early he left, something clearly within his knowledge.

June 20, 2008

DECISION AND ORDER OF
THE DEPARMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Dennis Patterson

Date of Filing: April 25, 2007

Case Number: TBH-0047

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Dennis Patterson ("Patterson," "the complainant," or "Complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant was an employee of Batelle Energy Alliance, LLC, ("BEA" or "the contractor") the management and operating contractor of the DOE Idaho National Laboratory (INL) in Idaho Falls, Idaho, where he was employed as the Employee Concerns Program Manager until June 2007. On June 1, 2006, he filed a complaint of retaliation against BEA with the DOE Office of Employee Concerns. In his complaint, Patterson contends that he made certain disclosures to officials of BEA, and that BEA retaliated against him in response to these disclosures.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. Part 708. Under the regulations, protected conduct includes:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [the] employer, or any higher tier contractor, information that [the employee] reasonably believes reveals –
>
> (1) A substantial violation of a law, rule, or regulation;

> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would-
>
> (1) Constitute a violation of a federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

Part 708 sets forth the proceedings for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. See 10 C.F.R. §§ 708.21-708.34.

B. Procedural Background

Patterson filed a complaint ("First Complaint") with the Idaho Operations Office Employee Concerns Office (DOE/ID) on June 1, 2006. DOE/ID dismissed his complaint and Patterson appealed this dismissal to OHA. OHA reversed the dismissal and ordered DOE/ID to proceed with the case. *See Dennis Patterson,* 29 DOE ¶ 87,011 (2006). On September 6, 2006, Patterson requested an investigation, pursuant to 10 C.F.R. 708.21(a)(2), and a hearing, and the complaint was transferred to OHA. On September 19, 2006, Patterson filed an addendum to the complaint ("First Addendum"). He then filed addenda on October 31, 2006 ("Second Addendum"), and February 20, 2007 ("Third Addendum"), requesting a hearing on the issues raised, but without an investigation.

On April 25, 2007, OHA issued a Report of Investigation (ROI) and I was appointed the Hearing Officer in the case on the same day. The ROI concluded that Patterson had met his burden of demonstrating that he made protected disclosures alleging that BEA abused its authority, and that those disclosures were a contributing factor to three alleged retaliatory acts. The investigator also concluded that BEA had provided sufficient evidence to demonstrate that it would have taken these actions notwithstanding Patterson's protected disclosures. On May 24, 2007, I scheduled a hearing in the case to be held on August 21, 2007. However, Patterson filed another addendum on June 26, 2007 ("Fourth Addendum"), also requesting a hearing without investigation. All of the addenda were consolidated into one complaint under the original case number. At the

request of the parties, I rescheduled the hearing to September 17, 2007. The parties participated in mediation on August 7, 2007, but the session was not successful.

On August 10, 2007, BEA filed a Motion for Summary Judgment. Mr. Patterson filed a Response to that pleading on August 27, 2007. BEA then filed a Reply in Support of BEA Motion for Summary Judgment on August 30, 2007. On August 30, 2007, the parties submitted a Joint Order to consolidate Dockets and Vacate Schedule. At the request of the parties, I granted an extension of the hearing date to November 27, 2007. On November 21, 2007, I granted in part BEA's Motion for Summary Judgment, and dismissed Mr. Patterson's First Complaint.[1] All other addenda remained under the same case number.

I finally convened the hearing in this case in Idaho Falls over a four-day period from November 27-30, 2007. Both parties submitted exhibits. BEA presented exhibits into the record which were numbered Exhibit 1 through Exhibit 137, and Mr. Patterson submitted 55 exhibits, lettered Exhibit A through Exhibit SS. BEA presented nine BEA management and non-management employees as witnesses. Mr. Patterson testified on his own behalf, and also called five current and former colleagues as witnesses. The parties submitted post-hearing briefs on February 4, 2008 ("BEA Brief," "Patterson Brief"), at which time I closed the record in this case.

C. Preface to Factual Background

This case is a consolidation of four separate complaints that arise from events that occurred between February 2005 and June 2007. This case contains many facts, names, and issues, and they are set forth in detail in Section D, "Factual Background." In that section, I set forth the facts, as elicited through documentary evidence and four days of testimony, in chronological order. However, to assist the reader, I first present this very brief summary of the facts and issues in this matter.

In 2005, BEA assumed the operations of INL and consolidated the workforces of the two previous contractors, Bechtel BWXT Idaho, LLC (BBWI) and Argonne National Laboratory-West (ANL-W). This action resulted in changes in personnel classification and performance appraisals. Patterson was Employee Concerns Manager under BBWI, and had one employee reporting to him. When BEA assumed the contract in 2005, that employee no longer reported to Patterson. In February 2005, BEA Security revoked the site access of a subcontractor employee who is also a relative of Patterson. Patterson maintained that this action was unjustified, and he launched an extensive investigation into the procedures BEA used to execute the revocation. Patterson was vocal in escalating this concern to BEA senior management, also alleging racial discrimination by the contractor. BEA found no evidence of discrimination, but Patterson did not accept that finding, to the dismay of his management. As a result of Patterson's investigation, BEA restored site access to the subcontractor employee, BEA management

[1] On November 21, 2007, I dismissed the First Complaint because five of the six allegations of retaliation were outside of the 90-day limit, and the sixth was not a negative personnel action. *See Dennis Patterson*, 29 DOE ¶ 87,035, Case No. TBZ-0047 (2007).

acknowledged that procedures had been violated, BEA revised some procedures, and the BEA Security manager was officially reprimanded. However, the relationship between Patterson and his management became strained as Patterson continued to press his views about the motivation behind the revocation. Mr. Patterson's manager directed the complainant to repair the damaged relationship between Employee Concerns and other BEA offices.

In 2006, BEA changed Patterson's job code from manager to specialist. In the spring of 2006, Patterson filed a discrimination complaint with the Idaho Human Resources Commission and, in June 2006, he filed a Part 708 complaint with DOE. The BEA Office of the General Counsel advised Patterson that he could not use company or government resources for personal litigation and, in June 2006, requested that BEA Security investigate Patterson's use of corporate and government resources for possible abuse. This led to workplace conflict and strained relations between Patterson and employees in BEA Safeguards and Security ("Security") and the BEA Office of the General Counsel. Later that year, a BEA manager, the subject of an investigation conducted by the complainant, accused Patterson of bias during that investigation. This led to BEA Security investigating Patterson again, this time on the manager's allegation of bias, in September 2006. Also in September 2006, a confidential source (a BEA employee) reported a concern to Patterson that resulted in a Security investigation into the activities of a colleague of the source. Security asked Patterson to disclose the identity of his confidential source in order to aid their investigation, but he refused because of his conviction that confidentiality was critical to encourage employees to file their concerns with his office, and also to protect those employees. In October 2006, Patterson was suspended for three days without pay, principally for his alleged lack of cooperation with Security in the two investigations into his behavior.

In February 2007, Patterson's manager rated his 2006 performance as "1" (on a scale of "0" to "4" with "4" as the highest rating). In April 2007, at a meeting with Patterson and the director of Security, Patterson's manager presented Patterson a directive to disclose the name of his confidential source in order to assist Security. The meeting was heated, and Patterson's manager alleges that Patterson was insubordinate. Patterson again refused to name the source. In June 2007, Patterson's manager gave him a zero merit increase for his 2006 performance, and a "directed reassignment" (involuntary transfer) to another position.

As discussed below, after carefully reviewing the documentary and testimonial evidence in this case, I have determined that Patterson engaged in protected conduct, and that BEA retaliated against him by the September 2006 bias investigation, the three-day suspension, the low performance rating and zero merit increase, and the directed reassignment. I have ordered relief for the retaliation, but I do not order Patterson's reinstatement to his previous position, because that position no longer exists.

D. Factual Background

(1) BEA

The Idaho National Laboratory (INL) is a DOE research and development laboratory located in Idaho Falls, Idaho. In 2002, INL was managed by Bechtel BWXT Idaho, LLC (BBWI) and Argonne National Laboratory-West (ANL-W). However, that year DOE changed the site mission to focus on building prototype nuclear plants, and began the search for a new contractor for the mission, as well as a new contractor for environmental management responsibilities. The INL contract was awarded to BEA, a nonprofit limited liability company (LLC) owned by Battelle Memorial Institute (BMI) in November 2004, and on February 1, 2005, BEA assumed operation of INL. BBWI assumed responsibilities for advance mixed waste treatment.

BEA combined the BBWI and ANL-W work forces when it assumed the contract as management and operating contractor, and also modified personnel and compensation policies as a result. BEA utilized a web-based performance evaluation system that differed from its predecessors in the categories to be evaluated. According to BEA, BBWI's system was more subjective because each supervisor determined the rating of those that reported to him or her. BEA's system, on the other hand, placed greater emphasis on performance expectations and how employee performance related to accomplishing the BEA mission.

(2) The Complainant

Patterson has worked at INL since 1980, and served as Ethics Officer/Department Manager from 1994 to 1999 under BBWI's predecessor, Lockheed Martin Idaho Technologies company (LIMITCO). At LIMITCO, Patterson reported directly to the president, John Denson. (Transcript of Hearing) Tr. at 534-538. In 1999, BBWI replaced LMITCO and Patterson became Employee Concerns (EC) Program Manager, reporting to Doug Benson (Benson), BBWI Audit and Oversight Director. One employee, Joan Mehner (Mehner), reported to Patterson. In December 2004, BEA offered employment to Patterson effective February 1, 2005, as Department Manager of Employee Concerns reporting to Benson. BEA does not have an Ethics Officer, but rather assigns the responsibility for the ethics function and "Standards of Conduct" to the Office of the General Counsel. Transcript of Hearing (Tr.) at 637-8. During the transition to BEA in 2005, Mehner elected to stay with BBWI and consequently Patterson had no employees reporting to him.

According to the BEA Charter, the mission of the ECP Office was to oversee and promote ethical business behavior as a government contractor and to provide an independent avenue for employees to resolve concerns. Exhibit (Ex.) 69; Ex. 70 at 1. The Employee Concerns Office is responsible for receiving, coordinating and conducting investigations of reported concerns. The EC Office advises employees who report concerns that they may elect to remain anonymous, in which case confidentiality is

maintained "to the maximum extent possible." Ex. 70. A source is only divulged if "clearly essential" to the investigation. *Id.* at 3, 4. Unless divulging names is clearly essential to the investigation, the investigator is to protect the confidentiality of both the concerned employee and the person named in the complaint. Ex. 70 (Management Control Procedure (MCP)) at 3. Benson, the first level manager of the Employee Concerns Manager, makes the final decision on whether a name should be disclosed. Tr. at 640. Mehner testified at the hearing that, with one exception, EC had honored all requests for anonymity during the years that she worked there under BBWI, even when a complaint was transferred to Security. Tr. at 600-01. In that case, she asked the employee for his permission to disclose his name to Security. *Id.*

(3) Chronology

a. 2005

BEA Revokes Site Access of a Subcontractor Employee

On February 1, 2005, BEA assumed the operations of INL. Patterson's first complaint arises from the events that occurred when a subcontractor employee ("the subcontractor") was denied access to the INL site in February 2005. The subcontractor, a relative of Patterson, had worked at the site periodically for eight years. On February 24, 2005, Security staff at INL revoked the site access of the subcontractor employee based on a previous felony conviction and allegedly "ongoing" problems with the law. Tr. at 115-16; Ex. 19. The subcontractor employee then contacted Patterson for assistance in getting his site access restored. Patterson met with his supervisor (Benson) and the General Counsel, Mark Olsen (Olsen). Patterson wanted to investigate the matter and expressed concerns with the manner in which Security had handled the incident. During the meeting, Patterson, Benson and Olsen discussed the issue of a possible conflict of interest due to the family relationship between Patterson and the subcontractor employee. However, according to Benson, Olsen concluded that any conflict of interest could be waived because of the limited scope of the investigation. Benson determined how to handle the conflict of interest issue. Tr. at 885.

On March 3, 2005, Patterson gave the BEA Personnel Security Manager, Jody Streier (Streier), a copy of the subcontractor employee's police record, which showed no problems since 1998, and recommended that BEA restore the subcontractor's site access. Tr. at 117. When the subcontractor asked about appealing the decision, Security told him that there was no opportunity to appeal. The subcontractor employee's union later informed him how to appeal the decision. On March 8, 2005, BEA granted the subcontractor an appeal of the decision. On March 15, 2005, the appeal panel met and denied his appeal, based on Streier's assertion that the subcontractor employee had not reported problems with the law that occurred since 2003. According to Patterson, Benson recommended that Patterson drop the matter after the appeal, but Patterson refused. Tr. at 118, 133.[2] Up until the investigation, Benson and Patterson had a "very positive, cordial relationship." Tr. at 133.

[2] Benson, on the other hand, testified that both men jointly agreed to investigate further. Tr. at 886.

On March 16, 2005, Patterson requested the information that caused the appeal panel to deny the appeal. Streier denied his request. Patterson pursued his investigation by reviewing the applicable standards and procedures regarding site access and also collected information regarding the subcontractor's criminal record.

Patterson Alleges Violations of Procedure

Patterson continued with his own investigation. On April 22, 2005, Security gave Patterson and Benson access to the subcontractor employee's file. Ex. 19. Patterson met with Security, but found them uncooperative and after researching their procedures, he found violations. Tr. at 120. During an interview on May 3, 2005, Streier told Benson that she believed that the subcontractor could not possibly have stopped his criminal activity, and that he either got lucky and had not been caught, or he had learned to manipulate the system. Tr. at 122. On May 4, 2005, Patterson sent an e-mail to Benson reporting several procedural and regulatory violations that BEA Security had committed in the site revocation. Patterson reported procedural and regulatory violations committed by BEA Security and also filed a discrimination complaint with the BEA EEO officer. Tr. at 122.

On May 9, 2005, Patterson met with the BEA Manager of Workforce Practices in Human Resources, Arantza Zabala (Zabala), and expressed concern that the action against the subcontractor employee may have been motivated by race.[3] Zabala initiated an investigation.

On June 8, 2005, Patterson met with BEA officials and discussed problems relating to alleged violations of company procedure in the matter of the subcontractor employee. On June 15, 2005, Security restored site access to the subcontractor. As a result of the investigation, Security changed at least one of its site access procedures. Tr. at 128. The relationship between Benson and Patterson, formerly friendly, began to deteriorate.

On July 9, 2005, Zabala sent Patterson an e-mail and concluded that she was unable to establish that discrimination was a factor in the removal of the subcontractor employee's access. Despite this conclusion, Patterson maintained that Steier had discriminated against his relative. On July 27, 2005, Benson informed Olsen that Patterson was going to report his concerns to the BEA president, and Olsen objected.

On August 11, 2005, Patterson met with Juan Alvarez (Alvarez), Deputy Laboratory Director for Management, and other BEA officials concerning the violations he had found during his investigation of the revocation of the subcontractor employee's site access. Patterson became agitated and visibly angry, according to the other attendees, alleging a cover-up and racial discrimination. Tr. at 641. However, Patterson denies that his behavior was unprofessional. Patterson testified that he speaks passionately and

---

[3] Zabala is responsible for Labor Relations, Employee Relations, Diversity and Affirmative Action at BEA. TR. at 1195.

directly on issues. Tr. at 135. He considered his behavior at the meeting to be professional. *Id.*

On August 12, 2005, Alvarez issued a memo about the incident to BEA officials that explained the problems and recommended corrective and disciplinary actions. At the end of the memo, Alvarez wrote that he found Patterson's conduct at the meeting "lacked impartiality" and was interpreted by his staff to be offensive and threatening. Ex. 30. Streier received a verbal warning about her misconduct that was noted in her personnel file for six months. Tr. at 885-888.

INL Requests an Investigation of the Site Access Revocation

In October 2005, INL asked BMI to investigate the subcontractor access matter. INL later expanded its request to include an investigation of the Ethics Office investigation function, and the optimal organizational location of the Ethics Office. This investigation found that "most of the substantive aspects" of Patterson's investigation were appropriate and that Patterson's and Benson's efforts were instrumental in leading to the proper reinstatement of the subcontractor employee's site access. Ex. 37 at 2. The report concluded that Katherine Moriarty (Moriarty), BEA Senior Counsel, helped to resolve the issues of the incorrect revocation and correctly interpreted several items in the employee's record, permitting Security to reinstate access. The BMI investigators found no unethical conduct by management. Alvarez related that he may have been hasty in distributing his memorandum widely. The investigators did voice concern about Patterson's interaction with BEA managers and staff, specifically his refusal to accept the conclusion of the BEA EEO officer that racial discrimination was not involved, and his apparent inability to understand that there was an appearance of a lack of impartiality in his actions because of his relationship to the subcontractor employee. BMI recommended actions appropriate to improve the working relationships between the Ethics Office and the managers involved in the site access matter. *Id.* at 3.

b. 2006

In his 2005 performance evaluation, Benson commented on Patterson's willingness to ensure that the Standards were effectively enforced and that he "knows and lives the Standards without compromise." Ex. H; Tr. at 125. Benson gave Patterson his 2005 performance evaluation with a rating of "all expectations met" (the third highest rating). Patterson felt that he deserved a higher evaluation and, after some discussion, Benson changed the rating to the second highest rating ("all expectations met, some exceeded). However, Patterson had received the highest rating (under BBWI) for his 2004 performance as a BBWI employee. On February 24, 2006, BEA changed Patterson's job code from Manager to Specialist 5, which reduced his maximum possible monthly salary from $11,047 to $9,198. BEA applies the term "Specialist" to professionals, such as attorneys. Tr. at 561-2. However, Patterson's position was no longer considered managerial, since no employees reported to him after Mehner opted to remain with BBWI. Benson informed Patterson that his position description would maintain the "functional title" of Employee Concerns Manager. Tr. at 646. Patterson refused to use

the functional title, and referred to himself as "Specialist." Tr. at 646-7. According to Benson, the relationship between Benson and Patterson deteriorated further. Tr. at 780. On March 14, 2006, Benson gave Patterson a 4.05 percent merit increase. Patterson's merit increase for the previous year was 4.32%.

Idaho Human Resources Commission (IHRC) Complaint and Allegations of Misuse of Government and Corporate Equipment

On March 14, 2006, Patterson filed a complaint with the Idaho Human Rights Commission (IHRC) alleging discrimination based on race and retaliation. Ex. 44. On April 27, 2006, Patterson asked Moriarty for two files that Moriarty assumed were for the purpose of furthering his IHRC complaint. On May 1, 2006, Moriarty informed Patterson that it was inappropriate for employees to pursue personal litigation during business hours. Patterson replied that he would follow the Standards of Conduct and the BEA Employee Handbook. Patterson sent four e-mails and one fax to the IHRC on May 24-25, 2006. On May 25, 2006, the IHRC notified Moriarty of Patterson's intent to withdraw his IHRC complaint, and referenced Patterson's office e-mail address, and telephone and fax numbers.

Several important events occurred on June 1, 2006. First, Patterson filed a Part 708 complaint alleging that BEA retaliated against him for making protected disclosures when he reported procedural violations committed by BEA surrounding the revocation of the subcontractor employee's site access Second, the IHRC withdrew Patterson's complaint upon his request for administrative dismissal without a Notice of Right to Sue. Ex. M. Finally, surprised that Patterson had ignored her admonition about personal litigation, on June 1, 2006, Moriarty initiated an investigation to determine the extent of Patterson's use of company time and equipment. Tr. at 1352-1360. In the past, when confronted with an allegation that an employee had used company resources, Benson had either counseled the employee about the use of company resources or he had put that information in the employee's Performance Appraisal. *Id.* at 891-3. The investigation was assigned to Torrance Shirley (Shirley), BEA Security, who examined Patterson's e-mails and informed Moriarty on June 6, 2006, that Patterson had filed or was about to file a Part 708 complaint.

On July 5, 2006, BEA received a copy of Patterson's complaint. On July 10, 2006, Moriarty directed the investigator to proceed with the investigation. On July 13, 2006, Shirley informed Patterson that he was under investigation for possible misuse of government equipment and resources, and later that day he interviewed Patterson for approximately 20 minutes. Ex. NN; Tr. at 957. The interview was recorded and transcribed. Ex. NN; Ex. 54.

Shirley found that Patterson had made ten calls to the IHRC. Ex. 54 at 7. Shirley also found that Patterson had used company time to work on his Part 708 complaint. However, Patterson steadfastly maintained that company policy permitted some use of company time and resources for his Part 708 complaint and, at the end of the investigation, Shirley concluded that Patterson's use of company resources was

incidental. Tr. at 154-157. BEA acknowledged that an employee could use company time and equipment to purse a Part 708 complaint, and to contact DOE, thereby affirming Patterson's previous contention. Tr. at 194-196; 446-47; Ex. U, Ex. BB at 4. Shirley presented his findings to a Personnel Action Advisory Group (PAAG), a group of managers convened by Human Resources to determine disciplinary action.

Employee Confidentiality Issue

In September 2006, a BEA employee filed a complaint with the Employee Concerns Office alleging that another employee, who also held a political office, was using company time to conduct political activities on the telephone. Ex 86. As a 501(c) (3) entity, BEA was prohibited from participating in any political campaign and such actions, if true, put their contract in jeopardy. On September 22, 2006, Patterson, Benson, Moriarty and two employees from Security met to determine the appropriate course of action. The group decided to transfer the case to Security, headed by Tom Middleton (Middleton), for investigation. Dee Wise (Wise) was assigned as principal investigator, and Patterson sent his file to Wise that day.[4] On September 25, 2006, Wise informed Patterson that she needed the name of the person who reported the allegation, and added that Security could protect his or her identity. Tr. at 1148; Ex. 75. Patterson refused to release the name, and said that he would intercede and ask questions of the source. Tr. at 1148. Wise felt limited without the name of the source. *Id.* at 1152.

On September 28, 2006, Benson sent Security an e-mail stating that confidentiality was required by the EC Procedure and that they could not breach that requirement. Patterson offered three options for Wise to get information that she needed, but he refused to reveal the name.[5] However, after discussions with Middleton, Benson asked Patterson to disclose the name of his source so that Wise could complete her assignment.

Although the request had been transferred to Security for investigation, Patterson contacted Wise three times asking for updates and also a copy of the final report. Wise then asked Patterson not to communicate with her except through her managers. Tr. at 1150-2.

Events That Led to Allegation of Bias Against Patterson

Between May and July 2006, Patterson conducted an investigation of an employee concern, an allegation that an employee was not properly evaluated by his manager. Tr. at 205; Ex. OO; Ex. 61. As part of the investigation, he interviewed the complainants' manager. Patterson concluded that the manager had not evaluated the employee properly and did not use information from all relevant contributors. The manager then filed a formal employee concern with Benson alleging bias in Patterson's conduct during the

[4] When a case is transferred from the Employee Concerns Office, the receiving organization has full responsibility for the new matter.

[5] Even though Wise was new to the company, she had substantial experience in investigations. Tr. at 1139-42.

investigation. Tr. at 659. Specifically, the complainant alleged that Patterson was "prosecutorial," had failed to inform him of the scope of the investigation, and had failed to validate the facts presented by the interviewee during the interview, resulting in inaccuracies in the report. No one challenged the accuracy of the report. Ex. 61 at 5. On July 19, 2006, Benson asked Security to investigate the concern, recusing himself because Patterson's first Part 708 Complaint had accused Benson of retaliation. Tr. at 656, 897. The investigation was again assigned to Torrance Shirley.

On August 31, 2006, Shirley called Patterson for follow-up questions on the first investigation, and Patterson asked him "Is there anything else?" Tr. at 927-8. Shirley then asked Patterson if anyone had informed him of the second investigation, but Patterson at first refused to answer the question and later stated "I'd rather not answer that question." At the time, Patterson was at the hospital visiting a sick friend. Tr. 200-02. He chose to defer answering that question until the interview. Tr. at 202.

On September 6, 2006, Patterson was told to attend an interview with Shirley. The interview lasted one hour and 14 minutes. Ex. OO; Tr. at 957. Patterson's attorney was present. Shirley informed Patterson that he was required to answer all questions and that failure to respond would be viewed as not cooperating with the investigation. Ex. 61. When Shirley asked why Patterson had not told him if anyone had given him advance notice of the second investigation, Patterson jokingly stated that he liked "to keep [Shirley] guessing" and "to level the playing field." Ex. 61 at 28. Patterson said this jokingly, but Shirley testified that he did not take it as a joke, rather he was surprised. Tr. 934. The men then had a discussion of e-mails, with Patterson complaining that Shirley and Benson sent unencrypted e-mails about the investigations that Patterson alleged invaded his privacy; *i.e.*, people who did not have a "need to know" had seen e-mail correspondence. According to Patterson, he had knowledge of administrative personnel opening mail that concerned his issues. Shirley asked Patterson if he had unauthorized access to Benson's e-mail messages via Benson's secretary, and Patterson at first said "I'm not saying anything like that. No." Ex. 61 at 15. Patterson later stated "I'm not answering your question." *Id.*

Patterson acknowledged that this would be held against him. *Id.* Shirley also questioned why Complainant had failed to mark a document "Official Use Only." Complainant admitted the mistake, and explained what he did to correct the mistake. Shirley investigated Benson's secretary in order to see if she had shared Benson's e-mails with Patterson. However, Shirley could not substantiate that Patterson had inappropriate access to any e-mail and the investigation into the matter was dropped. Tr. at 846-47. The investigation did not establish bias by Patterson in his conduct of the employee concern investigation.

On September 19, 2006, Patterson filed an "Addendum" alleging that BEA management initiated two Security investigations as retaliation for filing a Part 708 complaint. As a remedy, Patterson requested reimbursement for the attorney fees incurred when his attorney attended the September 6, 2006, Security interview, and also an undetermined

remedy set forth as "To be determined based on the outcome of the Security Investigations."

Three-Day Suspension

Benson was concerned by Patterson's behavior and interaction with Shirley during the interviews. At the conclusion of the investigations, Benson convened a Personnel Action Advisory Group (PAAG) to discuss appropriate disciplinary action.[6] Members of the PAAG included Benson, Moriarty, Shirley, Terry Brooks of Human Resources and Art Clark. Tr. at 605. Shirley presented summaries of his investigation. Benson testified that he read the transcripts and listened to portions of the recorded interviews and then made a decision on discipline based on Patterson's behavior in the September 2006 investigation. Tr. at 666-667. Human Resources prepared a suspension notice, reciting all inappropriate behavior or performance, including issues that standing alone would not warrant suspension. Tr. at 1055-1056; 1110-111; 1132-33.[7] Consequently, on October 16, 2006, Complainant was suspended without pay for three days for the following misconduct:

> Your failure to cooperate with an investigation by misleading an investigator; refusal to answer investigation questions regarding the unauthorized use of government computers and systems and the attendant inferred unauthorized use of government computers and systems; failure to follow company policies and protocols regarding an Employee Concerns investigation; failure to follow directions from BEA Office of General Counsel.

Ex. X. Patterson had not received a verbal or written warning prior to this suspension. Tr. at 136; Ex. O. The Notice also highlighted Patterson's position as program manager for the Employee Concerns Office, and stated that his "misconduct demonstrates a lack of judgment and has resulted in a loss of credibility regarding your ability to ensure fair treatment, to effectively address resolution of employees' concerns in compliance with INL's Standards of Conduct, Conflict of Interest criteria and BEA's policies and protocols, and/or to effectively implement DOE Order 442.IA, Department of Energy Employee Concerns Program. Further, your misconduct has demonstrated an inability to communicate effectively with co-workers and has severely hampered your ability, and hence BEA's ability to coordinate multi-discipline investigations to resolve employee concerns." Ex. X. The notice directed Patterson to immediately begin to restore the trust and confidence of management and his fellow employees. Ex. 65.

Benson testified that the primary reasons for suspending Patterson were: (1) the complainant's refusal to answer Shirley's question on whether Patterson had gained

---

[6] Prior to initiation of any proposed suspension or discharge or at the request of a manager, BEA Employee Relations will convene a PAAG to assist line management to determine a possible course of disciplinary action. Ex. 67 at 1-73.

[7] The items that did not warrant suspension were: (1) Patterson's failure to follow Benson's directive to allow all interviewees to review their statements; and (2) Patterson's failure to follow Moriarty's directive not to use government property to pursue his IHRC complaint. Tr. at 671.

access to e-mails regarding the investigations; and (2) Patterson's statements that he had refused to answer a question "to keep [Shirley] guessing and level the playing field." Benson described this conduct as "inappropriate." Tr. at 668-9.

On October 31, 2006, Patterson filed an "Update to Addendum" (Complaint III) indicating that the suspension was a retaliation for his past 708 activity. As a remedy, he requested (1) removal of the suspension notice from his personnel file, and (2) reimbursement for lost pay and benefits.

On November 2, 2006, a second employee sent Patterson an e-mail complaining about the political phone calls, and Wise asked to speak to the new source. Patterson conducted an interview with the source in his office, but Wise again maintained that she could not proceed without direct contact with the sources.

c. 2007

In January 2007, Benson rated Patterson's 2006 performance as "some expectations not met ("1" on a scale of "0" to "4," with "4" as the highest rating)."

On February 20, 2007, Patterson filed a "Second Addendum" (Fourth Complaint) alleging that BEA had retaliated against him by evaluating his performance at the level of "1" on a scale of 0 to 4 for the period January 1-September 30, 2006. The Second Addendum was processed as Patterson's fourth complaint. Patterson requested that his appraisal be revised to reflect his actual performance.

On March 13, 2007, Wise interviewed the subject of the political telephone calls investigation, but determined that she needed more information to rebut certain statements from the interview. Tr. at 1154-55. On March 28, 2007, Security decided to contact the people who had received calls from the subject of the investigation in order to ascertain the subject of their conversation, i.e., to determine if the conversation was political in nature. Wise first obtained background information on the recipients of the calls and then traced the phone calls that Patterson had identified as relevant. Tr. at 1153. Wise determined that each individual called had a potential political connection to the subject of the investigation. Security was unwilling to risk exposure of the subject employee, and did not go forward with contacting the individuals who had received the phone calls. Tr. at 712, 719. Security still maintained that the name of the source was critical to its investigation.

On April 19, 2007, Patterson sent an e-mail to Benson and Middleton telling them to invite their families to the Part 708 hearing so that they could see justice done. Ex. 90.

Events Leading to Patterson's "Directed Reassignment"

On April 24, 2007, Benson, Patterson and Middleton met regarding the confidential source. Benson presented Patterson a formal directive to disclose the name of the source to Wise by the following day at 9 o'clock. Benson stated that a personal meeting

between the source and the principal investigator was essential to the investigation. Disturbed by Patterson's behavior at the meeting, Benson and Middleton went to Moriarty's office immediately after the meeting and created a memorandum of their recollection of events. Following are some excerpts from that document:

> Dennis became visibly angry, raising his voice. His body language changed (he began rocking in his chair); he began sneering at Doug and Tom; and his facial features changed—he was obviously "furious" in response to Doug's statements regarding the path forward in the investigation.
>
> At this point, Dennis lost his composure and became extremely agitated. He repeatedly made provocative, threatening comments to Doug and Tom, threatening that any action would have consequences.
>
> Dennis threatened Doug and Tom, saying "You know what 9 o'clock is going to bring. Do you know what the consequences will be to you and the company?" Later, Dennis stated, "BEA will pay!"—again the connotation being that the company would suffer consequences.
>
> Dennis was insubordinate, responding to Doug "You don't have the training or background to tell me how to run my program. You can't tell me to disclose the name of my confidential source. You can't tell me how to run my program." (Notably, in the meeting of April 16, 2007, Dennis told Doug and Tom that he had not promised confidentiality to his source.)
>
> Dennis became increasingly aggressive, saying "Middleton, you know me well enough to know what I'm going to do." (This was strange, because Dennis has had a long term relationship with Tom, and had never addressed him in this way before.)
>
> * * *
>
> Dennis continued to raise his voice, saying to Tom "Am I clear on this? You have not provided a credible reason for disclosing this person's identity."
>
> * * *
>
> After leaving the room, Dennis returned to make a final statement to Tom, stating in a derogatory tone "You're doing a great job as head of Safeguards & Security."

Ex. 92; BEA Brief at 67-68.

Late in the evening on April 24, 2007, Patterson sent an e-mail response, still refusing to name the source. However, he did state that the source was not a BEA employee. Ex. 93.

With this new information, Wise was able to determine the identity of the source via a seating chart.[8]

On April 25, 2007, Middleton experienced what he called a "disturbing encounter" with Patterson when Patterson cut off Middleton's car as he was backing out of his driveway to leave for work. BEA Brief at 78. Middleton found this disturbing because in the ten years that they were neighbors, they had never left for work simultaneously.[9] Patterson waited at a stop sign for what Middleton considered a prolonged period, with Middleton behind him, and did not move until another car approached. *Id.*; Tr. at 1291-4.

On April 25, 2007, Benson convened a PAAG. The PAAG members were Benson, Middleton, Zabala, Moriarty, and Mark Holubar, Zabala's manager. Tr. at 1198-99. The PAAG members decided that they needed additional managers present, and reconvened the next day with Olsen and Clark. *Id.* at 1199. The PAAG also had additional meetings. Zabala interviewed Patterson to get his version of the meeting, and she testified that Patterson felt intimidated by Middleton's presence at the meeting. Zabala considered Patterson to be hostile and condescending during their interview. Tr. at 1201. The PAAG members discussed his previous suspension where he was asked to cooperate with Security, and they felt a lack of confidence in his ability to continue in his position. *Id.* at 1202. The members of the PAAG considered terminating Patterson, but Benson suggested reassignment. *Id.* at 1203. Zabala searched company vacancies for a suitable position for Patterson, and ultimately placed him as a Management Systems Process Lead in Engineering Design. *Id* at 1204.

On June 7, 2007, Benson gave Patterson a zero merit increase. On June 13, 2007, Benson reassigned Patterson to the position of Management Systems Process Lead in Engineering Design. Patterson filed a "Third Addendum" (Fifth Complaint) on June 21, 2007, citing the zero merit increase and directed reassignment as acts of retaliation. As remedy, he requests: (1) a wage increase consistent with the average for those employees who received a top performance rating; and (2) reassignment to the position of Manager of the Employee Concerns and Business Ethics Office.

BEA Modifies the Employee Concerns Manager Position

In September 2007, Benson modified the position description for the Employee Concerns Manager, and renamed the position "Senior Auditor/Employee Concerns Program Manager." Ex. RR at 3; Tr. at 755-56. The new position was radically changed. Benson

[8] Wise ascertained the name of the second source and, during an interview, the source named other witnesses, which enabled Wise to complete the investigation. Wise substantiated the concern regarding political activity. Tr. at 1152, 1158.

[9] Middleton also testified about other behavior that Middleton considered "distressing," e.g., Patterson sits on his porch and glares at Middleton while Middleton works in his yard; Patterson does not speak to Middleton in the hall; and Patterson allegedly passes Middleton's office frequently and makes sure that Middleton sees him. Tr. at 1293-7.

converted a permanent position into a lower level, two-year rotational assignment.[10] According to Benson, the workload in Employee Concerns did not justify a full-time position, and he needed another auditor. Tr. at 757-58, 767-68, 902. At the time of the hearing, the position was temporarily filled by an employee from BEA Human Resources. *Id.*

On September 21, 2007, Shirley filed a formal complaint against Patterson with Zabala of Employee Relations. Tr. at 942-45; 1204-05; BEA Brief at 81. According to Shirley, Patterson followed him for approximately 100 yards in an INL office building to a cubicle area. When an occupant of the cubicle area asked Patterson if Patterson needed help, Paterson pointed to Shirley, causing the occupant to believe that Patterson and Shirley were together. Patterson then left the area. Shirley reported the encounter because he was concerned about Patterson's intentions "based on [Patterson's] actions of not speaking to Shirley or Shirley's co-workers, his frequent appearances in passing by the Security area, and because Shirley had conducted the investigations that resulted in Patterson's suspension." BEA Brief at 81 (citing Tr. at 945, 978). Zabala interviewed Patterson about the incident and described him as disrespectful, rude, and unprofessional during their meeting. Tr. at 1209-10. Patterson maintained that he followed Shirley intending to ask him a question but then changed his mind. Zabala informed Patterson that Shirley found his conduct "intimidating" and hoped that it would not happen again. BEA did not take any disciplinary action against Patterson. Tr. at 1221.

In November 2007, Patterson visited Zabala's office prior to Thanksgiving and said "Happy Thanksgiving. I'm looking forward to seeing you." Tr. at 1230. Zabala found this to be "intimidating" because she interpreted the remarks as pertaining to the hearing in this case. *Id*.

II. ANALYSIS

A. Did Patterson Engage in Protected Conduct?

Under the regulations governing the DOE Contractor Employee Protection program, the complainant "has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." § 708.29. *See Joshua Lucero*, 29 DOE ¶ 87,034 (2007); *Ronald Sorri*, 23 DOE ¶ 87,503 (1993). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Lucero,* 29 DOE at 89,180 (citing *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)). Patterson filed his first Part 708 complaint on June 1, 2006. In that complaint, Patterson alleged that he made protected disclosures when he sent e-mails to Benson indicating that BEA had violated its procedures by revoking the site access of the subcontractor employee. Patterson also alleged that he made a protected

[10] Under BEA, the functional position of "Employee Concerns Manager" was a Specialist 5 (with Specialist 6 as the highest level), but the new position was reclassified as a Specialist 3 or 4. Tr. at 567-69.

disclosure when he briefed Alvarez in August 2005 about the same issues.[11] He then filed four supplemental complaints on (1) September 19, 2006; (2) October 31, 2006; (3) February 20, 2007; and (4) June 26, 2007. Therefore, I find that Patterson engaged in protected conduct based on his participation in this Part 708 proceeding. As described below, I further find that this protected conduct was a contributing factor in one or more alleged acts of retaliation against Patterson by BEA.

B. Whether Protected Conduct Was a Contributing Factor in an Act of Retaliation

Section 708.2 of the Contractor Protection regulations defines retaliation as "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the disclosure of information." 10 C.F.R. § 708.2. In his complaint, Patterson maintains that BEA retaliated against him in the following ways:

1. Initiated two Security investigations, in July 2006 and in September 2006;[12]

2. Suspended him for three days without pay beginning October 16, 2006;

3. Gave him a "1" performance rating ("some key expectations not met") on a scale of "0" to "4" on his performance review dated January 10, 2007;

4. Gave him a zero merit increase on June 7, 2007, for his 2006 performance; and

5. Ordered a "directed reassignment" that involuntarily transferred him from his position as Employee Concerns Manager to a new position as Management System Process Lead in Engineering Design and Drafting on June 14, 2007.

In order to prevail in a Part 708 action, the complainant must show, by a preponderance of the evidence, that the protected disclosures or conduct were a contributing factor in the retaliation against him. In prior decisions of the Office of Hearings and Appeals, we have decided that:

---

[11] As noted in Section I.B., I dismissed this complaint on November 21, 2007, on procedural grounds. *See Dennis Patterson*, 29 DOE ¶ 87,035 (2007). Nonetheless it appears, based on the findings of the ROI, that there was substantive merit to the disclosures, which alleged an abuse of authority related to violations of company procedure. The focus of this Decision is not, however, on the allegations contained in the first complaint but on those alleged retaliatory actions that occurred after Patterson filed his first complaint, as the mere filing of this complaint constituted protected conduct under Part 708.

[12] In its Motion for Summary Judgment, BEA argued that the Security investigations cannot be considered retaliation because contractors have a duty to investigate allegations of misconduct. However, we concluded that the use of an investigation to punish or discipline an employee can be considered an act of retaliation. *See Dennis Patterson,* 29 DOE ¶ 87,035, Case No. TBZ-0047 (2007) (stating that the motive and intent behind the investigation determines whether an investigation has been used in a retaliatory manner).

> A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

Charles Barry DeLoach, 26 DOE ¶ 87,509 (1997) (quoting *Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993). If these conditions are met, the burden of proof shifts from the complainant to the contractor, which must then show by clear and convincing evidence that it would have taken the same actions against the complainant even in the absence of the protected disclosures. *Id.*

I find that the officials responsible for the alleged adverse personnel actions had actual knowledge of Patterson's protected activity. The record in this case describes a sequence of adverse personnel actions that occurred in the 12 months from July 2006 to June 2007. During that year Patterson filed four Part 708 complaints. It is clear from the testimony at the hearing that the BEA managers who were responsible for these adverse personnel actions had actual knowledge of his protected conduct--all members of the first PAAG knew that Patterson had filed a Part 708 complaint because that information was in the report that Shirley presented to the first PAAG. Tr. at 886-7. I further find that that there was temporal proximity between his protected conduct and the alleged acts of retaliation which occurred between July 2006 and June 2007. "[T]emporal proximity" between a protected disclosure and an alleged reprisal is sufficient to establish the required element in a prima facie case for retaliation. *See Casey von Bargen*, 29 DOE ¶ 87,031 at 89,167, Case No. TBH-0034 (2007) (stating that a showing that protected activity occurred proximate in time to the adverse personnel action is sufficient for complainant to meet the contributing factor test); *Dr. Jiunn S. Yu*, 27 DOE ¶ 87,556 (2000).

I recognize that this time period coincides with a period of corporate change at INL, and I do not minimize the reality that some employees weather change better than others. Despite documented evidence of friction between Patterson and some of his colleagues, I cannot conclude that his workplace behavior was the sole cause of the adverse personnel actions. A review of the relevant events, including the protected conduct and alleged retaliations, leads me to conclude that it is more likely than not that these were not "isolated occurrences." *See William Cor*, 28 DOE ¶ 87,026 at 89,212, Case No. VBH-0079 (2002). Therefore, I find that the temporal proximity between Patterson's protected conduct and the adverse personnel actions is sufficient to establish, by a preponderance of the evidence, that his protected conduct was a contributing factor to the alleged acts of retaliation.

C. Whether the Contractor Would Have Taken the Same Action in the Absence of the Protected Disclosures

Section 708.29 states that once a complaining employee has met the burden of demonstrating that conduct protected under § 708.5 was a contributing factor in the contractor's retaliation, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's

disclosure, participation, or refusal." 10 C.F.R. § 708.29. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See Casey von Bargen*, 29 DOE ¶ 87,031 at 89,163 (2007). If the contractor meets this heavy burden, the allegation of retaliation for whistleblowing is defeated despite evidence that the retaliation may have been in response to the complainant's protected conduct.

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

1. Security Investigations

a. July 2006- Misuse of Government Equipment

On June 1, 2006, BEA requested that Security investigate Patterson for the alleged misuse of company time and resources. Ex. 121 at 1; Ex. 122. Security interviewed Patterson on July 13, 2006. Patterson contends that this investigation was in retaliation for filing Part 708 complaints, and BEA counters that it would have initiated the investigation despite the complaints. BEA states that its Standards of Conduct prohibit the use of company property for personal gain or personal causes.

> BEA's network and Internet connection is to be used for official use only. However, incidental personal use is permissible as long as it does not interfere with the operations of BEA, create additional costs, or interfere with employee's duties.
>
> * * *
>
> Use of BEA e-mail system and Internet connection for personal advertisement or gain; on behalf of outside business ventures; to leak confidential or privileged information or for personal, political, or religious causes is prohibited.

Standards of Conduct and Business Ethics, Ex. 66 at 9.

Patterson argues that other similarly situated employees were not subject to investigation. *See* Patterson Brief at 10-11. In the past, when Benson suspected misuse of equipment, he would counsel the employee or put that information into the employee's performance appraisal. Tr. at 888-9. Patterson alleges that his use of the office equipment was

incidental and, in the case of his Part 708 activity, permissible. Patterson notes that IHRC is listed as recommended dispute resolution program for employees in the BBWI handbook. Ex. Q at 1-2.

The IHRC sent Moriarty correspondence that referenced complainant's office contact information. This was credible information that Patterson had used company equipment to send the information to the IHRC, despite Moriarty's previous admonition. See Ex. 50 (e-mails from Patterson to IHRC in May 2006). As it turns out, the investigation substantiated Patterson's assertion that his use was incidental, and that he was permitted to use company equipment for his Part 708 complaint. Nonetheless, that does not negate BEA's duty to investigate possible misuse of government equipment. Prior to the investigation, Moriarty did not know the extent of Patterson's use of company equipment, and she requested an investigation to determine whether there was any misuse.[13] Even though the allegation of misuse was not substantiated, I find that BEA properly initiated the investigation. I agree with BEA that Moriarty had a duty to pursue an investigation once she suspected that an employee was using company resources for other purposes. BEA presented credible information that it had investigated 52 employees in 2006 and 2007 for possible misuse of company resources. Ex. 125. Thus, this was not an unusual action on the part of BEA. I find that BEA has presented clear and convincing evidence that it would have initiated an investigation against complainant despite his protected conduct.

b. September 2006- Bias during an Investigation

In September 2006, a BEA manager formally complained about Patterson's behavior during an investigation into alleged wrongdoing on the part of the manager.[14] The manager complained that Patterson showed bias in favor of the employee who filed the initial complaint. Benson testified that he had never found Patterson to be biased in the past. Tr. at 810, 880. When there was a complaint against Patterson in the past, Patterson's supervisor (first Denson, President of LIMITCO, and then Benson) would first review Patterson's investigation and findings. Tr. at 205-6. Benson also testified that in the two previous instances where an employee had accused Patterson of bias, Benson had handled the investigation himself. Benson met with the employees in those situations and resolved their issues informally. However, Benson argued that he deviated from procedure and transferred this case to Security because: (1) the manager had filed a formal complaint with Employee Concerns; and (2) Patterson had named Benson in his Part 708 complaint.[15] Benson testified that he assumed that Patterson would not be comfortable with Legal or Human Resources as investigators because those groups were represented in the PAAG that had disciplined him. Tr. at 656, 660. BEA argued that its

[13] I note that Shirley notified Moriarty of Patterson's Part 708 complaint before the complaint had been officially transmitted to BEA. BEA received Patterson's Part 708 complaint on July 5, 2006. Tr. at 1355.

[14] In an e-mail to Benson, the manager indicated that Benson may have overstated the complainant's concerns. Ex. 120; Tr. at 834.

[15] The investigation did not substantiate the allegation of bias against Patterson.

policy required investigation of the complaint, and that only Security and Human Resources could have conducted the investigation. BEA Brief at 103.

Benson's statement that only Legal or Human Resources could conduct the investigation was not credible because there is no evidence that Patterson would be more comfortable with Security, the organization that had just investigated him for the first time in his career. In fact, a review of the evidence suggests that Security would be the least likely group Patterson would choose to conduct this second investigation, given the controversy over the first. There were other characteristics of this investigation that were dissimilar to other BEA investigations. For instance, Security investigators were trained to investigate waste, fraud, and abuse, not issues such as bias. In similar situations in the past, the investigator had first reviewed Patterson's file to determine how he conducted his investigation. Tr. at 205, 210-11, 233. [16] In this investigation, Shirley did not review Patterson's file to determine how Patterson had conducted his investigation.[17] The clear and convincing evidence standard applicable to contractors is a difficult standard to meet and, based on the above, I conclude that BEA has not presented clear and convincing evidence that it would have taken the same action in the absence of Patterson's protected conduct.

2. Three-Day Suspension

On October 16, 2006, Benson suspended Patterson without pay for three days. The suspension notice listed the following four items of alleged misconduct: (1) refusal to cooperate with an investigation by misleading the investigator; (2) refusal to answer questions regarding misuse of government equipment; (3) failure to follow company protocol regarding employee concerns investigation; and (4) failure to follow direction from BEA Office of the General Counsel.

The first two items of alleged misconduct occurred during the September 2006 bias interview conducted by Shirley. Benson testified that he suspended Patterson primarily because of Patterson's statement to Shirley that he refused to answer a question in order to "to keep [Shirley] guessing and level the playing field," and also because of Patterson's refusal to cooperate with the bias investigation by refusing to answer Shirley's question about Patterson's access to Benson's e-mails. BEA Brief at 108. Benson considered this inappropriate during an investigation. According to Benson, Patterson should have answered the question, even though not related to the issue of bias, because he knew that it was inappropriate to access someone else's e-mail and because he was aware of the consequences of not answering an investigator's question. Benson also noted that Patterson had failed to follow company protocol when he did not allow an interviewee to review his notes, and that Patterson failed to follow the guidance of the Office of General Counsel regarding use of government equipment for personal litigation. BEA argues that the suspension was warranted because the BEA Employee Handbook

[16] Although Shirley was not trained in bias investigations, I find that he credibly testified about his substantial experience as an investigator.

[17] The investigator did tell Paterson that he had interviewed the employee who filed the complaint.

states that suspension without pay is warranted for "failure to cooperate with an investigation." Ex. O at 1-71; Ex. R at 51. BEA also argues that Patterson, who expected cooperation in the investigations conducted by his office, did not cooperate in his own investigation. The contractor contends that Patterson was treated no differently than similarly situated employees, and that the only other employee who refused to cooperate with an investigation was terminated on April 24, 2007. However, I find for the following reasons that the contractor has not shown by clear and convincing evidence that it would have suspended Patterson for three days absent his protected conduct.

Allegation of Refusal to Cooperate With an Investigation

The transcript of the interview is somewhat puzzling. It appears that Patterson first answered the question ("I'm not saying anything like that. No."), denying that the secretary had given him unauthorized access, but then later in the conversation clearly stated that he would not answer the question.

> TS: As far as e-mails that you are referring to, are you saying that [Bensons]'s secretary has come forward to you with information?
>
> DP: *I'm not saying anything like that. No*.
>
> TS: OK. Has she shared e-mails with you?
>
> DP: I'm not saying anything like that.
>
> TS: But, I'm asking you a question.
>
> DP: And I'm saying, I'm not saying anything like that.
>
> TS: So, you're saying she has not.
>
> DP: *I'm not answering your question*.
>
> TS: And, do you realize by not answering my question that . . . .
>
> DP: They can hold that against me.
>
> TS: OK. And you still choose to not to talk about that. OK.
>
> DP: Yes.

Ex. OO; Ex. 61 at 15-16 (emphasis added). Despite his initial answer, Patterson clearly stated his refusal, and Shirley had to then interview Benson's secretary. [18]

[18] Shirley's investigations did not substantiate improper e-mail access by anyone.

Although Patterson refused to answer one question during the interview, I find that this refusal did not impede the investigation. In fact, the investigator testified credibly that Patterson was otherwise cooperative, professional, and truthful, and the investigation did not substantiate any improper activity. Thus, I cannot conclude that the complainant was not cooperative with the investigation. Further, there are distinct differences between Patterson's punishment and the manner in which BEA treated the employee who was terminated for failure to cooperate with an investigation. First, that individual displayed a lack of cooperation so egregious that it cannot compare with Patterson's behavior. The terminated individual had engaged in ongoing and extensive fraud, using the office telephone and Internet for three hours out of each eight hour day. Ex. 125; Tr. at 1105. When questioned by investigators, he told them that he could substantiate his misuse, but became belligerent when they asked him for the information. In fact, the investigator had to ask the individual four times for the information – during an interview, on the telephone, and twice via e-mail, but the individual refused to cooperate. Tr. at 1054, 1103-4. After reviewing information regarding the individual who refused to cooperate in an investigation, it is clear that the failure to cooperate was not the basis for that employee's termination. He also engaged in time card fraud, a violation so egregious that the only other employee who committed that violation was suspended for 30 days, 10 times the length of Patterson's suspension. Ex. 125 at 5. Therefore, for the reasons set forth above, I conclude that the three-day suspension was excessive.

Allegation of Refusal to Answer an Investigator's Question

An examination of Patterson's testimony shows that Shirley called Patterson's cell phone on August 31, 2006, to ask him a few follow-up questions about the July 2006 investigation. Patterson testified that at the time of the call, he was at the hospital visiting a very sick friend. When Patterson kept asking Shirley "Is there anything else?," Shirley suspected that Patterson may have been advised that a second investigation was about to commence. Shirley asked Patterson if anyone had told him about the second investigation, and Patterson did not answer. At the September 2006 interview, Shirley again asked Patterson if anyone had warned him that he was going to be investigated again.

> TS: OK. On the particular, when I asked you before, you chose not to answer.
>
> DP: I did. I like to keep you guessing. Kinda keep the playing field even. (chuckles)
>
> TS: That's why I'm asking. So, why didn't you answer at that point? So you're just saying you wanted to keep me guessing at that point. OK.
>
> DP: First of all, I wasn't sure why you were asking the question. You kinda caught me off guard. Quite frankly, even though I knew the answer

was no, I decided to defer on answering that until today. But no, no one notified me of this.

Ex. 61 at 28.

As shown above, Patterson, although initially silent, truthfully answered the question about the second investigation during the interview, which took place a week after the phone call from Shirley. Although Patterson initially refused to answer, Shirley testified that Patterson was cooperative and professional throughout the interviews. He acknowledged that interview subjects are often stressed, but stated that Patterson maintained a professional demeanor. Further, Shirley testified that he believed that Patterson was truthful with him. In addition, it is not clear why Patterson should be required to answer questions about an investigation that had not yet officially opened.

A review of other BEA employee suspensions reveals some key differences that distinguish Patterson's treatment. BEA compares Patterson to an employee who was suspended without pay for four days for starting a nuclear reactor without approval. Ex. 125. There is a vast difference between Patterson's refusal to answer a question, and an individual who violated technical requirements and restarted a nuclear reactor without management concurrence and without determining the cause of the shutdown of a safety system. Yet, that individual was punished with only one more day without pay than Complainant. Patterson clearly refused to answer a question, but I cannot find that action of the same level of severity as the other actions, presented by the contractor in support of its position, that have warranted suspension at BEA. The other employees who were suspended committed more serious violations such as the misuse of government computer with "excessive use" involving sexually explicit material, pornography, and racially derogative materials, the exchange of offensive e-mails within a workgroup, inappropriate conduct in the workplace, and mistreatment of employees. *Id.* I further find that BEA could have fashioned a different punishment, because there is evidence in the record that BEA utilizes many other forms of discipline. BEA practices progressive discipline through documented verbal warnings, verbal counseling, and suspensions as short as one day. Ex. 125. For example, the BEA Personnel Security Manager, who did not cooperate with Benson's investigation into the site access revocation, was given a verbal warning that was documented and placed in her personnel file. Thus, I conclude that BEA did not present clear and convincing evidence that it would have suspended Patterson for three days absent his protected conduct. *See Curtis Hall*, 29 DOE ¶ 87,022 at 89,116-7 (2007) (contractor did not establish by clear and convincing evidence that the type of behavior exhibited by complainant in a workplace conflict generally resulted in the discipline applied to complainant).

3. Performance Rating and Zero Merit Increase

BEA argues that Patterson's rating of "1" ("some key expectations not met") was a proper rating given Patterson's marginal performance in 2006 that culminated in a three-day suspension in October 2006. *See* Ex. 79 (INL 2006 Performance Review). As a

result of his "1" performance rating, Patterson received no merit increase. The factors that caused the suspension were referenced in his 2006 review, and I find that such reference properly adhered to BEA policy. BEA argues that 250 BEA employees also did not receive a merit increase in 2007 and that at least 11 other BEA employees who received a performance rating of "1" also failed to receive a merit increase in 2007.

Patterson's rating of "1" in the areas of Security (8% of total rating), Teamwork (8% of total rating), Judgment (9% of total rating), and Ethics (12% of total rating) was based on many of the same events that were referenced in his suspension. *See* BEA Brief at 47-48. These areas comprise 37% of his total rating. However, the categories of "Adaptability" (8% of total rating) and "Communications" (8% of total rating) based their ratings on different events. Patterson received a rating of "1" in the area of Adaptability "based on his refusal to accept his role as Employee Concerns Program Manager after his job code was changed to Specialist, his insistence on identifying himself as a 'Specialist,' and his refusal to attend certain management meetings that Benson had asked him to attend." BEA Brief at 48, Tr. at 690-91. In the area of Communications, Benson gave Patterson a '1" for "unprofessional communications" – disclosing to counterparts at other facilities that he had filed a Part 708 complaint and posing a hypothetical that actually reflected his own litigation. Tr. at 692.

Patterson's function may have stayed the same, but his job classification had changed significantly. It is a significant change to remove a job from the ranks of management after 10 years. Patterson was reclassified as a Specialist, and it was reasonable to reject a title that he no longer held. There was no testimony that the management meetings were a required part of his job. Tr. at 690-2. A Part 708 complaint is not a confidential proceeding, so it is likely that his counterparts would have had knowledge of the complaint at some stage in the proceeding despite his communications.

Patterson's behavior was less than exemplary, especially in the areas of Teamwork (8%) and Judgment (12%), and this behavior will be reflected in any equitable remedy available to him. *See Robert Burd*, 28 DOE ¶ 87,025 at 89,201 (2002) (declaring that the ancient maxim of equity states that one who seeks equity must come into a court of equity with clean hands). These two categories comprise 20% of his rating. However, as stated above, BEA has not provided clear and convincing evidence that it would have suspended Patterson for three days had he not engaged in protected activity. Consequently, because the 2006 performance rating and zero merit increase were based on many of the same events as the suspension, I also find that BEA has not presented clear and convincing evidence that it would have given Patterson a "1" rating and a zero merit increase if he had not engaged in protected activity.

4. Directed Reassignment

BEA argues that the reassignment was a "good faith attempt to salvage [Patterson's] career at the INL and was not a negative personnel action." BEA Brief at 117. According to BEA, Patterson was reassigned due to inappropriate interaction during the April 24, 2007, meeting with Benson and Middleton "during which time he failed to treat

the managers with dignity and respect," his failure to cooperate with Wise's investigation and to tell her that the anonymous employee was not a BEA employee until April 24, 2007, his unwillingness to provide the name of the source, and refusal to take direction from Benson. The contractor contends that Patterson failed to follow Benson's instructions when he stated to Benson that Benson did not have the training or background to tell Patterson how to run his program. BEA Brief at 120. Patterson denies that he made this statement.

BEA states that discharge is the appropriate penalty for insubordination, according to its handbook. Members of the PAAG considered terminating Patterson for insubordination, but deferred to Benson's recommendation of a "directed reassignment." BEA Brief at 119; 73. According to BEA, the managers had lost confidence in Patterson's ability to perform as manager of Employee Concerns. Benson testified that Patterson's conduct at the April 24th meeting was the cause of his reassignment and, absent that conduct, Patterson's refusal to disclose the source would not have resulted in reassignment. Tr. at 900.

BEA argues that Patterson was insubordinate, and insubordination is grounds for termination at BEA. However, if Patterson's conduct truly warranted termination, then BEA should have terminated him at that time. It is disingenuous of BEA to state that he was reassigned in order to salvage his career. *See Curtis Hall*, 29 DOE at 89,116-7 (finding that contractor did not establish that the type of behavior exhibited by complainant generally resulted in termination of an employee at that company). By the time the reassignment was put into place, all of his senior management was aware of the tension between Patterson and Security, the Office of the General Counsel, and Benson. It is difficult to see how BEA "salvaged his career" by moving him to a job that does match his educational and professional background or his aspirations.

At the time Patterson was ordered to release the name of the source, the policy in place was that the source could elect to remain anonymous, and the source's identity would be protected to the maximum extent possible, *i.e.,* confidentiality was not guaranteed. Tr. at 802-3. However, it is not surprising that Patterson would try to protect the identity of his source because, in the 13 years that he had worked with confidential sources, he had never before been asked to reveal an identity. *Id.* at 270. In fact, Patterson testified that he considered the disclosure of a source to be a violation of company standards and procedures. *Id*. at 286. During conversations with management, Patterson stressed the negative impact on the company for taking what he considered an ill-advised action.

According to Patterson's job description, he was accountable to INL management to identify significant risk areas, and, as the former president of LIMITCO testified, the nature of Patterson's job caused him to sometimes step on management's toes. Tr. at 812. Although Patterson clearly could have been more diplomatic and tactful in his delivery, he nonetheless had a duty to convey the message.[19] During the April 24, 2007,

[19] Some of the complaints against Patterson's behavior seem exaggerated. Shirley filed a complaint against Patterson for allegedly following him into his office area and then leaving when asked, Middleton is disturbed when he and Patterson leave home for the office at the same time and Patterson engages in

meeting the complainant made sarcastic and hostile comments, and he became infuriated, but he did not raise his voice, or physically threaten anyone. Patterson may not have been a model employee, but he was not insubordinate as described in previous cases adjudicated by this office. *See*, e.g., *Casey Von Bargen*, 29 DOE ¶ 87,031 (2007) (complainant had general inability to work with anyone on a regular basis, hostility to suggestions, constant strife, attitude made resolution impossible despite attempts by EEO department to repair relations); *S. R. Davis*, 28 DOE ¶ 87,044 (2004) (complainant made inflammatory and disrespectful statements to and about others, rejected manager's direction, told management that she would not be available on nights and weekends, told managers that they did not have the authority to reverse her opinion); *William Cor*, 28 DOE ¶ 87,026 (2002) (complainant refused an order to return to work because he alleged mistreatment by his supervisor); *Dr. Jiunn S. Yu*, 27 DOE ¶ 87,556 (2000) (complainant consistently disregarded orders, distributed memoranda with unprofessional invectives, and displayed "repeated failure to abide by the reasonable and legitimate instructions of his managers").

BEA argues that Patterson's reassignment is similar to that of a BEA Fire Department Staff Officer who was reassigned in April 2006 based in part on inadequate performance and failure to meet goals and objectives. Tr. at 1066-68; Ex. 137. That employee had been placed on a Performance Improvement Plan and failed to improve. Two other managerial level fire department employees were given directed reassignments after safety issues resulted in injury to some of their employees. These situations, which resulted in injury and were a threat to public safety, are not comparable to Patterson's behavior.

In summary, although Patterson had an abrasive personality, it is telling that the BEA managers did not terminate him, even though BEA had terminated at least nine employees in 2006 and 2007. I conclude that BEA has not presented clear and convincing evidence that it would have given Patterson a "directed reassignment" absent his protected conduct. *See Joshua Lucero,* 29 DOE at 89,185-6 (finding that even though individual conducted himself in an immature, volatile manner, his protected conduct changed his relationship with his supervisors, and contractor did not prove by clear and convincing evidence that it would have terminated complainant despite his protected conduct).

III. CONCLUSION

As the foregoing Decision demonstrates, I find that Patterson has presented a preponderance of evidence that he engaged in protected conduct by his participation in this proceeding, and that this conduct was a contributing factor to acts of retaliation. I

(according to Middleton) odd behavior, Zabala is intimidated by a reference to Thanksgiving. I note that no allegations against Patterson were substantiated and Shirley's complaint resulted in no disciplinary action. The actions that BEA labels "aggressive" and "threatening" (including the driveway dance with Middleton, and the sarcastic and condescending behavior alleged by Zabala and other colleagues) appear to be expressions of anger or immaturity that were surprising to those who had known Patterson for years. There is no evidence in the record of aggressive, threatening behavior by Patterson. *See* BEA Brief at 48.

further find that BEA has not presented clear and convincing evidence that it would have taken the same actions at issue absent the protected conduct. Therefore, I find that the complainant is entitled to relief under Part 708. [20] I will direct BEA to reimburse Patterson's legal fees for this proceeding, to remove the disciplinary notices from his personnel file, to adjust his 2006 wage increase to an amount equivalent to the average of those employees who received a rating of "2" during the same evaluation period, and to reimburse him for lost pay and benefits relating to his activity in this case. [21]

Patterson shall submit a calculation in support of his claim for lost pay and benefits to BEA. As for his litigation expenses, attorney fees in Part 708 cases are generally calculated using the "lodestar" methodology described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989). *See Sue Rice Gossett*, 28 DOE ¶ 87,028 (2002); *Ronald A. Sorri*, 23 DOE 87,503 (1993), *affirmed as modified*, 24 DOE 87,509 (1994); 10 C.F.R. § 708.36(4). I will direct Patterson to submit a calculation of attorney fees with evidence supporting the hours worked and the rates claimed. *See Sue Rice Gossett*, 28 DOE at 89,227 (citing *Webb v. Board of Education of Dyer County, Tennessee*, 105 S. Ct. 1923, 1928 (1985)).

Patterson also requested that BEA revise his 2006 appraisal to reflect his actual performance, and that BEA award him a wage increase consistent with the average for employees who received a top performance rating. Although BEA has not shown by clear and convincing evidence that it would have appraised Patterson as a "1"in 2006 despite his protected conduct, I cannot conclude that Patterson has presented evidence that he performed at the level of the average of employees who received the top performance rating for 2006 performance. His work on the site access issue in 2005 is admirable and was even recognized by BMI as a thorough investigation that revealed violations of procedure. However, the evidence relating to his 2006 performance shows some behavior towards his colleagues that is less than cooperative and is not representative of a top performer. *See S. R. Davis,* 28 DOE ¶ 87,044, Case No. VBH-0083 (2004) (Part 708 does not provide its complainants with protection from the ramifications of unacceptable behavior). Nonetheless, in order to place Patterson in the position that he would have occupied had he not engaged in protected conduct, I find that his increase should be adjusted to the equivalent of the average for those employees who received a rating of "2." *See Curtis Hall/Bechtel National, Inc.*, 30 DOE ¶ _____, Case Nos. TBA-0042/TBA-0064 (February 13, 2008) (stating that the goal of the restitutionary remedies in 10 C.F.R. § 708.36 is "to restore employees to the position that they would have occupied but for the retaliation").

---

[20] Patterson has requested the following remedies: reinstatement; back pay and benefits for the three-day suspension, the four days attending the hearing, one day spent at a deposition, and other uncompensated time off related to his participation in the Part 708 proceeding complaint; attorney fees; removal of retaliatory actions from his personnel file; an adjustment of his 2006 zero merit increase to the average of the wage increase for employees who received the highest rating; and a revision of his 2006 performance evaluation to reflect his actual performance. Tr. at 299-302.

[21] I will not order that his 2006 performance review be revised to reflect his actual performance because the wage increase (for a "2" rating) has abated the violation. 10 C.F.R. § 708.36 (a) (5).

In his complaint, Patterson requested reassignment to the position of Manager of the Employee Concerns and Business Ethics Office. Although I concluded above that BEA has not presented clear and convincing evidence that it would have reassigned Patterson absent his protected conduct, I cannot find that Patterson is entitled to reinstatement as Manager of the Employee Concerns and Business Ethics Manager because that position no longer exists. In September 2007, Benson changed the position to "Senior Auditor/Employee Concerns Manager." Benson testified that he modified the position because the Employee Concerns workload did not warrant a full time employee, and BEA presented credible evidence to support that argument.[22] BEA also maintains that the position was changed to a two-year rotation in order to provide career development and cross training for its employees. Reinstatement is an equitable remedy, and an examination of the evidence leads me to conclude that the equities weigh against reinstatement. *See Robert Burd*, 28 DOE at 89,201. According to Benson's testimony, the new position is a lower level (Specialist 3 or 4) than Patterson's current level (Specialist 5). An equitable remedy cannot put the complainant in a worse position than the position that he currently occupies.[23] As Senior Auditor/Employee Concerns Manager under Benson's new position, Patterson would be subject to an even lower salary scale, and would be effectively demoted. However, BEA should review all currently available vacancies in order to determine if a position comparable to Patterson's old position exists, for which Patterson qualifies. If there is a comparable position, and if Patterson is in agreement, BEA shall transfer Patterson to that position.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Mr. Dennis Patterson under 10 C.F.R. § 708 is hereby granted as set forth below, and denied in all other respects;

(2) Within 30 days of its receipt of this Decision, BEA shall remove the notice of suspension and other notices of retaliatory actions from Mr. Patterson's personnel file;

(3) Within 30 days of receipt of this Decision, BEA shall revise Mr. Patterson's 2006 wage increase to the average of employees who were rated a "2" on their INL 2006 Performance Review;

---

[22] It is important to examine BEA's justification for radically changing Patterson's position after he filed his Part 708 complaints. Tr. at 882. A contractor should not dissolve a whistleblower's job in anticipation of, or as a barrier to, the possibility that OHA will order reinstatement of the whistleblower. However, an examination of the evidence finds that there is merit to BEA's argument that the position of Employee Concerns (EC) Manager does not require a full time employee. The EC Office investigated only a handful of concerns annually. Ex. 126. Further, BEA can determine its own corporate structure, and its actions (as well as those of its predecessor BBWI) show a preference for an EC Manager who is less visible and lower in the corporate hierarchy than LIMITCO. At LIMITCO, the EC Manager was a highly visible manager who reported directly to the president and who also had responsibility for the ethics function. Thus, I find that BEA has presented evidence to support the modification of the position.

[23] However if Patterson so chooses, he should be considered for rotation into this position, especially in light of BEA's expressed desire to salvage his career at INL.

(4) Within 30 days of receipt of this Decision, Mr. Patterson shall send BEA and the Hearing Officer a report setting forth the number of days of lost pay related to his participation in this proceeding;

(5) Within 30 days of receipt of this Decision, Mr. Patterson shall send BEA and the Hearing Officer a bill for attorney fees reasonably incurred to prepare for and participate in proceedings leading to the Initial Agency Decision. The fees shall be calculated using the lodestar approach;

(6) Within 30 days of this decision, BEA shall notify Mr. Patterson and the Hearing Officer if there is a vacancy comparable to Mr. Patterson's previous position;

(7) If a comparable position is identified and Mr. Patterson desires to transfer to that position, BEA shall transfer Mr. Patterson to that position within 30 days of his request for a transfer;

(8) The parties will have up to 30 days from the later of BEA's receipt of Mr. Patterson's bill for attorney fees or BEA's receipt of Mr. Patterson's calculation of the number of days of lost pay and benefits to discuss and negotiate any disputes regarding those two items. During the period of negotiation, both parties will provide reasonable information to the other party to facilitate the other party's understanding of the calculations;

(9) Within 30 days of the end of the period of negotiation, BEA shall reimburse Mr. Patterson for the lost pay and benefits related to his participation in this proceeding;

(10) Within 30 days of the end of the period of negotiation, BEA shall reimburse Mr. Patterson for his attorney fees reasonably incurred to prepare for and participate in proceedings leading to the Initial Agency Decision;

(11) Mr. Patterson's request for reinstatement to the position of Manager of the Employee Concerns and Business Ethics Office is denied;

(12) Mr. Patterson's request for a wage increase consistent with the average for those employees who received a top performance rating in their 2006 performance appraisal is denied; and

(13) Mr. Patterson's request that his 2006 Performance Review be revised to reflect his actual performance is denied.

(14) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within 15 days of receiving this decision, a Notice of

Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: June 20, 2008

November 8, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Frederick L. Higgs

Date of Filing: December 7, 2006

Case Number: TBH-0057

This Decision concerns a whistleblower complaint that Frederick L. Higgs (the complainant) filed under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708, against his former employer, Texas Environmental Plastics, Ltd. (TEP), a DOE subcontractor at the DOE's Savannah River Site in Aiken, South Carolina.[1] The complainant contends that he made a number of disclosures that are protected under Part 708, and that TEP retaliated against him for making those disclosures by terminating his employment. As relief from this alleged reprisal, the complainant seeks back pay and additional monetary compensation as well as reinstatement as a TEP employee in the position of "key" employee, a position he did not hold before his employment was terminated. After considering all the submissions by the parties and all the testimony received at the hearing held on this matter, I have concluded that the complainant has not made a disclosure protected under Part 708 and, therefore, is not entitled to relief.

I. Background

A. The Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

---

[1] TEP is a subcontractor of Tetra Tech EC, Inc., which is, in turn, a subcontractor of Washington Savannah River Company, the management and operations contractor of the Savannah River Site.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health. *See* 10 C.F.R. § 708.5(a)(1), (2). Employees of DOE contractors who believe that they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an evidentiary hearing before an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

On April 1, 2006, the complainant filed a whistleblower complaint with the Employee Concerns Program of the DOE's Savannah River Operations Office. After attempting to resolve the complaint through union arbitration, the Employee Concerns Program determined that those efforts had failed, and transmitted the complaint to the OHA, together with the complainant's request that the OHA Director appoint a Hearing Officer to conduct an administrative hearing regarding the complaint without a preceding investigation. I was appointed the Hearing Officer for this proceeding on December 20, 2006.

In his complaint, Mr. Higgs contended that his disclosures concerned a "biased safety practice" and that he was "unlawfully fired for bringing up concerns of health and safety." Complaint at 4, 5. In preparation for the hearing, I obtained statements from the complainant and from a number of other individuals who had knowledge of the events surrounding Mr. Higgs' disclosures. I identified five disclosures that Mr. Higgs alleged were protected under Part 708, and one alleged reprisal for those disclosures, his termination from employment with TEP. Four disclosures concerned the wearing of, or failure to wear, safety vests on the worksite. The fifth disclosure addressed the failure to service the portable toilets on the worksite.

At the hearing convened on February 21, 2007, I heard testimony from Mr. Higgs; Navann Chou, Mr. Higgs' supervisor; Crystal Smith, a fellow employee who had been appointed "safety person" for the TEP work crew; Sam Mangrum, an estimator for TEP who arranged for the company's labor needs at the Savannah River worksite; and Michael Estess, the senior project manager in remediation for Tetra Tech, and the individual responsible for the construction project on which Mr. Higgs worked. Both parties submitted additional documents at the hearing and after the hearing, which I have accepted into the record.

II. Findings of Fact

In this section, I will lay out the evidence received in this proceeding that has permitted me to determine facts, events and circumstances surrounding Mr. Higgs' alleged disclosures. Although I also received evidence concerning TEP's alleged acts of retaliation, I will not address this evidence. Because I find that Mr. Higgs did not make a disclosure that was protected under Part 708, I need not consider actions taken allegedly in retaliation for a protected disclosure.

Mr. Higgs was employed by TEP as a general laborer for a four-month period, from August 2005 to December 12, 2005. He was a union steward for the Laborers' International Union Local 515 during that time. Transcript of Hearing (Tr.) at 11, 36, 53. He worked under the direction of a supervisor on a construction site where heavy equipment shared the terrain with laborers working on the ground. *Id.* at 16, 46, 65. Due to the hazardous conditions of the worksite, all workers were required to wear protective gear, including high-visibility clothing. *Id.* at 15, 225.

A. The Disclosures

1. Disclosure to Annatah Vongtajack

In his complaint and at the hearing, Mr. Higgs asserted that his first protected disclosure occurred when he told Annatah Vongtajack, a co-worker, that he was not wearing a safety vest. *Id.* at 13, 37. The date of this event is uncertain, but it appears to have taken place in November 2005. Restatement of Complaint (January 30, 2007).

2. Disclosure to Thomas Brantley

Mr. Higgs then reported to Thomas Brantley that Mr. Vongtajack was refusing to wear a safety vest. Mr. Brantley is an engineer who was working for QORE, another subcontractor to Tetra Tech. *Id.* at 17-18. The evidence indicates that this disclosure was made later on the same day as the first disclosure. *Id.*

3. Disclosure at Safety Meeting

During the period of Mr. Higgs' employment, each morning on the site began with a safety training meeting which all workers on the site were required to attend, including his supervisor, Navann Chou. *Id.* at 195, 200. At one such meeting, Mr. Higgs raised issues concerning safety practices on the worksite, including Mr. Vongtajack's failure to wear a safety vest. *Id.* at 20, 144. The evidence is inconclusive with respect to other details of his speech. I have, however, determined that this event occurred at least a week after the first two disclosures and possibly as late as December 9, 2005. I have also determined that Mr. Higgs invoked the names of other workers whom he had observed not wearing safety vests, and that the gist of his speech was that enforcement of the rule

that required wearing safety vests was "biased," in that some workers were required to wear safety vests, while others were not. *Id.* at 20-21, 52.[2]

4. Disclosures to the Crystal Smith

In November 2005, Mr. Chou appointed Crystal Smith, a co-worker of Mr. Higgs, as a "safety person" for the TEP employees on the worksite. She received training for that role, and her duties included ensuring that the workers wore appropriate protective equipment, including safety clothing. *Id.* at 132, 138. Mr. Higgs testified that he spoke with Ms. Smith on December 12, 2005, less than an hour before he was given his separation notice, about two workers not wearing their safety vests, Thomas Skronski, a QORE engineer, and Tony Glenn, a TEP co-worker. *Id.* at 24-25. At the hearing, Ms. Smith recalled that Mr. Higgs spoke with her in November 2005 about two workers not wearing their safety vests, Mr. Skronski and Mr. Vongtajack. *Id.* at 132. Upon further questioning, she recalled that Mr. Higgs also spoke to her about safety vests, possibly on December 12, 2005, or possibly the week before, regarding the same individuals Mr. Higgs had mentioned. *Id.* at 147, 159. Although the witnesses' memories had faded by the time of the hearing, I can safely conclude that Mr. Higgs made at least one disclosure to Ms. Smith regarding the failure of some workers to wear safety vests, and that at least one such disclosure occurred no more than one month before, and possibly on the day of, his termination of employment.

5. Disclosure Concerning Portable Toilet Maintenance

Mr. Higgs testified that on December 12, 2005, he spoke to Ms. Smith, TEP's "safety person," about the fact that the portable toilets on the worksite had not been serviced over the weekend preceding that workday. He further stated that she informed him she would bring that matter to the attention of the safety committee. *Id.* at 55-56. This disclosure occurred in the same conversation with the fourth disclosure, discussed in the above paragraph. The evidence is unclear as to whether this disclosure occurred on December 12, 2005, or during the week before that date, but I can conclude for the purposes of this decision that Mr. Higgs made a disclosure to Ms. Smith regarding the condition of the portable toilets within a week of the day his employment was terminated.

It is clear from the summary of this evidence that there are factual inconsistencies regarding the dates on which Mr. Higgs disclosed his concerns about the wearing of safety vests and the maintenance of the on-site portable toilets. Nevertheless, there is sufficient evidence to support a finding that Mr. Higgs disclosed those concerns to a number of individuals.

---

[2] Despite this proclamation of bias during his disclosure, Mr. Higgs has not alleged that the bias itself was a violation of law, rule or regulation. Consequently, for the purposes of this proceeding, I have focused on whether his disclosure of the failure to wear safety vests, rather than the inconsistent enforcement of that requirement, constituted a protected disclosure.

B. Reasonable Belief that Disclosures Revealed a Substantial Violation of Law, Rule or Regulation or a Substantial and Specific Danger to Employees or to Public Health

At various stages of this proceeding, Mr. Higgs has contended that he believed his disclosures were protected under Part 708. I will next summarize the evidence regarding whether he reasonably believed the concerns he disclosed to these individuals revealed a "substantial violation of law, rule or regulation" or "a substantial and specific danger to employees or to public health," a requisite condition for the disclosures to be considered protected under the applicable regulations. 10 C.F.R. § 708.5(a)(1), (2).

Mr. Higgs described his concern in his April 1, 2006 complaint, as follows: "I believe that according to the laws of the contract under which I worked I was discriminated against and was unlawfully fired for bringing up concerns of health and safety which was my duty as steward to do. . . . I seek through DOE protection of 10 C.F.R. Part 708." Complaint at 5. Because Mr. Higgs was not represented by counsel at the hearing, I questioned him in an effort to assist him in building a record with respect to his five disclosures. As we discussed each disclosure, I asked him what his basis was for claiming that the disclosure was protected under Part 708. His responses can be summarized as follows. Regarding the first disclosure, made to Mr. Vongtajack, Mr. Higgs stated that he believed that not wearing a safety vest "violat[ed] the safety regulations." When asked what regulations had been violated, Mr. Higgs stated:

> That safety vest is to be worn in that area. There's a sign when we enter that gate each day to wear the proper PPE [personal protection equipment] with hard hat, safety vest, and safety shoes and safety glasses.

Tr. at 15. The actual content of that sign is not in evidence. On cross-examination, Mr. Higgs stated that he believed not wearing a safety vest was a violation but not a substantial violation. Tr. at 15, 39. Concerning his third disclosure, at a daily safety meeting, Mr. Higgs testified in a similar manner. He stated that he "believed it was a violation of the regulations and laws," but not a substantial one. Tr. at 22.

When testifying about his second disclosure, which he made to Thomas Brantley of QORE, he stated that Mr. Vongtajack's failure to wear a safety vest was a safety concern; he further stated that it was Mr. Vongtajack's safety that was at stake, not his. *Id.* at 19. As for the fourth disclosure about safety vests, made to Ms. Smith, when Mr. Higgs was asked who was at risk because Mr. Skronski was wearing a red and black hooded jacket but no safety vest, Mr. Higgs testified, "I imagine it would be a risk to him, or whoever he was working with where his visibility wasn't seen." *Id.* at 77. Finally, with respect to the fifth disclosure, Mr. Higgs did not cite any law, rule or regulation that set a minimum schedule for servicing portable toilets, but rather maintained that the failure was an "infringement of health" and "unhealthy." *Id.* at 27-28, 74. He also stated that shortly after this fifth disclosure, the portable toilets were serviced. *Id.* at 25.

TEP presented a great deal of evidence regarding the safety requirements on the worksite. Michael Estess, the senior project manager in remediation for Tetra Tech, and the individual responsible for the construction project on which Mr. Higgs worked, testified on this topic. According to his testimony, there was no law, rule or regulation that required that safety vests be worn. *Id.* at 197-98, 234-35. Tetra Tech imposed on itself and its sub-contractors a high-visibility clothing requirement for the specific site on which Mr. Higgs worked, because it was located along one of the main roads of the Savannah River Site and had a lot of traffic passing by. *Id.* at 199. The source of the requirement was a Task-Specific Plan (TSP) for that project, two versions of which TEP submitted into evidence at the hearing. Task Specific Plan (TSP) SSHASP for GSACU – TtFW Project 2919, dated August 15, 2005 and October 14, 2005. On the first page of each version, under "Required Safety Measures/PPE," the following appears: "Wear reflective and/or brightly colored vests or high-visibility clothing if working near traffic or equipment paths." He testified that high-visibility clothing is "[n]ot just the stuff we issue. But if they bring in something that qualifies as high visibility clothing, they've met out company procedure [sic] site specific health and safety plan." *Id.* at 224. Mr. Estess clarified that there was no requirement that safety vests specifically be worn; the TSP merely required some form of high-visibility clothing. *Id.* at 224-25.

Crystal Smith, the on-site safety person, and Mr. Higgs testified about the enforcement of the safety clothing requirement. The evidence indicates that Mr. Vongtajack, Mr. Skronski and Mr. Glenn were wearing red jackets or shirts at the time Mr. Higgs disclosed their failure to wear safety vests. *Id.* at 25, 52 (testimony of Mr. Higgs); 138-39 (testimony of Ms. Smith). Mr. Higgs stated that, after his disclosures, safety officials required Mr. Vongtajack and Mr. Glenn to put on safety vests, but did not require Mr. Skronski to do the same. *Id.* at 25, 44. Ms. Smith testified that Mr. Skronski had had his red jacket approved as high-visibility clothing. *Id.* at 135; *see also id.* at 201 (testimony of Mr. Estess). There is no evidence that Mr. Vongtajack or Mr. Glenn had done so. There is conflicting testimony regarding whether Ms. Smith or anyone else communicated to Mr. Higgs that Mr. Skronski's jacket had been approved as high-visibility clothing. *Id.* at 97 (testimony of Mr. Higgs), 135-36 (testimony of Ms. Smith). Finally, Ms. Smith testified that she was informed during November 2005 that the definition of "high-visibility clothing" was re-defined such that it could no longer be red, but had to be either bright green or bright orange. *Id.* at 139-40.

TEP produced evidence that shed light on Mr. Higgs' belief at the time of his disclosures. At the hearing, Mr. Estess testified that all workers are informed orally of the terms of the TSP for their work location at a meeting held before work activity begins on the site, at which they sign an attendance sheet. *Id.* at 235. While that statement indicates that Mr. Higgs was likely informed at that meeting about the safety equipment requirements, additional evidence demonstrates that he was informed specifically about what articles qualified as high-visibility clothing. In a statement submitted into the record on February 6, 2007, Mr. Estess wrote, "It was explain[ed] by myself and Harry Atwood, [Tetra Tech] Safety Manager, to Mr. Higgs that Mr. Skronsk[i] was wearing a High Visibility jacket that had been approved by the safety department and had been discussed in prior safety meetings." Letter from Michael Estess to Sam Mangrum, February 5,

2007. He also replied to Mr. Higgs' questioning at the hearing as follows: "[Y]ou turned the conversation on Mr. Skronski. At that point, the explanation given to you [about] the jacket just did not satisfy you. You kept calling that we were showing double standards on our project which was untrue." Tr. at 219. In addition, Ms. Smith testified that when the rules changed regarding which colors were permitted on high-visibility clothing, this change was communicated to the workers at daily safety meetings. *Id.* at 148.

III. Analysis

A. Legal Standards Governing This Case

The obligations on each of the parties to this proceeding are established in the governing regulations. One provision of the regulations defines what constitutes employee conduct that is protected from retaliation by an employer. The portions of that provision that are pertinent to Mr. Higgs' complaint require that an employee file a complaint that alleges that he has been subject to retaliation for disclosing, to a DOE official, a member of Congress, any government official who has responsibility for the oversight of the conduct of operations at a DOE site, or his employer or any higher tier contractor, information that he reasonably believes reveals a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health. 10 C.F.R. § 708.5(a)(1), (2). A second provision sets forth the burdens on the respective parties. The portions of that provision that are pertinent to Mr. Higgs' complaint state that the employee who files the complaint has the burden of establishing by a preponderance of the evidence that: (1) he or she made a disclosure, as described in § 708.5 of the regulations, and (2) the disclosure was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. If the employee meets this burden, the burden then shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal. *Id.* Accordingly, in the present case, if Mr. Higgs establishes that he made a protected disclosure, and that disclosure was a factor that contributed to his termination, he is entitled to relief, unless TEP convinces me that it would have taken the same actions even if he had not engaged in any activity protected under Part 708.

It is therefore my task, as the Hearing Officer, to weigh the sufficiency of the evidence presented by Mr. Higgs and TEP in this proceeding. Preponderance of the evidence, the burden applied to Mr. Higgs' evidence, has been defined as proof sufficient to persuade the finder of fact that a proposition is more likely true than not. McCormick on Evidence, § 339 at 439 (4th Ed. 1992). Clear and convincing evidence, which TEP must provide in order to prevail against those claims for which Mr. Higgs has met his burden, has been described as that evidence sufficient to persuade a trier of fact that the truth of a contested fact is "highly probable." *Id.*, § 340 at 442. This latter burden is clearly more stringent than the former.

B. The Disclosures

As discussed above, the first step in determining whether Mr. Higgs is entitled to relief under the Part 708 regulations is to determine whether any of his disclosures qualify for protection from retaliation by an employer. To reach that determination, I must consider, for each disclosure, first, whether Mr. Higgs made the disclosure to a person described at section 708.5 of the regulations. If I find that he made the disclosure to an appropriate individual, I must then consider whether, for each disclosure, Mr. Higgs reasonably believed that his disclosure revealed a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health. If Mr. Higgs fails to meet his burden of establishing, by the preponderance of the evidence, that he made at least one disclosure to an appropriate individual and that he reasonably believed it revealed a substantial violation or a substantial and specific danger, then he has not made a *prima facie* case and his claim must be denied. If he does meet that burden, then he must prove that the disclosure was a contributing factor in the personnel action taken against him, that is, his termination of employment.

1. Whether Mr. Higgs Made a Disclosure to an Appropriate Individual

The Part 708 regulations, which govern this proceeding, require that a disclosure be made to an appropriate individual in order to be protected from retaliation by an employer. In the first of Mr. Higgs' disclosures, he alleges that he told his co-worker, Mr. Vongtajack, that he was not wearing a safety vest. Tr. at 13. Mr. Vongtajack was a co-worker and an employee of TEP. There is no evidence that Mr. Vongtajack held any position in TEP, such as a supervisor, from which I might infer that TEP had received notice of this disclosure. Rather, the evidence indicates that all workers on the site were encouraged to "challenge" each other when they observed a safety concern. *Id.* at 202-03 (testimony of Mr. Estess). It appears to me that it was in this spirit that Mr. Higgs made his first disclosure. At the hearing, Mr. Higgs testified that he also reported this matter to his supervisor, Navann Chou. *Id.* at 51. This disclosure was not reported, however, in his initial complaint to the Employee Concerns Program nor in the restatement of his complaint he provided to me on January 30, 2007, at my request. Furthermore, Mr. Chou testified that Mr. Higgs did not speak to him about this concern. *Id.* at 119. Elsewhere in their respective testimony, both Mr. Higgs and Mr. Chou were uncertain whether they had spoken about this issue. *Id.* at 50-51, 128. In light of this evidence, Mr. Higgs has not met his burden of showing that such a communication actually took place. Consequently, I conclude that Mr. Higgs' first disclosure was made only to Mr. Vongtajack. Because Mr. Vongtajack, as a co-worker, was not "a DOE official, a member of Congress, any government official who has responsibility for the oversight of the conduct of operations at a DOE site, [Mr. Higgs'] employer or any higher tier contractor," 10 C.F.R. § 708.5, this disclosure does not qualify as a protected disclosure under Part 708.[3]

[3] Even if I were to consider that a disclosure to Mr. Vongtajack, as an employee of TEP, constituted a disclosure to TEP, this disclosure would nevertheless not be protected under Part 708, for the reasons set forth below in the section analyzing Mr. Higgs' reasonable belief.

I reach the same conclusion with respect to Mr. Higgs' second disclosure. This disclosure also concerned Mr. Vongtajack's failure to wear a safety vest, and was made to Thomas Brantley, a QORE employee. Although Mr. Higgs testified that he did not know the contractual relationship between TEP and QORE, *id.* at 42, it is evident to me that he understood that Mr. Brantley and he worked for different employers. In any event, Mr. Brantley was not in fact "a DOE official, a member of Congress, any government official who has responsibility for the oversight of the conduct of operations at a DOE site, [Mr. Higgs'] employer or any higher tier contractor." 10 C.F.R. § 708.5. Consequently, this disclosure does not qualify as a protected disclosure under Part 708.

I find that the remaining three disclosures were made to individuals who meet the requirements of 10 C.F.R. § 708.5. Because all workers were required to attend the daily safety training meeting, it is more likely than not that Mr. Higgs' supervisor, Mr. Chou, was in attendance on the day that he made his third disclosure, in which he contended that the enforcement of safety practices was biased, in that some workers were required to wear safety vests and others were not. Mr. Higgs made his fourth and fifth disclosures to Crystal Smith, a co-worker employed by his employer and named the "safety person" for their work group. Because she had been given a responsibility for safety issues by their employer, his disclosures to her, particularly because they related to her official role, can reasonably be considered disclosures to the employer. Consequently, Mr. Higgs' disclosures to Mr. Chou and Ms. Smith constitute disclosures to his employer, TEP, which comports with one of the requirements set forth in 10 C.F.R. § 708.5. As a result, I will now consider whether Mr. Higgs reasonably believed that any of these disclosures met the additional requirements of that section.

2. Whether Mr. Higgs Reasonably Believed His Disclosures Revealed a Substantial Violation of a Law, Rule or Regulation, or a Substantial and Specific Danger to Employees or to Public Health

At various times during the hearing, Mr. Higgs testified that failure to wear safety vests on the worksite both violated a law, rule or regulation and posed a danger to employees. While unable to cite a specific law, rule or regulation by name, he testified that a sign posted at the entrance to the worksite stated that appropriate protective gear, including safety vests, must be worn. On the other hand, both Ms. Smith and Mr. Estess testified that vests *per se* need not be worn, but that high-visibility clothing must be worn. High-visibility clothing did not need to be a vest, but it did need to be brightly colored, in accordance with established rules that changed in minor respects during Mr. Higgs' period of employment. In addition, TEP entered into evidence a Task Specific Plan, which included among its safety measures the requirement that high-visibility clothing be worn on Mr. Higgs' worksite. The preponderance of the evidence presented in this proceeding is that high-visibility clothing, but not necessarily safety vests, were required to be worn on the worksite. The evidence before me also demonstrates that the three individuals Mr. Higgs identified in his disclosures as not wearing safety vests were wearing red shirts or jackets at the time he made his disclosures. Finally, the preponderance of the evidence received in this proceeding indicates that Mr. Higgs was

informed that certain brightly colored clothing articles had been approved as high-visibility clothing and deemed suitable protective equipment in lieu of safety vests. After considering all the evidence presented in this proceeding, I conclude that it was not reasonable for Mr. Higgs to believe that safety vests were inherently safer than high-visibility clothing in his particular working environment, nor that any rule in effect required that safety vests be worn.[4] Therefore, I have determined that Mr. Higgs has not demonstrated by the preponderance of the evidence that he reasonably believed his disclosures revealed a substantial violation of a law, rule, or regulation. Moreover, even if I were to assume that a law, rule or regulation required safety vests to be worn, the violations he alleged in his disclosures were not substantial: the purpose of any such rule would be to ensure the visibility of the workers, and the individuals about whom he made the disclosures were wearing bright clothing, regardless of whether it met the technical requirements of the rule. Consequently, I cannot find that Mr. Higgs demonstrated by the preponderance of the evidence that the danger he has alleged was substantial and specific.

As for his disclosure about the portable toilets, I find that Mr. Higgs did not reasonably believe that it revealed a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health. Mr. Higgs' testimony in this regard was that he knew there must be some regulation that required portable toilets to be maintained periodically, but he could not identify any. He also testified that the lack of maintenance presented an "infringement of health" and was "unhealthy." It is not unreasonable for Mr. Higgs to assume that a law, rule or regulation exists that generally regulates the provision of sanitary facilities on a construction site. No evidence was presented in this proceeding, however, that demonstrated any requirement that the portable toilets be serviced on any specified time schedule. Consequently, I cannot find that Mr. Higgs' disclosure that the toilets had not been serviced over the preceding weekend reveals a "substantial" violation of any law, rule or regulation, even assuming the existence of a law, rule or regulation generally regarding sanitary facilities. Furthermore, without any evidence regarding the condition of the portable toilets at the time of the disclosure, Mr. Higgs' testimony alone fails to meet his burden of establishing that their condition presented a "substantial and specific" danger to employees or public health.

Because Mr. Higgs has not met his burden of establishing that he reasonably believed these disclosures revealed a substantial violation of law, rule or regulation, or a substantial and specific danger to employees or to public health, these disclosures do not comport with the description of protected activity under 10 C.F.R. § 708.5. Therefore, I

---

[4] As I noted in section II.A.3 above, at the time of his disclosures, it appears that Mr. Higgs was less focused on the danger or violation of rule inherent in the failure to wear safety vests and more concerned that the rule was being enforced in a "biased" manner, in that some workers were required to wear safety vests, while others were not. *Id.* at 20-21, 52. As the evidence has established, the alleged inconsistency in TEP's application of the protective clothing rule was merely a matter of perception and did not support a reasonable belief that its disclosure revealed a substantial violation of a law, rule or regulation or a substantial and specific danger to employees or public health.

find that Mr. Higgs has not engaged in activity protected from retaliation under that provision of the Part 708 regulations.

IV. Conclusion

As set forth above, I have concluded that the complainant has not met his burden of establishing by a preponderance of the evidence that he engaged in an activity protected under 10 C.F.R. Part 708. After a thorough review of the evidence offered in this proceeding, I find that Mr. Higgs made two disclosures that are not protected under Part 708 because he did not make them to his employer or any other person defined in the regulations as an appropriate person to receive a disclosure. Moreover, although Mr. Higgs made three disclosures to his employer, he could not reasonably have believed that his disclosures revealed a substantial violation of law, rule, or regulation, or a substantial and specific danger to employees or to public health. Consequently, he has failed to establish the existence of activity that would merit protection under the DOE's Contractor Employment Protection Program. Accordingly, I have determined that Mr. Higgs is not entitled to the relief he has requested in his complaint.

It Is Therefore Ordered That:

(1) The request for relief filed by Frederick L. Higgs under 10 C.F.R. Part 708 on December 7, 2006, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: November 8, 2007

May 21, 2008

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision
Motion To Dismiss

Name of Case:	Richard L. Urie
Dates of Filing:	May 15, 2007 July 19, 2007
Case Numbers:	TBH-0063 TBZ-0063

This Decision concerns a Complaint filed by Richard L. Urie (hereinafter referred to as "Mr. Urie" or "the Complainant") against Los Alamos National Laboratory (hereinafter referred to as "LANL" or "the Respondent"), his former employer, under the Department of Energy's (DOE) Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708. At all times relevant to this proceeding, LANL was a DOE contractor operating in Los Alamos, New Mexico. It is the Complainant's contention that during his employment with LANL, he engaged in protected activity and, as a consequence, suffered reprisals by LANL. Among the remedies that the Complainant seeks are reinstatement, back pay, and reimbursement for legal and other expenses. As discussed below, I have concluded that Mr. Urie is not entitled to the relief that he seeks.

I. Background

A. Regulatory Background

The DOE established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). The Program's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit retaliation by a DOE contractor against its employee because the employee has engaged in certain protected activity, including:

> (a) Disclosing to a DOE official, a member of Congress, . . . [the employee's] employer, or any higher tier contractor, information that [the employee] reasonably believe[s] reveals—
>
> (1) A substantial violation of any law, rule, or regulation;

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

(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority.

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

An employee who believes that he or she has suffered retaliation for making such disclosures may file a complaint with the DOE. It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets this burden of proof, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." *Id.*

B. Factual Background

The following facts are not in dispute. Mr. Urie is an experienced industrial hygienist who began working in LANL's Emergency Operations Division (EOD) in October 2003. He was the Team Lead for the Biological Emergency Support Team (BEST), which was a deployable air monitoring team that performed work for the U.S. Department of Homeland Security and other governmental organizations. During his tenure in EOD, the Complainant reported to William J. Flor, a group leader. During the period relevant to this case, Mr. Flor reported to Beverly A. Ramsey, the Acting EOD Director.

In the spring of 2005, Mr. Urie was transferred to the respondent's Health, Safety and Radiation Division (HSR). These employees were deployed, as needed, to do projects for other LANL offices. The complainant reported to Phillip Romero, who in turn reported to Barbara Hargis. Ms. Hargis' supervisor was John McNeel. During the period from February 6, 2006, until his departure from LANL in April 2006, Mr. Urie was detailed to Ms. Hargis. In May 2006, the Complainant began working for another company, Kellogg, Brown & Root, LLC (KBR). During his brief tenure with KBR, Mr. Urie worked on a project involving a LANL subcontractor, KSL Services Joint Venture (KSL). Mr. Urie left KBR in June 2006.

C. Procedural Background

On July 17, 2006, Mr. Urie filed a Part 708 Complaint with the Manager of the DOE's Office of Employee Concerns Program at the National Nuclear Security Administration Service Center in Albuquerque, New Mexico. LANL filed a response to this Complaint, conducted its own investigation, and then issued a report dated February 15, 2007. The Complaint was not resolved, and the Complainant requested that it be forwarded to the Office of Hearings and Appeals (OHA) for an investigation and hearing. The Employee Concerns Program Manager forwarded the Complaint to OHA on February 22, 2007, and the Acting OHA Director appointed an investigator. The OHA investigator interviewed Mr. Urie and three LANL employees and reviewed a large number of documents before issuing a Report of Investigation (ROI) on May 15, 2007.

On that same day, the Acting OHA Director appointed me as the Hearing Officer in this case. Given the findings of the OHA investigator, discussed in Section D below, I requested that the parties submit pre-hearing briefs concerning whether Mr. Urie's Complaint should be dismissed. [1] The parties submitted these briefs on July 9, 2007. I conducted a three-day hearing in this case in Los Alamos, New Mexico, beginning on October 15, 2007. As more fully explained below, I dismissed a portion of the Complaint before taking testimony at the hearing. Over the course of the hearing, 12 witnesses testified. The Complainant introduced 22 exhibits into the record, and the Respondent introduced 58 exhibits. On January 22 and 23, 2008, respectively, the Respondent and the Complainant submitted written closing arguments, at which time I closed the record in the case.

D. Mr. Urie's Complaint and the Report of Investigation

As previously stated, Mr. Urie alleges in his Complaint that he made protected disclosures during his tenure with EOD. Specifically, he reported to LANL management: (1) gross misconduct, sexual harassment and fraud committed by a fellow LANL employee, (2) the failure of Mr. Flor to act upon Mr. Urie's request for a "safety stand-down," and (3) the intentional deletion of the Complainant's e-mails by Mr. Flor. Mr. Urie repeated these allegations on multiple occasions, most recently in an e-mail to LANL management on January 19, 2006.

In retaliation for making these disclosures, Mr. Urie alleges that LANL management: (1) failed to take action to stop sexual harassment and gross misconduct toward Mr. Urie, (2) cancelled training that he was to take part in, (3) failed to compensate him for 27 weekend and holiday days worked, (4) deleted a number of his e-mails, (5) did not return his security questionnaire until after several requests, (6) initially refused to transfer him from the EOD, (7) created a hostile working environment by failing to give him work, which eventually forced him to resign from LANL, (8) forced him to resign from a subsequent job by communicating to the subsequent employer that the Complainant was a whistleblower, and (9) gave a negative reference to a prospective employer. As relief for these alleged retaliations, the Complainant requests reinstatement, back pay, reimbursement of legal expenses, restoration of time toward retirement, and an opportunity for advancement. *See* July 15, 2006, letter from the Complainant to Eva G. Brownlow, DOE Employee Concerns Program.

After reviewing this Complaint, interviewing Mr. Urie and three LANL employees and examining a large number of documents, the OHA investigator concluded that Mr. Urie had disclosed a number of matters to LANL management which were "probably protected disclosures." ROI at 8. However, the investigator also concluded that "Mr. Urie has not shown, by a preponderance of the evidence, that the Contractor took the alleged adverse actions or, if the Contractor took the actions, the actions

---

1/ Specifically, I asked them to address the issues of whether that portion of the Complaint relating to alleged retaliations that occurred prior to Mr. Urie's transfer to HSR in March 2005 should be dismissed as untimely, whether those retaliations are related to the post-March 2005 alleged retaliations or to the relief requested by Mr. Urie, whether LANL retaliated against Mr. Urie by withholding work assignments, whether his March 2006 resignation from LANL was "forced," whether LANL took retaliatory actions against the Complainant subsequent to his resignation and, if so, whether those actions were covered under the Part 708 regulations. *See* May 17, 2007 letter to Mr. Urie and to Pablo Prando, Counsel for LANL.

are relevant to the instant complaint." ROI at 9. With regard to the Respondent's alleged retaliations against the Complainant during his tenure in EOD, the OHA investigator opined that they "do not warrant further consideration" because "they have a tenuous relationship to the principal alleged retaliations (*i.e.*, the withholding of work and the related "forced" resignation from his position in HSR) and to the request for relief," and are time-barred. In this regard, the investigator noted that under 10 C.F.R. § 708.14, an employee has 90 days from the alleged retaliation to file a complaint, and that over a year had elapsed between the alleged retaliations that occurred prior to Mr. Urie's transfer from EOD in March 2005 and the filing of the Complaint. ROI at 10. With regard to the alleged retaliations that occurred after the Complainant's transfer to HSR in March 2005 (*i.e.*, the "forced" resignation from LANL in April 2006 caused by LANL's failure to assign him sufficient work and LANL's alleged negative references to two employers), the OHA investigator concluded that Mr. Urie had not established, by a preponderance of the evidence, that they occurred, or, if they did occur, that they were covered under the Part 708 regulations.

E. LANL's Motion to Dismiss

As previously mentioned, after reviewing the ROI, I requested that the parties submit briefs concerning whether Mr. Urie's Complaint should be dismissed. Considering LANL's brief as a Motion to Dismiss (Case No. TBZ-0063), I issued an oral ruling on this Motion at the beginning of the hearing. Hearing Transcript (Tr.) at 13-16. Specifically, I determined that LANL's Motion should be granted as to that portion of the Complaint pertaining to the alleged retaliatory actions that took place prior to Mr. Urie's transfer to HSR in March 2005. I concluded that earlier alleged retaliations had a "tenuous relationship to later alleged retaliations," including the primary claim of "forced," or constructive discharge, and "no meaningful relationship" to the requested relief. I reached these conclusions in part because the LANL management that allegedly retaliated against Mr. Urie during his tenure in EOD (*i.e.*, Mr. Flor and Dr. Ramsey) were not the ones who allegedly withheld work from Mr. Urie and allegedly forced him to resign from his position in HSR . I further found that "no useful purpose would be served by resolving those issues on a more complete record," and consequently, I dismissed that portion of the Complaint pertaining to the alleged retaliations prior to Mr. Urie's transfer to HSR in March 2005. Tr. at 14. [2]

However, I denied the Respondent's Motion with regard to that portion of the Complaint concerning the alleged constructive discharge of Mr. Urie by LANL in April 2006 and the related issue of whether LANL retaliated against the Complainant by withholding work assignments. I concluded that unresolved issues of fact remained regarding these claims, Tr. at 17, and that the goals of the

---

2/ I also agree with the OHA investigator that this portion of the Complaint should be dismissed as untimely. Under § 708.14 of the regulations, complaints must be filed within 90 days of the date that the complainant knew, or should have known, of the alleged retaliation. Mr. Urie filed his Complaint on July 17, 2006, more than 16 months after the alleged pre-March 2005 retaliations. The Complainant has not presented any justification for this lengthy delay.

Part 708 Contractor Employee Protection Program would best be served by resolving these issues on a more complete record. [3] Tr. at 15-16.

I also declined to dismiss at that time the portion of Mr. Urie's complaint having to do with the alleged retaliations that occurred after the Complainant left the Respondent's employ. I observed that the question of whether post-employment alleged retaliations were covered under the Part 708 regulations appeared to be "a question of first impression in our Office," and I stated that I wanted "further time to consider the matter and to do it on a more complete factual record." Tr. at 16.

II. Analysis

As stated in Section I.A above, in order to prevail in a Part 708 proceeding, an employee must show, by a preponderance of the evidence, that he made a protected disclosure or engaged in protected behavior, and that this was a contributing factor to one or more alleged acts of retaliation by the contractor against the employee. For the reasons set forth below, I find that Mr. Urie did make protected disclosures. However, I conclude that LANL did not retaliate against him. I therefore need not address the issue of whether the protected disclosures were a contributing factor to any retaliation, and I will accordingly deny the Complainant's request for relief.

A. The Protected Disclosures

As previously discussed, an employee of a DOE contractor makes a protected disclosure when he or she reveals to that employer, a higher-tier contractor, a DOE official, a member of Congress, or any other government official with oversight authority at a DOE site, information that the employee reasonably believes reveals (i) a substantial violation of a law, rule or regulation; (ii) a substantial and specific danger to employees or to public health or safety; or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a).

Based on these standards, I find that Mr. Urie's January 19, 2006, memorandum to Mr. Romero and Mr. McNeel, in which he states that Mr. Flor knowingly and deliberately ignored a request for a safety stand-down, thereby jeopardizing the safety of his personnel, constitutes a protected disclosure. Complainant's Exhibit 15.

With regard to this allegation, the record shows that the Complainant requested this stand-down because he believed that LANL had not supplied some of its employees with equipment and training called for under guidelines promulgated by the Center for Disease Control that would properly protect the employees from possible exposure to biological or chemical hazards. Complainant's Exhibit 4. Given these guidelines and the Complainant's training and experience in this area, he clearly had a reasonable belief that this disclosure concerned a substantial and specific danger to LANL employees.

With regard to the other alleged disclosures in Mr. Urie's January 19, 2006, e-mail, I have examined them in detail and I find that none of the other matters raised by Mr. Urie rise to the level of a "protected disclosure" under 10 C.F.R. § 708.5(a).

3/ For the same reasons, I also denied LANL's Motion for Partial Summary Judgement. Tr. at 16-17.

B. The Alleged Retaliations

Under the Part 708 regulations, "retaliation" means "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information" or participation in protected conduct as described in 10 C.F.R. § 708.5.

In his Complaint, Mr. Urie alleges three post-March 2005 retaliations. First, he claims that LANL constructively discharged him from his position in April 2006. Second, he alleges that after his departure from LANL, Dr. Ramsey gave a negative reference to Dynamic Corporation, a company with whom Mr. Urie was seeking employment. Finally, the Complainant contends that he was constructively discharged from a position with a subsequent employer, KBR, because a LANL employee informed KBR that Mr. Urie was a whistleblower.

1. The Alleged Constructive Discharge

Mr. Urie claims generally that the Respondent created a hostile work environment by providing him with a substandard physical working environment, by not communicating with him, and by withholding work from him. I will address each of these claims in turn.

a. Substandard Physical Working Environment

Mr. Urie contends that he was forced to work under substandard physical conditions toward the end of his tenure in HSR. Specifically, he testified that after his return to LANL at the end of November 2005 from approximately six weeks of unpaid leave (during which he worked for KBR in Iraq), he found out that he had been moved from his office to a cubicle, that he had no trash can, and that his computer was "in pieces." Hearing Transcript (Tr.) at 187-189. These conditions continued for an unspecified period of time, and there is nothing in the record to contradict these claims. However, it does not appear that Phillip Romero, Mr. Urie's Group Leader, knew of the situation with the Complainant's computer, Tr. at 556-557, and there is nothing in the record to indicate that he knew about Mr. Urie's lack of a trash receptacle. Moreover, an e-mail sent by Mr. Urie from a LANL work station would seem to indicate that he had access to a working computer as of January 3, 2006, Tr. at 310, Respondent's Exhibit (Resp. Ex.) 14, and Ms. Hargis has stated that when Mr. Urie began working for her in February 2006, he was provided with a new computer. Resp. Ex. 32, tab 86H (Statement of Barbara Hargis).

b. Management's Lack of Communications with Mr. Urie

Second, the Complainant contends that LANL management was not communicating with him during this period. Tr. at 26. It does appear that after his return from Iraq at the end of November 2005, there was little or no communication from management to Mr. Urie until January 2006 despite at least one instance in which he complained to Mr. Romero that he needed work. Tr. at 555. However, it is also apparent that Mr. Urie did not have a working computer during this period, which, of course, would make it difficult to receive e-mails. Also, Mr. Romero explained that the pace of work at the laboratory tended to slow in the time leading up to the holidays, and he indicated that this was why he did not respond to Mr. Urie's communication about needing work. Tr. at 556. The record does indicate that Mr. Romero and Ms. Hargis did communicate with Mr. Urie to some extent after January 1, 2006.

Mr. Romero's communications with the Complainant in the early part of 2006 primarily concerned Mr. Urie's announced intent to resign from LANL for personal reasons, issues regarding time and attendance, and Mr. Romero's concern with Mr. Urie's personal problems. In a December 22, 2005, e-mail to Mr. Romero (with copies to Mr. McNeel and four other employees), Mr. Urie stated

> Friends, I have been at Los Alamos for five years now and find that I have failed miserably with my personal and career goals. Those of you that know me, understand that I really never fit well with government work. I respectfully submit my resignation. I will be in tomorrow to begin processing and follow up after the holidays. Please cancel my Q clearance processing - never felt right about the intrusions. I understand that my absenteeism of late is unaceptable [*sic*]. I beg your indulgence, as my family life is a disaster and I have been out of the home, trying to sort things out. It is very difficult to face anyone at this time.

Respondent's Exhibit 1.

In a January 3 e-mail, Mr. Urie wrote

> Folks, it has been a real pleasure to work with each of you. However, due to personal reasons, I have submitted my resignation and my last day will be January 20th, to allow for transitional needs. I plan to go back into private consulting (either NM or Colorado based), cauz [*sic*] despite all the talent here, the best boss I ever had was me! I apologize for the disruptions, as I had planned to make a go of it here, but circumstances beyond my control are in effect. I look forward to these last few weeks with you.

In an undated e-mail sent to Mr. Urie sometime between January 3 and January 9, 2006, Tr. at 559, Mr. Romero said

> We have been trying to get a! hold [*sic*] of you for your Time and Effort, please note I need to approve time for this past week by 9:00 and need your time. Thus, please call me or Arlene so we can enter your time, hope things are going okay with you and also did you get a chance to ever talk to Barbara Hargis and John McNeel.

On January 9, 2006, Mr. Urie responded

> Phil, I need to back out my time from last Thursday/Friday. As a fellow professional, I am placing myself on unfit for duty status due to depression - no exageration [*sic*]. Last week I was contacted by UC payroll and informed that the IRS is garnishing 95% of my take home pay effective immediately stemming from a 1995 business/divorce tax issue. In addition, if I am to terminate, the IRS will garnish my retirement/savings upon liquidation. In short, I am F'd. I hit the emotional wall and am seeking medical and legal help this week. I very much want to speak with John and Barbara, but frankly I need some time to regain some sense of control.

On that same day, Mr. Romero responded

> First hang in there. I know these are difficult times but rest assured I am here to help in any way I can. Please let me know how things are proceeding. In terms of your time I believe you've expended your vacation and sick leave which were charged to

> cover this past pay period. In addition I believe we had Arlene enter LWOP for a day or two but if we need to change it we can. Please call me so we establish a path forward for reporting your time in the immediate future, in addition you may want to talk with an HSR-2 fitness for duty coordinator or someone in the employee assistance program. In either case please take care of your self and let me know if there is anything we can do on this end.

Respondent's Exhibit 2. In an e-mail sent to Mr. McNeel the next day, Mr. Romero indicated that he had made "numerous attempts" to contact the Complainant.

> Not sure you got the opportunity to see the message from Rich Urie yesterday, after numerous attempts I finally connected with him via his home e-mail address. It appears he is not doing well and I am concerned, please note I responded to his message but it may be a good idea if you could send him a reply as well. As I mentioned I am concerned for his safety and I indicated to him that help is available from HSR-2 "FFD" or the "EAP" sources.

Respondent's Exhibit 49.

In a January 19, 2006, e-mail to Mr. Urie, Mr. Romero wrote

> Need to talk to you, hope things are okay. Specifically I need to ask you a couple of questions regarding time and effort and potential options based on your circumstances and desires. Again hope things are going okay and please call me as soon as you get this message. You can call me at home as well 455-3430 or work 667-8332.

Respondent's Exhibit 15.

At the hearing, Mr. Romero testified that he did not receive Mr. Urie's December 22 e-mail until after the holiday break in early January, and that the Complainant was then absent from the office "on various types of leave through most of January." On the "twenty-second or twenty-third," he "talked to Mr. Urie about potential other opportunities, and tried to get him back into the workplace in some productive manner." Tr. at 497. He did this, he said, because he didn't "want to lose a good resource," and he was concerned about the Complainant's well-being. Tr. at 564.

The Complainant's communications with Ms. Hargis were more limited in nature, as was the period of time that he reported directly to her. The record indicates that she met with Mr. Urie on January 23, 2006, to discuss the duties that she allegedly wanted him to perform. During the period from January 25 through February 3, Mr. Urie was on work-related travel and, on February 6, he began working under Ms. Hargis' direct supervision. Tr. at 695-696, Respondent's Exhibit 3. Approximately six weeks later, beginning on March 21, Mr. Urie took an extended "leave without pay," after which he left LANL. Tr. at 712, Respondent's Exhibit 3. During the period between February 6 and March 21, there is no evidence of any e-mails from Ms. Hargis to Mr. Urie. However, she stated that although she "didn't routinely have one-on-one meetings with Urie . . . I would sit with him on occasion . . . ." Statement of Barbara Hargis, Respondent's Exhibit 32. The record does not indicate what was discussed on these occasions.

In all, there was a lack of communication with the Complainant after he returned from Iraq in late November 2005 until January 2006. However, it is undisputed that the pace of work tended to slow

during the period leading up to the holidays, and the Complainant apparently did not have access to a working LANL computer during this period. I believe that these factors contributed to the lack of communications. During the period between January 2 and January 23, 2006, the record indicates that the Complainant was away from the office on various types of leave for fourteen days, making communications more difficult. Respondent's Exhibit 3. However, Mr. Romero was able to reach Mr. Urie on several occasions, as set forth above. Ms. Hargis' communications with Mr. Urie appear to have been limited primarily to her meeting with the Complainant on January 23, and it is the substance of that meeting that is central to the primary factor in the alleged hostile work environment: that toward the end of his tenure with the Respondent, LANL management, and particularly Ms. Hargis, withheld work from him, thereby forcing him to resign.

c. Withholding of Work

Mr. Urie's tenure in HSR of approximately one year was marked by periods of very heavy work and periods that were relatively "slow." Tr. at 270-277; 298-302. After his return from Iraq at the end of November 2005, however, and lasting until Mr. Urie went on leave on December 19th, it appears that the pace of work was not slow, but non-existent. Tr. at 141, 182, 189. The record also indicates that Mr. Romero was generally aware that Mr. Urie did not have sufficient work during this period. Tr. at 499, 555.

After the December 2005 holidays, as indicated above, the Complainant was on various types of leave on almost every working day between January 2nd and January 23rd. [4] After meeting with Ms. Hargis on the 23rd, Mr. Urie left on LANL-sponsored travel on January 25th, returning on February 3rd. Respondent's Exhibit 3. During at least a portion of this time, he was working "12 hr graveyard shifts." Respondent's Exhibit 17.

Upon his return, Mr. Urie's assignment under Ms. Hargis' supervision began. The two met on January 23rd to discuss the duties that Mr. Urie was to perform. The substance of that meeting is in dispute. Ms. Hargis testified that

> The assignment, the work that I needed to get done in terms of what I was trying to get done for the Laboratory, the Laboratory, in . . . some recent assessments, had received some deficiencies related to integrated work management. That's the way we get our work done at the lab.
>
> And one of the corrective actions that we had committed to Headquarters and others was that we would set up what we call and [*sic*] IWM Mentoring Program. So, that's Integrated Work Management mentors. So, what we did was we ran a pilot in C Division and in MST Division in which we assign some of our ES and H people into groups. And . . . their main job was to actually help the scientists and the researchers prepare their integrated work management documents to get through the process, and to do a better job of identifying hazards and controls.

4/ During her testimony, she stated that she met with the Complainant on "January 20 or 23." However, Mr. Urie was absent from work, on "leave without pay" on January 20. Respondent's Exhibit 3.

> So, when I met with [Mr. Urie], what we talked about was . . . . This pilot had been successful, and we wanted to proliferate it across the laboratory. So, what we needed to do was to set up a formal description of . . . the training that was needed, and whether we needed a qualification, and to start reaching out to some of the mentors to get an understanding of what they were doing out there, and then to finally identify champions in other divisions that we could start linking with so we could actually spread it across the laboratory.

Tr. at 689-690. More specifically, she stated that "he started to work on the project, reviewing material and touching base with other folks." Memorandum of telephone interview with Ms. Hargis, dated April 25, 2007. Ms. Hargis testified that the material that he reviewed "was the integrated work management - - It was called the M300, and it was the requirement out in the laboratory on how people were to do work." Tr. at 690.

Mr. Urie's recollection of this meeting and its aftermath was substantially different. He testified that

> [w]hen I met with Hargis . . . she initially said, "Here's a leader," and I think it was the IWD thing . . . and it was all . . . roughed out, and she said, "Please look . . . this over. Make it . . . readable. You know, polish it and . . . give me your ideas."
>
> ***
>
> And so I knocked it out . . . in about a week, four or five days. I . . . made changes electronically. I, I did physical changes, and then I sent her an e-mail with the changes, requesting feedback. "Would you like me to do an executive summary?" Because it was a big, complicated thing. And I said, "how do you feel about me extrapolating this thing?" And I didn't hear anything, so I put a sticky note on it with some comment and questions, and I walked up to her office and I put it in her in-box, and I left. And I never heard anything for two months, or nearly two months.

Tr. at 213. What is undisputed is that Mr. Urie was directed to review and "polish" a document. The record indicates that he did so, and placed it in her in-box on February 15, 2006, nine days after he began working for Ms. Hargis. *Id.*, Complainant's Exhibit 16.

d. Analysis

The OHA has previously found that a constructive discharge can form the basis for relief under Part 708. *See Richard Sena*, Case No. VBA-0042, November 1, 2001 (*Sena*). In that case, the OHA Director looked to federal cases brought under Title VII of the Civil Rights Act of 1964 for guidance in determining whether the Claimant in that case had established that a constructive discharge had occurred. [5]

5/ Specifically, OHA cited *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995) (*Martin*) and adopted its holding that, in order to show a constructive discharge, a Claimant "must allege and prove two elements: (1) the intolerableness (hostility) of the working conditions, and (2) that the employer created the hostile environment in order to cause the employee to resign." *Sena, citing Martin*, 48 F.3d at 1354. However, in *Pennsylvania State*

(continued...)

In one such case, *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004) (*Suders*), the U.S. Supreme Court stated that "[t]he inquiry [as to whether a constructive discharge has occurred] is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Suders*, 124 S.Ct. at 2351. Administrative agencies have also applied this "reasonable person" standard in determining whether "whistleblowers" have been constructively discharged in retaliation for their protected activities. *See, e.g., Heining v. General Services Administration*, 68 M.S.P.R. 513 (Merit Systems Protection Board, August 22, 1995) ; *See also Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1998) (*Harris*) (working environment must be severely and pervasively hostile, one that a reasonable person would find abusive, and one that the Complainant perceives to be so). After reviewing these standards and the record as a whole, I find that Mr. Urie has failed to show, by a preponderance of the evidence, that his working conditions were intolerable. I further conclude that there is insufficient evidence to show that a "reasonable person" would have felt compelled to resign. With regard to the alleged intolerability of his working conditions, the record shows that Mr. Urie's environment in HSR was not severely and pervasively hostile, and that the conditions of which he complained at the hearing were remedied eventually by LANL management.

In fact, the evidence indicates that Mr. Urie was treated well and with compassion by Mr. Romero. As an initial matter, the only performance evaluation that Mr. Romero wrote for the Complainant, an undated one covering the period from August 2004 through July 2005, was a positive one. Respondent's Exhibit 47. Moreover, when Mr. Urie was experiencing personal difficulties in January 2006, as set forth above, Mr. Romero expressed his concern on multiple occasions and attempted to reach out to him to offer any assistance that he could. Mr. Romero's supportive posture is also reflected in the following exchange of e-mails, dated September 27, 2005. Mr. Urie wrote

> Phil, I continue to receive direct requests from the division office for special duties, which circumvent the standard chain of command through Jeff, Sean, etc. I am meeting with Jeanne Ball and Dan Cox this AM and thought I should suggest that they either run these through Sean/jeff or set me aside of that line management, so to stabilize reporting, auditing, and so forth. Any thoughts?

Mr. Romero responded, "Rich, I concur let me know their reaction and if I need to intercede on your behalf." Respondent's Exhibit 44. It is true that after Mr. Urie returned from a month-and-a-half in

---

5/ (...continued)
Police v. Suders, 124 S.Ct. 2342 (2004), discussed in the body of this Decision, the U.S. Supreme Court cast serious doubt on the validity of *Martin*'s requirement that Claimants must prove that the employer created the hostile environment in order to cause the employee to resign. In describing the Complainant's burden of proof in a constructive discharge case brought under Title VII, the Court used an objective, "reasonable person" standard, with no mention of any requirement that the Complainant show that the employer created the hostile environment in order to force the employee to resign. *Suders*, 124 S.Ct. at 2351. Indeed, at least one federal court has found that *Suders* overruled this requirement. *Cecala v. Newman*, 532 F.Supp. 2d 1118, 1168. I will therefore apply the *Suders* standard in determining whether Mr. Urie was the victim of a constructive discharge.

Iraq, a "leave without pay" that was approved by Mr. Romero at Mr. Urie's request, Respondent's Exhibit 45, Tr. at 540-542, he experienced a lack of work and communications, and substandard working conditions during the period leading up to the December 2005 holidays. However, as previously explained, communications improved and the substandard conditions were corrected in the new year. The record further indicates that the lack of work was due to the impending holidays, with Mr. Urie receiving an assignment in January 2006 after his return from various types of leave. Respondent's Exhibit 3.

The record also does not support Mr. Urie's contention that working conditions under Ms. Hargis were so intolerable that a reasonable person would have felt compelled to resign. As an initial matter, I did not find credible the Complainant's contention that the only work arising out of the January 23rd meeting with Ms. Hargis was to review and "polish" a single document. In an e-mail sent on that day to Mr. Romero, Ms. Hargis and others, Mr. Urie said, in pertinent part,

> Phil/Alice; per our discussion last week, I have elected to continue as an employee of UC-LANL and pursue new duties within the HSR Division. Per your request, I have contacted the Q Clearance representative and he is checking on the status of my L/Q paperwork. I recieved [*sic*] a call today from P-21 (Ricki Lopez) and am responding to a request for a short IH evaluation, which will be completed by mid morning tomorrow.
>
> Regarding future work, given a choice in the matter, I believe I am well suited to perform the duties outlined by Barbara Hargis in the IWM Mentoring Program and request the assignment.

Respondent's Exhibit 16. The clear implication of this e-mail is that an assignment was offered, and accepted, that involved certain duties regarding the mentoring program. I do not believe that Mr. Urie would have used this language if the work assigned consisted solely of editing a single document. Ms. Hargis indicated that Mr. Urie was also assigned to contact other employees in furtherance of the purposes of the program, *see* Memorandum of telephone interview with Ms. Hargis, dated April 25, 2007, and I find this statement to be credible. The record does not indicate that Ms. Hargis withheld work from Mr. Urie.

Furthermore, I believe that a reasonable person in the Complainant's position, who was not intent on leaving LANL, would have informed Mr. Romero of his lack of work in the hope of receiving additional assignments. Indeed, the record indicates that during a 2005 lull in Mr. Urie's workload, the Complainant did inform Mr. Romero and another LANL manager, and additional work was assigned. Tr. at 276-277. However, Mr. Urie did not inform Mr. Romero that he was not receiving sufficient work from Ms. Hargis. Tr. at 566.

It is true that Ms. Hargis was made aware of "slack" in the individual's schedule several weeks before he left LANL on unpaid leave, and did not assign him additional work. Respondent's Exhibit 20, 21; Tr. at 711. However, Ms. Hargis explained, credibly, that she believed that Mr. Urie would be leaving LANL soon and that she did not have any short-term, "filler" work that she could assign him in the interim. Tr. at 711. Ms. Hargis' belief finds support in the Complainant's e-mail to her and to Mr. McNeel dated February 22, 2006.

> Barbara/John: I have not yet heard back from KBR on the vacancies I am under consideration for (ES&H Manager for Middle East Ops and Middle East IH),

> although I expect to be traveling to DC for a day in the near future for a final interview. I will let you know as soon as things solidify. If I should accept a position, *I hope to leave LANL on good terms and leave the door open for a possible return in a year.* In that regard, I am concurrently working on the manufacturing of equipment developed by LANL under an approved no conflict of interest status. Is an Entrepreneur Leave of Absence a possibility in view of the contract change?
>
> *Thank you for your patience, as my finances are largely driving my interest in Iraq.*

Respondent's Exhibit 18 (italics added). I find it difficult to believe that the Complainant would write of leaving LANL on good terms and possibly returning in a year if he was being subjected to a work environment that was so severely and pervasively hostile that he was being forced to resign. Instead, this e-mail clearly suggests that he was leaving for what he considered to be a better opportunity with KBR. Based on the foregoing, I find, by a preponderance of the evidence, that Mr. Urie was not the victim of a constructive discharge.

2. The Alleged Post-Employment Retaliations

As previously stated, the Complainant also alleges that LANL retaliated against him after his departure from the Lab. Specifically, he alleges that after his departure from LANL, Dr. Ramsey gave a negative reference to Dynamic Corporation (Dynamic), a company with which the Complainant was seeking employment. In addition, Mr. Urie claims that he was forced to resign from a subsequent position with KBR because a LANL employee informed KBR that Mr. Urie was a "whistleblower." I need not determine, at this juncture, whether post-employment retaliations such as those alleged here are covered by the Part 708 regulations, because, as explained below, there is clearly insufficient evidence to support these allegations.

a. The Alleged Negative Reference

With regard to the alleged negative reference, the record indicates that subsequent to Mr. Urie's departure from LANL, Diana MacArthur of Dynamic contacted Dr. Ramsey to obtain information on several former LANL employees for possible future employment at Dynamic. Tr. at 592, 629-630. Two of the employees had already found jobs, so the one remaining employee was Mr. Urie. Tr. at 603. Ms. MacArthur testified that she discussed the qualifications that she was looking for in a prospective employee, that Dr. Ramsey informed her that Mr. Urie had those qualifications, and that she did not say anything critical of the complainant. Tr. at 593, 600-601. Dr. Ramsey testified that Ms. MacArthur informed her about the types of people Dynamic was looking for, and that the only information she provided about Mr. Urie was who he was, what his duties had been at LANL, and that he was a Certified Industrial Hygienist. Tr. at 630.

The Complainant makes much of the fact that, during LANL's internal investigation of Mr. Urie's Complaint, Dr. Ramsey stated that she told Ms. MacArthur "to check references carefully just as she would normally do," Respondent's Exhibit 32, Tab K. Mr. Urie suggests that this statement, when considered in conjunction with the fact that the other former employees that Ms. MacArthur asked about were unavailable, was made by Dr. Ramsey in order to cause Ms. MacArthur to draw unspecified negative inferences about Mr. Urie that would eventually lead to his failure to get the job.

I do not agree. As an initial matter, the statement complained of is neutral on its face. When asked during the hearing if she believed that Ms. MacArthur had asked her, a friend, about the former LANL employees in order to obtain more detailed information, she explained that she did not believe so, "because you simply do not walk across that friendship line to talk about individuals. You've got to go through your due diligence from one corporation to another and check people's references in the appropriate way." Tr. at 632. Moreover, the fact that Ms. MacArthur, who was able to witness Dr. Ramsey's intonations and facial expressions, later invited Mr. Urie to travel at company expense back to Dynamic headquarters in the Washington, D.C. area for further interviews suggests that there were no negative connotations to Dr. Ramsey's remarks.

It is true that after interviewing with Dynamic headquarters officials, Mr. Urie testified, he was informed that the company "didn't have any openings." Tr. at 227. Then, approximately one year later, he added, he saw advertisements for positions with Dynamic at Johnson Space Center, and submitted an application. He got a call from Dynamic's HR Director stating that they wanted to fly him in for an interview. He informed the HR Director of his earlier interview with a specific Dynamic official in the Washington, D.C. area and said that he was very interested in interviewing, but that he did not want to repeat his earlier experience of flying out for an interview just to be told that no jobs were available. Mr. Urie then received an e-mail from the official he interviewed with in the Washington, D.C. area saying that there were no positions available. Tr. at 227-228.

However, Ms. MacArthur adequately and credibly explained these occurrences. She testified that she was informed by the Dynamic headquarters interviewing officials that the reason that Mr. Urie was not offered a job is because the position that he was seeking required a "Top Secret" security clearance, and he did not have a security clearance. Tr. at 594. She explained that she did not ask Mr. Urie whether he had such a clearance before she invited him to company headquarters for further interviews because she was not one of Dynamic's regular recruiters and was therefore "not a very good interviewer." Tr. at 609. She assumed that Mr. Urie already had a security clearance because of where he was working and the field he was working in. Tr. at 610. Regarding the positions at the Johnson Space Center, Ms. MacArthur testified that Mr. Urie was not hired because they were looking for "entry-level people; you know, just out of college, maybe a year or so, that type of experience." Tr. at 596. There is nothing in the record that would indicate that these explanations were mere pretexts, and I cannot conclude, based on these facts, that Dr. Ramsey's suggestion that Ms. MacArthur follow normal procedures in evaluating applicants was intended as some type of warning about Mr. Urie. I therefore conclude that LANL did not retaliate against the Complainant by giving him a negative reference.

b. The Alleged Constructive Discharge from KBR

Equally unavailing are the Complainant's claims that he was constructively discharged from a subsequent job with KBR, and that LANL should be held liable for this discharge. Specifically, he alleges that he was forced to resign from KBR because LANL informed KBR of the individual's status as a whistleblower, and a KBR official subsequently informed Mr. Urie that she didn't think that his employment with KBR "was going to work." Tr. at 233.

The Complainant explained that after his hiring in May 2006, he traveled from New Mexico to KBR's offices in Arlington, Virginia at company expense in order to begin working. While there, he said, he informed KBR that he might have trouble getting a corporate credit card from the

company's provider, American Express, because he owed them approximately $30,000 stemming from a failed business venture prior to his employment with LANL. KBR allegedly told Mr. Urie to apply anyway, and told him that they had other options if his application was denied. Mr. Urie then returned to New Mexico to move into a new house, but did not have sufficient funds to return to KBR. KBR became upset at Mr. Urie's failure to return and at difficulties that they had had in contacting him, he stated. Prior to his return to KBR, Mr. Urie learned that his application for a KBR American Express Card had been denied. When he returned the following week, he continued, Mr. Urie was told that his employment with KBR would not "work out" because of his credit problems. *See* memorandum of April 26, 2007 telephone conversation between Mr. Urie and Janet Freimuth, OHA Investigator. However, because KBR allegedly knew of his credit problems before his application was denied and indicated to him that such a denial would not be a problem, the Complainant contends that the real reason for his inability to retain the KBR position was that LANL management informed KBR that Mr. Urie was a whistleblower, that as a result, he was forced to resign from KBR, and that LANL should be held liable for this alleged constructive discharge.

These contentions fail for several reasons. First, the relevant case law in this area focuses on the actions of the employer whose allegedly hostile environment the employee is leaving, and not on those of any previous employer. *See, e.g., Suders, Harris, Sena.* The Complainant has not cited, nor am I aware, of any legal authority that would allow me to find LANL liable under a theory of constructive discharge for Mr. Urie's departure from KBR.

Second, the record does not support Mr. Urie's claim that his resignation was forced. In a June 12, 2006, e-mail from Mr. Urie to KBR senior management, he stated

> Ladies, so we are clear on recent events, I had no choice but to terminate in view of my home purchase and moving expenses compounded by an oversight by KBR to direct pay DC expenses and house me adjacent to the office, as promised. Mistakes were made by all and a few days would have allowed me to re-calibrate my funds and work with a clear focus.

Respondent's Exhibit 23. This e-mail strongly suggests that Mr. Urie resigned because of his recent expenditures and because of travel difficulties caused by his poor credit.

Third, even if his resignation was forced, there is nothing in the record to indicate that the reason given by KBR was a pretext, or that LANL management conveyed in any way to KBR that the Complainant was a whistleblower. Mr. Urie suggests that Randy Sandoval, a LANL manager, may have informed officials of KSL, a company involved in a partnership with KBR at LANL, about the Complainant's whistleblower status, and that KSL then conveyed this information to KBR. However, the only information produced by Mr. Urie in support of this theory is that during his brief tenure with KBR, he saw Mr. Sandoval in the vicinity of KSL's offices at the LANL site, Tr. at 232. Mr. Sandoval testified that he did not recall ever talking with anyone at KSL about Mr. Urie. Tr. at 735. There is nothing in the record that would indicate that LANL management was in any way responsible for the Complainant's departure from KBR.

Given the factors mentioned above, I do not need to address the issue of whether the Part 708 regulations cover allegations of post-termination retaliations. I will, therefore, grant the Respondent's Motion to dismiss this portion of Mr. Urie's Complaint.

III. Conclusion

For the reasons set forth above, I conclude that although Mr. Urie did make protected disclosures, LANL did not retaliate against him. I therefore find that he is not entitled to any of the relief that he seeks.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Los Alamos National Laboratories on July 19, 2007 (Case No. TBZ-0063), is hereby granted with respect to that portion of Mr. Urie's Complaint concerning alleged retaliations that occurred after his resignation from the Respondent in April 2006, and is denied with respect to that portion of the Complaint concerning LANL's alleged constructive discharge of Mr. Urie.

(2) The Request for Relief filed by Richard Urie under 10 C.F.R. Part 708 is hereby denied.

(3) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: May 21, 2008

September 3, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Petitioner: David L. Moses

Date of Filing: October 2, 2007

Case Number: TBH-0066

This Initial Agency Decision involves a whistleblower complaint filed by Dr. David L. Moses ("Moses" or "the complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant was an employee of UT-Battelle, LLC, the firm employed by DOE to manage and operate the Oak Ridge National Laboratory (ORNL), where he was employed as a Senior Program Manager for ORNL's Nuclear Nonproliferation Program until May 2007. On February 23, 2007, he filed a complaint of retaliation against UT-Battelle with the DOE Office of Employee Concerns. In his complaint, Moses contends that he made certain disclosures to officials of UT-Battelle and DOE and that UT-Battelle retaliated against him in response to these disclosures. The complainant seeks monetary damages based upon his failure to receive a salary increase and his subsequent loss of employment.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. Part 708. Under the regulations, protected conduct includes:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [the] employer, or any higher tier contractor, information that [the employee] reasonably believes reveals –
>
> (1) A substantial violation of a law, rule, or regulation;

> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would-
>
> (1) Constitute a violation of a federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

Part 708 sets forth the proceedings for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. See 10 C.F.R. §§ 708.21-708.34.

B. Procedural Background

Moses filed a complaint ("Complaint") with the DOE's Oak Ridge Diversity Programs and Employee Concerns Office (DOE/OR) on February 23, 2007. DOE/OR provided a copy of the Complaint to UT-Battelle, after which Moses and UT-Battelle agreed to attempt to resolve the matter through mediation. After the parties failed to resolve the complaint through mediation, DOE/OR informed Moses that he had the option to request either a hearing or an investigation followed by a hearing. Moses requested that the Complaint be forwarded to OHA for an investigation and hearing.

The OHA investigator interviewed Moses and other ORNL employees and reviewed a large number of documents before issuing a Report of Investigation (ROI) on October 2, 2007. On that same day, the OHA Director appointed me as the Hearing Officer in this case. On October 18, 2007, I requested that the parties submit statements discussing the ROI and specifying "the parts of the document with which you agree and those parts of the document with which you disagree." E-mail from Steven Goering, OHA, to Alan M. Parker, UT-Battelle, and David Moses, *et al.* (October 18, 2007).

On October 24, 2007, UT-Battelle filed Motion to Dismiss a portion of the Complaint as untimely filed. After considering the Motion, and replies and cross-replies thereto, I granted the Motion in part, dismissing the complaint as to one of the alleged acts of retaliation. Letter from Steven Goering, OHA, to Alan Parker, UT-Battelle, and David L. Moses (November 5, 2007).

I subsequently convened a hearing in this case in Oak Ridge, Tennessee, over a three-day period from December 11-13, 2007. Both parties submitted exhibits. UT-Battelle presented exhibits into the record which were numbered Exhibit 1 through Exhibit 22, and Moses submitted exhibits lettered Exhibit A through Exhibit Q. UT-Battelle presented eight ORNL management employees as witnesses. Moses testified on his own behalf, and also called an ORNL management employee as a witness. On January 29, 2008, I reconvened the hearing for purposes of taking the testimony of one additional witness, a DOE official, called by the individual. The parties submitted post-hearing briefs on March 20, 2008.

C. Claim of Attorney-Client Privilege Regarding Certain Hearing Exhibits

Two of the exhibits submitted at the hearing, Exhibit 22 and Exhibit A, were provided by UT-Battelle with portions redacted based upon a claim of attorney-client privilege.[1] On March 26, 2008, I ordered that UT-Battelle submit to me unredacted copies of Exhibit A and Exhibit 22 for *in camera* review and a decision as to whether the redacted information is protected under the attorney-client privilege. Letter from Steven Goering, OHA, to Alan Parker, UT-Battelle (March 26, 2008). I allowed the parties until no later than April 25, 2008, to file arguments regarding the applicability of the attorney-client privilege, after my receipt of which I closed the record in this case.

In its brief, UT-Battelle argues that "the federal common law on the attorney-client privilege should be applied" in this case, and cites the following elements of the privilege as set forth by the U.S. Court of Appeals for the Sixth Circuit:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.

Reed v. Baxter, 134 F.3d 351, 355-56 (6th Cir. 1998); UT Battelle's Motion and Brief for a Protective Order to Protect Attorney-Client Privilege Communications (April 18, 2008) at 2.

I agree with UT-Battelle that the federal common law of attorney-client privilege is applicable in this case. The Part 708 regulations provide that, while "[f]ormal rules of evidence do not apply, . . . OHA may use the Federal Rules of Evidence as a guide; . . ." 10 C.F.R. § 708.28(a)(4). The Federal Rules of Evidence state that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501.[2]

---

[1] Exhibit A was a document submitted by Moses that he had obtained from UT-Battelle.

[2] The Merit Systems Protection Board, in cases under the Whistleblower Protection Act, and the Department of Labor, under whistleblower authority analogous to the DOE's under Part 708, have both applied the federal common law in interpretations of the attorney-client privilege. *See, e.g., Grimes v. Dep't of Navy*, 99 M.S.P.R. 7, 12 (2005) (decision of Merit Systems Protection Board); *Willy v. Coastal Corp.,* No. 98-060, 2004 WL 384741, at *20 (2004) (decision of Department of Labor Administrative Review Board); *Welch v. Cardinal*

Though this office has not previously ruled on the application of the attorney-client privilege in the context of a Part 708 proceeding, we have addressed this issue in cases arising under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In those cases, applying the federal common law as to the privilege, we have found that the privilege "covers facts divulged by a client to his or her attorney, and also covers opinions that the attorney gives the client based upon those facts. The privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts." *Washington Electric Cooperative/Downs Rachlin Martin PLLC,* 29 DOE ¶ 80,264 (2006) (citing *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977)) (citation omitted).

Under the interpretation of the courts in both *Reed* and *Mead,* the attorney-client privilege protects facts communicated by a client to his or her attorney. *Reed,* 134 F.3d at 355-56 ("communications . . . by the client"); *Mead*, 566 F.2d at 254 (privilege "covers facts divulged by a client to his or her attorney"). The court in *Mead* found that the privilege also "covers opinions that the attorney gives the client based upon those facts . . . in order to protect the secrecy of the underlying facts." *Mead*, 566 F.2d at 252, 254. Thus, the privilege protects "communications by the lawyer to his client," but only to the extent that "those communications reveal confidential client communications." *U.S. v (Under Seal)*, 748 F.2d 871, 874 (4th Cir. 1984).

With these principles in mind, I have reviewed the material that UT-Battelle has claimed are protected by the attorney-client privilege. I find that certain of the material, specifically that marked "Attorney-Client Privilege 0001" in Exhibit 22, is protected by that privilege, but that the remainder of the information redacted from the two exhibits in this case is not so protected. The information I find is not protected consists of communications by counsel for UT-Battelle that I cannot find would reveal confidential facts communicated by the client, UT-Battelle, to its counsel. Unless UT-Battelle files a notice of appeal by the fifteenth day after its receipt of this initial agency decision, a copy of the information that I have found is not protected will be released to the complainant.

D. Factual Background

Moses, immediately prior to his filing his complaint, was Senior Program Manager for Nuclear Nonproliferation Programs at ORNL. Moses' whistleblower complaint is based on disclosures made in 2004 and 2005 in various messages (all by e-mail with the exception of one sent by facsimile transmission) he sent to DOE and/or ORNL officials and to a French government official regarding DOE contracting practices, and allegations made in 2006 about wasteful spending relating to a research project to use Low Enriched Uranium and Molybdenum to fabricate both proliferation-resistant research reactor fuel and targets to produce a radioactive isotope, Molybdenum-99 (Mo-99).

Bankshares Corp., No. 2003-SOX-15, 2003 WL 25316943, at *4 (2003) (decision of Department of Labor Office of Administrative Law Judges).

1. Messages from March 2004 through March 2005 and Concerns Raised by DOE Regarding Moses' Communications

In 2004 and part of 2005, Moses was the ORNL Lead Program Manager on DOE's Fissile Materials Disposition Program (FMDP),[3] a program sponsored by the National Nuclear Security Administration's (NNSA) Office of Fissile Materials Disposition (NA-26). During this period, Moses sent various e-mails to DOE officials, including Norman Fletcher, an NNSA employee who was Moses' point of contact at NA-26, and Robert Boudreau, who replaced Fletcher as Moses' NA-26 point of contact in February 2005. Ex. 1. These e-mails referenced, among other things, possible violations of the "Anti-Bribery and Books & Records provisions of the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-2," the Federal Acquisition Regulations (FAR), and the Department of Energy Acquisition Regulations (DEAR).[4]

On February 27, 2005, Moses sent a message by facsimile to Bruno Sicard (Sicard), a French representative to a multi-national effort to modify Russian VVER-1000 reactors. In the message, Moses stated that Rosenergoatom (REA), a Russian quasi-governmental firm, would not give ORNL cost and effort proposals to do work. Moses stated that, without such proposals, ORNL would be unable to create contracts that "comply with federal contracting requirements avoiding the appearance of violations of the Foreign Corrupt Practices Act." Ex. 1; Electronic Mail from David Moses to Richard Cronin, OHA (May 8, 2007) (containing full text of Moses' message to Sicard).

After learning of Moses' facsimile message to Sicard, Boudreau spoke with Dr. Lawrence J. Satkowiak, Director of ORNL's Nuclear Nonproliferation Office, to whom Moses had reported since August 2004. Boudreau expressed "concerns about [Moses] continuing to lead the Fissile Material Disposition Program," referencing Moses' message to Sicard and Moses' previous e-mails, a copy of which Boudreau e-mailed to Satkowiak. Tr. at 372.

Satkowiak discussed these concerns with Moses and decided, with Moses' agreement, that Brian Cowell, who worked for Moses, would replace Moses as FMDP Lead Program Manager, and Moses would continue to work as a Senior Advisor to the program. *Id.* at 148-49. According to Satkowiak, though DOE was "incensed" at Moses for contacting Sicard, DOE officials agreed with this new arrangement because Cowell would replace Moses as the point of contact between DOE and ORNL on matters related to the FMDP. *Id.* at 270-71.

On April 4, 2005, Satkowiak issued a memorandum announcing Cowell and Moses' new roles. Ex 2. The same day Moses sent a copy of the memorandum along with the following e-mail to Sterling Franks, an NNSA employee at the DOE's Savannah River facility:

> The reward for complaining about Norman Fletcher's ill treatment of my staff, complaining about his attempts to defraud the US government with pay-off

[3] The FMDP is a project to assist in the disposal of weapons-grade plutonium in the United States and in Russia. ORNL and Moses were working to support this project.

[4] These e-mails are described in greater detail in the October 2, 2007, ROI. As discussed below, UT-Battelle has conceded that these e-mails contained disclosures protected under Part 708. Hearing Transcript (Tr.) at 13-14.

> contracts to skim money to his friends in the Rosenergoatom International Department, and my telling our reputed French partners on VVER-1000 modifications that they need to make sure that their often expressed concerns about delays in contracting caused by Norman's promises to his REA buddies are communicated to Mr. Boudreau.

Ex. 3. Franks, concerned that the message referenced possible violation of law, forwarded the message to Kenneth M. Bromberg, Acting Assistant Deputy Administrator for Fissile Material Disposition, NNSA, on April 11, 2005. *Id.*

On April 12, 2005, Bromberg sent an e-mail message to Satkowiak stating, in relevant part, "Given his unhappiness with my staff and his unsupported allegations, I think it's time to remove David from any and all work on the Department's plutonium disposition program. I would appreciate if you would advise me what action Oak Ridge National Laboratory plans to take." *Id.* Bromberg again asked Satkowiak in an April 25, 2005, e-mail what actions were being taken with respect to Moses. *Id.* On April 26, 2005, Satkowiak responded by e-mail that Moses had been removed from "all NA-26 duties and assignments." He also stated that he had counseled Moses about his statements and that he had been "reassigned" to another activity unrelated to FMDP and NA-26. *Id.* The same day, Bromberg replied to Satkowiak's e-mail, stating, "At this point, I just want him off any of the work that NA-26 is sponsoring." Ex. 3. Also in April 2005, Moses provided to Satkowiak an 11-page document reiterating his concerns about, among other things, what he described as "[i]rregular/illegal subcontracting direction" by DOE, again referencing the Foreign Corrupt Practices Act. *See* E-mail from David Moses to Richard Cronin, OHA (May 22, 2007) (attaching copy of 11-page document); Tr. at 704-710.

2. September 6, 2006, E-mail

After Moses' removal from all work sponsored by NA-26 in April 2005, Satkowiak tried to find a project for Moses to work on. Satkowiak asked Moses to work with Jeff Binder to see if they could find work for ORNL in the DOE's Reduced Enrichment for Research and Test Reactors (RERTR) program sponsored by the NNSA's Office of Global Threat Reduction (NA-21).[5] Moses began working on a project that sought to use a LEU and molybdenum foil target in a nuclear reactor to produce Mo-99 for medical purposes. One significant problem in this process was the migration of the uranium atoms from the foil (because of heat and the fission of uranium atoms) to the aluminum casing which held the foil.[6]

[5] The RERTR program seeks to develop the technology necessary to enable the conversion of civilian nuclear reactors to utilize low enriched uranium (LEU) instead of high enriched uranium (HEU).

[6] Such migration would produce problems in removing the LEU and molybdenum foil to process the newly created Mo-99. Initially, a nickel barrier was used to prevent uranium atoms from migrating to the aluminum casing that held the uranium and molybdenum foil target. Using nickel as a barrier to prevent diffusion of uranium to the aluminum casing which held the foil created a problem since the nickel would itself become radioactive. One radioactive isotope of nickel, Ni-63, produced in the process had a half-life of 103 years and another, Ni-59, had a half life of 76,000 years. Consequently, use of nickel as a barrier would create a significant radioactive waste problem.

Moses developed an idea to mitigate this problem using a diffusion barrier made of a specific aluminum-and-silicon alloy instead of nickel. On September 1, 2006, Moses shared his idea via an e-mail addressed to Charlie Allen at the University of Missouri Research Reactor Center (MURR) and George Vandergrift at Argonne National Laboratory (ANL). Ex. M.

On September 6, Moses and Allen exchanged two further e-mails regarding Moses' idea, each of which was also addressed to Vandergrift. *Id.* On the same day, Vandergrift sent an e-mail to Moses and Allen in a response to Moses' idea, stating that "Ni [nickel] foil is a fission-recoil barrier and must be there or foil will bond to target walls during irradiation. Al [aluminum] barrier will work but will not dissolve in nitric acid." *Id.* Moses became upset with Vandergrift's response and sent another e-mail to Vandergrift and Allen later on September 6, 2006, stating in part:

> What you call a "fission recoil barrier" to prevent the aluminum clad foil from bonding to the U-Mo target is what Atomics International (AI) called a diffusion barrier in its testing work in the late 1950s and early 1960s . . . . with U-Mo fuel clad with aluminum using a nickel diffusion barrier to prevent the interdiffusion of uranium and aluminum. . . . Don't you guys in the RERTR Program at ANL ever do any literature research? I had assumed that you picked nickel because of the earlier AI work in using it as a diffusion barrier between uranium-molybdenum and aluminum. Who came up with this "fission recoil barrier" terminology as opposed to diffusion barrier? Does calling it by a new name make it a new discovery? Much of the work in the 1950s and 1960s focused on correlating thermally/temperature-induced diffusion with fission-induced diffusion mechanisms.
>
> It truly amazes me from reading the papers in the RERTR annual meetings starting in about 1997-1998 that you in the LEU Mo-99 target production development work were exploring options for "fission recoil barriers" while the LEU fuel development activities at ANL, without apparently ever talking to you all in Mo-99 target work, worked diligently on U-Mo LEU fuel forms with aluminum matrix and clad without realizing the need for a diffusion barrier between the U-Mo and the aluminum. Apparently, neither side talked to each other or listened to each other's presentation at the RERTR annual meetings or did their literature research for precedential R&D work like every graduate student at a top-flight university (such as Missouri) must surely be taught to do.
>
> . . . .
>
> I find that ANL and now ANL-INL have indeed made this into not only a full-employment science program but a bad science program principally consisting of doing lots of high-priced work that leads to a rediscovering of that which should have been recognized or known by a decent and diligent literature search back in 1997-1998. How much taxpayer money has been wasted since 1998 to now on this bad science?

My apologies for possibly being overly dramatic in making my points.

Id. Moses' September 1 e-mail, and each of the subsequent September 6 e-mails from Moses, Allen, and Vandergrift, were also copied to, among others at ANL and ORNL, Satkowiak, Ralph Butler, Director of MURR, and Parrish Staples, Moses' point of contact at NA-21. *Id.*

When Satkowiak came to work on September 7, he found that Butler had left a voice mail message telling Satkowiak, "you've got a problem. Better look at your e-mail." Tr. at 281-82. Upon reading Moses' September 6 e-mail, Satkowiak "was kind of stunned at the language. . . . It was the, the unprofessional manner; the, the, the way he was treating colleagues; and the fact that he was doing it in what I considered a public forum." *Id.* at 282.

Over the next few days, Satkowiak contacted some of the individuals on the e-mail's distribution list "to get their read on it" and found that "they were surprised he used that tone." *Id.* at 285. None of the feedback he received touched upon the technical issues Moses raised in his e-mail. *Id.* On September 8, Satkowiak also forwarded a copy of the e-mail to his supervisor, Dana Christensen, Associate Laboratory Director for Engineering and Science. *Id.* at 286. Christensen thought the e-mail "sounded very unprofessional. It sounded like a ranting-and-raving type of e-mail about concerns, and [Satkowiak] brought it to me because of the extensive distribution list that was on the e-mail." *Id.* at 604.

After several discussions with his management and with Katherine Finnie, an ORNL Human Relations official, *id.* at 289, Satkowiak met with Moses and Finnie on September 15, 2006. Ex. J (minutes of meeting taken by Finnie). At the meeting, Satkowiak told Moses that he would be suspended with pay, during which time he would not have access to the ORNL computer system. *Id.* at 3. Moses remained on administrative leave with pay for one week, from September 18 through September 22, 2006. Tr. at 294, 303.

By a memorandum dated September 22, Satkowiak issued a "disciplinary written warning" to Moses in which he characterized Moses' September 6 e-mail as having a "highly insulting, completely unprofessional and totally unacceptable tone toward colleagues in a collaborative program that involves efforts by ORNL and scientists from other national laboratories. Regardless of any merit to your technical points, you demonstrated egregiously poor judgment in deciding to communicate your observations in the manner you chose." Ex. E. Noting that ORNL had placed Moses "in a position of considerable responsibility," Satkowiak stated that Moses failed to demonstrate the "tact and skillful communication strategies" his job demanded. *Id.* Finally, Satkowiak stated that he did "not want to inhibit any efforts" to bring to light "concerns regarding fraud, waste and abuse," but that "insulting and belittling colleagues is unacceptable." *Id.* On September 24, 2006, Moses sent an e-mail to the recipients of his September 6 e-mail expressing his "sincerest apologies for the tone and substance of the e-mail . . . ." Ex. 11.

During the week of September 25 through September 29, 2006, Satkowiak traveled to DOE Headquarters for several meetings, and intended to talk to Parrish Staples and the DOE official to whom Staples reported, Nicole Nelson-Jean, the director of DOE's Office of North and South American Threat Reduction within NA-21. Tr. at 312. Staples was not in his office when

Satkowiak arrived, and while he was in a hallway speaking to another DOE official, Nelson-Jean saw Satkowiak, grabbed his arm and said "Larry, I need to talk to you right now." *Id.* at 313.

Satkowiak and Nelson-Jean then met in Nelson-Jean's office. Satkowiak testified that he told Nelson-Jean that he hoped she had seen Moses' written apology, and described Moses as an "incredibly bright guy" and a "great nuclear engineer" and that "it would be an asset to keep him on the [RERTR] program." *Id*. at 313-14; *see* Transcript of January 29, 2008 Hearing Testimony of Nicole Nelson-Jean (Nelson-Jean Tr.) at 12 (corroborating Satkowiak's testimony that he offered support for Moses in their meeting and recommended that he continue working on the RERTR program). Nelson-Jean responded that she no longer wanted Moses working on the program, and Satkowiak asked that this direction be provided to him in writing. Tr. at 314-16.

On September 27, 2006, Nelson-Jean sent an e-mail to Satkowiak in which she stated: "I am writing in Reference to Dr. David Lewis Moses and his participation in the GTRI Conversion Program (RERTR). As I have discussed with you in detail, the GTRI Conversion Program will no longer support, financially or otherwise, the participation of Dr. Moses in the program." Ex. C.

On October 5, 2006, Satkowiak sent a memorandum to Moses referencing Nelson-Jean's September 27 e-mail, and stating that Moses' "position as a Senior Program Manager within the Nuclear Nonproliferation Programs is predicated upon your ability to develop/manage projects/programs and build/maintain healthy and productive DOE sponsor relationships. In addition, one of the key performance expectations for all band 4 researchers at ORNL is to secure funding for their time." Ex. D. The memorandum stated that Satkowiak would continue Moses' employment "until the end of November to allow you time to find other funding within the laboratory. During this time period your main focus will be securing funding. In addition, I will provide you with miscellaneous assignments within the laboratory." *Id.* Finally, the memo stated that if, "at the end of November you have not located funding sponsorship, your employment with ORNL will be terminated for your failure to meet the performance requirements of your job." *Id.*

Satkowiak and Finnie met with Moses on November 5, 2006 to discuss his progress in obtaining funding, at which time Satkowiak was "very hopeful" as it "sounded like he had some leads." Tr. at 334; Ex. 13 (minutes of meeting taken by Finnie). On January 25, 2007, Satkowiak completed Moses' 2006 Performance Assessment, in which he rated Moses as "Not Fully Contributing." Ex. B. In a January 29, 2007, e-mail to Finnie, Satkowiak stated that "[a]t David's performance review we discussed his situation. I agreed, in light of the continuing resolution, to continue to fund him until the end of February giving him additional time to find other funding sources." Ex. 14.

On February 2, 2007, Satkowiak issued a Performance Improvement Plan (PIP) to Moses. Ex. 15. The PIP described as "performance to be improved" Moses' "behavior [that] led to a loss of funding by NA-20 sponsors"[7] and listed as goals to "[e]xhibit professionalism in all written and verbal communication" and "secure funding to fully cover employee labor so no longer

[7] NA-20 is the office of the NNSA's Office of Defense Nuclear Nonproliferation, within which are seven program offices, including NA-21 and NA-26.

dependent on NNP [ORNL Office of Nuclear Nonproliferation] funding." *Id.* The document noted that Moses "was initially given 2 months of NNP funding to secure funding. This was extended 3 more months with a new end date of February 28, 2007." *Id.* Finally, the plan further required "[w]eekly detailed, status reports, first one due February 9, 2007, documenting progress toward acquiring alternate funding. It should identify the date/time, project/program manager, source of funds, amount funding, and percentage covered." *Id.*

On February 23, 2007, Satkowiak sent Moses an e-mail reminding him about the requirement for weekly reports in the PIP, Ex. 5 at 2, as he had received no such report as of that date. Tr. at 347. Moses responded the same day by e-mail with a one paragraph summary of his current progress in finding funding, to which Satkowiak responded by e-mail, also the same day, thanking him for the information, but telling him that his response did not "contain the detail requested in the signed PIP, see text below. We would like to have a short meeting Monday morning to review your prospects in detail. Please come prepared with the details in writing." Ex. 5 at 1-2. On February 25, Moses sent an e-mail with a more detailed report attached, stating that he had "enough work to carry me into March but not much beyond." Ex. 5 at 1.

After receiving this e-mail and concluding that he had provided Moses enough time to secure funding, Satkowiak consulted Katherine Finnie to see what his options were. Tr. at 350. Finnie suggested the possibility of submitting Moses' case to an ORNL Suspension/Termination Review Committee (STRC). *Id.* at 350-51. Satkowiak decided on this course of action, and recommended to the STRC that Moses be terminated due to lack of funding. *Id.* at 352.

The STRC was composed of three ORNL "Level 1" managers: Dana Christensen, the Level 1 manager above Moses and Satkowiak, Lori Barreras, ORNL's Director of Human Resources, and Reinhold Mann, ORNL's Associate Laboratory Director for Biological and Environmental Sciences, who served as the "neutral" Level 1 manager on the STRC. *Id.* at 470-71.

The STRC met on March 12, 2007. According to the minutes of that meeting, Satkowiak and Finnie presented the facts of Moses' case, after which the members of the committee discussed whether Moses had been given an adequate period of time to find funding. Ex. A at 2-3. Satkowiak indicated that Moses had become eligible for early retirement as of the end of January 2007. *Id.* at 2. The minutes reflect the committee's decision that Satkowiak discuss with Moses the option of taking early retirement, and that if he did not elect retirement, Satkowiak had the committee's approval for termination. *Id.* at 3. Satkowiak met with Moses a "couple of days" after the STRC meeting, and offered him the opportunity to choose retirement in lieu of termination. Tr. at 363. A "day or so later" Moses informed Satkowiak that he was choosing to retire, which he did, effective May 31, 2007. *Id.* at 30, 363.

II. Analysis

A. Did Moses Engage in Protected Conduct?

Under the regulations governing the DOE Contractor Employee Protection program, the complainant "has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under

Section 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua Lucero*, 29 DOE ¶ 87,034 at 89,180 (2007) (citing *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

As noted above, Moses' alleged protected disclosures fall into two discrete categories: (1) those made in 2004 and 2005 regarding DOE contracting practices; and (2) those made in 2006 alleging wasteful spending relating to a research project to use Low Enriched Uranium and Molybdenum to fabricate both proliferation-resistant research reactor fuel and targets to produce Mo-99.

1. 2004-2005 Disclosures Regarding DOE Contracting Practices

During the pre-hearing telephone conference held in this matter on November 20, 2007, I asked Moses to specifically identify the disclosures he made that he is alleging were protected under Part 708. With respect to the first category of disclosures, Moses identified 17 e-mail messages, the first on January 10, 2004, and the last on April 4, 2005. Memorandum of Pre-Hearing Telephone Conference (November 20, 2007).[8] UT-Battelle agrees that Moses' communications during this period regarding DOE contracting practices included disclosures protected under Part 708. Tr. at 13-14. Thus, I find that Moses' disclosures during this period were protected,[9] with the exception of Moses' facsimile transmission to French official Bruno Sicard, since in order to be protected under Part 708, a disclosure must be made "to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct

[8] On November 21, 2007, I sent a copy of this memorandum to Moses and UT-Battelle, asking them to notify me if they found any errors or omissions in the document. The parties noted no omissions in response to my message, and the only errors noted were regarding the names of two ORNL personnel. E-mail from Steven Goering, OHA, to Alan M. Parker, UT-Battelle, and David Moses, *et al.* (November 21, 2007); E-mail from David Moses to Steven Goering, OHA, and Alan M. Parker, UT-Battelle, *et al.* (November 25, 2007) (noting "two minor changes with names of personnel"). In this regard, I note Moses has previously stated that he communicated concerns to the DOE Office of Inspector General in August 2005, September 2005, and September 2006. Electronic Mail from David Moses to Richard Cronin, OHA (October 8, 2007). However, during the pre-hearing conference, Moses did not identify these communications as disclosures that he was alleging to be protected under Part 708. In any event, there is no evidence in the record that the ORNL officials responsible for taking the personnel actions against Moses that are alleged to be retaliatory had actual or constructive knowledge of these communications at the time of the personnel actions. Had Moses alleged that his communications to the IG included protected disclosures, he would have had to prove that these officials had such knowledge of the communications in order to meet his burden of showing that they were contributing factors to the personnel actions taken against him. *See infra* Section II.B.

[9] Included in the communications I find to be protected is the 11-page document Moses provided to Satkowiak in April 2005, as discussed in Section I.D.1 above. Though Moses did not specifically identify this as an alleged protected disclosure during the pre-hearing conference, I do not find that UT-Battelle would be prejudiced by my consideration of this communication as a protected disclosure. First, UT-Battelle has already agreed that Moses' communications regarding alleged illegal contracting practices were protected under Part 708. Tr. at 13-14. Further, the Report of Investigation in this case specifically discussed this document as an alleged protected disclosure. ROI at 8-9.

of operations at a DOE site, your employer, or any higher tier contractor, . . ." 10 C.F.R. § 708.5(a).[10]

2. September 6, 2006, E-mail

With respect to the second category of disclosures, during the pre-hearing conference Moses identified his September 6, 2006, e-mail as an alleged protected disclosure. Memorandum of Pre-Hearing Telephone Conference (November 20, 2007). The OHA Investigator in this case concluded that the September 6 e-mail was a disclosure protected under Part 708. ROI at 9. This conclusion was based in part on a stipulation by UT-Battelle that (1) it would have been reasonable for Moses to believe that a literature search should have been conducted concerning fission recoil barriers and that such a literature search would have identified a solution to the research problem concerning the barrier; and (2) the potential savings in research costs that could have been achieved if a proper literature search had been conducted in a timely manner would have ranged from "$100,000 to several hundred thousand dollars." *Id.* (citing E-mail from Jeff Guilford, Counsel, UT-Battelle to Richard Cronin, Assistant Director, OHA (August 7, 2007)).

In its statement discussing the Report of Investigation, UT-Battelle took issue with the OHA Investigator's conclusion, first because the September 6 e-mail "was not directed at a DOE official or other individual described in Section 708.5(a)," and second, because "the purpose of the email was to berate colleagues on what Dr. Moses believed to be an unprofessional approach to scientific research rather than to make protected disclosures to company or DOE officials." UT-Battelle's Statement Discussing the Report of Investigation at 5 (November 19, 2007).

I find both of these arguments to be without merit. The Part 708 regulations includes as protected conduct the disclosure of information "to a DOE official" or the individual's "employer, . . ." 10 C.F.R. § 708.5(a). UT-Battelle's argument rests on the fact that Moses' September 6 e-mail was addressed to individuals at MURR and ANL, while others, including Satkowiak and DOE official Parrish Staples, received the e-mail by virtue of being included on the "cc:" line. It is clear, however, that the September 6 e-mail was received by Satkowiak and Staples, and that therefore the information contained in the e-mail was "disclosed to a DOE official" and to Moses' "employer," and UT-Battelle offers no basis for reading an additional requirement into Section 708.5(a) that the information be primarily "directed at a DOE official or other individual described in Section 708.5(a)."

Neither does Section 708.5(a) require that information be disclosed with a particular purpose or intent. The DOE made this explicit when, in revising Section 708.5(a) to remove the requirement that a disclosure be made "in good faith," it stated that it "did not intend to place the employee's state of mind into issue." Criteria and Procedures for DOE Contractor Employee Protection Program, 65 Fed. Reg. 6314, 6317 (February 9, 2000). Even under the previous

[10] Moses contends that because, in his message to Sicard, he "encouraged" Sicard to discuss his concerns with DOE official Robert Boudreau, and Sicard provided a copy of Moses' message to Boudreau, his message to Sicard should be treated as a protected disclosure made through a "third-party conduit" to a DOE official. Letter from David Moses to Steven Goering, OHA (November 29, 2007). Moses offers no support from the plain language of the Part 708 regulations or from prior Part 708 cases for such an interpretation of 10 C.F.R. § 708.5(a), and I find none.

wording of Section 708.5(a), the OHA Director held that, "in evaluating whether a person has made a disclosure in good faith, the person's motivations for making the disclosure are irrelevant." *Diane E. Meier*, 28 DOE ¶ 87,004 at 89,041 (2000).

Finally, at the hearing in this matter, counsel for UT-Battelle acknowledged that "Moses did believe there was a gross waste of funds, and I think he reasonably believed that there was gross waste of funds. . . ," but then raised the issue of whether, in the September 6 e-mail, a "statement of gross waste of funds had been made. It only asks a question, and there is never, in the communication trail, an answer to the question, or any declaration thereafter." Tr. at 494. However, the Part 708 regulations do not require that an employee make an affirmative declaration that a "gross waste of funds" has occurred in order to qualify for protection from retaliation. Rather, Section 708.5(a) merely requires that a disclosure be of "information" that the employee "reasonably believes reveals," among other things, "gross waste of funds, . . ." 10 C.F.R. § 708.5(a).

In this case, there is no dispute that Moses reasonably believed that there was a gross waste of funds, ROI at 9; Tr. at 494, and I find that it would have been reasonable for Moses to assume that his September 6 e-mail conveyed his belief and the basis thereof. In the e-mail, after explicitly expressing his belief, which UT-Battelle has acknowledged was reasonable, that there should have been a "literature research for precedential R&D," Ex. M, Moses concludes by characterizing the RERTR program as "a full-employment science program . . . principally consisting of doing lots of high-priced work that leads to a rediscovering of that which should have been recognized or known by a decent and diligent literature search," and then asks, in what is by all appearances a rhetorical question, "How much taxpayer money has been wasted since 1998 to now on this bad science?" *Id.*

After considering the arguments raised by UT-Battelle, I conclude that Moses' September 6, 2006, e-mail did disclose, to a DOE official and to his employer, information that he reasonably believed revealed a gross waste of funds, and that therefore the September 6 e-mail included a disclosure protected under Part 708.[11]

B. Whether Protected Activity Was a Contributing Factor in an Act of Retaliation

In order to prevail in a Part 708 action, the complainant must show, by a preponderance of the evidence, that the protected activity was a contributing factor to a retaliatory action taken against him. Section 708.2 of the Contractor Employee Protection regulations defines retaliation as "an

[11] During the pre-hearing conference, Moses identified four other disclosures pertaining to the RERTR program, made prior to the September 6, 2006, e-mail, that he contends are protected under Part 708. Memorandum of Pre-Hearing Telephone Conference (November 20, 2007). In addition, at the hearing in this matter, Moses characterized two other documents, also predating his September 6 e-mail, as being protected disclosures. Tr. at 69, 73, 107; Ex. F; Ex. G. As I have already found Moses' September 6 e-mail contained a protected disclosure, and I find below that Moses has met his burden of showing that this protected disclosure was a contributing factor in the alleged retaliatory actions at issue in this case, I need not consider whether these earlier disclosures are also protected under Part 708. For the same reason, at the pre-hearing conference I found that it would not be necessary to take the testimony of five witnesses proposed by Moses as to the validity of his concerns pertaining to the RERTR program "as UT-Battelle has conceded that disclosure protected as to the substance . . . ." Memorandum of Pre-Hearing Telephone Conference (November 20, 2007).

action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the disclosure of information." 10 C.F.R. § 708.2. At the pre-hearing conference, Moses identified the following actions by ORNL as alleged retaliations:

1. The September 2006 decision to place him on one week of paid administrative leave, without access to his work computer;

2. The denial of a merit increase based upon his fiscal year 2006 performance assessment;

3. The March 2007 decision to offer him the choice of termination or early retirement.

Memorandum of Pre-Hearing Telephone Conference (November 20, 2007).[12]

Regarding UT-Battelle's decision to place Moses on a week of paid administrative leave, UT-Battelle presented the hearing testimony of Katherine Finnie, a Senior Resource Manager in ORNL Human Relations. Tr. at 423. Ms. Finnie testified that administrative leave is not considered a "disciplinary action" within ORNL's Human Resources system, and that Moses lost no pay, benefits, or seniority as a result of the action. *Id.* at 427-28. Citing this testimony, UT-Battelle argues in its post-hearing brief that this action "did not constitute an act of 'retaliation' as that term is used in 10 C.F.R. § 708.2" as it "was not a 'negative action with respect to the employee's compensation, terms, conditions or privileges of employment.'" UT-Battelle Brief at 32 (quoting 10 C.F.R. § 708.2).

First, the definition of retaliation in Section 708.2 is clearly not limited to a "negative action with respect to the employee's compensation, terms, conditions or privileges of employment." Rather, such an action is provided in the text only as an example of an "action . . . taken by a contractor against an employee with respect to employment." 10 C.F.R. § 708.2.

Moreover, in his testimony, Satkowiak stated that, as a result of Moses' September 6, 2006, e-mail, his "recommendation for discipline was let David sit at home, think about what he did, and then have him come back to the office after, after a week." Tr. at 295. Thus, Satkowiak saw the administrative leave as "discipline," and whether or not ORNL officially regarded it as such,[13] this was clearly an "an action . . . taken by" UT-Battelle "against" Moses "with respect to employment." 10 C.F.R. § 708.2. In addition, though Finnie testified that the denial of Moses' access to his official e-mail was "pretty much standard procedure when a person went on administrative leave pending an investigation . . . of improprieties," Tr. at 428, this action was clearly a negative one with respect to the "terms, conditions, or privileges" of Moses employment. 10 C.F.R. § 708.2. Therefore, both of these actions would fall within the definition of "retaliation" under Section 708.2, if taken as a result of his disclosures. *Id.*

[12] Moses did not identify the September 22, 2006, written warning as an alleged retaliation. In any event, I note that ORNL HR official Katherine Finnie testified at the hearing that the written warning is no longer in Moses' personnel file. Tr. at 434.

[13] When asked whether "suspension with pay" is considered by ORNL to be a "disciplinary action," Satkowiak responded, "I don't know. Is it?" *Id.*

I find that in this case the placement of Moses on paid administrative leave, particularly when viewed in conjunction with the denial of access to his work computer, was an action taken by UT-Battelle against Moses with respect to his employment, even though it had no effect on his compensation.

1. Whether Protected Disclosure in Moses' September 6, 2006, E-mail Was a Contributing Factor in the Alleged Acts of Retaliation

In prior decisions, OHA has found that:

> A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

Charles Barry DeLoach, 26 DOE ¶ 87,509 (1997) (quoting *Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993).

a. Administrative Leave and 2006 Performance Assessment

The record indicates that Lawrence Satkowiak took the first two personnel actions alleged to be retaliatory on September 15, 2006 (the placement of Moses on administrative leave without access to work computer) and January 25, 2007 (Moses' 2006 performance assessment). Satkowiak was copied on Moses' September 6, 2006, e-mail, and became aware of the e-mail the following day. Thus, Satkowiak took these two personnel actions within eight days, and five months, respectively, of when he gained actual or constructive knowledge of the protected disclosures contained in Moses' September 6 e-mail. Based solely on the temporal proximity between the e-mail and these two alleged retaliations, I find that a reasonable person could conclude that Moses' protected disclosure in the September 6 e-mail was a factor in both of these two personnel actions. *Luis P. Silva*, 27 DOE ¶ 87,550 (2000) (eight months sufficiently proximate in time); *Barbara Nabb*, 27 DOE ¶ 87,519 (1999) (eight months); *Robert Gardner*, 27 DOE ¶ 87,536 (1999) (six months); *Frank E. Isbill*, 27 DOE ¶ 87,513 (1999) (six months).

b. Decision to offer Moses Choice Between Termination and Early Retirement

As for the last alleged retaliation, the members of the STRC, Lori Barreras, Dana Christensen, and Reinhold Mann, decided at their March 12, 2007, meeting to offer Moses the choice between early retirement and termination. Ex. A. Prior to the meeting, ORNL HR official Katherine Finnie compiled a notebook for purposes of the meeting that was provided to each member either the day of or the business day prior to the meeting. Tr. at 499, 560, 577. Included in the notebook was a copy of Moses' September 6, 2006, e-mail. Ex. 22 at Tab "2006 E-Mails".

Although neither Barreras nor Mann testified as to any specific recollection of having read the September 6 e-mail, and both recalled the notebook being referenced as background material regarding Moses' loss of funding, Tr. at 560, 579, I find that the inclusion of the September 6 e-

mail in the notebook was sufficient to provide both Barreras and Mann at least constructive, if not actual, knowledge of Moses' September 6, 2006, protected disclosure.

This finding is further supported by the minutes of the March 12, 2007, STRC meeting, which includes a statement that "Kathie [Finnie] and Larry [Satkowiak] reviewed the 'Synopsis of Issues and E-Mail communication 2004-2006.'" Ex. A. This synopsis was also included in the notebook prepared for the STRC meeting, and contains the following regarding Moses' September 6, 2006, e-mail:

- 9/6/2006 (9:44 PM) Moses > Vandergrift et. al

  > "what you call a "fission recoil barrier" to prevent the aluminum clad foil from bonding ….is what Atomics International (AI) called a diffusion barrier in its testing work in the late 1950's and early 1960's...Don't you guys...ever do any literature research? ...My word, INL,-ANL, has rediscovered what Oak Ridge and Hanford knew in the late 1940's....made into a bad science program principally consisting of doing lots of high priced work that leads to rediscovering of that which should have been recognized or known by a decent and diligent literature search….how much tax payer money has been wasted since 1998 to now on this bad science?

Ex 22 at 11 (ellipses in original). There is no evidence in the record that either Barreras or Mann were aware of the September 6 e-mail prior to being provided a copy of the STRC meeting notebook. However, Dana Christensen, the third member of the STRC, clearly had previous knowledge of the contents of the September 6 e-mail, as Satkowiak testified that he forwarded a copy of the e-mail to Christensen on September 8, 2006, Tr. at 286, and Christensen recalled reading it. *Id*. at 603-04.

Thus, all three officials responsible for deciding that Moses would be offered the choice between termination and retirement had either actual or constructive knowledge of the contents of Moses' September 6 e-mail, Barreras and Mann first gaining that knowledge either the business day prior to or the day of the meeting at which they made the decision, and Christensen first being made aware of the September 6 e-mail approximately six months prior to the meeting. Based solely on this temporal proximity, I find that a reasonable person could conclude that Moses' protected disclosure in the September 6 e-mail was a contributing factor in the STRC's decision.[14]

[14] Though it is common in cases applying the "temporal proximity" analysis to measure the proximity between the date of the protected disclosure and the personnel action at issue, the standard itself is silent as to how the "period of time" is to be measured and, as has been noted by the OHA Director in a prior Part 708 Appeal decision, "[a]pplying a reasonable-person standard to this issue requires considering the circumstances of each case." *Kaiser-Hill Company, L.L.C.*, 27 DOE ¶ 87,555 at 89,300 (2000). Thus, for example, in a case where a protected disclosure was made to the DOE Inspector General, the Hearing Officer considered the proximity in time between the point at which the official taking the action became aware of the protected disclosure (as opposed to the date of the disclosure itself) and the personnel action at issue. *Elaine M. Blakely*, 28 DOE ¶ 87,039 at 89,273 (2003), *aff'd*, 28 DOE ¶ 87,043 (2004).

2. Whether Protected Disclosures in Moses' 2004 and 2005 Communications Were Contributing Factors in the Alleged Acts of Retaliation

a. Administrative Leave and 2006 Performance Assessment

Of the disclosures during 2004 and early 2005 that I find above to be protected, the most recent is the 11-page document that Moses provided to Satkowiak in April 2005. As noted above, Satkowiak took the first two alleged retaliatory actions on September 15, 2006 (the placement of Moses on administrative leave without access to work computer) and January 25, 2007 (Moses' 2006 performance assessment). Thus, Satkowiak took these two actions approximately 17 months and 21 months after the most recent protected disclosure from the 2004 to 2005 period. Based solely on these facts, I do not find that a reasonable person could conclude that the April 2005 disclosure, and those that preceded it, were contributing factors in these two personnel actions. *Donald Searle*, Case No. TBU-0079 (July 28, 2008) (twelve months between protected conduct and alleged retaliation "an unusually extended period of time" which does not amount to "even a perfunctory showing of a contributing factor").

Thus, Moses must rely on other evidence in order to meet his burden of establishing, by a preponderance of the evidence, that his protected disclosures from 2004 and 2005 were contributing factors in the two actions. With regard to Satkowiak's September 15, 2006, decision to place Moses on administrative leave, Moses offers no evidence that would establish this, and I find none.

As for the 2006 Performance Assessment, Moses cites the following statement by Satkowiak in the assessment: "Mr. Moses has repeatedly demonstrated his inability to interact professionally with our NNSA/NA-20 sponsors." Ex. B at 3. Satkowiak testified at the hearing that this statement referred to events with respect to both NA-21 in 2006 and NA-26 in 2005. Tr. at 42-43. Nonetheless, as discussed below, the preponderance of the evidence in the record supports a finding that Satkowiak's statement regarding Moses' "inability to interact professionally" referred not to Moses' disclosure of information regarding DOE contracting practices in 2004 and 2005, but rather to the manner in which he raised those issues.

Satkowiak testified that, after Moses began to report to him in the summer of 2004, he got involved in " a limited sense" in the issues being raised by Moses in 2004, and that he supported Moses in reporting those concerns. *Id.* at 263-64. When asked at the hearing whether Satkowiak and UT-Battelle "fully supported" him in making his concerns known to DOE in 2004, Moses responded, "I presume so. I really didn't discuss a lot of this with Dr. Satkowiak." *Id*. at 143. It appears therefore that Satkowiak was aware that Moses was raising concerns at the time he completed his first Performance Assessment of Moses on January 25, 2005. Ex. 22, "Performance Reviews" Tab at 1. Yet, in that assessment, Moses received the highest possible rating of 6, and Satkowiak commended Moses for doing an excellent job . . . during what, at best, could be described as a difficult year." *Id.* at 15. Satkowiak further cited Moses' ability to act "as a buffer between the frustrations of junior technical staff and the sponsors, whose motivations are sometimes politically driven rather than guided by logic, . . ." *Id.*

Moses' 2005 Performance Assessment, for the year ending September 30, 2005, was completed on February 7, 2006, after the events of early 2005 leading to Moses' loss of funding from NA-26. Satkowiak gave Moses a rating of 4 out of a possible 6. Ex. 22, "Performance Reviews" Tab at 1. However, the only negative comments in the assessment reference not the fact that Moses raised issues, but the manner in which he raised them: "Mr. Moses' relationship with NA-26 has been tumultuous during the past year. Although I agreed with many of the issues raised by David, I found his approach to address the issues lacking in the finesse necessary in these delicate situations." *Id.* at 9.

Indeed, the testimony of Satkowiak, and more importantly Moses, indicates that Satkowiak supported Moses in his continued communications with DOE officials throughout 2005, both before the loss of NA-26 funding, and afterward, when he began to work with, and raise concerns with, NA-21 officials in his new work for ORNL on the RERTR program. Tr. at 161-62, 171-72. Specifically with regard to the issues relating to NA-26, Satkowiak testified that he raised at least some of the issues set forth in the 11-page document Moses provided to him in April 2005 in a meeting with DOE officials in Washington later in the spring, one of the purposes of which was to try to convince DOE officials to restore NA-26 funding for Moses. *Id.* at 706-709. Satkowiak's support of Moses' communications after he was no longer funded by NA-26 is further reflected in the following exchange between counsel for UT-Battelle and Moses:

> Q. . . . You began raising these [RERTR] issues in 2005?
> A. Um-hum.
> Q. And you sent e-mails to Dr. Satkowiak. Does he take any action against you?
> A. No.
> Q. Does he criticize you because you've raised these issues?
> A. No.
> Q. Did he continue to support you while you raised these issues?
> A. Yes.

Tr. at 171,72. Satkowiak's support continued, according to Moses' testimony, through the summer of 2006, prior to the September 6, 2006, e-mail. *Id.* at 175-76.

Given this context, I cannot find that Satkowiak's reference in Moses' 2006 Performance Assessment to unprofessional interactions is sufficient to prove, by a preponderance of the evidence, that Moses' 2004 and 2005 disclosures were contributing factors to the rating Moses received on that assessment.

b. Decision to offer Moses Choice Between Termination and Early Retirement

I found in Section II.B.1.b above that the three members of the STRC, who decided that Moses would be offered the choice between termination and retirement, had either actual or constructive knowledge of the contents of Moses' September 6 e-mail, based upon the inclusion of the e-mail in the notebook compiled for the purpose of the March 12, 2007, STRC meeting. I find the same

is true for the protected disclosures contained in Moses' e-mail communications of 2004 and 2005, which were also included in the notebook. Ex. 22 at Tab "2005 E-Mails," Tab "2004 E-Mails." Also, as in the case of the September 6 e-mail, Moses' e-mail communications in 2004 and 2005 are summarized in the "Synopsis of Issues and E-Mail communication 2004-2006" contained in the notebook, the summary of the 2004 communications presented under the heading "Issue - Moses alleges DOE mismanagement of contracts; ineffectiveness of sponsor, (Fletcher) bribery, corruption, DOE'S lost credibility, conflict of interest" and the 2005 communications under the heading "Issue - DOE has handled subcontracts inappropriately, improper management - particularly on the part of Norman Fletcher." Ex. 22 at 6-9. Specifically included in the synopsis, among other things, is Moses' reference to possible violations of the Foreign Corrupt Practices Act. *Id.* at 6. Further, there is no evidence that the three committee members were aware of Moses' 2004 and 2005 protected conduct prior to receiving the notebook either on the day of the meeting or the business day preceding it. Based on the close proximity in time between when these three officials gained knowledge, either actual or constructive, of Moses' 2004 and 2005 protected disclosures, and the date of the STRC's decision, I find that a reasonable person could conclude that those disclosures were contributing factors in that decision.

In sum, for the reasons set forth above, I find that Moses has not established, by a preponderance of the evidence, that his protected disclosures in 2004 and 2005 were contributing factors in either his placement on administrative leave on September 15, 2006, or his 2006 Performance Assessment and the resulting lack of a merit increase in 2007. However, I find that Moses has established by a preponderance of the evidence that the September 6, 2006, disclosure was a contributing factor in the decision to place him on administrative leave and in his 2006 Performance Assessment, and that both the 2006 disclosure and Moses' protected disclosures in 2004 and 2005 were contributing factors in the decision by the STRC to offer Moses the choice between retiring or being terminated. Thus, the burden shifts to UT-Battelle to prove by clear and convincing evidence that (1) Satkowiak would have placed Moses on administrative leave and given Moses the same rating on his 2006 Performance Assessment in the absence of his September 6, 2006 protected disclosure, and (2) that the STRC would have reached the same decision to offer Moses the choice between retiring and being terminated in the absence of both his 2004 to 2005 protected disclosures and his September 6, 2006, protected disclosure.

C. Whether the Contractor Would Have Taken the Same Actions in the Absence of the Protected Disclosures

Section 708.29 states that once a complaining employee has met the burden of demonstrating that conduct protected under § 708.5 was a contributing factor in the contractor's retaliation, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." 10 C.F.R. § 708.29. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See Casey von Bargen*, 29 DOE ¶ 87,031 at 89,163 (2007). If the contractor meets this heavy burden, the allegation of retaliation for whistleblowing is defeated despite evidence that the retaliation may have been in response to the complainant's protected conduct.

It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against a whistleblower in the absence of the whistleblower's protected conduct. The Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, has identified several factors that may be considered, including "(1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees . . . ." *Dennis Patterson*, 30 DOE ¶ 87,005 at 89,040 (2008) (quoting *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007)).

1. Whether Satkowiak Would Have Placed Moses on Administrative Leave in the Absence of His September 6, 2006, Protected Disclosure

As an initial matter with regard to this issue, I note the Part 708 regulations protect, among other things, the disclosure of certain "information." 10 C.F.R. § 708.5. It is therefore the disclosure of particular information contained in a communication that is protected, not the communication in its entirety. Thus, in the present case, I have found above that Moses' September 6, 2006, e-mail *contained* information the disclosure of which is protected under Part 708, not that the e-mail as a whole is protected.

This distinction is of particular importance in the present case, since there is little doubt that had Moses not sent the September 6 e-mail, he would not have been placed on administrative leave on September 15, 2006. That, however, is not the issue before me. Rather, the proper question in the present case is whether Satkowiak would have placed Moses on administrative leave had Moses' September 6 e-mail not contained information the disclosure of which is protected under Part 708. The Federal Circuit's 2007 decision in *Kalil*, cited above, and its 2006 decision in *Greenspan v. Department of Veteran Affairs*, are helpful to my analysis in this regard. *Greenspan v. Dep't of Veteran Affairs*, 464 F.3d 1297 (Fed. Cir. 2006).

In *Greenspan*, the agency issued a letter of reprimand to an employee doctor after his statement to an agency executive at a meeting, basing its decision on its characterization of the statement as "unfounded" and "defamatory." *Id.* at 1305. The court found that the discipline was improper, as the charges were "anchored in the protected disclosures themselves."

In *Kalil*, however, the court rejected an interpretation of *Greenspan* advanced by the employee that "once a disclosure qualifies as protected, the character or nature of that disclosure can never supply support for any disciplinary action." 479 F.3d at 825. Thus, after setting forth the factors listed above that "may be considered," the court in *Kalil* held that "the character of the disclosure itself supplie[d] clear and convincing evidence that the Agency met its burden of proof." *Id.*

Applying the analysis of *Kalil* and *Greenspan* to the present case, I turn to the first of the three factors set forth in those cases, the strength of the employer's reason for the personnel action excluding the whistleblowing. Here, the only contemporaneous evidence of the basis for the decision to place Moses on administrative leave is the notes of the September 15, 2006, meeting between Moses, Satkowiak, and ORNL HR official Katherine Finnie. Ex. J. These notes begin with Satkowiak's statement that the September 6 e-mail created "a very sensitive situation the

next day" and mentions "[c]alls from [Parrish] Staples and [Ralph] Butler," two of the recipients of the e-mail. *Id.* at 1. Moses responds by discussing the merits of the issues raised in the e-mail, and characterizing it as a "[f]raud, waste, and abuse accusation." *Id.* Satkowiak immediately responds that " [r]eporting fraud, waste and abuse not the problem. It was the wording." *Id.* Moses later states, "Technically what we said is correct," to which Satkowiak responds, "I assume you are correct." *Id.*

The notes include Satkowiak's statement that Moses' "job as a senior program manager is to think about the bigger picture. How do we get things done without jeopardizing funding?" and that the problem was not "what was said but what was implied. Personal. When emotional no e-mail is good advice." *Id.* at 2. Finally, Satkowiak's states that his boss, Dana Christensen, viewed

> this very seriously. New to lab. Main concern is with reputation to lab. As a consequence will go ahead and suspend you with pay pending further investigation. Compromised lab.
>
> David: By pointing out fraud, waste and abuse?
>
> Kathy [Finnie]: No. By the manner in which you did this report.

Id. at 3.

From these notes, it is clear that in the present case, unlike in *Greenspan*, Satkowiak's objection to Moses September 6 e-mail was not "anchored in the protected disclosures themselves." *Greenspan*, 464 F.3d at 1305. In fact, again in contrast to the contention of the agency in *Greenspan* that the employee's allegations were "unfounded," Satkowiak explicitly stated in the September 15 meeting that he assumed what Moses alleged was "correct." Ex. J at 1.

Further, as the court held in *Kalil*, the "character of [a] disclosure itself" can "suppl[y] clear and convincing evidence" in support of a employer's personnel action. 479 F.3d at 825. Here, Satkowiak and Finnie made clear in the September 15, 2006, meeting that they saw the problem as the "wording" and the "manner" of Moses' e-mail, not any report of waste, fraud, or abuse. Examples of the tone of Moses' September 6 e-mail, longer portions of which are quoted above, can be found in statements such as:

- Don't you guys in the RERTR Program at ANL ever do any literature research?
- Who came up with this "fission recoil barrier" terminology as opposed to diffusion barrier? Does calling it by a new name make it a new discovery?
- Apparently, neither side . . . did their literature research for precedential R&D work like every graduate student at a top-flight university (such as Missouri) must surely be taught to do.

- [W]e were privileged to hear from ANL's Dr. Hofman how INL-ANL has "rediscovered" the magic properties of silicon when added to aluminum to arrest the interdiffusion of uranium and aluminum. My word, INL-ANL has rediscovered what Oak Ridge and Hanford knew in the late 1940s and Knolls Atomic Power Laboratory (KAPL) and the UKAEA-Harwell studied in more detail along with ORNL in the 1950s.

The court in *Greenspan* made clear that disclosures do not lose protection when they are "stated in a blunt manner." 464 F.3d at 1299. Thus, in this case, had Moses' September 6 simply expressed his reasonable beliefs in a way that was direct and straight to the point, even if those beliefs touched on uncomfortable truths, it would be difficult for UT-Battelle to claim that Satkowiak would have taken the same action in the absence of protected disclosures.

However, *Greenspan* makes equally clear that "wrongful or disruptive conduct is not shielded by the presence of a protected disclosure, . . ." *Id.* at 1305. As is evident from the excerpts above, Moses' e-mail went well beyond being merely blunt, and became sarcastic and gratuitously insulting to his fellow scientists. The September 15 meeting notes indicate that Satkowiak considered the possible negative repercussions of this behavior, telling Moses that he needed to "think about the bigger picture. How do we get things done without jeopardizing funding?" Satkowiak's concern was understandable, given Moses' loss of NA-26 funding the previous year. In short, Moses' e-mail was not only rude in tone, but gave Satkowiak good reason to be concerned that it would be disruptive in its consequences, a concern that was proven to be well-founded when NA-21 decided later that month that it could no longer fund Moses' work. Accordingly, in applying the first factor set forth in *Kalil*, I find strong reasons for Satkowiak's decision completely apart from Moses' protected activity.

In applying the second factor, the strength of any motive to retaliate for the whistleblowing, I find no evidence of any such motive on the part of Satkowiak, such as would be the case if Moses' protected disclosures were in any way critical of Satkowiak or ORNL. Rather, the targets of Moses' allegations were officials at other DOE laboratories and at DOE Headquarters. *See Carr v. Soc. Security Admin*, 185 F.3d 1318, 1326 (Fed. Cir. 1999) (those with motive to retaliate "not 'agency officials' recommending discipline").

As for the third factor, UT-Battelle offers no evidence of similar action taken against other ORNL employees situated similarly to Moses, though it would not be surprising if there were no such employees, given the nature of Moses' actions that resulted in his placement on administrative leave. In any event, it is clear under the Federal Circuit's application of these factors that an employer can meet its clear and convincing evidentiary burden despite the lack of such evidence. *Kalil*, 479 F.3d at 825 (finding clear and convincing evidence based upon "character of [the] disclosure itself"); *Carr,* 185 F.3d at 1326-27 (upholding finding of clear and convincing evidence where lack of evidence of similar action against similarly situated employees).

Based on all of the above considerations, I find that UT-Battelle has proven by clear and convincing evidence that Satkowiak would have place Moses on administrative leave on September 15, 2006, in the absence of the protected disclosure in his September 6, 2006, e-mail.

2. Whether Satkowiak Would Have Given Moses a "Not Fully Contributing" Rating on His 2006 Performance Assessment in the Absence of His September 6, 2006, Protected Disclosure

In considering whether UT-Battelle has shown by clear and convincing evidence that Moses' 2006 Performance Assessment rating of "Not Fully Contributing" would have been the same in the absence of his September 6, 2006, disclosure, I again turn to the three factors set forth in *Kalil*. Regarding the first factor, the strength of the employer's reason for the personnel action, the only contemporaneous evidence of the basis for the rating is found in Satkowiak's summary comments in the 2006 Performance Assessment:

> Mr. Moses has repeatedly demonstrated his inability to interact professionally with our NNSA/NA-20 sponsors. This is unacceptable as a senior program manager within the Nuclear Nonproliferation Program office who has as a primary function interfacing with the sponsor. As a result he has been asked to find "other" funding outside of NNP Office funding. On October 4, 2006, Mr. Moses was directed to secure this funding by the end of November, however, I extended this deadline until the end of February understanding the difficulty of the task given the general funding uncertainty associated with the continuing resolution.

Ex. 22, "Performance Reviews" Tab at 5.

In Section II.B.2.a above, I found that Moses had not met his burden of proving that his 2004 and 2005 disclosures were contributing factors to the 2006 Performance Assessment, in part because, though the Performance Assessment clearly references Moses' communications in 2004 and 2005, Satkowiak was referring to the manner in which Moses raised issues regarding DOE contracting practices in 2004 and 2005, not to the disclosure of this information, *per se*. For the same reasons discussed therein, although the proximity in time between Moses' September 6, 2006, disclosure and the 2006 Performance Assessment provided sufficient circumstantial evidence to prove the disclosure was a contributing factor in the performance assessment, the direct evidence in the record supports a finding that Satkowiak's statement as to Moses' "inability to interact professionally" in the performance assessment was based not upon the disclosures contained in Moses' September 6 e-mail, but rather to the manner in which the e-mail presented those disclosures.

Thus, as with Satkowiak's understandable concern regarding the character of Moses' September 6 e-mail as expressed in the September 15, 2006, meeting, Satkowiak's criticism of Moses' "inability to interact professionally" in the 2006 Performance Assessment is evidence of the strength of Satkowiak's reason, completely apart from any protected activity, for rating Moses as "Not Fully Contributing." The same is true of Satkowiak's comments in the assessment regarding Moses' lack of funding, since by the time of the assessment, DOE had removed Moses from NA-21 funding, presenting Satkowiak with the same problem he faced when Moses was removed from NA-26 funding in April 2005. Indeed, the problem had become even worse, as two of the primary sources of potential funding for Moses, NA-21 and NA-26, were now effectively off-limits. Tr. at 241-49 (testimony of Satkowiak regarding possible sources of DOE-

sponsored funding). Given these circumstances, with regard to the 2006 Performance Assessment, "the strength of the . . . reason for the personnel action excluding the whistleblowing," *Kalil,* 479 F.3d at 824, is clearly evident.

Regarding the second factor to be considered, I have already found above that there is no evidence that Satkowiak had any motive to retaliate against Moses for his September 6, 2006 disclosure by placing him on administrative leave. The lack of any such motive is just as relevant here as to Satkowiak's decision to rate Moses "Not Fully Contributing" on his 2006 Performance Assessment.

Applying the third factor set forth in *Kalil* to Satkowiak's 2006 rating of Moses, I note that UT-Battelle again offers no evidence of similar action against similarly situated employees. However, for the same reasons set forth in the preceding section regarding the placement of Moses on administrative leave, I find that this lack of evidence does not necessarily preclude UT-Battelle from meeting its clear and convincing evidentiary burden regarding the 2006 Performance Assessment.

Considering all three relevant factors, I find it most significant that Satkowiak's reason for the rating he gave Moses on his 2006 Performance Assessment was stronger still than the basis he had for placing Moses on administrative leave in September 2006. By January 2007, when Satkowiak completed the assessment, Moses' September 6, 2006, e-mail had resulted in the loss of his funding from NA-21, and had therefore seriously disrupted Moses' ability to do his job. I note here that the first of the three "Objectives" set forth in the 2006 Performance Assessment was to "Manage the ORNL [RERTR] Program," Ex. 22, "Performance Reviews" Tab at 3, a task made impossible by the loss of NA-21 funding. The second objective, "Technical and program management support to the NNPO," is described as serving as "Senior Program Manager," including by "Providing customer interface," with Moses' performance to be measured by whether he is "judged responsive and responsible by the Director [Satkowiak], his senior management, his outside sponsors, and his peers in serving the needs of the office and in advancing the programs' agendas and growth." *Id.* at 4. These two objectives together accounted for 75 percent of the weight of his assessment. Satkowiak testified as follows regarding the basis for his "Not Fully Contributing" rating of Moses:

> [Y]ou can be winning a race, but if you trip and fall and come in, or don't even finish coming in at the end of, at the end of the race, all of the hard work that you did during the race is very, is, is nice, but . . . because he lost his funding, and essentially soured that relationship with NA-21, he failed to meet the objectives that he agreed to.

Tr. at 339-40.

Based upon the evidence regarding the strength of Satkowiak's reason for the 2006 Performance Assessment, and the lack of any apparent retaliatory motive for Satkowiak's action, I find that UT-Battelle has proven by clear and convincing evidence that Satkowiak would have rated Moses "Not Fully Contributing" on his 2006 Performance Assessment in the absence of any protected disclosure in his September 6, 2006, e-mail.

3. Whether the STRC Would Have Decided to Offer Moses the Choice Between Retiring and Being Terminated in the Absence of Both His 2004 and 2005, and September 6, 2006, Protected Disclosures

Regarding the decision of the STRC to offer Moses the choice between retirement and termination, I find that all three of the factors set forth in *Kalil* support a conclusion that the STRC would have reached the same decision in the absence of Moses' protected disclosures, for the reasons set forth below.

Moses acknowledged at the hearing that, after NA-21 decided in September 2006 that it would no longer fund Moses, it was his responsibility to find other funding. Tr. at 206-07.[15] Satkowiak testified that, while Moses was trying to find direct funding from, for example, a DOE sponsor such as he had previously from NA-26 and NA-21, he was able to fund Moses' employment from an "indirect account," which was funded by a "tax" on the direct funding his office receives from all DOE NA-20 offices, including NA-26 and NA-21. *Id*. at 325-26. This was of some concern to Satkowiak, since using this account meant that NA-21 and NA-26 would still be funding Moses, albeit indirectly and to a much smaller degree. *Id.* at 326; *see also id.* at 506-13 (testimony of ORNL Director of Accounting regarding charging of employee time as indirect versus direct cost).

As noted above, five months after Moses' loss of funding from NA-21, Moses stated in a February 25, 2007, e-mail to Satkowiak that he had "enough work to carry me into March but not much beyond." Ex. 5 at 1. Moses, responding affirmatively to questions from counsel for UT-Battelle, acknowledged that he didn't "have in place adequate long-term funding" and that the "prospects were very poor." Tr. at 223. Satkowiak testified credibly that he was, at this point, "disappointed. I thought, I thought this would have done it. I thought he would have, would have been able to find the, the funding that he needed to find. . . . It put me at a, in a position where I had to make a bad, a difficult decision." Tr. at 348. After consulting with ORNL HR official Katherine Finnie, Satkowiak decided to initiate an STRC review of Moses' case, with the recommendation that Moses be terminated.

The minutes of the March 12, 2007, STRC meeting reflect a discussion as to whether five months was a "reasonable" amount of time within which Moses could be expected to find funding, with the conclusion that it was reasonable. Ex. A at 2. The minutes further indicate that Satkowiak's superior and STRC member Dana Christensen sought and received confirmation

[15] The October 5, 2006, memorandum Satkowiak issued to Moses, discussed in section I.D.2 above, stated that "[u]ntil further notice, you are no longer permitted to have direct contact of any manner, including personal, email and verbal, with our DOE/NNSA NA-20 sponsors." *Id.* At the hearing, Moses stated that the effect of the memorandum was that "he was not allowed to market though NA-20, period." Tr. at 67. However, Moses did not take issue with the testimony of Satkowiak that Moses could have inquired as to funding opportunities from NA-20 through one of "Customer Interface Managers" within ORNL's Nuclear Nonproliferation Program Office (NNPO). Ex. 7 (NNPO organization chart). Satkowiak testified that he "just didn't want David, being as enthusiastic as he is, I didn't want him running up to DOE without engaging the Customer Interface Managers, because it puts them in a, in a very difficult position, because they don't know what's going on in their own area." Tr. at 252; Ex. 8 (August 8, 2005 e-mail from Satkowiak designating specified NNPO employees as Customer Interface Managers). In fact, Moses testified that he talked to at least two of the Customer Interface Managers in his attempt to find funding. Tr. at 126-27, 252-53.

that Satkowiak's recommendation for termination was "based on the lack of success in attracting funding to do work . . ." *Id.* at 3. The hearing testimony of all three committee members, and others in attendance, confirmed that Moses' lack of funding was the primary focus of the meeting. *See, e.g.,* Tr. at 63, 359-60 (testimony of Satkowiak), 448-49 (Finnie), 474-75, 563-63, 565 (Barreras), 572-73, 582-84 (Mann), 618-20 (Christensen).

The minutes also reflect that following statements at the meeting:

> Larry [Satkowiak] discussed that . . . [Moses'] behavior has been more out-of-the-box, and sponsors do not want to deal with him. David must have good customer relations to do his job; but he has alienated the Washington DOE offices. This is of great concern and could impact whether DOE Washington will want to work with ORNL in general.
>
> . . . .
>
> Larry discussed that he was trying to find a spot for David to land – apparently the Washington offices talk to one another, and no one wanted to work with David. Larry said that David is a talented individual, but people are afraid of what he might do to their program. Kathie [Finnie] discussed David's fraud, waste, and abuse concerns and that the fact that he voiced his concerns was not a problem – it was the manner in which he did it.

Ex. A at 2. These excerpts could be read to reflect a discussion of something other than Moses' lack of funding. However, read in context, their connection to the funding issue is clear, as an explanation of why Moses' lost funding and how the opinion of certain DOE officials might affect his ability to obtain funding in the future.

Thus, applying the first factor set forth in *Kalil*, the strength of the reason for the personnel action, the record as a whole, with respect the STRC's decision and the events leading up to it, clearly supports a finding that the reason for the decision was Moses' lack of funding. Further, the undisputed fact that five months had passed since Moses' loss of NA-21 funding and that prospects for future funding were dim certainly is evidence of the strength of the reason for the committee's decision.

As for the strength of any motive on the part of the STRC committee to retaliate against Moses for his protected activity, there is no direct evidence of any such motive since, as discussed above, the targets of Moses' protected disclosures were officials at DOE headquarters and at other DOE laboratories, not ORNL in general or any of the committee members in particular.

In finding a lack of retaliatory motive, I have considered the evidence in the record that after STRC committee member Dana Christensen first read Moses' September 6, 2006, e-mail a few days after it was sent, Christensen wanted to take an action against Moses stronger than putting him on administrative leave and issuing a written warning. Finnie testified that she recalled Christensen being "quite angry that a person of your stature and your background could write an inflammatory e-mail such as that." Tr. at 672. Satkowiak testified that Christensen "was

disturbed that a professional at the laboratory would act like that in a public forum. So, yeah, he was upset. And, yeah, he . . . said something like, 'Why don't we get rid of the guy? Why, why are we keeping this trouble-maker?'" *Id.* at 696-97. Finnie and Satkowiak both testified that, after they had proceeded to discuss Moses' "value to the program" and the fact the he was "sincerely sorry," Christensen agreed with the recommendation of Finnie and Satkowiak for the less severe action that was ultimately taken. *Id.* at 672-73, 697. However, this same testimony indicates that Christensen's anger was not based upon the substance of Moses' protected disclosure, but rather the "inflammatory" nature of the e-mail, and whether there "was going to be a problem with [the DOE] customer." *Id.* at 672, 697; *see also id. at* 623-28, 632-36 (testimony of Christensen). I therefore do not consider this testimony to be evidence of Christensen's motive to retaliate against Moses for his protected activity.

Finally, regarding the third factor set forth in *Kalil*, UT-Battelle submitted a document at the hearing which it contends shows that it has taken similar action against other ORNL employees similarly situated to Moses. Ex. 17. ORNL HR official Katherine Finnie testified at the hearing that she compiled this document using information she had gathered regarding ORNL employees "who would be expected to form their own funding; that is, Researchers, Senior Researchers, and Program Managers . . . who experienced an immediate loss of major funding, and they were charging to the indirect account greater than 50 percent in the last six months of their employment." Tr. at 450, 451. According to Finnie's testimony, the document reflects information regarding nine ORNL employees so situated who were ultimately terminated, and indicates the length of time between when the employee lost direct funding and the date the employee was terminated, the length of time ranging from zero to seven and one-half months, and averaging approximately three and one-half months. Ex. 17; Tr. at 462-63.

In addition, Reinhold Mann, ORNL's Associate Laboratory Director for Biological and Environmental Sciences and one of the three members of the STRC, testified regarding another employee who appears to have been similarly situated to Moses with respect to loss of funding. That employee was, according to Mann, a "pioneer" in the field of cryobiology at the laboratory in the late 1990s. Tr. at 575. Mann received guidance that there would no funding for cryobiology at the laboratory in fiscal year 1998. *Id.* at 574. He testified that ORNL gave the employee approximately five or six months to obtain other funding, but ultimately ended his employment when he was unable to do so. *Id.* at 576.

In comments on the Report of Investigation that Moses submitted to the OHA investigator, he refers to two other ORNL employees that he contends should be considered as similarly situated to him vis-à-vis lack of funding. Ex. 21. At the hearing, UT-Battelle presented the testimony of the ORNL officials for whom these two individuals worked.

The testimony of one of the officials, the Director of ORNL's Nuclear Science and Technology Division, described how one of the employees at issue was hired by ORNL for the purpose of doing "program development," and was paid from indirect funds that were budgeted into his division's overhead account for that specific purpose. Tr. at 518-19.

The other official, for whom the second ORNL employee at issue worked, was at the time the Director of ORNL's Engineering, Science and Technology Division (ESTD). *Id.* at 537. He

testified to "second-hand" knowledge that the employee was removed from her position as Director of ORNL's Energy Efficiency and Renewable Energy Programs at the request of the DOE, after which she became the ESTD Deputy Director. *Id.* at 540. The ESTD Director testified that this employee, in her new Deputy Director position, was paid from "indirect" funds, and was not asked to "develop her own direct funding," though by the time she left ORNL approximately 13 months later, she was working on climate change programs that allowed her charge about half of her time to direct funds. *Id.* at 541-43.

Based on the testimony of these two officials, I do not find either of the employees at issue to have been similarly situated to Moses. Although there is evidence that one of the employees in question was removed from her position at the request of DOE, neither appears to have been in a position similar to Moses, who does not dispute that his position as a "band 4 researcher" required him to secure direct funding for his time. *Id.* at 208; Ex. D.

Considering all of the relevant factors as applied to the evidence discussed above, I am convinced that, given Moses' lack of funding and his lack of prospects for future funding, the STRC would have decided to give Moses the choice between retirement and termination, regardless of whether he had engaged in any activity protected under Part 708. Therefore, I find that UT-Battelle has proven, by clear and convincing evidence, that the STRC committee would have reached the same decision in the absence of Moses' protected disclosures in 2004, 2005, and September 2006. [16]

IV. Conclusion

In the present case, there is no dispute that Moses' communications resulted in a loss of DOE funding support of Moses twice, from NA-26 in April 2005 and from NA-21 in September 2006. The record further reflects that UT-Battelle was not responsible for DOE's decisions, and that in fact Moses' supervisor Satkowiak attempted in both instances to keep Moses working on the DOE-funded programs. Tr. at 267-68, 312-16. On this point, Moses offered the following testimony:

> I know that in this discussion it has been brought out that Larry [Satkowiak], you know, tried his best to keep me employed, but I do stay very concerned about the Contractor's responsibility to initiate investigations when disclosures are made, whether they have responsibilities under [DOE Order 442.1A and 221.1] to either pursue a concern when a legitimate concern about fraud, waste, abuse, abuse of authority, mismanagement arise, other than just

[16] Moses asked questions at the hearing regarding whether the STRC considered offering Moses part-time employment as an alternative to the action it took. Tr. at 478-79, 667-67. Although Moses has not argued that the STRC should have offered him this additional option, I note here the testimony of ORNL HR official Barreras that part-time status would customarily be requested by the employee, *id.* at 481, and the testimony of Moses that he did not request it because it "didn't occur to me to request it, and it wasn't offered as an option." *Id.* at 667. Further, Satkowiak testified that if Moses "was part-time, he'd still have the same requirement to be funded or not." *Id.* at 737. Finally, I note that since retiring, Moses has worked as a subcontractor for ORNL at a higher hourly rate than he earned as an ORNL employee. *Id.* at 668-70. In any event, the issue before me is not whether UT-Battelle should have offered Moses another alternative to retirement or termination, but rather whether it would have taken the action it did take in the absence of Moses' protected disclosures.

> going, talking to the Program Office and have them say, "Well, there's nothing there," because to the best that I can determine, both in the NA-26 disclosure and the NA-21 disclosure, these were just summarily dismissed by Headquarters.
>
> There was no investigation, either by the Lab or by the Headquarters, of the substance of the disclosure.

Tr. at 233-34. It is clear from this and other testimony by Moses that he believes DOE removed him from NA-21 and NA-26 funding in retaliation for his protected disclosures, and that UT-Battelle did not fulfill what Moses believes was the contractor's obligation to "initiate investigations" or otherwise "pursue" the substance of concerns raised by its employees. *See, e.g.,* Tr. at 18.

However, whether the DOE took actions against Moses in retaliation for disclosures is not an issue within the scope of Part 708. *See Ronald E. Timm,* 28 DOE ¶ 87,015 (OHA lacks jurisdiction to consider Part 708 complaint filed against DOE). The ultimate issue in this case is whether *UT-Battelle's* actions were taken in retaliation for Moses' protected disclosures. In this regard, whether UT-Battelle is obligated by legal authority other than Part 708 to initiate investigations regarding the substance of a protected disclosure or raise these concerns to higher levels within the DOE is, again, not an issue in this case. Finally, Part 708 does not provide a forum for a consideration of the merits or validity of the substance of a protected disclosure, beyond the issue of whether the complainant "reasonably believed" that the information revealed is of such a nature that the disclosure would qualify for Part 708 protection. Once the complainant has met this burden, as Moses did in the present case, and proven that the disclosure was a contributing factor in the action taken against him, the only remaining issue is whether the contractor would have taken the same action absent the disclosure. For the reasons set forth above, after careful consideration of the record,[17] I find that UT-Battelle, faced with a set of circumstances out of its control, took actions that I am convinced it would have taken had it faced the same circumstances in the absence of Moses' protected disclosures. I will, therefore, deny the present complaint.

It Is Therefore Ordered That:

(1) The complaint filed by Dr. David L. Moses under 10 C.F.R. Part 708, OHA Case No. TBH-0066, is hereby denied.

(2) An unredacted copy of Exhibit A and the portion of Exhibit 22 marked "Attorney-Client Privilege 0002" will be released to the Complainant unless UT-Battelle files a notice of appeal by the fifteenth day after its receipt of the initial agency decision.

[17] In Section I.B above, I found certain information UT-Battelle redacted from two of the exhibits submitted at the hearing to be protected under the attorney-client privilege. I note here that, were I to consider as evidence all of the information that was redacted from the two exhibits, included that which I find is privileged, I would reach the same relevant legal conclusions and the same ultimate decision as I do without considering as evidence any of the privileged material.

(3) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: September 8, 2008

February 12, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Petitioner: Dean P. Dennis

Date of Filing: August 14, 2008

Case Number: TBH-0072

This Initial Agency Decision concerns a whistleblower complaint (the "Complaint") filed by Dean P. Dennis (Mr. Dennis or the "Complainant") against his former employer, National Security Technologies, LLC (hereinafter referred to as "NSTec"), under the Department of Energy's (DOE) Contractor Employee Protection Program regulations set forth at 10 C.F.R. Part 708. At all times relevant to this proceeding, NSTec managed and operated the Nevada Test Site and other satellite facilities for the DOE's National Nuclear Security Administration's (NNSA) [1] Nevada Site Office. Mr. Dennis alleges in his Complaint that during his employment tenure with NSTec he made several disclosures protected under 10 C.F.R. Part 708 and that NSTec terminated him in retaliation for his having made those protected disclosures. Mr. Dennis seeks monetary damages, reimbursement of medical bills for a one-year period beginning from the date of his termination, an offer of re-employment with NSTec, an apology letter, a letter of recommendation, the deletion from his personnel and personnel security files of any reference to his "termination for cause" and a notation in his personnel and personnel security files of "layoff" to explain his absence from the workplace after June 6, 2007. As discussed below, I have determined that the Complainant is not entitled to relief under 10 C.F.R. Part 708.

I. Background

A. The DOE's Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to "safeguard public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992).[2] Its primary purpose is to encourage contractor employees to disclose information which

[1] NNSA is a semi-autonomous agency within the DOE which Congress established in 2000.

[2] The DOE has amended the Part 708 regulations a few times since its original promulgation of the regulations. *See* 64 Fed. Reg. 12,862 (March 15, 1999) (interim final rule), amended, 64 Fed. Reg. 37,396 (1999), amended and finalized, 65 Fed. Reg 6314 (2000), 65 Fed. Reg. 9201 (2000) (technical correction).

they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. Part 708. Under the Part 708 regulations, protected conduct includes:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [the employee's] employer, or any higher tier contractor; information that [the employee] reasonably believes reveals-
>
> (1) A substantial violation of a law, rule, or regulation;
> (2) A substantial and specific danger to employees or to public health or safety; or
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if [the employee] believe[s] participation would –
>
> (1) Constitute a violation of a federal health or safety law; or
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

The Part 708 regulations set forth the process for considering complaints of retaliation filed pursuant to those regulations. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating Part 708 complaints, convening evidentiary hearings, issuing Initial Agency Decisions, and considering appeals. *See* 10 C.F.R. §§ 708.21-708.34.

B. Procedural Background

On August 10, 2007, Mr. Dennis filed a Part 708 Complaint against NSTec with the local DOE Employee Concerns Program (ECP) Office. After efforts to engage in mediation proved unsuccessful, the ECP Office transferred the Complaint in October 2007 to OHA for an investigation, followed by an administrative hearing. The OHA investigation was delayed for several months due to the potentially classified nature of Mr. Dennis' Part 708 concerns, and the resulting need to make arrangements to allow the OHA investigator to conduct interviews and store documents in a secure environment. On August 14, 2008, the OHA Investigator issued his Report of Investigation (ROI) in this case, and I was appointed the Hearing Officer in the matter on August 19, 2008.

On October 21 and 22, 2008, I convened an unclassified hearing on Mr. Dennis' Complaint and heard testimony from eight witnesses. Counsel for Mr. Dennis submitted seven documents into the record which he labeled as Exhibits A through G; Counsel for

NSTec tendered four documents which he designated as Exhibits 1 through 4. These exhibits will be referred to in this Decision as "Ex." followed by the appropriate numeric or alphabetic designation. The hearing transcript in this case will be referred to as "Tr."

C. Mr. Dennis' Part 708 Complaint

Under the Part 708 regulations, a complaint must specifically describe the disclosures that the complainant believes gave rise to the alleged retaliation. 10 C.F.R. § 708.12 (a)(2). In his Complaint, Mr. Dennis stated that he was terminated for "informing my management that I needed to disclose security problems" at the RSL. Complaint at 1. Mr. Dennis related that the details of his security concerns were classified and for this reason he did not articulate them in his Complaint. *Id.* In his Complaint, Mr. Dennis generally described his protected disclosures as revealing "gross mismanagement relating to security practices and major security vulnerabilities in a facility and relating to classified computer security within the DOE in general." *Id.*

In the ROI, the OHA investigator stated that Mr. Dennis' failure to specifically describe his disclosures in his Part 708 Complaint would ordinarily result in his Part 708 action being dismissed. *See* ROI at 4. The OHA investigator found, however, that it was reasonable and necessary for Mr. Dennis to withhold the specifics of his disclosures until he could convey them to an investigator in a secure setting because the substance of the disclosures could potentially be classified. *Id.* Accordingly, Mr. Dennis was permitted to correct the procedural deficiencies in his Complaint when he met face-to-face with an OHA investigator who held a security clearance.

After meeting with Mr. Dennis, the OHA Investigator identified six possible protected disclosures, four related to security matters and two related to management issues. *Id.* at 4-5. Specifically, those disclosures in the former category include: (1) alleged ineffective security procedures related to ACREM, (2) alleged inefficiencies and security problems related to security logs, (3) the alleged presence of tracker software of unknown origin on a classified computer, and (4) alleged inadequate security procedures for escorting workers performing construction repairs in the Sensitive Compartmented Information Facility (SCIF). As for those disclosures in the latter category, they pertained to: (1) NSTec's alleged failure to provide Mr. Dennis with software so he could efficiently and effectively conduct reviews of security logs, and (2) NSTec's change in the access rules for the SCIF and the alleged negative impact that change had on Mr. Dennis's productivity.

The OHA Investigator concluded based on the evidence gathered during his investigation that, with the exception of the alleged "tracker software" issue, Mr. Dennis could not reasonably have believed that any of the other five alleged protected disclosures revealed "a substantial and specific danger to public health and safety." *See* ROI at 11.

At the hearing, I allowed Mr. Dennis to provide documentary and testimonial evidence on all six alleged disclosures. In this Decision, I have reviewed all of Mr. Dennis' disclosures not only to determine if any of them can be characterized as revealing "a

substantial and specific danger to public health and safety," but also to determine whether any of the disclosures revealed a "substantial violation of a law, rule or regulation," or "fraud, gross mismanagement, gross waste of funds, or abuse of authority."

II. The Legal Standard

As noted above, the regulations set forth at 10 C.F.R. Part 708 provide an administrative mechanism for resolving whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the Complainant and the contractor with regard to their respective allegations and defenses, and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

A. The Complainant's Burden

It is the burden of the Complainant under Part 708 to establish, by a preponderance of the evidence, that he or she made a protected disclosure, participated in a proceeding, or refused to participate as described in 10 C.F.R. 708.5, and that such act was a contributing factor to a retaliatory action. 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua, Lucero*, Case No. TBH-0039 (2007),[3] *citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990). In the present case, Mr. Dennis must make two showings in connection with his Part 708 Complaint. First, he must show that he disclosed information to NSTec management that he "reasonably" believed revealed, either "a **substantial** violation of law, rule or regulation," "a **substantial** and specific danger to employees or to public health and safety" or "fraud, **gross** mismanagement, gross waste of funds, or abuse of authority (emphasis added)." 10 C.F.R. § 708.5. If Mr. Dennis meets this threshold showing with regard to any of his alleged protected disclosures, he must next prove that at least one of his disclosures was a contributing factor to his termination. One way a complainant can meet this evidentiary burden is to provide evidence that "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person cold conclude that the disclosure was a factor in a personnel action." *See David Moses*, Case No. TBH-0066 (2008), *Ronald Sorri*, Case No. LWA-0001 (1993).

B. The Contractor's Burden

If the Complainant satisfies his evidentiary burden, the burden then shifts to the Contractor to show, by clear and convincing evidence, that it would have taken the same action absent any protected disclosures. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See Casey von Bargen*, Case No. TBH-0034 (2007). OHA Hearing

[3] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entered the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

Officers have recently relied on the Federal Circuit for guidance in evaluating whether the contractor has met its evidentiary burden in a Part 708 case. *See David Moses*, Case No. TBH-0066 (2008), *Dennis Patterson*, Case No. TBH-0047 (2008). Specifically, the Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, examines: (1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees . . ." *See Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007).

III. Findings of Fact

Mr. Dennis holds a Bachelor's degree in finance and an MBA degree in management. Tr. at 25. He has worked for a number of DOE contractors at different locations since 1990. *See* Complaint at 1, Ex. 1. For most of his employment history before joining NSTec, he had little, if any, experience working in matters relating to security or intelligence activities. Mr. Dennis worked at the Nevada Site Office beginning in September 2003 as an employee of another contractor. Ex. 1. The record reflects that sometime in the fall of 2006, the contractor that preceded NSTec at the Nevada Site Office reorganized. Tr. at 27, 278, 374. The position occupied by Mr. Dennis at the predecessor contractor was abolished and that contractor placed him in a position so he could stay employed. *Id.* at 374, Ex. 1. Mr. Dennis' position after the reorganization was that of a Senior Operations Specialist working in the Special Programs Department at the Remote Sensing Laboratory (RSL) located on Nellis Air Force Base. *See* Complaint at 1. On March 21, 2006, the Field Intelligence Element (FIE) Director at the RSL asked Mr. Dennis to assume additional duties as an Information Systems Security Officer (ISSO) at the Sensitive Compartmented Information Facilities (SCIF)[4] at the RSL and the Nevada Intelligence Center. *See* Ex. D. Mr. Dennis testified that he had no background or training for either Senior Operations Specialist position or the ISSO position. Tr. at 28, 56.

NSTec became the management and operating (M&O) contractor for the NNSA's Nevada Test Site and the Nevada Site Office on July 1, 2006. *Id.* at 40, 46. NSTec elected to maintain the organizational structure established by the previous contractor at the site, a structure which included the position encumbered by Mr. Dennis. Tr. at 28. The previous contractor's FIE Director also assumed the same job responsibilities and title with NSTec that he held with the previous contractor. According to the record, NSTec management recognized that Mr. Dennis had no background in the positions that he occupied but nonetheless believed that he was qualified for his positions with "some on-the-job training."[5] *Id.* at 375.

---

[4] A SCIF is an "accredited area, room, group of rooms, or installation where Sensitive Compartmented Information Facility may be stored, used, discussed, and/or electronically processed." *See* DOE Order 5639.8A at http://www.directives.doe.gov.

[5] Between March 2006 and his termination in June 2007, Mr. Dennis completed seven training courses, some of them multi-day, which covered cyber security and other security-related topics. See Ex. C.

During his tenure with NSTec, Mr. Dennis' responsibilities included completing System Security Plans for computer systems at the RSL and another location;[6] serving as one of two custodians for Accountable Classified Removable Electronic Media (ACREM) in the RSL;[7] reviewing print-outs showing activity for computer terminals for access denials or some sort of irregularity (hereinafter referred to as "security logs") at the RSL and another location; and performing Derivative Classifier (DC) functions for NSTec. *See* Performance Review at Ex. 1, Tr. at 57, 62, 104-105, 356-357.

NSTec operated as a "matrix" organization, meaning that employees supported the activities of, and reported to, a number of different supervisors and managers at the facility. Tr. at 118. As a result, Mr. Dennis' actions were subject to the scrutiny of several NSTec officials. Mr. Dennis' supervisor of record was Ron Gross, the Manager of Special Programs. Tr. at 275. Mr. Dennis' supervisor for technical matters relating to information security was Jeff Harvey, the Information Systems Security Manager (ISSM). *Id.* at 93. Mr. Dennis' supervisor for the functions that he performed in the SCIF at the RSL, was Loretta DeVault, the Deputy FIE Director and Special Security Officer. *Id.* at 226-227. When Ms. DeVault was absent, her assistant, Rhonda Fulkerson, a Security Specialist and Alternate Special Security Officer, acted in her stead. *Id*. at 328. All of Mr. Dennis' supervisors reported to Alan Will, the Deputy Director of the RSL and the Director of FIE. *Id.* at 381. These reporting chains are important to determining whether Mr. Dennis raised any protected disclosures to a person in a position superior to his own at NSTec.

Sometime in the winter or spring of 2007, a number of events occurred that are relevant to understanding and appreciating some of the issues in this case. First, NSTec, at the direction of the DOE, implemented new procedures for handling ACREM in response to an incident that had occurred at another DOE facility. *Id* at 235. Next, NSTec, again at the direction of the DOE, decided to enhance the security at its site by reducing the number of persons who could access the SCIF without an escort. *Id.* at 257. Among those no longer allowed unrestricted access to the SCIFs as a result of the access changes were Mr. Dennis and his supervisor of record. *Id.* at 302. Third, NSTec decided to prohibit all thumb-drives, personal and company-owned, from the work site. *Id.* at 266, 289.

The record indicates that Mr. Dennis did not react well to the security enhancements noted immediately above. With respect to the ban of thumb drives, Mr. Dennis approached his supervisor of record four or five times and tried to convince him that he needed the company-owned thumb drive to do his job. *Id.* at 289. Mr. Dennis even raised the issue to the FIE Director in an attempt to "get his thumb drive" back, but to no avail. *Id*. at 267. As for the restricted access to the SCIF, one witness described Mr. Dennis as being "very unhappy, very aggravated" when he learned that he no longer had unrestricted access to the SCIF. *Id.* at 239-240. Another witness related she had

---

6 By his own report, this task required him to understand the requirements of a Director of Central Intelligence Directive, DCID 6/3. Ex. 1.

7 According to Mr. Dennis, all the ACREM resided outside the SCIF at RSL. Tr. at 71.

"multiple, extremely intense and somewhat confrontational conversations" with Mr. Dennis about the new access procedures at the SCIF. *Id.* at 331. Mr. Dennis expressed his view that the new access rules inhibited his ability to do his work and negatively impacted his productivity. *Id.* Mr. Dennis' supervisor of record responded to Mr. Dennis' concern by noting that "if you live in a classified world, you must adhere to the rules." *Id.* at 303. As for the DOE's new rules for handling ACREM, Mr. Dennis voiced his opinion numerous times to his superiors in April and May 2007 that the security improvements were pointless and ineffective. *Id.* at 194. To support his viewpoint, he speculated that someone with malicious intent could defeat the security procedures by surreptitiously copying ACREM after checking it out from the custodian. He also posited several scenarios where he, as a trusted insider and ACREM custodian, could maliciously circumvent the procedures without detection. *Id.* at 62-85.

Based on my observation of the demeanor of the witnesses at the hearing and my assessment of their credibility, it appears that Mr. Dennis' relationship with those in charge of the SCIF at the RSL was strained and that Mr. Dennis was less than cooperative in acceding to the legitimate work-related requests of those in charge of the SCIF. The Assistant Special Security Officer in the SCIF at the RSL testified that she had problems with Mr. Dennis bringing CDs into the SCIF to destroy. *Id*. at 335. She stated that "anything that comes into the SCIF needs to be approved by the Special Security Officer or the Assistant Special Security Officer." *Id.* at 336. According to the Assistant Special Security Officer, Mr. Dennis brought disks or CDs into the SCIF multiple times each week. *Id*. at 344. She opined that this kind of media did not need to be destroyed in a SCIF and that she approached Mr. Dennis every time he brought materials into the SCIF to destroy. *Id.* at 344-346. She related that Mr. Dennis did not take the disks to her upon entering the SCIF, that he was uncooperative in allowing her to look at the documentation, and that he told her she did not need to know what he was working on. *Id.* at 336-338. The Assistant Special Security Officer claimed, but Mr. Dennis vehemently denied, that she told him multiple times not to bring CDs or disks into the SCIF to destroy. *Id.* at 345, 360. The Special Security Officer testified that the Alternate Special Security Officer reported to her that Mr. Dennis was taking paperwork from the SCIF and had become irate when the Alternate Special Security Officer requested to see the paperwork. *Id*. at 263-264.

NSTec conducted performance evaluations of its workforce in March 2007. In anticipation of completing Mr. Dennis' performance evaluation, Mr. Dennis' supervisor of record inquired about Mr. Dennis' performance and conduct of those with whom he regularly worked. Mr. Dennis' supervisor of record learned for the first time that several persons, including those in charge of the SCIF at the RSL, claimed to have had difficulty finding Mr. Dennis during the work day. *Id.* at 280, 282. In March 2007, Mr. Dennis' supervisor rated Mr. Dennis' performance as "satisfactory" based principally on the comments that he had received about Mr. Dennis' unavailability. *See* Ex. 1. Mr. Dennis objected strenuously to the rating and eventually elevated the matter to the FIE Director. The FIE Director refused to alter Mr. Dennis' performance rating. Tr. at 287.

At some point shortly after completing Mr. Dennis' performance review in March 2007, Mr. Dennis' supervisor of record reviewed some reports relating to the classification activities at the site. *Id.* at 291. At that point, the supervisor of record discovered that Mr. Dennis had derivatively classified "a lot" of documents. *Id.* This fact troubled the supervisor of record because Mr. Dennis allegedly lacked the technical expertise to review many documents. *Id.* at 291-293. The supervisor of record explained at the hearing that he was concerned that Mr. Dennis might have been privy to information that he should not have been due to the extensive nature of his derivative classification activities. *Id.* at 291. The supervisor of record immediately instructed Mr. Dennis to stop derivatively classifying documents unless Mr. Dennis was the only person available to perform that function and the document needed to get out. *Id.* at 292.

Sometime in late March 2007 or early April 2007, Mr. Dennis' supervisor of record and the Special Security Officer of the SCIF at the RSL independently met with the FIE Director to discuss their respective security concerns about Mr. Dennis. Mr. Dennis supervisor of record first expressed his concern to the FIE Director about Mr. Dennis' repeated requests to get his company-owned thumb drive back. *Id.* at 290. According to the supervisor of record, there was no reason why Mr. Dennis required a thumb drive to do his work. *Id.* The supervisor of record also shared with the FIE Director his concern about the excessive number of derivative classification reviews that Mr. Dennis had performed in light of the fact that Mr. Dennis might have lacked the technical expertise to review or even see some of the documents that he had derivatively classified. *Id.* at 291-293. Next, the supervisor of record advised the FIE Director that several persons had reported that Mr. Dennis was not available during the workdays. *Id.* at 291. In addition, the supervisor of record mentioned to the FIE Director that Mr. Dennis often worked times beyond normal work hours, including weekends. [8]*Id.* at 297. There were times, according to the supervisor of record, where Mr. Dennis would be isolated in his area even when there was a second person present in the facility.[9] *Id.*

The Special Security Officer of the SCIF at the RSL also reported numerous concerns about Mr. Dennis' behavior to the FIE Director. First, she told him that Mr. Dennis was aggravated with the security procedures that the DOE had put in place in the facility and had repeatedly expressed his view that the security procedures were ineffective. *Id.* at 239. Second, she related that Mr. Dennis had told her he could do "damage and walk away with things." *Id.* Third, she stated that Mr. Dennis was under a lot of emotional and financial stress due to his divorce and contested child custody issues. *Id.* Fourth, she advised the FIE Director that Mr. Dennis had become very upset with NSTec's prohibition of thumb drives in the work place. *Id.* Fifth, she related that Mr. Dennis had expressed concerns about passing a polygraph examination because he needed to

---

[8] The supervisor of record testified that NSTec had sanctioned some of Mr. Dennis' unusual work hours in an effort to accommodate his childcare issues. *Id.* at 298.

[9] The supervisor of record testified that there was a two-person rule in the building where Mr. Dennis worked, meaning that there needed to be two persons present at the location at all times for purposes of security and accountability. *Id.*

manipulate an insurance claim in order to be made whole after a serious automobile accident. *Id.* at 264-265.

In addition to the litany of concerns enumerated above by Mr. Dennis' supervisor of record and the Special Security Officer, the FIE Director testified that the Special Security Officer had also raised a concern that Mr. Dennis had been visiting sites on the classified network where he should not have been going. [10] According to the FIE Director, he communicated all the concerns that he received about Mr. Dennis in early April 2007 to his senior management at NSTec and to the DOE organization responsible for overseeing NSTec's operations. *Id.* at 384.

In mid-May 2007, Mr. Dennis reported to the ISSM that there was tracking software on his computer. *Id.* at 96. The ISSM immediately brought this matter to the attention of the Special Security Officer. [11]*Id.* at 418. The FIE Director testified that the ISSM also informed him of Mr. Dennis' computer software tracking discovery. *Id*. at 402.

While the DOE was reviewing the allegations relating to Mr. Dennis that NSTec had brought to the agency's attention in early April 2007, Mr. Dennis sent an e-mail to the FIE Director on May 31, 2007, in which he related his accomplishments for the week and asked to discuss the negative impact the new SCIF access requirements were having on his ability to do his job. *See* Ex. 3. On June 1, 2007, Mr. Dennis sent another e-mail to the FIE Director, this one elaborating on the impact his restricted SCIF access was having on his work. *See* Ex. 2. A meeting to discuss Mr. Dennis' SCIF-related concerns was scheduled in the FIE Director's office for June 6, 2007. *See* Complaint at 1.

At some point, the DOE allegedly decided that the agency could no longer support Mr. Dennis working in the SCIF environment in view of the information NSTec had presented to the agency and its own analysis of the situation. *Id.* at 388. The FIE Director testified that the DOE advised NSTec that it was NSTec management's decision whether to find another position for Mr. Dennis. *Id*.

Sometime in early June 2007, several high level NSTec managers, including the company President met to discuss Mr. Dennis' future with NSTec. *Id.* at 447. The NSTec President testified that those assembled unanimously agreed to terminate Mr. Dennis' employ. *Id.* at 448. According to the NSTec President, Mr. Dennis had exhibited an aggressive pursuit of highly classified information that was deemed not relevant to his job assignment. *Id.* Mr. Dennis' persistent demands to access classified information and his financial situation were alleged to be among the reasons for his termination. *Id.* at 450.

---

[10] It appears from the record that Mr. Dennis did access classified sites that he should not have. Under cross-examination, Mr. Dennis claimed that he had the right to access [certain sites] even if he didn't have a "need to know" because he thought he was being groomed for a position in intelligence. *Id.* at 187-188.

[11] There is some conflicting testimony on this matter. The Special Security Officer claims to have no recollection of the ISSM raising the issue of tracking software with her. *Id.* at 244. Instead, her recollection is that the ISSM communicated to her that Mr. Dennis' administrative rights to the computer had been taken away from him. *Id.* at 247. Based on my assessment of the demeanor and credibility of the witnesses, I find that the ISSM did report Mr. Dennis' belief to the Special Security Officer.

After the NSTec management decided Mr. Dennis' fate, the Employee Relations Manager for NSTec prepared the necessary paperwork and Mr. Dennis was terminated on June 6, 2007. *Id.* at 476. Ex. 1.

IV. Analysis

A. Whether the Complainant Made any Disclosures Protected under 10 C.F.R. Part 708?

As noted in Section I.C. above, Mr. Dennis alleges that he made six protected disclosures during his tenure with NSTec. Two of those disclosures involve the same subject matter, *i.e.*, security logs. For purposes of this Decision, the alleged disclosures relating to security logs will be analyzed together.

1. Allegations regarding ineffective security procedures relating to ACREM

It is undisputed that, in April and May 2007, Mr. Dennis expressed his view to the Special Security Officer whose responsibility it was to oversee the SCIF at the RSL that the new procedures imposed by the DOE on the handling of ACREM were ineffective. Tr. at 234-236. To support his opinion on this matter, Mr. Dennis suggested that someone could bring a thumb drive or a disk into the facility and improperly download materials. *Id.* at 72. Mr. Dennis also suggested at the hearing that he could take a disk from the facility, go into his vehicle, copy the disk onto a laptop, and then return the disk to the facility without detection. At the hearing, Mr. Dennis admitted that there are some security safeguards (i.e. strap seals over the ports) that might make it difficult for someone to copy ACREM. *Id.* at 73-74. However, he pointed out that as the ACREM custodian, he was "in control of all the strap seals" and if he "were a bad guy" he could compromise security. *Id.* In fact, on several occasions, Mr. Dennis expressed his opinion to the Special Security Officer that he, as a custodian of ACREM, had too much authority and could pose an "insider threat" to NSTec. He also detailed some hypothetical fact scenarios where he could do damage to the facility. *Id.* at 68-85. Finally, at the hearing, Mr. Dennis raised for the first time his claim that the configuration of the software being used to comply with DOE's new ACREM requirements was deficient and that he had been prevented from elevating his concerns in this regard to senior management at NSTec.

As an initial matter, I find that Mr. Dennis' allegations relating to ACREM are all based on speculation. He admitted at the hearing that his concerns were grounded in what "potentially" could happen and that he never observed anyone do anything remotely approximating the security breach scenarios that he posited. *Id.* at 79. I also inferred from his testimony that he had never knowingly engaged in any conduct that had potentially compromised the security of the systems that he oversaw. Moreover, the record is clear that NSTec had banned the use of all thumb drives, including company-owned thumb drives, at its facility to enhance its security posture. I find it curious then that Mr. Dennis

raised the issue of thumb drives in connection with ACREM as a potential security concern when it was he who vociferously objected to this security enhancement when NSTec took his thumb drive away. With regard to Mr. Dennis' claim that he could have exited the facility with classified information and surreptitiously copied it onto a laptop in his car, he admitted under questioning by me that all vehicles entering and exiting the facility were subject to random search.[12] I was not convinced from Mr. Dennis' testimony that the physical security at the NSTec complex was non-existent, as he claimed. Regarding his contention that there were deficiencies in the configuration of the software used to prevent cyber security breaches, I was not convinced that Mr. Dennis possessed the technical expertise to render such an opinion. At the hearing, I asked Mr. Dennis how he knew enough about computers to do his job in view of his lack of background in the area. *Id.* at 56. He responded, "I didn't. That was the issue. . . I had no technical knowledge at all." *Id.* For this reason, I am unable to find that Mr. Dennis' belief about the possible deficient configurations in the ACREM software was reasonable.

In the end, I find that Mr. Dennis has not provided a preponderance of evidence that his statements about the ACREM are covered by the Part 708 regulations. First, since NSTec was following the DOE instructions on implementing the new ACREM procedures and Mr. Dennis did not allege that NSTec was not complying with DOE's mandate, neither a charge of gross mismanagement[13] nor a violation of a regulation or rule[14]could reasonably be argued here. Second, I find that Mr. Dennis could not reasonably have believed that NSTec's implementation of the ACREM amounted to a substantial and specific danger to employees or to public health and safety. It appears from the record that there were checks and balances in place in the locations where Mr. Dennis was handling ACREM. For example, the conflict between him and the Assistant Special Security Officer revolved around his introduction and destruction of ACREM in the SCIF at RSL. Mr. Dennis appears to have resented the intrusion of the Assistant Special Security Officer into his activities relating to ACREM when he was in a facility which she managed in an alternate capacity. She questioned him constantly, and asked to see

---

[12] The location where I conducted the two-day hearing in this case is one of the locations where Mr. Dennis spent a portion of his time while he was employed by NSTec. I personally observed security measures, including the random searches of vehicles entering and exiting the facility. It strains credulity, therefore, how Mr. Dennis could believe that there were no physical security measures in place at the NSTec facility.

[13] At the hearing, Mr. Dennis claimed that NSTec was "mismanaging how it handled ACREM." *Id.* at 79-80, 129-130. When questioned whether the mismanagement rose to the level of "gross" mismanagement, Mr. Dennis stated that NSTec's handling of ACREM did not constitute "gross mismanagement" but rather violated some rule, regulation, etc. *Id.* at 131. Later in his testimony, Mr. Dennis claimed that NSTec did engage in gross mismanagement because it did not do anything immediately about his ACREM concerns and prevented him from going to a higher level with the matter by firing him. *Id.* at 133-134.

14 In making this finding, I considered the testimony of the ISSM who characterized Mr. Dennis' "insider threat" comments as legitimate concerns expressed by one security professional to another. There was no testimonial or documentary evidence in the record to allow me to conclude that Mr. Dennis' concerns were anything more than rank speculation.

his paperwork for work being done in the SCIF. It was my impression from the Assistant Special Security Officer's testimony that the activities of those working at the NSTec facility were monitored by those with oversight responsibility. While it is possible that a trusted insider could breach security in any secure environment, it did not appear to me that there was anything fundamentally flawed with the new ACREM rules that would cause a reasonable person to believe that national security was at risk.

Finally, I find no evidence to support Mr. Dennis' claim that NSTec prevented him from advancing his concerns about ACREM up the chain of command. In fact, there was testimony in the record that the FIE Director had an "open door" policy and was generally available to NSTec employees. *Id.* at 376, 407. Mr. Dennis himself availed himself of the opportunity to speak to the FIE Director to complain about the thumb drives being removed and about issues relating to his performance evaluation. He could easily, it appears, had raised the ACREM matter directly with the FIE Director if he had chosen to do so.

2. Allegations regarding inefficiencies and security problems relating to security logs

Mr. Dennis was tasked with reconciling security logs which allegedly entailed his sifting through thousands of entries to identify anomalies. At the hearing, Mr. Dennis claimed that NSTec did not maintain its security logs in a "legal fashion." *Id.* at 105. In this regard, he stated that DCID 6/3 requires the separation of duties between administrators and the ISSO. *Id.* at 105. However, Mr. Dennis acknowledged at the hearing that such a separation did exist at the NSTec facility. *Id.* He also admitted at the hearing that DCID 6/3 did not require that software be put on computers for purposes of reviewing the security logs; it only mandated that the security logs be reviewed, not how to do it. *Id.* at 110. The evidence is clear that Mr. Dennis' disclosure about the security logs, if he articulated it to anyone,[15] did not reveal a substantial violation of a law, rule or regulation.

Mr. Dennis believed that the task of reviewing the security logs was cumbersome for him to perform. When Mr. Dennis learned that another DOE facility was using a software program to perform the function, he requested that NSTec purchase the software. *Id.* at 104, 129. At the hearing, Mr. Dennis admitted that NSTec never declined his request to purchase the software. *Id.* at 129. He also testified that he did not believe NSTec was engaging in gross mismanagement with regard to the requirements it imposed on him to review the security logs. *Id.*

Although the Assistant Special Security Officer denies it, Mr. Dennis claims that he told her that the security logs should be converted to a CD to prevent a system administrator from overwriting the entries. *Id.* at 103, 330. Mr. Dennis testified that "he was worried that someone might change the manual logs." *Id.* at 112. It appears from the evidence before me that Mr. Dennis was offering a "process improvement" to unburden him from

---

[15] None of the witnesses recall Mr. Dennis raising this issue with them.

the cumbersome task of manually reviewing the security logs. Mr. Dennis' unfounded speculation that someone might change a security log does not rise to the level of a reasonable belief protected under Part 708 that a security concern existed in the workplace with regard to the security logs.

3. Allegations about Tracking Software

Mr. Dennis alleges that in mid-May 2007, he reported to the ISSM that he had discovered an unauthorized software program on his classified computer in the SCIF. *Id.* at 96. Mr. Dennis testified that he noticed the presence of the software when he saw an unfamiliar icon in the lower right hand corner of his computer screen. *Id.* at 91. The ISSM confirmed at the hearing that Mr. Dennis showed[16] him the computer icon which appeared to be some sort of tracking software. *Id.* at 416-417. The ISSM testified that had grave concerns about this discovery, and immediately reported the matter first to the Special Security Officer in the SCIF[17] and then to the FIE Director. *Id.* at 418.

Mr. Dennis' supervisor of record testified that Mr. Dennis told him about the tracking software that he had discovered on his classified computer. *Id.* at 300. The supervisor asked him why the matter concerned him. *Id.* Mr. Dennis told the supervisor that he may have been "surfing on places where [he] shouldn't have been." *Id.* The supervisor responded by stating that he had no knowledge of any tracking software on the classified computers but if there was any tracking software, Mr. Dennis would need to answer for any of his unauthorized viewing of information on the classified network. *Id.*

The FIE Director confirmed at the hearing that the ISSM came to him with Mr. Dennis' concern about the tracking software. *Id.* at 378. The FIE Director provided probative testimony on the issue, the details of which need not be elaborated in this Decision, except that he was not concerned that any outsiders or "malicious folks" had hacked into NSTec's computer systems. *Id.* at 402-403.

Ultimately, it is not relevant whether the tracking software was installed with proper authorization, or even if tracking software was installed at all. Rather, I must look at whether it was reasonable for Mr. Dennis to believe that (1) unauthorized tracking software had been installed on the classified network in the SCIF, and (2) whether someone might have compromised the security procedures and rules at the SCIF by

---

[16] There is some conflicting testimony on this matter. Mr. Dennis claims that he called the ISSM into his office and asked him to look at the icon on his computer screen. *Id.* at 102. Mr. Dennis stated at the hearing that he did not print anything out. *Id.* The ISSM testified that Mr. Dennis "handed him a print of the name" of the software. *Id.* at 417. I need not resolve this conflicting testimony since I ultimately find that Mr. Dennis disclosed information to a supervisor, the ISSM, (either in person or by providing a print-out) that he reasonably believed revealed a substantial violation of security rules.

[17] The Special Security Officer claimed that she had no recollection of any conversation with either the ISSM or Mr. Dennis about Mr. Dennis' discovery of unauthorized tracking software on his classified computer. I did not find this testimony credible. Instead, I believed Mr. Dennis and the ISSM's account of their interaction with the Special Security Officer on this matter.

installing unauthorized software on the classified computer system. Mr. Dennis' testimony and that of the ISSM convince me that Mr. Dennis had a reasonable belief that there was unauthorized tracking software on his classified computer.[18] Specifically, Mr. Dennis' discovery of the icon on his computer and the ISSM's independent assessment of the situation clearly suggest that the two men reasonably believed that a cyber security breach may have occurred. In a classified setting, unauthorized tracking software, if it were truly unauthorized as Mr. Dennis believed, would clearly violate security rules, and potentially pose a significant threat to the national security. Mr. Dennis disclosed the presence of the tracking software to one of his superiors, the ISSM, and then to the Special Security Officer who oversaw the SCIF. In the end, I find that Mr. Dennis has proven, by a preponderance of evidence, that he made a protected disclosure regarding the tracking software on his classified computer.

4. Allegations of inadequate security procedures for escorting workmen in the SCIF

It is unclear from the evidence whether Mr. Dennis communicated his concern regarding the escorting procedures for construction workers in the SCIF to anyone. He testified that he did not speak to either the Special Security Officer or the Alternate Special Security Officer who oversaw the SCIF because they "seemed angry at [him] all the time." *Id.* at 141. He testified further that "he was going to" discuss the matter with the FIE Director, a statement that clearly indicates he had not done so. *Id.* at 140. He testified further that he told the ISSM, although the ISSM testified that he had no recollection of any such discussion. *Id.* at 414-415. Because Mr. Dennis could not prove that he disclosed this concern regarding the workmen in the SCIF to anyone, I find that he did not meet his evidentiary burden that he made a disclosure protected under Part 708 with regard to this discrete matter.

5. Allegations regarding changes to the SCIF access procedures

Mr. Dennis expressed his frustration with the new changes to the SCIF access procedures to the ISSM, the Assistant Special Security Officer, and his supervisor of record. *Id.* at 302, 331, 416. He also sent two e-mails to FIE Director requesting a meeting specifically to discuss the new access procedures. Ex. 2, 3.

The ISSM testified that Mr. Dennis did not consider the new access rules to constitute some sort of security breach. Tr. at 416. The ISSM explained to Mr. Dennis that he had no authority or oversight over the physical security at the SCIF, and directed him to share his concerns with the Special Security Officer at the SCIF or with the FIE Director. *Id.*

[18] Mr. Dennis' motive in revealing his discovery is not relevant here. Specifically, it is not relevant that Mr. Dennis may have been more concerned that the tracking software might uncover his possible misuse of the classified computer than with the potential security breach posed by that software. The DOE made it clear in the preamble to the 2000 amendments to the Part 708 regulations that it would not impose a "motives test" that could "allow an employee's intentions to be put on trial as a precondition to using the rule." See 65 Fed. Reg. 6314 (February 9, 2000).

The Assistant Special Security Officer at the SCIF related at the hearing that she had "multiple, extremely intense and somewhat confrontational conversations" about the SCIF access changes. *Id.* at 331. She stated that Mr. Dennis felt that the access changes inhibited his ability to do his work. *Id.*

The individual's supervisor of record testified that Mr. Dennis spoke to him about being excluded[19] from the SCIF. Id. at 302. The supervisor related that he, too, was excluded from the SCIF under the new rules. *Id.* He stated that he had no trouble under the new rules because he knew that NSTec was tightening its security by restricting access to the SCIF. *Id.*

At the hearing, Mr. Dennis testified that the SCIF access changes were inconvenient. *Id.* at 142. He related that he did not know the rules under which he was allowed to remain in the SCIF after he was escorted in there, and that the rules "kept changing." *Id.* at 214, 142. He clarified at the hearing that he did not consider his issues with the SCIF access changes to constitute gross mismanagement on the part of NSTec. *Id.* at 143. In addition, Mr. Dennis did not advance any argument at the hearing that would allow me to characterize his concerns about the new SCIF access procedures as a disclosure which revealed the substantial violation of some law, rule, or regulation, or a substantial danger to employee or the public health or safety. *Id.* Therefore, based on the evidence before me, I find that Mr. Dennis's concerns about the new SCIF access procedures do not fall within the ambit of 10 C.F.R. § 708.5.

6. Summary

In conclusion, for the reasons discussed above, I find that Mr. Dennis presented a preponderance of evidence that he made only one protected disclosure, a disclosure about the presence of tracking software on his classified computer. I turn next to whether Mr. Dennis has met the second prong of his evidentiary burden.

B. Whether Mr. Dennis' Protected Disclosure was a Contributing Factor in NSTec's Decision to Terminate Him?

In most cases, it is impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Thus, Hearing Officers in Part 708 proceedings allow complainants to meet their burden of proof through circumstantial evidence. In prior cases, Hearing Officers have held that a protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in a personnel action." *Ronald A. Sorri*, Case No. LWA-0001 (1993), *Thomas T. Tiller*, Case No. VWA-0018 (1997), *David L. Moses*, Case No. TBH-0066 (2008), *Richard L. Strausbaugh, et al*., Case Nos. TBH-0073, TBH-0075 (2008). In addition, "temporary proximity" between a protected

[19] Neither the Mr. Dennis nor his supervisor was "excluded" from the SCIF in the conventional meaning of that term. Rather, they both required an escort to enter the SCIF and their activities were monitored while in that location.

disclosure and an alleged act of reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *Ronald A. Sorri*, Case No. LWA-0001 (1993), citing, *County v. Dole*, 886 F.2d 147 (8th Cir.), *Janet Benson*, Case No. VWA-0044 (1999), *David L. Moses*, Case No. TBH-0066 (2008). Finally, a United States District Court has made it clear that a putative whistleblower must show both temporal proximity and knowledge to satisfy his or her regulatory burden. *See Safety & Ecology Corporation v. DOE*, Civil Action No. 03-0747 (D.D.C. 2004).

Applying these standards to the present case, I find that there is clearly temporal proximity between Mr. Dennis' protected disclosure in mid-May 2007 and his termination on June 6, 2007. I also find that at least one of those involved in the decision to terminate Mr. Dennis, namely the FIE Director, had actual knowledge of Mr. Dennis' protected disclosure. As previously stated in this Decision, the Field Intelligence Director testified that the ISSM told him in May 2007 about Mr. Dennis' concern about the computer tracking software. *Id.* at 378. The FIE Director also testified that he was one of seven senior NSTec managers who met in June 2007 and voted to terminate Mr. Dennis. *Id.* at 385-386. Accordingly, I find that Mr. Dennis has shown both temporal proximity and the knowledge necessary to meet his regulatory burden.

In sum, I find that Mr. Dennis has established a prima facie case that his protected disclosure was a contributing factor to his termination. The burden now shifts to NSTec to prove by clear and convincing evidence that it would have terminated Mr. Dennis absent his protected disclosure. 10 C.F.R. § 708.9(d).

C. Whether NSTec proved by clear and convincing evidence that it would have terminated Mr. Dennis even if he had not made a protected disclosure?

Under 10 C.F.R. § 708.29, NSTec bears a heavy burden in establishing that it would have terminated Mr. Dennis in the absence of his having made a protected disclosure. If NSTec meets this burden, however, it will defeat Mr. Dennis' allegation of retaliation in this case.

As an initial matter, I recognize that NSTec may have been prevented from providing as much testimonial evidence in support of its decision to terminate Mr. Dennis as it might have wished because I conducted the hearing in an unclassified format. In this regard, there were two occasions when NSTec witnesses (*e.g.* the FIE Director and the Special Security Officer) refrained from providing details for their responses because they were unable to do so in an unclassified forum.[20] *See* Tr. at 251, 388. Notwithstanding the constraints imposed on NSTec at the hearing, I find, as discussed below, that NSTec has

[20] A Classification Representative from DOE Headquarters accompanied me to the hearing. While I conducted the hearing in a secure location in an abundance of caution due to the potential classified overtones to the case, I admonished all witnesses that they were not to communicate any classified information to me during the hearing. On several occasions, I stopped the hearing at the request of a witness and permitted the witness to step outside the hearing room to speak with the Classification Representative to ensure that the witness' anticipated testimony would be unclassified.

provided clear and convincing evidence that it would have terminated Mr. Dennis even if he had not raised his concerns about the tracking software.

The testimonial evidence adduced at the hearing made it clear to me that once senior management at NSTec had "lost trust" in Mr. Dennis, they could no longer continue to assume the risk that Mr. Dennis might compromise national security while he occupied a position of major responsibility in a very secure environment. I was particularly struck by the testimony of NSTec's President whom I observed choose his words carefully and reflectively so as not to reveal classified information. The President, who remarked that he had held a top secret security clearance for several decades, expressed grave concern that Mr. Dennis had exhibited an "aggressive pursuit of highly classified information that NSTec deemed not relevant to his assigned job." *Id.* at 448. Explaining how "need to know" is the foundation of access to classified information, the NSTec President stated that Mr. Dennis' persistent demand to access classified information without the requisite "need to know" raised "a red flag of security concerns."[21] *Id.* at 449-450. The NSTec President testified that the decision to terminate Mr. Dennis was unanimous among those who assembled in June 2007 to discuss Mr. Dennis' behavior and conduct in the workplace. *Id.* at 448

Another senior manager who voted to terminate Mr. Dennis at a meeting convened in June 2007 also provided probative testimony at the hearing. The FIE Director first discussed the concerns brought to him by the Special Security Officer and Mr. Dennis' supervisor of record *(e.g.* Mr. Dennis' accessing of classified sites without a "need to know," his "insider threat" comments about himself, his unavailability, etc.) and then explained in detail how those concerns were elevated to the DOE. *Id.* at 381-385. The FIE Director also revealed that the DOE decided, after reviewing and analyzing the information presented to it by NSTec, that it would not support Mr. Dennis' activities in the SCIF. The FIE Director stated that DOE informed the company that it was free to find another position for Mr. Dennis in the company. *Id.* at 388. Finally, the FIE Director testified that NSTec was concerned about what Mr. Dennis could do as an insider, not what some hypothetical person could do to damage national security. *Id.* at 393.

Many of the concerns identified by both the FIE Director and NSTec's President as evidence of why the company "lost trust" in Mr. Dennis are corroborated by hearing testimony in the record. With regard to Mr. Dennis' persistent attempts to access classified information that he did not need to complete his job assignments, the following testimonial evidence is relevant. First, Mr. Dennis admitted on cross-examination that he thought it was permissible for him to access classified information even if he did not have a "need to know" because he thought he was being groomed for a position in the intelligence.[22] *Id.* at 187-188. I found this admission very disturbing for a former DOE

---

[21] The President also expressed a concern about Mr. Dennis' financial situation. However, NSTec did not provide any evidence of Mr. Dennis' financial irregularities. Had NSTec's only articulated reason for terminating Mr. Dennis been because of Mr. Dennis' financial situation, I would not have found any credible evidence to support that concern.

[22] When pressed at the hearing, Mr. Dennis acknowledged that he did not have "carte blanche" to access any classified site that he wanted. *Id.* at 187-188.

security clearance holder. The President of NSTec is correct that the "need to know" is the foundation for all activities involving classified information. Second, Mr. Dennis' supervisor of record testified convincingly of his concern in learning that Mr. Dennis had proactively sought out "a lot" of derivative classification assignments which might have given him access to classified material that he should not have had and for which he lacked the technical expertise. *Id.* at 291-296. Third, several managers expressed concern about Mr. Dennis' repeated vocal objections to the NSTec's decision to remove all thumb drives from the work site and his elevation of the matter to the FIE Director. *Id.* at 239, 289-290. As noted by Mr. Dennis' supervisor of record, Mr. Dennis' reaction to the enhanced security measure was perplexing given that he did not need a thumb drive to do his work. *Id.* at 290. Mr. Dennis' persistence in trying to get his company-owned thumb drive[23] returned raises a concern whether he had been downloading classified information and removing it from the work site, a scenario that he suggested on several occasions was possible in his work environment. Further, the Special Security Officer testified about Mr. Dennis' possible fraudulent manipulation of an insurance claim for pecuniary gain as a reason why he was concerned about undergoing a polygraph examination. The specter of possible fraudulent activity on Mr. Dennis' part is troubling in that it raises a question about his honesty, his willingness to comply with rules and regulations, and his potential violation of the law. The record already contains some evidence that Mr. Dennis might have been less than diligent in complying with security rules. Specifically, the Assistant Security Officer testified that Mr. Dennis was not always compliant with the SCIF requirement that, upon entering the SCIF, he provide the Special Security Officer with any material that he carried into the SCIF so she could examine it. *Id.* at 337. The Assistant Special Security Officer further testified those exiting the SCIF were subject to inspection to ensure that no classified material is removed from the SCIF. *Id.* According to the Assistant Special Security Officer, one time when she challenged Mr. Dennis, he reportedly told her that she did not need to know what he was working on. *Id.* at 338. She related that she continued to press the issue with Mr. Dennis which resulted in his leaving the document in the SCIF.

Turning to the factors set out in *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007), I find that NSTec has provided strong evidence that Mr. Dennis' behavior in the workplace, most notably his aggressive pursuit of classified information without a "need to know," his seeming disregard of the rules in the SCIF, and his characterization of himself as an "insider threat," raised legitimate suspicions that he might be failing to properly safeguard classified information. This conduct must necessarily be evaluated in the context of very secure environment in which Mr. Dennis worked to appreciate fully why it potentially implicated national security. If one chooses to work in a classified environment, one must be trusted to adhere strictly to stringent rules and endure restrictions on movement, speech and other freedoms enjoyed by others in an unclassified

[23] At the hearing, Mr. Dennis tried to minimize the concerns that he had expressed regarding the removal of all thumb drives by NSTec. When asked whether he was upset that NSTec had taken the thumb drives away from its employees, Mr. Dennis responded, "not really." *Id.* at 221. When queried if he had complained on many occasions about the removal of the thumb drives, he replied, "not on many occasions, no." *Id.* It was my impression from observing Mr. Dennis' demeanor during his testimony about this matter that he was not candid.

environment. Trust must exist among supervisors and subordinates and co-workers to ensure those charged with missions relating to national security and the common defense function at high levels and with minimal risk of security breaches. Whether Mr. Dennis deliberately or negligently engaged in the behaviors that caused NSTec to raise "red flags" well in advance of the protected disclosure at issue in this proceeding is not relevant. In looking at the strength of NSTec's reason for the personnel action excluding the whistleblowing, I find that NSTec's contention that it terminated Mr. Dennis because it lost "trust" in him is supported by the evidence. [24]

As for the second factor set forth in *Kalil, i.e.*, the strength of any motive to retaliate for the whistleblowing, there is no direct evidence in the record of any such motive on NSTec's part.

Finally, with regard to the third factor set forth in *Kalil, e.g.*, evidence of similar action against similarly situated employees, NSTec's President testified that he had never terminated an employee because of concerns relating to national security before, but had for "comparable reasons in other areas." *Id.* at 453. He then related that the company had terminated a manager for bullying in the workplace. He also stated that there were similar cases where he made the decision that he could no longer trust an individual, and dismissed him. The Manager of Employee Relations at the time Mr. Dennis was terminated testified that there were other occasions when NSTec's behaviors resulted in termination as "the immediate and only discipline." *Id.* at 467. The first example provided was a situation where an employee was involved in a car accident at the work site and was required to take a drug screen. Id. When the individual's drug screen came back positive, NSTec immediately terminated the employee for having come to work with drugs in his system. *Id.* The second example occurred when an employee arrived at work with a weapon in his vehicle. *Id.* at 468. Rather than turning the weapon into security, the employee took the bullets out of the gun, put the bullets in the glove box of the vehicle, and the gun in the trunk. *Id.* Upon exiting the work site, the car was randomly searched and the gun and bullets found. *Id.* NSTec immediately terminated the employee. In the end, while there does not appear to have been any employee similarly situated to Mr. Dennis, NSTec did introduce evidence that it has disciplined other employees through immediate termination when it deemed conduct to be so serious that it resulted in management losing "trust" in an employee.

Considering all the relevant factors as applied to the evidence discussed above, I am convinced, based on Mr. Dennis' conduct that pre-dated his protected disclosure, that NSTec would have terminated him regardless of whether he had raised the issue of the alleged unauthorized tracking computer software. Therefore, I find that NSTec has

---

[24] The FIE Director testified that the DOE informed NSTec that it would no longer support Mr. Dennis working in the SCIF based on information provided to the agency by NSTec. Assuming this uncorroborated assertion is true and that NSTec had no other positions for Mr. Dennis, these facts would justify the personnel action taken by NSTec against Mr. Dennis. *See* David L. Moses, Case No. TBH-0066 (2008) (NNSA refused to continue funding Mr. Moses in his position because of his disruptive behavior in the workplace.)

proven, by clear and convincing evidence, that NSTec would have terminated Mr. Dennis in the absence of his protected disclosure.

V. Conclusion

As set forth above, I have determined that Mr. Dennis made one protected disclosure and has proven by a preponderance of evidence that the protected disclosure was a contributing factor to his termination. I determined, however, that NSTec has provided clear and convincing evidence to demonstrate that it would have terminated Mr. Dennis even if he had not made his protected disclosure. In conclusion, I find that Mr. Dennis has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted under Part 708.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Dean P. Dennis under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within 15 days of the issuance of this Decision, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: February 12, 2009

December 9, 2008

DECISION AND ORDER OF
THE DEPARMENT OF ENERGY

Initial Agency Decision

Names of Petitioners:	Jonathan K. Strausbaugh Richard L. Rieckenberg
Date of Filing:	February 1, 2008
Case Numbers:	TBH-0073 TBH-0075

This Initial Agency Decision involves two whistleblower complaints, one filed by Jonathan K. Strausbaugh (Case No. TBH-0073) and the other filed by Richard L. Rieckenberg (Case No. TBH-0075) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Both complainants were employees of KSL Services, Inc. ("KSL" or "the contractor"), a contractor providing technical services on the site of the DOE Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico, where they were employed until June 14, 2007. In their respective complaints, Mr. Strausbaugh and Mr. Rieckenberg contend that they made protected disclosures to officials of KSL and LANL and that KSL retaliated against them in response to these disclosures. Mr. Strausbaugh seeks back pay and benefits from the date of his suspension, reinstatement, and the expunging from his personnel record of any negative references to his suspension and termination. Mr. Rieckenberg similarly seeks back pay and benefits from the date of his suspension, reinstatement (or nine months of severance pay if reinstatement is not practicable), and a formal letter from KSL clearing his personnel record of any evidence of his suspension or termination.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. Part 708. Under the regulations, protected conduct includes:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [the] employer, or any higher tier contractor, information that [the employee] reasonably believes reveals –
>
> (1) A substantial violation of a law, rule, or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would-
>
> (1) Constitute a violation of a federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

Part 708 sets forth the proceedings for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. *See* 10 C.F.R. §§ 708.21-708.34.

B. Procedural Background

On August 16, 2007, Mr. Rieckenberg filed a complaint of retaliation against KSL with the local DOE Employee Concerns Program Office. On August 30, 2007, Mr. Strausbaugh filed his complaint of retaliation against KSL with the same office. In their complaints, Mr. Rieckenberg and Mr. Strausbaugh contend that they made certain disclosures to officials of KSL and LANL, and that KSL terminated their employment in response to these disclosures. After attempts at informal resolution failed, the complaints were transferred to OHA, where an investigator was appointed. Because the issues, key witnesses and evidence in the two cases were virtually identical, the OHA investigator conducted a joint investigation and addressed both complaints in a single Report of Investigation (ROI).

On February 1, 2008, OHA issued its joint ROI and I was appointed the Hearing Officer in the cases on the same day. The ROI concluded that Mr. Strausbaugh and Mr. Rieckenberg had met their respective burdens of demonstrating that they made protected

disclosures regarding the discovery of uncontrolled asbestos, i.e., asbestos that had not been remediated and exposure to which was potentially hazardous, and that those disclosures were a contributing factor to their termination of employment with KSL. The OHA investigator also concluded that KSL had provided significant evidence in support of its position that it would have terminated the complainants even in the absence of their protected disclosures. On March 12, 2008, I scheduled a hearing in the case to be held on May 14, 2008. On April 2, 2008, the complainants filed a Motion to Compel Discovery. After considering the Motion, the underlying discovery requests and objections, and KSL's response to the Motion, I granted the Motion in part, requiring KSL to produce certain documents in advance of the hearing. *Jonathan K. Strausbaugh*, 30 DOE ¶ 87,002, Case No. TBD-0073 (April 16, 2008).

I convened the hearing in these cases on May 14 and 15, 2008. Due to the extensive testimony and the contentiousness of the proceeding, I was unable to conclude the hearing over the two-day period. At the request of the attorneys, I re-convened and concluded the hearing on June 23-25, 2008. Both parties submitted exhibits. Mr. Strausbaugh and Mr. Rieckenberg presented 134 exhibits into the record, which are numbered Exhibit 1 through Exhibit 134, and KSL submitted 27 exhibits, which are designated as Exhibit A through Exhibit AA. The complainants testified on their own behalf, and both they and KSL presented numerous KSL and LANL employees and former employees as witnesses, representing both management and non-management. The parties submitted post-hearing briefs on July 9, 2008. I received the final installments of the transcript on August 11, 2008, at which time I closed the record in this case.

As discussed below, after carefully reviewing the documentary and testimonial evidence in this case, I have determined that Mr. Strausbaugh and Mr. Rieckenberg engaged in protected conduct, and that KSL retaliated against them by terminating them on June 14, 2007. I have also concluded that KSL failed to meet its evidentiary burden in this case. Accordingly, I have ordered that KSL provide relief to both parties.

C. Factual Background

The complainants were employed by KSL at the DOE's Los Alamos site. Mr. Rieckenberg was employed by KSL from November 2005 to June 14, 2007, the date on which he was terminated. Mr. Strausbaugh was employed by KSL from July 2005 to the same date of termination. KSL is responsible for the maintenance of the TA-3 steam distribution system, a 58-year-old steam piping system. The TA-3 system was scheduled for an extended 30-day shutdown, also known as an outage, in order to undergo extensive maintenance, beginning on May 30, 2007. Exhibit (Ex.) 46. Mr. Rieckenberg was the Utilities, Electric, and Steam Branch (UESB) Manager from May 2006 to February 2007, when he was relieved of that position and appointed the Project Leader for the planned steam system outage. Mr. Strausbaugh was hired as the UESB Steam Distribution Engineer in November 2005 and, in June 2006, was given the additional position of Steam Distribution Superintendent. Mr. Rieckenberg and Mr. Strausbaugh had the primary responsibility for planning and coordinating the steam system shutdown.

The TA-3 steam system is composed of pipes passing through the ground that lead from the steam plant to other buildings and facilities that use the steam for various purposes, such as heat, sterilization, and food preparation. The system also comprises a large number of manholes, which are below-ground, open-topped pits, covered with gratings, through which the pipes pass. The manholes permit laborers and pipefitters access to critical portions of the steam system for purposes of maintenance and repair. Nevertheless, large stretches of the steam system are not easily accessible as they are buried in the ground. It was widely known among steam system professionals and laborers at Los Alamos that asbestos had been employed in the construction of the TA-3 steam system, as that was standard practice in systems built during that era. *See, e.g.*, Transcript of Hearing (Tr.) at 1150, 1725-26, 1863. Asbestos was commonly used in piping insulation, valves, and gaskets. It was also widely known that a large-scale remediation project was conducted in the early 1990s to abate the asbestos in the TA-3 steam distribution system manholes. *Id.* at 262-63, 280. In March 2007, KSL announced that it would no longer perform asbestos abatement work, but rather would engage a contractor, Eberline, to perform such work in the future. Ex. 7. According to Mr. Strausbaugh, KSL management had indicated to him that KSL's parent company had recently been involved in an asbestos lawsuit and wanted to distance itself from that business. Tr. at 536.

On May 31, 2007, shortly after the TA-3 steam system shutdown began, members of a crew performing maintenance work in one or more of the manholes found a substance they suspected was asbestos.[1] Mr. Strausbaugh was informed of the discovery of the substance. Work was suspended in the manholes in which the suspicious substance had been found. Joan Taylor, the KSL safety engineer assigned to the shutdown, collected samples of the suspect substance, and brought them to a LANL laboratory for analysis. Later the same day, the results of the testing confirmed that uncontrolled asbestos had in fact been identified, and work was suspended in all of the manholes of the TA-3 steam system.

On May 31, 2007, Mr. Strausbaugh informed Mr. Rieckenberg about the presence of asbestos in the manholes. Tr. at 557 (testimony of Strausbaugh), 980 (testimony of Rieckenberg). He informed others as well, including his supervisor Ted Torres, and Jerome Gonzales, LANL Gas and Steam Engineer, Steven Long, LANL Operations Manager for Utilities, and Richard Nelson, LANL Project Manager for the shutdown. *Id.* at 557-58. Over the course of the following days, Mr. Rieckenberg in turn notified several individuals in his KSL chain of command and at LANL of the same discovery. Those notified included Thomas Hay, KSL Utilities Director and Mr. Rieckenberg's supervisor, and Steven Long and Richard Nelson. *Id.* at 983; *see also* Ex. 10 ("TA-3 Steam Shutdown Status Report #3 – Asbestos found in Manholes").

---

[1] The testimony given at the hearing regarding the details of what transpired on May 31, 2007, and over the course of the next two weeks was highly contested and internally inconsistent. I need not resolve those discrepancies. The facts that I present here are uncontested and are those upon which I rely in reaching my decision.

On the morning of June 5, 2007, KSL's General Manager, David Whitaker, tasked Laura Jenkins, Labor Relations Administrator, and B.J. Tedder, Human Relations Generalist (the KSL investigators), to conduct an investigation of the management abilities of Mr. Rieckenberg, Mr. Strausbaugh, and Aaron Osborne, a foreman associated with the shutdown. *Id.* at 58-59 (testimony of Jenkins); Ex. 114. Mr. Whitaker indicated that the investigation was to focus on two incidents: that supervisors had condoned an unsafe working environment by ignoring a concern about the possibility of asbestos in an area and permitting employees to work there, and that Mr. Osborne created a hostile work environment by using foul language. *Id.* at 60.

During the afternoon of the same day, Steven Long of LANL chaired a critique of the May 31 asbestos incident at the shutdown. According to Mr. Long, the purpose of the critique was to assess what went wrong and to assign corrective actions to responsible individuals; it was not to ascribe fault to any party. Tr. at 348-49. In attendance at the critique were Mr. Rieckenberg, Mr. Strausbaugh, Mr. Whitaker, Keith Trosen, the KSL Deputy Manager, and Mr. Hay. *Id.* at 571 (testimony of Strausbaugh), 1013 (testimony of Rieckenberg). Immediately after the critique, the complainants were suspended without pay pending an investigation of the incident involving the discovery of uncontrolled asbestos in the manholes, and escorted off the premises.

After interviewing the three subjects of the investigation and six other individuals on June 8 and 11, 2007, ranging from Mr. Rieckenberg's chain of command to Joan Taylor, the safety engineer, and two shutdown crew members, the KSL investigators recommended that the complainants be subject to discipline ranging from a minimum of 5 days suspension to a maximum of termination. Ex. 114 at 0437. They presented the results of their investigation to Mr. Whitaker, Mr. Trosen, Mr. Hay, Michael Goodwin, KSL Director of Human Relations, and perhaps others at a meeting on June 13, 2007. Tr. at 1314 (testimony of Hay). The KSL investigators left the meeting after their presentation and, following a discussion among the remaining participants, Mr. Whitaker made the decision to terminate both complainants. *Id.* at 1315.

On June 14, 2007, Thomas Hay presented Mr. Rieckenberg and Mr. Strausbaugh with termination letters. The termination letters issued to the complainants are identical, save for the name of the addressee. Each lists the company's reasons for terminating the employee, based on the "result of the fact-finding hearings [of] June 8-11, 2007":

> On numerous occasions during the planning and execution of the 2007 Steam System Outage, you created a hostile environment where employees were intimidated to the point of not being able to discharge their duties. You overlooked key safety concerns which ultimately placed other employees in harm's way. Many aspects of the outage were left unplanned or were poorly planned, leading to the inefficient use of craft manpower and threatening KSL's ability to meet budget and schedule targets. These actions indicate a lack of leadership skills which endanger other employees and jeopardize the Company's goals.

Exs. 1, 2. The letters further stated that the above actions constituted "unacceptable behavior which violates Company policy. KSL senior management has lost confidence in your ability to lead others in your control." *Id.*

II. ANALYSIS

A. Whether the Complainants Engaged in Protected Conduct

Under the regulations governing the DOE Contractor Employee Protection program, the complainant "has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under [10 C.F.R.] § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. *See Joshua Lucero*, 29 DOE ¶ 87,034, Case No. TBH-0039 (November19, 2007); *Ronald Sorri*, 23 DOE ¶ 87,503, Case No. LWA-0001 (December 19, 1993). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Lucero*, 29 DOE at 89,180 (citing *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

In his Part 708 complaint, Mr. Strausbaugh alleged that he made disclosures protected under Part 708 when he reported the discovery of suspected uncontrolled asbestos in TA-3 steam system manholes to Mr. Rieckenberg and Mr. Gonzales on May 31, 2007. Strausbaugh Complaint at ¶ O. At the hearing, Mr. Strausbaugh testified that he telephoned his KSL supervisor, Mr. Rieckenberg, as soon as he learned that material suspected of containing asbestos had been found, and telephoned both Mr. Rieckenberg and Mr. Gonzales, a LANL gas and steam engineer involved with the shutdown, when he learned that the test results were positive for asbestos. Tr. at 865-67. Mr. Strausbaugh also described in his complaint the briefings he provided to Mr. Rieckenberg over the following days concerning the presence and mitigation of uncontrolled asbestos in the manholes. Strausbaugh Complaint at ¶¶ R, U, V. At the hearing, both complainants testified that Mr. Strausbaugh met with, and provided significant input to, Mr. Rieckenberg over the next several days to assist Mr. Rieckenberg in preparing several documents, described below, that Mr. Rieckenberg e-mailed to managers at KSL and LANL. *Id.* at 558, 566, 569, 573 (testimony of Strausbaugh), 1006, 1012 (testimony of Rieckenberg).[2]

In his Part 708 complaint, Mr. Rieckenberg alleged that he made protected disclosures when he reported the discovery of uncontrolled asbestos in TA-3 steam system manholes

[2] Mr. Rieckenberg also testified that Mr. Strausbaugh disclosed concerns about the possibility of asbestos-contaminated water run-off emanating from TA-3 steam system at the June 5, 2007, critique, which was attended by KSL managers and LANL managers and project directors. *Id.* at 1014. As set forth below, I need not address whether this alleged disclosure is protected conduct under 10 C.F.R. § 708.5.

to his chains of command at both KSL and LANL on May 31, 2007. Rieckenberg Complaint at ¶ 7. He also described in his complaint three reports that he authored, with Mr. Strausbaugh's assistance, concerning the status of, and possible safety concerns associated with, the shutdown in the wake of the discovery of uncontrolled asbestos. He e-mailed two of these reports to several supervisors and officials associated with the shutdown, including Mr. Trosen and Mr. Hay of KSL and Messrs. Long, Nelson and Gonzales of LANL. Rieckenberg Complaint at ¶¶ 11, 15. *See* Exs. 10, 12. He further claimed in his complaint that he made additional protected disclosures when he raised the idea that asbestos may have been present in the manholes, but had gone undetected for many years. *Id.* at ¶¶ 13, 15. *See* Exs. 10 (to Hay only), 12 (to Trosen, Hay, Long, Nelson, Gonzales, and others). At the hearing, Mr. Rieckenberg testified that on May 31, 2007, he notified Mr. Hay, Mr. Long, and Mr. Nelson by telephone that uncontrolled asbestos had been discovered in steam system manholes. Tr. at 983. These individuals and the additional addressees of the shutdown status reports (Exhibits 10 and 12) are KSL superiors and officials of a higher-tier contractor at the Los Alamos National Laboratory.

Each of these disclosures described above was made to one or more superiors within the complainants' company—Mr. Strausbaugh to Mr. Rieckenberg, a KSL manager, and Mr. Rieckenberg to Mr. Hay, and in some instances to Mr. Trosen as well. In addition, Mr. Strausbaugh made at least one of his disclosures to Mr. Gonzales, an engineer of a higher-level contractor. Mr. Rieckenberg made all but one (Ex. 11) of his disclosures to LANL managers, specifically Mr. Long and Mr. Nelson, and, in one instance, to Mr. Gonzales as well. All of the disclosures described above relayed information regarding the discovery and management of uncontrolled asbestos, a substance exposure to which can cause significant health problems. Based on the evidence before me, I find that Mr. Strausbaugh and Mr. Rieckenberg reasonably believed that the subject disclosures communicated a "substantial and specific danger to employees or to public health or safety." 10 C.F.R. § 708.5(a)(2).

KSL argued at the hearing that the complainants' disclosures did not "reveal" a "substantial and specific danger to employees or to public health or safety," and therefore are not protected under Part 708. The contractor's rationale for this contention is that these disclosures in fact did not reveal any information to any recipient of the disclosure of which the recipient was not yet aware, because in at least several instances the recipients of the disclosures had already been informed of the same information through other sources. I find this argument to be without merit. We have considered such a restricted interpretation of a protected disclosure in the past, and have rejected it. Ruling on a Motion to Dismiss, an OHA Hearing Officer determined that a protected disclosure need not contain unique information not known to the recipient. "Imposing the interpretation [the contractor] suggests would require an employee to first ascertain whether his or her information is unknown to DOE or the contractor in order to assure his or her protected status and that process could be an elaborate and difficult one. In any case, it would tend to inhibit employees from freely coming forward with sensitive information and concerns." *META, Inc.,* 26 DOE ¶ 87,504 at 89,015, Case No. VWZ-0007 (October 23, 1996). Such an interpretation would not further the policy behind the Part 708 regulations of encouraging "employees of DOE contractors and subcontractors

to make their employers or the DOE aware of concerns about health, safety, mismanagement and unlawful or fraudulent practices without fear of employer reprisal." *Id.* After carefully considering all the evidence, I find that the complainants have established by the preponderance of the evidence that the disclosures described above are protected conduct as defined in 10 C.F.R. § 708.5.[3]

B. Whether Protected Conduct Was a Contributing Factor in an Act of Retaliation

Section 708.2 of the Contractor Employee Protection regulations defines retaliation as "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the disclosure of information." 10 C.F.R. § 708.2. The complainants allege that KSL retaliated against them by terminating their employment on June 14, 2007. KSL does not challenge the fact that it discharged both employees on that date, but contends that it was not an action taken in retaliation for any disclosures they made.

In order to prevail in a Part 708 action, the complainants must show, by a preponderance of the evidence, that the protected disclosures or conduct were a contributing factor in the retaliation against them. 10 C.F.R. § 205.29. In prior decisions of the Office of Hearings and Appeals, we have decided that:

> A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54, Case No. VWA-0014 (February 5, 1997) (quoting *Sorri*, 23 DOE ¶ 87,503 at 89,010).

Throughout the hearing, KSL contended that Mr. Whitaker was the individual who made the decision to terminate the complainants' employment. *See, e.g.*, Tr. at 1568 (testimony of Whitaker). KSL also contended that he had no actual knowledge of Mr. Rieckenberg's and Mr. Strausbaugh's disclosures, because neither complainant had addressed any of his disclosures to Mr. Whitaker. The totality of the evidence certainly

---

[3] On several occasions throughout this proceeding, Mr. Rieckenberg attempted to amend his complaint to include other disclosures he believes constituted protected conduct under 10 C.F.R. § 708.5, including a number he raised in a submission filed after the first two days of the hearing, styled as a "Motion to Amend Complaint to Conform to Evidence and Testimony to Include Additional Disclosures." Because I have determined that Mr. Rieckenberg has met his burden with respect to making the protected disclosures he claimed in his complaint, I need not reach the issues of whether any of Mr. Rieckenberg's later-alleged disclosures constituted protected conduct under 10 C.F.R. § 708.5 and whether amending his complaint to include such disclosures would unfairly prejudice KSL in the proceeding. *See David L. Moses*, 30 DOE ¶ 87,007 at 89,058 n.11, Case No. TBH-0066 (September 3, 2008).

supports those facts. Nevertheless, the contractor does not prevail in its argument that these facts should disqualify the disclosures from being considered a contributing factor in Mr. Whitaker's decision to discharge Mr. Rieckenberg and Mr. Strausbaugh. The evidence clearly establishes that Mr. Hay and Mr. Trosen, who constituted the chain of command between Mr. Rieckenberg and Mr. Whitaker, were aware of the disclosures at issue in this proceeding. Mr. Rieckenberg spoke to each of them directly and sent two status reports to them regarding the discovery and management of uncontrolled asbestos on the first full day of the TA-3 steam system shutdown. *See* Exs. 10, 12. Mr. Hay and Mr. Trosen could easily see that Mr. Rieckenberg had disclosed his concerns to LANL officials as well, because several were listed as addressees of the same status reports. Finally, both Mr. Hay and Mr. Trosen attended the June 5, 2005 critique, chaired by Mr. Long, LANL official, at which both Mr. Rieckenberg and Mr. Strausbaugh presented their perspective on these matters.[4] Mr. Hay and Mr. Trosen, then, had actual knowledge of the disclosures, and Mr. Whitaker, the decision-maker, did not. I turn now to whether Mr. Whitaker had constructive knowledge of the disclosures.

A complainant can demonstrate constructive knowledge by establishing that the individual making the adverse personnel decision was influenced by persons with knowledge of the protected conduct. *Jagdish C. Laul,* 28 DOE ¶ 87,006 at 89,050, Case No. VBH-0010 (September 1, 2000) (and cases cited therein). In this case, Mr. Hay and Mr. Trosen had actual knowledge of the complainants' disclosures, and they advised Mr. Whitaker during the June 13, 2007, meeting at which he reached his decision to terminate the complainants. Mr. Whitaker testified that after the KSL investigators presented their findings regarding Mr. Rieckenberg and Mr. Strausbaugh at the meeting, "we had a discussion as to the nature of the findings, and what action, as a management team, we should take regarding those findings." Tr. at 1567-68; *see also id.* at 1743-44 (testimony of Trosen). Following that discussion, Mr. Whitaker decided to terminate the employment of Mr. Rieckenberg and Mr. Strausbaugh. *Id.* at 1568. As a consequence of that meeting, Mr. Whitaker benefited from the opinions and advice of his management team, including Mr. Hay and Mr. Trosen, and their actual knowledge of the disclosures can be imputed to Mr. Whitaker as constructive knowledge. I therefore find that Mr. Whitaker had constructive knowledge of the complainants' protected disclosures when he decided to terminate their employment on June 13, 2007.

I further find that that there was temporal proximity between their protected disclosures and Mr. Whitaker's decision to terminate their employment. "[T]emporal proximity" between a protected disclosure and an alleged reprisal is sufficient to establish the required element in a prima facie case for retaliation. *See Casey von Bargen,* 29 DOE ¶ 87,031 at 89,167, Case No. TBH-0034 (November 2, 2007) (stating that a showing that protected activity occurred proximate in time to the adverse personnel action is sufficient for complainant to meet the contributing factor test); *Dr. Jiunn S. Yu,* 27 DOE ¶ 87,556, Case No. VBH-0028 (April 7, 2000). Mr. Strausbaugh's and Mr. Rieckenberg's earliest

[4] The evidence is inconclusive as to whether Mr. Whitaker attended this critique or any portion of it. Even assuming he did not attend it at all, Mr. Hay's and Mr. Trosen's knowledge of the complainants' disclosures at the critique are sufficient under this analysis, as set forth below.

disclosures occurred on May 31, 2007. Mr. Whitaker made his decision to terminate their employment on June 13, 2007, just two weeks later. The proximity of those two dates is sufficient in itself to draw the inference that the disclosures were a contributing factor in the termination.

In its closing argument, however, KSL contends that, under these particular circumstances, temporal proximity is not sufficient to establish that the complainants' disclosures were a contributing factor in the decision to terminate their employment. KSL's attorneys argue that in a 1998 decision, OHA concluded that it would be unreasonable to rely on temporal proximity to establish that the protected conduct was a contributing factor in the alleged retaliatory action by the contractor. KSL Post-Hearing Brief at 12 (citing *Carlos M. Castillo*, 27 DOE ¶ 87,505, Case No. VWA-0021 (February 2, 1998). I have reviewed *Castillo* and have determined that the rationale applied in that case is inapplicable here. Mr. Castillo had raised a safety concern with his employer. A day later, he was terminated. The evidence in the record, however, was "overwhelming in support of the finding that Castillo was disruptive at safety meetings and confrontational with . . . management over union/work jurisdiction issues despite repeated warnings from [his employer] and his own union to desist in this behavior." *Castillo*, 27 DOE at 89,048. While I recognize that safety issues formed the basis for the protected disclosures in both *Castillo* and the present cases, the facts in these cases are entirely different. The evidence in this record supports a finding that Mr. Rieckenberg and Mr. Strausbaugh were respectful toward management at all times, even during technical and financial disputes, the stuff of normal business conduct.

I conclude that the complainants have established by a preponderance of the evidence that their protected disclosures were a contributing factor to their termination.

C. Whether the Contractor Would Have Taken the Same Action in the Absence of the Protected Disclosures

Section 708.29 of the governing regulations states that once a complaining employee has met the burden of demonstrating that conduct protected under 10 C.F.R. § 708.5 was a contributing factor in the contractor's retaliation, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." 10 C.F.R. § 708.29. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See Casey von Bargen*, 29 DOE at 89,163. If the contractor meets this heavy burden, the allegation of retaliation for whistleblowing is defeated despite evidence that the complainant's protected conduct was a contributing factor in the company's alleged act of retaliation.

It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against a whistleblower in the absence of the whistleblower's protected conduct. The Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, has identified several factors

that may be considered, including "(1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees . . . ." *Dennis Patterson*, 30 DOE ¶ 87,005 at 89,040, Case No. TBH-0047 (June 20, 2008) (quoting *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007)).

1. The Strength of the Reason for the Personnel Action

The first factor I will consider, following the analysis set forth in *Patterson*, is the strength of KSL's reason for terminating the complainants, excluding their protected disclosures. The termination letters set out the company's stated reasons for termination. Exs. 1, 2. But for the name of each addressee, the letters contained identical language, holding Mr. Rieckenberg and Mr. Strausbaugh equally and identically culpable for the presence of a safety hazard, uncontrolled asbestos, on a worksite at the start of an important maintenance project which, due to their poor planning and lack of concern for safety, placed workers in harm's way. They were also held responsible for creating a hostile work environment in which employees were so intimidated that they could not discharge their duties.

Mr. Hay, who signed the termination letters for KSL, offered the following factual bases for the company's grounds for terminating the complainants. He testified that the letters' reference to overlooking "key safety concerns" was based solely on their reliance on anecdotal evidence that the manholes were free from asbestos due to abatement. Tr. at 144-45. He also testified that the letters' reference to aspects of the shutdown being "left unplanned or poorly planned" represented two concerns that revealed themselves after the complainants had been suspended: that necessary parts had not been ordered, and that the complete plan for restarting the steam system had not been reduced to paper. *Id.* at 146. Finally, Mr. Hay testified about the statement in the termination letters that "[o]n numerous occasions," Mr. Rieckenberg and Mr. Strausbaugh "created a hostile work environment where employees were intimidated to the point of not being able to discharge their duties." Mr. Hay testified that the "numerous occasions" were planning meetings, and that the "employees" were Ms. Taylor and Mr. Lujan, the safety engineers. *Id.* at 134. According to Mr. Hay, Mr. Rieckenberg informed them that there was no asbestos in the manholes after they raised the issue. *Id.* at 136. Ms. Taylor and Mr. Lujan then proceeded to conduct the necessary inspections and produce the certifications within the scope of their duties. *Id.* at 138. Mr. Hay testified that Ms. Taylor had reported to him that she felt she was working in a hostile environment when she was working with the maintenance crew, who would not "listen to her" and used "vulgar and offensive language" in her presence, but "not so much Mr. Rieckenberg and Strausbaugh, but the Foreman and the crew." *Id.* at 140.

Several witnesses, including Mr. Hay, testified that Mr. Rieckenberg and Mr. Strausbaugh, like their employer, were safety-oriented. *Id.* at 159 (testimony of Hay), 279 (testimony of Nelson). Mr. Nelson further testified that he was present at most if not all of the planning meetings, which Mr. Hay identified as the numerous occasions of

hostile work environment, and he observed no atmosphere of intimidation. *Id.* at 279. Mr. Gonzales testified that he had worked with the steam systems at LANL since the mid-1980s and had participated in the steam system asbestos abatement project. *Id.* at 263, *see also id.* at 170-72 (testimony of Hay), 279-80 (testimony of Nelson). He further testified that it was not reasonable to anticipate the presence of uncontrolled asbestos in the TA-3 steam system manholes, because none had been encountered in hundreds of entries into those manholes in the years since the abatement. *Id.* at 264-66. Both Mr. Gonzales and Mr. Nelson were among the 10 or 12 members of the planning team for the shutdown. *Id.* at 292 (testimony of Nelson). Mr. Gonzales also clarified that Mr. Rieckenberg and Mr. Strausbaugh's plan had provisions for encountering asbestos in gaskets and other specific items, where asbestos had been found in the past; it had no provisions for uncontrolled asbestos, which was what was encountered on May 31, 2007. *Id.* at 265. All members on the planning team had significant experience in safety and steam system shutdowns, yet none raised a concern about uncontrolled asbestos as they planned the shutdown. *Id.* at 294 (testimony of Nelson). Mr. Nelson also testified that after Mr. Rieckenberg and Mr. Strausbaugh were no longer working on the shutdown, the new team had difficulty locating the necessary parts. He added, however, that, for the most part, the parts had been ordered and delivered to the site, but due to the lack of an organized storage area, could not be easily found. *Id.* at 282-83. Finally, regarding Ms. Taylor's complaint that the work crew's use of obscene language created a hostile work environment, testimony revealed that Mr. Rieckenberg and Mr. Hay had offered to address the situation, but Ms. Taylor informed them that she would handle the situation herself. *Id.* at 159 (testimony of Hay), 1850-51 (testimony of Taylor).

The evidence before me strongly suggests the bases for KSL's stated grounds of termination were in fact rather weak. I find that Mr. Rieckenberg and Mr. Strausbaugh were reasonable to conclude from their discussions with experienced LANL officials and maintenance workers, as well as from the steam system's history of asbestos abatement and hundreds of subsequent manhole entries, that uncontrolled asbestos should not have been encountered in the manholes in the course of the maintenance project. I also find that the additional stated grounds for termination, poor planning and creation of a hostile work environment, are not strongly supported by the evidence. The weakness of the stated reasons for the terminations of Mr. Rieckenberg and Mr. Strausbaugh does not contribute to a finding in the company's favor.

2. The Strength of a Motive to Retaliate

In applying the second factor, the strength of any motive to retaliate for the protected disclosures, I find no evidence of any such motive on the part of Mr. Whitaker or his managers. The complainants presented evidence at the hearing that in March 2007, KSL announced that it would no longer perform its own asbestos abatement work, but rather would engage a contractor to perform such work. Ex. 7. Moreover, Mr. Strausbaugh testified that KSL's parent company had recently been involved in an asbestos lawsuit and wanted to distance itself from that business. Tr. at 536. The fact that uncontrolled asbestos was discovered during a maintenance project two months after this announcement likely caused KSL management a great deal of concern, but I fail to see

that the announcement or its aftermath gave rise to a motive for KSL to retaliate against the complainants for making their protected disclosures. Their disclosures related to the fact that uncontrolled asbestos had been discovered and, in the case of Mr. Rieckenberg, that there may be long-range consequences for exposed employees. Their disclosures did not concern the contract in place to perform asbestos work, nor were they in any way critical of Mr. Whitaker, Mr. Trosen, Mr. Hay, or KSL, either of which topics may have given Mr. Whitaker or his managers a motive to retaliate. Under these circumstances, I find no evidence that the KSL officials recommending and deciding the personnel action had any motive to retaliate against the complainants for their protected disclosures. *See Carr v. Soc. Security Admin.*, 185 F.3d 1318, 1326 (Fed. Cir. 1999) (those with motive to retaliate "not 'agency officials' recommending discipline").

3. Evidence of Similar Action Against Similarly Situated Employees

The third factor set forth in *Kalil* is whether there is any evidence that the employer took similar action against similarly situated employees. Following the June 5, 2007, critique of the May 31, 2007, discovery of uncontrolled asbestos in the TA-3 steam system manholes, Mr. Whitaker placed Mr. Rieckenberg and Mr. Strausbaugh on suspension pending a fact-finding investigation. Tr. at 1563; *see also id.* at 1408 (testimony of Martin Dominguez, KSL Manager of Labor and Employee Relations: "investigative leave pending investigation," citing Ex. H). At about the same time, Mr. Whitaker and Mr. Dominguez gave Ms. Jenkins and Ms. Tedder, the KSL investigators, direction concerning the investigation they were tasked to perform. *Id.* at 1401-02. The KSL investigators presented their findings at a June 13, 2007, meeting of Mr. Whitaker, Mr. Trosen, Mr. Hay, and others, during which Mr. Whitaker consulted with his managers and decided to terminate the employment of Mr. Rieckenberg and Mr. Strausbaugh.

The evidence in the record clearly indicates that KSL did not follow its own procedures regarding the termination of the complainants. The company's Performance Improvement and Disciplinary Action for KSL Employees provides that a "fact-finding hearing . . . will be conducted for disciplinary actions that could reach the level of suspension or termination and where a preliminary investigation raises questions of fact." Ex. H at § 5.2.4.1. The policy defines a "fact-finding hearing" as "a formal meeting of the appropriate Supervisor, the employee, a representative of the Labor/Employee Relations Department and any witnesses deemed appropriate." In these cases, only an investigation was conducted, although as the investigative report indicates, the recommended discipline for Mr. Rieckenberg and Mr. Strausbaugh included the possibility of termination. Ex. 114 at 0437. KSL representatives testified that no formal "fact-finding hearing" was held concerning the complainants. Tr. at 85 (testimony of Jenkins), 1426, 1436 (testimony of Dominguez).

Mr. Dominguez, testified, however, that KSL need not follow its own policy when terminating employees. He testified at the hearing that KSL is free to select which, if any, of its discipline procedures it wished to apply to a given employee. *Id.* at 1407. In these cases, for example, although no fact-finding hearing was convened, KSL nevertheless relied on a matrix of disciplinary penalties, attached to its disciplinary

policy, to determine the range of penalties that applied to the charges against the complainants. Ex. H at K001431. Moreover, in its closing statement, KSL pointed out that the policy "does not limit the Company in taking any actions regarding an employee if the Company determines it is appropriate under the circumstances." Ex. H at § 2.0. It also contends that, as at-will employees, Mr. Rieckenberg and Mr. Strausbaugh could have been terminated at any time and for any reason not prohibited by statute.

While KSL may be technically correct, its position does not support a finding that it has taken similar action regarding similarly situated employees. Moreover, the evidence in the record establishes that KSL could not demonstrate that it had treated similarly situated employees in a manner similar to the treatment of Mr. Rieckenberg and Mr. Strausbaugh. Mr. Dominguez testified that three supervisors had been terminated for safety-related issues about two years ago, and others had been disciplined in other manners for safety-related issues. Tr. at 1456. He could not, however, recall sufficient details to distinguish between those who were terminated and those who were not. *Id.* Nor could he recall whether those who were terminated were given fact-finding hearings before their respective terminations. *Id.* at 1457-58. Mr. Whitaker testified that, in arriving at his decision to terminate Mr. Rieckenberg and Mr. Strausbaugh, there was no precedent to follow regarding the treatment of similarly situated employees. *Id.* at 1569, 1622.

KSL has not met its burden of showing, by clear and convincing evidence, that it would have taken the same action against Mr. Rieckenberg and Mr. Strausbaugh had they not made their protected disclosures. The company has demonstrated that it believed it had grounds for terminating the complainants, as set forth in the termination letters. But that demonstration does not satisfy the heavy burden that Part 708 places on the employer. After examining the evidence in this case in light of the factors set forth in *Kalil*, I am not convinced that KSL's stated grounds for terminating the complainants were particularly strong, nor that the company treated similarly situated employees in a similar manner. It has demonstrated, at best, what action it could have taken, pursuant to its discipline policy, against Mr. Rieckenberg and Mr. Strausbaugh. However, it has not shown, as it must, what action it would have taken against them in the absence of protected conduct, let alone by clear and convincing evidence. I therefore find that KSL has not presented clear and convincing evidence that it would have terminated Mr. Rieckenberg and Mr. Strausbaugh absent their protected disclosures.

III. CONCLUSION

In the foregoing Decision, I have found that Mr. Rieckenberg and Mr. Strausbaugh have established by a preponderance of the evidence that they engaged in protected conduct when they made oral disclosures regarding safety concerns to individuals in their chains of command and others employed by a higher-level contractor, and that these disclosures were a contributing factor to an act of retaliation. I have further found that KSL has not presented clear and convincing evidence that it would have taken the same actions at

issue absent the protected conduct. Therefore, I find that the complainants are entitled to relief under Part 708.[5] After I receive documentation from the parties, as set forth in the Order below, I will direct KSL to reimburse the complainants' legal fees for this proceeding, to remove any negative information regarding their suspension and termination from their respective personnel files and notify each complainant in writing that such removal has been performed, to reinstate them to their positions or place them in equivalent positions (or provide nine months of severance pay if re-employment is not practicable), and to reimburse them for back pay and benefits starting from the date of their suspension, offset by any income earned from employment during that same period.

Mr. Rieckenberg and Mr. Strausbaugh shall submit a calculation in support of their claims for back pay and benefits to KSL. As for their litigation expenses, attorney fees in Part 708 cases are generally calculated using the "lodestar" methodology described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989). *See Sue Rice Gossett*, 28 DOE ¶ 87,028 (2002); *Ronald A. Sorri*, 23 DOE 87,503 (1993), *affirmed as modified*, 24 DOE 87,509 (1994); 10 C.F.R. § 708.36(a)(4). I will direct Mr. Rieckenberg and Mr. Strausbaugh to submit a calculation of attorney fees with evidence supporting the hours worked and the rates claimed. *See Sue Rice Gossett*, 28 DOE at 89,227 (citing *Webb v. Board of Education of Dyer County, Tennessee*, 105 S. Ct. 1923, 1928 (1985)).

Reinstatement is an equitable remedy. There is no evidence in the record that the positions occupied by Mr. Rieckenberg and Mr. Strausbaugh, with similar compensation levels, exist at this time. An equitable remedy cannot put the complainant in a worse position than the position that he currently occupies. When so ordered, KSL should review all currently available vacancies in order to determine if positions comparable to the complainants' former positions exist, at comparable levels of compensation, for which they qualify. If there are such comparable positions, and if Mr. Rieckenberg and Mr. Strausbaugh are in agreement, KSL shall place Mr. Rieckenberg and Mr. Strausbaugh in those positions.

This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by the affected NNSA element, official or employee and by each affected contractor.

---

[5] As stated above, Mr. Strausbaugh seeks back pay and benefits from the date of his suspension, reinstatement, and the expunging of any negative references to his suspension and termination from his personnel record. Mr. Rieckenberg similarly seeks back pay and benefits from the date of his suspension, reinstatement (or nine months of severance pay if reinstatement is not practicable), and a formal letter from KSL clearing his personnel record of any evidence of his suspension or termination. *See* Memoranda of OHA Investigator's Interviews with Complainants in Case Nos. TBI-0073 (Strausbaugh) and TBI-0075 (Rieckenberg).

It Is Therefore Ordered That:

(1) The relief sought by Jonathan K. Strausbaugh (Case No. TBH-0073) and Richard L. Rieckenberg (Case No. TBH-0075) under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) Within 15 days of receipt of this Initial Agency Decision, Mr. Rieckenberg and Mr. Strausbaugh shall submit to KSL Services, Inc., and to the Hearing Officer a report containing a detailed calculation of their attorney fees reasonably incurred to prepare for and participate in proceedings leading to the Initial Agency Decision. The fees shall be calculated using the lodestar approach. The report shall also contain a calculation of their respective claims for back pay and associated benefits from the date of their suspension, offset by any income earned from employment during that same period.

(3) Within 15 days of its receipt of the report described in paragraph (2) above, KSL shall submit a responsive document to Mr. Rieckenberg and Mr. Strausbaugh and to the Hearing Officer. Should the parties elect to seek mediation to resolve the remedial phase of these cases, they shall notify me immediately and I will hold this proceeding in abeyance for a period of 30 days.

(4) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within 15 days of the issuance of a Supplemental Order with regard to remedy in these cases, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: December 9, 2008

May 7, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Order to Show Cause
Motion for Summary Judgment
Initial Agency Decision

Name of Cases:	Billy Joe Baptist
Dates of Filing:	December 19, 2008 February 18, 2009
Case Numbers:	TBH-0080 TBZ-0080

This decision will consider an Order to Show Cause that I issued on February 3, 2009, regarding a March 6, 2008, whistleblower complaint filed by Billy Joe Baptist (Baptist) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708, against his employer, CH2M-WG Idaho, LLC (CWI). I will also consider in this decision as a Motion for Summary Judgment that CWI filed on February 18, 2009 regarding this complaint.

Pursuant to Part 708, an OHA attorney conducted an investigation of Baptist's whistleblower complaint and issued a Report of Investigation (Report) on December 19, 2008. The Report noted that Baptist filed his whistleblower complaint on March 6, 2008[1], but that five of the six alleged retaliations occurred on June 4, 2007. The investigator opined that these retaliations may be barred by the fact that Part 708 requires a complaint to be filed no later than the 90th day after the individual knows or reasonably should have known of the alleged retaliation. 10 C.F.R. § 708.14. In a conference call to the parties on February 3, 2009, I ordered counsel for Baptist to submit a brief showing cause why these retaliations are not barred from consideration pursuant to the 90-day deadline in 10 C.F.R. § 708.14. Subsequently, CWI moved for a summary judgment regarding the remaining retaliation alleged by Baptist in his complaint.

As discussed below, I find that the first five alleged retaliations are time-barred from consideration under 10 C.F.R. § 708.14. I also find that CWI is entitled to Summary Judgment in its favor regarding the remaining sixth alleged retaliation.

I. Background

[1] Baptist sent a complaint under 10 C.F.R. § 851 (DOE Worker Health and Safety Program) dated January 10, 2008, to Beth Sellers (Sellers) at the Department of Energy's Idaho Operation Office (DOE-ID) detailing various electrical safety complaints. In his letter he seeks to "invoke the whistleblower clause." *See* Tab A Report of Investigation Exhibits at 21. He later filed his Part 708 whistleblower complaint on March 6, 2008.

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862 (March 15, 1999) (interim final rule). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against its employee because the employee has engaged in certain protected activity, including when the employee has

> (a) Disclos[ed] to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals—
>
> (1) A substantial violation of a law, rule, or regulation;
> (2) A substantial and specific danger to employees or to public health or safety; or
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority . . . .

10 C.F.R. § 708.5(a).

CWI is the management and operating contractor for the Idaho Cleanup Project[2] at the DOE's Idaho National Laboratory site. Baptist was hired in March 2004 as a temporary laborer at INL by Bechtel BWXT Idaho, LLC (BBWI). In May 2004, Baptist was promoted to Electrician 1st class and was given regular, full-time employment status in January 2005. In May 2005, Baptist was hired by CWI when it was awarded the prime contract to perform the ICP.

In response to a April 2005 memorandum issued by the Secretary of Energy directing all DOE facilities to improve electrical safety performance, CWI submitted its plan to improve electrical safety for ICP employees entitled *First 90-Days Safety Assurance Plan*. CWI also subsequently drafted and implemented an Electrical Safety Improvement Plan (ESIP), designated PLN-1971. The ESIP mandated that an Electrical Safety Committee (ESC) be formed for the ICP. Baptist was one of the employees who drafted the charter for the newly formed ESC and was appointed to serve on the ESC. The ESC was designed to be the company vehicle to monitor implementation of the ESIP. He was also selected to serve on two CWI boards, the Project Evaluation Board (PEB) and the Energy Facilities Contractor's Group (EFCOG), a committee to look at electrical safety issues complexwide.

To support the Secretary of Energy's emphasis on electrical safety, the DOE's Office of Environmental Management offered a $10,000 prize (the DOE-EM Challenge) to the site or project that demonstrated the most improved safety culture. CWI won the DOE-EM Challenge and Baptist was individually recognized for his efforts in winning the prize. Approximately two weeks after

[2] The Idaho Cleanup Project (ICP) is tasked with the environmental cleanup of the Idaho National Laboratory (INL) site.

CWI won the prize, Baptist alleges that the then-President of CWI, Alan Parker, designated him and another employee, James Watters, as Subject Matter Experts (SMEs) for electrical safety.[3]

In addition to his responsibilities on the ESC, Baptist alleges that he was responsible for conducting independent assessments regarding electrical safety. In 2006, an electrician for the Idaho Nuclear Technology and Engineering Center (INTEC) raised a safety concern regarding a particular electrical transformer and its related equipment, Transformer XRF-YDH-666 (INTEC Transformer).[4] Baptist alleges that he conducted several inspections of the INTEC Transformer and submitted several reports in the Issues Communication and Resolution Environment (ICARE) tracking system concerning safety issues in late 2006.[5]

The ICARE report at issue in this case, ICARE #102586 (the ICARE), was submitted by Baptist on May 2007. The ICARE detailed a number of alleged safety and regulatory violations concerning the INTEC Transformer. In late May 2007, Baptist alleges that he spoke to William Reed (Reed), Engineering Group Supervisor at CWI and Chairman of the ESC, concerning his findings regarding the INTEC Transformer. He informed Reed that he would report these safety concerns directly to DOE if CWI took no action to remedy the concerns by CWI. During their conversation, Reed informed Baptist that going directly to DOE with his concern would be "career limiting" and a "poor career move." Report at 6.

At a June 4, 2007, ESC meeting, Baptist expressed his safety concerns about the INTEC Transformer to CWI senior management. During the meeting Baptist discussed "lock and tag" [6] issues regarding the INTEC Transformer and questioned how CWI officials could calculate a Flash Hazard Analysis[7] for the transformer "without all of the proper information." Report at 4. Immediately after the meeting, Baptist alleges that he was removed from his supervisory duties, his duty as a SME for Electrical Safety and was removed from his positions on the PEB, the EFCOG Committee and the PLN-1971 Board. [8]

At the time of the June 2007 ESC meeting, Baptist had been experiencing pain in his hands which subsequently spread to his fingers and wrists, and took personal leave later on June 4, 2007. On

---

[3] CWI disputes Baptist's account regarding his SME status.

[4] A transformer is a device than allows electrical energy to be transformed from one voltage to another. The INTEC Transformer was a temporary transformer that had been installed over 15 years prior to the dates of Baptist's inspections. Report at 6.

[5] The reports were submitted to CWI via the ICARE system. The ICARE system is a tool by which any employee can identify and report a safety concern. Report at 5 n.11.

[6] A "lock and tag" issue is an issue relating to the proper isolation of hazardous electrical energy.

[7] A Flash Hazard Analysis (or Flash Calculation) is a determination that mandates what type of electrical equipment is necessary for an electrician to wear to avoid injury while working on a particular electrical equipment.

[8] The nature of the PLN-1971 Board is not described in the Report of Investigation.

June 6, 2007, Baptist completed an application for short-term disability (STD) benefits with CWI's insurance carrier, Cigna Group Insurance (Cigna). Baptist would subsequently require surgery to correct his condition. Memorandum in Opposition to Motion for Summary Judgment, Case No. TBH-0080 (April 20, 2009) at 3-5. Sometime in June 2007, Baptist began to receive disability benefits from Cigna. In September 2007, Baptist was transferred to another ICP organization - INTEC Area Operations Electrical.

On October 15, 2007, Cigna contacted CWI to determine if Baptist could return to work. Baptist claims that his personal physician cleared him to go back to work with a "15-pound weight restriction." Report at 8. Such a weight restriction, he asserted, would prohibit him from performing his regular work tasks but would not have restricted him in performing the duties of a SME for Electrical Safety.

Debbie Anglin (Anglin), CWI Benefits Specialist, sent an E-mail to Baptist's then supervisor, Richard Tullock (Tullock), inquiring if he could accommodate Baptist in a light-duty position. Exhibit (Ex.) 2 Complainant's Opposition to Summary Judgment Exhibits (SJ Exhibits), Case No. TBH-0080 at 46. Later, Anglin reported to Cigna that CWI could not accommodate Baptist by placing him in a light-duty position.

In December 2007, Baptist was approved for long-term disability (LTD) benefits. Baptist submitted an Inactive Employee Status (IES) request (Request) form signed on December 19, 2007.[9] Anglin sent an E-mail to Jeffrey Hobbes (Hobbes), Baptist's then-manager, on January 10, 2008, asking if he would approve IES status for Baptist. Hobbes approved IES status for Baptist later that day. CWI subsequently placed Baptist on IES on January 7, 2008.[10] Baptist was transferred again in February 2008 to the Water/Steam organization at INTEC.

The Request states that an employee on IES who wishes to return to work must obtain a written release from their personal physician and then report to the nearest INL medical dispensary for an examination by a company-designated physician. Baptist received a letter from CWI on April 29, 2008, stating that if he wished to return to work he needed to obtain the medical clearances as specified in the Request. CWI asserts that it was never informed by Baptist that he sought to return to work. CWI also asserts that Baptist never contacted the INL medical dispensary to obtain a medical clearance to return to work. Subsequently, because Baptist had been on IES for one year, on June 10, 2008, CWI terminated his employment.

Baptist asserts that he made two protected disclosures regarding INTEC Transformer safety concern while employed at CWI: his submission of ICARE #102586 and his discussion of safety concerns at

[9] Baptist's IES status was deemed to start from the first day of his absence due to disability, June 5, 2007. *See* Motion Ex. H (January 23, 2008 E-mail); Report at 7 n.21.

[10] IES refers to the status of an employee who is on STD and LTD. CWI asserts that its consistent policy is that all employees on IES for one year who have not sought reinstatement or other employment with it are automatically terminated from employment. This policy was stated in the Request for Inactive Employee Status that Baptist received on January 14, 2008.

the June 4, 2007, ESC meeting. He alleges that he experienced six acts of retaliation caused by his two protected disclosures. Five of the retaliations occurred immediately after the June 4, 2007, ESC meeting: (1) Relief from Supervisory Duties; (2) Removal as a SME for Electrical Safety; (3) Removal from PEB; (4) Removal from EFCOG Committee; and (5) Removal from PLN-1971 Board. The sixth alleged retaliation was his termination by CWI on June 10, 2008. [11]

II. Analysis

As described above, in a conference call to the parties on February 3, 2009, I ordered counsel for Baptist to submit a brief showing cause why Retaliations Nos. 1-5 are not barred from consideration pursuant to the 90-day deadline in 10 C.F.R. § 708.14. Subsequently, on February 18, 2009, CWI filed a Motion for Summary Judgment asking that the remaining alleged retaliatory act, Baptist's termination on June 10, 2008 also be dismissed. Baptist filed responses to my show cause order and CWI's Motion on April 20, 2009. CWI filed a reply to Baptist's Summary Judgment response on April 27, 2009.

The Part 708 regulations do not include procedures and standards governing summary judgment motions. I note that the Federal Rules of Civil Procedure provide that such a motion shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). While the Federal Rules do not govern this proceeding, Rule 56 has been used as a guide in the evaluation of Motions for Summary Judgment filed in a Part 708 proceeding. *See Edward J. Seawalt*, Case No. VBZ-0047 (August 20, 2000).[12] Prior cases of this office considering Motions for Summary Judgment instruct that such a motion should only be granted if it is supported by "clear and convincing" evidence. *Fluor Daniel Fernald*, Case No. VBZ-0005 (October 4, 1999) (motion to dismiss should only be granted where there are clear and convincing grounds for dismissal).

To prevail in a whistleblower complaint, a complainant has the burden of establishing by a preponderance of the evidence that he or she made a protected disclosure and that the disclosure was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29.[13] Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal. *Id.*

[11] In this decision, I will also refer to these alleged retaliations by retaliation number (Retaliation No.).

[12] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996 are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[13] For the purpose of deciding the Motion for Summary Judgment addressed in this Decision, I will assume that Baptist made protected disclosures and that he in fact had SME status. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (court must consider all materials in the light most favorable to the party opposing the motion for summary judgment).

After considering the record before me, I find that Retaliation Nos. 1-5 are time-barred. Additionally, I find clear and convincing evidence that the contractor would have terminated Baptist from his position notwithstanding his disclosures. Accordingly, I will grant the motion for summary judgment.

A. Retaliations Nos. 1-5 – Removal from Supervisory Duties, Subject Matter Expert Status, Project Evaluation Board, EFCOG Committee and PLN-1971 Board

The Report of Investigation recorded that Baptist alleged that after June 4, 2007, ESC meeting, he was removed from all supervisory duties, as a SME for Electrical Safety, the PEB, the EFCOG Committee and the PLN-1971 Board (Retaliations Nos. 1-5). Baptist filed his whistleblower complaint on March 6, 2008.

Section 708.14 of Part 708 states in relevant part "[Y]ou must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a). In the present case, Baptist did not file a complaint until some 11 months after he claimed that he had suffered Retaliation Nos. 1-5.

In his response, Baptist makes three arguments. First, Baptist argues that officials at the DOE field Office at Idaho Falls (DOE-ID) accepted his whistleblower complaint and that it now should not be deemed untimely. In support of this argument, Baptist asserts that the DOE-ID never informed him that his complaint was untimely or otherwise defective, despite having a series of contacts from September 2007 until the filing of his complaint on January 10, 2008. With regard to his position that DOE-ID erred in its processing of his whistleblower case, Baptist draws our attention to *Charles Evans*, Case No. TBU-0026 (June 2, 2004) (*Evans*) which he believes stands for the proposition that whistleblower complaints should not be dismissed where a field office gives erroneous information about Part 708 procedures.

Baptist's second argument is that when he contacted Anglin in June 2007 and told her of the retaliation he experienced, he expected that CWI's HR department (CWI-HR) would investigate his whistleblower complaint. Because CWI-HR did nothing in regard to this alleged complaint, Baptist was not aware that he was being retaliated against and the failure to investigate constitutes "a violation" that is renewed with each failure to investigate. Response to Order to Show Cause, Case No. TBH-0080 (April 20, 2009) at 6. (Response). Once he discovered that CWI-HR was not going to take any action on his complaint, Baptist promptly filed his Part 708 complaint with DOE-ID.

Lastly, Baptist argues that Retaliation Nos. 1-5 are a part of a "continuing violation" by CWI of Part 708. Specifically, Baptist asserts that the retaliations are part of a "hostile work environment claim." Response at 6. In this regard, Baptist points to *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116-17 (2002) (*Morgan*) for the proposition that, as long as one of the retaliations occurred within the 90-day deadline, all of the acts may be considered for determining liability. Response at 6-7. In the present case, Baptist argues that Retaliations No. 1-5 were a "pattern of hostile acts that culminated in the on-going failure of HR to investigate his [whistleblower] claims or accommodate his restrictions." Further, Baptist asserts that even if Retaliations Nos. 1-5 are not actionable in

themselves, they still can form a basis of a hostile work environment claim that can be considered as timely filed.

After considering each of these arguments, I find that Baptist has failed to show good cause why Retaliations Nos. 1-5 should not be time-barred.

With regard to Baptist's first argument, the fact that a field office has accepted a complaint for processing does not overcome timeliness requirements. In *Donald E. Searle*, Case No. TBU-0065 (May 16, 2007) (*Searle*), the field office accepted the whistleblower's complaint for processing. Nonetheless, OHA later dismissed the complaint for the failure of the whistleblower to comply with the 90-day deadline. Nor does Baptist's assertion regarding the fact that he was not apprised of any potential timeliness issues change the result. OHA case law has consistently held that complainants are presumed to understand their rights and obligations under applicable DOE regulations notwithstanding claims that they did not have an actual knowledge of the regulations. *Searle* at 3; *Carolyn C. Roberts*, TBU-0040 (January 26, 2006) at 3. Baptist's invocation of *Evans* is unavailing. Unlike the facts in *Evans*, in which a DOE field office provided a whistleblower inaccurate information which led to the whistleblower missing a deadline, there has been no allegation that DOE-ID affirmatively provided Baptist with any incorrect information concerning his complaint.

Baptist's second argument is also unconvincing. Baptist's new allegation is that he suffered retaliation due to CWI-HR's failure to investigate his complaint about retaliation. Baptist raises this allegation now, for the first time in this proceeding. Given the fact that Baptist did not complain of this retaliation at any time during the Part 708 process until responding to the Order to Show Cause, I find that such an allegation can not now be used to excuse non-compliance with the 90-day deadline. Just as importantly, I find that Baptist could not have had any reasonable expectation that his conversation with Anglin, a CWI-HR Benefits Specialist, would trigger a formal (or informal) whistleblower investigation. Baptist avers in a sworn declaration accompanying his response that after the June 4, 2007, meeting, he called Anglin and told her that he had been relieved of his duties and subjected to a hostile work environment and also informed her as to his need for "time off" to get surgery for his hand and arm. Exhibit 1, Baptist Opposition for Summary Judgment (Baptist Affidavit) at ¶ 4. Baptist goes on to describe Anglin's response "so you want to take STD [Short Term Disability]. I can help you with that." Baptist Affidavit at ¶ 4. According to Baptist, Anglin went on to explain about STD and inform him that the STD insurance company was Cigna, and that she would be responsible for providing him the forms needed to file for STD. She also stated that she would help him through the "benefits" process. Baptist Affidavit at ¶ 5. I see no possible way that Baptist could have reasonably interpreted Anglin's response as promising that CWI-HR would conduct an investigation of his whistleblower allegations. Baptist's claim that he was not aware of this retaliation until he sent his Part 851 complaint to DOE-ID on January 10, 2008. *See* note 1 *supra*. Especially telling is that there is no mention of this particular "retaliation" in his complaint. In sum, the fact that Baptist may have verbally informed Anglin of his belief that he had been retaliated against is not good cause to waive the 90-day deadline.

Finally, I do not find that Retaliations Nos. 1-5 can be found to be a part of a hostile work

environment claim.[14] The Supreme Court, in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (*Vinson*), defined a hostile workplace environment for Title VII purposes as one where the workplace is sufficiently permeated with harassment that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Vinson*, 477 U.S. at 67. Subsequently, the Supreme Court, in *Harris v. Forklift Systems, Inc*., 510 U.S. 17 (1993) (*Harris)* held that the determination as to whether a hostile workplace exists must be made by examining all of the circumstances of a particular case. *Harris*, 510 U.S. at 23. The court went on to give a non-exhaustive list as of factors that could establish a hostile workplace: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23. In *Morgan*, the case to which Baptist directs my attention, the U.S. Supreme Court affirmed a Court of Appeals finding that evidence of similar types of negative employment actions, the frequency the actions, and evidence that the actions were perpetrated by the same managers, were sufficient to establish a claim of a hostile work environment. *Morgan*, 536 U.S. at 120-21.

As discussed above, I do not find CWI-HR's failure to investigate to be a retaliation at all. Even if I did, I can not find that Retaliations Nos. 1-5 and the failure to investigate to be related such that a pattern of retaliation exists. Retaliations Nos. 1-5 are discrete acts of retaliation not related to the alleged retaliation for failure to investigate. In the present case, Retaliations Nos. 1-5 are of a totally different type of retaliation from that of the alleged failure to investigate and involved different supervisors and employees. Further, Baptist was on medical leave and not working at his job when the alleged failure to investigate his allegations of retaliation occurred. None of the alleged conduct was physically threatening or humiliating or of a severe or pervasive nature that would raise of hostile work environment claim. Nor can I find any other factual circumstance in this case that would support a finding of a hostile workplace environment. Thus, Baptist has failed to demonstrate an actionable hostile workplace environment claim that would save Retaliations No. 1-5 from dismissal.

B. Retaliation No. 6 - Termination from CWI

In its Motion, CWI argues that there are no disputed material facts concerning Baptist's complaint and that the facts demonstrate as a matter of law that Baptist's protected disclosures could not have been a contributing factor regarding his termination. This argument is based upon three separate grounds. First, CWI argues that Anglin, the CWI official that terminated Baptist, had no actual or constructive knowledge of Baptist's protected disclosures and thus his disclosures could not have been a contributing factor in Anglin's decision to terminate Baptist. Motion for Summary Judgment (Motion) at 8. Second, CWI argues that given the period of time that elapsed from the date of his

[14] Hostile work environment claims, while historically originating in Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, litigation, have been found to be a cognizable action under Part 708. *Cf. Richard R. Sena*, Case No. VBH-0042 (February 24, 2000) (Part 708 whistleblower complaint alleging constructive discharge by virtue of a hostile work environment).

disclosures, June 2007, to the date of his termination, June 2008, there is no evidence, nor can an inference be made, via temporal proximity, that the protected disclosure was a contributing factor in his termination. Motion at 11. Lastly, CWI argues that Baptist was terminated for failure to comply with the requirements for reinstatement from IES and that it has shown by clear and convincing evidence that it would have terminated Baptist notwithstanding his disclosures. Motion at 9.

1. Anglin's Actual or Constructive Knowledge of Baptist's Protected Conduct

With its Motion, CWI has submitted an affidavit from Debbie Anglin (Anglin), an ICP Benefits Specialist. In the affidavit, Anglin affirms that as the Benefits Specialist for CWI, she supervised and reviewed Baptist's medical disability leave comprising both short- and long-term disability benefits and was responsible for making the decision to terminate his employment because of a failure to comply with the requirements for reinstatement from IES. CWI Motion for Summary Judgment Attachment E (Anglin Affidavit) at ¶¶ 6, 12. In her affidavit, Anglin states that in performing her job responsibilities, she had no contact with Baptist's former supervisors, managers or co-workers regarding his job performance. Anglin Affidavit at ¶ 8. Further, she states that she did not become aware of Baptist's safety concerns and Part 708 complaint until after his termination in June 2008. Anglin Affidavit at ¶¶ 14, 16.

In his response, Baptist has averred in an affidavit that, in fact, he told Anglin of the retaliation he experienced when he contacted her in June 2007. He also points out that several E-mails indicate that Anglin had contact with Baptist's manager and supervisor. *See* SJ Exhibits 9, 10 and 20. Specifically, Anglin had involvement in soliciting CWI's response to a Cigna inquiry that it had no light-duty jobs available for accommodating Baptist. Baptist points out that Anglin, in a deposition, stated that with regard to the Cigna inquiry, she had spoken to Tullock and he informed her that Baptist's organization could not accommodate him with a light-duty position. SJ Exhibit 2 at 46.

Baptist also believes that several E-mails concerning Baptist's request for IES also provide credibility issues with regard to Anglin. These E-mails are "suspicious" because, on an E-mail dated January 9, 2008, to Richard Tullock reminding him that unless Baptist's IES status was approved HR would be forced to place him on time without pay status, there was a handwritten notation "Verbal Jeff Hobbes 1-10-09." SJ Exhibit 17. The date of the notation is one year in advance of the date of the E-mail. Additionally, in an E-mail dated January 10, 2008, from Hobbes approving IES status, there is no mention of the supposed conversation referenced in the prior "Verbal" notation on the E-mail. SJ Exhibit 20.

2. Baptist's Protected Disclosure's Temporal Proximity To His Termination

In its Motion, CWI also argues that the lengthy period of time, 12 months, between Baptist's protected disclosures and his termination does not allow any inference that the termination was a factor in the decision to terminate Baptist. This is especially true since an independent, intervening event, Baptist's failure to establish medical fitness to return to work by the end of his IES period, severs any conceivable connection between the protected disclosures and the termination.

Baptist attempts to rebut CWI's arguments by asserting that there was an "uninterrupted and contiguous" "chain of events" between Baptist's disclosure and his termination. These events are described below:

> 1. On June 4, 2007, when Baptist took medical leave, he had been in the preceding 48 hours removed from his inspection duties, but as of the day he was given medical leave he had not been reassigned to a different set of duties;
> 2. After his surgery in July 2007 and an alleged September 10th end of his family leave, Baptist was assigned to a new unit, but not given any description of what his duties would be;
> 3. In October 2007 he inquired of CWI, via Cigna, about accommodation with job duties not requiring significant lifting but Cigna did not inform him until December or early January that CWI did not offer any such accommodation. On January 7, 2008, his status was changed from STD to LTD/IES;
> 4.On January 10, 2008, Baptist sent his Part 851 complaint to Sellers concerning electrical safety issues and within weeks he was reassigned to another unit with unspecified job duties;
> 5. On March 6, 2008, Baptist filed his whistleblower complaint with DOE-ID;
> 6. From January 2008 through his termination in June 2008, neither Anglin or anyone at else at CWI offered Baptist any assistance in understanding or exercising the policy options for an employee to remain at CWI after the expiration of IES.

Given this chain of events, Baptist argues that a *prima facie* nexus exists between his protected disclosure and his termination in 2008.

3. CWI Would Have Terminated Baptist Notwithstanding His Disclosures

CWI has submitted a copy of its policy regarding IES employees. It states that an employee may be on IES status for a maximum of 12 months and that prior to that period running out must either (1) obtain a medical release to return to his or her former position; (2) obtain a medical release to return to a part-time position with permission of his or her manager; (3) terminate his or her employment by taking an Administrative Leave of Absence; or (4) otherwise terminate his or her employment. Attachment D to Motion at 2; Anglin Affidavit at ¶ 4. CWI has also provided a copy of the IES request form signed by Baptist which explains the requirements for reinstatement. Attachment F to Motion.

Anglin, in her affidavit, states that she was the sole person who reviewed and managed all CWI employees on IES. She managed Baptist's STD and LTD benefits and his IES and was the sole person responsible for managing his IES. Anglin Affidavit at ¶ 6. In this role, she sent Baptist a letter dated November 7, 2007, providing him with a copy of a "Request for Inactive Status" form and explaining the IES process for reinstatement of employment. She received the completed form on January 7, 2008, and processed his request on that same day. Anglin Affidavit at ¶ 6.

In an April 28, 2008 letter, she again explained the procedures required for an employee on IES to reinstate his employment with CWI. Anglin Affidavit at ¶ 8. The CWI policy required that an employee provide the firm with a medical release before his or her IES status expired. She subsequently received a receipt indicating that Baptist had received the letter on April 29, 2008. [15] She goes on to affirm in her affidavit that at no time did she receive a medical release from Baptist authorizing him to return to work. Nor did Baptist obtain an evaluation from the CWI medical dispensary to obtain reinstatement. Anglin Affidavit at ¶ 10. Baptist did not communicate to Anglin any interest in returning to work nor did Baptist seek an Administrative Leave of Absence. Anglin also avers that in several telephone conversations with Baptist, with one such conversation occurring as early as May 2007, he indicated his belief that he would not be returning to work. Because Baptist had not taken any of the required actions to be reinstated from work before his IES status expired on June 5, 2008, Anglin made the decision to process Baptist's termination, which became effective on June 10, 2008. Anglin Affidavit at ¶ 11. Additionally, Anglin stated that the policy of terminating employees whose IES expired had been in effect for at least 10 years before she took this action. She is aware of 10 employees whose IES status expired, and all were terminated. Anglin Affidavit at ¶ 5.

In his response, Baptist does not specifically provide an argument as to CWI's assertion that it would have terminated him notwithstanding his disclosures for failure to comply with company policy regarding IES. Baptist does argue that Anglin's handling of his STD request did not comport with the written policy since Anglin, and not Baptist, went to his supervisors to apply for Baptist's STD. Memorandum in Opposition to Summary Judgment Motion at 8. Baptist also notes that Anglin never discussed the options of returning to work, accommodation or administrative leave with him before terminating him. Memorandum in Opposition to Summary Judgment Motion at 9.

4. Analysis

My review of the evidence and submissions regarding the Motion for Summary Judgment leads me to conclude that the Motion should be granted. As discussed earlier, a Motion for Summary Judgment should only be granted where the available pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. With regard to CWI's first two arguments, there is sufficient evidence to conclude that there may be disputable factual issues concerning whether Baptist's disclosures were a contributing factor in his subsequent termination. As to CWI's assertion that Anglin did not have any knowledge of Baptist's safety concerns or his belief that he had been retaliated against prior to his termination, I find that there is a potential issue of fact. In his affidavit, Baptist states that when he contacted CWI-HR in June 2007 that he told a CWI-HR representative and Ms. Anglin about the retaliation he was experiencing. Baptist Affidavit at ¶ 4. This presents a factual issue as to whether Anglin had actual knowledge of Baptist's protected disclosures. In light of this evidence, Summary Judgment on this ground would be inappropriate.

CWI also asserts that there could be no causal nexus between Baptist's protected disclosures and his termination since they occurred some 12 months apart.[16] While there does not appear to be any

[15] With its Motion, CWI has provided copies of the letters and requests for IES referenced in Anglin's Deposition.
[16] OHA has held that a period as long as 12 months between a disclosure and an alleged retaliation may be sufficient to

direct connection between the protected disclosure and the "chain of events" suggested by Baptist, these events might create a disputable issue as to whether that CWI management's attention was directed to Baptist and his disclosures between the date of his protected disclosures on June 4, 2007 and his termination on June 10, 2008.

However, with regard to CWI's third argument, I find that there is no issue of material fact concerning CWI's claim that it would have terminated Baptist notwithstanding his protected disclosure. The evidence before me clearly indicates that CWI would have terminated Baptist for failure to follow the procedures for reinstatement from IES. Since CWI has met its burden under 10 C.F.R. § 708.29, the issue of whether Baptist's disclosures were a contributing factor in his dismissal is moot. Consequently I find as a matter of law that CWI, as the contractor, has met it burden with clear and convincing evidence under Part 708 and Summary Judgment should be granted.

As mentioned above with regard to CWI's third argument, my review of the evidence and submissions regarding the Motion for Summary Judgment leads me to conclude that there is no issue of material fact regarding the defense under 10 C.F.R. § 708.29 offered by CWI against Baptist's Part 708 complaint, i.e., that it would have dismissed Baptist notwithstanding his disclosure. Baptist does not dispute that he requested STD status in June 2007. Baptist then submitted a IES request (Request) form signed on December 19, 2007. The Request stated that an employee on IES who wishes to return to work must obtain a written release from his personal physician and then report to the nearest INL medical dispensary for an examination by a company-designated physician. Baptist received a letter from CWI on April 29, 2008, again informing him that if he wished to return to work, he needed to obtain the medical clearances as specified in the Request. CWI has provided copies of these documents for the record. Baptist has not alleged at any time that he tried to comply with the stated requirements of IES. Nor has he alleged that the CWI policy has been capriciously applied to him or that CWI has not applied its IES policy uniformly towards its employees. Baptist failed to comply with the requirements to return to duty after one year of IES and was terminated pursuant to the IES policy. After a period of discovery, Baptist has failed to produce any evidence that would raise an issue of material fact regarding CWI's defense that it would have terminated him notwithstanding his disclosure. As a matter of law, I find that CWI would have dismissed Baptist notwithstanding the protected disclosures he alleges.

None of the alleged factual disputes raised by Baptist affects the material facts described above. Even if I conclude that Anglin had some type of animus against Baptist or was influenced by CWI management, there is no evidence that the CWI IES policy was improperly applied to Baptist. The one example of Anglin's variation from the policy, pointed out by Baptist, actually accommodated his effort to receive STD and provides no evidence as to the CWI's IES policy being applied in a manner prejudicial to Baptist. Further, Baptist has not presented sufficient evidence that would cause Anglin's credibility to become an issue of material fact with regard to the application of IES to all CWI employees.[17]

---

conclude there is not sufficient temporal nexus to support a finding that the disclosure was a contributing factor for the retaliation. *See Donald E. Searle*, TBU-0079 (July 25, 2008).

[17] The issue of whether Baptist told Anglin about his retaliations in June 2007 is not relevant to my finding that CWI has presented sufficient evidence to establish that it would have terminated Baptist notwithstanding his protected disclosures.

III. Summary

As to Retaliation Nos. 1-5 as described in the Report of Investigation regarding the whistleblower complaint filed by Billy Joe Baptist, I find that each of the alleged retaliations is time-barred under 10 C.F.R. § 708.14. Consequently, none of these are actionable under Part 708. With regard to the last remaining retaliation referenced in the Report of Investigation, Retaliation No. 6, I will grant CWI's Motion for Summary Judgment.

It Is Therefore Ordered That:

(1) Retaliations Nos. 1-5 as specified on page 8 of the Report of Investigation concerning Billy Joe Baptist, Case No. TBI-0080, dated December 19, 2008, are hereby dismissed.

(2) The Motion for Summary Judgment filed by CH2M-WG Idaho, LLC on February 18, 2009, Case No. TBZ-0080, regarding Retaliation No. 6, is hereby granted.

(3) The Request for Relief filed by Billy Joe Baptist, Case No. TBH-0080, under 10 C.F.R. Part 708 on December 19, 2008, is hereby denied.

(4) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: May 7, 2009

January 22, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision
Motion to Dismiss

Name of Case: David P. Sanchez

Dates of Filing: October 30, 2009
December 21, 2009

Case Numbers: TBH-0087
TBZ-0087

This Decision will consider a Motion to Dismiss filed by Los Alamos National Laboratory ("LANL" or "the Respondent"). LANL seeks dismissal of a pending complaint filed by David P. Sanchez ("Mr. Sanchez" or "the Complainant") against his employer, Los Alamos National Security, L. L. C. ("LANS"),[1] on October 30, 2009, under the Department of Energy's (DOE) Contractor Employee Protection Program, set for that 10 C.F.R. Part 708. OHA has assigned Mr. Sanchez' hearing request Case No. TBH-0087, and the present Motion to Dismiss Case No. TBZ-0087. For the reasons set forth below, I have determined that Mr. Sanchez' complaint should be dismissed.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 2, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The Part 708 regulations prohibit retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including "disclosing to a DOE official … information that [the employee] reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or

[1] Los Alamos National Security, L.L.C., (LANS) manages and operates Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico, pursuant to a contract with the National Nuclear Security Administration (NNSA), a separately organized agency within the Department of Energy (DOE).

safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include "a statement specifically describing the alleged retaliation taken against [the complainant] and the disclosure, participation, or refusal that [the complainant believes gave rise to the retaliation." 10 C.F.R. § 708.12.

B. Factual Background

The Complainant is an employee at LANS, the management and operations contractor at LANL in Los Alamos, New Mexico. Mr. Sanchez was assigned to the Quality Assurance Division's Institutional Quality Group (QA-IQ) as a Quality Assurance (QA) Specialist. This position is a "deployed position," which means that he can be deployed by his current organization to other LANL organizations in order to provide support in the QA area. Beginning in January 2008, Mr. Sanchez was deployed as a Senior QA Specialist in the Tech Area (TA)-55 Nuclear Facility. In October 2008, Mr. Sanchez participated in an interview with the DOE Office of Inspector General (OIG) regarding the TA-55 QA program. During this conversation, Mr. Sanchez allegedly disclosed concerns regarding deficiencies in the TA-55 QA program, including health and safety concerns. In November 2008, Mr. Sanchez was transferred from his position within TA-55 back to the QA-IQ.

II. PROCEDURAL HISTORY

On July 15, 2009, Mr. Sanchez filed a complaint under 10 C.F.R. Part 708 with the Employee Concerns Program (ECP) office of the National Nuclear Security Administration (NNSA) in Albuquerque, New Mexico. In his Part 708 complaint, Mr. Sanchez alleged that LANS removed him from his position in TA-55, and took several other negative actions against him, in retaliation for his participation in the DOE OIG interview in October 2008 during which he disclosed nuclear facility non-compliance issues. LANL, on behalf of LANS, maintained that it did not engage in any retaliatory conduct against Mr. Sanchez.

On August 24, 2009, the Complainant requested an investigation followed by a hearing conducted by the DOE Office of Hearings and Appeals (OHA). *See* E-Mail from David P. Sanchez to Michelle Rodriguez de Varela, NNSA ECP, August 24, 2009. OHA received the request on September 2, 2009, and the OHA Director appointed an investigator to the case. The OHA investigator issued a report of investigation (ROI) on October 30, 2009. *See* Report of Investigation, Case No. TBI-0087 (2009). The OHA Director appointed me to serve as Hearing Officer on November 2, 2009.

After consulting with the parties, I scheduled a three-day hearing in this case to occur on January 26, 2010, through January 28, 2010, and informed the parties of the hearing dates by letter dated November 5, 2009. *See* Letter from Diane DeMoura, OHA, to David P. Sanchez and Pablo Prando, LANL, November 5, 2009. In the November 5, 2009, letter I also established a

schedule for the submission of pre-hearing briefs. I requested that, by November 25, 2009, the parties submit briefs identifying (i) any disagreements each party had with the October 30, 2009, ROI and (ii) the names of their respective witnesses and a short description of the subject matter of each witness' testimony. *Id*. In addition, because Mr. Sanchez' complaint consisted primarily of general allegations, I stated the following, "Mr. Sanchez include in his brief the substance of his disclosures to the DOE Inspector General in Fall 2009 in detail and specify why he believes those disclosures fall within the ambit of Part 708. Mr. Sanchez should also specify in detail the alleged retaliations to which he was subjected." *Id*. (emphasis in original). I further requested that Mr. Sanchez "specify in detail" the remedies he sought and include a brief statement regarding why he believed each of the claimed remedies was available under Part 708. *Id*. Finally, I afforded each party the opportunity to submit reply briefs, due ten days after receipt of the initial briefs. *Id*. On November 17, 2009, I granted an extension of time to file briefs. Following the extension, the initial briefs were due on December 4, 2009, and reply briefs were due on December 21, 2009. E-mail from Diane DeMoura, OHA, to David P. Sanchez and Pablo Prando, LANL, November 17, 2009.

The Complainant filed his initial brief on December 2, 2009. *See* E-Mail from David Sanchez to Diane DeMoura, OHA, December 2, 2009 (transmitting Complainant's Initial Brief, November 30, 2009). In his brief, the Complainant failed to respond to each of the requests in my November 5, 2009, letter. Mr. Sanchez described generally his interview with personnel from the DOE OIG, but provided no specifics regarding his disclosures. *See* Complainant's Initial Brief at 2. In addition, Mr. Sanchez did not describe the alleged retaliations to which he was subjected with any level of specificity, despite my request that he do so. In addition, Mr. Sanchez did not specify which remedies he sought under Part 708. Further, although he included a list of potential witnesses in his brief, Mr. Sanchez did not provide a description of the subject matter of their testimony as requested. *Id*. at 3. Mr. Sanchez identified in his brief various documents which he intended to submit as exhibits at the hearing and made a discovery request in which he requested the production of specific documents from LANL. *Id*. at 4.

LANL submitted its initial brief on December 4, 2009, addressing each of the issues identified in the November 5, 2009, letter. *See* Respondent's Initial Brief, December 4, 2009. LANL submitted a reply brief and the instant Motion to Dismiss on December 21, 2009. In the reply brief, LANL noted Mr. Sanchez' failure to comply with my requests for specific statements regarding his protected disclosures, the alleged retaliations, the remedies sought by Mr. Sanchez, and Mr. Sanchez' potential witness list. *Id*. at 1-3. LANL further requested that a discovery order be entered in this case and noted objections to the Complainant's discovery request, namely that some of the sought documents were either already in Mr. Sanchez' possession or not documents created or possessed by LANL. *Id*. at 3. Mr. Sanchez did not submit a reply brief.

Following receipt of the parties' briefs, I issued a letter to the parties on December 22, 2009, in which I addressed various issues raised in the briefs. *See* Letter from Diane DeMoura, OHA, to David P. Sanchez and Philip Kruger, LANL, December 22, 2009. In that letter, I noted Mr. Sanchez' failure to comply with my requests for specific information regarding (1) the substance of his discussion with the DOE OIG; (2) the alleged retaliations to which he was subjected; and, (3) the remedies he sought. I requested that Mr. Sanchez provide this information no later than January 4, 2010, and I noted that failure to comply with my request may result in adverse

findings or dismissal of the complaint, pursuant to 10 C.F.R. 708.28(b)(5). *Id*. at 1-2. In addition, I requested that Mr. Sanchez provide, no later than January 4, 2010, an amended witness list which included a statement regarding the subject matter of each witness' testimony, and I noted that failure to comply with this request may also result in adverse findings or dismissal of the complaint, pursuant to 10 C.F.R. § 708.25(b)(5). *Id*. at 2. Finally, regarding discovery, I noted that certain documents in Mr. Sanchez' discovery request were not LANS/LANL documents and therefore fell outside the scope of my authority to order discovery. As to the remaining documents, I noted that OHA expects parties to amicably resolve discovery matters among themselves to the extent possible. *Id*. at 2.

LANL requested discovery from Mr. Sanchez on December 23, 2009. LANL requested that Mr. Sanchez produce copies of the documents Mr. Sanchez identified in his initial brief as potential exhibits. Email from Philip Kruger, LANL, to David P. Sanchez, December 23, 2009.

On January 5, 2010, I sent an e-mail to the parties confirming our scheduled pre-hearing telephone conference for January 7, 2010. In that email, I again noted that Mr. Sanchez had failed to comply with the requests in my December 22, 2009, letter and I indicated that he must submit the requested information as soon as possible. *See* E-Mail from Diane DeMoura, OHA, to David P. Sanchez and Philip Kruger, LANL, January 5, 2010.

On January 7, 2010, I convened a pre-hearing telephone conference in this case. *See* Record of Pre-Hearing Telephone Conference, January 7, 2010. At that time, I noted that Mr. Sanchez had failed to comply with my requests for specific information regarding his protected disclosures, the alleged retaliations, the sought remedies, and his witness list, which I requested on November 5, 2009, December 22, 2009, and January 5, 2009. *Id*. LANL raised an objection to Mr. Sanchez' failure to comply with my requests. LANL stated that Mr. Sanchez' lack of cooperation was infringing on its due process rights by hindering LANL's ability to prepare for the hearing. We discussed his allegations during the pre-hearing conference and I again requested that Mr. Sanchez submit a detailed written statement with this information as soon as possible following the pre-hearing conference. *Id*. Mr. Sanchez failed to comply with this request.

In addition, during the January 7, 2010, telephone conference, the Complainant expressed some uncertainty during the pre-hearing telephone conference regarding whether the Part 708 process was the appropriate forum for his complaint and whether he wished to proceed with his complaint. Therefore, I instructed Mr. Sanchez to inform me no later than January 12, 2010, whether he wished to proceed with the hearing. *See* E-Mail from Diane DeMoura, OHA, to David P. Sanchez and Philip Kruger, LANL, January 11, 2010. Mr. Sanchez failed to comply with this request. Rather, he requested that this proceeding be held in abeyance for an indefinite period of time until the DOE OIG issued reports which he believed were relevant to this case. *See* E-Mail from David P. Sanchez to Diane DeMoura, OHA, January 12, 2010. I denied Mr. Sanchez' request for an extension and again requested that he inform me no later than January 13, 2010, whether he wished to proceed. When Mr. Sanchez failed to comply with this request on January 13, 2010, LANL renewed its Motion to Dismiss, citing Mr. Sanchez' refusal to provide a written statement regarding his protected disclosures, alleged retaliations, and requested remedies, as well as his refusal to respond to LANL's discovery requests, despite the

fact that the hearing date was rapidly approaching. *See* E-Mail from Philip Kruger, LANL, to Diane DeMoura, OHA, January 13, 2010.

On January 15, 2010, I ordered Mr. Sanchez to provide specific documents in response to LANL's discovery request. *See* Letter from Diane DeMoura, OHA, to David P. Sanchez and Philip Kruger, LANL, January 15, 2010, at 3. In addition, I ordered Mr. Sanchez to provide an updated and complete witness list. *Id*. at 5. I stated that failure by Mr. Sanchez to comply with these orders by January 20, 2010, would result in immediate dismissal of this proceeding. *Id*. at 3, 5. In addition, I scheduled another pre-hearing telephone conference for January 20, 2010. *Id*. at 6.

During the January 20, 2010, pre-hearing telephone conference, Mr. Sanchez reiterated his desire for an extension of time in this case and stated that he was unwilling to proceed on the scheduled hearing date, January 26, 2010. *See* Record of Pre-Hearing Telephone Conference, January 20, 2010. I stated that no extension had been granted in this case and that the parties should be prepared to proceed on January 26, 2010, as scheduled. *Id*. I further reminded Mr. Sanchez that I had ordered him to produce discovery and his witness list by January 20, 2010. At that time, Mr. Sanchez stated that he would not comply with the pending orders, and would not be present at the hearing as scheduled, because he did not yet have the DOE OIG reports which he was awaiting. *Id*. I stressed to Mr. Sanchez that failure to comply with the pending orders and failure to appear at the scheduled hearing were grounds for dismissal of this case. *Id*. Mr. Sanchez stated that he understood, but repeated that he would not comply with the pending orders and would not appear at the hearing as scheduled. *Id*.

III. ANALYSIS

The Part 708 regulations set forth provisions governing the conduct of Part 708 hearings and enumerating the various powers of the Hearing Officer. *See* 10 C.F.R. § 708.28. Among the powers accorded to the Hearing Officer is the authority "upon request of a party or on his or her own initiative, [to] dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Hearing Officer, or, without good cause, to attend a hearing[.]" 10 C.F.R. § 708.28(b)(5). It is well settled that dismissal of a complaint is "the most severe sanction that we may apply" in Part 708 proceedings and "should be used sparingly." *See Richard L. Urie*, Case No. TBZ-0063 (2007).[2] Consequently, Motions to Dismiss should be granted "only if supported by clear and convincing evidence." *Id*. (internal citations omitted).

In this case, the Complainant has failed to comply with every request and order issued to him. As set forth above, Mr. Sanchez was afforded numerous opportunities to provide the information that is required of him under the Part 708 regulations and which is critical to the conduct of this proceeding. The Complainant's refusal to comply has unduly prejudiced the Respondent's ability to prepare for the hearing. In addition, the Complainant affirmatively stated that, since his request for an abeyance in the proceeding until the DOE OIG issued specific reports was not

[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

granted, he would not attend the hearing as scheduled. The Complainant's refusal to attend the scheduled hearing renders continuing with this proceeding impracticable.

Based on the foregoing, I find that this proceeding should be dismissed based on the Complainant's lack of cooperation and failure to comply with lawful orders of the Hearing Officer. Specifically, I find that the Complainant (1) has refused to provide specific information regarding his protected disclosures and alleged retaliations, as required under 10 C.F.R. § 708.12, despite my repeated requests; (2) has failed to provide a statement as to his requested remedies, despite my repeated requests; (3) has failed to provide discovery, despite LANL's repeated requests and my January 15, 2010, order; (4) has failed to provide a witness list, despite my repeated requests and January 15, 2010, order; and, (5) has informed me and LANL counsel that he will not be present at the hearing, scheduled for January 26, 2010. The above-enumerated conduct constitutes grounds under 10 C.F.R. § 708.28(b)(5) supporting the dismissal of Mr. Sanchez' Part 708 complaint.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Los Alamos National Laboratory on December 21, 2009, Case No. TBZ-0087, is hereby granted as set forth in paragraph (2) below.

(2) The Complaint filed by David P. Sanchez under 10 C.F.R. Part 708 on October 30, 2009, Case No. TBH-0087, is hereby dismissed.

(3) This is an Initial Agency Decision, which shall become a Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date: January 22, 2010

August 25, 2010

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case:	Arun K. Dutta
Dates of Filing:	December 4, 2009
Case Number:	TBH-0088

This Decision concerns a Complaint filed by Arun K. Dutta (hereinafter referred to as "Mr. Dutta" or "the Complainant") against Parsons Infrastructure and Technology Group, Inc. (hereinafter referred to as "Parsons" or "the Respondent"), his former employer, under the Department of Energy's (DOE) Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708. At all times relevant to this proceeding, Parsons was a DOE contractor operating in Aiken, South Carolina. It is the Complainant's contention that during his employment with Parsons, he engaged in protected activity and, as a consequence, suffered reprisals by Parsons. Among the remedies that the Complainant seeks are reinstatement, back pay, and reimbursement for legal and other expenses. As discussed below, I have concluded that Mr. Dutta is not entitled to the relief that he seeks.

I. Background

A. Regulatory Background

The DOE established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). The Program's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit a DOE contractor from retaliating against its employee because the employee has engaged in certain protected activity, including:

> (a) Disclosing to a DOE official, a member of Congress, . . . [the employee's] employer, or any higher tier contractor, information that [the employee] reasonably believe[s] reveals—
>
> (1) A substantial violation of any law, rule, or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or

(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority.

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

An employee who believes that he or she has suffered retaliation for making such disclosures may file a complaint with the DOE. It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets this burden of proof, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." *Id.*

B. Factual Background [1]

The following facts are not in dispute. Parsons contracted with the DOE to construct a salt waste processing facility (SWPF) at the DOE's Savannah River Site. An SWPF processes nuclear waste. Mr. Dutta is a mechanical engineer with over 30 years of experience who was hired by Parsons as a Senior Pipe Stress Engineer in March 2007. He was assigned to the Engineering Mechanics Group (EMG). At all times relevant to this proceeding, the EMG was headed by Richard Stegan, P.E. Stegan reported to James Somma, P.E., Engineering and Design Manager for the SWPF. In the summer of 2007, the Complainant was assigned to work on two specifications, numbered 11818 and 11819. Specification 11818 detailed seismic qualification criteria for PC-3 vessels, and 11819 set forth seismic qualification criteria for PC-1 and PC-2 vessels. These documents had already been submitted for IDR review, and it was Mr. Dutta's job to review, and make a preliminary disposition

---

1/ The following terms will be used throughout this Decision.

- *Specification*: a document requiring that certain equipment meets statutory and regulatory safety requirements.
- *PC-1, PC-2, and PC-3*: classes of seismic regulatory requirements. PC-1 and PC-2 are very similar, while PC-3 is more stringent.
- *LDE*: Lead discipline engineer.
- *IDR Process*: (inter-disciplinary review): a review process for specifications and other documents. An engineer drafts or "initiates" a specification and sends it to a reviewer. If the reviewer "signs off" on the document, it is then sent to the IDR committee, along with an IDR form. The IDR committee returns comments on the form, and the initiator resolves the comments. The reviewer, the LDE, and the Engineering and Design Manager then review the form, and if they all sign off, the specification is then submitted to the document control system (DCS) operator, who verifies the signatures and dates on the specification and on the IDR form, and enters the data into the document control system.
- *Condition Report (CR)*: A pre-printed form that an initiator uses to identify issues and provide recommendations. An evaluator signs off on it, beginning an action plan. The last step verifies the action.
- *Job Shopper*: A contractor employee.

of, the IDR committee's comments. Mr. Dutta performed this duty, and then gave the specifications to Mr. Stegan, the LDE, for his review. However, instead of approving these documents and forwarding them to Mr. Somma, Mr. Stegan cancelled specification 11818 and assigned another engineer, Anthony Edwards, to revise specification 11819. Mr. Edwards incorporated elements from specification 11818, revised the specification given to him, and submitted the finished product, specification 11819, rev. 0, to Mr. Stegan. Stegan forwarded the specification to Mr. Somma, Somma approved it, and on October 31, 2007, specification 11819, rev. 0, was entered into Parsons' DCS.

In a letter to David Amerine, Senior Vice President/Project Manager, SWPF, dated November 13, 2007, the Complainant alleged that "an inferior quality document [the revised specification 11819, rev. 0] was slipped into our Document Control system using fraudulent means." Complainant's Exhibit (Comp. Ex.) 11. He further alleged that specification 11819, rev. 0 did not go through the IDR process, but was instead improperly substituted for specification 11819, which the Complainant worked on, and which did go through IDR. The IDR form that originally accompanied specification 11819 was passed on with specification 11819, rev. 0. "This is," the Complainant claimed, "a case of an intentional falsification of [a] safety document since these specs deal with design requirements for safety-related equipment." *Id.* Mr. Amerine said that it looked as if Mr. Dutta had identified a problem and that it should be fixed. He gave the letter to Mr. Somma.

In November 2007, the Respondent began a process that resulted in the EMG group being divided into two groups: the vessel design group, which would remain under the supervision of Mr. Stegan, and the pipe stress group, under the management of Calvin Hughes. This division became official as of January 2008. Mr. Dutta was placed in the pipe stress group.

On January 3, 2008, Mr. Somma met with Mr. Dutta, Mr. Stegan, and Mr. Edwards to discuss the Complainant's allegations. During the meeting, Mr. Somma suggested that Mr. Dutta initiate a CR, and the Complainant did so.

In November 2008, the Complainant discussed his concern with Mr. Hughes that, although design of the SWPF was 90% complete, the pipe support design had not been completed. On January 15, 2009, Parsons terminated the Complainant's employment.

C. Procedural Background

On April 6, 2009, Mr. Dutta filed a Part 708 Complaint with the Director of the DOE's Office of Civil Rights at the Department of Energy's Savannah River Operations Office. Parsons filed a response to this complaint. The Savannah River Employee Concerns Program attempted to mediate the Complaint on August 13, 2009, but those efforts failed. Mr. Dutta requested that his Complaint be forwarded to the Office of Hearings and Appeals (OHA) for an investigation and hearing. The Director forwarded the Complaint to OHA on October 7, 2009, and the OHA Director appointed an investigator. The OHA investigator interviewed Mr. Dutta and other current and past Parsons employees and contractor employees and reviewed a large number of documents before issuing a Report of Investigation (ROI) on December 4, 2009.

On that same day, the OHA Director appointed me as the Hearing Officer in this case. I conducted a three-day hearing in this case in Aiken, South Carolina, beginning on March 2, 2010. Because one of the Complainant's witnesses was unavailable during this period, his testimony was heard by video

teleconferencing on May 14, 2010. [2] Over the course of the hearing, 14 witnesses testified. The Complainant introduced 47 exhibits into the record, and the Respondent introduced 68 exhibits. On May 28, 2010, the Respondent and the Complainant submitted written closing arguments, at which time I closed the record in the case.

D. Mr. Dutta's Complaint and the Report of Investigation

Mr. Dutta alleges in his Complaint that he made two protected disclosures during his tenure with Parsons. First, he alleges that specification 11819, rev. 0 (the document prepared by Mr. Edwards), was entered into Parsons' DCS without first being subjected to IDR. According to Mr. Dutta, this action was fraudulent in that it involved taking the specification number and IDR form for a document that had gone through IDR, and applying them to a document that had not gone through that process. He further alleged that the action was a violation of the SWPF Project Procedure No. PP-EN-5006, Rev. 6, which sets forth Parsons' rules governing the IDR process. Respondent's Exhibit (Resp. Ex.) 4. According to Mr. Dutta, this also represented a substantial and specific danger to employees or to public health and safety. Second, the Complainant raised his concerns that, although the design of the SWPF had reached 90% completion, the piping support design had not yet been completed. He alleged that completing the piping support design during the construction phase of the project, as was planned by Parsons, constituted "a substantial violation of a law, rule, or regulation," "a substantial and specific danger to employees or to public health and safety," and "gross mismanagement" and a "gross waste of funds."

In retaliation for making these disclosures, Mr. Dutta alleges, the Respondent transferred him in January 2008 to the pipe stress group, after which he claimed to have received "no responsible task[s]," Comp. Ex. 11, and terminated his employment on January 15, 2009. As relief for these alleged retaliations, the Complainant requests reinstatement, back pay, compensation for loss of medical and other benefits and reimbursement of legal expenses. *Id.*

After reviewing this Complaint, interviewing Mr. Dutta and 10 other current and former employees and examining a large number of documents, the OHA investigator concluded that, regarding his first disclosure, "the evidence suggests that Mr. Dutta reasonably believed that he disclosed a substantial violation of a law, rule, or regulation." ROI at 17. The ROI further concluded that the evidence was not clear as to whether the Complainant's second disclosure revealed a substantial violation of a law, rule, or regulation, a substantial and specific danger to public health and safety, or a gross waste of funds. *Id.* The investigator also observed that Parsons apparently did have knowledge of the disclosures.

II. Analysis

As stated in Section I.A above, in order to prevail in a Part 708 proceeding, an employee must show, by a preponderance of the evidence, that he made a protected disclosure or engaged in protected behavior, and that this was a contributing factor to one or more alleged acts of retaliation by the contractor against the employee. For the reasons set forth below, I find that Mr. Dutta made two

---

2/ Citations to the transcript of the testimony that was taken from March 2 though March 4, 2010, will be abbreviated as "Tr." Citations to the supplemental transcript of the testimony of XXXXXXXXX that was taken on May 14, 2010, will be abbreviated as "Sup. Tr."

protected disclosures, and that the second disclosure was a contributing factor in his termination. However, because Parsons would have taken the same action in the absence of any disclosures, I conclude that Mr. Dutta is not entitled to the compensation that he seeks.

A. The Protected Disclosures

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

1. Parsons' Failure To Send The Revised Specification 11819, Rev. 0 Through IDR

It is undisputed that the Complainant made this disclosure to SWPF Project Manager David Amerine in a letter dated November 13, 2007. Consequently, the issue to be decided is whether Mr. Dutta reasonably believed that this constituted (i) a substantial violation of any law, rule, or regulation, (ii) a substantial and specific danger to employees or to public health or safety, or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. The Complainant contends that all three criteria apply to this disclosure. Because I conclude that a reasonable person in Mr. Dutta's position, with his level of experience, could have believed that Parson's failure to send the revised document through IDR violated the company's Procedure No. PP-EN-5006, Rev. 6 (IDR rules), I need not decide whether the Respondent's action was fraudulent or constituted a substantial and specific danger to employees or to public health and safety.

Parsons argues that, under section 6, paragraph 4(b) of its IDR rules, Mr. Stegan, as LDE, did not need to submit specification 11819, rev. 0, for IDR. That paragraph states, in pertinent part, that "If the LDE determines that changes to the document are significant, the documents shall be rechecked in accordance with PP-EN-5005 and an additional IDR be performed in accordance with this PP." Resp. Ex. 4 at pg. RES 05297. The implication that Parsons wishes me to draw from this provision is that if the LDE determines that the changes to the document are not significant, an additional IDR need not be performed. At the hearing, Stegan testified to that effect, stating that he did not resubmit the revised specification for IDR because "there was not a substantial technical change made to that document." Tr. at 533-534. The Respondent contends that I should not substitute my judgement as to whether the document should have been submitted for IDR for that of a trained professional such as Mr. Stegan.

I agree. However, the relevant question is not whether Parsons' IDR rules required Stegan to submit the document in question for IDR, it is whether Dutta *could reasonably have believed* that the rules required Stegan to do so. I find that such a belief was reasonable.

Contrary to Parsons' contentions, the wording of the IDR rules does not preclude this finding. Section 2.0 of the rules states that the IDR requirements are applicable "to all SWPF design and technical output documentation such as drawings, specifications, and other technical design documents, with the exception of . . . design calculations." Resp. Ex. 4 at pg. RES 05292. Section

6, paragraph 4 of the IDR rules sets forth the LDE's duties after the document has gone through IDR. Paragraph 4(a) states, in pertinent part, that the LDE shall "Review and disposition all comments identified on the Comment Review Form . . . and coordinate all proposed responses and document changes with the reviewer(s). The LDE is responsible for getting the reviewers' concurrence to proposed responses and document changes." *Id.* at RES 05297. The "document changes" referred to could reasonably be interpreted as being changes made in response to comments on the Comment Review Form. Therefore, the LDE's implied discretion in paragraph 4(b) to not send a revised document back through IDR could reasonably be interpreted as applying to revisions made in response to those comments, and not to revisions made by the LDE.

Moreover, even if the LDE's discretion under paragraph 4(b) does extend to documents that were changed at his request, the Complainant could reasonably have concluded that those changes were sufficiently significant to require re-submission for IDR. As previously stated, Stegan testified that he did not submit the revised specification for IDR because there were no "substantial *technical* change[s]." Tr. at 534 (Italics added). However, paragraph 4(b) does not refer to technical changes, but only to significant changes, implying that the changes need not be technical in nature to require an additional IDR. The revised specification was essentially a combination of two earlier specifications, and included over four pages worth of changes from the previous iteration of specification 11819, including changes to the Quality Assurance requirements in the specification. Comp. Ex. 17. Mr. Dutta could reasonably have believed that those changes were significant enough to have required Mr. Stegan to resubmit specification 11819, rev. 0 for IDR.

2. Parsons' Failure To Complete The Pipe Support Design Before The Construction Phase Of The SWPF

Mr. Dutta's second alleged disclosure is that Parsons did not complete the piping support design for the SWPF before the construction phase of the SWPF project. Some explanation of this allegation is necessary.

As described by Mr. Stegan during his testimony, the SWPF project was to proceed in three phases. The first phase was the design phase. During this phase, a "conceptual design" was created, which establishes an overall scope, or framework, of the project. Tr. at 508. The second was the detailed design phase, which included the creation of the actual design document specifications, the data sheets, the calculations, and the drawings. *Id.* In phase three, the actual construction was to take place. Equipment is purchased, and once construction is completed, individual systems are tested to make sure that they are functioning in accordance with the design documents. *Id.*

According to the Complainant, the design and location of the pipe supports should have been completed concurrently with the pipe stress calculations, before the beginning of phase three. This is because, Mr. Dutta claims, the accuracy of the stress calculations depended in part on knowing where the supports would be placed. Proceeding according to Parsons' plans, he contends, would mean that the stress calculations would likely have to be redone after the piping support design had been completed, at the cost of a great deal of wasted time and effort. This would, he alleges, constitute a gross waste of funds. Tr. at 82. The Complainant testified that he made this second disclosure to Mr. Hughes and to Mr. Somma in November of 2008, prior to Parsons entering into phase three of the SWPF construction in December 2008. Tr. at 174. Mr. Hughes confirmed that the Complainant raised this issue with him. Tr. at 739.

Parsons argues that Mr. Dutta could not have had a reasonable belief that its failure to complete the pipe support design before entering into the construction phase constituted a gross waste of funds. As an initial matter, Mr. Hughes testified that it was not necessary to do pipe support work concurrently with pipe stress work, and that it was "pretty much a typical industry standard" that some design work be completed during the construction phase of a project of this kind. Tr. at 737. Furthermore, Hughes testified that the DOE had been informed that pipe support design would be completed during phase three, Tr. at 739, Resp. Ex. 15, and SWPF Project Manager Robert Breor testified that the DOE approved the inception of phase three after having received that information. Tr. at 662; Resp. Ex. 30 and 31.

Nevertheless, I find that the Complainant reasonably believed that Parsons' failure to complete the pipe support design prior to phase three would result in a gross waste of funds. Mr. Dutta's testimony in this regard is amply supported by that of XXXXXXXX, and two of the Respondent's witnesses, Mr. Breor and Ted Niedbalski. XXXXXX, who worked in the pipe stress group with Mr. Dutta at Parsons, and who testified that he has more than 25 years of pipe stress experience, indicated that stress calculations were affected by pipe support design, and that it was very important that the two be done concurrently. Sup. Tr. at 28. Mr. Breor testified that Parsons had to rehire some pipe stress analysts that it had laid off in January 2009 because of design changes, Tr. at 674, and that some of those changes might have been avoided if the support work had been done concurrently with the pipe stress analysis. Tr. at 677. Mr. Niedbalski, who has over 40 years of pipe stress and support experience, served as the "lead" for the pipe stress group during Mr. Dutta's tenure with Parsons. He testified that the support design has to be completed before construction. Tr. at 813. Furthermore, Mr. Dutta's testimony indicates that, at the time of his disclosure, he was not aware of any agreement between Parsons and the DOE about the timing of the completion of the pipe support design. Tr. at 232-237. Thus, the evidence supports the conclusion that the Complainant's belief was reasonable.

B. The Alleged Retaliations

In order to prevail, the Complainant must next demonstrate, by a preponderance of the evidence, that his protected disclosures were a contributing factor to one or more alleged acts of retaliation taken against him by Parsons. Under the Part 708 regulations, "retaliation" means "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to the employee's compensation, terms, conditions or privileges of employment as a result of the employee's disclosure of information" or participation in protected conduct as described in 10 C.F.R. § 708.5.

Mr. Dutta alleges two instances of retaliation. First, he claims that his assignment to the pipe stress group, under the supervision of Mr. Hughes, was in retaliation for his first protected disclosure, which he made in his November 13, 2007 letter to Mr. Amerine. While working under Mr. Hughes, he indicated, he was not given work that was commensurate with his abilities and level of experience. Tr. at 268-269. The second alleged retaliation was his termination in January 2009.

In determining whether protected disclosures were a contributing factor to allegedly retaliatory acts, OHA Hearing Officers have noted that there is rarely a "smoking gun" that establishes such a nexus. *See, e.g., Ronald Sorri*, Case No. LWA-0001 (1993). Consequently, we have consistently held that retaliatory intent can be established through circumstantial evidence. Specifically, a Complainant can demonstrate that a protected disclosure was a contributing factor to an alleged retaliatory act if

he can show that the acting official had actual or constructive knowledge of the protected disclosure, and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. *Id.* Since there is no direct evidence of retaliation in the record, Mr. Dutta must demonstrate that the Parsons employees responsible for the alleged retaliatory acts had actual or constructive knowledge of Dutta's protected disclosures, and must also show temporal proximity between the disclosures and the retaliation.

1. The Complainant's Assignment To The Pipe Stress Group

Mr. Dutta testified that after his November 13, 2007 letter to David Amerine, he was transferred to the pipe stress group "at the end of December or [early] January," and that, whereas under Stegan the Complainant was involved in the designing of pressure vessels, checking vessel design calculations, and writing specifications, after his assignment to the pipe stress group, Hughes assigned Mr. Dutta pipe stress calculations, and little else. Tr. at 88, 107-109. In his statement to the OHA Investigator, he further alleged that Hughes "ignored" him and never discussed his assignments with him. Resp. Ex. 53.

A preponderance of the evidence indicates that the Complainant's November 13, 2007 disclosure to Mr. Amerine was not a contributing factor to this re-assignment and to Mr. Hughes' subsequent treatment of the Complainant. According to Mr. Stegan, he and Mr. Somma made the decision as to whom to place in the pipe stress group and whom to place in the vessel design group. Tr. at 558. However, it appears that Mr. Somma essentially delegated this task to Stegan. Tr. at 961. Mr. Stegan further indicated that, although Mr. Dutta's re-assignment was not formalized until February 2008, Tr. at 555, he made the decision to place the Complainant in Hughes' pipe stress group sometime in October 2007. Tr. at 557-558, 566. This testimony is amply supported by Respondent's Exhibits 16 and 32.

Respondent's Exhibit 16 consists of three e-mails, two of which were authored by Mr. Stegan. The first of Mr. Stegan's e-mails, dated November 2, 2007, is addressed to 15 employees, including Mr. Dutta, and concerns the subject "Near-Term Deadlines and Commitments - *Piping Stress*" (italics added). Stegan testified that he wrote this e-mail to identify the near-term activities that the pipe stress group needed to perform, Tr. at 559, and that he had identified the individuals to whom the e-mail was sent, for the most part, as being the employees who would serve in the pipe stress group. Tr. at 560. Mr. Hughes was copied on that e-mail because, Stegan testified, according to the plan that was "in place . . . he would be taking over supervisory responsibilities for the pipe stress group." Tr. at 559. Mr. Stegan's second e-mail, dated November 14, 2010, was on the subject of "Near Term Actions - Vessels," and was addressed to eight employees whom Stegan saw as serving in the vessel design group. Mr. Dutta was not a recipient of this e-mail.

Respondent's Exhibit 32 is a print-out from Parsons' time card entry tracking system. Using this document, Mr. Stegan was able to track all of the Complainant's time that had been charged to the vessel design group and all the time that was charged to the pipe stress group. According to this Exhibit, the last time that Mr. Dutta did any work that was charged to the vessel design group was during the week ending October 12, 2007, more than one month prior to his November 13 letter to Mr. Amerine. Since Stegan made the decision to place Mr. Dutta in the pipe stress group before November 13, 2007, Dutta's protected disclosure on that date could not have been a contributing factor to this personnel action.

Regarding Mr. Hughes' alleged treatment of the Complainant, there is no evidence in the record that Mr. Hughes had actual or constructive knowledge of the Complainant's first disclosure until after he had filed the Complaint at issue here. Mr. Dutta was not reporting to Hughes, either directly or indirectly, at the time of the disclosure. There is no evidence that Stegan or Somma informed Hughes of the disclosure, or that it was widely known at Parsons that Mr. Dutta had made a protected disclosure or initiated a CR. In fact, Mr. Somma testified that he did not discuss the CR with Mr. Hughes prior to it being resolved, Tr. at 1042, and Mr. Hughes testified that he did not know that the Complainant had initiated a CR until after the Complaint had been filed. Tr. at 745. Consequently, I cannot conclude that Mr. Dutta's first disclosure was a contributing factor to Hughes' alleged ignoring of the Complainant or his assigning tasks to the Complainant that Mr. Dutta believed to be not commensurate with his skills and experience.

2. The Complainant's Termination

The Complainant's employment with Parsons was terminated on January 15, 2009. Mr. Somma made the decision to lay off the Complainant, with input from Mr. Hughes and Mr. Niedbalski. Tr. at 664, 743, 1038. As previously explained, if the Complainant can demonstrate that either of his disclosures was a contributing factor to his termination, Parsons must then demonstrate, by clear and convincing evidence, that it would have laid off Mr. Dutta even in the absence of any protected disclosures. For the reasons set forth below, I find that the Complainant's second disclosure was a contributing factor to Parson's decision to terminate his employment. I therefore need not consider whether the Complainant's first disclosure, which occurred 14 months prior to the termination, was a contributing factor.

As an initial matter, it is evident that Mr. Somma had either actual or constructive knowledge of Mr. Dutta's disclosure regarding the timing of the pipe support work. During his interview with the DOE Investigator, the Complainant said that he raised this issue in August or September 2008 at the weekly status meetings that Mr. Hughes had with the pipe stress group. Resp. Ex 56. Mr. Somma attended these meetings. Tr. at 962. Mr. Dutta also told the Investigator that he went to Mr. Somma's office in October or early November 2008 to discuss his concern. Resp. Ex. 56. At the hearing, the Complainant testified that he raised the issue "a couple of times, maybe" in status meetings in June or July, and in one-on-one encounters with Somma and Hughes in November. Tr. at 174. Mr. Hughes and Mr. Somma both testified that they have no recollection of the Complainant raising the issue during the status meetings. Tr. at 722; 1084. However, Hughes admitted that Dutta discussed the matter with him in his office, Tr. at 723, and Parsons presented no evidence to refute the Complainant's claim that he discussed this disclosure with Mr. Somma in his office.

Moreover, even if Mr. Somma did not have actual knowledge of this protected disclosure, it is clear that he had constructive knowledge of it. In previous cases, OHA Hearing Officers have held that a Complainant can establish constructive knowledge by showing that the person taking the alleged retaliatory action was influenced by the negative opinions of those with knowledge of the protected conduct. *See, e.g., Jagdish Laul*, Case No. VBH-0010 (2000). In this case, Mr. Somma compiled a list of eight employees in the pipe stress group, and a rating of those employees' skills in six areas that Somma and his managers believed to be important. Mr. Somma consulted with Mr. Hughes in rating the employees in the six skill areas. Tr. at 1038. Hughes believed that Mr. Dutta's performance was "below average" as compared to the rest of the pipe stress group. Tr. at 744. The Complainant's cumulative score in the six skill areas was the lowest of the employees ranked. Furthermore, this

November 2008 disclosure was sufficiently close in time to the January 2009 termination such that a reasonable person could conclude that the disclosure was a contributing factor to the termination.

C. Whether Parsons Would Have Terminated The Complainant's Employment In The Absence Of His Protected Disclosures

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

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

1. The Strength Of Parsons' Stated Reasons For Terminating Mr. Dutta's Employment

It is essentially undisputed that after the SWPF project moved from the design stages into the construction stages, layoffs of substantial numbers of Parsons employees and contractors who were involved in design-related activities were necessary. Mr. Breor testified that a Reduction in Force (RIF) was necessary because Parsons was only given limited funds to complete the project and needed to stay within budget. He added that the RIFs in December 2008 and January 2009 affected employees throughout the company. Tr. at 663. According to Mr. Hughes, 17 of the 22 employees in the pipe stress group were terminated, with 14 being RIFed in December 2008 and the remaining three, including the Complainant, leaving in January 2009. Tr. at 741-742. Mr. Somma testified that the RIFs were needed at the onset of the construction phase because Parsons would be shifting into construction support activity. Tr. at 1029. It is also undisputed that layoffs are common in projects of this type. XXXXXX testified to that effect, Sup. Tr. at 37, and Mr. Dutta testified that he himself had been laid off at least six times over the course of his career as a mechanical engineer. Tr. at 188.

Mr. Dutta claims, however, that the circumstances surrounding this RIF suggest that he was terminated because of his protected disclosures. He specifically argues that he was more qualified than some of the five pipe stress analysts who were retained, and that the fact that he, a Parsons employee, was fired while job shoppers were retained is evidence of retaliatory intent.

In assessing the validity of these claims, it is useful to examine the manner in which the five employees who were retained were selected from the eight pipe stress engineers left after the

December 2008 RIF. The record indicates that the Parsons employees involved in these determinations were, in descending order of importance, Mr. Somma, Mr. Hughes, and Mr. Niedbalski.

Mr. Somma testified that, over the course of the prior year, he would attend meetings, review documents and discuss personnel with the project "leads" to determine who the best performers were, with the knowledge that he would have to terminate employees at the beginning of the construction phase. Tr. at 1032. After gathering this information, Somma prepared a Group Assessment Summary. Tr. at 1032; Resp. Ex. 12, p. 05375. This summary consisted of the names of the eight remaining engineers in Hughes' pipe stress group, and ratings of each engineer in five separate skill areas. [3] Somma arrived at these skill areas after talking with some of his managers and their "leads" about "the skill set that we needed to bring into the next phase of the project." Tr. at 1033. Each engineer received a rating of between 1 and 5 for each skill area. A rating of "1" denoted "minimal to no skills" in that area, a rating of "3" meant that the individual had "marginal skills," and a "5" meant that the engineer "meets future needs" in that particular area. The Complainant had the lowest cumulative score of the eight engineers. Of the two next lowest-scoring engineers, XXXXXX was scheduled to be laid off but found another job with Parsons outside of the pipe stress group and XXXXXXXX, who was also a Parsons employee, was also terminated.

Mr. Dutta challenges the validity of this summary. Specifically, he claims that his low rating in that document is inconsistent with his February 2008 performance evaluation. In that evaluation, the Complainant received an overall rating of "Meets Expectations," and received that same rating in six of the seven performance categories for which he was evaluated. In the seventh category, "Quality Work, Technical Competence/Job Knowledge," he received a higher rating of "Very Good." Comp. Ex. 10.

I do not agree with the Complainant that an inconsistency exists. Mr. Dutta had only been working in Mr. Hughes' pipe stress group for approximately one month when the performance evaluation was issued. It therefore appears that Mr. Stegan was evaluating the Complainant based primarily on his work prior to that re-assignment. As previously stated, Mr Dutta testified that when he worked under Stegan, he was largely engaged in writing specifications, designing pressure vessels, and checking vessel design calculations. Tr. at 107-109. However, Somma's assessment of Mr. Dutta was based, at least in part, on input from Mr. Hughes and Mr. Niedbalski based on work that was done after the Complainant joined the pipe stress group. According to Mr. Dutta, that work consisted primarily of pipe stress calculations. As the performance evaluation and Mr. Somma's ranking of the Complainant were based on Mr. Dutta's performance in different kinds of work, I see no inconsistency between the two.

3/ These skill areas are (1) Safety Conscious Work Environment (the ability to work safely each day, understand the hazards associated with work prior to performance, and to raise all safety issues to management for appropriate actions), (2) Discipline Knowledge, Skills and Abilities, (3) CADD (PDS model or 2D) and/or software skills (as appropriate), (4) Multi-discipline versatility, (5) Real-time design and field support solutions-oriented resolution attitude and capability. There was a sixth skill area, "Specialized Skills or Knowledge." However, only one of the eight analysts received a rating in this area.

Mr. Dutta also testified that he was more highly qualified than at least three of the five pipe stress analysts who were retained. Tr. at 155-158. He contended that he should have been kept over Alan Helton because Helton reviewed and approved allegedly faulty pipe stress calculations that were performed by DMJM, a contractor that Parsons retained to assist with pipe stress calculations. In a November 24, 2008, e-mail from XXXXX to Mr. Hughes, XXXX complained that one of the DMJM calculations approved by Helton was "faulty," and would result in "unrealistic loads," or stresses, for the pipes involved. Comp. Ex. 47.

However, it appears that Mr. Helton was aware of this issue and accounted for it prior to approving the calculation in question. In a May 27, 2008, e-mail to Hughes, Helton said that "After reviewing the first two calcs [including the one in question], I've noticed high loads . . ." Comp. Ex. 47. He went on to recommend that four measures be taken "before finalizing supports for these calcs." *Id.* Mr. Hughes testified that there was no more of a problem with the quality of DMJM's calculations than there was with any of their other engineers. Tr. at 766. He added that the measures suggested by Mr. Helton were "issues . . . that we had to go back and review again" in order to address XXXXX concerns. Tr. at 769. Mr. Helton had the highest cumulative score in Mr. Somma's ranking of the eight remaining pipe stress engineers. Resp. Ex. 12. Based on the information before me, I cannot conclude that Parsons' would have retained Mr. Dutta instead of Mr. Helton in the absence of Mr. Dutta's protected disclosures.

The Complainant also testified that he was far more experienced than Jihad Al-Soudi and Charles Abbot, two other engineers whom the Respondent retained. While it is true that Mr. Dutta had over 30 years of experience in mechanical engineering and pipe stress analysis, while Mr. Abbot had 2 years' experience and Mr. Al-Soudi, 10 years, Parsons could reasonably have considered factors other than the relative experience of the pipe stress engineers in deciding whom to lay off and whom to retain.

For example, Mr. Hughes testified that the Complainant was not able to complete as many calculations during his tenure with Parsons as other engineers in the pipe stress group. Tr. at 729. Respondent's Exhibit 21 is a listing of calculations done by analysts in the pipe stress group from the date that the analyst began working for the Respondent through January 15, 2009. It shows that although Mr. Abbot joined Parsons almost one year after the Complainant, and Mr. Al-Soudi's tenure started approximately one month later than Mr. Dutta's, Mr. Abbot completed 26 calculations and Mr. Al-Soudi completed 37 calculations, while the Complainant completed 11 calculations during his 22 months at Parsons. Resp. Ex. 21.

Mr. Dutta attempted to address this apparent disparity by presenting evidence that the calculations assigned to him were more complicated than those assigned to Mr. Al-Soudi and Mr. Abbott. Specifically, he testified that he was performing PC-3 calculations, "which require[] a dynamic analysis," Tr. at 166, while Abbott and Al-Soudi were doing mostly PC-1 calculations. Tr. at 166-167. XXXXX also testified that Mr. Dutta did PC-3 calculations, and that these took longer to do than PC-1 calculations. Sup. Tr. at 15. He added that, as a result of his duties as a "checker," he had an opportunity to evaluate the work of almost all of the other pipe stress analysts in Mr. Hughes' group, and that the Complainant was "far better than the other guys." Sup. Tr. at 10.

There is other testimony in the record indicating, however, that Mr. Dutta's calculations were not more difficult than those performed by other pipe stress engineers, and that he was an average, or

below average, performer. As a "lead" for the pipe stress group, Mr. Niedbalski assigned work and provided technical guidance for the group. Tr. at 791. He testified that he assigned calculations to the Complainant and the other engineers on a random basis, and that most of them did both PC-1 and PC-3 calculations. Tr. at 794. He stated that PC-1 calculations were not easier than PC-3 calculations, nor did they take a shorter amount of time to perform. Tr. at 803. He added that, while PC-3 calculations did involve dynamic analysis, this did not make them more complicated. In fact, he said that, "Once it's set up, it's easier to do a dynamic [analysis] than it is a static [analysis]." Tr. at 804. PC-1 calculations involve static analysis. Regarding the quality of Mr. Dutta's technical skills and of his work in the pipe stress group, Mr. Niedbalski characterized them both as being "average," but said that the number of calculations that he produced was "below average." Tr. at 795.

Mr. Hughes testified that Mr. Dutta was not given more difficult work than the rest of the engineers, Tr. at 752, and that PC-3 calculations were not necessarily more difficult that PC-1 calculations. Tr. at 758. He characterized Mr. Dutta's performance as "below average," and said that he sometimes required multiple "iterations," or attempts, to complete relatively simple calculations. Tr. at 733.

XXXXXXXX testified that he reviewed more of Mr. Dutta's calculations (four) than XXXXX (two) did, and he concluded that Mr. Dutta's work was "average." Tr. at 901-903. He further testified that Jack Shen and Mr. Al-Soudi were the best performers in the group. Tr. at 903.

Given the foregoing testimony, I cannot conclude that the wide disparity between the number of calculations performed by Mr. Dutta and the number performed by Mr. Al-Soudi and Mr. Abbott can fully be explained by a variation in the difficulty of the calculations assigned to the three analysts. The evidence further indicates that Mr. Niedbalski and XXXXXXX had a greater opportunity to observe the quality of Mr. Dutta's work than did XXXXXX. I therefore attribute more weight to their testimony as to the Complainant's performance than I do to XXXXX testimony. [4]

Finally, the Complainant claims that Parsons employees should have been given preference over job-shoppers in determining who should have been laid off. Mr. Dutta cites Parsons' Global Talent Initiative (GTI) in support of this contention, and contends that the fact that his employment was terminated while job-shoppers Helton, Niedbalski and Shen were retained is also evidence of retaliatory intent. [5]

I do not agree. Mr. Breor and Mr. Somma testified that there is no Parsons policy giving a preference to Parsons employees over job-shoppers in determining the identity of people to be laid off. Tr. at 665, 1038. Travis Gordon, a Parsons Human Resources Manager, testified that the GTI program

---

4/ I note that Mr. Helton was retained despite having completed only four calculations during the period from his January 14, 2008, hiring through January 15, 2009. Resp. Ex. 21. However, the record indicates that doing these calculations was not his primary responsibility. Helton testified that he operated as an interface between DMJM and Parsons, and that, after DMJM's work for Parsons ended in July 2008, he was more involved in pipe support work. Tr. at 922-923. Mr. Hughes testified that Helton "wasn't doing calcs." Tr. at 761.

5/ The stated objectives of the GTI are "to recruit, retain, develop and deploy our people efficiently and effectively." Comp. Ex. 23.

contained no requirement that Parsons lay off job shoppers before regular employees. Tr. at 941. Moreover, two other Parsons employees, XXXXXXX and XXXXXX, were selected for layoff with Mr. Dutta.

The record indicates that Parsons had substantial reasons for terminating Mr. Dutta's employment. The company was entering the construction phase of the SWPF project, a phase in which it reasonably believed that it would require substantially fewer employees in the Complainant's pipe stress group. The RIF was conducted using facially-neutral standards. The quality of the Complainant's work in the pipe stress group was average at best, and the number of calculations that he completed was below average. These factors suggest that Parsons would have terminated Mr. Dutta in the absence of his protected disclosures.

2. The Strength Of Any Motive To Retaliate For The Whistleblowing

The next factor to be examined is the strength of any motive on the part of Mr. Somma, Mr. Hughes, and Mr. Niedbalski to retaliate against Mr. Dutta. For the reasons that follow, I find there to be insufficient evidence of any motive to retaliate on the part of Mr. Hughes and Mr. Niedbalski, and limited evidence of a motive to retaliate on the part of Mr. Somma.

There is simply no evidence in the record that either of Mr. Dutta's disclosures impacted Mr. Niedbalski or Mr. Hughes in such a way as to provide a motive to retaliate. There is no connection between these two and the Complainant's first disclosure, and the record is unclear as to who made the decision for Parsons that the pipe support work would be finished during the construction phase of the project. In view of this uncertainty, I cannot conclude that either Mr. Hughes or Mr. Niedbalski had an incentive to retaliate because of the second disclosure.

There is some evidence of a motive to retaliate on the part of Mr. Somma, who made the final decision to terminate the Complainant. He did sign off on a document (specification 11819, rev. 0) that the Complainant called "fraudulent." Furthermore, he did testify, perhaps somewhat euphemistically, that he was "a little disappointed" when Mr. Dutta presented his concerns directly to Mr. Amerine, rather that coming to Mr. Somma first. Tr. at 1000.

However, it was Mr. Stegan, and not Mr. Somma, who was the primary actor in the series of events that led to Mr. Dutta's first disclosure. It was Stegan who took the version of this specification that had gone through IDR and gave it to Mr. Edwards with the directions to, in effect, combine it with specification 11818. It was Stegan who got the revised specification back from Mr. Edwards, found it to be to his liking, and forwarded it, with the IDR form from the original specification 11819, to Mr. Somma and to document control, rather than sending the revised specification back through IDR. Therefore, if anyone had a motive to retaliate against Mr. Dutta, it would have been Mr. Stegan.

However, it is undisputed that, after this disclosure, Mr. Dutta received a "meets expectations" personnel evaluation in February 2008 that he found to be fair, Tr. at 210, and two pay increases, only one of which was company-wide. [6] Given these facts, Mr. Somma's motive to retaliate against Mr. Dutta does not appear to have been particularly strong.

6/ Moreover, Mr. Stegan continued to give Mr. Dutta work as a "checker," which the Complainant indicated that he preferred over pipe stress calculations, for several months after he joined the pipe stress group. Tr. at 108.

Mr. Dutta contends that the events that transpired during a January 2009 meeting with Mr. Breor, Mr. Gordon and Mr. Somma indicate that Mr. Somma had a strong motive to retaliate against him. After the Complainant was informed in January 2009 that he would be laid off, he wrote a memo to Parsons' human resources department alleging that his termination was in violation of the GTI, and was likely the result of age discrimination. Comp. Ex. 19. After allegedly not receiving a response from human resources, Mr. Dutta went to see Mr. Breor. Mr. Gordon was also present, and Mr. Somma came in after the meeting had already begun. Mr. Dutta complained to Mr. Breor that he had been laid off while job-shoppers had been retained, in contravention of what he believed to be Parsons policy. At that point, the Complainant testified, Mr. Somma came into the room, and Mr. Breor said, "If I give you a job, will you accept it?" Mr. Dutta replied "Yes," but, allegedly, Mr. Somma very strongly opposed that decision, and Mr. Breor "backed off." Tr. at 161-162.

Mr. Breor, Mr. Gordon and Mr. Somma all testified that no offer or mention of a job for the Complainant with Parsons was made during the meeting. Tr. at 668, 940, 1046. Furthermore, Mr. Gordon's undated and unsigned notes from that meeting contained no mention of such an offer. Resp. Ex. 34. Based on this evidence, I find that Mr. Breor did not offer Mr. Dutta another job with Parsons during this meeting. However, even if I was to conclude that Breor made such an offer, and that Somma strongly objected, it would not necessarily be evidence of the existence of a motive to retaliate on Mr. Somma's part. Such an objection could have been caused by a belief that offering a job to someone to head off a potential age discrimination complaint would set a bad precedent, or a belief that the process by which the Complainant was chosen for termination was fair and well-thought out, and that it should not be overturned simply because the Complainant objected to it. I find no evidence of a motive to retaliate on the part of Mr. Niedbalski and Mr. Hughes, and no evidence of a strong motive to retaliate on the part of Mr. Somma.

3. Treatment Of Similarly-Situated Employees

As previously indicated, all of the analysts in the pipe stress group except for five, were originally selected to be laid off. Consequently, most, if not all, of the analysts who were in situations that were analogous to that of the Complainant were also terminated. However, unlike Mr. Dutta, a substantial number of analysts who were chosen to be laid off were either able to locate another job within Parsons, or were laid off and then subsequently rehired by the Respondent. Nevertheless, I find that there are credible non-retaliatory explanations for this apparent disparity.

XXXXXXX was originally scheduled to be laid off, but was able to obtain another position with Parsons. XXXXXXX testified that his background was in Quality Assurance (QA), and that he was looking for a QA job when he came to Parsons. Tr. at 932-933. Artis Reynolds, a former Parsons QA Manager, also testified. He stated that he interviewed XXXXXX when XXXXX first applied for a job with Parsons, and had an interest in him. However, because he did not have a position open at that time, he referred XXXXXXX to Parsons' engineering group, and XXXXXXX was hired as an engineer. At a later date, XXXXXXX informed Mr. Reynolds that he still had an interest in QA, and that he believed that he would soon be laid off from his engineering position. Mr. Reynolds contacted Mr. Hughes, and XXXXXXX was eventually transferred to QA. Mr. Reynolds indicated that XXXXXXX was hired because his "background supported" QA functions. Tr. at 854-856. He further testified that Mr. Dutta approached him and gave him a resume, but that he did not have a position available at that time. He added that no one told him not to hire Mr. Dutta, and that he would have resigned from Parsons if some one had. Tr. at 857. I found Mr. Reynolds' testimony to

be credible, and I have no reason to doubt his testimony that he did not have a position available when the Complainant gave Reynolds his resume, or to doubt his testimony that, unlike Mr. Dutta, Reynolds had had a previous contact with XXXXXXX, and an on-going interest in XXXXXXXX services based upon that previous contact.

Mr. Breor testified that as many as ten pipe stress engineers who were laid off in December 2008 were subsequently re-hired by Parsons. Tr. at 670. Mr. Breor and Mr. Somma testified that this was due to design changes and to changes in the Construction Execution Plan. Tr. at 674, 957-958. Somma testified that these engineers were rehired beginning in September 2009, and that this future need for more engineers than the five who were retained was not anticipated at the time of the layoffs. Tr. at 957. He added that when this need was realized, a request for more pipe stress engineers was made to the Human Resources department. The jobs were posted on the Parsons website and applicants, including the engineers who had been laid off earlier, submitted resumes either directly to Parsons or to System One, a contractor who helped them find engineers. To his knowledge, none of the laid off engineers were recalled. Tr. at 1050. Mr. Gordon testified that Parsons had no policy concerning recalling laid off employees. Tr. at 942. He added that Mr. Dutta had not applied for another position with Parsons since his termination, and Mr. Somma stated that the Complainant has not applied for another pipe stress position since that time. Tr. at 1051.

XXXXXXXXX, who was laid off by Parsons in December 2008, largely confirmed this testimony about how laid off engineers were re-hired. He testified that, through his contact with another engineer who had been laid off, and through monitoring internet job sites, he knew that pipe engineering work at Parsons was picking up again. Tr. at 914. He informed System One that he wanted to return to work at Parsons, and he was eventually re-hired. Tr. at 915.

The record in this matter indicates that the engineers who either were able to avoid termination by finding another job with Parsons, or were subsequently re-hired, either had a previous contact with the Parsons employee who sought their services, or re-applied to Parsons or to a Parsons contractor after their termination. Neither of these circumstances have been shown to apply to Mr. Dutta.

Based on the forgoing, I conclude that Parsons would have terminated the Complainant's employment even in the absence of his protected disclosures. The Respondent's reasons for the termination are convincing, the motive for retaliation is limited, at best, and although some of the pipe stress analysts who were similarly situated to Mr. Dutta were re-hired, the record indicates that they re-applied for their positions, whereas Mr. Dutta did not.

III. Conclusion

I conclude that Mr. Dutta made two protected disclosures, and that at least the second of those disclosures was a contributing factor to his termination. However, I find that Parsons has shown, by clear and convincing evidence, that it would have taken the same action even in the absence of the disclosures. Consequently, I conclude that Mr. Dutta is not entitled to the remedies that he seeks.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Arun K. Dutta under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

Robert B. Palmer
Senior Hearing Officer
Office of Hearings and Appeals

Date: August 25, 2010

November 9, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Himadri K. Das

Dates of Filing: April 16, 2010

Case Number: TBH-0089

This Decision concerns a Complaint filed by Himadri K. Das against RCS Corporation, his former employer, and Parsons Infrastructure and Technology Group, Inc. (Parsons), under the Department of Energy's (DOE) Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708. RCS is professional staffing company that identifies and hires personnel for its clients. At all times relevant to this proceeding, Parsons was a DOE contractor operating in Aiken, South Carolina, and was a client of RCS. RCS hired Mr. Das to provided his services to Parsons as a mechanical engineer. Mr. Das contends that during his placement with Parsons, he engaged in protected activity and, as a consequence, suffered reprisal by RCS and Parsons. Among the remedies that the Complainant seeks are reinstatement, back pay, and reimbursement for legal and other expenses. As discussed below, I have concluded that Mr. Das is not entitled to the relief that he seeks.

I. Background

A. Regulatory Background

The DOE established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). The Program's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit a DOE contractor from retaliating against its employee because the employee has engaged in certain protected activity, including:

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

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

An employee who believes that he or she has suffered retaliation for making such disclosures may file a complaint with the DOE. It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets this burden of proof, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." *Id.*

B. Factual Background

The following facts are not in dispute. Parsons contracted with the DOE to construct a salt waste processing facility (SWPF) at the DOE's Savannah River Site. An SWPF processes nuclear waste. Mr. Das is a mechanical engineer with over 25 years of experience who was hired by RCS as a Senior Pipe Stress Engineer in March 2008. He was assigned to Parsons's SWPF project, to perform calculations for the Pipe Stress Group of the Engineering Mechanics Group, during the Enhanced Final Design stage of preparing for the construction of the SWPF. Mr. Das understood that the assignment would last between nine and 12 months, and would end when Parsons no longer needed his services on the project. At all times relevant to this proceeding, the Pipe Stress Group was headed by Calvin Hughes. P.E. Mr. Hughes reported to James Somma, P.E., Engineering and Design Manager for the SWPF. Ted Niedbalski was the coordinator of the Pipe Stress Group. In that role, Mr. Niedbalski distributed the work assignments in the group and served as a resource. Shortly after Mr. Das began working in the Pipe Stress Group, Mr. Niedbalski selected him to be a "checker," who was responsible for ensuring that calculations performed by other members of the Pipe Stress Group conformed to the established piping design guidelines.

In November 2008, Mr. Das was checking stress calculation J-00875, which covered a length of piping that branched off from a larger pipe, or "header line." The stress calculation for that header line, J-00473, had been performed by DMJM, an outside company that Parsons had contracted to perform a number of the pipe stress calculations. In May 2008, Calculation J-00473 had been approved by Mr. Hughes and entered into Parsons's Document Control System, an electronic repository of completed and approved pipe stress calculations. In a cursory review of the J-00473 stress calculation, Mr. Das noticed a number of problems, including very large piping loads (volume demands) on the pipe under analysis and the fact that those loads appeared to have not yet been approved by the Pipe Support Group, the team responsible for reviewing the design for fastening the pipes to the structure.

On November 24, 2008, Mr. Das sent an e-mail to Mr, Hughes, with a copy to Mr. Somma, in which he related that he found "serious quality and safety" problems with the J-00473 stress calculation and reported that other DMJM calculations had likewise been of poor quality. He

asked that management develop a "corrective action plan to deal with this and other technical issues" in his group. Parsons Ex. 36.

On December 16, 2008, Mr. Hughes informed Mr. Das that his last day of work would be December 18, 2008. On December 17, 2008, Mr. Das asked for, and was granted, an appointment to speak with Mark Breor, the project manager of the SWPF. In that meeting, Mr. Das brought to Mr. Breor's attention a number of concerns that Mr. Das believed needed to be addressed before the construction phase of the SWPF began. On December 18, 2008, RCS terminated Mr. Das's employment, having been informed by Parsons on December 16, 2008, that December 18 would be his last day of work on the SWPF project.

C. Procedural Background

On January 15, 2009, Mr. Das filed a Part 708 Complaint with the Director of the DOE's Office of Civil Rights at its Savannah River Operations Office. Parsons filed a response to this complaint. The Savannah River Employee Concerns Program attempted to mediate the complaint on August 31, 2009, but those efforts failed. Mr. Das requested that his complaint be forwarded to the Office of Hearings and Appeals (OHA) for an investigation and hearing. The Director forwarded the complaint to OHA on October 7, 2009, and the OHA Director appointed an investigator.

The OHA investigator interviewed Mr. Das and other current and past Parsons employees and contractor employees and reviewed a large number of documents before issuing a Report of Investigation (ROI) on April 16, 2010. In the ROI, the OHA investigator concluded that, regarding his November 24, 2008, disclosure, "Mr. Das reasonably believed that the technical issues he had identified needed to be resolved before moving forward safely with the construction of the SWPF." Report of Investigation at 8. The investigator also observed that Mr. Hughes, whom the investigator found to have taken the adverse personnel action against Mr. Das, had actual knowledge of the disclosure. *Id.* at 9.

On April 16, 2010, the OHA Director appointed me as the Hearing Officer in this case. I conducted a two-day hearing in this case in Aiken, South Carolina, beginning on July 14, 2010. Over the course of the hearing, eight witnesses testified. Mr. Das introduced 25 exhibits into the record, Parsons introduced 64 exhibits, and RCS introduced four exhibits. On September 1, 2010, the parties submitted written closing arguments, at which time I closed the record in the case.

D. Mr. Das's Complaint and the Report of Investigation

Mr. Das alleges in his complaint that he made a number of protected disclosures during his tenure with the Pipe Stress Group. First, he alleges that he had identified 12 technical issues, specified in the complaint, that he considered to be related to safety or an inappropriate use of funds. In general, they concerned the lack of technical guidelines and the fact that Parsons had approved a number of stress calculations that he felt were incomplete. He voiced his concerns regarding these issues at weekly meetings of the Pipe Stress Group during the months of April through July 2008. Mr. Das raised later concerns about the J-00473 stress calculation and other

calculations done by DMJM in an e-mail to Mr. Hughes and Mr. Somma. Parsons Ex. 36. In that e-mail, he wrote that he found "a serious quality and safety problem" with J-00473 and expressed his concern that work performed by DMJM "may create safety concerns in [the] future." *Id.* In his complaint, he stated that the incomplete and inaccurate stress calculations did not comply with Parsons's project procedures and that the poor quality of DMJM calculations demonstrated an "inappropriate use of funds." In retaliation for making these disclosures, Mr. Das alleges, Mr. Hughes, his Parsons supervisor, informed him that his last day of work would be December 18, 2008, due to a lack of DOE funding. As relief for these alleged retaliations, Mr. Das requests back pay, reimbursement of costs and expenses, including legal expenses, and any other relief deemed necessary, as well as a commitment by Parsons that it addresses all of the technical issues that he raised in his complaint.

II. Analysis

As stated in Section I.A above, in order to prevail in a Part 708 proceeding, an employee must show, by a preponderance of the evidence, that he made a protected disclosure or engaged in protected behavior, and that this was a contributing factor to one or more alleged acts of retaliation by the contractor against the employee. For the reasons set forth below, I find that Mr. Das made protected disclosures, and that his November 24, 2008, disclosure was a contributing factor in his termination. However, because Parsons and RCS would have taken the same action in the absence of any disclosures, I conclude that Mr. Das is not entitled to the relief that he seeks.

As an initial matter, I must address the roles of the two respondents in this proceeding. RCS was Mr. Das's employer: it extended an offer of employment to Mr. Das to work as a Senior Pipe Stress Engineer. RCS Ex. B. The offer of employment specified that he would be providing services to Parsons at its SWPF project in accordance with a service agreement between RCS and Parsons. RCS Ex. A. While not Mr. Das's nominal employer, Parsons controlled his work assignments (through Mr. Niedbalski, himself a non-Parsons employee), provided his work environment and resources, and supervised his day-to-day activities. The purpose of Part 708 is to "provide procedures for processing complaint by employees of DOE contractors alleging retaliation by their employers for" making protected disclosures. 10 C.F.R. § 708.1. Both RCS and Parsons meet the definition of "contractor" set forth in Part 708: Parsons is a party to a "contract with DOE to perform work directly related to activities at DOE-owned or –leased facilities," in this case, the construction of the SWPF, and RCS is a party to a subcontract under a contract of the type described above. *See* 10 C.F.R. § 708.2. Although both companies are contractors for Part 708 purposes, all disclosures were made to Parsons personnel. None was made to RCS, Mr. Das's employer. Nevertheless, RCS terminated Mr. Das, after Parsons advised it of its determination that December 18, 2008, would be Mr. Das's last day of work. Because RCS was not a party to the proceeding before the issuance of the Report of Investigation, and because I determined that RCS was Mr. Das's actual employer despite his close relationship with Parsons, I requested that Mr. Das amend his complaint to include RCS as a respondent. RCS then asked to be dismissed from the proceeding, on the grounds that it had no role in the decision that led to Mr. Das's termination. RCS Prehearing Brief (June 1. 2010).

We have addressed this matter in earlier decisions. In a case presenting similarly complex employment circumstances, the complainant, like Mr. Das, was an employee of a subcontractor that provided staffing services to a higher-tier contractor, but he made his disclosures to the higher-tier contractor. *Jimmie L. Russell,* Case No. VBH-0017 (July 18, 2000).[1] All of the retaliatory actions Mr. Russell alleged were taken by the higher-tier contractor, with the exception of his termination from employment with the subcontractor. Under those circumstances, the Hearing Officer in that case determined that both the subcontractor and the higher-tier contractor were appropriate parties to the proceeding. He also stated that if the actual employer were dismissed from the proceeding, he believed he would lack the authority to take any remedial action against the higher-tier contractor, "whose liability under Part 708 appears to be based on the 'subcontract under the contract.'" *Id.* Because Mr. Das requested relief that would require remedial actions by both RCS and Parsons, and because Parsons's potential liability under Part 708 stems from its contract with RCS, it was proper to maintain both companies as respondents to Mr. Das's complaint.

A. The Protected Disclosures

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

1. Complaints Raised in Weekly Staff Meetings

Mr. Das maintains that he raised a number of safety issues during weekly staff meetings of the Pipe Stress Group held in the months of April through July 2008. In his complaint, he outlines 12 technical issues that he allegedly raised in those meetings. There is no evidence in the record of specific dates on which he brought up these concerns. At the hearing, Mr. Das testified that he continually raised a concern that, despite Parsons's own procedures and desktop instruction—a set of guidelines for processing pipe stress calculations in his group—pipe stress calculations were being approved and entered into the Document Control System (DCS) without being subjected to review by pipe support engineers. Transcript of Hearing (Tr.) at 101. He had heard that construction on the SWPF was about to begin, and without the input from the pipe support group, the plans were incomplete and could require substantial revision before they could be considered complete and reliable for construction. *Id.* at 106-08. In his complaint, Mr. Das stated that his concerns were not addressed at the meetings. Instead, he was told that they would be "taken care of later." At least one witness recalled that Mr. Das had voiced the above concern during at least one weekly meeting. *Id.* at 258. The witness himself had raised the same

[1] Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at http//www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

concern, because he had never before encountered a process in which pipe stress and pipe support calculations were not performed simultaneously, to achieve safety, quality and cost savings. *Id.* That witness named three other staff members who raised similar issues. *Id.* at 271, 273.[2] Mr. Hughes and Mr. Somma attended some or all of the weekly meetings. *Id.* at 99, 259, 689. I will assume for the sake of argument that Mr. Das raised his stated concerns in the presence of Mr. Hughes or Mr. Somma, both Parsons employees.

The issue to be decided is whether Mr. Das reasonably believed that the disclosures he made at one or more of the weekly meetings constituted (i) a substantial violation of any law, rule, or regulation, (ii) a substantial and specific danger to employees or to public health or safety, or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. Mr. Das contends in his complaint that all three criteria apply to these disclosures. Because I conclude that a reasonable person in Mr. Das's position, with his level of experience, could have believed that Parsons's posting of incomplete pipe stress calculations to the DCS was a gross waste of funds, I need not decide whether Parsons's action posed a substantial and specific danger to employees or to public health and safety or constituted a substantial violation of a law, rule, or regulation.

Parsons argues that reserving the finalization of pipe stress calculations until the construction stage of a facility like the SWPF, rather than completing them at the design stage, is not a gross waste of funds. Mr. Niedbalski testified that, in his opinion, it was not a waste of money to perform pipe stress calculations with generic information during the Enhanced Final Design stage for which Mr. Das was employed, and then revisit those calculations at a later stage; in fact, he argued, that approach saved money. Tr. at 558-59. Mr. Somma also expressed his opinion, based on 30 years of experience, that it is not unusual to perform pipe support calculations after pipe stress calculations have been completed. *Id.* at 707. He acknowledged that that approach might require revisiting the pipe stress calculations a second time, if design changes involved equipment changes or rerouting of pipes, but he believed that such an approach was not a waste of funds. *Id.* at 707-09. Mr. Hughes testified that pipe stress and pipe support calculations were to be reconciled at a later stage of the project, after the design was 90% completed. *Id.* at 618-21; *see* Parsons Ex. 2. In fact, Parsons had informed the DOE that pipe stress analysis would continue during the construction stage, and the DOE had approved the approach. Tr. at 623; *see* Parsons Ex. 10.

The relevant question, however, is not whether funds would actually be wasted because the pipe stress calculations were not completed, in conjunction with the pipe support calculations, before the SWPF project entered the construction stage. It is rather whether Mr. Das *could reasonably have believed* that the procedure Parsons was following would lead to a gross waste of funds. I find that such a belief was reasonable.

As stated above, Mr. Das has over 25 years of experience in pipe stress analysis. *Id.* at 41. In his testimony, he referred to a Parsons directive entitled "Intradiscipline Checking, Procedure No. PP-EN-5005, one of a series of Parsons SWPF Project Procedures, which describes the checker's responsibilities. *Id.* at 63; *see* Parsons Ex. 24. He further testified that his understanding was that the Savannah River Site Engineering Practices Manual,

[2] Mr. Nieldbalski testified that "[c]oncerns were mentioned" about the DMJM calculations in particular at those meetings, but he could not recall whether it was Mr. Das or others who raised them. *Id.* at 573.

WSRC-IM-95-58, applied to his group's work. He maintained that one part of that manual, entitled "Application of ASME B31.3," clearly contemplated that pipe stress analysis required coordination with and input from pipe support analysis. Tr. at 68; *see* Das Ex. F. He stated that checking whether the pipe loads, as calculated in the pipe stress analysis, are reasonable or excessive loads on the pipe supports is a critical element in pipe stress analysis. Tr. at 85. One witness, with 30 years of experience in the field, concurred that pipe stress and pipe support analysis are generally performed in tandem. *Id.* at 258. In fact, while testifying that there is no serious flaw in performing pipe stress and pipe stress support during the construction stage, Mr. Niedbalski stated his preference that both pipe stress and pipe support calculations be completed before that stage. *Id.* at 581.

Furthermore, Parsons's desktop instruction, which was circulated to all members of the Pipe Stress Group, contains a flowchart that indicates that pipe stress and pipe support calculations would be prepared roughly concurrently. Das Ex. M at Attachment B. During Mr. Das's tenure at the Pipe Stress Group, the desktop instruction was not formally a company procedure, as it was in draft form and subject to modification. *Id.* at 598 (testimony of Niedbalski). Nevertheless, according to Mr. Niedbalski, who created the document, its contents were to be followed as guidance, and Attachment B was the "way we would normally proceed." Tr. at 595. A co-worker in the Pipe Stress Group testified that pipe stress calculations were uniformly entered into the DCS without any pipe support review of them. *Id.* at 218-19. The co-worker further testified that at an earlier stage of the project, "it was intended that pipe supports would be done in conjunction with pipe stress," as shown in the flowchart, but by 2008 this was not the case. *Id.* at 231-32. Finally, Mr. Das was not part of the management team, nor was he involved in long-range planning of the SWPF project. *Id.* at 480. Consequently, he had no knowledge of the future stages of the project beyond what his managers imparted to him. Given his understanding that his group's calculations would have to be revisited at a later stage of the project and that coordination with pipe support engineers and completion of stress calculations was not only his experience but the intended work flow presented in the Parsons's desktop instruction, coupled with his belief that the construction stage was imminent and his assertion that the concerns he raised at the weekly meetings were treated dismissively, I find that Mr. Das reasonably believed that the procedure Parsons was following was wasting money.

Having determined that Mr. Das reasonably believed he had revealed in his disclosure a waste of funds, the remaining question is whether he believed the waste of funds was "gross," as set forth in Part 708. Adopting language from cases argued under the Whistleblower Protection Act, which also provides protection for disclosures of "gross waste of funds," OHA has defined that term as "a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonable expected to accrue to the government." *See Thomas L. Townsend*, Case No. TBU-0082 (2008); *Fred Hua*, Case No. TBU-0078 (2008) (*citing Jensen v. Dep't of Agriculture*, 104 M.S.P.R. 379 (2007)). In describing the costs associated with Parsons's failure to complete the pipe stress calculations, integrating pipe support review, before declaring them suitable to be entered into the DCS, Mr. Das testified that when the pipe support analysts eventually reviewed a given pipe stress calculation, they might well determine that the locations of the supports assumed by the pipe stress analysts were inappropriate to the loads generated, and require that the supports be relocated; this would require in turn new pipe stress calculations for the same length of pipe. Tr. at 106-07. Such recalculations could be required of hundreds of calculations

involving thousands of supports, each support location potentially needing revision. *Id.* at 108-09. Mr. Das never mentioned a specific amount that he believed Parsons was wasting by not coordinating pipe stress and pipe support analysis as he had seen done in his experience. Nevetheless, I will assume that he was aware of the substantial professional hourly rate he was being paid, and that it was reasonable for him to surmise that the other pipe stress and pipe support analysts were being paid comparable rates. As I found above, Mr. Das reasonably believed that Parsons's procedure was wasting funds. I now find as well that he reasonably believed that correcting the calculations at a later stage of the project would require extensive labor, billed at substantial rates. I conclude that he reasonably believed that the costs associated with the additional labor of revisiting hundreds of calculations would constitute "a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government," or a gross waste of funds.

2. The November 24, 2010, E-Mail to Mr. Hughes and Mr. Somma

It is undisputed that Mr. Das made a second disclosure to Mr. Hughes and Mr. Somma in an e-mail dated November 24, 2008. In the e-mail, Mr. Das disclosed what he termed "a serious quality and safety problem" with DMJM's Calculation J-00473 and expressed his concern that work performed by DMJM "may create safety concerns in [the] future." *Id.* In his complaint, he stated that the incomplete and inaccurate stress calculations did not comply with Parsons's project procedures and that the poor quality of DMJM calculations demonstrated an "inappropriate use of funds."

Once again, I must decide whether Mr. Das reasonably believed that the disclosures he made, this time in his November 24, 2008, e-mail, constituted (i) a substantial violation of any law, rule, or regulation, (ii) a substantial and specific danger to employees or to public health or safety, or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. Because I conclude that a reasonable person in Mr. Das's position, with his level of experience, could have believed that the quality of DMJM's calculations demonstrated a gross waste of funds, I need not decide whether Parsons's action posed a substantial and specific danger to employees or to public health and safety or constituted a substantial violation of a law, rule, or regulation. I note, however, that in the e-mail, Mr. Das alleged safety concerns. He conceded at that time, and during the hearing as well, that any danger arising from the allegedly poor quality of DMJM's calculations was speculative; it would not manifest itself until later, and only if the calculations were not corrected: if the design was faulty, the construction would be faulty, and "we do not know the future consequence" of faulty construction. *Id.* at 316. The disclosure of danger only potentially rising in the future is not a protected disclosure. *Chambers v. Department of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (Whistleblower Protection Act case). Considering the low likelihood of harm resulting from the cited danger, in light of the testimony that he was aware the pipe stress calculations would be revisited during the construction stage of the project, I would find that Mr. Das did not meet his burden of establishing by the preponderance of the evidence that he reasonably believed that his disclosure revealed a "substantial and specific danger to employees or public safety." 10 C.F.R. §§ 708.5, .29.

Parsons argues that the DMJM pipe stress calculations were acceptable. Alan Helton, the Pipe Stress Group member who served as the liaison with DMJM, testified about the subject of Mr.

Das's November 24, 2008, e-mail, Calculation J-00473. He stated that DMJM had found that the proposed piping met the requirements of the governing code. Tr. at 183. While he recognized that some of the loads DMJM had calculated were "very high," the resulting stresses were nevertheless within acceptable limits, and he recommended to Mr. Hughes that the calculation be approved, on the condition that certain steps be taken at a later stage of the project. *Id.* at 184, 186.

Mr. Das in fact agreed that the calculated stresses met the applicable code. *Id.* at 303. Nevertheless, Mr. Helton was aware, and advised Mr. Hughes and Mr. Niedbalski, that several of DMJM's calculations, involving different segments of the piping design, revealed high loads that would need to be addressed before the piping plan was finalized. Parsons Ex. 37 (e-mail from Mr. Hughes in response to Mr. Das's November 24, 2008, e-mail.) Furthermore, Mr. Das testified that Calculation J-00473 did not record, as is industry practice, where the DMJM analysts had made assumptions in their analysis. *Id.* at 121-22. He argued to Mr. Niedbalski that the calculation needed to be corrected; Mr. Niedbalski replied that those problems could be addressed later in the process. *Id.* at 123-24. Once a calculation was entered into the DCS, however, its results could be relied upon in other pipe stress calculations, particularly regarding segments of adjoining piping, and the analysts relying on it would not be aware of its weaknesses. *Id.* at 120.

Mr. Das knew that DMJM was being paid by Parsons to perform some 60 pipe stress calculations and felt that they should perform them properly. Tr. at 119, 168. Despite the fact that Mr. Niedbalski and Mr. Hughes told him that any weaknesses in DMJM's calculations would be addressed later, he was concerned that those weaknesses could lead to errors on any future calculations that referred back to those DMJM calculations, which would in turn require revisiting not just the DMJM calculations but potentially a great number of Pipe Stress Group calculations. I therefore find that Mr. Das reasonably believed the quality of the DMJM's calculations, from his perspective, constituted a waste of funds. For the reasons set forth in the above section, I find that Mr. Das reasonably believed that the extent of the labor costs entailed in reanalyzing the DMJM calculations and any Pipe Stress Group calculations that relied on them was significantly out of proportion to the government's benefit from those expenditures, and thus that he reasonably believed he had revealed a gross waste of funds.

B. The Alleged Retaliations

In order to prevail, Mr. Das must next demonstrate, by a preponderance of the evidence, that his protected disclosures were a contributing factor to one or more alleged acts of retaliation taken against him by Parsons. Under the Part 708 regulations, "retaliation" means "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to the employee's compensation, terms, conditions or privileges of employment as a result of the employee's disclosure of information" or participation in protected conduct as described in 10 C.F.R. § 708.5. Mr. Das alleges that Parsons retaliated against him by laying him off and thus causing RCS to terminate his employment.

In determining whether protected disclosures were a contributing factor to allegedly retaliatory acts, OHA Hearing Officers have noted that there is rarely a "smoking gun" that establishes such

a nexus. *See, e.g., Ronald Sorri*, Case No. LWA-0001 (1993). Consequently, we have consistently held that retaliatory intent can be established through circumstantial evidence. Specifically, a complainant can demonstrate that a protected disclosure was a contributing factor to an alleged retaliatory act if he can show that the acting official had actual or constructive knowledge of the protected disclosure, and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. *Id.* Since there is no direct evidence of retaliation in the record, Mr. Das must demonstrate that the Parsons and RCS employees responsible for the alleged retaliatory act had actual or constructive knowledge of his protected disclosures, and must also show temporal proximity between the disclosures and the retaliation.

As previously explained, if Mr. Das can demonstrate that either of his disclosures was a contributing factor to his termination, Parsons and RCS must then demonstrate, by clear and convincing evidence, that they would have laid off and terminated Mr. Das even in the absence of any protected disclosures. For the reasons set forth below, I find that the Complainant's second disclosure was a contributing factor to Parson's decision to terminate his employment. I therefore need not consider whether the Complainant's first disclosures, which occurred between five and eight months prior to the termination, were a contributing factor.

Mr. Somma made the decision to lay off Mr. Das, with input from Mr. Hughes and Mr. Niedbalski. Tr. at 552, 694, 703. It is evident that Mr. Somma had actual knowledge of Mr. Das's second disclosure. He was a recipient of the November 24, 2008, e-mail in which Mr. Das expressed his concerns regarding the DMJM calculations. Parsons Ex. 36. He was also copied on Mr. Hughes's response to Mr. Das minutes later. Parsons Ex. 37. According to his testimony, Mr. Somma began discussing anticipated layoffs in the summer or early fall of 2008. Tr. at 693. The layoffs were to take place when Parsons certified to the DOE that its planning for the SWPF was 90% complete. *Id.* at 692. That milestone was achieved on December 12, 2008. *Id.* As set forth above, Mr. Hughes advised Mr. Das on December 16 that his last day would be December 18. Mr. Das's November 24, 2008, disclosure was sufficiently close in time to Mr. Hughes's layoff decisions such that a reasonable person could conclude that the disclosure was a contributing factor to Parsons's decision to lay off Mr. Das.

Although I have found that Mr. Das's November 2008 disclosure was a contributing factor in Parsons's decision to lay him off, I must also consider whether his disclosure was a contributing factor to the decision to terminate his employment. This case presents somewhat unusual facts, in that Mr. Das made his disclosures only to Parsons, but it was RCS, his employer, that terminated his employment. In its post-hearing brief, RCS contends that Mr. Das's disclosure cannot be a contributing factor to RCS's termination of Mr. Das's employment, because RCS never had any knowledge of his complaint. RCS Post-Hearing Brief at 4. At the hearing, RCS's human relations manager testified that Parsons sent an e-mail to RCS notifying it that three of its employees, including Mr. Das, were going to be laid off on December 18, 2008. Tr. at 390-91; *see* RCS Ex. C. She further testified that Mr. Das's employment ended solely because Parsons had laid him off. Tr. at 393. Although I find that RCS had no role in Parsons's decision to terminate Mr. Das's employment at Parsons, RCS admits that it terminated its employment contract with Mr. Das because Parsons ended his work assignment through a layoff. Had Parsons been Mr. Das's employer, I would proceed to analyze whether the Parsons employee

who was responsible for the termination had actual or constructive knowledge of the protected disclosures. Here, two entities divide the roles of, on one hand, the employer and, on the other, the entity responsible for determining whether an employee is laid off. To permit this role division to excuse an employer from responsibility under Part 708, where the employer's action is dictated by the entity controlling workplace retention "would vitiate the protections for whistleblowers that Part 708 was intended to provide." *Jimmie L. Russell* (holding similarly situated entities jointly and severally liable for retaliatory acts). Consequently, although the evidence is clear that RCS had no actual knowledge of Mr. Das's protected disclosure, I will attribute constructive knowledge of Mr. Das's protected disclosures to RCS. Because RCS terminated Mr. Das's employment on December 18, 2008, within four weeks of his second protected disclosure, a reasonable person could conclude that the disclosure was a contributing factor to RCS's decision to terminate Mr. Das's employment.

C. Whether Parsons and RCS Would Have Terminated Mr. Das's Employment in the Absence of His Protected Disclosures

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

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

1. The Strength of the Stated Reasons For Laying Off Mr. Das and Terminating His Employment

The evidence in this case is strong that this layoff was planned. Mr. Somma testified that as the design phases of the SWPF project were completed, fewer employees would be required for the project. Layoffs were anticipated in virtually every organization of the project team. Tr. at 693. Although no one dictated how many staff he could maintain under him, Mr. Somma was nonetheless provided with a reduced budget within which to pay his team members after the design was deemed 90% complete. *Id*. at 694. The general concept of an impending layoff was

known as early as March 2008, when Mr. Das was hired for the project. Mr. Das testified that RCS had advised him when he was first assigned to Parsons that his work there would last about nine to twelve months. *Id.* at 283. The layoff occurred about nine months after he began his work there. *Id.* During the fall of 2008, Mr. Breor, the project manager, held an all-hands meeting to announce a reduction in work force, because the project was approaching the point at which 90% of the design would be complete. *Id*. at 427-28. On November 12, 2008, Parsons held a job fair to assist SWPF workers in securing employment beyond the SWPF project. *Id*. at 432. As of that date, Parsons had not announced who would be laid off, but all employees were encouraged to attend. *Id.*

The evidence is also strong that Mr. Somma selected the workers he intended to retain into the construction stage for rational, business-related reasons. Mr. Somma ultimately determined that his funding would permit him to retain five pipe analysts, which would necessitate the release of 17 from the staff. *Id.* at 282, 642. Mr. Hughes testified that, although it was Mr. Somma who made the ultimate decision as to who was to be retained and who laid off, he recommended to Mr. Somma individuals to be retained, on the basis of their performance in the areas in which he anticipated a future need for services. *Id*. at 643-44. *See* Parsons Ex. 33. By October 13, Mr. Somma had worked with his supervisors to "identify personnel and the knowledge skills and abilities of the personnel to carry them into the next phase of the project." *Id*. at 695. By October 13, 2008, Mr. Somma had produced a preliminary list of workers to be laid off, and Mr. Das was one of those. Parsons Ex. 41. The layoff list was revised a number of times before it reached its final form, but Mr. Das's name remained on each version of the list. Tr. at 725; Parsons Exs. 42, 43.

The record indicates that Parsons had substantial reasons for laying off pipe stress analysts after the SWPF project reached the construction stage. Mr. Hughes had been advised that funding for pipe analysts would be severely curtailed and most of the currently employed analysts would have to be laid off. The layoff was conducted using facially neutral standards. Preliminary lists of those affected by the layoff, created as early as mid-October 2008 contained Mr. Das's name. These factors suggest that Parsons would have laid off Mr. Das in the absence of his protected disclosures. It is equally clear that RCS terminated Mr. Das's employment upon notification that Parsons had no more work for him, and would have done so upon such notification without regard for any justification or lack thereof provided by Parsons.

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

I find insufficient evidence of any motive on the part of Parsons or RCS to retaliate against Mr. Das for his whistleblowing. No motive for retaliation was revealed through any document or testimony during this proceeding. In his closing argument, however, Mr. Das's attorney notes Mr. Das made his second disclosure, his November 24, 2008, e-mail, three weeks before Parsons's December 12 target date for completing 90% of the SWPF's design, and so informing the DOE. In effect, he argues that, had the DOE learned of this disclosure and assigned significance to it, it might not have approved Parsons's milestone, which might have affected the DOE's continued funding of the project. I find this argument highly speculative. First of all, Mr. Hughes responded immediately to Mr. Das's disclosure, admitting that he recognized problems with DMJM's calculations and stating that those problems would be resolved at a

future stage. Parsons Ex. 37. More important, the DOE was already aware, and had approved, that pipe stress calculations would continued to be performed in post-90%-complete stages of the project. Tr. at 623. Therefore, even if Mr. Das's disclosure had come to the attention of the DOE funding source, it is unlikely that it would have caused concern. Finally, retaliating against Mr. Das for that disclosure only increased, rather than eliminated, the likelihood that his disclosure would reach the DOE. Given these facts, Parsons's motive to retaliate against Mr. Das is extremely weak, if one exists at all. With respect to RCS, I find absolutely no motive to retaliate against Mr. Das for his disclosure.

3. Treatment of Similarly-Situated Employees

Mr. Das alleges that in the third week of October 2008, Mr. Niedbalski, his team leader, assured him that he would continue to work in the Pipe Stress Group for "as long as the project goes on." *Id.* at 463.[3] Mr. Das has argued that Mr. Niedbalski's statement illustrates that, as of mid-October, he held Mr. Das in high esteem, in contrast to Parsons's decision, two months later, to lay him off. The evidence demonstrates, despite Mr. Das's contention, that Parsons treated him in a similar manner to others in his position.

Mr. Niedbalski testified that Mr. Das, in his opinion, was one of his best performers, and that he had hoped to keep Mr. Das working in the Pipe Stress Group. *Id.* at 553, 577-78. Mr. Niedbalski provided Mr. Hughes, his supervisor, with a list of the pipe stress analysts, placed in three groups, and Mr. Das was among four or five in the top group. *Id.* at 552-53. Nevertheless, several of his best performers were laid off. *Id.* at 554. Those retained were not in Mr. Niedbalski's top-rated group. *Id.* at 579. These facts do not indicate to me that Parsons retaliated against Mr. Das in selecting him to be laid off despite Mr. Niedbalski's opinion of him; instead, it indicates to me that Mr. Somma did not give Mr. Niedbalski's ranking much weight in his decision, assuming he was even aware of its existence. In any event, the fact that other analysts whom Mr. Niedbalski had rated highly were laid off along with Mr. Das demonstrates that Mr. Das was treated similarly to others in this regard.

Other evidence in the record also points out that Mr. Das was treated in a similar fashion to others similarly situated to him. Within the Pipe Stress Group, three analysts, including Mr. Das, had been appointed to be checkers. While it appears that each of them was selected to be a checker because of his capabilities, none of the three were retained beyond December 18, 2008. *Id.* at 644. Moreover, one of those checkers, like Mr. Das, had also been involved in special projects. Nevertheless, he was released on the same day as Mr. Das. *Id.* at 462.

Based on the foregoing, I conclude that Parsons would have laid off Mr. Das even in the absence of his protected disclosures. As discussed above, RCS terminated Mr. Das's employment based solely on Parsons's representation that Mr. Das was to be laid off, and would have done so regardless of Parsons's reason for laying him off. Parsons's and RCS's reasons for their actions are convincing, the motive for retaliation is extremely weak, if present at all, and similarly situated employees were treated in the same manner as Mr. Das.

---

[3] Mr. Niedbalski testified that he did not recall making that promise to Mr. Das and, in his role, lacked the authority to make such a promise to anyone on his team. *Id.* at 551.

III. Conclusion

I conclude that Mr. Das made two protected disclosures, and that the second of those disclosures was a contributing factor to his termination. However, I find that Parsons and RCS have shown, by clear and convincing evidence, that they would have taken the same action even in the absence of the disclosures. Consequently, I conclude that Mr. Das is not entitled to the remedies that he seeks.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Himadri K. Das under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: November 9, 2010

August 5, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Petitioner: Douglas L. Cartledge

Date of Filing: March 9, 2010

Case Number: TBH-0096

This Initial Agency Decision involves a whistleblower complaint filed by Douglas L. Cartledge ("Cartledge" or "the Complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The Complainant was an employee of Parsons Corporation ("Parsons" or "the Contractor"), a first-tier contractor at the DOE Savannah River Site (SRS) in Aiken, South Carolina, where he was employed as a laborer. On August 6, 2009, he filed a complaint of retaliation ("the Complaint") against Parsons with the DOE SRS Employee Concerns Program (ECP) Office. In the Complaint, Cartledge contends that he made certain disclosures to Parsons and DOE officials and that Parsons retaliated by terminating his employment. The Complainant seeks reinstatement to his former position and back pay.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information that they believe reveals unsafe, illegal, fraudulent, or wasteful practices, and to protect those employees from consequential reprisals by their employers. 10 C.F.R. Part 708. Under the regulations, protected conduct includes:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [the] employer, or any higher-tier contractor, information that [the employee] reasonably believes reveals –
>
> (1) A substantial violation of law, rule, or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or

(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or

(b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or

(c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if [the employee] believe[s] participation would –

(1) Constitute a violation of a federal health or safety law; or

(2) Cause [the employee] to have a reasonable fear of serious injury to [himself or herself], other employees, or members of the public.

10 C.F.R. § 708.5.

Part 708 sets forth the procedures for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. *See* 10 C.F.R. §§ 708.21 – 708.34.

B. Procedural Background

Cartledge filed the Complaint with the ECP Office on August 6, 2009,[1] alleging that Parsons terminated his employment in retaliation for his making protected disclosures. On October 15, 2010, the ECP Office forwarded the Complaint to Parsons, which then filed a response. The parties engaged in a mediation conference on December 16, 2009. The parties were unable to resolve the matter through mediation, and Cartledge requested that the Complaint be forwarded to the OHA for an investigation followed by a hearing. 10 C.F.R. § 708.28(a). The OHA received the Complaint on January 12, 2010, and the OHA Director appointed an attorney-investigator. After interviewing Cartledge and six other Parsons employees, and gathering numerous documents from both parties, the attorney-investigator issued a Report of Investigation (ROI) on March 9, 2010. On that same day, I was appointed as Hearing Officer in this matter. On March 16, 2010, I requested that the parties submit statements identifying any disagreements with the ROI. Letter from Diane DeMoura, OHA, to Douglas L. Cartledge, Complainant, and Lisa R. Claxton, counsel for Parsons (March 16, 2010).

I convened a hearing in Aiken, South Carolina, over a three-day period from May 18-20, 2010. Both parties submitted exhibits at the hearing. Cartledge submitted Exhibits 1 through 24, and Parsons submitted Exhibits A through OOO into the record. Cartledge testified on his own behalf, and called five additional witnesses. Parsons, represented by counsel, presented the testimony of five management employees and two non-management employees. *See* Transcript

[1] Cartledge contacted the ECP office to notify them of his complaint on August 6, 2009. He submitted his initial statement on August 10, 2009. Cartledge submitted additional statements to supplement his complaint on September 20, 2009, and October 14, 2009. The three submissions together are considered the Complaint in this proceeding.

of Hearing, Case No. TBH-0096 (hereinafter cited as "Tr."). The parties did not submit post-hearing briefs.

C. Factual Background

The pertinent facts in this proceeding are essentially undisputed. The following is a brief timeline of the events relevant to this proceeding.

Parsons is a DOE contractor at SRS in Aiken, South Carolina. The company has a contract to design and construct a Salt Waste Processing Facility (SWPF). Tr. at 325. Cartledge, an active member of the Augusta Building and Construction Trades Council, AFL-CIO, Union, Local 515 ("the labor union") was employed as a "Laborer" with Parsons from November 5, 2008, until his termination on August 6, 2009. Tr. at 40. According to the position description for a Parsons laborer, the laborer may be responsible for various tasks, including the following: physical labor at building and heavy construction sites; operation of hand and power tools, including air hammers, jack hammers, clay spades, earth tampers, cement mixers, concrete vibrators; cleaning and preparing sites; digging trenches; laying underground pipe; setting braces to support the sides of excavations; assisting in the erection of scaffolding; cleaning up rubble, debris, and hazardous waste materials; and assisting other craft workers. Ex. D. In addition, Parsons laborers, other craft personnel, and supervisory staff at the SWPF attend daily meetings to discuss the day's work, as well as weekly all-hands meetings on Monday mornings. *See, e.g.*, Tr. at 356, 426, 530. Safety-related issues are a frequent topic at those meetings. *See* Exs. HHH, III. When Cartledge began working at the SWPF project, he worked on a laborer crew whose primary responsibility was to work with concrete. Tr. at 38.

On April 10, 2009, Cartledge's then-foreman, William Fallen, assigned a task to Cartledge. Cartledge, in turn, instructed an apprentice to begin the task. Tr. at 94. Fallen objected to Cartledge's assignment of the task to the apprentice. *Id*. Fallen and Cartledge argued about whether Cartledge or the apprentice should perform the assigned task, and this argument resulted in Cartledge being verbally reprimanded for insubordination to his foreman.[2] *Id*.; s*ee also* Ex. I.

On July 10, 2009, while searching for the contact information for the ECP Office, Cartledge observed that a required ECP notice was missing from its usual location on a bulletin board in the craft tent. Cartledge notified James Goodall, the Parsons Labor Relations Specialist, of the missing notice. Goodall obtained a copy of the notice for Cartledge and replaced the missing copy. Tr. at 112. Also on July 10, 2009, Cartledge was transferred to a different crew whose main duties included site clean-up and maintenance, despite his preference to remain on the concrete crew.[3] Ex. B. On July 15, 2009, a representative from the labor union held a meeting with the laborers at the SWPF site in the craft tent, during which the laborers discussed various concerns regarding their work. Complaint; ROI at 3. In addition, on several occasions in July 2009, Cartledge contacted the ECP Office to raise concerns regarding his working conditions. *See* Exs. 1, 4; Ex. M. Relevant to this proceeding, among Cartledge's allegations was that, while assigned to "weed-eater duty," he was stationed away from drinking water and was routinely

[2] The reprimand was documented in a "Verbal Record of Category Three Work Rule Violation." Ex. I.

[3] The official payroll time records indicate that the Complainant was officially transferred on July 13, 2009. Ex. B.

assigned to work alone in high heat conditions, in alleged violation of Parsons' "buddy system." *Id*.

On August 5, 2009, a lawnmower threw a rock, which broke a window of the site administration building. Ex. Z. Following this incident, Cartledge was assigned the task of picking up rocks around the administration building. Cartledge alleged that, as a result of bending over and straightening repeatedly while performing this task, he became ill and had to leave work early that day. Complaint; *see also* Tr. at 186.

During an August 6, 2009, morning meeting, Cartledge questioned Michael Quattro, Parsons' Construction Safety Manager, about the company's policies for addressing worker heat stress. Complaint; Tr. at 181-82, 454-55. Seeing that Cartledge was not satisfied with his response, Quattro told Cartledge that they could continue the conversation in Quattro's office in the safety trailer after the meeting if Cartledge needed more information or had additional questions. Tr. at 455. Following the meeting, Cartledge was again assigned the task of picking up rocks around the administration building. Tr. at 186. While completing this task, Cartledge again reported feeling ill and asked to go to the site safety office to seek medical attention. Michael Lynn, Parsons' Construction Superintendent at the SWPF site, accompanied Cartledge. Tr. at 455.

When they arrived at the safety office, Cartledge informed Quattro that he was not feeling well and informed him that a prior medical condition was aggravated by Cartledge's repeated bending over and straightening while picking up rocks. Tr. at 186, 455. Quattro was unaware of the condition Cartledge described and noted that Cartledge did not have any medically-necessary work restrictions in his file. Quattro suggested that Cartledge complete his task with a shovel to eliminate the need for repeated bending over and straightening. Tr. at 457. During this visit to the safety trailer, Cartledge also again raised concerns regarding Parsons' heat stress procedures, including the concern that Parsons was not responding appropriately to high heat conditions and was jeopardizing worker safety. Tr. at 455. Cartledge was dissatisfied with the answers he received and soon the conversation escalated into an argument. Lynn observed the argument. *Id*., Tr. at 529.

Later that day, while he was continuing with his assignment of picking up rocks, Cartledge was called to see Michael Lynn. Lynn informed Cartledge that he was being terminated for insubordination due to his interactions with Quattro. Tr. at 70.

II. FINDINGS OF FACT AND ANALYSIS

A. Whether the Complainant Engaged in Protected Conduct That Was a Contributing Factor to an Alleged Retaliation

A complainant "has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under Section 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it.

See Joshua Lucero, Case No. TBH-0039 (2006) (*citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

1. Whether the Complainant Engaged in Protected Conduct

Protected conduct includes the disclosure of information to a DOE official or the individual's employer that the individual reasonably believes reveals "a substantial violation of a law, rule, or regulation;" "a substantial and specific danger to employees or to public health or safety; or "fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a).

In the ROI, the attorney-investigator identified the alleged protected disclosures in Cartledge's complaint. The parties stipulated that certain disclosures were not protected.[4] Therefore, the hearing focused on the following four disclosures: (1) Cartledge's July 10, 2009, disclosure to Parsons' Labor Relations Specialist that a required ECP notice was not posted in its usual location; (2) Cartledge's subsequent July 2009 disclosures to the ECP Office regarding his assignment to weed-eater duty; (3) Cartledge's alleged disclosures during a July 15, 2009, meeting between the laborers at the SWPF and a union representative; and (4) Cartledge's August 6, 2009, disclosures regarding whether Parsons was adhering to its heat stress procedures. As the discussion below indicates, the August disclosure rises to the level of a protected disclosure, but none of the July disclosures are protected.

a. The August 6, 2009, Disclosures Regarding Parsons' Heat Stress Procedures

As indicated above, the following is undisputed. On August 6, 2009, Cartledge raised concerns during a morning safety meeting regarding whether Parsons was properly administering to heat stress on the SWPF site. Cartledge asked Michael Quattro, the Construction Safety Manager, why Parsons was not taking appropriate actions in response to the high temperatures at the work site, such as instituting a work-rest regimen. Tr. at 181-82. Cartledge further stated that he had heard public address announcements elsewhere at SRS regarding heat-stress levels and questioned Quattro's explanation that temperatures had not reached the point where the heat stress procedures would take effect. *Id*. Cartledge expressed the view that his employer was exposing employees to danger by ignoring their physical safety on days where employees were working outside in high heat. *Id*. Because it was a daily safety meeting, several Parsons management personnel were present. *Id*. Later the same day in Quattro's office, Cartledge again questioned Quattro regarding whether Parsons had failed to follow its heat stress procedures and ignored employees' physical safety. Cartledge asked to see the temperature readings taken at the SWPF and inquired as to how Quattro determined whether to take any actions to protect employees working in the heat. Tr. at 455. Michael Lynn was present during that conversation. *Id*.

[4] In the ROI, in a section titled "Disclosures Not Likely To Be Protected," the attorney-investigator identified several disclosures that did not appear to rise to the level of protected disclosures. ROI at 4-5. During a May 5, 2010, pre-hearing telephone conference, the parties stipulated that those disclosures fall outside the ambit of Part 708 and, therefore, were outside the scope of the instant proceeding. *See* Record of Pre-Hearing Telephone Conference, May 5, 2010.

Parsons maintains that Cartledge's disclosure is not protected under Part 708, stating that Cartledge raised the issue after hearing announcements regarding heat stress procedures by other contractors at SRS and that he could not have reasonably believed that Parsons was required to follow the policies of other contractors. I find this argument to be without merit. Cartledge, having heard an announcement that temperatures were hot enough at SRS to prompt a response by another contractor, questioned whether Parsons was adequately protecting hundreds of employees from the high heat.[5] The fact that another contractor made such an announcement supports Cartledge's position that he reasonably believed that he was disclosing a substantial and specific danger to employees. Therefore, I find that Cartledge's safety concern, which he raised to the Parsons Site Safety Manager, and other management personnel, regarding Parsons' heat stress procedures is a protected disclosure within the meaning of Part 708.

b. The July Disclosures

Cartledge has not established that he reasonably believed that the July 10, 2009, disclosure regarding the missing ECP poster is a protected disclosure. The Part 708 regulations do require that contractors inform their employees of the Part 708 program by "posting notices in conspicuous places at the work site." 10 C.F.R. § 708.40. However, Cartledge could not have reasonably believed that the absence of the notice, which he had seen earlier, revealed a violation, let alone a *substantial* violation, of the Part 708 regulations. Cartledge admitted that he was aware that Parsons maintained another bulletin board outside, which is covered with a hard plastic sheet, making posters less susceptible to removal, and that the ECP notice was likely also posted there. Tr. at 111-12. Indeed, when Cartledge asked for a copy of the notice, James Goodall, the Parsons Labor Relations Specialist, immediately provided Cartledge with a copy. Tr. at 112. Accordingly, I cannot find that Cartledge reasonably believed that his disclosure of the absence of the ECP notice revealed a substantial violation of law, rule, or regulation.

Similarly, Cartledge's July 2009 disclosures to the ECP Office were not protected. Cartledge filed concerns with the ECP Office regarding his assignment to the task of weed-eating. Cartledge reported that his supervisors abused their authority by assigning him to the same task several days in a row, and that they endangered his safety by assigning him to work alone in remote locations away from drinking water. Cartledge's assertions are unfounded. Although Cartledge did not like the task to which he was assigned, at no time was he assigned any tasks falling outside those listed in the position description for a laborer. Tr. at 57-60 (Cartledge's testimony), 348-51 (Hyder's testimony). In addition, water was readily available to Cartledge. He had the option to carry water with him, walk to stationary water coolers, or call for water to be brought to his location. Tr. at 219-22 (co-worker's testimony), 332-33 (Hyder's testimony). Cartledge's expressed belief that those options were undesirable or inconvenient does not amount to a denial of access to water. Moreover, while Parsons encourages workers to look out for one another on hot days, there is no rule requiring employees to be assigned to tasks in pairs. Tr. at 282, 297, 303 (foreman's testimony). Finally, the SWPF site is not overly large, and the areas where Cartledge was assigned to work are heavily trafficked during the workday. Tr. at 328 (Hyder's testimony), 714-15 (Head's testimony); *see also* Ex. JJ. Based on these facts, Cartledge could not have reasonably believed that he was disclosing "a substantial violation of a

[5] Mark Hyder, the Daytime General Superintendent, testified that Parsons has approximately 300 employees on the SWPF site. Tr. at 319.

law, rule, or regulation;" "a substantial and specific danger to employees or to public health or safety; or "fraud, gross mismanagement, gross waste of funds, or abuse of authority." Therefore, his disclosures to the ECP Office do not rise to the level of protected disclosures.

Finally, Cartledge's alleged July 15, 2009, disclosures during the laborers' meeting with the union representative were not protected disclosures. First, there is little evidence in the record regarding what Cartledge disclosed at the meeting. Cartledge alleges generally that he raised concerns regarding assignment of work tasks and other safety issues, but could not recall with any specificity exactly which safety issues he discussed. Cartledge's notes from July 15, 2009, indicate only that he complained to the union representative about "chain of command," *i.e.*, the process for assigning job tasks. Ex. C. One of Cartledge's co-workers testified that she remembered that Cartledge raised concerns at the meeting, but could not recall the nature of the concerns. Tr. at 234. Such general allegations do not meet the threshold for a protected disclosure under Section 708.5. *See David K. Isham*, Case No. TBH-0046 (2007) (complainant's alleged disclosure too general to satisfy evidentiary burden). Moreover, even if Cartledge disclosed information that could be the basis for a protected disclosure under Part 708, no DOE officials or Parsons management personnel were present. Although Cartledge and two of his witnesses alleged that James Goodall and Michael Lynn were present during the meeting, Tr. at 120 (Cartledge's testimony), 233, 549 (co-workers' testimony), both Goodall and Lynn denied being present, Tr. at 509 (Lynn), 635-36 (Goodall). Likewise, other witnesses did not recall either Goodall or Lynn being present during the meeting. Tr. at 247, 693 (co-workers). Rather, they recalled the meeting involving only the laborers and the union representative. Therefore, even if Cartledge had made any disclosures during the meeting, they do not rise to the level of a protected disclosure under Part 708 because they were not made to, or in the presence of, DOE officials or Parsons management personnel.

2. Whether Protected Activity Was a Contributing Factor to a Retaliation

An individual must show, by a preponderance of the evidence, that his or her protected disclosure or conduct was a contributing factor in an retaliation. 10 C.F.R. § 708.29. Accordingly, I consider whether the August 6, 2009, disclosure was a contributing factor to an alleged retaliation.

A retaliation is "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g. discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions, or privileges of employment) as a result of the disclosure of information." 10 C.F.R. § 708.2. Cartledge alleges that Parsons retaliated against him by (1) transferring him from one crew to another (on July 10, 2009), (2) assigning him to belittling tasks (from July 10, 2009, until August 6, 2009) and (3) terminating his employment (on August 6, 2009). Since the first two alleged retaliations occurred before the August 6, 2009, protected disclosure, that disclosure could not have been a contributing factor. Accordingly, I turn to whether the August 6, 2009, disclosure was a contributing factor to Cartledge's termination on the same date.

In prior decisions of the Office of Hearings and Appeals, we have stated:

> A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

Jonathan K. Strausbaugh, Case No. TBH-0073 (2008) (internal citations omitted). In this case, Parsons management was aware that Cartledge made a protected disclosure during the August 6, 2009, morning meeting. Cartledge was terminated on the same day. Based on Parsons' knowledge and the temporal proximity between the protected disclosure and the alleged retaliation, I find that a reasonable person could conclude that Cartledge's protected disclosure was a factor in his termination. *See id*. (two weeks between disclosure and alleged retaliation sufficiently proximate in time); *see also David L. Moses*, Case No. TBH-0066 (2008) (eight days sufficiently proximate in time). Consequently, I now turn to Parsons' contention that it would have terminated Cartledge even in the absence of a protected disclosure.

B. Whether the Contractor Would Have Taken the Same Action in the Absence of the Protected Disclosure

Once a complaining employee has met the burden of demonstrating that conduct protected under Section 708.5 was a contributing factor to a retaliation, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's [protected conduct]." 10 C.F.R. § 708.29. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *David L. Moses*, Case No. TBH-0066 (2008) (*citing Casey Von Bargen*, Case No. TBH-0034 (2007)).

It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against a whistleblower in the absence of the whistleblower's protected conduct. The factors include "(1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees . . . ." *Dennis Patterson*, Case No. TBH-0047 (2008) (*quoting Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007)).

As just indicated, the first factor in *Kalil* is the strength of the employer's reason for the adverse action. In this case, the termination letter cites "insubordination" and "failure to complete work task efficiently" as the reasons for Parsons' decision to terminate Cartledge. Ex. ZZ. Parsons management testified extensively on the rationale for the termination.

Michael Quattro testified that he was offended by Cartledge's attitude toward him on August 6, 2009, and that Cartledge's behavior was inappropriate. Tr. at 458. Quattro testified that Cartledge questioned him during the morning meeting about Parsons' heat stress procedures and was not satisfied was his response. Tr. at 454-55. Because Quattro felt they were not getting the issue resolved, Quattro told Cartledge they could continue the conversation after the meeting in his office if Cartledge wanted additional information. *Id*. Mark Hyder, the Daytime General

Superintendent, believed Carteldge became confrontational when discussing his concerns with Quattro. Tr. at 357. Later that morning, Cartledge and Michael Lynn went to Quattro's office in the safety trailer because Cartledge stated that he was not feeling well. Tr. at 455. After discussing Cartledge's condition, the topic again turned to heat stress. Tr. at 457. Quattro testified that Cartledge was "accusatory" and "argumentative," accused Quattro of lying, and was "attacking [his] honesty and integrity." Tr. at 458. Lynn observed the confrontation and felt that Cartledge crossed the line with Quattro. Tr. at 529-30. Lynn was disturbed by Cartledge's behavior toward a manager and brought the matter to the attention of Craig Head, the General Superintendent. *Id*. (Lynn), 735 (Head).

Parson's project work rules very clearly define types of disciplinary violations and their consequences. A first instance of insubordination is defined as a "Category Two" violation and is subject to suspension. Tr. at 376 (Hyder); *see also* Ex. AA. Repeated insubordination is designated as a "Category One" violation and can result in immediate termination. *Id*. Cartledge had been insubordinate to his foreman on April 10, 2009. Tr. at 291-94, Ex. I. Four months later, on August 6, 2009, he was insubordinate to the Michael Quattro, the Construction Safety Manager. Charles Head testified that, after learning of Cartledge's confrontation with Quattro, he made the decision to terminate Cartledge because it was not Cartledge's first incident of insubordination. Head further testified that he was not aware of any individuals who had engaged in repeated insubordination who had not been terminated and he believed the decision to terminate Cartledge's employment was consistent with how other cases of repeated insubordination had been handled. Tr. at 717.

Based on the foregoing, applying the first factor set forth in *Kalil* – the strength of the reason for the personnel action – the record as a whole supports a finding that the reason for the decision to terminate Cartledge's employment was that Cartledge's confrontation with the site safety manager was his second instance of insubordination in four months. I further find that the nature of the confrontation itself and the company's express policy regarding repeated instances of insubordination is evidence of the strength of the reason for the termination.

As for the second factor – the strength of any motive to retaliate against Cartledge for his protected disclosure – I find no evidence of any such motive. Parsons conducts extensive and mandatory safety training for incoming employees. Tr. at 429-33 (Quattro), 625-32 (Goodall); *see also* Exs. JJJ – OOO. The safety personnel maintain an incentive program recognizing employees who raise safety concerns, report "near-misses," or suggest safety topics for meetings. Tr. at 388 (safety specialist), 426-28 (Quattro). The weekly all-hands meetings and daily laborers' meetings focus on safety topics. Tr. at 354 (Hyder), 426 (Quattro). In addition, the employees discuss safety issues during their daily meetings. Tr. at 356 (Hyder), 386 (safety specialist), 426 (Quattro), 530-31 (Lynn). Employees are allowed to stop work on a task if they feel it is unsafe without fear of retaliation or other negative consequences. Tr. at 387-88 (safety specialist), 432-33 (Quattro). The record as a whole supports a conclusion that Parsons employees at the SWPF are encouraged to raise safety concerns without fear of reprisal. Therefore, applying the second *Kalil* factor, I find no evidence of any motive on the part of the company to retaliate against Cartledge for raising a safety concern.

The final factor set forth in *Kalil* is whether there is any evidence that the employer has taken similar action against similarly situated employees. Parsons submitted termination notices of two other employees terminated for repeated insubordination. One employee was terminated on June 4, 2009 for insubordination. That employee refused to do his job and then had a confrontation with his foreman. Ex. T. The other employee was terminated for insubordination on December 9, 2008, as a result of failing to perform a task as instructed and demonstrating a "poor attitude." Ex. BBB. Mark Hyder, the Daytime General Superintendent, also testified that he recalled several instances of repeatedly insubordinate employees being terminated. Tr. at 373-75. Finally, Craig Head, the General Superintendent, testified that he recalled at least one other employee who was terminated for insubordination. Tr. at 736.

Considering all of the relevant factors as applied to the evidence discussed above, I am convinced that, in light of Cartledge's prior instance of insubordination toward his foreman, Parsons would have chosen to terminate Cartledge's employment following his insubordinate behavior toward Michael Quattro, regardless of whether Cartledge had engaged in any activity protected under Part 708. Therefore, I find that Parson has proven, by clear and convincing evidence, that it would have terminated Cartledge's employment on August 6, 2009, in the absence of Cartledge's protected disclosure on the same day.

IV. CONCLUSION

As set forth above, I have concluded that the Complainant made one protected disclosure and has proven by a preponderance of the evidence that the protected disclosure was a contributing factor to his termination. I have determined, however, that the Contractor has provided clear and convincing evidence that it would have terminated the Complainant even if he had not made his protected disclosure. In conclusion, I find that Cartledge has failed to establish the existence of any violations of the DOE Contractor Employee Protection Program for which relief is warranted under Part 708.

It Is Therefore Ordered That:

(1) The complaint filed by Douglas L. Cartledge under 10 C.F.R. Part 708, Case No. TBH-0096, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision. 10 C.F.R. § 708.32.

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date: August 6, 2010

November 9, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motion to Dismiss
Initial Agency Decision

Names of Petitioners:	Mark D. Siciliano Battelle Energy Alliance LLC
Dates of Filings:	March 15, 2010 August 16, 2010
Case Numbers:	TBH-0098 TBZ-0098

This Decision will consider a Motion to Dismiss filed by Battelle Energy Alliance LLC (Battelle), the Management and Operating Contractor for the Department of Energy's (DOE) Idaho National Laboratory (INL), in connection with the pending Complaint of Retaliation filed by Mark Siciliano against Battelle under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The Office of Hearings and Appeals (OHA) assigned the hearing component of Mr. Siciliano's Part 708 Complaint proceeding, Case No. TBH-0098, and Battelle's Motion to Dismiss, Case No. TBZ-0098. For the reasons set forth below, I have determined that Battelle's Motion should be granted and that Mr. Siciliano's Complaint of Retaliation should be dismissed.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a

substantial and specific danger to employees or to the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1)-(3). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

Mr. Siciliano filed his Part 708 Complaint on December 11, 2009, at the DOE's Idaho Operations Office. In his Complaint, Mr. Siciliano alleged that, during 2008 and 2009, he made a number of protected disclosures and, as a result of his so doing, Battelle engaged in a series of retaliatory actions against him, including reassigning him to a new position in December 2009. Battelle filed its response to the Part 708 Complaint on March 4, 2010, contesting that Mr. Siciliano had made any disclosure protected under Part 708, and arguing that Mr. Siciliano's reassignment was not retaliatory for a number of reasons, including that the reassignment did not result in a materially adverse change in his employment conditions. The Employee Concerns Manager of the Idaho Operations Office transmitted the Complaint to OHA for an investigation, followed by a hearing when informal resolution of the Complaint proved unsuccessful.

On March 16, 2010, the OHA Director appointed an Investigator (OHA Investigator) who conducted an investigation into the allegations contained in Mr. Siciliano's Complaint. During the course of the investigation, Mr. Siciliano filed a supplemental complaint, alleging that Battelle had engaged in further retaliation by excluding him from a March 2010 meeting involving his area of expertise. The OHA Investigator advised the parties that she would consolidate the supplemental complaint filing with her investigation of the December 2009 Complaint. On June 30, 2010, the OHA Investigator issued the Report of Investigation (ROI) in this case. In the ROI, the OHA Investigator concluded that of the ten alleged protected disclosures, only one was arguably a protected disclosure under Part 708.[1] With regard to that one disclosure, the OHA Investigator found that Mr. Siciliano cannot demonstrate, by a preponderance of the evidence, that this protected disclosure was a contributing factor to the decision to reassign him. Moreover, the OHA Investigator found that even if Mr. Siciliano could meet his evidentiary burden in this case, it is likely that Batelle would be able to demonstrate by clear and convincing evidence that it would have reassigned Mr. Siciliano absent any proven protected disclosure.

[1] The OHA Investigator found that eight of the ten disclosures were not, on their face, protected disclosures. She also found that with respect to a ninth disclosure, Mr. Siciliano had not demonstrated, by a preponderance of the evidence, that he reasonably believed that Battelle was requiring its employees to admit responsibility on a security form for actions that they did not commit.

Immediately after the ROI was issued, the OHA Director appointed me the Hearing Officer in this case. On July 14, 2010, I sent a letter to the parties and asked them to submit briefs addressing the following issues:

(1) Whether they agree with the Investigator's assessment that eight[2] of the ten alleged disclosures made by Mr. Siciliano are not protected under 10 CFR Part 708;
(2) Whether there is any evidence to support a finding that Mr. Siciliano had a "reasonable" belief that Battelle was requiring its employees to admit responsibility on DOE Form 5639.3 for security infractions that they did not commit;
(3) Whether there is any evidence to support a finding that Mr. Siciliano's allegations regarding a Batelle senior manager (*i.e.* that the senior manager had not met a security reporting requirement) was a contributing factor to an act of retaliation;
(4) Whether Mr. Siciliano's December 2009 reassignment constituted an act of retaliation for purposes of 10 CFR Part 708;

Mr. Siciliano submitted his brief on these issues on August 4, 2010; Battelle tendered its brief on August 15, 2010. I subsequently requested additional information from Mr. Siciliano on the issue of remedies in this case. Mr. Siciliano filed a "Statement of Requested Remedies" on September 24, 2010, and supplemented that filing, *sua sponte*, on October 14, 2010.

C. Factual Overview

Battelle hired Mr. Siciliano in May 2007 to work as a Relationship Manager supporting the U.S. Special Operations Command (SOCOM) in INL's National and Homeland Security Directorate (the Directorate) under Dr. K. P. Ananth, INL's Associate Director. In August 2007, Mr. Siciliano became the Acting Manager for the Special Materials and Processes Department and reported to Wayne Austad. One year later, in August 2008, Mr. Siciliano accepted a permanent position as Manager for the Special Materials and Processes Department with collateral duties as the Relationship Manager for the SOCOM.

In December 2008, the Directorate discovered a classified document that had been misplaced at some earlier date. An inquiry ensued and several members of Mr. Siciliano's department and he were questioned about their knowledge of, and possible involvement with, the misplaced document. Eventually, several of Mr. Siciliano's employees and he were required to complete

[2] Those eight purported disclosures are: (1) the "suggestions" provided by Mr. Siciliano during 2008 and 2009 to "improve his [division's] security posture," including a February 2009 memorandum to his leadership; (2) Mr. Siciliano's statement in June 2009 to a DOE official that a DOE security requirement was overly restrictive; (3) the "value statements" drafted by Mr. Siciliano in July 2009 to improve leadership and management in his division; (4) the verbal exchange that Mr. Siciliano had in August 2009 with a higher-level Battelle manager who allegedly improperly attributed security shortfalls to Mr. Siciliano's department; (5) the equity concern submitted by Mr. Siciliano in October 2009 in which Mr. Siciliano alleged that he was misled when he was hired as a "Department Manager 3;" (6) Mr. Siciliano's objection in November 2009 to Battelle's decision to divest itself from certain work; (7) Mr. Siciliano's belief that Battelle management perceived him not to care about security; and (8) Mr. Siciliano's disability. Each disclosure set forth above will be referred to in this Decision by the corresponding numeric designation given in this footnote. In addition, Disclosure Number 9 will refer to Mr. Siciliano's allegations that a senior manager had not met a security reporting requirement, and Disclosure Number 10 will refer to Mr. Siciliano's communications concerning the security incident report at issue in his Complaint.

Part II of DOE Form 5639.3, entitled, "Notification of Security Incident" (hereinafter referred to as DOE Form 5639.3 or the relevant security form).[3] One of Mr. Sicilano's disclosures concerns his view that Battelle was requiring its employees to admit responsibility by completing the security incident reporting form in question. The record contains the relevant security forms for Mr. Siciliano and four of his employees. Box 2 on each of the relevant security forms is entitled, "Name and title of person responsible for incident." Battelle Security had typed the names, titles, social security numbers and organization code for Mr. Siciliano and his four employees in Box 2 when it presented DOE Form 5639.3 to each of them. Box 3 had pre-typed the clearance number for each of the five persons in question.

Each of Mr. Siciliano's employees denied involvement with the security incident in question and refused to sign the box requesting the signature of the responsible individual. In addition, Mr. Siciliano, as the supervisor for each of the four, completed Box 7 which asked for the corrective or disciplinary action flowing from the security incident by noting the following: (1) there was no objective proof indicating the employee was responsible; (2) that he had counseled the employee regarding their option to file grievances through Employee Concerns and HR; and (3) some employees had used the term "witch hunt" in connection with their having to complete Part II of the relevant security form. Mr. Siciliano signed each of the relevant security forms in his capacity as supervisor on March 4, 2009, March 5, 2009, March 20, 2009, and March 20, 2009 respectively.

Regarding his own DOE Form 5639.3, Mr. Siciliano prepared a memorandum on July 1, 2009, in which he denied knowledge of the security incident and pointed out that the incident had occurred prior to his becoming a Battelle employee. He also complained that he is identified on that form as "the person responsible for this incident and was being asked to sign the form as the person responsible for the incident." Mr. Siciliano also stated that he believed the DOE form "implies guilt and is not in alignment with the most rudimentary roots of due process." He added that "it is offensive, arbitrary and capricious to say the least and it needs to be revised. . ."

Dr. Ananth, INL's Associate Director, was aware of Mr. Siciliano's objection to Battelle's use of DOE Form 5639.3 and had heard from the Director of Battelle's Safeguards and Security Office that Mr. Siciliano was telling his employees to go to Human Resources concerning the forms. Dr. Ananth reported to the OHA Investigator that he had met with Mr. Austad about the matter.

On July 1, 2009, Mr. Siciliano's immediate supervisor, Wayne Austad, completed Part II of DOE Form 5639.3 for Mr. Siciliano. Mr. Austad first crossed out the words, "responsible for the incident" in two places on the form. Next, he related the following three points which are important to this Decision: (1) he had discussed with Mr. Siciliano that the form is used as part of the investigation process and does not establish culpability; (2) he opined that Mr. Siciliano's recommendation that the form needs to be revised to more accurately establish culpability and determine when an infraction should be issued was a good one; and (3) he stated that Mr. Siciliano had no clear role in the security incident.

[3] INL slightly modified DOE Form 5639.3 for its own use. The only difference between the DOE security form and INL's version of the security form is a negligible one, *i.e.* the INL form includes a box for the employee's clearance number.

Mr. Siciliano alleges in his Complaint that Battelle's senior management perceived him as not caring about security requirements, and Battelle viewed some of Mr. Siciliano's interactions with others, particularly DOE, as lacking a degree of professionalism. Mr. Siciliano's August 2009 mid-year performance evaluation reflects the latter viewpoint.

In June 2009, the Directorate's senior management began discussions regarding a reorganization in the Directorate. Mr. Siciliano's supervisor, Mr. Austad informed Mr. Siciliano in August 2009 about the reorganization and that he would not be assigning Mr. Siciliano to a department manager position in the upcoming reorganization. On October 1, 2009, Mr. Siciliano filed an equity concern with the Battelle Diversity Officer, arguing that he should be in a higher pay band and that he should be placed in a department manager position in the reorganization. Soon thereafter, on October 12, 2009, Mr. Siciliano reported to several managers that Dr. Ananth had allegedly failed to follow security reporting requirements. In November 2009, Mr. Siciliano complained to upper management about Dr. Ananth's decision to discontinue doing a particular kind of work. In December 2009, the Directorate announced the reorganization. The reorganization eliminated two divisions, including Mr. Austad's division which included the department headed by Mr. Siciliano. Mr. Austad was reassigned to a relationship manager position, with collateral duties. The functions of Mr. Siciliano's department were moved to an existing department in another division. Mr. Siciliano retained his relationship manager position and salary, but was placed in a higher pay band.

II. The Legal Standard

As noted above, the regulations set forth at 10 C.F.R. Part 708 provide an administrative mechanism for resolving whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the Complainant and the contractor with regard to their allegations and defenses, and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

A. The Complainant's Burden

It is the burden of the Complainant under Part 708 to establish, by a preponderance of the evidence, that he or she made a protected disclosure, participated in a proceeding, or refused to participate as described in 10 C.F.R. 708.5, and that such act was a contributing factor to a retaliatory action. 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua, Lucero*, Case No. TBH-0039 (2007), *citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990). If Mr. Siciliano meets this threshold showing with regard to any of his alleged protected disclosures, he must next prove that at least one of his disclosures was a contributing factor to his reassignment or other act of retaliation. One way a complainant can meet this evidentiary burden is to provide evidence that "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in a personnel action." *See David Moses*, Case No. TBH-0066 (2008), *Ronald Sorri*, Case No. LWA-0001 (1993).

B. The Contractor's Burden

If the Complainant satisfies his evidentiary burden, the burden then shifts to the Contractor to show, by clear and convincing evidence, that it would have taken the same action absent any protected disclosures. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See Casey von Bargen*, Case No. TBH-0034 (2007). OHA Hearing Officers have relied on the Federal Circuit for guidance in evaluating whether the contractor has met its evidentiary burden in a Part 708 case. *See David Moses*, Case No. TBH-0066 (2008), *Dennis Patterson*, Case No. TBH-0047 (2008). Specifically, the Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, examines: (1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees . . ." *See Kalil v. Dept. of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007).

III. Analysis

A. Disclosures Number 2, 3, 4, 7 and 8

Mr. Siciliano concedes in his August 4, 2010, Brief that five of his ten disclosures set forth in his Complaint do not fall within the definition of "protected disclosure" under 10 C.F.R. § 708.5. Siciliano Brief at 14. Those five disclosures are Disclosures Number 2, 3, 4, 7 and 8. Accordingly, I will dismiss those five disclosures from this proceeding.

B. Disclosure Number 1

Regarding Disclosure Number 1, *i.e.*, his "suggestions" in 2008 and 2009 to improve the security posture of his division, Mr. Siciliano now argues that the suggestions were actually disclosures of information that revealed a threat to the public safety. Siciliano Brief at 13. He argues further in his Brief that Battelle's failure to embrace his suggestions amounted to "gross misconduct." *Id.* at 14.

As an initial matter, Mr. Siciliano has not provided any information that would allow me to conclude that he communicated information to his management which revealed a *substantial and specific danger* to employees or to public health and safety (emphasis added) for purposes of 10 C.F.R. § 708.5(a)(2). In making this finding, I have reviewed an e-mail dated February 17, 2009, from Mr. Siciliano to a number of persons entitled, "security thoughts" which he appended to his Complaint as pages 8-11. The four-page e-mail lists a number of topics but is preceded by the introductory paragraph which states as follows:

> Thank you for volunteering to be our moderator for next week's security working Group. While it's fresh in my mind, I wanted to send you a few of my thoughts. Some of these suggestions may be out of my sphere of influence, but I'm hopeful that They will stimulate dialogue and other ideas from my colleagues.

There is nothing in the four-page e-mail that even remotely relates to a safety concern let alone a disclosure of a "substantial and specific danger to employees or to public health or safety." Hence, the "suggestions" do not rise to the level of a protected disclosure under 10 C.F.R. § 708.5 (a)(2).

As for Mr. Siciliano's contention that Battelle management's failure to embrace his suggestions constituted "gross mismanagement" or "gross misconduct," I find no support for this position in the documentary evidence in the case. There is nothing in the communications between Mr. Siciliano and Battelle management that suggests he was relating information that constituted "gross mismanagement." Rather, in its Brief, Battelle accurately characterizes Mr. Siciliano's suggestions as "brainstorming" in preparation for a meeting. *See* Battelle Brief at 18. Gross mismanagement "does not include decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. [It] means a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission." *See Embree v. Dept. of Treasury*, 70 M.S.P.R. 79 (1996). A careful reading of the e-mail in question shows that Mr. Siciliano listed "pros" and "cons" relating to his suggestions. The manner in which Mr. Siciliano communicated his suggestions indicates that the matters under discussion were "debatable." In addition, there is nothing in the e-mail or elsewhere in the record indicating that Mr. Siciliano ever stated that Battelle's failure to implement Mr. Siciliano's suggestions would create a substantial risk of significant adverse impact on INL's ability to accomplish its mission.[4] Hence, I find that there is no factual basis for Mr. Siciliano's contention that Battelle's failure to consider his security suggestions constitutes "gross mismanagement" or "gross misconduct" under 10 C.F.R. § 708.5(a)(3).

In the end, I must find that Mr. Siciliano did not make a protected disclosure for purposes of Part 708 when he made suggestions to improve the security posture of his department. Accordingly, I will dismiss Disclosure Number 1.

C. Disclosure Number 5

Mr. Siciliano challenges the OHA Investigator's finding that the equity concern he raised (Disclosure Number 5) with Battelle's Diversity group does not rise to the level of a protected disclosure under Part 708. In his Brief, Mr. Siciliano claims that Battelle fraudulently induced him to take a position at a particular grade based upon assertions that others managers were being paid at the same level. Brief at 11. He claims that Battelle arbitrarily assigned pay grades to persons essentially performing the same work. *Id.* According to Mr. Siciliano, this action constitutes an abuse of authority. *Id.*

[4] In his Brief, Mr. Siciliano claims that Battelle's senior leadership recently was required to brief Congress on some security matters which Mr. Sicliano now believes would not have been necessary had Battelle taken his suggestions. There is absolutely nothing in the record that links Mr. Siciliano's suggestions or "security thoughts" about policy matters to whatever inquiries Congress may have made recently to Battelle.

An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to other preferred persons. *Jessup V. Dept. of Homeland Security*, Docket No. AT-1221-07-0049-W-1 (September 17, 2007); *Wheeler v. Dept. of* Veterans *Affairs*, 88 M.S.P.R. 236 (2001); *Frank Isbell*, Case No. VWA-0034 (1999).

In its Brief, Battelle states that it performed a job audit and compensation review with regard to Mr. Siciliano's concerns. On December 22, 2009, a representative of Battelle's Diversity group met with Mr. Siciliano for two hours and reviewed its findings which included that Mr. Siciliano was properly classified as a "Manager 3," that Mr. Siciliano was the highest paid person occupying the "Manager 3" category, and the one person reviewed who occupied a Manager 4 position had been hired as a "strategic hire" and possessed a Ph.D. Battelle Brief at 7.

First, there is no information in the record to support Mr. Siciliano's position that he reasonably believed that Battelle management had abused its authority in not hiring him at a Manager 4 level, or that they had fraudulently induced him to take the position that was classified as a Manager 3 position. Second, even if Mr. Siciliano had presented such evidence, the record would not support a finding that any such disclosure in this regard could be construed as a contributing factor to the reorganization that resulted in Mr. Siciliano's transfer. Mr. Austad informed Mr. Siciliano in August 2009 about the reorganization and that he would not be assigning Mr. Siciliano to a department manager position in the upcoming reorganization. Mr. Siciliano filed his equity concern complaining about his job classification on October 1, 2009, **after** he learned of the impending reorganization. The senior managers at Battelle who made the decision to reorganize and eliminate two divisions, including the one in which Mr. Siciliano worked, could not have had any actual or constructive knowledge of a disclosure that was made **after** they had decided and informed Mr. Siciliano that the reorganization would occur. For all the foregoing reasons, I will dismiss Disclosure Number 5 from further consideration.

D. Disclosure Number 6

Mr. Siciliano also challenges the finding in the ROI that the concerns he voiced to upper-level management about Battelle's decision to divest itself from certain work did not constitute a protected disclosure. He argues that Battelle's action constituted "gross mismanagement" because it caused the loss of millions of dollars of future work for INL and adversely impacted the mission of the organization. Siciliano Brief at 12. He also contends that Dr. Ananth abused his authority in deciding not to continue doing a particular kind of work due to the security risks inherent in that kind of work because Dr. Ananth wanted to avoid risks to further his personal career. *Id.* at 13.

Mere differences of opinion between an employee and his supervisors as to the proper approach to a particular problem or the most appropriate course of action do not rise to the level of gross mismanagement. *See White v. Dept. of the Air Force*, 391 F.3d 1377 (Fed. Cir. 2004). Moreover, the Deputy Secretary of Energy in *Mehta v. Universities Ass'n*, 24 DOE ¶ 87,514 (1995) held that:

> Equating a particular type of disagreement to "mismanagement" as contemplated by the "whistleblower" regulations demands a careful balancing lest the term encompass all disagreements between a contractor and its employees . . .[t]here must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, at the same time granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork.

Id. at 89,065.[5] OHA has followed the Deputy Secretary's holding in other cases. *See Ronny J. Escamilla*, Case No. VWA-0012 (1997).[6]

Deciding what kind of work to undertake and making risk assessments are inherently managerial functions. For this reason, I find that Mr. Siciliano's disagreement with management's decision to decline doing work that had associated security risks do not rise to the level of a protected disclosure in that it does not reveal "gross mismanagement."

As for Mr. Siciliano's contention that Dr. Ananth abused his authority in refusing to continue doing a particular kind of work, I find, based on the record, that Mr. Siciliano did not communicate his concerns in this regard in a way that a disinterested person would have construed his comments as claiming that Dr. Ananth had abused his authority. Mr. Siciliano clearly disagreed with Dr. Ananth's decision, but his statements belie any suggestion that he ever revealed his belief that Dr. Ananth had abused his authority. By way of example, I note that Mr. Siciliano provided an update to his boss on November 4, 2009, about the loss of work in which he stated that the "client was very disappointed with our decision" to stop the work, but that he fully understood the situation and would work with the group to explain Battelle's position and improve the group's reputation. This verbiage does not support Mr. Siciliano's claim of a protected disclosure.

For all the above reasons, I will dismiss Disclosure Number 6.

E. Disclosure Number 9

Mr. Siciliano contends that the OHA Investigator erred in finding that his allegations regarding a senior manager at Battelle were not a contributing factor to his reassignment. I find no merit to Mr. Siciliano's argument.

As noted in Section I. C. above, Battelle management informed Mr. Siciliano in August 2009 that the Directorate in which he worked would be reorganized and that he would not be retaining his Manager position in the newly reorganized Directorate. Two months after he learned of the reorganization and that he would not be assigned to a management position (on October 12,

---

[5] It is noteworthy that the *Mehta* case was decided under an earlier version of the Part 708 regulations, one that allowed disclosures of mere mismanagement, as opposed to gross mismanagement, to proceed under Part 708.

[6] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entered the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

2009), Mr. Siciliano reported his concerns about Dr. Ananth to several managers. Battelle managers could not have had actual or constructive knowledge of Mr. Siciliano's October 12, 2009, disclosure when they told him in August 2009 about their decision to reorganize the Directorate and his fate in the reorganization. Thus, I must find that the information revealed by Mr. Siciliano about Dr. Ananth was not a contributing factor to his reassignment as the result of the reorganization.

F. Disclosure Number 10

In his Complaint, Mr. Siciliano contends that he told Battelle management that his employees were being required to admit responsibility for security infractions that they did not commit. In the ROI, the OHA Investigator noted that Battelle had given Mr. Siciliano a written memorandum explaining that the security form in question was to be used for the employees to provide their version of events. The OHA Investigator found, for this reason, that Mr. Siciliano had not proven by a preponderance of evidence that he reasonably believed that Battelle was requiring it employees to admit guilt on a certain security form. In his Brief, Mr. Siciliano objects to the OHA Investigator's finding in this regard and states that he "absolutely had a reasonable belief that [Battelle] was requiring its employees to admit responsibility on DOE Form 5639.3 for security infractions they did not commit." Siciliano Brief at 15. He disputes that neither he nor his employees received any memorandum from Battelle giving guidance on how to complete the security form in question prior to his bringing the matter to Battelle's attention.

While there appears to be a factual dispute about whether Mr. Siciliano received the memorandum in question, I find nevertheless that the record does not support a finding that Mr. Siciliano had a reasonable belief that Battelle management was abusing their authority or engaging in gross mismanagement by requiring him and his employees to admit liability for a security incident that they did not commit. The facts are clear that Mr. Siciliano made interlineations on Form 5639.3 to reflect that none of his employees was "responsible" for the security incident in question. Mr. Siciliano then provided detailed written comments to explain why he believed that his employees were not culpable for the security incident in question. Moreover, none of Mr. Siciliano's employees signed the box which asked for the signature of the person responsible for the security incident. Instead, in each instance, the employee wrote "I was not responsible for the security incident." Through their proactive actions, the four employees took responsibility to ensure that the form could in no way be construed as an admission of guilt for a security incident that later could have potentially been adjudged to be a security infraction. Mr. Siciliano, as their supervisor, also provided written comments on the respective forms which clearly stated that none of the four employees bore any responsibility for the security incident in question. Similarly, Mr. Siciliano completed Part II of the relevant security form in such a way that it was clear from the face of that document that he was not admitting any guilt for a security incident that he did not commit. In his instance, his supervisor, Mr. Austad also provided detailed comments which addressed Mr. Siciliano's concerns that someone might misinterpret Part II of DOE Form 5639.3 as an admission of guilt. While it appears that Battelle Security was using Part II of DOE Form 5639.3 to gather facts incident to an investigation instead of using that form to document the results of its completed investigation, I nonetheless find that this practice did not rise to the level of gross mismanagement or an abuse of authority on Battelle's

part. As previously noted in this Decision, gross mismanagement requires an element of blatancy and means "a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission." I find that Battelle Security's use of Part II of DOE Form 5639.3 prior to its completion of its investigation does not equate to blatant mismanagement, nor did it create a substantial risk of significant adverse impact on its ability to accomplish its mission. Furthermore, there is no abuse of authority here because it does not appear that Battelle Security arbitrarily and capriciously exercised its power which adversely affected its employees' rights. My decision might have been different had Battelle Security refused to allow its employees to make corrections to, or interlineations on, the relevant security form to clarify their non-involvement in the matter under scrutiny. Instead, Battelle Security allowed its employees to "set the record straight." In the end, while it might not be a best practice to use DOE Form 5639.3 in the manner in which Battelle did, Battelle's actions in allowing its employees (and the employees' supervisors) the opportunity to provide relevant information regarding the security incident in question and to deny culpability, negates a finding of either gross mismanagement or abuse of authority.

Based on all the foregoing, I find that Disclosure Number 10 does not rise to the level of a protected disclosure under Part 708.[7]

G. Protected Conduct

Mr. Siciliano filed a supplemental Complaint on June 8, 2010, alleging that Battelle had retaliated against him for filing his December 11, 2010, Complaint when the company failed to invite him to an event on March 24, 2010, which allegedly involved his area of expertise. The filing of a Part 708 Complaint constitutes protected activity. 10 C.F.R. § 708.5(b); *see also Thomas T. Tiller*, Case No. VWA-0018 (1998). Accordingly, I find that Mr. Siciliano engaged in protected activity on December 11, 2009, when he filed his Part 708 Complaint.

Based on the record before me, I do not find, however, that Battelle's failure to invite Mr. Siciliano to an event in March 2010 constitutes an act of retaliation under 10 C.F.R. § 708.2. Retaliation is defined under Part 708 as "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (*e.g.* discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges or employment) . . ." 10 C.F.R. § 708.2. Mr. Siciliano does not specify in its Supplemental Complaint whether and how the lack of an invitation to the March 2010 event negatively or materially impacted his "compensation, terms, conditions or privileges of employment. Based on the record before me, I find that Battelle's failure to invite Mr. Siciliano to the event in question is a "trivial" matter that does not rise to an act of retaliation under Part 708.

[7] Because I find that Mr. Siciliano did not raise a protected disclosure with regard to his concerns about Battelle's use of Part II of DOE Form 5639.3, I need not address Mr. Siciliano's allegation that he suffered an additional act of retaliation (i.e., the re-opening of the investigation into his involvement the security incident in question) for having raised issues about that form.

H. Summary

As fully discussed above, I have found that none of the ten disclosures contained in Mr. Siciliano's Complaint rises to the level of a protected disclosure under 10 C.F.R. § 708.5(a). I found further that while Mr. Siciliano engaged in protected conduct by filing his Part 708 Complaint, he did not suffer an act of retaliation when Battelle failed to invite him to a March 2010 event. Accordingly, I find that Battelle's Motion to Dismiss should be granted and Mr. Siciliano's Complaint should be dismissed.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Battelle Energy Alliance LLC on August 16, 2010, Case No. TBZ-0098, be and hereby is granted as set forth in paragraph (2) below and denied in all other respects.

(2) The Complaint filed by Mark D. Siciliano against Battelle Energy Alliance LLC, on December 11, 2009, as supplemented on June 8, 2010, Case No. TBH-0098, be and hereby is dismissed.

(3) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

Ann Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: November 9, 2010

January 13, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision
Motion to Dismiss

Names of Petitioners: Vinod C. Chudgar
Savannah River Remediation, LLC

Dates of Filing: September 27, 2010
December 8, 2010

Case Numbers: TBH-0100
TBZ-0100

This Decision will consider a Motion to Dismiss filed by Savannah River Remediation, LLC ("SRR" or "Respondent"), the Management and Operating Contractor for the Department of Energy's (DOE) Savannah River Site (SRS), in connection with the pending Complaint of Retaliation filed by Vinod Chudgar ("Complainant" or "the complainant") against SRR under the Department of Energy's (DOE) Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The Office of Hearings and Appeals (OHA) assigned the hearing component of Mr. Chudgar's Part 708 Complaint proceeding, Case No. TBH-0100, and SRR's Motion to Dismiss, Case No. TBZ-0100. For the reasons set forth below, I have determined that SRR's Motion should be granted and that Mr. Chudgar's Complaint of Retaliation should be dismissed.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862, 12863 (1999). Its primary purpose is to encourage contractor employees to disclose information that they

believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations provide procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for, among others:

> II. Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [the] employer, or any higher tier contractor, information that [the employee] reasonably believe[s] reveals--
>
> (i) A substantial violation of a law, rule, or regulation;
>
> (ii) A substantial and specific danger to employees or to public health or safety; or
>
> (iii) Fraud, gross mismanagement, gross waste of funds, or abuse of authority. . . .

65 Fed. Reg. 6319 (2000).

Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with DOE and are entitled to an investigation by an OHA investigator, an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

The complainant is a Principal Process Computer Analyst at SRR. On July 13, 2009, Mr. Chudgar filed a complaint with the Office of Civil Rights of the DOE Savannah River Operations Office (DOE/SR). In the complaint, Mr.Chudgar alleged that in April 2009, while employed by the predecessor contractor Washington Savannah River Company (WSRC), he engaged in protected conduct under 10 C.F.R. Part 708 and, as a result, was transferred to a non-engineering position in July 2009 when SRR won the contract. As a remedy for the alleged act of retaliation, the complainant sought reinstatement to an engineering position, disciplinary action against individuals who intimidated him, a copy of an investigation report, and the correction of a procedure. *See* Complaint (July 13, 2009) at 2. SRR filed its response to the Part 708 Complaint on October 9, 2009, arguing that Mr. Chudgar had not made a protected disclosure as defined by Part 708, that none of the decision makers had any constructive or actual knowledge of his complaint, and that his reassignment was not retaliatory and did not result in a materially adverse change in his employment.[1] The parties attempted mediation of the dispute, but mediation was not successful. The Employee Concerns Manager of the Savannah River Operations Office then forwarded the complaint to OHA in May 2010 for an investigation followed by a hearing.

[1] SRR also argued that it was improperly joined as a party, but DOE/SR rejected that argument and found that SRR was a proper party to this action. Letter from OCR to SRR (December 9, 2009).

The OHA Director appointed an Investigator who conducted an investigation into the allegations in Mr. Chudgar's complaint. On September 27, 2010, the investigator issued the Report of Investigation (ROI) in this case. In the ROI, the investigator identified two disclosures. First, Mr. Chudgar complained that a software change he was asked to archive was incomplete and could have put a worker in danger. With regard to the first disclosure, the investigator could not conclude from the evidence that the complainant reasonably believed that there was a substantial danger to employees or the public. As for the second disclosure, Mr. Chudgar complained that SRR violated a procedure because a safety committee had not approved the changes recommended in the software design package and thus it was not implemented according to approved procedure. He said that the Process Control Operation Support engineers were not following instructions to supersede the previous revisions when "baselining" the files.[2] The investigator concluded that the evidence suggested that there was no danger to employees or the plant from proceeding to baseline the files. The investigator also found that there was a factual dispute as to whether the complainant's reassignment to Principal Process Computer Analyst during the transition resulted in an adverse material change in his employment conditions that could be considered an act of retaliation. The investigator was not able to determine from the evidence that Mr. Chudgar reasonably believed that the software change posed a "substantial and specific danger" to public health or safety. When addressing the issue of whether the SRR decision makers had actual or constructive knowledge of Mr. Chudgar's complaint, the investigator found that it was likely that they did not. Moreover, the investigator concluded that it is likely that SRR would be able to offer "compelling evidence" that it would have reassigned Mr. Chudgar in the absence of any protected disclosure.

On December 8, 2010, SRR filed a Motion to Dismiss. *See* Motion to Dismiss (December 8, 2010). Mr. Chudgar filed a Response to the Motion on December 21, 2010. *See* Complainant's Response to Motion to Dismiss (December 21, 2010) (Response). SRR filed an additional affidavit on January 6, 2011. *See* Affidavit of Kim Cassara (January 6, 2011).

C. Factual Overview

Mr. Chudgar, who holds a masters degree in chemical engineering, has been employed at the Savannah River Site (SRS) since 1988. At SRS he held various jobs and, according to Mr. Chudgar, he was a design engineer earlier during his employment at SRS. In April 2009, he was a Senior Engineer A for Washington Savannah River Company (WSRC), then the prime contractor at SRS. Mr. Chudgar's job was to electronically file software and software revisions as they were created. This software was written and tested by design engineers, implementing engineers and software end users who are tasked with designing, implementing, critiquing and trouble-shooting the software. Mr. Chudgar acknowledged that he did not use his chemical engineering background to perform his duties as a Senior Engineer A, and other employees described his duties as clerical.

[2] Baselining is adding software revisions to the existing software in the library, thereby establishing a new baseline for the software or hardware.

In July 2009, SRR became the prime contractor for nuclear clean-up at SRS. During the transition from WSRC to SRR, a management team was selected to evaluate all applicants for employment under the new contract. The team members were SRR managers and other managers chosen based on their expertise in the various functional areas that had vacancies. From this team, "functional evaluation panels" were created to evaluate each applicant in a functional area. Each panel had three members: (1) a SRR functional lead; (2) a WSRC employee; and (3) an independent human resources contractor not employed by SRR or WSRC. All exempt WSRC employees had to apply for employment under the new SRR contract and each employee could apply for three jobs. SRR offered forms and assistance to employees through a resume resource center and also created a video that explained the application process. Applicants were asked to answer eight competency-based questions, and could also add supplemental information to their application. The panel restricted its evaluation to the application package—they did not review or accept performance evaluations, nor did they interview or solicit information from the applicant's managers or colleagues. The panel that evaluated Mr. Chudgar's application found it was not well-prepared and the responses were poorly written and difficult to understand. They rated the application very low and recommended that SRR not hire Mr. Chudgar. However, SRR hired all of the applicants. Over 500 applicants were offered engineering positions and 12 were placed in non-engineering positions. The twelve employees who were not offered engineering positions, including Mr. Chudgar, were offered other opportunities. The complainant was offered and accepted his current position as a Principal Process Computer Analyst.

II. The Legal Standard

The Part 708 regulations provide an administrative mechanism for resolving whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the complainant and the contractor with regard to their allegations and defenses, and prescribe the criteria for reviewing and analyzing the allegations and defenses.

A. The Complainant's Burden

It is the burden of the Complainant under Part 708 to establish, by a preponderance of the evidence, that he or she made a protected disclosure, participated in a proceeding, or refused to participate as described in 10 C.F.R, § 708.5, and that such act was a contributing factor to a retaliatory action 10 C.F.R. §708.9. [3] If Mr. Chudgar meets this threshold showing with regard to any of his alleged protected disclosures, he must then prove that at least one of his disclosures was a contributing factor to his reassignment to a non-engineering position or any other alleged act of retaliation. One way a complainant can meet this evidentiary burden is to provide evidence that "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of

[3] The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua Lucero*, Case No. TBH-0039 (2007), *citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990).

time that a reasonable person could conclude that the disclosure was a factor in a personnel action." *See David Moses*, Case No. TBH-0066 (2008): *Mark D. Siciliano*, Case No. TBH-0098 (2010).

B. The Contractor's Burden

If the complainant satisfies his evidentiary burden, the burden then shifts to the Contractor to show, by clear and convincing evidence, that it would have taken the same action absent any protected disclosures. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See Mark D. Siciliano*, Case No TBH-0098 (2010); *Casey von Bargen*, Case No. TBH-0034 (2007). OHA Hearing Officers have relied on the Federal Circuit for guidance in evaluating whether the contractor has met its evidentiary burden in a Part 708 case. *See David Moses*, Case No. TBH-0066 (2008); *Dennis Patterson*, Case No. TBH-0047 (2008). The Federal Circuit, in cases interpreting the federal Whistleblower Protection Act, which is the model for Part 708, examines: (1) the strength of the employer's reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees . . ." *See Kalil v. Dept. of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007).

III. The Contractor's Motion to Dismiss

In its Motion, the contractor argues that Mr. Chudgar's complaint should be dismissed for the following reasons:

1. Complainant has no evidence that he engaged in protected conduct; and

2. The officials taking the alleged retaliatory action did not have actual or constructive knowledge of Mr. Chudgar's complaint.

Motion to Dismiss at 1.

Under the Part 708 regulations, dismissal of a complaint for lack of jurisdiction or other good cause is appropriate if (1) the complaint is untimely; or (2) if the facts, as alleged in the complaint, do not present issues for which relief can be granted under Part 708, or (3) the complainant filed a complaint under state or other applicable law concerning the same facts that are alleged in the Part 708 complaint, or (4) the complaint is frivolous on its face, or (5) the complaint has been rendered moot by subsequent events; or (6) the Respondent has made a formal offer of relief that is equivalent to what could be provided as a remedy under Part 708. 10 C.F.R. § 708.17 (c). Our previous cases state that such a motion should only be granted if it is supported by "clear and convincing" evidence. *See also Fluor Daniel Fernald*, 27 DOE ¶ 87,532 at 89,163 (1999) (motion to dismiss should only be granted where there are clear and convincing grounds for dismissal); *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994) (describing dismissal as "the

most severe sanction that we may apply" and thus should be used sparingly). For the reasons discussed below, I will grant the contractor's motion to dismiss.

A. Whether There is Evidence of Protected Conduct

SRR alleges that Chudgar could not have reasonably believed that his disclosures concerned a substantial risk of harm to employees or the public or a substantial violation of law or regulation. In support of this argument, SRR explains that Chudgar's job was merely to act as a librarian for engineering software—i.e., to archive existing software and revisions to that software. He did not, according to SRR, have the background necessary to critique the software that he was tasked to file and he lacked the expertise to make an accurate assessment of the safety implications, if any, of the software changes.

1. Disclosure 1

According to the record, on April 8, 2009, Mr. Jim Coleman, Production Lead Engineer at WSRC, brought Mr. Chudgar a revision to enter into the library. That revision was titled CMT-0133. The revision contained schematics showing a software change (that complainant needed to record) and a hardware change that was implemented using a separate document.[4] This software change was intended to change the function of the pump used to move liquid from one storage tank to another. The software had been tested and accepted on April 7-8, 2009, and was actually in use prior to Mr. Coleman asking Mr. Chudgar to file the software. Little Affidavit at 4. Complainant knew that the software had been tested and accepted by two systems engineers. *Id*. Mr. Coleman had to make additional changes, but could not continue with his work until the changes in the software package were archived, thereby establishing a "baseline." Mr. Chudgar examined the schematics and realized that they depicted a hardware change but there was no documentation about the hardware change in the package. Since the documentation did not contain an explanation of the hardware change, Mr. Chudgar refused to archive the software. Mr. Chudgar refused because he believed that the documentation should contain an explanation of the hardware change in the package. Mr. Coleman explained that the hardware change was controlled by another document. However, Complainant refused to archive the software package and the men argued.

At this point, the facts are in dispute. SRR claims that Chudgar did not elevate the issue to management nor did he call for a "time out" or a "stop work."[5] Motion to Dismiss at 3. According to SRR, management was unaware of the dispute until Chudgar filed his complaint on April 13, 2009. However, Mr. Chudgar contends that on April 8, 2009, he called the Quality Assurance Manager, who advised Mr. Coleman to file a Non-Conformance Report (NCR) and enter his concern into the Site Tracking, Analysis and

[4] Significant software and hardware changes are controlled by a Design Change Form (DCF). Software changes are tracked using a Computer Program Modification Traveller (CMT).

[5] A "time out" is an informal process used to address safety concerns where an employee (1) feels uncomfortable in performing a task or (2) observes an unsafe condition that they want to correct.

Reporting (STAR) system.[6] The QA manager was not willing to provide further direction to Mr. Coleman and Mr. Chudgar without viewing the actual documents in question. The QA manager did not meet or speak with either man after the incident. There is no evidence that Mr. Chudgar or Mr. Coleman filed a NCR. In fact, Mr. Chudgar left the office for the weekend, assuming that Mr. Coleman would not continue with the changes. [7] Mr. Chudgar did not make any further report until April 13, 2009, when he filed his complaint. The Office of Employee Concerns then contacted WSRC management about the complaint, and the staff began an investigation of the concern. They also issued a timeout. Motion to Dismiss at 5. The investigation concluded that there was no safety concern and that the engineers could file an "as found" document in the library.[8] According to WSRC management, DOE also conducted an independent investigation and concluded that there was no safety concern. *See* Little Affidavit at 5.

Whether Chudgar reasonably believed that his disclosure revealed a substantial and specific danger to employees or the public can be decided after consideration of the available facts. There is evidence that he escalated the concern to the QA Manager. According to Mr. Chudgar, he believed that Mr. Coleman would not go forward with the changes after the conversation with the QA Manager and Mr. Chudgar then went home for the weekend. However, it is not clear why Mr. Chudgar did not file an NCR if he thought that someone could be hurt if the software package was archived as presented to him. This situation seems to be the type of event that merits a NCR—significant enough to report to management, but not urgent enough to call a time out. Further, even though Mr. Chudgar argues that the QA manager directed Mr. Coleman to file the report, it is not logical that Mr. Coleman, who did not believe there was any problem, would file such a report. Further, it is customary that the software packages presented to Mr. Chudgar for archiving have been tested by the design engineers prior to their transfer to the library for archiving. Thus, the evidence before me indicates that Mr. Chudgar's actions on that day do not reflect the actions of an individual who believed that archiving the software package would result in a substantial and specific danger to employees at SRR or to public health or safety. As a 20-year employee of the plant, he was familiar with the "time out" procedure available to any employee with a safety concern, yet he did not avail himself of this alternative. He did not identify a specific danger to the employees but rather alluded to a possible danger to anyone who may work on the hardware in the future. After Mr. Chudgar reported his concerns when he returned to work the following week, SRR management did call a time out to investigate his concern. Little Affidavit at 5. WSRC management determined that the software was functioning correctly but that the DCF needed a drawing reflecting a hardware change, as Mr. Chudgar had stated in his complaint. DOE also investigated the issue and concurred with the WSRC conclusion that there was no safety issue but that an "as found" drawing should be added to the DCF. Little Affidavit at 5.

---

[6] A NCR is required when an item fails to satisfy required technical, design or quality requirements, is of indeterminate quality, is found to be suspect (counterfeit), has documentation deficiencies which render the item indeterminate, or meets one or more of the previous conditions but its continued use is required. The STAR system is available to all employees to identify and report safety concerns.

[7] Another engineer entered the changes in to the library after Mr. Chudgar left for the weekend.

[8] An "as found" document is an existing design document that defines and reflects what the field condition should be. It is placed into a DCF as a convenience for the user.

To sum up, no reasonable trier of fact could conclude that Mr. Chudgar had established by a preponderance of the evidence that the missing documentation at issue rose to the level of "a substantial and specific danger to employees or to public health or safety" under Part 708. Accordingly, I will dismiss Disclosure 1 from this proceeding.

2. Disclosure 2

On April 23, 2009, Mr. Chudgar amended his complaint arguing that WSRC had violated its procedure when it changed to a new operating system on its computers. The change involved approximately 500 files, much larger than the typical software update that Mr. Chudgar was assigned to catalog and record. Mr. Chudgar reviewed the change documentation and alleged that it violated WSRC procedure because it was lacking the proper approvals by the Facility Operations Safety Committee (FOSC). Although the software changes associated with the concern had been tested successfully off line and were scheduled for online test on April 27, 2009, WSRC management asked a team of engineers ("the investigation team") to review the changes in response to Mr. Chudgar's amended complaint.

According to WSRC, the FOSC must approve only changes which are "Safety Significant," and only 20 pages of the 500 page package were safety significant. Little Affidavit at 6. Those pages had indeed been approved. Mr. Chudgar's manager, Mr. Tipton, asked Mr. Chudgar to identify his concerns and notify the appropriate manager if modifications were made but had not been captured in the change document. However, Mr. Chudgar did not identify any safety concerns and, according to Mr. Tipton, stated that he was satisfied with the package. The fact that Mr. Chudgar could not articulate his concerns when asked undermines the reasonableness of any belief he may have held about the new system violating company procedures.

The investigation team could not determine Complainant's concern and contacted him for clarification. Mr. Chudgar complained that WSRC had not followed proper procedure, which was to record the final software product after multiple software revisions, and not catalog every revision to the software. For the hardware changes, Mr. Chudgar complained that they should be revised every time there was a design change instead of only adding drawings that depicted the change. He also stated that the WSRC engineers did not follow WSRC procedures as set forth in Manual 2s, Procedure 1.3. Nonetheless, Mr. Chudgar did not provide any additional technical information or clarification of a safety issue, and the team still did not understand his concern. Little Affidavit at 6.

Based on the evidence, I conclude that Mr. Chudgar's second disclosure was actually a dispute with management over proper procedure and does not rise to the level of a "substantial violation of a law, rule, or regulation." Mr. Chudgar complained that FOSC had not approved the change and that the method of cataloguing software was not correct. However, FOSC had approved that portion of the change package that was "safety significant." Thus, his concern was not reasonable since the contractor's safety committee had examined and approved the documents in question and he knew that the

software changes had been successfully tested. Complainant also alleged that WSRC did not follow its own procedures. However, WSRC contends that Manual 2s, Procedure 1.3 was not applicable to the engineering procedures that Mr. Chudgar catalogued but actually set forth administrative procedures for Operations and Maintenance Activities. Further, Mr. Chudgar could not articulate to the investigation team any safety problem he found with the new changes. Thus, I cannot find that the disclosures by Mr. Chudgar rise to the level of protected disclosures. There is no evidence that they reveal a substantial violation of law, rule or regulation.[9] Accordingly, I will dismiss Disclosure 2 from this proceeding. [10]

IV. Conclusion

I find that the two disclosures set forth in Mr. Chudgar's Complaint of Retaliation do not rise to the level of a protected disclosure under 10 CFR 708.5(a). Accordingly, I conclude that SRR's Motion to Dismiss should be granted and Mr. Chudgar's Complaint of Retaliation should be dismissed.

It Is Therefore ORDERED That:

(1) The Motion to Dismiss filed by Savannah River Remediation, LLC on December 8, 2010, Case No. TBZ-0100, be and hereby is granted.

(2) The Complaint filed by Vinod C. Chudgar against Savannah River Remediation, LLC, on July 13, 2009, Case No. TBH-0100, be and hereby is dismissed.

(3) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the

[9] According to Albert Zaharia, an engineer who does the same job as Complainant, the files do not need to be opened except to compare the software version to the paperwork. Reviewing the electronic files is not part of the CM process.

[10] Even assuming, *arguendo*, that either of the two disclosures could be considered protected under Part 708, I find that neither was a contributing factor to an act of retaliation. Mr. Chudgar was unable to show that (1) the person taking the adverse action had actual or constructive knowledge of the protected disclosure and (2) the alleged retaliatory act occurred sufficiently soon after the protected disclosure to permit a reasonable inference that the protected disclosure was a contributing factor. *See generally, Dean P. Dennis*, TBA-0072 at 4 (2009). SRR submitted affidavits from two of the three panel members who evaluated Mr. Chudgar's application, and both stated that they did not know that he had filed a Part 708 complaint. The third panel member was an independent contractor who did not work for either SRR or WSRC. Furthermore, Mr. Chudgar's reassignment to a non-engineering position is not an act of retaliation under Part 708. An employment action is not "retaliation" unless it results in a materially adverse change in employment conditions comparable to a termination of employment, a demotion evidenced by decrease in wages or other negative action with respect to the compensation, terms, condition or privileges of employment. *See Dennis Patterson*, Case No. TBH-0047 (2008). There was no negative effect on the terms and conditions of the complainant's employment because his new position maintained his salary and grade level.

decision in accordance with 10 C.F.R. § 708.32.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: January 13, 2011

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

January 6, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motion for Summary Judgment
Initial Agency Decision

Petitioners:	Mary Ravage Medcor, Inc.
Dates of Filings:	June 9, 2010 November 12, 2010
Case Numbers:	TBH-0102 TBZ-0102

This Decision will consider a Motion for Summary Judgment filed by Medcor, Inc. (Medcor), a subcontractor providing medical services at the Department of Energy's (DOE) Hanford Site, in connection with the pending Complaint of Retaliation filed by Mary Ravage against Medcor under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The Office of Hearings and Appeals (OHA) assigned the hearing component of Ms. Ravage's Part 708 Complaint proceeding, Case No. TBH-0102, and Medcor's Motion for Summary Judgment, Case No. TBZ-0102. For the reasons set forth below, I have determined that Medcor's Motion should be granted and that Ms. Ravage's Complaint of Retaliation should be dismissed.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1)-(3). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36. Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. § 708.21, 708.32.

B. Procedural History

Ms. Ravage filed her Part 708 Complaint on January 21, 2010,[1] with the DOE's Office of River Protection (ORP). In her Complaint, Ms. Ravage alleged that she had made protected disclosures and, as a result of her so doing, Medcor engaged in a series of retaliatory actions against her, including terminating her on January 6, 2010.

Medcor filed responses to the Part 708 Complaint on March 4, 2010, and on May 14, 2010, contesting that Ms. Ravage had made any disclosure protected under Part 708, and arguing that Ms. Ravage's termination was not retaliatory since the decision to terminate her was made for valid business reasons unrelated to her alleged protected disclosures. ORP's Employee Concerns Manager transmitted the Complaint to OHA for an investigation followed by a hearing, when informal resolution of the Complaint proved unsuccessful. OHA received Ms. Ravage's Complaint on June 9, 2010.

On June 9, 2010, the OHA Director appointed an Investigator (OHA Investigator) who conducted an investigation into the allegations contained in Ms. Ravage's Complaint. On September 8, 2010, the OHA Investigator issued the Report of Investigation (ROI) in this case. In the ROI, the OHA Investigator concluded that Ms. Ravage was alleging a single protected disclosure. With regard to that one disclosure, the OHA Investigator found that Ms. Ravage had not demonstrated, by a preponderance of the evidence, that she had made a protected disclosure that was a contributing factor to the decision to terminate her. Immediately after the ROI was issued, the OHA Director appointed me the Hearing Officer in this case. On November 12, 2010, Medcor filed the present motion, claiming that, as a matter of law, Ms. Ravage has not met, and cannot meet, her burden of proving that she made a protected disclosure.

C. Factual Overview

[1] The Complaint is dated January 20, 2010. The Report of Investigation indicates that the Complaint was filed on January 21, 2010. The Memorandum transferring the Complaint from the ORP to this office for investigation and hearing indicates that the ORP received the Complaint on April 28, 2010.

Ms. Ravage began working for Medcor as a registered nurse on June 15, 2009. Transcript of November 4, 2010, Deposition (hereinafter Tr.) at 17. Ms. Ravage asserts that, four months into her employment tenure, on October 8, 2009, she arrived at work and found a co-worker, Kristine Welsh, "crying in a fetal position." *Id.* According to Ms. Ravage, Welsh informed her that she had been "struck in anger" the previous evening by XXXXX, a co-worker of both Ravage and Welsh. *Id.* Ms. Ravage contends that she found Welsh's allegation credible because she too had been struck by XXXXX during the previous week. *Id.* Ms. Ravage verbally reported Welsh's allegations to Medcor's Director of Operations, Cindi McCormack, that evening. Ms. Ravage asserts that she also reported being struck by Welsh during her October 8, 2009, conversation with McCormack. Tr. at 32. McCormack, however, claims she has no recollection of being informed by Ms. Ravage during the October 8, 2009, conversation that XXXXX had struck Ms. Ravage. Welsh subsequently informed McCormack that, on October 7, 2009, XXXXX had "slapped my left arm pretty hard."[2] October 12, 2009, email from Welsh to McCormack.[3]

On October 28, 2009, XXXXX was promoted to Lead Nurse, a position for which Ms. Ravage had also applied. On October 29, 2009, Ms. Ravage was promoted from a part-time nursing position to a full-time nursing position.

On November 1, 2009, Ms. Ravage sent an e-mail to McCormack reiterating the concerns that she had verbally expressed. Ms. Ravage's November 1, 2009, written account does not assert that she was ever struck by XXXXX. It does, however, accuse XXXXX of speaking to her with "an angry voice and with a mean face." November 1, 2009, e-mail from Ms. Ravage to McCormack.

On November 11, 2009, Medcor issued a written warning to Ms. Ravage. The November 11, 2009, written warning alleged that Ms. Ravage had signed an inaccurately completed laboratory form. Medcor issued a second written warning to Ms. Ravage on December 3, 2009. The second written warning was issued by Medcor after Ms. Ravage allegedly faxed a form containing confidential patient information to non-authorized personnel. On December 8, 2009, two members of Medcor's supervisory team met with Ms. Ravage to discuss a number of Medcor's concerns. During this meeting, the supervisors informed Ms. Ravage that future problems could result in disciplinary action including termination, and provided Ms. Ravage with a corrective action plan.

On January 6, 2010, Medcor asked Ms. Ravage to resign. She refused to resign, and Medcor terminated her employment. Tr. at 19.

---

[2] Welsh subsequently described the incident as "an assault, being physically slapped in anger on the left arm by another nurse." October 26, 2009, letter from Welsh to Ted Feiganbaum.

[3] Medcor's Human Resources (HR) Director, Julia Philippova, conducted an in-house investigation of Welsh's allegations. In response to the HR's inquiries, the two other persons present when Welsh was allegedly slapped in the arm, XXXXX and Geri Bauer, both denied that XXXXX had slapped or hit Welsh. November 18, 2009, letter from Philippova to Welsh. The HR Director closed her investigation after the other alleged eyewitnesses did not corroborate Welsh's allegations.

On January 21, 2010, Ms. Ravage filed her Complaint. The Complaint does not specifically identify any protected disclosures, stating only that "Medcor had been given copious warning[s] that there were issues in their Richland operation and the response was to try and reign in the squeaky wheel." Complaint at 4. However, the Complaint alleges that XXXXX systematically harassed and undermined Ravage in retaliation for her reporting Welsh's allegation to McCormack.[4] Complaint at 1. The Complaint also alleges that XXXXX had struck Ms. Ravage approximately a week before the alleged incident involving Welsh.[5]

On November 12, 2010, Medcor submitted the present motion contending that Ms. Ravage has not met her burden of proof and that summary judgment should accordingly be entered in its favor. Medcor's Motion for Summary Judgment (Motion) at 5. Specifically, the Motion asserts that Ms. Ravage's report of an alleged arm-slapping incident does not constitute a protected disclosure under 10 C.F.R. § 708.5. *Id.* Ms. Ravage filed a Cross-Motion for Partial Summary Judgment on November 12, 2010, and submitted a supplemental response to Medcor's Motion on November 22, 2010. Ms. Ravage's Cross-Motion requests a ruling that her report of an alleged arm-slapping incident constitutes a protected disclosure. Supplemental Response at 1. Ms. Ravage asserts that her October 8, 2009, disclosure meets two of the criteria for protected disclosures set forth at § 708.5. Specifically, Ms. Ravage asserts that her disclosure communicated a reasonable belief that "XXXXX posed a substantial and significant danger to employees" under §708.5(a) (2) and that the reported incident "was a violation of law" under §708.5(a) (1). *Id.*

II. The Legal Standards

As noted above, the regulations set forth at 10 C.F.R. Part 708 provide an administrative mechanism for resolving whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the Complainant and the contractor with regard to their allegations and defenses, and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

A. The Complainant's Burden

It is the burden of the Complainant under Part 708 to establish, by a preponderance of the evidence, that he or she made a protected disclosure, participated in a proceeding, or refused to

[4] Ravage's Complaint also contends that she had complained to McCormack that XXXXX was constantly harassing her. The Complaint further alleges that Ravage had informed McCormack and Medcor's CEO that she considered XXXXX a threat to her safety. Compliant at 7. The Complaint also asserted that Ravage had reported to Medcor's CEO that Medcor's chain of commend was badly broken. *Id.* The Complaint does not, however, indicate that any of these complaints on her part contributed to Medcor's January 4, 2010, decision to terminate her.

[5] Ravage's husband, Dr. Chris Ravage, M.D., wrote Bennet W. Petersen, Medcor's Chief Operating Officer, on December 22, 2009, to express his concerns about his wife's relationship with XXXXX, who was now her supervisor. Dr. Ravage accused XXXXX of acting in an abusive manner towards Ms. Ravage and asserted that XXXXX had hip-checked Ms. Ravage during the same week that XXXXX had allegedly slapped Welsh. December 22, 2009, email from Dr. Ravage to Petersen at 2. This is the first instance where the claim that XXXXX struck Ms. Ravage appears in writing. Dr. Ravage accused XXXXX of having a vendetta against Ms. Ravage which he attributed to two causes, stating: "XXXXX has a personality disorder" and that Ms. Ravage "was able to back up another nurse's complaint that [XXXXX] had struck her in anger." *Id.*

participate as described in 10 C.F.R. § 708.5, and that such act was a contributing factor to a retaliatory action. 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua Lucero*, Case No. TBH-0039 (2007), *citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990).

Under 10 C.F.R. Part 708, proving, by a preponderance of evidence, that one has made a protected disclosure is an essential element of a Complainant's case. If Ms. Ravage cannot meet this threshold showing, then judgment cannot be awarded in her favor in the present proceeding.

Section 708.5 sets forth the applicable definition of protected disclosure. Under § 708.5:

> If you are an employee of a contractor, you may file a complaint against your employer alleging that you have been subject to retaliation for: (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you *reasonably* believe reveals-- (1) A *substantial* violation of a law, rule, or regulation; [or] (2) A *substantial and specific* danger to employees or to public health or safety[.]

10 C.F.R. § 708.5(a)(1) and (2) (emphasis supplied).

Although Medcor has captioned its motion as a Motion to Dismiss, it is more accurately characterized as a Motion for Summary Judgment. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment may be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. A moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Celotex v. Catrett*, 106 S. Ct. 2548, 2552-2553 (1986). The Supreme Court has further articulated the following test: "If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986) (*Matsushita*).

III. Analysis

A. Whether Ms. Ravage has disclosed information that she reasonably believed reveals a substantial violation of a law, rule, or regulation

Citing Washington State law, Ms. Ravage asserts that "the incident that was reported was a violation of law, and therefore was a [protected disclosure]." Ms. Ravage is correct that intentionally slapping a fellow employee could violate state law depending on the circumstances and severity of the hitting. However, reporting a reasonable belief of a violation of a law, rule or regulation does not suffice to qualify an individual for protection under 10 C.F.R. Part 708. Under Part 708, a protected disclosure must communicate a reasonable belief of a *substantial* violation of a law, rule or regulation in order to receive protection. 10 C.F.R. § 708.5(a)(1). In the present case, the victim contemporaneously described the alleged incident as an intentional hard arm slap. While such an arm slap may have resulted in a technical violation of the law, it certainly did not constitute a sufficiently *substantial* violation of law to constitute a protected disclosure under § 708.5(a) (1).

Ms. Ravage contends that "Medcor downplayed the violence involved." Ravage's November 12, 2010, submission at 1. She further states: "It is our contention that the assault was violent, not isolated, and XXXXX showed a consistent pattern of aggressive, abusive behavior." Supplemental Submission at 1. However, Welsh's own actions, as well as her contemporaneous description of the alleged incident, indicate that she did not believe that a substantial violation of law had occurred. There is no evidence in the record that Welsh ever contacted law enforcement authorities to report this alleged incident. Furthermore, it is suspect that she did not immediately report the incident to Medcor officials. In fact, it was not until McCormack contacted her on October 9, 2009, two days after the alleged incident's occurrence, that she first mentioned the incident to Medcor's management. Affidavit of Cindi D. McCormack at 1. At McCormack's request, Welsh provided a written description of the alleged incident, in which she stated that XXXXX "slapped my left arm pretty hard." October 12, 2009, e-mail from Welsh to McCormack. Thus, I do not accept that Ms. Ravage could have reasonably believed that a substantial violation of law had occurred based upon her October 8, 2009, conversation with Welsh concerning the alleged incident.

Since the record does not contain any reliable evidence supporting her contention that she reasonably believed that a substantial violation of law had occurred, no reasonable trier of fact could find in her favor on this issue. *Matsushita,* 475 U.S. at 597. Accordingly, I am granting summary judgment in favor of Medcor on the issue of whether Ms. Ravage has disclosed information that she reasonably believed reveals a substantial violation of a law, rule, or regulation.

B. Whether Ms. Ravage has disclosed information that she reasonably believed revealed a substantial and specific danger to employees or to public health or safety.

Ms. Ravage asserts that it was her "reasonable belief that XXXXX posed a substantial and significant danger to employees." Ravage's November 12, 2010, submission at 1. Medcor asserts that: "Even if the incident Ms. Ravage disclosed did occur, her reporting of this second-hand information does not rise to the level of a protected disclosure, because Ms. Ravage could not have reasonably believed that this 'arm slap,' which she did not witness, revealed a substantial and specific danger to employees or to public health or safety." Medcor's Motion at 1.

Ms. Ravage's Supplemental Response to Medcor's Motion essentially concedes the issue. Ms. Ravage states: "I agree with [Counsel for Medcor's] statement that 'no reasonable person would believe that a simple isolated slap on the arm . . . poses . . . a danger. . . . It is our contention that the assault was violent, not isolated, and XXXXX showed a consistent pattern of aggressive abusive behavior." Supplemental Response at 1. As discussed above, the alleged victim described the reported incident as a single, hard slap to the arm. No rational trier of fact could conclude that even a particularly vigorous arm-slapper poses a substantial and specific danger to employees or to public health or safety.

After conceding that an arm-slapping nurse does not pose a substantial and specific danger to employees or to public health or safety, Ms. Ravage now attempts to re-characterize her alleged October 8, 2009, disclosure by asserting that she had reported a pattern of aggressive, violent, and abusive behavior, as well as, an alleged incident in which XXXXX hip-checked Ms. Ravage, to McCormack during their conversation.

1. Ms. Ravage's Claim that She Reported a Hip-Checking Incident to McCormack on October 8, 2009.

Ms. Ravage claims that she was hip-checked by XXXXX, and reported the alleged hip-checking incident to McCormack during their October 8, 2009, conversation. However, this claim is simply not credible. There is no evidence in the record, including her November 4, 2010, deposition testimony, supporting her contention that she was hip-checked by XXXXX. Those accounts of the alleged hip-checking incident provided by Ms. Ravage are not consistent. While her Supplemental Submission states that she had received "a hip check like in a hockey game, and not a simple brushing aside," her initial deposition testimony indicates only that XXXXX had struck Ms. Ravage with her elbow while brushing her aside.[6] Tr. at 37-38.

Moreover, although the record contains a number of communications from Ms. Ravage to Medcor officials complaining about XXXXX between October 8, 2009, and December 22, 2009, (when her husband made the allegation in an email to Petersen; *see* note 5, *supra*) none of these communications indicate that XXXXX had struck Ms. Ravage.[7] At her deposition, Medcor's counsel challenged Ms. Ravage to identify any document in the record other than her January 21, 2010, Compliant, in which she asserted that she had been struck by XXXXX. Ms. Ravage could not do so. Tr. at 40-42, 46.

---

[6] She subsequently, in response to a clearly leading question posed by her advocate, amended her testimony by indicating that she was both elbowed and hip-checked. *Id.* at 75.

[7] On November 1, 2009, Ms. Ravage sent an e-mail to McCormack complaining that XXXXX had spoken to her "in an angry voice and with a mean face." November 1, 2009, email from Ms. Ravage to McCormack. In this e-mail, Ms. Ravage related her account of the conversation that she had with Welsh on October 8, 2009. *Id.* However, the November 1, 2009, e-mail does not contain any discussion whatsoever of the alleged hip-checking incident. On December 7, 2009, Ms. Ravage sent McCormack an e-mail complaining about XXXXX's aggressiveness. She complained that XXXXX had spoken to her in a "harsh voice" with "an aggressive face." She further stated that XXXXX had wrongly accused her on several occasions and indicated her concern that XXXXX had a vendetta against her. Ms. Ravage accused XXXXX of having a "history of violence against co-workers," and stated that she was worried about her safety. December 7, 2009, e-mail from Ms. Ravage to McCormack.

Furthermore, there is no evidence in the record that Ms. Ravage reported the alleged hip-checking incident to McCormack during their October 8, 2009, conversation. During her deposition testimony, Ms. Ravage admitted that she does not know if she informed McCormack of this incident during their October 8, 2009, conversation. Tr. at 35. A sworn affidavit signed by McCormack indicates that "at no time did . . . Mary Ravage inform me that Ms. Ravage had been struck by XXXXX." November 12, 2010, Affidavit of Cindi D. McCormack at ¶ 6.

Considering all the evidence in the light most favorable to the non-moving party, Ms. Ravage, I find that Ms. Ravage will not meet her evidentiary burden regarding an alleged hip-checking incident.

2. Ms. Ravage's Claim that she Reported a Pattern of Aggressive, Violent, and Abusive Behavior to McCormack on October 8, 2009.

As discussed above, Ms. Ravage has on several occasions accused XXXXX of aggressive and abusive behavior in her correspondence with Medcor and other officials. However, Ms. Ravage has repeatedly indicated that this alleged pattern of abuse and aggressiveness was motivated by, and began occurring after, Ms. Ravage's alleged October 9, 2009, disclosures. In her Complaint, Ms. Ravage states that "very shortly after" she reported the alleged arm-slapping incident to McCormack, "XXXXX began systematically harassing and undermining [Ms. Ravage]." Complaint at 1. During her deposition testimony, Ms. Ravage stated that XXXXX had started being aggressive to her at some point after Medcor's investigation of the alleged arm-slapping incident had been concluded.[8] Tr. at 16.

While Ms. Ravage claims that she had reported a pattern of abusive, violent, and aggressive behavior on the part of XXXXX during her October 9, 2009, conversation with McCormack, the evidence in the record does not support that claim. In fact, the evidence undercuts it.

Since the record does not contain any reliable evidence supporting Ms. Ravage's contention that she has disclosed information that she reasonably believed revealed a substantial and specific danger to employees or to public health or safety, no reasonable trier of fact could find in her favor on this issue. *Matsushita*, 475 U.S. at 597. Simply put, no rational trier of fact could conclude that a nurse who may have committed simple battery at most presented a substantial and specific danger to employees or to public health or safety. Accordingly, I am granting summary judgment in favor of Medcor on the issue of whether Ms. Ravage has disclosed information that she reasonably believed revealed a substantial and specific danger to employees or to public health or safety.

After reviewing the record as a whole, I find that the record could not lead a rational trier of fact to conclude that Ms. Ravage made a protected disclosure under 10 C.F.R. § 708.5(a) on October 8, 2009. Ms. Ravage does not claim that she has made any other protected disclosures. Tr. at 13. Accordingly, I find that that no rational trier of fact could issue a judgment in favor of Ravage's Complaint under 10 C.F.R. Part 708.

---

[8] If XXXXX had in fact started a pattern of abusive behavior prior to the alleged disclosure, it would undercut Ms. Ravage's contention that such alleged abusive behavior was motivated by that protected disclosure.

Summary

As fully discussed above, I have found that the sole disclosure contained in Ms. Ravage's Complaint does not constitute a protected disclosure. Accordingly, I find that Medcor's Motion for Summary Judgment should be granted, and that Ms. Ravage's Cross-Motion and Complaint should be dismissed.

It Is Therefore Ordered That:

(1) The Motion for Summary Judgment filed by Medcor, Inc. on November 12, 2010, Case No. TBZ-0102, be and hereby is granted as set forth in paragraph (3) below.

(2) The Cross-Motion for Partial Summary Judgment filed by Mary Ravage on November 12, 2010, Case No. TBZ-0102, be and hereby is denied.

(3) The Complaint filed by Mary Ravage against Medcor, Inc. on January 21, 2010, Case No. TBH-0102, be and hereby is dismissed.

(3) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: January 6, 2011

February 14, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Names of Petitioner: Hansford F. Johnson

Dates of Filing: September 17, 2010

Case Number: TBH-0104

This Initial Agency Decision involves a Complaint of Retaliation filed by Hansford F. Johnson against B&W Pantex LLC (B&W) under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The complainant was an employee of B&W, the firm employed by DOE to manage and operate the Pantex Plant, where he was employed as a Program Manager, working as the plant energy manager until he retired on March 24, 2010. Mr. Johnson characterizes his retirement as a constructive discharge, alleging that he suffered harassment from his supervisor in the months preceding his retirement, and that this was in retaliation for activity protected under Part 708. For the reasons set forth below, I will deny Mr. Johnson's Complaint.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1)-(3). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower Complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent

fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

Mr. Johnson filed a Part 708 Complaint on September 8, 2008, with the Whistleblower Program Manager at the National Nuclear Security Administration's Service Center in Albuquerque, New Mexico. He filed an amendment to his Complaint on November 20, 2008. In his Complaint, Mr. Johnson alleged that he had made protected disclosures and, as a result of his so doing, B&W engaged in a series of retaliatory actions against him, including threatening to fire him and subjecting him to an internal audit. B&W filed its response to the Part 708 Complaint on December 10, 2008, contesting that Mr. Johnson had engaged in any conduct protected under Part 708, and arguing that his Complaint did not identify any acts of retaliation. The Whistleblower Program Manager transmitted the Complaint to OHA for an investigation, to be followed by a hearing, when informal resolution of the Complaint proved unsuccessful. While the case was pending before an OHA Investigator, Mr. Johnson requested that his Complaint be dismissed. On June 4, 2009, the OHA dismissed his Complaint.

On April 14, 2010, after leaving his employment with B&W on March 24, 2010, Mr. Johnson filed a new Part 708 Complaint with the Whistleblower Program Manager. In this Complaint, he referenced his earlier alleged protected disclosures and his previous Part 708 Complaint, and alleged that B&W management had retaliated against him by harassing and constructively discharging him. B&W filed a response to the Complaint on April 23, 2010, requesting that the Complaint be dismissed because Mr. Johnson was improperly attempting to reinstate his prior Complaint, which had been dismissed at his request, and because Mr. Johnson had not alleged an act of retaliation for which relief could be granted under Part 708. The Whistleblower Program Manager subsequently transmitted the Complaint to OHA for an investigation followed by a hearing.

On June 28, 2010, the OHA Director appointed an Investigator (OHA Investigator), who conducted an investigation into the allegations contained in Mr. Johnson's Complaint. The OHA Investigator issued a Report of Investigation (ROI) on September 17, 2010. In the ROI, the OHA Investigator noted that the filing of Mr. Johnson's previous Part 708 Complaint would constitute a protected activity under the regulations, which protect from retaliation conduct including "[p]articipating in . . . an administrative proceeding conducted under this regulation; . . . ." 10 C.F.R. § 708.5(b). However, the Investigator concluded that it was uncertain whether there was sufficient temporal proximity between the filing of Mr. Johnson's 2008 whistleblower Complaint and the harassment he allegedly experienced beginning in January 2010 to permit an inference that the Complaint was a contributing factor to the alleged retaliation. In addition, the Investigator, though finding that the OHA has held that a constructive discharge can form the basis for relief under Part 708, reached no conclusion as to whether the facts alleged by Mr. Johnson in this case would constitute a constructive discharge.

Immediately after the ROI was issued, the OHA Director appointed me the Hearing Officer in this case. On October 8, 2010, I sent a letter to the parties and asked them to submit briefs discussing the ROI, specifically identifying the parts of the ROI with which each party agreed and disagreed, and identifying facts in the record supporting the party's position. On October 28, 2010, B&W submitted its brief, in which it requested that the Complaint be dismissed. Mr. Johnson tendered his brief and a response to the Motion to Dismiss on November 9, 2010.

On November 24, 2010, I issued a decision granting B&W's Motion to Dismiss to the extent that the Complaint alleged any acts of retaliation other than the harassment and constructive discharge Mr. Johnson alleged occurred in 2010, and denied the Motion in all other respects. *B&W Pantex, LLC*, Case No. TBZ-0104 (2010) (complainant time-barred from alleging any acts of retaliation that he alleged in his first Complaint).

I subsequently convened a hearing in this case, in Amarillo, Texas, on December 1, 2010. Both parties submitted exhibits. B&W presented exhibits into the record which were lettered Exhibit A through Exhibit O, and Mr. Johnson submitted exhibits numbered Exhibit 1 through Exhibit 5. B&W presented as witnesses three B&W management employees, one HR official, and three of Mr. Johnson's co-workers. Mr. Johnson testified on his own behalf, and called his wife, his doctor, three DOE Pantex Site Office employees, and four B&W employees as witnesses.

C. Factual Background

Mr. Johnson alleges that, in 2007 and 2008, he made disclosures protected under Part 708 regarding the implementation of an Energy Savings Performance Contract (ESPC) at Pantex, including by filing a Complaint with the DOE Office of Inspector General (IG). An ESPC is a partnership between a Federal agency and an energy service company (ESC). The ESC conducts a comprehensive energy audit for the Federal facility and identifies improvements to save energy. In consultation with the Federal agency, the ESC designs and constructs a project that meets the agency's needs and arranges the necessary financing. The ESC guarantees that the improvements will generate energy cost savings sufficient to pay for the project over the term of the contract. After the contract ends, all additional cost savings accrue to the agency. Contract terms up to 25 years are allowed. Federal Energy Management Program: Energy Savings Performance Contracts, http://www1.eere.energy.gov/femp/financing/espcs.html.

Mr. Johnson claims he was subject to retaliation for his advocacy of the ESPC by virtue of an audit requested by Pantex Manager Dan Swaim. In March 2008, Mr. Swaim requested an internal audit of the ESPC, to review several issues, including Mr. Johnson's relationship with the owner of NORESCO, LLC, the ESC chosen for the Pantex ESPC. Mr. Johnson further alleges that, in late August 2008, he experienced "emotional distress" from negative interactions with his supervisor, Dale Stout, and that Mr. Stout gave him an increased workload and increasingly shorter deadlines to comply with. Allegedly pursuant to a Complaint by Mr. Stout about Mr. Johnson's performance, Mr. Johnson was subsequently asked by Pantex HR to respond to a Complaint about his work performance.

As noted above, Mr. Johnson filed a Part 708 Complaint in September 2008, but withdrew the Complaint in June 2009, after the Whistleblower Program Manager referred the Complaint to the OHA. Mr. Johnson alleges that he dropped this Complaint because he feared for his job.

In his present Complaint, Mr. Johnson alleges that he began to notice, in approximately January 2010, that Mr. Stout was again retaliating against him by demanding that major documents be finished within one day. Johnson also alleges that Mr. Stout would angrily ask a few hours later what Mr. Johnson was doing or why he was doing a particular function. It seemed to Mr. Johnson that Mr. Stout's conduct was "angrier and louder" every day. These incidents allegedly increased in frequency.

In March 2010, Mr. Johnson went to his physician regarding the stress he was experiencing on the job. His physician prescribed a tranquilizer and recommended that Mr. Johnson stay at home for one week. Mr. Johnson stayed home on sick leave during the week of March 15. Mr. Johnson alleges that, on March 22, 2010, his physician wrote on a Health Event Report Form that Mr. Johnson should not be returned to his previous work environment.

On March 23, 2010, Mr. Johnson met with Jeff Flowers, Mr. Stout's supervisor, and expressed his desire to work in a different location. Mr. Flowers instructed Mr. Johnson to report to him the following day. In his statement to the OHA Investigator, Mr. Johnson described the March 24th meeting as follows:

> I went to Mr. Flower's office at 8 am. He told me to come in and shut the door. He said, "So are you ready to go back to work?" I said, "Yes. Where am I going? He said, "Back to your cubicle." At this point I went into shock. I was dazed, and stayed that way for several weeks. I said, "Back to that same environment? No, I'm not going back there. Haven't you seen the doctor's restrictions? Haven't you seen the 53-B? I am under doctor's orders not to go back to that environment." He said "Reconsider." I said, "No. I can't." He said "Again, reconsider." I said, "No. You surely know I can't go back there." He turned around and grabbed a sheaf of papers. He put them in front of me. Without looking at them, I said "Are you firing me?!" He said, "No. I'm retiring you. Sign at the bottom." I said, "I don't want to retire. I can't afford to retire." He said, "Sign your name at the bottom." I said, "I can't retire. I'll lose my house." He said, "Sign." I signed, in shock. The rest of the day was a blur.

ROI at 9.

II. Analysis

A. Whether the Complainant Engaged in Protected Conduct

Under the regulations governing the DOE Contractor Employee Protection program, the complainant "has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under Section 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua Lucero*, 29 DOE ¶ 87,034 at 89,180 (2007) (citing *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

The Part 708 regulations specifically protect employees from retaliation for "[p]articipating in . . . an administrative proceeding conducted under this regulation; . . . ." 10 C.F.R. § 708.5(b). In the ROI, the OHA Investigator found, correctly, that filing a Part 708 Complaint constitutes a protected activity under the regulations. Mr. Johnson's filing of his first Part 708 Complaint in September 2008 began his participation in a Part 708 administrative proceeding, and his participation continued until June 2009, when he withdrew the Complaint. Thus, Mr. Johnson clearly engaged in protected activity, as defined under Section 708.5, from September 2008 to June 2009.

B. Whether Protected Activity Was a Contributing Factor in an Act of Retaliation

As noted above, in order to prevail in a Part 708 action, the complainant must show, by a preponderance of the evidence, that his protected activity was a contributing factor to a retaliatory action taken against him. Section 708.2 of the Contractor Employee Protection regulations defines retaliation as "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the disclosure of information." 10 C.F.R. § 708.2. Mr. Johnson alleges that B&W constructively discharged him on March 24, 2010.

The OHA has held that a constructive discharge can form the basis for relief under Part 708. *Richard L. Urie*, Case No. TBH-0063 (2008). In *Urie*, the hearing officer used the standard articulated in a Supreme Court case, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), as the standard to establish constructive discharge in the Part 708 context. Under this standard, for a whistleblower to establish that he or she was constructively discharged, the whistleblower must prove by a preponderance of the evidence that his or her working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Urie* at 11. This is an objective "reasonable employee" standard which cannot be triggered by an employee's subjective beliefs. *See Roman v. Porter*, 604 F. 3d 34, 42 (1st Cir. 2010).

1. Working Environment from January to March 2010

In his testimony, Mr. Johnson described being berated by Mr. Stout at work every day from January 2010 until Mr. Johnson's retirement in March 2010. Hearing Transcript (Tr.) at 68-69. He testified that, one to three times a day, Mr. Stout would come by his cubicle and, after joking with Johnson's co-workers, "would do one of those, what the hell are you doing? What -- every time I come by your cubicle, you're either looking at the computer, you're looking at a book, or you're reading the newspaper. And the tone of voice got vicious is what it was." *Id.* at 68. Mr. Johnson testified that, by March, "I was scared to come to work, literally." *Id.* at 69.

One can make a legitimate argument that being unfairly singled out for verbal abuse several times a day could indeed become intolerable. What is glaringly absent in this case, however, is any evidence, aside from Mr. Johnson's assertions, that such were in fact the conditions under which he worked.

Mr. Johnson's supervisor, Mr. Stout, testified that he tried to treat each of his employees the same, and thinks that he did. *Id.* at 235. He described an instance, on March 10, 2010, when he was working on a project with an approaching deadline, relying on input from Mr. Johnson. He stated that he walked by Mr. Johnson's cubicle and saw him reading a newspaper. After going to his office to think about this, he returned to Mr. Johnson's cubicle and said, "Fred, don't you have anything better to do." Tr. at 231. Mr. Stout testified that, after returning to his office, Mr. Johnson came and told him that "you can't come in and talk to me that way; I've been working all day and all that." *Id.*

One of Mr. Johnson's co-workers, David Griffis, who worked in a cubicle near Mr. Johnson, testified that he recalled an instance where Mr. Stout entered Mr. Johnson's cubicle and told him to "put the paper down; I need you to work on some project. You know, not in a conversational tone, but not -- you know, not overly loud. Loud enough for me to hear in the next cubicle, but that was about it." *Id.* at 220.

Mr. Griffis, who was new to Mr. Stout's group, stated that he was assigned a cubicle near Mr. Johnson's for about two and one-half weeks beginning in mid-February 2010. *Id.* at 223. Though this was a period in which Mr. Johnson describes being verbally accosted by Mr. Stout one to three times per day, Mr. Griffis testified that the instance he described was the only time he heard Mr. Stout raise his voice at Mr. Johnson. *Id.* at 224.

Aside from Mr. Johnson and Mr. Griffis, there were two other employees who worked in Mr. Stout's group, both of whom testified at the hearing. One of them, Boyd Deaver, stated that he never saw Mr. Stout single Mr. Johnson out by giving him more work than others, and did not recall Mr. Stout ever treating Mr. Johnson differently than his co-workers. *Id.* at 194. The other employee, David Koontz, agreed. *Id.* at 211. Having worked at Pantex for 37 years, Mr. Koontz described Mr. Stout as being "like any supervisor. You know, once in a while, when you don't do what you're supposed to do, you consider you're probably going to get your butt chewed out. And, you know, that's happened, but it's never been . . . you know, I guess I don't take work personal." *Id.* at 213.

Mr. Johnson did present evidence that he was exhibiting signs of stress during the period in question. A friend of Mr. Johnson's, John O'Brien, who works at the Pantex Site Office, testified that he saw a "decline" in Mr. Johnson, that he was more distracted, agitated, showing signs of "memory issues," and reported lack of sleep and stomach problems. *Id.* at 129. Mr. O'Brien stated that on the weekend prior to his resignation, Mr. Johnson "was very concerned about having to go back into that environment, and I was seriously questioning your ability to function in the environment, as you were perceiving it." *Id* at 130.

A doctor who treated Mr. Johnson during the period in question also testified at the hearing. He explained that Mr. Johnson had presented with symptoms of stress in August 2008, and that Mr. Johnson "reported that his working environment had contributed to most of the symptoms." *Id.* at 145. At that time, Mr. Johnson's doctor prescribed an anti-depressant, Zoloft. *Id.* Though this is an earlier period in which Mr. Johnson alleges that he suffered from emotional distress because of interactions with Mr. Stout, I note here the doctor's testimony as to the 2008 visit only as background, since I have already ruled that Mr. Johnson's previous allegations of retaliation are time-barred from being raised again in the present complaint.

The doctor testified that Mr. Johnson returned to see him on March 15, 2010, "complaining that his depression was worsening. He claimed that his boss at work has been, quote unquote, verbally abusive, making it hard on him to continue working there." *Id.* at 151-52. Because of this, the doctor increased Mr. Johnson's Zoloft dosage from 50 milligrams to 100 milligrams per day, and added a "small dose of Xanax," an anti-anxiety medication. *Id.* at 152. The doctor wrote a note requesting that Mr. Johnson be excused from work during the week of March 15 through 19, 2010. Exhibit 4. When Mr. Johnson returned to work on March 23, 2010, he brought with him a Health Event Report Form (Pantex Form 53-B), indicating that he had visited his doctor again on March 22, 2010. Exhibit 3. The form contained a diagnosis from the doctor of "Depression/Anxiety," and listed under restrictions, "No stressful environment." *Id.*

Mr. Johnson's wife also testified, and her testimony was consistent with the observations of Mr. O'Brien, and Mr. Johnson's doctor. Tr. at 183-84. All of this testimony is evidence that Mr. Johnson was experiencing stress during the period in question. But it is *not* evidence of Mr. Johnson's working conditions, viewed objectively. At best, it is circumstantial evidence of Mr. Johnson's subjective belief regarding those conditions, as it verifies that he contemporaneously complained about his work environment. It may also be circumstantial evidence that his work

environment caused him stress, to the extent one can infer this from the distress observed firsthand by these witnesses. Even then, as Mr. Johnson's doctor testified, a number of external factors can cause stress. "It could be marriage; it can be work; it can be financial problems. It can be anything, yes." *Id.* at 157.

From this evidence, therefore, I might find that Mr. Johnson *subjectively perceived* his working environment to be stressful and unpleasant, perhaps even intolerable for him. But, as noted above, this office, following the Supreme Court, applies an objective "reasonable person" standard to allegations of constructive discharge. That is, Mr. Johnson must prove by a preponderance of the evidence that his working conditions became so intolerable that a reasonable person in his position would have felt compelled to resign. *Urie* at 11. Without any direct evidence of those conditions, other than his own testimony, and with credible testimony in fact contradicting Mr. Johnson's assertions, I cannot find that he has met this burden.

2. Events of March 23 and March 24, 2010

The individual testified that, upon returning to work from leave on March 23, 2010, he reported to the plant medical department, Tr. at 20, which is the standard procedure for employees returning from medical leave. *Id.* at 95. He brought with him the form referenced above, Form 53-B, with the notation from his doctor, "No stressful environment," written as a restriction. *Id.* at 161, 166; Exhibit 3. Mr. Johnson testified that after he turned in this form to the medical department, it was returned to him, but "the restrictions weren't there anymore." Tr. at 173. However, a copy of this form was brought to the hearing by a nurse from the medical department, and it did still contain the restrictions written by Mr. Johnson's doctor. Exhibit 3.

Based on the hearing testimony, I find it more likely that Mr. Johnson confused the Form 53-B that he brought to the plant with a different form, a return to work form that is given to workers to take to their supervisor after they have been processed through the medical department. Tr. at 173-75. This form, which was also produced at the hearing, has a space for restrictions based on the medical department's evaluation of Mr. Johnson, and in this space was printed, "No restrictions at this time." Exhibit 5. There is no need, therefore, to consider what relevance, if any, there might be to the present case had the medical department removed restrictions from Mr. Johnson's Form 53-B.

After leaving the medical department, Mr. Johnson reported to the office of Jeff Flowers, the supervisor of Mr. Stout. Tr. at 27, 58. Mr. Flowers testified that he asked for Mr. Johnson to report to him because of what he had heard that day from a Human Reliability Program (HRP) supervisor at the Pantex Plant. *Id.* at 83-84. The HRP official had told Mr. Flowers that she and a plant psychologist had spoken to Mr. Johnson and that he said he preferred to retire rather than return to work for Mr. Stout. *Id.*

Mr. Flowers testified that, in their meeting of March 23, Mr. Johnson described "his version" of events, and reiterated that he preferred retirement to working for Mr. Stout. *Id.* at 84. Mr. Flowers said that he told Mr. Johnson that he did not want him to make a rash decision, and therefore told him to come back and see him the following morning, "because I wanted to talk to his co-workers alone." *Id.* Mr. Flowers stated that he then called Mr. Johnson's co-workers to his office, and asked another department manager to sit in on the meeting. *Id.* He asked the co-workers if Mr. Johnson's description of his conditions was true, and they said it was not. *Id.*

Mr. Johnson returned to Mr. Flower's office on the morning of March 24. *Id.* at 22, 85. There is a stark discrepancy between the accounts of the two men regarding this meeting. Mr. Johnson's testimony at the hearing was virtually identical to the statement he provided to the OHA Investigator, as set forth in Section I.C of this decision above, in which he stated that Mr. Flowers told him, after Mr. Johnson stated that he could not go back to the same working environment, that he was going to "retire" him. *Id.* at 22-24. He contended that he told Mr. Flowers that he could not afford to retire, but that Mr. Flowers insisted he sign certain documents and took him to an HR official to process the papers, from which point, according to Mr. Johnson's testimony, he "was dazed or shocked or whatever you want to call it." *Id.* at 25.

In contrast, Mr. Flowers testified that, in their March 24 meeting, he asked Mr. Johnson if he was still intent on retiring rather than work for Mr. Stout, and he said that he was. *Id.* at 85. The previous day, Mr. Flowers had asked one of Mr. Johnson's co-workers to put together the papers that would need to be filled out by Mr. Johnson should he choose to retire. *Id.* When Mr. Johnson informed him that he still wished to retire, Mr. Flowers got out the necessary paperwork, which they began to fill out. *Id.* Because Mr. Flowers was not sure whether they were filling out the paperwork correctly, he called an HR official and asked if they could come to his office to go over the retirement paperwork. *Id.*

The HR official, D.J. Shead, testified at the hearing. He was shown a March 24, 2010, memorandum from Mr. Johnson informing the HR department of his retirement, Exhibit I, and Mr. Shead stated that he was present when Mr. Johnson signed the document. Tr. at 244. He testified that he engaged in small talk with Mr. Johnson, asking him about his retirement plans, and that he saw nothing out of the ordinary about Mr. Johnson's demeanor during their meeting. *Id.* at 246.

Finally, on March 24, 2010, Mr. Flowers and Mr. Johnson met with Bill Mairson, the manager of Pantex's Environmental Safety and Health Division, to whom Mr. Flowers reports. Mr. Mairson testified that their meeting began with Mr. Johnson telling him that he could not work for Mr. Stout. *Id.* at 204. Mr. Mairson said that he responded by offering Mr. Johnson "a physical location away from Mr. Stout," though Mr. Johnson would continue to report to Mr. Stout. *Id.* Mr. Mairson also testified that he told Mr. Johnson that he was "free to bid on other positions that were available." *Id.* According to Mr. Mairson, Mr. Johnson found neither option to be an acceptable alternative to resigning. *Id.* In his testimony, Mr. Johnson denied that Mr. Mairson offered him a location away from Mr. Stout, but acknowledged that he had mentioned bidding for other positions. *Id.* at 60.

Considering all of the hearing testimony regarding the events of March 24, 2010, I find more credible the accounts of Mr. Flowers, Mr. Shead, and Mr. Mairson, as opposed to that of Mr. Johnson. If Mr. Johnson could prove that Mr. Flowers in fact coerced him into signing his retirement papers, there would be a basis for finding that he was constructively discharged. *See Heining v. General Serv. Admin.*, 68 M.S.P.R. 513, 519 (1995) ("presumption of voluntariness may be rebutted if the employee can establish that the resignation or retirement was the product of duress or coercion"). My evaluation of the evidence, however, leads me to find that Mr. Johnson has not proven this.

In summary, for the reasons set forth above, I will deny Mr. Johnson's Complaint of Retaliation, as he has not proven by a preponderance of the evidence that he was subject to any action that meets the definition of retaliation set forth in 10 C.F.R. § 708.2, more specifically that his resignation was the product of intolerable working conditions from January 2010 to March 2010, or of any coercion or duress on the day of his retirement, March 24, 2010.

It Is Therefore Ordered That:

(1) The Complaint filed by Hansford F. Johnson under 10 C.F.R. Part 708, OHA Case No. TBH-0104, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: February 14, 2011

January 20, 2011

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Motion For Summary Judgement
Initial Agency Decision

Name of Case:	Colleen Monk
Date of Filing:	August 25, 2010
Case Number:	TBH-0105

This Decision concerns a Complaint filed by Colleen Monk (hereinafter referred to as "Ms. Monk" or "the Complainant") against Washington TRU Solutions, VJ Technologies, and Mobile Characterization Services (hereinafter referred to individually as "WTS," "VJT," and "MCS," respectively, or collectively as "the Respondents"), under the Department of Energy's (DOE) Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708. At all times relevant to this proceeding, the Respondents were DOE contractors operating in Los Alamos, New Mexico. It is the Complainant's contention that during her employment with VJT, she engaged in protected activity and, as a consequence, suffered reprisals by the Respondents. Among the remedies that the Complainant is seeking are reinstatement of her former pay, back pay, and compensation for the time that she has spent representing herself in this proceeding. As discussed below, I have concluded that Ms. Monk is not entitled to the relief that she seeks.

I. Background

A. Regulatory Background

The DOE established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). The Program's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit a DOE contractor from retaliating against its employee because the employee has engaged in certain protected activity, including:

> (a) Disclosing to a DOE official, a member of Congress, . . . [the employee's] employer, or any higher tier contractor, information that [the employee] reasonably believe[s] reveals—

(1) A substantial violation of any law, rule, or regulation;

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

(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority, or . . .

(c) . . .[R]efusing to participate in an activity, policy or practice if you believe participation would . . .

(2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

An employee who believes that he or she has suffered retaliation for making such disclosures may file a complaint with the DOE. It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets this burden of proof, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." *Id.*

B. Factual Background

Except as otherwise indicated, the following facts are not in dispute. WTS is the Management and Operations contractor for the DOE's Waste Isolation Pilot Plant (WIPP) in Carlsbad, New Mexico. The function of the WIPP is to safely store radioactive waste collected from various defense-related facilities around the United States. One of the departments within WTS is the Central Characterization Project (CCP). It is the responsibility of the CCP to provide on-site analysis of the radioactive wastes, which are usually contained in 55-gallon drums, to determine their composition and to ensure that no prohibited items are included in the drums for shipment to the WIPP. Drums shipped to WIPP are subject to strict controls regarding their content, and specifically regarding the amount of liquid wastes they contain. This analysis, called "characterization," is sometimes performed by subcontractors. MCS is one such subcontractor, providing Real Time Radiography (RTR) and Non-Destructive Assay services for WTS. RTR, which is the only characterization procedure that is relevant to this proceeding, essentially consists of X-raying the 55-gallon drums and analyzing their contents.

Ms. Monk was hired by VJT, an MCS subcontractor, in September 2001 as an Administrative Manager and Lead Facility Records Coordinator for the Savannah River Site. In 2005, she relocated to the Los Alamos National Laboratory (LANL) and began training for a position as an RTR Operator. The Complainant received her qualifications and became an RTR Operator in January 2006.

Beginning in January 2009, the Complainant began experiencing constant pain and fatigue. She was subsequently diagnosed as suffering from Fibromyalgia. She informed her supervisor that she was taking pain medication and that she could not take her medication while working in the field (as an

RTR Operator). Ms. Monk alleges that, during that same time, she made protected disclosures, primarily regarding issues related to safety at LANL.

In particular, she alleges that a WTS manager came to LANL to oversee RTR operations. The manager allegedly told the RTR Operators that they were rejecting too many drums for containing an excessive amount of liquid wastes, and asked that the Operators use an Excel spreadsheet provided by WTS to quantify the drums' liquid content. The Complainant and other RTR Operators did not believe that this spreadsheet accurately calculated the amount of liquid in a drum, and resisted the use of this tool, preferring to use other estimation techniques and their experience and training to perform this task.

Because of concerns on the part of WTS and VJT management that RTR Operators were not following a consistent procedure for determining the amount of liquid in the drums, WTS revoked the qualifications of all RTR Operators at LANL in October 2009. In November 2009, WTS management informed the Operators that they would be trained on the use of the spreadsheet and would be tested on their knowledge in order to be re-qualified. Six Operators took the test, and two of the six passed, were placed on the List of Qualified Individuals (LOQI), and were subsequently re-qualified as RTRs. The Complainant also passed the test, but she was not placed on the LOQI. In December 2009, Ms. Monk was moved to an administrative position with MCS. As a result of this reassignment, the Complainant's pay was reduced by about $2.00 per hour.

C. Procedural Background

On January 20, 2010, Ms. Monk filed a Part 708 Complaint with the DOE's Carlsbad Field Office. That Office attempted to mediate the Complaint on June 18, 2010, but those efforts failed. Ms. Monk requested that her Complaint be forwarded to the Office of Hearings and Appeals (OHA) for an investigation and hearing. The Carlsbad Field Office forwarded the Complaint to OHA and the OHA Director appointed an investigator. The OHA investigator interviewed Ms. Monk and other VJT employees and reviewed a number of documents before issuing a Report of Investigation (ROI). I will discuss Ms. Monk's Complaint and the ROI in greater detail in section I.D below.

The OHA Director appointed me as the Hearing Officer in this case. In a letter to the parties, I requested that they submit briefs focusing on the findings and conclusions in the ROI with which they disagree, and the reasons for that disagreement. The parties submitted briefs and replies setting forth their positions concerning the issues raised in the ROI.

D. Ms. Monk's Complaint and the Report of Investigation

1. Ms. Monk's Complaint

Ms. Monk alleges in her Complaint that she engaged in activities that are protected by the Part 708 regulations, and that the Respondents retaliated against her because of those activities. Specifically, the Complainant alleges that, during the period from 2007 to 2009, WTS wanted all operators to also act as "spotters" for the forklifts used to move the 55-gallon drums of radioactive waste. However, Ms. Monk refused to act as a "spotter" because of a LANL rule that required forklift "spotters" to be qualified forklift operators. The Complainant had no such qualification. She informed her supervisor of her concerns in March 2009. She alleges that WTS management was "not happy with her over this refusal." *See* addendum to Part 708 Complaint at 2. The Complainant contends that her actions in this regard were both a protected disclosure (that employees who were not forklift-

qualified were being required to act as "spotters"), and a refusal to participate in an activity that caused her to have a reasonable fear of serious injury to herself or to other employees.

The Complaint also alleges that in March 2009, Ms. Monk approached a Site Project Manager at LANL with her concerns about the use of an Excel spreadsheet to calculate the amount of liquid in the drums. According to the Complainant, the Manager had determined that the RTR Operators' rejection rate for the drums was too high, and asked that the Operators use the spreadsheet. Specifically, the spreadsheet would calculate the amount of liquid in a drum after the Operator entered the physical measurements of the liquid observed inside the drum. Ms. Monk and other RTR Operators believed that the spreadsheet would underestimate the amount of liquid in the drums. The Complainant states that she told the Site Project Manager of her concerns in this area during February and March 2009, and that the Manager informed her that she and other RTR Operators would have to use the spreadsheets or he would find other RTR Operators who would. This constitutes Ms. Monk's second alleged protected disclosure.

The Complainant's final alleged protected disclosure concerns a March 2009 incident during which a technician improperly performed maintenance on an energized RTR generator. Ms. Monk stated that she informed VJT and WTS management of this unsafe situation, and unsuccessfully tried to stop the technician herself, but was told by one of the VJT employees that she was "overstepping her bounds." *See* Addendum to Complaint at 13.

The Complaint further states that, because Ms. Monk engaged in this protected activity, the Respondents retaliated against her. Specifically, the Complainant alleges that she was transferred to an administrative position, with a reduction in pay of approximately $2.00 per hour, that her name was not included on the LOQI despite having passed the re-qualification test, and that she was made to endure a hostile work environment from March 2009, after her disclosure concerning the technician working on the energized equipment, until October 2009. *See generally* Addendum to Complaint; Complainant's Brief in Opposition to Summary Judgement (hereinafter referred to as "Comp. Reply") at 4.

2. The ROI

In her ROI, the OHA Investigator discussed the Complainant's allegations relating to protected activity and retaliatory acts taken against her. Regarding Ms. Monk's refusal to act as a "spotter" for forklift operators and her disclosure that non-forklift qualified personnel were being required to perform "spotter" duties, the Investigator took note of (i) Ms. Monk's admission that she and other RTR Operators were told that they did not have to act as a "spotter" if doing so made them uncomfortable, (ii) the evidence that she could have taken a test to become forklift-qualified, and (iii) the lack of corroboration from other RTR Operators that WTS insisted that Operators serve as "spotters." For these reasons, the Investigator concluded that the Complainant's refusal to act as a "spotter" and her disclosure did not constitute protected activity under Part 708.

The OHA Investigator also found that Ms. Monk's complaint to management about the Excel spreadsheet was not a protected disclosure. The Investigator cited WTS's contention that its major concern was that Operators were not using a consistent, justifiable process to estimate the amount of liquid in the drums, and its claim that Operators were not forced to use the spreadsheet, but could also estimate the volumes by performing manual calculations. The Investigator found that management was making an attempt to improve upon its procedures, and concluded that the

Complainant had not demonstrated, by a preponderance of the evidence, that she reasonably believed that the use of the Excel spreadsheet would result in a substantial and specific danger to public health or safety.

However, the Investigator reached a different conclusion with regard to Ms. Monk's disclosure concerning the technician's unauthorized work on an energized piece of equipment. The Investigator noted that VJT management admitted that this was a serious incident because safety protocols were violated, and that they acknowledged that the Complainant communicated her concerns about the incident to them. The Investigator found that, although the incident raised issues about Ms. Monk's own culpability in the events that occurred, "it is possible that [she] can demonstrate by a preponderance of the evidence that she reasonably believed this incident was a substantial and specific danger to employees or to public health or safety." ROI at 7.

The ROI also discussed the retaliations alleged by the Complainant. The Investigator concluded that the primary retaliation alleged by Ms. Monk was her transfer from her position as an RTR Operator to an administrative position, with the accompanying reduction in pay. However, the Investigator found there to be some question as to whether the reassignment rose to the level of a retaliation under Part 708. In this regard, she noted the Respondents' claims that the Complainant was taking pain medication that raised concerns about her fitness for duty and that Ms. Monk requested to be taken from the field and placed in an administrative position because of that medication. Proceeding on the assumption that the transfer was a retaliation, the Investigator stated that the Complainant might be able to show that her alleged protected disclosure was a contributing factor to this action.

The Investigator then pointed out that, if the Complainant were able to make these showings, the burden would then shift to the Respondents to show, by clear and convincing evidence, that they would have taken the same actions in the absence of any protected disclosure. The Investigator concluded that, in all likelihood, the Respondents would be able to make this showing. She based her conclusion on evidence in the record indicating that the Complainant asked for this reassignment because of her medical condition, and on concerns by the Respondents that Ms. Monk's pain medications might render her unfit for duty as an RTR Operator. Regarding the issue of Ms. Monk's exclusion from the LOQI, the Investigator cited the rationale of VJT management that, since the Complainant was being transferred to an administrative position, there was no need to include her on the List. There was also evidence that the Respondents took a similar action with a comparably-situated individual. Because of this conclusion, the Investigator recommended that I consider whether this case should be decided by means of summary judgement. [*]

II. Analysis

---

*/ With regard to the allegation of a hostile work environment, the Investigator concluded that "a mere assertion of a hostile work environment does not rise to the level of retaliation." ROI at 8, n.11. I agree. However, even if the Complainant's pleadings regarding this issue had gone beyond mere assertion, the record in this matter clearly indicates that she knew, or should have known, of any hostile work environment more than 90 days prior to the date on which she filed her Part 708 complaint. Her allegation regarding a hostile work environment is therefore time-barred. 10 C.F.R. § 708.14(a).

The Part 708 regulations do not include procedures and standards governing summary judgment. I note, however, that the Federal Rules of Civil Procedure provide that a Motion for Summary Judgement shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). While the Federal Rules do not govern this proceeding, Rule 56 has been used as a guide in the evaluation of Motions for Summary Judgment filed in a Part 708 proceeding. *See Edward J. Seawalt*, Case No. VBZ-0047 (August 20, 2000). Prior cases of this office considering Motions for Summary Judgment instruct that such a motion should only be granted if it is supported by "clear and convincing" evidence. *Cf. Fluor Daniel Fernald*, Case No. VBZ-0005 (October 4, 1999) (motion to dismiss should only be granted where there are clear and convincing grounds for dismissal).

As previously set forth, in order to prevail in a whistleblower complaint, a complainant has the burden of establishing by a preponderance of the evidence that he or she made a protected disclosure and that the disclosure was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal. *Id.* Therefore, if there are no genuine issues as to any material fact and the Respondents are entitled to a judgement as a matter of law on any of these elements, then summary judgement in favor of the Respondents is appropriate.

For the reasons that follow, I harbor serious doubts as to whether the Complainant's reassignment, which is the primary alleged retaliatory act, can properly be considered as retaliation. However, even if the Respondents' actions could be considered as retaliation as that term is defined in the Part 708 regulations, and the Complainant could demonstrate that she made a protected disclosure that was a contributing factor to that retaliation, I conclude, as a matter of law, that the Respondents would have taken the same actions in the absence of any protected activity on the part of the Complainant. The Complainant is therefore not entitled to the relief that she seeks.

"Retaliation" is defined in the Part 708 regulations as being "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor *against an employee* with respect to employment (*e.g*., discharge, demotion, or other *negative* action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart." 10 C.F.R. § 708.2 (italics added). Certainly, reassignment to a less desirable position can constitute retaliation. *See, e.g., Deford v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983). However, in this case, not only is it undisputed that the Complainant requested the reassignment, but she included a permanent transfer to an administrative position as part of the relief that she sought in her Part 708 complaint. Complaint at 3. It would therefore turn the definition of "retaliation" on its head to consider an action that she indicated would help "make her whole," *id.*, as being a "negative" action taken "against" her by the Respondents.

In her response opposing summary judgement, the Complainant argues that she requested the transfer because she feared being fired. Oct. 21, 2010 Response at 4. She explains that in July 2009, she had a discussion with the VJT Human Resources (HR) Director about her working conditions as an RTR operator. She told the director that she had been told by her RTR Lead that, because of a periodic shortage of RTR operators, she and another operator were prohibited from taking time off during the

month of August 2009. Her manager allegedly told her that, if she or the other operator took time off or called in sick, they would be reprimanded. Ms. Monk and the HR Director discussed the Complainant's concerns about the RTR operators going from 10 to 12 hour shifts in August and about getting in trouble because of possible "flare-ups" of her medical condition. According to Ms. Monk, the HR Director raised the possibility of the Complainant going on disability, and when she declined to consider this option, the HR Director allegedly said that if Ms. Monk could not perform her duties as an RTR operator 100 percent of the time, including going into the field when needed, she might be terminated.

Even if these allegations are true, the Complainant appears to be claiming that she feared termination because of a potential inability to be available for duty as an RTR operator to the extent demanded by her employer, and not because of retaliation for engaging in protected activity. Termination solely because of an inability to be available for duty on the schedule set by the employer is not a violation of the Part 708 regulations.

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

Applying these standards to the case at hand, the Respondents' reasons for transferring the Complainant to an administrative position were exceptionally strong. First, according to the Complainant, her medical condition was such that, when combined with the stress that the Complainant was under while working as an RTR operator, it "debilitated [her] body to the point where [she was] not able to return to the field." Complaint at 3. Her condition was known to the Respondents, to the extent that VJT's HR Director suggested that Ms. Monk consider going on disability. OHA Investigator's Record of Telephonic Interview with the Complainant at 3. Second, because of this condition, Ms. Monk was taking prescription drugs, including hydrocodone, that, at least on occasion, rendered her unfit for work in the field. *Id.* at 1; Addendum to Complaint at 7. The Respondents agreed with the Complainant that she could not work in the field on days that she had to take her pain medication. *See* affidavit of Karen Ventura, VJT Director of Human Resources at 2. There is further evidence that the Respondents were concerned about "liability issues" that could result from allowing the Complainant to continue to work as an RTR operator. OHA Investigator's Record of Telephonic Interview with Ms. Ventura at 2. Finally, as set forth above, it is undisputed that Ms. Monk requested the transfer.

Furthermore, the strength of the Respondents' motive to retaliate appears to have been minimal. Ms. Monk's alleged protected disclosure about the technician's unauthorized work on an energized piece of equipment did not directly implicate the Respondents' employees who played a role in the Complainant's reassignment. Also, I agree with the OHA Investigator that this incident was

appropriately investigated and adequately addressed with the findings made by the Respondents' Root Cause Analysis Report. There is little or no evidence of a retaliatory motive on the part of the Respondents.

Finally, there is evidence that the Respondents took similar actions against a similarly-situated employee for reasons that had nothing to do with "whistleblowing." The record indicates that another RTR operator requested reassignment because of the superior benefits that he would be eligible for in his new position. *See* OHA Investigator's Record of Telephonic Interview with Steve Halliwell, Head of Nuclear Division, VJT, at 2. His request was granted, and, like Ms. Monk, his name was taken off the LOQI and not placed back on the List because he was being reassigned. For these reasons, I find that the record, as it currently stands, conclusively indicates that the Respondents would have taken the same actions regarding the Complainant in the absence of any alleged protected activities.

III. Conclusion

As discussed above, I find that, even if Ms. Monk's reassignment could be defined as "retaliation," and even if she could show that she engaged in protected activity that was a contributing factor to that "retaliation," the record in this matter conclusively demonstrates that the Respondents would have taken the same actions in the absence of that protected activity. I therefore conclude that there are no genuine issues as to any material fact, and that the Respondents are entitled to a judgement in their favor as a matter of law.

It Is Therefore Ordered That:

(1) Treating the Respondents' Brief in Support of Summary Judgement as a Motion for Summary Judgement, that Motion is hereby granted.

(2)The Request for Relief filed by Colleen Monk under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

Robert B. Palmer
Senior Hearing Officer
Office of Hearings and Appeals

Date: January 20, 2011

September 8, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision
Motion for Summary Judgment

Name of Case: Greta Kathy Congable

Dates of Filing: June 1, 2011
August 12, 2011

Case Numbers: TBH-0110
TBZ-0110

This Decision will consider a Motion for Summary Judgment filed by Sandia Corporation ("Sandia" or "the Respondent"), in connection with a complaint filed against the company by one of its employees, Greta Kathy Congable ("Ms. Congable" or "the Complainant"), on September 14, 2010, under the Department of Energy's (DOE) Contractor Employee Protection Program, set forth at 10 C.F.R. Part 708.[1] OHA has designated Ms. Congable's hearing request as Case No. TBH-0110, and the present Motion for Summary Judgment as Case No. TBZ-0110. For the reasons set forth below, I have determined that Sandia's Motion should be granted and Ms. Congable's complaint should be dismissed in its entirety.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 2, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The Part 708 regulations prohibit retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including "disclosing to a DOE official… information that [the employee] reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or

[1] Sandia Corporation, a wholly owned subsidiary of Lockheed Martin Corporation, manages and operates Sandia National Laboratory in Albuquerque, New Mexico, pursuant to a contract with the Department of Energy.

safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include "a statement specifically describing the alleged retaliation taken against [the complainant] and the disclosure, participation, or refusal that [the complainant believes gave rise to the retaliation." 10 C.F.R. § 708.12.

B. Factual Background

The Complainant has been employed by Sandia in a variety of administrative support positions since 1994. In August 2004, she was promoted to Administrative Staff Assistant (ASA) and assigned to Sandia's Corporate Investigations (CI) office. In September 2006, Christopher Padilla was named Senior Manager for CI, becoming Ms. Congable's direct supervisor. Between September 2008 and April 2010, Ms. Congable purportedly disclosed to several individuals at Sandia and Lockheed Martin, Sandia's parent company, the presence of unprotected personally identifiable information (PII) on Sandia's computer network, and Mr. Padilla's allegedly improper alteration of inquiry and case files. In June 2010, Ms. Congable was transferred from her ASA position in CI to an ASA position in Sandia's Management Assurance and Reporting Department (MA), retaining her same job title, job level, and salary.

C. Procedural Background

Ms. Congable filed a Part 708 complaint with the National Nuclear Security Administration Service Center (NNSA/SC) in Albuquerque, New Mexico, on September 14, 2010. In her complaint, Ms. Congable alleged that Sandia retaliated against her for making disclosures regarding the unsecured PII and Mr. Padilla's alleged misconduct by involuntarily transferring her from CI to MA. On October 27, 2010, NNSA/SC dismissed the complaint. Ms. Congable appealed the dismissal of her complaint to the OHA Director, pursuant to 10 C.F.R § 708.18. On December 6, 2010, the OHA Director granted Ms. Congable's appeal in part, and remanded her complaint back to NNSA/SC for further processing. *See Greta Kathy Congable*, Case No. TBU-0110 (2010).[2]

On April 5, 2011, NNSA/SC transmitted Ms. Congable's complaint to OHA, together with her request for an investigation followed by a hearing. The OHA Director appointed an Attorney-Investigator, who conducted an investigation and issued a Report of Investigation (ROI) on June 1, 2011. On June 2, 2011, I was appointed the Hearing Officer in this matter. I sent a letter to the parties directing them to submit briefs identifying areas of disagreement with the ROI and areas of agreement to which they were willing to stipulate. The parties submitted briefs and replies setting forth their positions regarding the findings in the ROI. After reviewing the documents in the record and the parties' submissions, I determined that further briefing was

[2] Decisions issued by OHA are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

necessary on a threshold issue, namely whether Ms. Congable's transfer constituted an alleged retaliation within the meaning of Part 708. On July 20, 2011, I sent a letter to the parties, instructing Ms. Congable to submit an additional brief specifically addressing this issue and affording Sandia the opportunity to submit a reply. Ms. Congable submitted the additional brief on August 6, 2011. On August 12, 2011, Sandia submitted its reply brief wherein the company requested that Ms. Congable's complaint be dismissed.

II. ANALYSIS

A. The Applicable Legal Standards

In order to meet his or her burden under Part 708, a complainant must demonstrate, by a preponderance of the evidence, each of the following elements: (i) he or she made a protected disclosure or engaged in protected activity; (ii) he or she was the subject of a retaliation; and, (iii) the protected disclosure or activity was a contributing factor to the retaliation.[3] 10 C.F.R. § 708.29. Only if the complainant meets his or her burden does the burden then shift to the contractor to prove, by clear and convincing evidence, that it would have taken the same action absent the protected disclosure or activity. *Id*.

In her complaint, Ms. Congable alleges that she made several protected disclosures and that Sandia retaliated against her for making those disclosures by transferring her from an ASA position in CI to an ASA position in MA. In its August 12, 2011, brief, Sandia maintained that Ms. Congable's transfer, although involuntary, did not constitute a "retaliation" within the meaning of Part 708 and, therefore, her complaint should be dismissed in its entirety.

Although Sandia has moved for dismissal of the complaint, given the facts at hand, Sandia's motion is more aptly characterized as a Motion for Summary Judgment. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] Fed. R. Civ. P. 56(c). Under this standard, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Summary judgment may be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such cases, there can be "no genuine issue as to any material fact," since the non-moving party's complete failure of proof concerning an essential, threshold element of his case necessarily renders all other facts immaterial. The moving party is then "entitled to a judgment as a matter of law"

[3] The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely than not true when weighed against the evidence opposed to it. *See Joshua Lucero*, Case No. TBH-0039 (2006) (*citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

[4] While the Federal Rules do not govern Part 708 proceedings, Rule 56 has been used by OHA as a guide in considering Motions for Summary Judgment filed in Part 708 cases. *See Colleen Monk*, Case No. TBH-0105 (2011); *Edward J. Seawalt*, Case No. VBZ-0047 (2000).

because the non-moving party has failed to satisfy his burden of proof on an essential element of his case. *See Mary Ravage*, Case No. TBH-0102 (2011) (*citing Celotex v. Catrett*, 477 U.S. 317 (1986)).

As noted above, an essential element of Ms. Congable's case is proving, by a preponderance of the evidence, that she was the subject of "a retaliation" within the meaning of Part 708. If Ms. Congable cannot meet this threshold showing, then judgment cannot be awarded in her favor in this proceeding.

B. Whether the Complainant's Transfer Could Constitute a "Retaliation" Under Part 708

The Part 708 regulations define "retaliation" as "an action (including intimidation, threats, restraint, coercion or similar actions) taken by a contractor against an employee with respect to employment (*e.g.*, discharge, demotion, or other *negative action* with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities" protected under Part 708. 10 C.F.R. § 708.2 (emphasis added). It is well-established in OHA precedent that in order to constitute "a retaliation" within the ambit of Part 708, the allegedly retaliatory personnel action must negatively affect the terms and conditions of the complainant's employment. *See Colleen Monk*, Case No. TBA-0105 (2011) (transfer requested by complainant not a "negative action" within the meaning of Part 708, despite entailing slightly lower salary); *Vinod Chudgar*, Case No. TBH-0100 (2011) (transfer "did not have a negative effect on the terms and conditions of [his] employment because his new position retained his salary and grade level"); *Mark D. Siciliano*, Case No. TBH-0098 (2010) (contractor's failure to invite complainant to an event did not negatively affect the complainant's "compensation, terms, conditions or privileges of employment" and, therefore, was not a "negative action" within the meaning of Part 708).

In this case, the Complainant maintains that her transfer from her ASA position in CI to the ASA position in MA was retaliatory, basing her assertion primarily on the fact that the transfer was involuntary. It is undisputed, however, that Ms. Congable's transfer did not result in a loss in pay, benefits, or seniority. Ms. Congable also alleges that she has no meaningful job duties in her new position. Nonetheless, the record indicates that Ms. Congable's job duties in her new position are comparable to those in her old position.[5] The fact that the Complainant clearly preferred her old position to her current one is of little import in determining whether her transfer constitutes a retaliation under Part 708. The relevant standard is an objective one – whether the personnel action negatively affected the terms and conditions of employment. The evidence in the record clearly indicates that it did not. Therefore, the transfer was not a "retaliation," as that

[5] The performance reviews include a description of each of the Complainant's duties and her own input regarding each of the duties she accomplished during the review period. Among the job duties listed on Ms. Congable's 2009 performance review, the last complete year she worked as an ASA in CI, are: maintaining databases and websites, collecting data and maintaining files, preparing certain reports, and providing administrative support to CI by scheduling meetings, keeping meeting minutes, arranging travel, and composing, transcribing, and proofreading correspondence. Ms. Congable's current performance review, which covers the time she has worked as an ASA in MA, includes the following job duties: assisting in improving a "monthly recurring assessment evaluations process" used by the company; maintaining websites, collecting data, preparing reports, and assisting her supervisor with organizing monthly meetings by managing logistics, taking notes, and posting meeting materials.

term is defined in the Part 708 regulations. *See Vinod Chudgar*, Case No. TBH-0100 (2011). Accordingly, I find that Ms. Congable cannot satisfy her burden of proof on an element essential to her case and, as a result, is not entitled to the relief that she seeks.

III. CONCLUSION

As discussed above, I find that the Complainant's alleged retaliation, her involuntary transfer from an ASA position in Sandia's Corporate Investigations Office to a comparable ASA position in the company's Management Assurance and Reporting Department, does not constitute a "retaliation" within the meaning of Part 708. Therefore, the Complainant cannot satisfy her burden of proof on an essential element of her case, entitling the Respondent to a judgment in its favor as a matter of law. Accordingly, I conclude that Sandia's Motion for Summary Judgment should be granted and Ms. Congable's Complaint of Retaliation should be dismissed.

It Is Therefore Ordered That:

(1) The Motion for Summary Judgment filed by Sandia Corporation on August 12, 2011, Case No. TBZ-0110, is hereby granted as set forth in paragraph (2) below.

(2) The Complaint of Retaliation filed by Greta Kathy Congable against Sandia Corporation on September 14, 2010, is hereby dismissed.

(3) This is an Initial Agency Decision, which shall become a Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date:September 8, 2011

April 28, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motion to Dismiss
Initial Agency Decision

Names of Petitioner:	Eugene N. Kilmer Los Alamos National Security, LLC
Dates of Filings:	March 1, 2010 March 24, 2011
Case Numbers:	TBH-0111 TBZ-0111

This Decision will consider a Motion to Dismiss filed by Los Alamos National Security, LLC (LANS), the Management and Operating Contractor for the Department of Energy's (DOE) Los Alamos National Laboratory (LANL), in connection with the pending Complaint of Retaliation filed by Eugene N. Kilmer against LANS under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The Office of Hearings and Appeals (OHA) assigned the hearing component of Kilmer's Part 708 Complaint proceeding, Case No. TBH-0111, and LANS's Motion to Dismiss, Case No. TBZ-0111. For the reasons set forth below, I will grant LANS's Motion and dismiss Kilmer's Complaint.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1)-(3). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower Complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

Kilmer filed a Part 708 Complaint on September 17, 2010, with the Employee Concerns Program (ECP) at the National Nuclear Security Administration's Service Center (NNSA/SC) in Albuquerque, New Mexico. In his Complaint, Kilmer alleged that, over the period 2006 through 2010, he made protected disclosures and refused to engage in improper activities. As a result, the complainant alleges, he suffered harassment by his supervisors and ultimately was constructively discharged by LANS. LANS filed a response to the Part 708 Complaint on October 18, 2010, in which it contended that nothing "in the complaint describes or even suggests that Mr. Kilmer engaged in any actions that meet the requirements of" Part 708. Letter from Christine Chandler, Practice Group Leader, LANS, to Eva Glow Brownlow, ECP Manager, NNSA/SC. The ECP Manager transmitted the Complaint to OHA for an investigation, to be followed by a hearing, stating that LANS did not wish to pursue an informal resolution of the complaint.

On November 22, 2010, the OHA Director appointed an Investigator (OHA Investigator), who conducted an investigation into the allegations contained in Kilmer's Complaint. The OHA Investigator issued a Report of Investigation (ROI) on March 1, 2011. In the ROI, the OHA Investigator noted that the complainant alleged that his disclosures revealed violations of DOE standard STD 1073-2003 and LANL Procedures P1020 and P1020-2. The Investigator found it uncertain whether violation of a "standard" would constitute a violation of a "rule" for purposes of Part 708. ROI at 10 (citing *Rusin v, U.S. Dep't of Treasury*, 92 M.S.P.R. 298 (2002)). Assuming that it would for purposes of the report, the Investigator found that there remained a significant question as to whether the alleged disclosures sought to inform management officials that a standard was being broken, let alone that there was a "substantial" violation of a standard. *Id.* at 10-11. With regard to Kilmer's allegations that he refused to engage in certain activities, the Investigator found that, in the absence of additional evidence, the refusals alleged would not be protected under Part 708. *Id.* at 12.

Immediately after the Investigator issued his report, the OHA Director appointed me as Hearing Officer in this case. On March 14, 2010, I sent a letter to the parties and asked them to submit briefs addressing specific issues in the case. Kilmer submitted his brief on March 21, 2011. On March 23, 2011, LANS submitted its brief, in which it requested that the Complaint be dismissed. I then provided the parties an opportunity to submit replies to the briefs and the Motion to Dismiss. The complainant submitted replies on March 27 and 29, 2011, and LANS tendered its reply brief on April 1, 2011.

C. Factual Overview[1]

[1] This overview includes many facts set forth in the ROI, but does not restate the facts therein that are not relevant to the issues I address in ruling on the present Motion to Dismiss.

Kilmer, prior to resigning his position in September 2010, was employed by LANS as a mechanical designer. His first alleged protected activity occurred in 2006, when he told his manager that making certain changes to a drawing would violate applicable DOE standards. Kilmer was assigned to "W-11" (a work group at the Los Alamos facility) and was working on changes to a drawing, which then had to be reviewed by a "checker." Peggy Volz, the checker for this drawing, requested various additional changes. Kilmer refused, stating that the changes were not authorized. Ultimately, Kilmer's direct supervisor, Christopher Scully, Group Leader, W-11, directed Kilmer to make Volz's changes and Kilmer complied.

The complainant alleges that he made a second protected disclosure in 2007. Kilmer Interview at 1-2; Complaint at 3. Kilmer was assigned to develop training materials for a new software called "Windchill," a document management program that would store drawings and documents, as well as track changes to the documents. Scully instructed Kilmer to incorporate into the training materials the new design definition release procedures used by W-11. *Id*. The complainant alleges that he "protested the implementation of a new drawing release procedure that specified that document handlers routinely modify released documents without authorization." Brief attached to E-mail from Eugene Kilmer to Steven Goering, OHA (March 21, 2011) ("Complainant's Pre-Hearing Brief") at 3.

Kilmer asserts that he made another alleged protected disclosure in 2007 when he was working as a liaison between two separate LANS groups, "W-11" and "DX-1." Letter from Eugene Kilmer to Richard Cronin, OHA Investigator (November 27, 2010) at 1. The complainant states that, at a meeting, he pointed out to the group leader of DX-1, Daniel Montoya, that DX-1's current practice of storing drawings and configuration management information on an Excel spreadsheet, instead of using the Project Data Management computer system, was a dangerous practice, *id.* at 1, and that the DX-1/Excel system was "no good." Kilmer Interview at 2.

In 2008, Kilmer was tasked to make a drawing for a LANS department headed by William Bearden, which required approval by a checker, in this case Volz. Kilmer Interview at 3. Kilmer requested Volz's approval four or five times, but she rejected his approval requests and asked for changes. While Kilmer concedes that some of Volz's comments were valid, he viewed the process as taking too much time. *Id*. Kilmer released the drawing without Volz's changes, *id.*, and contends that doing so was an action protected under Part 708. Complainant's Pre-Hearing Brief at 3.

Kilmer alleges that he also made a protected disclosure in April 2010. Kilmer received a copy of a proposed document control procedures document from Jan Redding. Letter from Eugene Kilmer to Richard Cronin, OHA Investigator (November 27, 2010) at 2; Kilmer Interview at 4. Kilmer believed that the proposed procedures were poorly written and conceived, in part, because the procedures would allow unauthorized changes to a document and "violated basic configuration management precepts." Letter from Eugene Kilmer to Richard Cronin, OHA Investigator (November 27, 2010) at 2; Kilmer Interview at 4. Kilmer complained to Brandon Gabel and Manuel Garcia, Scully's deputy, in an attempt to stop implementation of the proposed procedures. Kilmer sent the entire Weapons Department an E-mail with a marked up version of the procedures. Kilmer Interview at 4.

In the summer of 2010, Kilmer was supporting the "W-7" group at LANL as a designer, documenting procedures, and producing drawings of gas transfer components. Kilmer Interview at 5. The complainant alleges that, in connection with this work, he told Scully in August 2010 that, "despite his directions, I would have to make some required changes to a drawing on which I was working." Complainant's Pre-Hearing Brief at 4. On August 25, 2010, when he arrived at his office,

Kilmer discovered that he had been removed from the Windchill system he was using for the drawing. Kilmer Interview at 6.

According to Kilmer, in a subsequent meeting that day, after learning that he was removed from the Windchill system because of the changes he had made to the drawing, Kilmer told Scully that his changes were necessary to avoid others making unauthorized changes to the document after its release. Kilmer also alleges telling Scully that W-11 practices such as stamping a "released" document with "Preliminary Version" or "Not for Use in Manufacturing" had been "obviated" by a product data management system like Windchill. Kilmer Interview at 7. Kilmer alleged that such practices would allow "anyone to change a document" with or without authorization. Kilmer Interview at 7. Kilmer further asserts that, during their August 25, 2010, meeting, he told Scully that he was going to inform Scully's superiors as to what was being done to "released" documents. Kilmer Interview at 7. According to Kilmer, Scully responded that he was free to speak to anyone he wanted. Kilmer Interview at 7.

After the meeting, Kilmer went to speak with John Benner, the Weapons Division Leader. Benner and Steve Renfro, the Weapons Division Deputy Leader, were in Renfro's office. Benner invited Kilmer inside Renfro's office and asked if he could do anything for Kilmer. Kilmer asked Benner, "Do you think it's right for a released drawing to be checked out and back in three more times with approximately 25 modifications being made to it along the way?" Kilmer Interview at 7.

D. LANS's Motion to Dismiss

In its pre-hearing brief, LANS argues that Kilmer's Complaint "fail[s] to meet the threshold requirements of Part 708," and requests that the Complaint be dismissed. Memorandum attached to E-mail from Ariel A. Ramirez to Steven Goering, OHA (March 23, 2011) ("Respondent's Pre-Hearing Brief") at 1, 2. More specifically, LANS contends that none of the actions described in Kilmer's Complaint are protected under Part 708. *Id.* at 7.[2]

The Part 708 regulations do not include procedures and standards governing motions to dismiss. In the absence of such standards, the Federal Rules of Civil Procedure, though not governing this proceeding, may be used for analogous support. *See, e.g., Billy Joe Baptist*, Case No. TBH-0080 (2009); *Edward J. Seawalt*, Case No. VBZ-0047 (2000) (applying standards of Fed. R. Civ. P. 56 to Motion for Summary Judgment).[3] The motion to dismiss filed by LANS in the present case is most analogous to what would, under the Federal Rules, be a motion to dismiss for "failure to state a claim upon which relief can be granted . . . ." Fed. R. Civ. P. 12(b)(6); s*ee Hansford F. Johnson*, Case No. TBZ-0104 (2010) (applying standards of Fed. R. Civ. P. 12(b)(6) to Motion to Dismiss).
The Supreme Court has held that, to survive a Rule 12(b)(6) motion, a Complaint must plead "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While the Complaint "does not need detailed factual allegations, . . . [f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption

[2] The Respondent's Pre-Hearing Brief also argues that Kilmer has not alleged actions that rise to the level of retaliation under the Part 708 regulations, *id.* at 7-10, but I do not address those arguments in this Decision, as I find below that the complainant has not made a plausible claim of conduct that is protected from retaliation under Part 708.

[3] Decisions issued by the OHA are available at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

that all of the Complaint's allegations are true (even if doubtful in fact), ..." *Id.* at 555 (citations omitted).

In addition, prior cases of this office instruct that such a motion should be granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact on a more complete record. *Curtis Broaddus*, Case No. TBH-0030 (2006); *Henry T. Greene*, Case No. TBU-0010 (2003) (decision of OHA Director characterizing this standard as "well-settled"); *see also David K. Isham*, Case No. TBH-0046 (2007) (complaint may be dismissed where it fails to allege facts which, if established, would constitute a protected disclosure); *accord Ingram v. Dep't of the Army*, 114 M.S.P.R. 43, 47 (2010) (finding Merit Systems Protection Board jurisdiction under federal Whistleblower Protection Act where complaint makes non-frivolous allegation that he engaged in whistleblowing activity by making a protected disclosure, and the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action).

Applying the relevant standards, for the reasons explained below, I will dismiss the present Complaint. Even assuming that the relevant facts alleged by the complainant are true, those facts do not support a plausible claim for relief under Part 708.

II. Analysis

The Part 708 regulations provide that a contractor employee may file a complaint against his employer alleging that he has been subject to retaliation for:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--
>
> > (1) A substantial violation of a law, rule, or regulation;
> >
> > (2) A substantial and specific danger to employees or to public health or safety; or
> >
> > (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --
>
> > (1) Constitute a violation of a federal health or safety law; or
> >
> > (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5. In directing the parties to brief certain issues in this case, I asked the complainant to identify which of the above provisions of section 708.5 he believed applies to each of his alleged

protected actions, and why. Letter from Steven Goering to Christine Chandler, Office of Laboratory Counsel, LANL, and Eugene Kilmer (March 14, 2011). In his brief, the complainant alleged that his actions were protected by sections 708.5(a)(1), (a)(3), and (c)(1). I address each section in turn below.

A. The Actions Alleged by the Complainant are Not Protected by Section 708.5(a)(1)

Section 708.5(a)(1) protects the disclosure of information that a complainant reasonably believes "reveals . . . a substantial violation of a law, rule, or regulation." In his Complaint, and in response to a request from the OHA Investigator for a concise lists of Kilmer's protected disclosures and why they are protected, the complainant references DOE standard STD 1073-2003 and LANL Procedures P1020 and P1020-2. Complaint at 1, 4; Letter from Eugene Kilmer to Richard Cronin, OHA Investigator (November 27, 2010). As noted above, the ROI questions whether violation of a "standard" would constitute a violation of a "rule" for purposes of Part 708. ROI at 10.

In a analogous case decided under the Whistleblower Protection Act (WPA), upon which Part 708 is modeled, the Merit Systems Protection Board addressed the question of whether certain agency documents constituted "rules" for purposes of the WPA. *Rusin v. U.S. Dep't of Treasury*, 92 M.S.P.R. 298, 305 (2002). The Board stated that resolution of this issue "cannot be based merely" on the titles of the documents in question, and that a "more substantive examination of these documents is required." *Id.*

One of the documents at issue in *Rusin*, a Procurement Instruction Memorandum (PIM), contained a "Don't Buy List" consisting of "17 sections, each entitled a 'rule,' which prohibited the purchase of various items." *Id.* The other, regarding the Government Commercial Credit Card Program (GCCCP) described "in detail the conditions and responsibilities governing the proper use of the government credit card, . . . and the criminal and civil penalties for improper use of the card." *Id.* Though not adopting a "a specific definition of a 'rule' here," *id.* at 306, the Board found that "the content and purpose of the PIM List and the GCCCP strongly support a finding that these documents were rules," within the meaning of the WPA. *Id.* at 305.

Though LANS does not cite *Rusin* in its pre-hearing brief, I find the analysis of the Board in that case lends support to LANS's contention that a "law, rule, or regulation equates to a requirement." Respondent's Pre-Hearing Brief at 2; *see Arun K. Dutta*, Case No. TBH-0088 (2009) (considering as within scope of section 708.5(a)(1) an internal company rule regarding when documents "shall be" rechecked and submitted for further review). Conversely, as in *Rusin*, these terms could equally equate to a prohibition of an action. Thus, it would certainly be more difficult to find that a document not containing mandatory language, either requiring (e.g., "shall") or prohibiting (e.g., "shall not") an action, is a "law, rule, or regulation" as those terms are used in 10 C.F.R. § 708.5.

1. As Applied to Activities at LANL, DOE Standard STD 1073-2003 is not a "Law, Rule, or Regulation" Under Section 708.5(a)(1)

With the above in mind, I note that STD 1073-2003 contains the following passage:

> The verbs "should," "may," and "must" are used throughout this standard. While our intent is that the purpose of this standard is to provide guidance, not requirements, some organizations may agree to have this standard included in the contract or in other commitments as a requirement. If this standard is listed as a requirement for a specific facility or activity or set of facilities or activities, the DOE contractor or other organization required to meet this standard must comply with all of the applicable provisions that include the word "must."

STD 1073-2003 at 1-5.

There is nothing in the record to support a finding that LANS, W division, or W-11, has ever agreed to have STD 1073-2003 "included in the contract or in other commitments as a requirement." *See also* E-mail from Christine Chandler, LANS, to Steven Goering (April 18, 2011) (forwarding e-mail from employee of LANL's contract office stating that there is "no record that the subject DOE STD has been in the LANS prime contract"). As such, I cannot find that DOE standard STD 1073-2003 is a "law, rule, or regulation" as those terms are used in Part 708, at least as applied to the parties in the present case.

2. LANL Procedures P1020 and P1020-2 Can Be Considered "Rules" Within the Scope of Section 708.5(a)(1)

LANL Procedures P1020 and P1020-2, in contrast to STD 1073-2003, appear to apply to all LANL organizations, P1020 stating that it "applies to all LANL employees and subcontractors," P1020 at 1, while the stated purpose of P1020-2 "is to provide Document Control Program (DCP) and implementation requirements to Laboratory organizations." P1020-2 at 1. LANS does not contend that these two policies do not apply to the employees of LANL's W Division, whose activities are the subject of the present complaint. Rather, LANS argues that the "LANL Procedures are broad, general procedures whose purpose is to impose institutional requirements. They are not legal requirements." Respondent's Pre-Hearing Brief at 3.

Though LANS does not explain what it believes would distinguish a mere "requirement" from a "legal requirement," or why that is relevant in this case, both P1020 and P1020-2 are replete with mandatory language. When asked by the OHA Investigator to identify the specific sections of these procedures that were allegedly violated, the complainant cited a number of examples of such language. He referenced a passage from P1020 providing that the "receipt or preparation, issue, and change of documents . . . must be controlled to assure that the most current documents are being used." P1020 at 2. In P1020-2, Kilmer highlighted statements that certain documents "must be placed under formal change control," P1020-2 at 1, and that organizations "must establish a process for preparing, reviewing, approving, distributing, using, and revising documents that specify requirements or prescribe activities important to the implementation and execution of work; and provide evidence of the acceptability of the items used or produced in the execution of work." *Id.* at 3. Based on their actual text, I find that at least these portions of both P1020 and P1020-2 can reasonably be considered "rules" for purposes of Part 708. *See Dutta, supra.*

3. The Complainant Did Not Disclose Information That He Could Have Reasonably Believed Revealed a Substantial Violation of P1020 or P1020-2

Having found that P1020 and P1020-2 can be considered "rules" under section 708.5(a)(1), I now must consider whether any of the alleged actions of the complainant constitute a disclosure of

information that he reasonably believed revealed a substantial violation of P1020 or P1020-2. Of the seven protected actions alleged by Kilmer, and described in section I.C above, the following five are alleged disclosures of violations of P1020 and P1020-2:[4]

> (1) In 2006, Kilmer contended, in response to the direction of Volz, that making changes to a drawing not listed on the Engineering Authorization constituted unauthorized changes to a document.
>
> (2) In 2007, Kilmer protested the implementation of drawing release procedures specifying that document handlers would make unauthorized changes to documents.
>
> (3) In April 2010, Kilmer criticized a proposed document control procedure.
>
> (4) In August 2010, Kilmer told Scully that, despite Scully's directions, he would have to make changes to a drawing that were necessary to avoid having to make unauthorized changes to documents.
>
> (5) Also in August 2010, Kilmer told Scully that he was going to inform Scully's superiors about unauthorized changes to documents, and in a subsequent meeting with Weapons Division Leader John Benner, Kilmer asked Benner whether he thought it was right for a released drawing to be checked out and back in three times during which approximately 25 modifications are made to the drawing.

Because a complainant's belief underlying an alleged protected disclosure must be held "reasonably" in order for the disclosure to be protected under section 708.5, I must consider the complainant's disclosures from the perspective of a disinterested person. *See Mark D. Siciliano*, Case No. TBH-0098 (2010) (finding disclosure not protected where not communicated in a way that a "disinterested person" would have construed complainant's comments as alleging an abuse of authority); *accord Heining v. General Serv. Admin.*, 116 M.S.P.R. 135, 143 (2011) ("proper test for determining whether an employee had a reasonable belief that his disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, . . .").

In the present case, for several reasons, I cannot find that a disinterested person would have construed that any of the complainant's five disclosures listed above revealed a substantial violation of P1020 or P1020-2.

First, in his original September 2010 Complaint, Kilmer describes the five disclosures at issue, but gives very little indication that he believed his disclosures revealed a violation of P1020 or P1020-2. In fact, the Complaint never mentions P1020, and refers to P1020-2 only once, in reference to the third disclosure listed above, Kilmer's criticism of a proposed document control procedure. Moreover, even as to that disclosure, his Complaint simply states *his present opinion* that the

[4] One of the remaining two alleged protected actions (in 2007) is identified by the complainant as a disclosure of information revealing a violation of STD 1073-2003. Complainant's Post-Hearing Brief at 3. I cannot find this disclosure to be protected, as I have found above that STD 1073-2003, as applied to the present case, is not a "law, rule, or regulation" as those terms are used in Part 708. The other remaining action, the release of a drawing in 2008, is not a disclosure and so is not addressed here, but I consider below whether it would be protected under other provisions of section 708.5.

proposed procedure violated P1020-2, not that he conveyed this opinion *at the time he criticized the procedure in April 2010*. Indeed, Kilmer's April 2010 e-mail criticizing the procedure neither states, nor implies, an opinion that the procedure violated any law, rule, or regulation. E-mail from Eugene Kilmer to "w-all@lanl.gov" (April 19, 2010) (submitted as attachment to Respondent's Pre-Hearing Brief).

Second, as noted above, in response to a request from the OHA Investigator for a concise lists of Kilmer's protected disclosures and why they are protected, the complainant references P1020 and P1020-2. Letter from Eugene Kilmer to Richard Cronin, OHA Investigator (November 27, 2010). However, he does so only in the context of stating his present opinion that certain practices violated P1020 and P1020-2. *Id.* at 1-2. He never states that he related this opinion contemporaneously with any of his alleged disclosures, or even that he held the opinion at the time of the disclosures. Neither do the notes of the OHA Investigator's interview with Kilmer, which were reviewed and edited by the complainant after the interview, describe disclosures that reference violations of P1020 or P1020-2. Kilmer Interview at 1-8. Finally, the complainant's Pre-Hearing Brief, similar to his earlier response to the OHA Investigator, again states his present opinion that "unauthorized document changes" violate P1020 and P1020-2, but does not allege that he expressed this opinion as part of any alleged disclosures. Complainant's Pre-Hearing Brief at 3-4.

Thus, based on the complainant's own description of his disclosures, I cannot find that a disinterested person could reasonably conclude that any of the Kilmer's five alleged disclosures listed above would have revealed a substantial violation of P1020 or P1020-2.[5]

Moreover, even if the individual had, with each of these alleged disclosures, explicitly stated that the practice with which he took issue violated a rule, I note that the substance of what he disclosed was not the practices themselves, but merely his opinion that those practices facilitated "unauthorized document changes."

Analyzing a similar issue under the WPA, the U.S. Court of Appeals for the Federal Circuit concluded that the term "disclose" means "to reveal something that was hidden and not known." *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1349-50 (Fed. Cir. 2001). The court also found it "quite significant that Congress in the WPA did not use a word with a broader connotation such as 'report' or 'state.'" *Id.* at 1350. Thus the court held that reporting to a wrongdoer that "there has been misconduct by the wrongdoer . . . is not making a 'disclosure' of misconduct. If the misconduct occurred, the wrongdoer necessarily knew of the conduct already because he is the one that engaged in the misconduct." *Id.*

In a footnote to the above text, the court adds a point that is directly relevant to the present case:

> To be sure, there may be situations where a government employee reports to the wrongdoer that the conduct of the wrongdoer is unlawful or improper, and the wrongdoer, though aware of the conduct, was unaware that it was unlawful or

[5] On March 29, 2011, Kilmer sent me an email stating that he had "researched and attached several more requirements documents describing LANL's responsibilities in the functional areas of document change control and configuration management." Email from Eugene Kilmer to Steven Goering (March 29, 2011). However, the relevant question here must be the reasonableness of the complainant's belief *at the time he alleges to have disclosed information*. If the complainant had no reasonable basis for believing that there was violation of a rule at the time of his disclosure, he certainly cannot remedy that by finding a basis for his belief after the fact.

> improper. Nonetheless, the report would not be a protected disclosure. It is clear from the statute, 5 U.S.C. § 2302(b)(8)(A), that the disclosure must pertain to the underlying conduct, rather than to the asserted fact of its unlawfulness or impropriety, in order for the disclosure to be protected by the WPA.

Id. n.2.

In the present case, for example, the complainant criticized W Division's Design Definition Release Process, W-11-SE-0003U (formerly W-SE-0014). This process became effective on February 14, 2007, states that it applies to all employees within W Division, and bears written initials indicating approval of the process by both Group Leader Scully and Weapons Division Leader Benner. The complainant identifies certain steps in this process, as set forth in the document, and states that "[i]n order to comply with this procedure, all designers have been granted the administrative privileges required to bypass the product data management's built in prohibition against allowing released documents to be modified." Complainant's Pre-Hearing Brief at 2-3.

Thus, what the complainant's disclosures amount to is pointing to established procedures of W Division (in the case of the second, fourth, and fifth disclosures listed above), or proposed procedures (in the case of the third disclosure), and registering his disagreement with those procedures.[6] For the same reasons noted by the court in *Huffman,* even if the complainant had couched his disagreement by stating that the procedures violated a law, rule, or regulation, the mere expression of this opinion would not be a "disclosure" under Part 708.

In sum, as I discuss above, I find that STD 1073-2003 is not, as to LANL, a "law, rule, or regulation" as those terms are used in Part 708, and that the complainant did not disclose information that he could have reasonably believed revealed a substantial violation of LANL Procedures P1020 or P1020-2. I therefore conclude that the actions alleged by the complainant are not protected under section 708.5(a)(1).

B. The Actions Alleged by the Complainant are Not Protected by Section 708.5(a)(3)

Section 708.5(a)(3) protects the disclosure of information that a complainant reasonably believes "reveals . . . fraud, gross mismanagement, gross waste of funds, or abuse of authority." In his Pre-Hearing Brief, responding to my request that he identify the specific provisions of 10 C.F.R. § 708.5 that apply to his alleged protected actions, the complainant, for the first time, uses the words "fraud" and "gross mismanagement" to describe the practices of his former employer, and contends that his disclosures were therefore protected under section 708.5(a)(3). Complainant's Pre-Hearing Brief at 1-3.

---

[6] The first disclosure listed above related to making changes to a drawing "not listed on the Engineering Authorization . . . ." Complainant's Pre-Hearing Brief at 3. In his interview with the OHA Investigator, Christopher Scully explained that changes not listed on an Engineering Authorization, such as a Advanced Change Order (ACO), could be made and then documented by issuing a revised ACO or by incorporating those changes into the Final Changes Order by which the ACO is closed. Scully stated that it was routine for designers in his group (W-11) to work with engineers to properly document such changes in a revised ACO or FCO. Scully Interview at 1-2. Clearly, the complainant disagreed with this procedure, and Scully appears to confirm that the complainant felt that the procedure violated certain standards, but registering a disagreement with a procedure is not the same as making a disclosure.

First, as for the recently raised allegations of fraud, LANS argues in reply to Kilmer's Pre-Hearing Brief that "[f]raud is generally described as an act of deceit. In none of Kilmer's papers does he articulate facts with sufficient specificity to conclude that he was alleging fraudulent acts." Memorandum attached to E-mail from Christine Chandler to Steven Goering (March 23, 2011) ("Respondent's Pre-Hearing Reply Brief") at 2.

I agree. The complainant alleges that his disclosures revealed "fraud in the sense that the American public relies heavily upon LANL and the other Nuclear Complex laboratories to exercise due diligence . . . ." Complainant's Pre-Hearing Brief at 1. While Part 708 does not contain a specific definition of "fraud," what Kilmer is alleging is clearly not "fraud" as that term is generally understood in the law. *See Black's Law Dictionary* (9th ed. 2009) (defining "fraud" as a **"**knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment").

Neither do the actions alleged by the complainant rise to the level of "gross mismanagement." In his pre-hearing brief, Kilmer states that it "only follows that violating" STD-1073-2003, P1020, or P1020-2, constitutes gross mismanagement. Complainant's Pre-Hearing Brief at 1. More specifically, he claims that W division officials engaged in gross mismanagement both by intentionally directing employees to "make unauthorized changes to released documents," *id.* at 2, and by adopting procedures that "open the door to accidental and unaccountable modifications to these documents." *Id.* at 3.

I have already found, above, no evidence that STD-1073-2003 imposes binding requirements on LANL, and that the complainant did not disclose information that he could have reasonably believed revealed a substantial violation of LANL Procedures P1020 or P1020-2. Thus, even if I were to agree that any violation of the standard and procedures would necessarily equate to gross mismanagement, which I do not, I would not find based on this alone that Kilmer disclosed information that he reasonably believed revealed gross mismanagement.

More importantly, mere differences of opinion between an employee and his supervisors as to the proper approach to a particular problem or the most appropriate course of action do not rise to the level of gross mismanagement. *See White v. Dept. of the Air Force*, 391 F.3d 1377 (Fed. Cir. 2004). The Deputy Secretary of Energy in *Mehta v. Universities Ass'n*, 24 DOE ¶ 87,514 (1995) held that:

> Equating a particular type of disagreement to "mismanagement" as contemplated by the "whistleblower" regulations demands a careful balancing lest the term encompass all disagreements between a contractor and its employees . . .[t]here must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, at the same time granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork.

Id. at 89,065.[7] OHA has followed the Deputy Secretary's holding in other cases. *See Siciliano, supra; Ronny J. Escamilla*, Case No. VWA-0012 (1997).

[7] Significantly, the Deputy Secretary's opinion in *Mehta* "was decided under an earlier version of the Part 708 regulations, one that allowed disclosures of mere mismanagement, as opposed to gross mismanagement, to proceed under Part 708." *Siciliano, supra.*

Indeed, prior OHA decisions have found that gross mismanagement is

> more than de minimis wrongdoing or negligence. It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. Therefore, gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission.

Fred B. Hua, Case No. TBU-0078 (2008) (quoting *Roger Hardwick*, Case No. VBA-0032, 27 DOE ¶ 87,539 (1999)); *see also Carolyn v. Dep't of the Interior*, 63 M.S.P.R. 684 (1994).

By this standard, the complainant's disclosures in this case, as he describes them, and as they are documented contemporaneously in the record, do not reveal gross mismanagement. There *are* allegations of management directing "unauthorized changes" to documents, though this seems internally contradictory since, by directing certain changes to documents or adopting procedures that allow changes, management has in fact authorized those changes. In essence, what Kilmer appears to object to is a system that allows changes to be made without what he sees as sufficient oversight or accountability.

Somewhat ironically, in offering an example of the system's failings in his pre-hearing brief, Kilmer undermines his own argument. He cites the "official record" as showing that a particular document was modified three times after being "released" and that the record shows the name of the person who made the modification. Complainant's Pre-Hearing Brief at 1-2. What the complainant allegedly revealed, then, is a tracking system that, despite its alleged shortcomings, allowed Kilmer to determine how many times a document had been modified, and by whom, with Kilmer's only real complaint being that "only way to determine what" changes were made "is to examine all four released versions of this document and carefully compare them." *Id.* at 2.

Assuming the truth of the complainant's allegations, one can see where there might be legitimate debate as to how changes to documents are authorized or what checks must be in place to monitor changes after they are made. But viewed from the perspective of a disinterested person, the complainant has not alleged "a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission."

It is true that, in one of his contemporaneously documented disclosures, Kilmer criticized a proposed document control procedure in April 2010, and in so doing stated that misuse of the Windchill product data management system "very well may bring disastrous consequences for the laboratory as a whole." E-mail from Eugene Kilmer to "w-all@lanl.gov" (April 19, 2010). And in 2007, the complainant alleges that he "pointed out to DX-1 management" that a certain practice was "dangerous." Complainant's Pre-Hearing Brief at 4. However, in addition to not specifying what those consequences or that danger may have been, the complainant's disclosures did not reveal any actual mismanagement. The only thing being revealed is Kilmer's opinion on procedures being openly discussed, and for reasons stated in the previous section of this Decision, simply expressing an opinion without revealing any underlying conduct does not qualify as a disclosure under section 708.5. *See Huffman, supra* at n.2.

As I cannot find that the complainant disclosed information that he could have reasonably believed revealed either fraud or gross mismanagement,[8] the disclosures alleged by the complainant are not protected under section 708.5(a)(3).

C. The Actions Alleged by the Complainant are Not Protected by Section 708.5(c)(1)

Section 708.5(c)(1) protects from retaliation the refusal to "participate in an activity, policy, or practice if you believe participation would [c]onstitute a violation of a federal health or safety law; . . . ." The complainant cites this section for the first time in his pre-hearing brief, and does so without specifying to which of his actions he believes it applies. Complainant's Pre-Hearing Brief at 3-4. Of the protected actions specified by Kilmer, the only one that could conceivably be construed as such a refusal is his February 2008 release of a drawing without making changes as directed by Peggy Volz, which he alleges was necessary to avoid "having to modify a released drawing without authorization as specified in Mr. Scully's new drawing release procedure." *Id.* at 4. Aside from the fact that this stretches the common understanding of the term "refusal," the individual has made no specific allegation as to what federal health or safety law would be violated by the "unauthorized" modification of a drawing. In short, there is no action alleged by the complainant that I could find would be protected by section 708.5(c)(1).

III. Conclusion

I have found above that, even assuming the truth of the complainant's allegations as to the relevant facts of this case, those allegations do not support a plausible claim that Kilmer disclosed information that he reasonably believed revealed fraud, gross mismanagement, or a substantial violation of a law, rule or regulation. Nor do the allegations support a plausible claim that he refused to participate in an activity, policy, or practice, which participation he believed would constitute a violation of a federal health or safety law. For these reasons, I will grant the Motion to Dismiss.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Los Alamos National Security, LLC, on March 24, 2011, Case No. TBZ-0111, be and hereby is granted as set forth in paragraph (2) below, and denied in all other respects.

(2) The Complaint filed by Eugene N. Kilmer against Los Alamos National Security, LLC on September 17, 2010, Case No. TBH-0111, be and hereby is dismissed.

[8] In his Pre-Hearing Brief, the complainant alleges that he has "eyewitness evidence" of gross mismanagement occurring on March 2, 2011, and has a "witness to the consequences" of that mismanagement. Here and elsewhere in his statements, Kilmer does not appear to appreciate the fact that the purpose of this proceeding is not to investigate the substance of his allegations, but rather to determine whether prior disclosures he allegedly made are protected under Part 708 and, if so, whether he experienced retaliation as a result. The complainant's current allegations of gross mismanagement are clearly not relevant to that purpose.

(3) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: April 28, 2011

Department of Energy
Washington, DC 20585

FEB - 9 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Stephani L. Ayers, Esq.
T.M. Guyer and Ayres & Friends, PC
116 Mistletoe Street
Medford, OR 97501

Gregory J. Kamer, Esq.
Kamer Zucker Abbott
3000 West Charleston Boulevard, Suite 3
Las Vegas, NV 89102

Re: Case No. TBH-0116
Suzanne Rhodes v. NSTec

Dear Ms. Ayers and Mr. Kamer:

On February 8, 2012, I received email messages from both of you informing me that Ms. Rhodes and NSTec have settled the above captioned Part 708 complaint, and have requested that the hearing in this matter be cancelled and the underlying Complaint of retaliation be dismissed. Accordingly, I hereby cancel the hearing scheduled to begin on February 20, 2012, and I hereby dismiss Ms. Rhodes pending Complaint of Retaliation currently assigned Office of Hearings and Appeals Case No. TBH-0116.

If you have any questions regarding the above, you may contact me at (202) 287-1490, fax number (202) 287-1415, or steven.fine@hq.doe.gov.

Sincerely,

Steven L. Fine
Hearing Officer, Case No. TBH-0116
Office of Hearings and Appeals

March 8, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motion for Reconsideration

Name of Case: Ricky Ladd

Date of Filing: February 7, 2011

Case Number: TBR-0112

In a letter dated January 18, 2011, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) dismissed the appeal of Ricky Ladd (hereinafter Mr. Ladd or the complainant) from the dismissal of his complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program (Case No. TBU-0112). After reconsidering Mr. Ladd's appeal in light of additional arguments and information provided by Mr. Ladd, we find that our January 18, 2011, dismissal was appropriate, and that the additional information provided by Mr. Ladd does not provide a basis for reversing that determination.

I. Background

A. Mr. Ladd's Part 708 Complaint

Mr. Ladd states that during the period June 2005 until May 2010, he was an employee of Uranium Disposition Services (UDS), which is a DOE contractor located at the DOE's Portsmouth/Paducah Project Office (PPPO) of the Paducah Gaseous Diffusion Plant in Paducah, Kentucky. In June 2010, Mr. Ladd filed a complaint of retaliation under Part 708 (the Part 708 Complaint) with the Whistleblower Program Manager of the DOE's National Nuclear Security Service Center (the WP Manager). In August 2010, the WP Manager provided Mr. Ladd's Part 708 Complaint to the Employee Concerns Manager of the DOE's Portsmouth/Paducah Project Office (the PPPO EC Manager) for review and processing. In his Part 708 Complaint, Mr. Ladd alleges that due to his protected disclosures to the DOE's Office of Inspector General (the DOE OIG) in October 2009, his employment at UDS was terminated in May 2010. Mr. Ladd seeks reinstatement to his former position at UDS, and relief for the expenses that he incurred as a result of his termination. Ladd Part 708 Complaint at 1-2.

B. The PPPO EC Manager's Determination and Mr. Ladd's Appeal

On December 8, 2010, the PPPO EC Manager informed Mr. Ladd that DOE was dismissing his Part 708 Complaint because it was "frivolous". Specifically, the PPPO EC Manager found that

Mr. Ladd's May 6, 2010, termination by UDS was based on his alleged misconduct on April 28, 2010, and not on Mr. Ladd's communication of alleged concerns to the DOE OIG in October 2009.

In a submission received by the OHA on December 20, 2010, Mr. Ladd appealed the PPPO EC Manager's determination dismissing his Part 708 Complaint. In his Appeal, Mr. Ladd argued that UDS was aware of his October 2009 disclosures to the DOE OIG concerning an alleged gross waste of funds by UDS arising from its practice of offering substantial amounts of overtime pay to some of its employees. He further contended that this knowledge by UDS was a contributing factor to his May 6, 2010, termination.

C. The OHA's Dismissal of Mr. Ladd's Appeal

On the basis of information contained in Mr. Ladd's Appeal, the OHA concluded that it would be inappropriate for it to conduct an analysis of the substance of the PPPO EC Manager's findings and the contentions made by Mr. Ladd in his Appeal. With his Appeal, Mr. Ladd provided a copy of a November 30, 2010, Order of Region 26 of the National Labor Relations Board (NLRB), which indicates that in August 2010, Mr. Ladd filed charges with the NLRB concerning alleged misconduct by both UDS and his union. This Order consolidates these charges and establishes a hearing date of February 22, 2011. In his Appeal, Mr. Ladd acknowledged that the charges made to the NLRB involve the same facts as his Complaint of Retaliation. Appeal at 4.

In its January 18, 2011, letter to Mr. Ladd, the OHA concluded that Mr. Ladd's action before the NLRB Region 26 barred the DOE from considering his Part 708 Complaint. In this regard, the OHA found that 10 C.F.R. § 708.15(d) provides that if a complainant files a complaint under State or other applicable law after filing a complaint under Part 708, the Part 708 complaint will be dismissed under § 708.17(c)(3). Accordingly, the OHA dismissed Mr. Ladd's Appeal of the PPPO EC Manager's December 8, 2010, dismissal of his Part 708 Complaint.

II. Mr. Ladd's February 2011 Submission and OHA's Reconsideration

On February 4, 2011, the OHA received a submission from Mr. Ladd requesting that the Secretary of Energy review the decision by the OHA to dismiss his Part 708 Appeal. Because the OHA had dismissed the Appeal by letter based on lack of jurisdiction, the OHA has chosen to issue the instant decision and order providing a procedural and substantive history of the DOE's processing of Mr. Ladd's Part 708 Complaint and considering additional arguments made by Mr. Ladd in his February 2011 submission. The OHA therefore has treated Mr. Ladd's submission as a Motion for Reconsideration.[1]

[1] The DOE Part 708 regulations do not explicitly provide for reconsideration by OHA of its determination concerning an appeal from the jurisdictional dismissal of a Part 708 Complaint. *See* 10 C.F.R. § 708.18. However, in other appeal proceedings, we have used our discretion to

In his Motion for Reconsideration, Mr. Ladd first contends that because the PPPO EC Manager knew of his NLRB action against UDS but did not raise it as a bar to the processing of his Part 708 Complaint, the OHA has no authority to raise the issue of his NLRB action in the context of his jurisdictional appeal of the PPPO Manager's dismissal of his Part 708 Complaint on other grounds. He concludes that the OHA acted outside of its "authority in the appeal process outlined in CFR 708" when it dismissed his jurisdictional appeal due to his NLRB action. Motion for Reconsideration at 1.

We reject this argument. The provisions of Part 708 provide that anyone who pursues a remedy on the same facts under State or other applicable law, "may not file a complaint under this part". 10 C.F.R. § 708.15(a). They further provide that if anyone files a Part 708 complaint and then files a complaint under State or other applicable law on the same facts, their Part 708 complaint "will be dismissed". 10 C.F.R. § 708.15(d). Thus, Section 708.15 of the regulations clearly bars anyone who is pursuing an action in another forum from simultaneously pursuing one on the same facts under Part 708. *See Charles Montano*, Case No. TBU-0067 (2007). While it appears that the PPPO EC Manager was aware of Mr. Ladd's NLRB action and overlooked this ground for dismissing Mr. Ladd's Part 708 Complaint, her oversight has no effect on the requirements of 10 C.F.R. § 708.15. It is not outside of OHA's authority to take the action necessary to enforce this requirement of Part 708 and dismiss Mr. Ladd's appeal. Indeed, in light of Mr. Ladd's NLRB action, it would have been outside of the OHA's authority to consider the merits of Mr. Ladd's appeal from the PPPO EC Manager's findings on the merits of his Part 708 Complaint.

Mr. Ladd also contends that the DOE should provide him with relief under Part 708 despite his NLRB action because the DOE's failure to protect his rights as a contractor employee forced him to go to the NLRB. He states that on June 16, 2010, he e-mailed the PPPO EC Manager, complained that he had been terminated by UDS without "due process", and asked her to inform him of his rights as a terminated employee under the DOE's Employee Concerns Program. In her July 13, 2010, response, the PPPO EC Manager stated that her review of the matter led her to conclude that he had been afforded an opportunity to make a statement to the DOE about his termination, that he had been terminated for cause by UDS, and that "the DOE inquiry into this matter is closed." July 13, 2010, e-mail from the PPPO EC Manager to Mr. Ladd. Mr. Ladd also contends that the PPPO EC Manager's December 2010 dismissal of his Part 708 Complaint on the grounds that it was "frivolous" is further evidence of the PPPO's failure to protect DOE contractor employees through the Employee Concerns Program and Part 708, and that this failure forced him to go to the NLRB to get the issues surrounding his termination properly investigated. He therefore requests that the DOE order UDS to make him whole within the provisions of Part 708. Motion for Reconsideration at 4.

---

issue decisions reconsidering our holdings where circumstances warrant. *See, e.g., Citizen Action New Mexico,* Case No. TFA-0215 (2007).

We find no merit in these contentions. Even if the DOE had the authority to waive the bar created by Mr. Ladd's NLRB action under 10 C.F.R. § 708.15, there is no basis for his assertion that he was forced to pursue the NLRB action by the DOE's alleged failure to protect his rights. Whatever deficiencies may have occurred in the response of the PPPO EC Manager to Mr. Ladd's initial inquiries, Mr. Ladd acknowledges in his Appeal submission that he was able to solicit advice and assistance from another DOE employee concerns official, and to submit a timely Part 708 complaint with the WP Manager in June 2010. Mr. Ladd's December 12, 2010, Appeal at 1. Mr. Ladd filed his action with NLRB Region 26 in August 2010, months before the PPPO EC Manager's dismissal of his Part 708 Complaint. Had Mr. Ladd not filed with the NLRB, he could have appealed the PPPO EC Manager's dismissal to the OHA for a full review on the merits. We therefore see no equitable basis for the DOE to provide Mr. Ladd with Part 708 relief despite his decision to pursue an action with the NLRB.

We therefore find that the additional arguments presented by Mr. Ladd lack merit, and our January 18, 2011, dismissal of his Appeal of the PPPO EC Manager's dismissal of his Part 708 Complaint was appropriate.

IT IS THEREFORE ORDERED THAT:

(1) The Motion for Reconsideration (Case No. TBR-0112) of our dismissal of the Appeal filed by Ricky Ladd (Case No. TBU-0112) is hereby denied.

(2) This decision is the final decision of the Department of Energy unless, by the 30th day after receiving the appeal decision, a party files a petition for Secretarial review.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 8, 2011

November 7, 2002
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: Mark J. Chugg

Date of Filing: October 9, 2002

Case Number: TBU-0002

Mark J. Chugg, a former employee of Bechtel BWXT Idaho (BWXT), a Department of Energy (DOE) contractor, appeals the dismissal of his whistleblower complaint filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. BWXT is the Management and Operating contractor for the Department of Energy at the Idaho National Engineering and Environmental Laboratory (INEEL). On September 30, 2002, the Employee Concerns Program Manager at the DOE's Idaho Operations Office (DOE/ID) dismissed Mr. Chugg's complaint. As explained below, I reverse the dismissal of the subject complaint, and remand the matter to DOE/ID for further processing.

I. Background

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, the DOE office initially receiving a complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

Mr. Chugg was employed as a Senior Business Operations Specialist at INEEL. After being terminated by BWXT in August 2002, Mr. Chugg filed a Part 708 complaint with DOE/ID, alleging

that he was fired in retaliation for, among other things, reporting to the DOE alleged ethical violations by a BWXT official.*

On September 30, 2002, the Employee Concerns Program Manager at DOE/ID dismissed the complaint. Letter from Paul Allen, Employee Concerns Program Manager, DOE/ID, to Mark J. Chugg (September 30, 2002). The dismissal letter states, in pertinent part:

> Specifically, your complaint does not indicate that you were retaliated against (per 10 CFR Part 708.5) for any of the following:
>
> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals-
>
> (1) A substantial violation of a law, rule, or regulation;
> (2) A substantial and specific danger to employees or to public health or safety; or
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --
>
> (1) Constitute a violation of a federal health or safety law; or
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.
>
> This is not to say that there are none of the above elements scattered among your case history. For instance, we are aware that in previous complaints (since settled) that you have reported what you believed to be violations of laws, rules, and regulations; that you have previously reported Dennis Patterson for ethics violations to a DOE official; and you have alleged abuse of authority. However, the record does not appear to support the supposition that your termination was based on any of the above criteria, but rather based on internal management decisions due to your actions and relationships with other employees, as well as misuse of company systems, and

*In 2001, Mr. Chugg filed a Part 708 complaint that was investigated by this office. After a report of investigation was issued in that case (OHA Case No. VBI-0074), Mr. Chugg and BWXT reached a settlement agreement, and we dismissed the complaint on October 24, 2001.

> not being truthful during the course of the investigation. The decision to terminate you was not made by any of the individuals you have previously reported, and thus it is difficult to draw a conclusion of retaliation. Furthermore, the theories you postulate to implicate your co-workers in a conspiracy against you are extremely unlikely. In as much as your employer is able to demonstrate reasonable cause for your termination unrelated to retaliatory motives, we are obligated to dismiss this complaint.

Id. at 1-2.

II. Analysis

DOE-ID's dismissal letter appears to concede that Mr. Chugg engaged in protected activity, but concludes that the claim of retaliation lacks merit. This determination is premature. It reaches an issue that is at the heart of this case and ends the entire proceeding. The complainant's contention that he was terminated because of his protected activity deserves closer examination, and is still in dispute. In fact, this is the very type of issue that the OHA is charged with investigating under Section 708.22 and considering through the hearing process described at Section 708.28.

A DOE Office may not dismiss a case by reaching this type of substantive determination under the provisions of Section 708.17, unless the facts do not present issues for which relief can be granted under Part 708, or the complaint is frivolous or without merit on its face. 10 C.F.R. § 708.17(c)(2), (4). DOE/ID failed to comply with these provisions by applying an incorrect standard for dismissal not consistent with the Part 708 regulations. It stated, "In as much as your employer is able to demonstrate reasonable cause for your termination unrelated to retaliatory motives, we are obligated to dismiss this complaint." Letter from Paul Allen, Employee Concerns Program Manager, DOE/ID, to Mark J. Chugg (September 30, 2002) at 2. However, an evaluation of whether Mr. Chugg was dismissed for cause should not be made at this stage. 10 C.F.R. § 708.17(c)(2), (4). I find that the claims raised here present issues for which relief can be granted (e.g., reinstatement of Mr. Chugg) and which are not frivolous or without merit on their face. Accordingly, I find that this determination by the DOE/ID was incorrect. Daryl J. Shadel, 27 DOE ¶ 87,561 (2000).

III. Conclusion

As indicated by the foregoing, I find that the DOE Office incorrectly dismissed the complaint filed by Mark J. Chugg. Accordingly, the complaint should be accepted for further consideration.

It Is Therefore Ordered That:

The Appeal filed by Mark J. Chugg (Case No. TBU-0002) is hereby granted and his Part 708 complaint is hereby remanded to the DOE Idaho Operations Office for further processing as set forth at 10 C.F.R. § 708.21.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 7, 2002

June 19, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Gary Vander Boegh**

Date of Filing: **May 27, 2003**

Case Number: **TBU-0007**

Gary Vander Boegh (the Complainant), an employee of WESKEM LLC (WESKEM), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. WESKEM is a subcontractor of Bechtel Jacobs Company LLC (BJC), the management and integration contractor for the C-746-U Landfill at the DOE's Paducah Gaseous Diffusion Plant located in Paducah, Kentucky. On April 21, 2003, the Manager of Diversity Programs and Employee Concerns (Manager) at the DOE Oak Ridge Operations Office (DOE/OR) dismissed the Vander Boegh complaint. As explained below, I reverse the dismissal of the complaint and remand the matter to the Manager for further processing.

The Complainant is a landfill manager at the C-746-U landfill operated by WESKEM. During the past year he has participated in a proceeding under Part 708. Office of Hearings and Appeals (OHA) Case Nos. TBI-0007; TBH-0007. In that proceeding, the Complainant alleged that he warned WESKEM and BJC about excessive accumulations of leachate in the storage tanks at the landfill that had reached and surpassed the maximum reserve capacities required by the state operating permit. The Complainant contended that these warnings constituted protected disclosures under Part 708. The Complainant further alleged that WESKEM had taken a number of retaliatory actions against him, including issuing a disciplinary memorandum, and reducing his compensation. Pursuant to 10 C.F.R. § 708.25, an OHA Hearing Officer conducted a hearing on this matter. The Hearing Officer has not yet issued an initial agency decision regarding that Vander Boegh complaint.

On March 19, 2003, the Complainant filed a second complaint of retaliation with the DOE/OR employee concerns office. This complaint alleged some additional protected disclosures and

continuing adverse actions by WESKEM, including coercion, intimidation, threats, and negative actions with respect to the terms and conditions of his employment. On April 21, 2003, the Manager dismissed the complaint for lack of jurisdiction. 10 C.F.R. § 708.17(c)(2). He stated as the basis for this finding that the facts as alleged in the complaint did not present issues for which relief can be granted, and the complaint appeared without merit on its face. On May 27, 2003, Vander Boegh filed an appeal of that dismissal with the Office of Hearings and Appeals. 10 C.F.R. § 708.18.

Before turning to the merits of this case, I must address a procedural issue. In reviewing the appeal, I found that the Notice of Appeal was filed via FAX one day late, on May 27. 10 C.F.R. §708.18(a). Since the one day delay is not at all significant here, I see no reason to give it any further consideration, and will proceed with a substantive review of this case. 1/

After reviewing the facts in this case, I do not agree that dismissal is appropriate. I do not think that the complaint appears without merit on its face. As an initial matter, I note that since Vander Boegh has filed this complaint during the pendency of the earlier Part 708 proceeding described above, he has participated in a protected activity under Part 708, and is continuing to do so. WESKEM is precluded from retaliating against him for that activity.

I reviewed the retaliations claimed by Vander Boegh. Although the retaliations were far from well delineated, he did allege in a general way that he had been subjected to threats, coercion and intimidation by his employer. He claimed that WESKEM had adversely affected the terms of his employment as a landfill manager. I was inclined to agree with the Manager's implicit conclusion that Vander Boegh's stated retaliations were vague. However, I did not believe that the complaint as a whole lacked any sign of merit, or

---

1/ The Complainant's attorney points out that in addition to the FAXed filing, on May 21 he mailed a Notice of Appeal through the U.S. mail. Mail sent to OHA via the U.S. Postal Service is being sanitized, which has caused some delay in delivery of our mail. Therefore, OHA did not receive that mailed notice until more than two weeks later, on June 6. The attorney states that he was not aware of the sanitization process and the delay it could cause. This is a reasonable explanation.

that there was no set of circumstances under which relief could be granted. Accordingly, OHA asked Vander Boegh to supplement his complaint by explaining the retaliations with greater specificity. In his reply, he mentioned as retaliations the removal of his responsibilities for two landfills. One of these removals allegedly took place after the hearing noted above, and thus could be construed as a new retaliation for participating in a protected proceeding. Vander Boegh cited as a remedy the restoration of those responsibilities. He also cited as a retaliation a negative performance evaluation that he received after the hearing. The remedy for this action would be appropriate changes to the evaluation. Thus, overall, there is now clearly sufficient substantive information in the record in this case to warrant further processing. I will therefore remand the matter to the Manager for that purpose.

During that additional processing, the Manager should give further consideration to some important procedural aspects of this case. After close review of the file here, I noted some procedural deficiencies that should be corrected as part of this remand. Section 708.12 specifies what information an employee must include in his complaint of retaliation. In addition to a description of the events giving rise to the complaint, the employee must make the following assertions: state that he is not currently pursuing a remedy under State or other applicable law; state that all of the facts included in the complaint are true and correct to the best of the complainant's knowledge and belief; and affirm that the complainant has completed all applicable grievance or arbitration procedures. 10 C.F.R. § 708.12(b), (c), and (d). In this case, the complaint does not set forth any of these statements for the record. Accordingly, the Manager should make sure to complete and correct the record in this case.

In reviewing the record here, I also noticed a reason why the Employee Concerns Office of DOE/OR might have failed to insure that these procedural statements were included in the complaint. The intake form used by that Office for Part 708 complaints is the same form that it uses for receiving employee concerns. The form is entitled "Employee Concerns Reporting Form," used "to report safety, health, and environmental concerns." The form states that it may also be used by employees to file complaints of retaliation under part 708. While there is certainly some similarity between Part 708 complaints and overall employee concerns about safety, health and environment, there are some obvious, important differences. The requirements of Section 708.12, cited above, are a significant example. These do not apply to the filing of

employee concerns about safety, health and environment outside of Part 708.

Further, a Part 708 complaint involves an allegation of retaliation by an employer for a protected disclosure, and this Part provides protection from such retaliation. The filing of an employee concern does not necessarily mean there was any retaliation involved, and the employee may not be seeking any protection.

Another difference is the fact that Part 708 includes protection for making disclosures that are not related to safety and health. These include reporting of fraud, gross mismanagement, gross waste of funds, or abuse of authority; and participating in a Part 708 proceeding, which is involved here. 10 C.F.R. § 708.5.

The employee concerns form at issue here simply does not provide for automatic consideration of the Section 708.12 requirements, and does not capture these other Part 708 concerns. Accordingly, if the DOE/OR Employee Concerns Office wishes to continue to use the employee concerns reporting form to record and report Part 708 complaints, it should consider amending the form so that it will include an opportunity to automatically review whether all relevant Part 708 requirements have been met. On the other hand, that Office might consider developing a form to be used only for Part 708 concerns, and in that context insure that all procedural requirements are easily identified and considered. I believe that an appropriate adjustment to intake procedures will help individuals who file complaints of retaliation and help insure full adherence to Part 708 procedural requirements.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Gary Vander Boegh (Case No. TBU-0007) is hereby granted and his Part 708 complaint is hereby remanded to the Manger, Diversity Programs and Employee Concerns located in Oak Ridge, Tennessee, for further processing as set forth above.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 19, 2003

March 18, 2003

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: Henry T. Greene

Date of Filing: February 3, 2003

Case Number: TBU-0010

Henry T. Greene, a former employee of Science Applications International Corporation (SAIC) and a present employee of Bechtel SAIC Company LLC (BSC), both Department of Energy (DOE) contractors, appeals the dismissal of the whistleblower complaint against BSC he filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. SAIC and BSC are both contractors for the Department of Energy at the Yucca Mountain Project Site. On January 13, 2003, the Deputy Director of DOE's Office of Repository Development (ORD) dismissed Greene's complaint against BSC. As explained below, I reverse the dismissal of the subject complaint, and remand the matter to ORD for further processing.

I. Background

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, the DOE office initially receiving a complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

On January 13, 2003, ORD's Deputy Director issued a letter in response to SAIC and BSC's motions to dismiss. The January 13th letter denied SAIC's motion to dismiss. However, the January 13th letter granted BSC's motion to dismiss. To this end, the dismissal letter states, in pertinent part:

> BSC has asked that the complaint against it be dismissed for lack of jurisdiction because the facts alleged do not present issues for which relief can be granted under Part 708 with regard to it. I find that the complaint alleges that "but for" retaliation by SAIC, the complainant would be better situated in his current employment with BSC. However, there is no allegation of a disclosure covered by Part 708 having contributed to any act by BSC that meets the definition of retaliation under Part 708. Therefore, I do find a lack of jurisdiction with regard to the complaint against BSC. The complaint as to BSC is hereby dismissed, in accordance with Section 708.17(c)(2).

January 13, 2003, Jurisdictional Determination at 1-2. On February 3, 2003, the Complainant filed the present Appeal. On March 10, 2003, BSC filed a response to the Complainant's appeal.

II. Analysis

It is well settled that a Motion to Dismiss in a 10 C.F.R. Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. *Lockheed Martin Energy Systems, Inc.,* 27 DOE ¶ 87,510 (1999)*; EG&G Rocky Flats,* 26 DOE ¶ 82,502 (1997) (EG&G). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely used it. *Boeing Petroleum Services,* 24 DOE ¶ 87,501 at 89,005 (1994). Moreover, this Office has held that, in order to further the purposes of the whistleblower protection program, which include encouraging employees to come forth with protected disclosures, it is important not to hold parties to proceedings under 10 C.F.R. Part 708 to the strictest standards of technical pleading. *EG&G, supra*; *Westinghouse Hanford Company*, 24 DOE ¶ 87,502 at 89,011 (1994) (*Westinghouse*).

10 C.F.R. § 708.17 sets forth those circumstances under which a Head of Field Element or EC Director may dismiss a complaint for lack of jurisdiction or for other good cause. ORD's January 13, 2003 Jurisdictional Determination cites only § 708.17(c)(2) as the basis for its dismissal of the complaint against BSC. 10 C.F.R. § 708.17(c)(2) provides: "Dismissal for lack of jurisdiction or other good cause is appropriate if: (2) The facts, *as alleged in your complaint*, do not present issues for which relief can be granted under this regulation." (Emphasis supplied). ORD's reliance on § 708.17(c)(2) is misplaced, however. The Complaint clearly and unambiguously states a claim against BSC for which relief can be granted under 10 C.F.R. Part 708. Under the Part 708 regulations:

> The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by

> clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal.

10 C.F.R. § 708.29. Accordingly, a complaint states a claim upon which relief can be granted under Part 708 if it alleges that (1) an employee made protected disclosures (or otherwise engaged in protected activity) and (2) the protected activity was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor.

Turning to the present case, we note that the Complaint clearly alleges that Greene made a number of protected disclosures. Complaint at ¶ 28, 41, 42, and 48. The Complaint also alleges that these protected disclosures were a contributing factor in a number of personnel actions taken by BSC which negatively affected Greene. Complaint at ¶ 19, 22, 24, 32-39. Thus, the Complaint clearly sets forth the allegations necessary to establish a *prima facie* case under the DOE whistleblower regulations. Therefore, I find that the claims raised here present issues for which relief can be granted. Accordingly, the determination by the ORD was incorrect, and I will remand this matter to the ORD for further consideration and processing.

BSC's Response to the Appeal (Response) is unpersuasive. In its Response, BSC asserts: (1) Greene's protected disclosure occurred before he was employed by BSC, (2) Greene's lack of success in getting the positions he desired resulted only from the residual effects of demotion and therefore did not result from any new retaliation by BSC, and (3) "[t]he factual allegations in the complaint allege nothing from which BSC's knowledge of Complainant's alleged protected activity or any retaliatory motive on BSC's part could fairly be inferred." Response at 2, 5.

Turning to BSC's first argument, we note that Part 708 does not restrict the protection it accords to protected activity to that conduct which takes place while an individual is actually employed by a DOE contractor. *See, e.g. Jagdish C. Laul, Case Number, VBH*-0010, (2000) (finding retaliation by an employer against an employee who had made protected disclosures while employed by a previous employer), *affirmed*, *Jagdish C. Laul, Case Number, VBA*-0010 (2001). Accordingly, BSC's first argument, whether true or untrue, is not controlling here. BSC's second contention is similarly flawed. Even if this contention is factually valid, any continuation of past retaliation by a subsequent DOE contractor would be actionable under Part 708. Finally, I note that BSC's third contention is factually flawed: The Complaint specifically states, "All respondents, and decision makers, had knowledge of the protected activities of the Complainant." Complaint at ¶ 52.

III. Conclusion

As indicated by the foregoing, I find that the DOE Office of Repository Development incorrectly dismissed the complaint filed by Henry T. Greene. Accordingly, the complaint against BSC should be accepted for further consideration and processing by ORD.

It Is Therefore Ordered That:

The Appeal filed by Henry T. Greene (Case No. TBU-0010) is hereby granted and his Part 708 complaint is hereby remanded to the Office of Repository Development for further processing as set forth at 10 C.F.R. § 708.21.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 18, 2003

June 2, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: Charles L. Evans

Date of Filing: May 17, 2004

Case Number: TBU-0026

Charles Evans, a former employee of Fluor Hanford Inc. (Fluor), a Department of Energy (DOE) contractor, appeals the DOE Richland Operations Office=s (Richland) dismissal of the whistleblower complaint he filed against Fluor under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program.

I. BACKGROUND

A. The DOE=s Contractor Employee Protection Program

The DOE=s Contractor Employee Protection Program was established to safeguard Apublic and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse@ at DOE=s government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those Awhistleblowers@ from consequential reprisals by their employers. The regulations governing the DOE=s Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, the DOE office initially receiving a complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. ' 708.17. The complainant may appeal such a dismissal to the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. ' 708.18.

B. The Procedural History

On February 19, 2004, the Complainant filed a "Complaint of Retaliation" with Richland. The Complaint alleges that the DOE and Fluor have retaliated against him for "previously filed paper work outlining gross mismanagement of DOE responsibilities to the citizens of Benton County and others adjoining the Hanford site for fire protection." Complaint at 1. The Complaint alleges that Richland and Fluor retaliated against him by delaying reimbursement for course work that was due to him under a DOE program. On March 29, 2004, Richland issued a Jurisdictional Determination under 10 C.F.R. ' 708.17 dismissing the Complaint (the

Jurisdictional Determination). The Jurisdictional Determination found that "the matter has been resolved though [Fluor's] commitment to work with [the Complainant] to answer any questions [the Complainant has] concerning [his] tuition reimbursement." Jurisdictional Determination at 1. In addition, Richland found that the Complaint fails to state a claim for which relief can be granted under 10 C.F.R. Part 708. *Id.* Richland then erroneously informed the Complainant that he could request that his Complaint be forwarded to this office for a hearing, under 10 C.F.R. §708.21. Instead, Richland should have informed the Complainant of his right to seek an appeal of Richland's dismissal under 10 C.F.R § 708.18. On April 19, 2004, the Complainant filed a request for hearing and investigation under 10 C.F.R. § 708.21(a)(2). For the reasons stated below, we are treating the April 19, 2004 submission as an appeal of Richland's Jurisdictional Determination.

II. ANALYSIS

10 C.F.R. ' 708.17 provides that a Complaint may be dismissed for lack of jurisdiction or for other good cause by the head of a DOE field element or a employee concerns manager. 10 C.F.R. § 708.18(a) provides the only available recourse to a complainant whose compliant has been dismissed by the Head of Field Element:

> If your complaint is dismissed by the Head of Field Element or EC Director, **the administrative process is terminated** unless you appeal the dismissal to the OHA Director by the 10th day after you receive the notice of dismissal as evidenced by a receipt for delivery of certified mail.

10 C.F.R. § 708.18(a) (emphasis supplied). Accordingly, Richland's dismissal letter terminated the administrative process. Since the administrative process had been terminated this office does not presently have jurisdiction to conduct an investigation or a hearing. Therefore, we must reject the Complainant's request for an investigation followed by a hearing.

Normally, our consideration would end with our determination that our office does not have jurisdiction over the complaint. But in the present case, the Complainant proceeded to the wrong venue after being misled by Richland's error. Accordingly, we will process the Complainant's submission as if it were properly filed under § 708.18.

Turning to the merits of the Appeal we note that § 708.17(b) requires the Employee Concerns Manager to "give [the Complainant] specific reasons for the dismissal . . ." The Jurisdictional Determination provides only the following reasons for dismissal:

> [Fluor] found no retaliation with regard to the allegations raised. [Richland] agrees with this evaluation and finds that the matter has been resolved through [Fluor's] commitment to work directly with [the Complainant] to answer any questions you have regarding [the Complainant's] tuition reimbursement. In

> addition, [Richland] finds that the facts, as alleged in your complaint, do not present issues for which relief can be granted under 10 C.F.R. Part 708.

Jurisdictional Determination at 1. The unsupported conclusions set forth in the Jurisdictional Determination are too vague and conclusory to allow the Complainant or this office to determine whether the Complaint was properly dismissed under § 708.17. Accordingly, we are remanding this matter to Richland. On remand, Richland must issue a new jurisdictional determination which indicates the factual and legal basis for its conclusions that (1) Fluor did not retaliate against the Complainant, and (2) the facts, as alleged in the complaint, do not present issues for which relief can be granted under 10 C.F.R. Part 708. Moreover, Richland must also explain the relevance of Fluor's professed willingness to work with the Complainant to answer his questions about tuition reimbursement, if it continues to serve as a basis for dismissing the Complaint.

III. Conclusion

The Department of Energy's Richland Operations Office issued a letter dismissing the Complaint filed by Charles Evans. The letter lacked sufficient specificity and detail and failed to clearly explain Richland's reasons for dismissing the Complaint. In addition, Richland provided the Complainant with inaccurate information about his procedural options which led the Complainant to file a request for an investigation and hearing instead of a jurisdictional appeal. Accordingly, we are remanding this matter to Richland in order to provide it with an opportunity to issue a new jurisdictional determination that would provide a sufficient basis for meaningful review.

It Is Therefore Ordered That:

(1) The Appeal filed by Charles Evans (Case No. TBU-0026) is hereby granted in part, as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is remanded to the Richland Operations Office for further processing in accordance with the instructions set forth above.

(3) This is a Final Decision and Order of the Department of Energy

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 2, 2004

August 13, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Clint Olson**

Date of Filing: **July 1, 2004**

Case Number: **TBU-0027**

Clint Olson (the complainant or the employee), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint should be reversed and the matter should be remanded for further processing to the Manager of the Employee Concerns Program (Manager) at the National Nuclear Security Administration Service Center (NNSA).

I. Background

The complainant is an employee of BWXT Pantex (BWXT), the Management and Operations Contractor at the DOE's Pantex Plant in Amarillo, Texas. He is employed as a counterintelligence (CI) officer at the plant. On March 15, 2004, he filed a complaint of retaliation against BWXT with the NNSA. On June 22, 2004, the Manager dismissed the complaint on the grounds that it "fails to meet the requirements of the Contractor Employee Protection Program." The Manager stated as the basis for this finding that the complainant had failed to identify any adverse action taken against him, and had also "failed to identify the disclosure that [the complainant] personally made that resulted in retaliation." The dismissal indicated that the complaint therefore failed to satisfy the requirements of 10 C.F.R. § 708.12. On July 1, 2004, the complainant filed the instant appeal of that dismissal with the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18. On July 15, 2004, the Chief Counsel of BWXT submitted a letter supporting the Manager's determination.

II. Analysis

I agree with the Manager that Section 708.12 requires that a complainant identify the protected disclosure that he made, as well as the retaliation taken against him for making that disclosure. However, after reviewing the facts in this case, I do not believe that dismissal is appropriate at this point.

Section 708.5 sets out the nature of the employee conduct that is protected from employer retaliation. That Section provides:

> If you are an employee of a contractor, you may file a complaint against your employer alleging that you have been subject to retaliation for:
>
> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer. . . information that you reasonably and in good faith believe reveals--
>
> (1) A substantial violation of a law, rule or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; . . . .

10 C.F.R. § 708.5.

I reviewed the complaint to assess whether it meets these standards. It is true that in his complaint, the employee addresses matter of policy. He also raises alleged retaliations against others. Generally speaking, these are not appropriate matters for consideration in a Part 708 proceeding. Nevertheless, I find that the complaint, although not fully explicit on all points, certainly alleges that disclosures were made and describes retaliations. However, as discussed below it does require some supplementation.

A. Protected Disclosures

I see the following possible disclosures in this complaint. First, the complainant states that in February 2002, Pantex CI worked on a case which involved the inaccurate reporting of a cyber security incident to the DOE. According to the complaint, Pantex CI reported to "DOE HQ" that "a piece of highly classified media was and is missing from Pantex." The complaint alleges that BWXT

Security nevertheless stated that it had "evidence of the destruction of the media and that no compromise of classified information took place." The complaint contends that, in fact, there was no evidence of the destruction of the media, and that no evaluation of the extent of the compromise of classified information has been conducted. The complainant states that covering up this incident by Pantex is criminal, and reporting of this incident to the DOE is protected.

These circumstances certainly seem to describe an incident which could be covered under Section 708.5(a)(1). However, the employee has worded his description of the event so that it is impossible to discern whether he was actually involved in the disclosure or whether someone else in his organization was responsible for the disclosure. If the disclosure was not made by the employee, or he was not among the group who made the disclosure, then he would not be conferred protected status under Part 708. It is also not clear to whom the disclosure was made and when it took place. To be protected under Part 708, the disclosure must be made to an individual named in Section 708.5(a).

The complainant should be given the opportunity to state (i) that he made the disclosure or was among those involved in the disclosure; (ii) to whom the disclosure was made; and (iii) when it took place. It was premature to dismiss the complaint without providing the employee an opportunity to furnish an appropriate clarification. The Manager could certainly have asked the complainant to clarify these points.

The complaint also describes the following statement which might qualify as a protected disclosure. The employee contends that during the first week of December 2003 he told "SCIO Broaddus that [he] did not want to remain in the PAP [Personnel Assurance Program] at Pantex due to the inconsistency, the malicious use of the program in retaliation and the lack of formal procedure." The complainant further states that in a meeting of December 11, 2003, with SCIO Broaddus, Larrie Trent, and Mike Mallory, he "detailed the violations of the Privacy Act and HIPPA Privacy Rule which I personally have observed being committed by the Pantex PAP."

This communication does describe the important details, including (i) that it was made by the complainant; (ii) to whom it was made and (iii) the date of the discussion. It therefore satisfies several of the key requirements of Section 708.5. However, the subject of the communication may not necessarily qualify as a disclosure of "[A] substantial violation of a law, rule or

regulation," or as some other type of revelation protected under Section 708.5. For example, the statement does not describe the nature of the alleged violations. It is thus not possible to gauge whether the employee reasonably and in good faith believed he disclosed violations and whether they are substantial. The Manager should offer the employee the opportunity to supply this information. As indicated by the foregoing, I find that summary dismissal for failure to allege a protected disclosure is not appropriate at this point in this proceeding.

B. Retaliations

The Manager also stated as a basis for the dismissal of the complaint that the complainant had not identified any adverse action taken against him. I cannot agree. After reviewing the complaint, I note that the complainant alleges that "no promotions were made to personnel of Pantex Counterintelligence" as a result of the complaint regarding the "missing media." The employee has also described the relief he seeks for the purported retaliation: a retroactive promotion and pay raise. An allegation of denial of promotion is an appropriate action for investigation and hearing. Relief is available under 10 C.F.R. § 708.36(a).

The employee also cites an incident in which he alleges that the PAP was used in a retaliatory fashion. He believes that he was required to undergo a fitness for duty psychological interview as a retaliation for his disclosures. He also believes that he was pressured to withdraw from PAP, after reporting that PAP was used in a malicious manner. The appropriate remedy for the employee for this alleged retaliation, were it demonstrated to have occurred, is not apparent. On remand, the employee should be sure to describe the type of relief he seeks for this purported retaliation.

C. Submission of BWXT

As noted above, we also received a filing in this case from the BWXT chief counsel. The submission supports the finding of the Manager and requests that I uphold her dismissal determination. Although the Part 708 regulations do not specifically provide for a filing by the contractor in these jurisdictional appeals, I have exercised my discretion to consider the BWXT submission.

Overall, the arguments raised do not persuade me that dismissal is appropriate at this point. For example, BWXT asserts that the description of the protected disclosures is incomplete. As indicated above, I agree with that assessment, but I believe that

the employee should be provided an opportunity to cure the deficiency. BWXT also claims that the stated retaliation, failure to provide promotions to Pantex CI officers as a group, does not constitute retaliation for Part 708 purposes. This issue involves both legal and factual questions which I believe merit further development. It is therefore not appropriate for summary dismissal. In sum, I see nothing in the BWXT submission which convinces me that I should uphold the Manger's determination at this time.

III. Conclusion

Overall, I believe that the disclosures and retaliations alleged here are far from well-delineated. It is not clear that they will ultimately satisfy Part 708 requirements. However, it was premature to dismiss this case at this point in the proceeding, before any further development could be undertaken. *See Mark J. Chugg*, 28 DOE ¶ 87,030 (2002); *Darryl Shadel*, 27 DOE ¶ 87,561 (2000). I do not believe that the complaint as a whole lacks any sign of merit. It is only natural that facts are thin at the early stages of a Part 708 proceeding. Employees who are not familiar with Part 708 are often unable to draft complaints that satisfy all the procedural and substantive requirements of this Part. *See Gary S. Vander Boegh*, 28 DOE ¶ 87,038 (2003)(*Vander Boegh)*. For this reason, I believe that employee concerns managers should take a liberal view when making jurisdictional determinations. Before a complaint is dismissed, the complainant should be given an opportunity to correct deficiencies. *See Vander Boegh*, 28 DOE at 89,266. Managers should err, if they must, on the side of accepting jurisdiction. The OHA may then consider jurisdictional issues more fully as the facts are developed in the investigation and hearing stages. In making jurisdictional determinations, managers should bear in mind that they are making only a preliminary determination as to whether further processing is warranted. They are not charged at this early stage of the proceeding with making a final assessment about the worthiness of the overall complaint.

At this point, there is clearly sufficient substantive information in the record in this case to warrant some further processing of this complaint. I will therefore remand the matter to the Manager for that purpose. 10 C.F.R. § 708.18(d).

During that additional processing, the Manager should give further consideration to some important procedural aspects of this case. Section 708.12 specifies what information an employee must include

in his complaint of retaliation. In addition to a description of the events giving rise to the complaint, the complainant must make the following assertions: state that he is not currently pursuing a remedy under State or other applicable law; state that all of the facts included in the complaint are true and correct to the best of his knowledge and belief; and affirm that he has completed all applicable grievance or arbitration procedures. 10 C.F.R. § 708.12(b),(c), and (d). The copy of the complaint submitted to the OHA as part of this appeal does not set forth any of these statements for the record. Accordingly, the Manager should also make sure that the record in this case is sufficient with respect to the requirements of Section 708.12. *Vander Boegh*, 28 DOE at 89,266-67.

Finally, the employee should, on his own, review all the deficiencies in the complaint, as discussed in the above determination, and correct them. The Manager will allot sufficient time to the employee for this purpose.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Clint Olson (Case No. TBU-0027) is hereby granted and his Part 708 complaint is hereby remanded to the Employee Concerns Program Manager, NNSA Service Center, for further processing as set forth above.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 13, 2004

December 9, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: Glenn Kuswa

Date of Filing: July 9, 2004

Case Number: TBU-0028

Glenn Kuswa, an employee of Sandia National Laboratories (Sandia) in Albuquerque, New Mexico, appeals the dismissal of his whistleblower complaint filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. On June 22, 2004, the Employee Concerns Program Manager at the DOE's National Nuclear Security Administration Service Center, Albuquerque, (NNSA/Albuquerque) dismissed Mr. Kuswa's complaint. As explained below, I reverse the dismissal of the subject complaint, and remand the matter to NNSA/Albuquerque for further processing.

I. Background

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, the DOE office initially receiving a complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

Mr. Kuswa was employed as a "general technical manager" at Sandia. After being demoted to "principle [*sic*] member of technical staff," Mr. Kuswa filed a Part 708 complaint with NNSA/Albuquerque, alleging that he was demoted in retaliation for raising concerns within Sandia about "pressures being exerted to produce data that would support an outcome calling for a costly replacement of a weapon component." Complaint at 1. Mr. Kuswa also alleged that the demotion

was in retribution for "the appearance that [he] and/or staff in his department had made statements to the DOE Office of Inspector General." *Id.*

On June 22, 2004, the Employee Concerns Program Manager at NNSA/Albuquerque dismissed the complaint. Letter from Eva Glow Brownlow, Employee Concerns Program Manager, NNSA/Albuquerque, to J. Edward Hollington, Attorney for Mr. Kuswa (June 22, 2004) ("Dismissal Letter"). The dismissal letter states, in pertinent part:

> 10 CFR Part 708.12 states that the complainant is required to identify in the complaint the 'disclosure, participation, or refusal that the employee believes gave rise to the retaliation.' Mr. Kuswa admits in his complaint that he did not make any disclosure, participate in making a disclosure or refuse to do any particular thing that he thought was dangerous. For this reason, Mr. Kuswa's complaint fails to meet the requirements of 10 CFR 708.

Dismissal Letter at 1.

In his Appeal, Mr. Kuswa contends that his "complaint contains numerous factual references to protected disclosures he made to his employer of fraud, gross mismanagement, gross waste of funds or abuse of authority as defined in 10 CFR 708.5(a)(3)." Appeal at 1.

II. Analysis

Part 708 provides that the DOE may dismiss a complaint for "lack of jurisdiction or for other good cause . . ." 10 C.F.R. § 708.17.

> Dismissal for lack of jurisdiction or other good cause is appropriate if:
>
> (1) Your complaint is untimely; or
>
> (2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this regulation; or
>
> (3) You filed a complaint under State or other applicable law with respect to the same facts alleged in a complaint under this regulation; or
>
> (4) Your complaint is frivolous or without merit on its face; or
>
> (5) The issues presented in your complaint have been rendered moot by subsequent events or substantially resolved; or

> (6) Your employer has made a formal offer to provide the remedy that you request in your complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this regulation.

10 C.F.R. § 708.17(c).

The Dismissal Letter does not specify one of the reasons listed in section 708.17(c) as the basis for dismissing Kuswa's complaint. However, because the Dismissal Letter finds that the complaint lacks an allegation of a disclosure, participation, or refusal to participate which is protected under Part 708, we can only assume that NNSA/Albuquerque found Mr. Kuswa's complaint to be "frivolous or without merit on its face." We disagree with this conclusion.

Part 708 protects a DOE contractor employee from retaliation for, among other things, disclosing to his "employer . . . , information that you reasonably and in good faith believe reveals . . . [f]raud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a)(3). We find that disclosures allegedly made by Mr. Kuswa would be protected by this provision of the regulations.

At the heart of Mr. Kuswa's complaint is his allegation that Sandia personnel briefed NNSA officials with a presentation of data "designed to close the sale for replacing the spin rocket motor, and that the representations made with this data were misleading and inappropriately biased." Complaint at 3. The complaint also alleges that the cost for replacement of the spin rocket motor stands at about $77 million.

Kuswa's complaint describes a meeting in the fall of 2002 in which he was informed "that we had three months to complete the investigation to provide critical data that would be need[ed] to support the effort to sell the DOE on a replacement program for the SRM [spin rocket motor]. . . . If we could not keep that schedule, management was prepared to make heads roll (that is, jobs would be lost), . . ." Kuswa responded that "[t]hree months would set a record even for the simplest problems, and it would not be possible to conduct a quality operation on the requested time line." Because of what he saw as "the threatening and unreasonable nature of part of the exchanges," Kuswa states that he "reported the incident to Janet Sjulin, manager of the Independent Surveillance Assurance organization, and also to Bill Norris."

Kuswa further alleges that he made his concerns known to Les Shephard, director of Organization 2900 at Sandia, at a lunch meeting in early summer 2003, in which he

> remarked that the spin rocket replacement had apparently been sold to NNSA, and that we in Surveillance were unconvinced that the case was strong enough, in view that there had been only one serious problem discovered out of hundreds of tests conducted at weapon quality standards. Clements [a member of Kuswa's staff] and Kuswa had also kept Bill Norris [Surveillance Level II manager] apprised of the pressures and exaggerations of problems from the outset.

Complaint at 4.

The gist of Kuswa's allegation is that there was pressure on lower level employees from Sandia management to provide data that would "sell" DOE on a weapon component replacement program costing as much as $77 million, and that when Sandia briefed DOE on this subject, it did so with representations that "were misleading and inappropriately biased." These allegations clearly raise an issue with regard to at least "gross waste of funds," the revelation of which is specifically protected under Part 708. And Mr. Kuswa alleges that he raised these very concerns with Sandia management. Thus, we have no doubt that Mr. Kuswa's activities, as alleged, would fall under the protection of Part 708.[*]

We emphasize that we are assuming Mr. Kuswa's allegations to be true for purposes of this appeal, as we must. NNSA/Albuquerque should normally make the same assumption when evaluating whether a complaint brought under Part 708 "is frivolous or without merit on its face." To do otherwise in the present case "reaches an issue that is at the heart of this case and ends the entire proceeding." *Mark J. Chugg*, 28 DOE ¶ 87,030 at 89,233 (2002). The complainant's contention that he was demoted because of his protected activity deserves closer examination, and is still in dispute. "In fact, this is the very type of issue that the OHA is charged with investigating under Section 708.22 and considering through the hearing process described at Section 708.28." *Id.* I find that the claims raised here present issues for which relief can be granted (e.g., a reversal of Mr. Kuswa's demotion) and which are not frivolous or without merit on their face. Accordingly, I conclude that this determination by the NNSA/Albuquerque was incorrect. *Daryl J. Shadel*, 27 DOE ¶ 87,561 (2000).

III. Conclusion

As indicated by the foregoing, I find that NNSA/Albuquerque incorrectly dismissed the complaint filed by Glenn Kuswa. Accordingly, the complaint should be accepted for further consideration.

[*] Because we find that Mr. Kuswa has alleged *actual* disclosures that would be protected under Part 708, we need not consider Mr. Kuswa's allegation of retaliation for "the appearance that [he] and/or staff in his department had made statements to the DOE Office of Inspector General." Complaint at 1.

It Is Therefore Ordered That:

(1) The Appeal filed by Glenn Kuswa (Case No. TBU-0028) is hereby granted and his Part 708 complaint is hereby remanded to the National Nuclear Security Administration Service Center, Albuquerque, for further processing as set forth at 10 C.F.R. § 708.21.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.18(d).

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 9, 2004

April 26, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Michael Goetz**

Date of Filing: **March 28, 2005**

Case Number: **TBU-0033**

Michael Goetz (the complainant) appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint is upheld.

I. Background

The complainant alleges the following facts. In 2000, he was employed by "MOTA," a DOE subcontractor at the DOE's Argonne National Laboratory (ANL) located in Argonne, Illinois. He filed a report describing safety violations involving radioactive materials and other safety matters that took place between February 2000 and June 2001. In October 2001 he met with an investigator regarding his safety concerns. He met with another investigator in early 2004 regarding this matter. On March 15, 2004, he voluntarily began work at a new position at NASA/Plum Brook Station, a remote test installation site for the National Aeronautics and Space Administration's Glenn Research Center.[1] His employer at Plum Brook was Bartlett Nuclear, Inc. (Bartlett).

It appears that Bartlett is performing a long-term remediation project (decontamination and decommission services) at Plum Brook. Montgomery-Watson is the NASA prime contractor at Plum Brook and Bartlett is a subcontractor of Montgomery-Watson. According to the complainant, "Montgomery-Watson is subject to the oversight of Argonne National Labs personnel." On November 4, 2004, the complainant was fired from his position with Bartlett, allegedly for improper computer use.

1/ The Plum Brook Station is located in Sandusky, Ohio.

The complainant filed a complaint of retaliation against Bartlett with the Argonne Site Office of the Department of Energy. The Argonne Site Office oversees the ANL. The complainant believes that he was fired from his job at Plum Brook in 2004 because he had made safety disclosures at ANL about 3 or 4 years earlier.

On March 4, 2005, the Acting Site Office Manager dismissed the complaint on the grounds that "the DOE Contractor Employee Protection Program applies to complaints of employees of DOE management and operating contractors and to subcontractors performing work at DOE-owned or-leased facilities. . . . Bartlett Nuclear has no contractual relationship with Argonne National Laboratory. The ANL oversight is pursuant to an interagency agreement between DOE and the National Aeronautics and Space Administration (NASA). Further, the NASA/Plum Brook Facility is not a DOE-owned or leased facility; therefore, DOE has no jurisdiction over your complaint." The complaint was dismissed pursuant to 10 C.F.R. § 708.17, for lack of jurisdiction.

On March 28, 2005, the complainant filed the instant appeal of that dismissal with the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18. In the appeal, the complainant stated that his complaint of retaliation was "initiated through a contractor directly under the oversight of Argonne National Labs. The Bartlett representative merely [followed] the direct instructions of the Montgomery-Watson superintendent. . . [whose] daily activities are subject to the supervision of ANL personnel directly involved with my concerns expressed at ANL. Bartlett functioned as a captive subcontractor employer whose activities at Plum Brook, including all staffing decisions, were subject to approval of the primary contractor, Montgomery-Watson." The complainant further claimed that the events forming the basis of his complaint occurred at ANL. Finally, the complainant stated that Bartlett has had contractual relationships with ANL, and maintains contracts with the DOE at other DOE sites.

On March 30, we wrote a letter to the complainant asking for additional information about the relationship between Bartlett and the DOE. Specifically, we asked him to (i) provide additional information about the (contractual) relationship between Bartlett and ANL; (ii) submit information showing the relevant entities with which Bartlett had a contractual arrangement; (iii) submit copies of contracts between the DOE/ANL and Bartlett, or a DOE prime contractor and Bartlett; (iv) provide some background about Montgomery-Watson and its relationship to ANL, DOE and Bartlett; and (v) provide information about work he was performing at Plum Brook

that directly related to activities at DOE-owned or -leased facilities.

In a telephone conversation with the complainant on April 13, we explained in more detail the type of information we were seeking and the reason it was important. The complainant indicated that he would attempt to provide information that would respond to our letter. Thereafter, the Complainant submitted a copy of a draft of his Complaint of Retaliation. He did not submit any other information.

Section 708.18 provides that the Director of OHA will issue a decision on this type of case by the 30th day after the appeal is received. Since this appeal was filed on March 28, I believe that it is now appropriate to proceed with an analysis of this matter based on the record before me.

II. Analysis

After reviewing that record, I am in agreement with the result reached by the Argonne Site Office. The Part 708 regulations were promulgated to protect DOE contractor/subcontractor employees. According to Section 708.2, an "employee" means a person employed by a contractor, and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in . . . this subpart." A "Contractor" means a seller of goods or services who is a party to: (1) a management and operating contract or other type of contract with DOE to perform work directly related to activities at DOE owned or-leased facilities, or (2) a subcontract under a contract of the type described in paragraph (1) of this definition, but only with respect to work related to activities at DOE-owned or-leased facilities." As discussed below, the complainant does not qualify as an employee under the regulatory definition, and Bartlett does not meet the definition of contractor or subcontractor.

The complainant simply states that Bartlett was subject to DOE contractor "oversight." However, he has provided no evidence or reasoned argument that there was any contractual relationship between Bartlett and any DOE contractor. The Argonne Acting Site Office Manager stated that ANL oversight of Bartlett was pursuant to an interagency agreement between DOE and NASA. Without any information to the contrary, I must conclude that this does not meet the definition set forth in Section 708.2.

In any event, the complainant's assertion that the Bartlett representative "merely followed the direct instructions of the Montgomery-Watson superintendent," even if true, does not mandate a different result. DOE contractors, and through them their subcontractors, must comply with Part 708. 64 Fed. Reg. 12862 at 12863 (March 15, 1999). If there is no contractual agreement between the DOE and Montgomery-Watson/Bartlett, but rather only an "inter-agency agreement," between the DOE and NASA, then there is no established basis for the DOE to expect Bartlett to comply with Part 708, and no apparent authority on the basis of which the DOE could order Bartlett to provide relief for the complainant. The complainant has shown no reason for me to conclude otherwise. The complainant's allegation that Bartlett has contracts with the DOE at other sites does not bring the complainant, who did not work at those sites, within the purview of Part 708.

Furthermore, even if there were a sub-contractor relationship between the DOE and Bartlett, since the complainant did not work at a DOE facility, he would be required to show that his work related to activities at a DOE-owned or -leased facility. 10 C.F.R. § 708.2. We asked the complainant to provide such information, by describing the work he was performing. Although submission of this type of evidence was well within his ability, he failed to come forth with even this relatively simple information.

As a final matter, aside from the fact that Part 708 does not permit consideration of the instant complaint, I find there is little plausibility to the gravamen of the complaint here, i.e., that the complainant was fired from a NASA site 4 years after his original DOE/ANL disclosures because a DOE overseer at the NASA site bore him some ill-will.

Even though the complainant is not covered by the DOE's Part 708 regulations, there are other programs and agencies that might offer him protection. The ANL provided the complainant with information about the Occupational Safety and Health Administration (OSHA) whistleblower protection program and suggested other agencies such as the Nuclear Regulatory Commission, NASA and the Army Corps of Engineers that might have jurisdiction over the complainant and "safety at his workplace." Thus, the complainant here may well have avenues of relief other than the DOE's Part 708.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Michael Goetz (Case No. TBU-0033) is denied, and his Complaint of Retaliation is hereby dismissed.

(2) This appeal decision shall become a final agency action unless a party files a petition for Secretarial review by the 30th day after receipt of this appeal determination. 10 C.F.R. § 708.18(d).

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 26, 2005

February 23, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Caroline C. Roberts**

Date of Filing: **January 26, 2006**

Case Number: **TBU-0040**

Caroline C. Roberts (the complainant), appeals the dismissal of her complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.

I. Background

The complainant is a former employee of the DOE's Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico. She claims that during the period October 2003 through August 2004 she made disclosures that are protected under Section 708.5. On August 9, 2004, she was terminated from her LANL position and on August 5, 2005, she filed the instant complaint of retaliation.

In a letter of January 10, 2006, the Whistleblower Concerns Program Manager at the National Nuclear Security Administration Service Center (NNSA) (Program Manager) dismissed the complaint. The Program Manager noted that Section 708.14 provides that a complaint must be filed within 90 days after the alleged retaliation. The Program Manger determined that the complainant's August 5, 2005 filing was untimely because it came about one year after the complainant's termination by LANL. In her letter, the Program Manager found this to constitute a basis for dismissing the complaint. 10 C.F.R. § 708.14. The January 10 letter gave as a second basis for the dismissal the failure of the complainant to specifically identify a disclosure that relates to the criteria set forth in 10 C.F.R. § 708.5. On January 26, 2006, the complainant filed the instant appeal of that dismissal with the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18.

II. Analysis

Section 708.17(a) provides that a complaint of retaliation may be dismissed by the Head of Field Element or EC Director for lack of jurisdiction. Section 708.17(c)(1) provides that untimeliness is an appropriate basis for dismissal on grounds of lack of jurisdiction. Section 708.17(b) states that if a complaint is dismissed for lack of jurisdiction or other good cause, the Head of Field Element or EC Director will provide a complainant with "*specific reasons for the dismissal*. . . ." (Emphasis added.) Setting out the specific reasons for the dismissal is a key part of this provision. It allows the employee to understand why his complaint may have fallen short, and also to craft an appropriate appeal. It also permits the Director of the Office of Hearings and Appeals to more effectively perform the review allowed in Section 708.18. A mechanistic repetition of the regulations by the Head of Field Element or EC Director does not permit the individual to understand the reasoning for the dismissal, nor does it promote effective review by the Director of the OHA. Thus, a jurisdictional denial letter should fully review and describe the facts that played a role in the denial, as well as the reasoning used to reach the ultimate determination. A mere formulaic repetition of the regulations or a summary rejection without reasoning or discussion of the facts in the record is simply not sufficient. With these considerations in mind, I turn to the jurisdictional determination that is under appeal in this case.

With respect to the dismissal on the grounds of untimeliness, the January 10 letter stated that there "was not enough information explaining the lapse in time from the termination of the complainant on August 9, 2003, to the filing on August 5, 2005 to be considered timely under 10 C.F.R. Part 708.14."

This explanation is inadequate. It does not discuss the information that was in the record regarding why the filing was late. The DOE Field Offices should provide a full explanation of their determinations so that a Part 708 complainant is able to understand and challenge the Field Office's reasoning if he believes its determination is incorrect. Nevertheless, in this case, for reasons of increased administrative efficiency, I will expedite this proceeding by providing my own review of the record regarding the late filing.

It is clear that the individual did not file her Part 708 complaint with the DOE until August 5, 2005. As stated above, this filing was made about one year after the termination. Section 708.14

provides that complaints of retaliation must be filed within 90 after the complainant knew or should have known of the retaliation. In this case, since the individual was terminated on August 9, 2004, the complaint should, ordinarily, have been filed with 90 days after that date. However, Section 708.14(d) provides a complainant with the "opportunity to show any good reason [she] may have for not filing within that period and the [appropriate DOE official] may, in his or her discretion, accept [the] complaint for processing.

In this case, the Program Manager asked the complainant to provide a reason for the untimely filing and the complainant provided a reason. In her December 30, 2005 filing with the Program Manager, the complainant stated that she was not aware of the DOE's Part 708 contractor employee protection provisions. She did not learn of Part 708 until August 5, 2005, which is when she submitted her Part 708 complaint to the Program Manager. The Program Manager did not discuss this assertion in the dismissal letter. I will therefore consider it now.

The fact that the complainant may not have learned of the existence of Part 708 until one year after her termination is simply not a sufficient excuse for the late filing, and does not constitute a good reason to accept her untimely submission. Individuals are generally expected to know and understand their rights and obligations under applicable DOE regulations. In this case, I find ignorance alone not to constitute good cause. Therefore dismissal seems appropriate here.

Furthermore, I have reviewed the record in this case to determine whether there is any other legal basis on which to rest an acceptance of the complaint. In this regard, I note that the submissions in the case also indicate that on the day the complainant was terminated, August 9, 2004, she filed a complaint with the head of LANL. This complaint was referred to LANL's own whistleblower office. However, after reviewing this material, I cannot find that it satisfies the requirements of Part 708. Part 708 clearly requires complaints of retaliation to be filed with the head of the DOE Field Element. [1] I cannot find that filing a

---

1/ Section 708.2 states: "Head of Field Element means the manager or head of a DOE operations office or field office, or any official to whom those individuals delegate their functions under this part." The head of LANL is not a delegated

(continued...)

complaint with the head of LANL, run by DOE contractor University of California, to be in any way equivalent to a proper Part 708 filing with the DOE. Further, since the complainant was not even aware of Part 708, I certainly cannot conclude that she was uncertain as to whether her complaint was filed pursuant to that Part or under LANL's own procedures. Thus, there is no basis to conclude that she should be granted an extension of time based on any legitimate confusion on her part.

Section 708.14 provides for some exceptions to the 90 day time limitation. First, complainants are required to exhaust all available opportunities for resolution through an "applicable grievance-arbitration procedure." Section 708.13. Moreover, there is a tolling of the 90 day period while the individual is attempting to resolve the dispute through an internal company grievance-arbitration process. However, the time period begins to run again 150 days after the internal grievance was filed if a final decision on the grievance has not been issued. Section 708.14(b). These provisions do not help the complainant here.

First, I do not believe that the LANL whistleblower procedures constitute a grievance-arbitration procedure within the meaning of Section 708.13. The procedures that fall within the purview of Sections 708.13 and Section 708.14 are those that are negotiated grievance procedures available to bargaining unit employees. ***Darryl H. Shadel*** (Case No. VBU-0050), 27 DOE ¶ 87,561 (2000). There is simply no evidence in this case that the whistleblower processes that LANL had implemented were negotiated grievance procedures. Accordingly, the tolling of the time periods allowed by Section 708.14 is not applicable.

In any event, even if the tolling period applied, Section 708.14 does not permit the process to linger indefinitely. After 150 days, if there has been no final decision, the 90-day filing period begins to run again. Therefore in this case, 150 days after the August 2004 filing with LANL, or by the beginning of January 2005, the period began to run again. The complainant therefore had 90 days to file her whistleblower complaint with the DOE. She did nothing in this regard. Consequently, the tolling provisions of Section 708.14(b), even if applicable, do not provide her with any benefit here.

1/ (...continued)
official under this regulation.

Accordingly, I find that the complainant has not shown that good cause exists for her failure to file her Part 708 complaint in a timely manner, or any other reason to conclude that her complaint should be accepted even though it was not filed within the 90-day regulatory time period. Accordingly, her complaint should be dismissed.

Given my determination that the complaint was not filed in a timely manner, I need not give any further consideration to the finding by the Program Manager that the substance of complainant's disclosures does not fall within the purview of Section 708.5.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Caroline C. Roberts (Case No. TBU-0040) is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.19.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 23, 2006

November 29, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **William Cor**

Date of Filing: **April 21, 2006**

Case Number: **TBU-0045**

William Cor (the complainant or the employee), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint should be reversed and the matter remanded for further processing to the Whistleblower Program Manager at the National Nuclear Security Administration Service Center (NNSA).

I. Background

The complainant was an employee with ARES Corporation, a DOE contractor at the Los Alamos National Laboratory in Los Alamos, New Mexico. Pursuant to Part 708, he filed a complaint of retaliation against ARES with the NNSA. On April 5, 2006, the Program Manager dismissed the complaint "for lack of jurisdiction." The Program Manager stated as the basis for this finding that the complainant had failed to show that ARES had terminated the complainant as he had asserted. Rather, the Program Manager found that the complainant's employment with ARES was on an "on call" basis. In this regard, the Program Manager noted that as an on call employee, the complainant was not guaranteed any work, and further that the complainant did not provide any documentation that any other casual employee has received work that could have been assigned to him. On this basis the Program Manager concluded that the Complaint should be dismissed for lack of jurisdiction, citing to 10 C.F.R. § 708.17(c). On April 21, 2006, the complainant filed the instant appeal of that dismissal with the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18.

II. Analysis

A program manager may dismiss a Part 708 complaint for lack of jurisdiction or other good cause under 10 C.F.R. § 708.17 based on one or more of the following grounds: (1) the complaint is untimely; (2) the facts, as alleged in the complaint, do not present issues for which relief can be granted under Part 708; (3) the complainant has filed a complaint under other applicable law with respect to the same allegations; (4) the complaint is frivolous or without merit on its face; (5) the issues have been rendered moot or substantially resolved; or (6) the employer has made an offer to provide the requested remedy or a remedy that DOE considers to be equivalent to the remedy that could be provided under Part 708.

The complainant alleges he made a protected disclosure regarding the safety of a proposed design for an acid fume hood system at Los Alamos National Laboratory's Beryllium Technology Facility at Tech Area 3, and then stopped receiving on-call work assignments, thereby constructively terminating his employment. In response to the program manager's solicitation of its comments concerning the complaint, the contractor submitted statements disputing the validity of the complainant's whistleblowing claims, and further asserting that the complainant had not been terminated but instead had stopped receiving assignments simply due to the termination of work on the subcontract on which the complainant was employed.

The complainant responded by submitting information to the Program Manager disputing these assertions, including his contention that further work on the project was performed after he was directed to stop work, and that in fact the parties had manifested an earlier intention to undertake a broader working relationship beyond the project on which complainant was directed to stop work. Complainant further asserted that, contrary to the contractor's assertion that complainant had not been terminated, the contractor had informed an independent witness that the complainant was no longer employed by the firm. See March 22, 2006, e-mail from William Cor to DOE Whistleblower Program Manager.

The Program Manager dismissed the complaint for lack of jurisdiction. In reaching this determination, the program manager found that the complainant had failed to refute the contractor's assertions that the complainant had not been terminated and that no further work remained on the project to which the complainant was assigned.

In the context of a dismissal of a complaint by a program manager as meritless, Section 708.17 authorizes dismissal by a program manager only if the complaint itself fails to allege "issues for which relief can be granted" or "is frivolous or without merit on its face." As relevant here, the Part 708 regulations prohibit a contractor employer from retaliating against its employees for making a disclosure, to various identified governmental or contractor personnel, including a complainant's employer, of information the employee reasonably believes reveals a "substantial and specific danger to employees or to public health or safety." 10 C.F.R. § 708.5 (a) & (a) (2). Complainant asserts that he was directed to design an acid fume exhaust system that was tied into an existing building exhaust system and was not adequate for the concentrated acid exhaust, which should have been exhausted independently from the system. Complainant asserts that the design was "unsafe" and suggests that the alleged design defects posed a risk of acid exposure and injury to workers at LANL.

The respondent contests that the complainant raised an actual safety concern and maintains that complainant's alleged safety disclosures lack protection under Part 708 as being both insubstantial, and actually motivated by the complainant's "inability to produce his work in a timely manner." See Exhibit 3, page 1 to ARES February 27, 2006, Response to Complaint. As noted above, the parties further dispute whether complainant's lack of further assignments following the alleged safety disclosure was the product of impermissible reprisal for the alleged protected disclosure, as alleged in the complaint, or resulted simply from the termination of the exhaust fume project and the absence of other available work.

Resolution of the parties' competing assertions concerning the legitimacy of the alleged safety concerns and availability of additional work is beyond the scope of this initial stage of the proceedings. In the present context, 10 C.F.R. § 708.17 permits a program manager to dismiss a Part 708 complaint if the allegations set forth in the complaint fail to allege a non-frivolous claim for which relief can be granted under Part 708. In the subject case, however, the parties' conflicting claims concerning whether or not the complaint presents a disclosure protected under Section 708.5, and whether or not the complainant suffered any actual reprisal, are not susceptible to summary resolution under Section 708.17. On the basis of the present limited record we cannot say that the allegations in the complaint that the complainant suffered retaliation for making a protected safety disclosure are either

plainly frivolous or, if ultimately proven, would not support relief under Part 708.

Where, as here, the complaint does not meet the grounds for dismissal under Section 708.17, the program manager is authorized to recommend that the parties attempt to resolve the complaint informally, and absent a voluntary resolution to notify the complainant of his options to have the matter referred to OHA for a hearing either with or without a preceding OHA investigation. See 10 C.F.R. § § 708.20, and 708.21. A remand to the program manager for further proceedings in accordance with these provisions is thus in order.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by William Cor (Case No. TBU-0045) is hereby granted and his Part 708 complaint is hereby remanded to the Employee Concerns Program Manager, NNSA Service Center, for further processing as set forth above.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 29, 2006

August 21, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case:	**Dennis D. Patterson**
Date of Filing:	**July 31, 2006**
Case Number:	**TBU-0047**

Dennis D. Patterson (Patterson or the complainant) appeals the dismissal of his June 1, 2006 complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. He filed the complaint with the Employee Concerns (EC) Manager of the DOE's Idaho Operations Office (DOE/ID), located in Idaho Falls, ID. As explained below, the EC Manager's July 17, 2006 dismissal of the complaint should be reversed, and the appeal granted.

I. Background

The complainant is the Manager of the Employee Concerns and Ethics Office of the Battelle Energy Alliance (BEA). BEA manages the DOE's Idaho National Laboratory. On June 1, 2006, Patterson filed a Complaint of Retaliation with the DOE/ID EC Manager. In that complaint, he alleged that he made protected disclosures involving violations of the Privacy Act, the Freedom of Information Act and Part 708. He stated that he made these disclosures to BEA senior management and to the BEA corporate office. He claimed that BEA retaliated against him in a number of ways, including intimidation, a retaliatory investigation of his ethics office, a lower performance appraisal than he had previously received, which resulted in a reduction in his merit pay increase for 2005, and a change in his job title from Manager to Specialist 5, which he contends will have an adverse impact on his future salary increases.

In the July 17, 2006 dismissal letter, the EC Manager of the DOE/ID determined that the complaint should be dismissed for the following reasons. First, the EC Manager found that the complaint was untimely filed. In this regard, she noted that a Part 708 complaint must be filed within 90 days of the date that the complainant knew or should have known of the alleged retaliation. 10 C.F.R.

§ 708.14(a). The EC Manager stated that the complainant had filed a "Charge of Discrimination" with the Idaho Human Rights Commission in which he stated that the latest date of discrimination was February 24, 2006. [1] She therefore determined that the June 1 filing of the Part 708 complaint took place beyond the 90 time frame and consequently was untimely.

As a second reason for the dismissal, the EC manager indicated that the complainant had not stated that he had exhausted all applicable grievance-arbitration procedures, as required by Section 708.13(a)(1).

Based on the above findings the EC Manager dismissed the complaint.

Pursuant to 10 C.F.R. § 708.18(a), Patterson filed the instant appeal with the Office of Hearings and Appeals.

II. Analysis

A. Timeliness

As noted above, the EC Manager found that the complaint was untimely because the latest retaliation noted by Patterson in his "Charge of Discrimination" with the Idaho Civil Rights Commission took place on February 24 and he filed his Part 708 complaint on June 1, which was more than 90 days later. I cannot discern why the EC manager referred to the Charge of Discrimination rather than Patterson's Part 708 Complaint of Retaliation in determining whether the filing was timely. In any event, Patterson filed a copy of his June 1 complaint along with his appeal. As Patterson notes in his appeal, the complaint clearly alleges a retaliation on March 14. The retaliation was a reduction in his 2005 merit increase. See Complaint Item (2)(F). Based on that alleged retaliation, the Part 708 complaint was clearly filed within the 90 day time frame permitted under Part 708. Accordingly, this aspect of the EC Manager's determination will not be sustained.

B. Exhaustion of Grievance/Arbitration Procedures

As stated above, the EC Manager included as a second reason for dismissing the complaint that Patterson had failed to state that he had exhausted all applicable grievance-arbitration procedures, as required by Section 708.13.

1/ The complainant withdrew that complaint on May 25, 2006.

After reviewing record in this case, I find that the EC Manager has erred regarding this issue. As an initial matter, I note that the Patterson complaint does include a statement regarding the grievance-arbitration issue. Specifically, Patterson has included a form that appears to have been developed by the DOE/ID. The form asks the filer to provide information about the various jurisdictional matters that every Part 708 complainant must address, including a required statement by a complainant that he has "exhausted (completed) all applicable grievance or arbitration procedures." 10 C.F.R. § 708.12(d). In connection with this subsection, the DOE/ID form offered the following three options as responses to whether the complainant had exhausted all applicable procedures: "(1) all attempts at resolution. . . have been exhausted; (2) the company grievance procedure is ineffectual or exposes me to employer reprisal; [2] (3) the company has no such procedures." The individual submitting this form is asked to mark all that apply.

In his complaint, Patterson responded by claiming that the procedures were ineffectual (Item No. 2). The EC manager then rejected that response, stating that the complainant had not exhausted all grievance arbitration procedures as required under Part 708.

The EC Manager's determination appears to assume that the complainant was required to exhaust the BEA grievance arbitration procedures. Based on the record in this case, we find that this assumption was incorrect. The term "grievance-arbitration procedure" used in the context of Part 708 has a specialized meaning related to procedures negotiated by employees and management under labor agreements. It therefore does not include every unilaterally-created grievance procedure that an employer may informally offer. *Darryl H. Shadel*, 27 DOE ¶ 87,561 (2000). *See also* 64 Fed. Reg. 12862 at 12868 (March 15, 1999).

2/ This option was one that was available under the prior version of Part 708 at Section 708.6(c)(2), which was promulgated in 1992. That provision is not included in the current version of Part 708, promulgated in 1999. Accordingly, this option should not have been included in the form.

In the instant case, it does not appear that Patterson has failed to participate in a union-mandated grievance procedure. [3] Rather, he has simply not utilized a voluntary BEA "Alternative Dispute Resolution" (ADR) process that is set out in the BEA handbook. [4] Such use is not required under Part 708. Accordingly, the complainant was not required to exhaust either a mandatory grievance-arbitration procedure or the BEA voluntary process. His failure to indicate exhaustion of grievance-arbitration procedures on the DOE/ID form is entirely understandable, since the form did not include the appropriate option, i.e. that he was not required to participate in a union-mandated grievance procedure. [5] (I recommend that the form be amended to include an opportunity for a complainant to indicate that he is not required to participate in a union-mandated grievance procedure.) Accordingly, the complaint was improperly dismissed based on the purported failure to include a statement regarding exhaustion of grievance-arbitration procedures.

As indicated by the above discussion, I find that the DOE/ID dismissal was incorrect and the Patterson complaint should be accepted for further processing.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Dennis D. Patterson (Case No. TBU-0047) is hereby granted, and his Part 708 complaint is hereby remanded to the

---

3/ In fact, it is not clear that he is even a member of a bargaining unit required to use such procedures.

4/ As Patterson points out, the BEA handbook indicates that "Employees have the right to file complaints with enforcement agencies without using the ADR program." Appeal at 2.

5/ It is also possible that there are no union-mandated procedures at the site, in which case the complainant should have checked item 3. In any event, based on the record here, it appears that the exhaustion requirements of Section 708.13 are not applicable. However, the complainant should confirm this is the case.

Employee Concerns Program Manager, Idaho Operations Office, for further processing as set forth above.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 21, 2006

August 3, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case:	**Gary S. Vander Boegh**
Date of Filing:	**July 11, 2006**
Case Number:	**TBU-0049**

Gary S. Vander Boegh (Vander Boegh or the complainant) appeals the dismissal of his February 21, 2006 complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. [1] He filed the complaint with the Office of Civil Rights and Diversity of the DOE's Environmental Management Consolidated Business Center (EMCBC) located in Cincinnati, Ohio. As explained below, the EMCBC June 29, 2006 dismissal of the complaint should be sustained, and the appeal denied.

I. Background

The complainant was employed by Weskem, LLC, a subcontractor of Bechtel Jacobs Company, LLC (BJC). BJC was the management and integration (M&I) contractor at the DOE's Paducah, Kentucky plant. The complainant was a landfill manager at a landfill site related to that plant. On April 23, 2006, he was terminated from that position, and on April 24, a new M&I contractor, Paducah Remediation Services (PRS), and a new subcontractor, Duratek, took over operation at the site.

The complainant's Part 708 history before the DOE dates from 2002. In that year, he filed a complaint claiming that in 2001 he made disclosures regarding the procedures used at the landfill that could result in environmental and regulatory violations. He contended that his employer, Weskem, then retaliated against him for making the disclosures. In an Initial Agency Decision issued on July 11,

---

1/ On February 23, 2006, the Complainant filed an amendment and supplement to the complaint and on April 23, he filed an additional supplement. For simplicity, the three filings will be referred to as "the complaint."

2003, a DOE Office of Hearings and Appeals (OHA) hearing officer found that the disclosures were protected, and that Weskem had taken several adverse personnel actions against Vander Boegh which constituted retaliation. The OHA hearing officer determined that the complainant should receive relief for those retaliations. *Gary Vander Boegh*, 29 DOE ¶ 87,040 (2003). [2]

The instant appeal concerns a different, although related, matter: a February 2006 complaint filed under Part 708 by Vander Boegh with the EMCBC. In that filing, the complainant contended that he had been subjected to ongoing retaliations for participating in the protected proceeding described above, and for making additional disclosures regarding landfill issues. He claimed that BJC, PRS, Weskem and Duratek, were all involved in a series of retaliations against him, culminating in his April 23, 2006 termination.

In its June 29, 2006 dismissal letter, the EMCBC determined that the complaint should be dismissed pursuant to Section 708.17(c), which in relevant part provides that:

> Dismissal for lack of jurisdiction or other good cause is appropriate if:
>
> . . .
>
> (3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this regulation;
>
> . . .

EMCBC found that Vander Boegh had filed a recent Complaint [with the Department of Labor (DOL)] under Section 211 of the Energy Reorganization Act, and determined that the DOL Complaint involved the same set of facts alleged in the complaint presented to the EMCBC. Accordingly, the EMCBC dismissed the Vander Boegh complaint under 10 C.F.R. § 708.17(c)(3). [3]

2/ That determination is currently under appeal both by the complainant and Weskem. OHA Case No. TBA-0007.

3/ There were several other bases on which the EMCBC rejected the Vander Boegh complaint. However, these are irrelevant, given our finding that the complaint was properly dismissed pursuant

(continued...)

Pursuant to 10 C.F.R. § 708.18(a), Vander Boegh filed the instant appeal with the Office of Hearings and Appeals.

II. Analysis

As noted above, Section 708.17(c) provides that a complaint of retaliation may be dismissed for lack of jurisdiction if the complainant "filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this regulation." Section 708.15(c) states that "you [i.e. the complainant] are considered to have filed a complaint under State or other applicable law if you file a complaint, or other pleading, with respect to the same facts . . . whether you file such complaint before, concurrently with, or after you file a complaint under this regulation." Finally, Section 708.15(a)(1) allows a complaint who has filed a complaint under State or other applicable law as described above to file a Part 708 complaint if the ". . . complaint under State or other applicable law is dismissed for lack of jurisdiction."

The EMCBC found that Vander Boegh filed a complaint with the DOL based on the same facts alleged before the DOE. Therefore, the EMCBC correctly dismissed the Vander Boegh complaint pursuant to 10 C.F.R. §708.17(c)(3).

However, the EMCBC dismissal was issued on June 29. The DOL had therefore not yet issued a determination regarding Vander Boegh's complaint. The DOL determination was issued on July 13. I must therefore consider whether under 10 C.F.R. § 708.15(a)(1), Vander Boegh is nevertheless entitled to a consideration of his complaint under Part 708. As I indicated above, that provision allows a complainant whose complaint has been dismissed under "other applicable law" to have his complaint considered under Part 708 if the dismissal was for "lack of jurisdiction."

We obtained a copy of the DOL determination, which was issued by the Atlanta Regional Administrator of the DOL's Occupational Safety and Health Administration (OSHA). In that determination, the OSHA Regional Administrator considered Vander Boegh's complaint that Duratek, Weskem, BJC and DOE retaliated against him (for voicing concerns regarding possible landfill pollution) by blocking his grandfathered rights to continue his employment as landfill manager

---

3/ (...continued)
to Section 708.17(c)(3).

under the new contract with PRS/Duratek. The Regional Administrator took note of Vander Boegh's termination, and found "clear and convincing evidence" there was no retaliation. Specifically, the Regional Administrator determined that from the time that they first formulated their bid for the contract in 2005, until the selection by PRS/Duratek of a new landfill manager, PRS/Duratek always intended to bring in their own landfill manager. I find that this determination does not constitute a dismissal of Vander Boegh's complaint for "lack of jurisdiction." The Regional Administrator fully considers the merits of the complaint and renders a substantive determination regarding the key retaliation raised by Vander Boegh. Accordingly, since he has received a consideration of the merits of his case from DOL, Vander Boegh no longer has the option of having his complaint of retaliation considered pursuant to Section 708.15(a)(1).

Vander Boegh raises other alleged retaliations that were not explicitly considered by DOL. These other retaliations, such as spreading false rumors about him, appear to me to be subsumed into the DOL determination. In any event, I can see no reason to provide any relief for this claim of purported retaliation, which is unsupported and not the type of retaliation against which protection is needed under Part 708.

However, one remaining retaliation raised by Vander Boegh does merit comment: his claim that he was forced to sell his Lockheed Martin stock, and that this was a retaliation for his protected activity. Vander Boegh offers no support for such a contention. He does assert that BJC breached a provision of its contract requiring it to confirm that all participants in the M&I 401(k) plan that held Lockheed Martin stock were required to sell their stock by April 30, 2003, before an automatic liquidation would occur. Vander Boegh claims that BJC withheld information that not all workers were required to sell their stock. I fail to see how this claim, which bears no meaningful direct relationship to an adverse personnel action against Vander Boegh, constitutes a retaliation under Part 708. Therefore I will deny this aspect of his appeal.

Accordingly, the Vander Boegh complaint was properly dismissed under Section 708.17(c)(3), and he is not entitled to any further review under Section 708.15(a)(1). His appeal should therefore be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Gary S. Vander Boegh (Case No. TBU-0049) is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.19.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 3, 2006

September 19, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case:	**John Merwin**
Date of Filing:	**August 30, 2006**
Case Number:	**TBU-0052**

John Merwin (Merwin or the complainant) appeals the dismissal of his May 1, 2006 complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. He filed the complaint with the Whistleblower Program Manager (WP Manager) of the DOE's National Nuclear Security Administration Service Center (NNSA/SC), located in Albuquerque, New Mexico. As explained below, the WP Manager's August 14, 2006 dismissal of the complaint should be upheld, and the appeal denied.

I. Background

The complainant is employed by BWXT Pantex, LLC (BWXT), the Management and Operations Contractor at the DOE's Pantex Plant located in Amarillo, Texas. On May 1, 2006, Merwin filed a Complaint of Retaliation with the NNSA/SC WP Manager. In that complaint, he alleged that he had participated in a protected proceeding under Part 708. Specifically, in July 2005, he appeared as a witness in a hearing involving two other Part 708 complaints of retaliation filed by Clint Olson and Curtis Broaddus. *See Clint Olson,* 29 DOE ¶ 87,007 (2005). He claimed that BWXT retaliated against him in a number of ways, all involving the contractor's refusal to certify him under the DOE's Human Reliability Program (HRP). 10 C.F.R. Part 712. In an amendment to the complaint, he included an additional retaliation, contending that BWXT assigned him to work in an unsafe office that was permeated by mold. As relief for these alleged retaliations, Merwin requested that BWXT be directed to (i) approve him for HRP status; (ii) provide him with a position more closely aligned with his skills and abilities; and (iii) raise his salary to the level it was prior to his "initial employment action." He also requested punitive damages for pain and suffering, attorney fees, a letter of apology and

assurances that no additional adverse employment actions will be taken against him during his tenure of employment at Pantex.

In the August 14, 2006 dismissal letter, the WP Manager determined that the complaint should be dismissed for the following reasons. With respect to the HRP claim, the WP Manager found that in a July 7, 2006 letter, the complainant had withdrawn the request for reinstatement into the program. The WP manager therefore determined that the entire HRP claim had been withdrawn. Further, the WP Manager determined that a complaint of retaliation based on the HRP falls outside the scope of Part 708, since HRP is a "requirement of the Department of Energy which provides its own administrative process for resolution."

With respect to Merwin's claim that he was assigned to a moldy office, the WP Manager noted that BWXT moved him to an acceptable office "within a relatively short period of time." The WP Manager therefore found that this aspect of the complaint had been "rendered moot by these subsequent events." She therefore determined that this aspect of Merwin's complaint should be dismissed pursuant to 10 C.F.R. § 708.17(c)(5). [1]

Based on the above findings the WP Manager dismissed the complaint.

Pursuant to 10 C.F.R. § 708.18(a), Merwin filed the instant appeal with the Office of Hearings and Appeals. In that appeal, Merwin again claims that BWXT (i) used the HRP as a "retaliatory tool" against him; and (ii) retaliated against him by failing to accept his physician's recommendations that he be moved to a "mold free environment" and that this refusal was deliberate since BWXT was aware of his medical condition. He also asserts that BWXT retaliated against him by moving his office nine times in eight months, by refusing to produce environmental testing results on his health request/accommodation issues; and by "using performance appraisals and merit increases against him."

1/ This Section provides that dismissal for lack of jurisdiction or other good cause is appropriate if "the issues presented in your complaint have been rendered moot by subsequent events or substantially resolved."

II. Analysis

A. HRP Program

As the WP Manager noted, in a July 7 2006 letter Merwin's attorney appeared to withdraw his claim regarding Merwin's HRP status. This should end the issue of review of the HRP matter in this case. However, given that it reappears in his appeal, I will revisit the issue, if only to repeat what is already part of the record. As we stated in a June 23, 2006 letter to Merwin's attorney, the remedy for challenging an erroneous denial of HRP status does not lie within Part 708, but rather within Part 712, which provides a mechanism for review of denial of HRP certification. 10 C.F.R. §§ 712.14-23. Thus, as a rule, we will not make a determination regarding denial of HRP status involving purported retaliation in the context of a Part 708 proceeding.

However, if Merwin can establish that BWXT has not followed its normal procedures in determining whether to submit his name to the DOE for HRP status, this could fall within the realm of a Part 708 retaliation. For example, Merwin seems to suggest that BWXT has required him to undergo many psychological tests in connection with his HRP application. Therefore, Merwin could file a fully developed complaint of retaliation, demonstrating that BWXT used unfair or unusual procedures in requiring those tests before deciding whether to submit him for HRP status, or that BWXT unfairly determined that the tests indicated that he should not be put forward to the DOE for HRP status. In such a case, we could, if otherwise appropriate and subject to other Part 708 jurisdictional limitations, direct BWXT to follow its normal procedures and submit Merwin for HRP consideration. If the DOE then rejected Merwin's application, he would be limited to Part 712 in the type of review he could seek. Part 708 would not be available to him if the DOE rejected his HRP certification.

However, I note in the record of this case that in 2003-2004 Merwin required accommodation under the Americans with Disabilities Act for headaches and associated cognitive and memory difficulties. He required treatment and medication for these conditions. Under these circumstances, BWXT does not seem at all unreasonable in requiring that Merwin undergo appropriate testing to assure that his cognitive functioning has been restored to normal. Thus, the record does not suggest at this point that BWXT has acted inappropriately or in a retaliatory manner. Quite the contrary, by requesting that Merwin submit to testing, BWXT appears to have been acting with due diligence.

Accordingly, the WP Manager's determination regarding Merwin's HRP status should be sustained.

B. Unhealthy Office

I see no Part 708 retaliation with respect to Merwin's claim that BWXT situated him in an unhealthy office. As stated above, the WP Manager indicated that BWXT had moved the complainant to a suitable office, and that this aspect of his complaint should therefore be dismissed under Section 708.17(c)(5). I agree. Merwin has indicated that BWXT moved him to an acceptable office within 10 days of the time that it learned that he was experiencing an adverse reaction to his office environment. May 18, 2006 Letter from John Merwin to Timothy Pridmore. While Merwin seems to believe that this 10 day period is too long, I disagree. I find that BWXT acted reasonably, and that 10 days does not constitute an unreasonable length of time to allow BWXT to evaluate Merwin's concern and locate another office for him and the other two affected employees. In fact, I believe that the firm acted in a relatively expeditious manner to accommodate Merwin. I therefore find that the unsafe office allegation, as described by Merwin himself, does not rise to the level of a retaliation. In any event, Merwin has been moved to a new office. Accordingly, this aspect of Merwin's complaint has been substantially resolved, and therefore no jurisdiction exists under which to consider it. 10 C.F.R. § 708.17(c)(5).

C. Other Retaliations

In several filings Merwin has indicated that he has not received proper salary increases or is not being paid at the appropriate salary level. For example, in his amended complaint he asked that BWXT be directed to raise his salary to the level it was prior to his "initial employment action." Strictly speaking, of course, this is stated as a request for relief and not a retaliation. However, taking this in the light most favorable to Merwin, I still see no adverse action that qualifies as a retaliation under Merwin's current Part 708 complaint. By "initial employment action" Merwin appears to be referring to the fact that in April 2003 he was terminated by BWXT. He took this matter to the Texas Commission on Human Rights, claiming that BWXT discriminated against him because of a disability, in violation of the Americans with Disabilities Act. The matter was settled in April 2004, and Merwin was reinstated, but apparently to a different position at a lower salary. *See*, BWXT June 1, 2006 Response, Exhibit 4, BWXT Pantex Employee History Profile. If Merwin is seeking a salary increase

based on this settlement agreement, it is not cognizable under his current Part 708 claim of retaliation. His alleged protected activity took place in 2005, long after the 2004 reduction in salary due to the settlement. Accordingly, the salary reduction cannot be considered a retaliation for protected activity.

Merwin indicates in his appeal that BWXT has retaliated against him by "using performance appraisals and merit increases against him." On its face, this assertion is too vague to form the foundation of a claim of retaliation. If by this Merwin means that he has received reduced salary increases and lowered performance appraisals, he should so state. Further, he should show that these personnel actions took place after he participated in the protected proceeding, rather than being associated with disability action discussed above. The record before us at this point does not indicate that Merwin's salary increases or performance ratings were reduced after he participated in the protected proceeding. In fact, it appears that the salary increases and ratings he has received since his participation in the Part 708 hearing have not been reduced. As stated above, the reduction in salary took place in 2004, after his reinstatement in connection with his 2004 disability settlement agreement, and not after his Part 708 protected activity. *See* Exhibit 4, BWXT Pantex Employee History File. If Merwin believes that his salary increases were reduced and his performance appraisals were lowered after his appearance in the Part 708 proceeding, he should file another Part 708 complaint of retaliation documenting this matter. This would, of course, be a new complaint and therefore subject to the filing and jurisdictional limitations of Part 708. *E.g.,* 10 C.F.R. §§ 708.14; 708.17.

Further, I find that Merwin's assertion that BWXT failed to provide environmental testing results has now been resolved, given the fact that Merwin has been moved to a new office. 10 C.F.R. § 708.17(c)(5). Finally, Merwin's allegation that his office was moved nine times in eight months, with nothing more, hardly rises to the level of a serious Part 708 retaliation. It should be dismissed under Section 708.17(c)(4) as frivolous.

As indicated by the above discussion, I find that the NNSA/SC dismissal was correct and that the Merwin appeal should be denied.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by John Merwin (Case No. TBU-0052) is hereby denied.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 19, 2006

October 12, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Felecia Broaddus**

Date of Filing: **September 15, 2006**

Case Number: **TBU-0053**

Felecia Broaddus (Broaddus or the complainant) appeals the dismissal of her July 18, 2006 complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. She filed the complaint with the Whistleblower Program Manager (WP Manager) of the DOE's National Nuclear Security Administration Service Center (NNSA/SC), located in Albuquerque, New Mexico. As explained below, the WP Manager's August 28, 2006 dismissal of the complaint should be upheld, and the appeal denied.

I. Background

Broaddus is employed by BWXT Pantex, LLC (BWXT), the Management and Operations Contractor at the DOE's Pantex Plant located in Amarillo, Texas. On July 18, 2006, she filed a Complaint of Retaliation with the NNSA/SC WP Manager. In that complaint, she alleged that she had made disclosures that are protected under Part 708. Broaddus believes that her alleged revelations are protected pursuant to Section 708.5(a)(1), which covers disclosures that reveal "a substantial violation of a law, rule or regulation." She claims that BWXT retaliated against her for making those disclosures.

A. Disclosures

1. Testimony at Part 710 Hearing

Broaddus states that in June 2005, she appeared as a witness in a hearing held pursuant to 10 C.F.R. Part 710. Hearings under that Part consider whether an individual is eligible to hold a DOE access authorization. The complainant states that her husband was the subject in that hearing, during which she gave testimony. Broaddus contends that the statements she made at this hearing disclosed

significant violations of law, policy and regulation committed by both BWXT and DOE/NNSA, and that they are therefore protected.

2. Disclosures to Human Reliability Program Team

Broaddus claims that in March 2006, she provided evidence to a team investigating the Human Reliability Program (HRP) at Pantex. She claims that she disclosed that BWXT was improperly administering the HRP program, and believes that providing such information is a disclosure of a violation of law, rule or regulation.

3. Disclosures Regarding Department Manager

The complainant states that on May 23, 2006, she told the BWXT employee concerns office about a "relationship" between one of her co-workers and her Department Manager. She stated that the co-worker was being given minimal assignments, while Broaddus herself was given more assignments, and further that this co-worker was being paid more than Broaddus herself.

4. Disclosure Regarding Unequal Pay Act

Broaddus states that in January 2006, she reported an inequity involving her own pay to the BWXT employee concerns office, and she believes that the inequity violates a law, the "Equal Pay Act."

5. Disclosure of Unsafe Working Conditions

Broaddus claims that on July 14, 2005, she was "accosted" by a co-worker. She asserts that she reported this unsafe work environment to her supervisor and to the Pantex employee concerns office. [1]

B. Retaliations

Broaddus claims that BWXT retaliated against her in the following ways. First, she alleges that she was involuntarily reassigned in July 2003, and again on January 10, 2005. She claims that in this latter position she was paid less than other employees in her department. In this regard, she states she was told when she was assigned to her new work group in 2005, that her pay would be

---

1/ She does not provide the date on which this disclosure was made. However, I will assume for purposes of this determination that she reported the incident on the day that it occurred.

commensurate with that of the others in the group. She believes her pay was never brought to the appropriate level.

Broaddus also claims that in November 2004, BWXT retaliated against her by giving her a performance appraisal which included evaluation for activities with which she was not involved. Broaddus also believes that as a retaliation for her protected disclosures, Pantex employees told lies about her at the Part 710 hearing. Finally, Broaddus claims that in retaliation for reporting the co-worker/department manager "relationship" and the pay/work inequity, her department manager and her second line supervisor falsely accused her of taking extended lunch breaks.

C. WP Manager's Determination

In the August 28, 2006 dismissal letter, the WP Manager determined that the complaint should be dismissed. The WP Manager found two "arguably protected" disclosures: Broaddus' June 2005 statements at a Part 710 hearing; and the information that she provided to the DOE HRP inspection team on March 14, 2006.

In considering these two disclosures, the WP Manager found that the two reassignments about which Broaddus complained took place before her alleged protected activities, and could therefore not be considered Part 708 retaliations. Regarding the claim that some of the testimony given at the Part 710 hearing was false, the WP Manager found that this was not reviewable under Part 708, and further that it was untimely. The WP manager found that Broaddus' assertion that she was retaliated against for disclosure of the unsafe workplace condition was untimely, since it was filed nearly a full year after the incident took place. She further found that the claim was vague and did not appear to be connected to any matter associated with her participation in the Part 710 hearing. The WP Manager determined that Broaddus' disclosure concerning the Equal Pay Act was not a matter within the purview of Part 708. The WP manager also found that BWXT had no motive to retaliate against Broaddus.

Based on the above findings the WP Manager dismissed the complaint.

Pursuant to 10 C.F.R. § 708.18(a), Broaddus filed the instant appeal with the Office of Hearings and Appeals. In that appeal, Broaddus (i) claims that the WP Manager's finding that BWXT had no motive to retaliate against her was improper and that this issue should be addressed at a hearing; (ii) contends that the claim of an unsafe work environment was a protected disclosure; (iii) reiterates her

claim that she was forced into her current job as a retaliation, and that but for her protected disclosures she would not have been transferred multiple times, and (iv) claims that in her current position, her salary is approximately one-half of the salary being paid to a man with a similar position and that she has a substantially higher workload than others in her department.

II. Analysis

A. Retaliations

As stated above, Broaddus claims that she was involuntarily reassigned in 2003, and again on January 10, 2005. She also objects to a 2004 performance appraisal. These are obviously not retaliations for her testimony at the June 2005 Part 710 hearing or for the March 2006 HRP "revelations," since they preceded those alleged disclosures. Her claims that in the position to which she was assigned in 2005, her pay is less than that of another worker and her workload is greater are too vague to rise to the level of a Part 708 retaliation. There is no allegation or evidence that the pay and workload matters arose after a protected disclosure. In fact, her claim of unequal pay seems to be a continuing one: her belief that since her 2005 reassignment, she has not been payed at the appropriate level. No new evidence of any additional pay disparity arising after her protected disclosures has been alleged.

Broaddus' allegations that Pantex employees told lies about her at the Part 710 hearing are frivolous. I see no retaliation. I reach a similar conclusion regarding her claim that in response to reporting a relationship between a co-worker and a manager and some pay/work inequity, she was falsely accused of taking extended lunch breaks. 10 C.F.R. § 708.17(c)(4).

B. Disclosure of an unsafe work place

Disclosures concerning an unsafe work environment are entitled to protection under 10 C.F.R. § 708.5(a)(1) and (2). Broaddus claims that she disclosed that a co-worker assaulted her. In this regard, Broaddus asserts that BWXT failed to take any action to report the "assault" to law enforcement agencies, or correct the behavior of the employee involved. She seems to believe that this "failure" on the part of the contractor is a retaliation. I do not agree. Part 708 covers adverse personnel actions taken by a contractor against the employee who made a disclosure. 10 C.F.R. § 708.2. The purported failure of BWXT to punish another employee cannot be considered a Part 708 retaliation against Broaddus. It is not an

adverse personnel action against her. I fail to see a Part 708 retaliation that took place after the disclosure of the unsafe workplace. Therefore, Broaddus' allegation regarding the unsafe workplace must be dismissed.

C. BWXT Motive to Retaliate

Broaddus objects to the WP manager's finding that BWXT had no motive to retaliate against Broaddus. Broaddus believes that this finding was improper and should be addressed at a hearing. I agree that this determination was prematurely made, and that if I had found that there were a reason to overturn the dismissal, the WP Manager's finding regarding motive to retaliate would not be sustained. This type of determination is one that should be based on a full airing of all facts and circumstances, and not on untested assertions by the parties. However, given the fact that, as discussed above, I find no Part 708 retaliations, I see no harm in this error.

D. Timeliness

Part 708 requires that complaints be filed within 90 days of the date that the complainant knew or reasonably should have known of the alleged retaliation. 10 C.F.R. § 708.14(a). BWXT claims the Broaddus complaint was untimely filed, although it points to no specific events or retaliation from which to measure the filing of the complaint. Broaddus argues that the complaint was timely, because additional time beyond the 90 days is permitted to resolve a dispute through an internal company grievance-arbitration procedure. The parties' arguments regarding timeliness need not be given any further review. Ultimately, this issue is irrelevant because, as discussed above, I see no BWXT retaliation in this case.

As indicated by the above discussion, I find that the NNSA/SC dismissal was correct and that the Broaddus appeal should be denied.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Felecia Broaddus (Case No. TBU-0053) is hereby denied.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 12, 2006

December 19, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case:	**Donald R. Rhodes**
Date of Filing:	**December 8, 2006**
Case Number:	**TBU-0058**

Donald R. Rhodes (Rhodes or the complainant) appeals the dismissal of his August 25, 2006 complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. He filed the complaint with the Whistleblower Program Manager (WP Manager) of the DOE's National Nuclear Security Administration Service Center (NNSA/SC), located in Albuquerque, New Mexico. As explained below, the WP Manager's November 16, 2006 dismissal of the complaint should be upheld, and the appeal denied.

I. Background

The complainant is employed by the DOE's Sandia National Laboratories (SNL) located in Albuquerque, New Mexico. On August 25, 2006, Rhodes filed a Complaint of Retaliation with the NNSA/SC WP Manager. In that complaint, he alleged that his supervisor directed him to change his time card estimation of time spent on his various work projects by rounding from 20 minute intervals to 30 minute intervals. [1] Believing that this change would not reflect the correct amount of time spent, Rhodes refused to make this amendment. After several such refusals, his employer eventually suspended him for one day, as a punishment for insubordination. [2]

In the November 16, 2006 dismissal letter, the WP Manager determined that the complaint should be dismissed because Rhodes' refusal to make the time card changes was an internal dispute between him and SNL, and not a protected disclosure under Part 708. The WP Manager

---

1/ According to SNL, the 30 minute estimation period is the standard practice for this work group.

2/ The complainant later made the correction as directed and returned to work.

further determined that the complainant's refusal to change his time card did not constitute a refusal to participate in an activity protected by Part 708. In this regard, the WP Manager stated that Rhodes' refusal to follow his supervisor's instructions is not "a refusal to participate in an activity that would constitute a violation of federal health or safety law, or put you in reasonable fear of serious injury to yourself or others." [3]

Based on the above findings the WP Manager dismissed the complaint.

Pursuant to 10 C.F.R. § 708.18(a), Rhodes filed the instant appeal with the Office of Hearings and Appeals. In that appeal, Rhodes again claims that the one-day suspension was a retaliation by SNL because he refused to engage in fraudulent time-card amendment.

II. Analysis

The issue in this case is whether Rhodes' refusal to adjust his time cards as his supervisor directed constitutes an activity or disclosure protected under Part 708. As discussed below, I find it does not.

A. Refusal to Participate

As the WP Manager noted, Rhodes' refusal to correct his time card as directed by his supervisor does not amount to a "refusal to participate" under Part 708. Section 708.5 describes the types of "refusals to participate" that are protected. Such refusals are limited to activities, policies or practices that an individual believes would "(1) constitute a violation of a federal health or safety law; or (2) cause [the individual] to have a reasonable fear of serious injury to [himself], other employees or members of the public." 10 C.F.R. §708.5(c). It is quite obvious that there is no health or safety concern or fear of serious injury at issue in connection with adjusting a time card. Accordingly, Section 708.5(c) is not applicable in this case.

3/ The WP Manager stated that an additional basis for dismissal of the claim was the complainant's failure to exhaust grievance and arbitration procedures as required by his union's collective bargaining agreement. 10 C.F.R. § 708.13. I need not reach this issue in order to arrive at a dispositive result in this case.

B. Claim of Protected Disclosure of Fraud

I see no Part 708 protected disclosure with respect to Rhodes' purported revelation to his supervisor that changing the estimate of time spent on a task would amount to "time card fraud." On its face, SNL's policy of estimates of time spent on job projects rounded to 30 minute intervals rather than 20 minute intervals does not appear to be unreasonable or designed to result in fraud or overbilling. Rhodes has certainly not made any case for such a conclusion. In any event, the change that his supervisor asked him to make, to provide estimates rounded to 30 minute intervals rather than 20 minute intervals, is de minimis. Whether to estimate time spent on projects in 20 minute or 30 minute intervals is such a small matter so as not to rise to the level of fraud under Part 708, nor is the complainant's disclosure significant enough to warrant protection under Part 708.

As indicated by the above discussion, I find that the NNSA/SC dismissal was correct and that the Rhodes appeal should be denied.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Donald R. Rhodes (Case No. TBU-0058) is hereby denied.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 19, 2006

March 22, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Misti Wall**

Date of Filing: **February 15, 2007**

Case Number: **TBU-0061**

Misti Wall (the complainant or Wall), appeals the dismissal of her complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint should be reversed and the matter remanded for further processing to the Whistleblower Program Manager (Manager) at the National Nuclear Security Administration Service Center (NNSA).

I. Background

The complainant was an employee with Sandia Corporation (Sandia), a DOE contractor that runs Sandia National Laboratories (SNL), located in Albuquerque, New Mexico. Pursuant to Part 708, she filed a complaint of retaliation against Sandia with the NNSA. In her complaint, she stated that in October and November 2005 she disclosed to Sandia managers that her newly-hired supervisor was involved in a situation that indicates a conflict of interest in performing the supervisor's official Sandia duties. The complainant noted that this supervisor was hired to be the manager in Business, Leadership, Management and Development (BLMD) at SNL and that the supervisor's own company, LTD Unlimited (LTD), was a contractor of SNL, providing services to BLMD. Among the specific actions representing conflicts that the complainant cited were the following. The supervisor: (i) asked BLMD employees whom she managed to contact LTD so LTD (under the direction of the supervisor's daughter) could continue to provide services for BLMD; (ii) talked to BLMD employees about contacting and setting up appointments with her daughter regarding LTD's providing services for BLMD; (iii) talked to BLMD employees whom she managed about circumventing the Sandia Procurement process to continue contracting with LTD; and (iv) remained "a partner" of LTD.

On February 16, 2006, the complainant was terminated from her position at Sandia. On April 5, 2006, she contacted the Manager regarding this alleged retaliation. On April 7, at the complainant's request, the matter was held in abeyance pending consideration of the termination issue by the New Mexico Human Rights Division. This matter was dismissed by the New Mexico Human Rights Division, and on October 10, 2006, Wall filed a Part 708 complaint of retaliation with the Manager.

In the complaint, Wall claimed that she was terminated in retaliation for making protected disclosures regarding the supervisor's conflict of interest. She stated that the conflicts violated Sandia's Corporate Business Rule CPR001.2.3. This rule sets out Sandia's procedures for addressing employee conflicts of interest. In relevant part, it provides that employees must disclose conflicts of interest within 30 days of their hire date. CPR Section 3.2. It also provides for development of plans to mitigate any "actual, perceived or potential conflict of interest. . . . " CPR Section 3.1.

On January 31, 2007, the Manager dismissed the complaint "for lack of jurisdiction." The Manager stated as the basis for this finding that the complainant had failed to show that she had made a disclosure that is protected under Part 708. In this regard, the Manager stated that the disclosure that the complainant's supervisor might have a conflict of interest in performing her Sandia duties does not constitute a "(1) revelation of a substantial violation of law, (2) a substantial and specific danger to employees to public health or safety, or (3) fraud, gross mismanagement, gross waste of funds or abuse of authority." Specifically, the Manager found that the complainant's statement that Sandia's Corporate Business Rule was being violated by her supervisor is not sufficient to demonstrate a violation of law within the meaning of Part 708.

The Manager also noted that Sandia had responded to the complaint by asserting that it had taken steps to mitigate the conflict of interest problems and that Wall's termination was unrelated to the disclosures. In this regard, the Manager also found that the disclosures were not protected because the individuals to whom they were made were already aware of the supervisor's conflict of interest. On this basis, the Manager concluded that the complaint should be dismissed for lack of jurisdiction, citing to 10 C.F.R. § 708.17. On February 15, 2007, the complainant filed the instant appeal of that dismissal with the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18.

II. Analysis

Under Part 708, a DOE office may dismiss a whistleblower complaint for lack of jurisdiction if the facts do not present issues for which relief can be granted under Part 708, or the complaint is frivolous or without merit on its face. 10 C.F.R. §708.17(c)(2) and (4). After reviewing the record in this case, I find that the grounds for dismissal cited by the Manager did not comply with that provision. In my view, the Complaint is neither frivolous or without merit on its face, nor does it present issues for which relief cannot be granted.

In her dismissal letter, the Manager asserted that the complainant's conflict of interest disclosures "do not divulge a problem that Ms. Wall could reasonably believe 'reveals (1) substantial violation of law, (2) a substantial and specific danger to employee or to public health or safety, or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.' At most her 'disclosures' reveal her belief that Sandia's own policies were being violated by her supervisor." [1]

The record does not support this conclusion. The complainant raised a specific potential conflict of interest situation and cited what she believed was a valid rule that was violated. In view of the matters alleged by the complainant, that the supervisor encouraged subordinates to award contracts to a firm operated by her daughter and where the supervisor remained partner, it appears that there was ample evidence to support a reasonable belief by Wall that Sandia's conflicts rule was being violated. However, even if she was incorrect that this particular rule was violated, I do not believe that this constitutes an appropriate basis for dismissal under Section 708.17(c)(2) or (4). Part 708 does not require that the complainant specify in her complaint the precise law, rule or regulation that was violated. 10 C.F.R. §708.12. In this regard, at this very early stage of a Part 708 proceeding, it is often difficult for a whistleblower to determine and cite the precise laws or rules that might apply to the actions she is describing. To require a whistleblower to include that type of detailed legal analysis in her complaint would subvert the purposes of Part 708. Thus, even though Wall may be unable to ascertain all

---

1/ The Manager truncated her quotation of Section 708.5(a)(1), which extends protected status to disclosures that reveal "a substantial violation of a law, *rule, or regulation*." 10 C.F.R. § 708.5(a)(1) (emphasis supplied).

the specific violations of law, rule or regulation that might exist here, the facts thus far suggest that the complainant could have reasonably believed that the apparent conflict of interest violated a law, rule, or regulation.

The showing of which provisions of Section 708.5 are applicable often becomes clearer as the proceeding develops through the investigation and hearing stages. Therefore, it is inappropriate to dismiss the claim at this point, when the complainant's limited knowledge of the facts and law are not sufficiently refined to permit her to specify all the laws, rules and/or regulations that she believes have been violated by the information she has disclosed, as well as violations of other provisions of Section 708.5.

Thus, dismissal of the complaint because it does not cite an applicable law, rule or regulation at this early stage is premature. It is obvious that conflict of interest laws, rules and regulations do exist. The mere fact that Sandia has put into place CPR001.2.3, which sets forth its own requirements for disclosing and mitigating conflicts of interest, supports that position.

As stated above, Section 708.5(a)(1) does require, however, that the violation of the law, rule or regulation be a "substantial" one. The conflict of interest issue raised by the complainant meets that standard. In my opinion, the complainant's disclosures concerning her supervisor's alleged promotion of her personal business interests in the context of her SNL position raise a matter of substantial importance. I believe that the alleged conflict of interest could significantly impact the supervisor's objectivity in performing her Sandia functions. It is a well-recognized principle that individuals involved in administering contracts should not have a financial interest in the firms providing services. [2]

2/ The disclosures made by Wall also could raise issues of fraud, gross mismanagement, gross waste of funds or abuse of authority under Section 708.5(a)(3). In this regard, the supervisor could certainly exert undue influence on her BLMD employees in order to promote LTD. Although the complainant did not allege mismanagement, fraud or abuse, she has made allegations that the supervisor did attempt to influence Sandia employees to favorably consider her firm.

The Manager also found as a further basis for rejecting the complaint that the individuals to whom complainant made her disclosures were already aware of the potential conflict and had taken steps to mitigate its effect. In this regard, the Manager appears to rely on Sandia's Motion to Dismiss the Complaint. In that Motion, Sandia claims that it was aware at the time it hired the supervisor that she was involved in LTD, and that her firm was providing services to Sandia. Sandia claims that since it was well aware of the entire situation, no conflict of interest could occur and, in fact, it informed Wall that a mitigation plan was in place.

I find Sandia's argument unpersuasive, and the Manager's conclusion premature. The record in this case indicates that the complainant made a disclosure regarding the conflict of interest matter on October 25, 2005, one day after the supervisor was hired. The complaint further indicates that Wall also disclosed information about a conflict of interest regarding the supervisor on October 31, November 1, 2, 4, and 16. The record also shows that the supervisor signed a "Personal Conflict of Interest Questionnaire for Sandia Corporation Employees" on November 27, 2005, and she signed a mitigation plan on November 29, 2005. These documents therefore seem to have been put into place weeks after the complainant first raised her conflict of interest concerns. Accordingly, even if Sandia was aware of the potential conflict, the record at this point does not clearly demonstrate that Sandia had already taken care of the problem at the time the individual first raised it in October 2005.

Moreover, as stated above, Sandia CPR 1.2.3 provides that all employees are required to complete a "Personnel Conflict of Interest Questionnaire" within 30 days of their hire date. As indicated previously, the supervisor's "hire date" is October 24, 2005. The record further indicates that on November 27, the supervisor filled out a form disclosing the conflict of interest. Sandia Motion to Dismiss, Exhibit 2. Thus, the Sandia 30-day conflict of interest provisions were not strictly adhered to here. The implication by Sandia that at the time the complainant made her initial disclosure on October 25, company personnel that she spoke to were already aware of the possible conflict of interest and had taken steps to mitigate the concern, is not supported by the record thus far. [3]

3/ In any event, we do not believe that the fact that disclosures are made to officials who are already aware of the potential conflict of interest necessarily means that the disclosures

(continued...)

A resolution of the parties' competing assertions concerning the legitimacy of the alleged conflict of interest concerns is beyond the scope of this initial stage of the proceedings. As stated above, in the present context, Section 708.17 permits a program manager to dismiss a Part 708 complaint if the allegations set forth in the complaint fail to allege a non-frivolous claim for which relief can be granted under Part 708. In the subject case, however, the parties' conflicting claims concerning whether or not the complaint presents a disclosure protected under Section 708.5, is not susceptible to summary resolution under Section 708.17. On the basis of the present limited record, we cannot say that the allegations in the complaint that the complainant suffered retaliation for making a protected disclosure are either plainly frivolous or without merit, or, if ultimately proven, would not support relief under Part 708. *William Cor*, 29 DOE ¶ 87,016 (2006) at 89,072.

I find that the claims raised here present issues for which relief can be granted and which are not frivolous. Accordingly, I find that the dismissal by the Manager was incorrect, and that the complaint should be accepted for further processing.

This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that the decision and order shall be implemented by the affected NNSA element, official or employee.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Misti Wall (Case No. TBU-0061) is hereby granted and her Part 708 complaint is hereby remanded to the Employee Concerns Program Manager, NNSA Service Center, for further processing as set forth above.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: March 22, 2006

3/ (...continued)
are not protected under Part 708 where, as here, the complainant additionally disclosed specific incidents of improper conduct by the supervisor that were apparently unknown to Sandia management.

March 13, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Fredrick Abbott**

Date of Filing: **February 21, 2007**

Case Number: **TBU-0062**

Fredrick Abbott (the complainant or Abbott), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, I have determined that the dismissal of the complaint should be sustained and the appeal denied.

I. Background

The complainant is an employee with Washington Savannah River Company (WSRC), which operates the DOE's Savannah River site located in Aiken, South Carolina. Pursuant to Part 708, on April 13, 2006, he filed a complaint of retaliation against WSRC with the DOE's Savannah River Operations Office. In his complaint, he describes two incidents of alleged retaliation for purported protected disclosures, one in 2004 and the other in 2006.

The 2004 Alleged Retaliation

The complainant stated that in May 2004 he made disclosures to his employer that involved violations of safety procedures, and thereafter received an unjustly low performance review. He therefore filed a grievance against his employer. According to his complaint, this matter was investigated by the WSRC employee concerns program, and thereafter he was asked what relief he would like to resolve this matter. The complainant indicates that he requested the following remedy to resolve this grievance: (1) that he be transferred to a position not directly supervised by the management involved in the disclosure matter; (2) that he be given a fair performance evaluation that correctly reflected his work; and (3) that since the original performance rating was tied to an incentive bonus, that he be given the incentive bonus that equated to his revised rating. The complainant does not believe that all

of these requests were correctly implemented, and the issue was never resolved to his satisfaction. He was dissatisfied with the job transfer that he was given. He indicates that received a "special awards" bonus of $300, which he believes was too low to compensate him fully for his reduced performance rating. Nevertheless, he states that he decided to put this issue behind him in order to minimize the negative effect this "event" could have on his career.

The 2006 Alleged Retaliation

The complainant indicates that on January 15, 2006, he received his "Personal Assessment and Development Process" (PADP) and his "Non-exempt Evaluation Program" (NEEP) rating. He states that the PADP praised him, but the NEEP gave him only an average rating, and that WSRC management could not explain the inconsistency. Based on this purportedly improperly low NEEP rating, Abbott filed his Part 708 complaint. He believed that the low NEEP rating indicated a pattern of retaliation for the 2004 disclosures.

On February 7, 2007, the Acting Director, Office of Civil Rights, of the DOE's Savannah River Operations Office dismissed the complaint for lack of jurisdiction or other good cause. The Acting Director cited 10 C.F.R. § 708.17(c)(6), which provides in relevant part that dismissal is appropriate if "Your employer has made a formal offer to provide the remedy that you request in your complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this regulation." In this regard, the Acting Director stated that WSRC had made the following offer in settlement of the complaint: (1) to remove and destroy Pages 1 of 2, and 2 of 2 of the "Individual Non-Exempt Evaluation Program (NEEP) Scoring Form," as well as your comments of January 15, 2006, concerning the scoring, from your WSRC Personnel File; (2) to grant you an interview for the next two First Line Manager positions for which you meet the minimum qualifications and request consideration; and (3) to award you $500 (an amount equal to that given to those ranked 1-3 on the Individual NEEP Scoring Form for the Radiological Control Inspectors (RCI) group).

According to the dismissal letter, the complainant rejected this offer and stated that he would accept nothing but his own settlement terms as outlined in an e-mail of January 8, 2007. According to the complainant, these terms are as follows: (1) to remove and destroy pages 1 of 2, and 2 of 2 of the Individual Non-Exempt Evaluation Program (NEEP) Scoring form, as well as my comments of January 15, 2006, concerning the scoring from my WSRC

personnel file; (2) to provide me with a letter signed by WSRC legal counsel stating that the NEEP evaluation was deemed retaliatory, was not representative of my performance, and was removed for cause; and (3) to provide me with a "Special Awards Program" bonus of $3,000 (the maximum amount available under this program). In this regard, the complainant states that in the 2004 grievance proceeding described above, WSRC provided him with a "Special Awards Program" bonus of $300, the minimum bonus under that program. The complainant contends that since WSRC failed to comply with all corrective actions it was supposed to take as a result of the 2004 grievance process, he should now receive a monetary settlement based on the maximum amount available under the "Special Awards Program."

The Acting Director concluded that the complaint should be dismissed for lack of jurisdiction, citing to 10 C.F.R. § 708.17(c)(6). The Acting Director found that the complainant had received an offer of settlement to provide a remedy that DOE considers to be equivalent to what could be provided under Part 708. On February 21, 2007, the complainant filed the instant appeal of that dismissal with the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18.

II. Analysis

As indicated above, under Part 708, a DOE office may dismiss a whistleblower complaint for lack of jurisdiction if the employer has made a formal offer to provide the remedy requested in the complaint, or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this regulation. 10 C.F.R. §708.17(c)(6). After reviewing the record in this case, I find that the grounds for dismissal cited by the Acting Director comply with that provision. In my view, the WSRC settlement offer provides the complainant with relief that is equivalent to what he could receive under Part 708. [1]

1/ The complaint states that Abbott is seeking as relief "damages equal to ten percent of Grade 20 base pay (approximate supervisory level compensation), calculated from the time of this event to the earliest date that I am eligible for full retirement benefits." The complainant has requested relief here which he could not receive in any event under Part 708. With respect to monetary relief, Section 708.36 provides that a complainant is eligible for back pay and reasonable costs

(continued...)

As noted above, with respect to his 2006 rating, Abbott has complained that his NEEP rating was too low and that as a result he received a reduced NEEP bonus. Therefore, it appears that the relief he could be entitled to here would be removing the low NEEP rating from his personnel file, and awarding him the maximum NEEP bonus available. I will now consider whether WSRC's offer satisfies those elements.

Proposed Relief Item Number 1

Item Number 1 in both settlement offers is identical: removal of the "low" NEEP score from the complainant's personnel file. In this regard, WSRC will also remove some comments from that file. I believe that this relief is the maximum Abbott is entitled to with respect to adjustment of his personnel file, and his NEEP rating. Moreover, there is no disagreement regarding this Item. Accordingly, it merits no further consideration.

Proposed Relief Item Number 2

WSRC Relief Item Number 2 grants Abbott several managerial-level interviews. We do not believe he would necessarily be entitled to such relief in this proceeding. Therefore, this offer therefore goes beyond what WSRC would be required to provide.

Complainant's Relief Item Number 2 asks that WSRC be required to provide him with a letter signed by WSRC legal counsel stating that the NEEP evaluation was deemed retaliatory, was not representative of his performance, and was removed for cause. The complainant is not entitled to this type of relief. Relief granted under Section 708.36 does not extend to directing DOE contractors to admit to any violations of Part 708 or other rules, or sanctioning of contractors for violating Part 708. They are simply required to make a complainant whole. Accordingly, even if Abbott had prevailed in a Part 708 proceeding, an OHA hearing officer would not have granted his request to order WSRC to admit that the NEEP evaluation was deemed retaliatory, and that it was removed from the complainant's personnel file for cause.

1/ (...continued)
and expenses. The complainant's request for "damages" not tied to any specific monetary losses or expenses is simply not available under Part 708.

Proposed Relief Item Number 3

In his settlement request, the complainant asked for a $3,000 bonus under the "Special Awards Program." As noted above, he was granted the monetary award of $300 under the "Special Awards Program" as part of a settlement of his 2004 grievance. He now seeks to maximize that bonus as part of his 2006 Part 708 complaint. He is not entitled to do so. As a rule, a complainant may not in 2006 pursue Part 708 relief based on an alleged 2004 retaliation, since Part 708 complaints must be filed within 90 days of the date that the alleged retaliation occurred. 10 C.F.R. § 708.14(a). In this case, that time has long passed.[2] Moreover, as stated above, the complainant has admitted that he elected not to contest the $300 award in 2004 by filing a Part 708 complaint, but instead decided to put that matter behind him. Therefore, we find that he is not permitted to reassert that matter at this point, and attempt to base his relief on the earlier alleged retaliation. The relief that will be considered here relates solely to the 2006 alleged retaliation.

Based on the record, I believe that Item Number 3 of the settlement offer by WSRC represented the monetary remedy that the complainant could be eligible to receive under Part 708 for the 2006 alleged retaliation: $500, the maximum bonus given to those ranked highest under the 2006 NEEP evaluation.

I see no other relief available to the complainant under 10 C.F.R. § 708.36, based on the facts associated with the 2006 purported retaliation. Accordingly, I find that the dismissal by the Acting Director was correct, and that the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Fredrick Abbott (Case No. TBU-0062) is hereby denied.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: March 13, 2007

2/ In this case, there is no evidence that any of the exceptions to the 90 day rule set forth in Section 708.14 are applicable.

May 16, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Donald E. Searle**

Date of Filing: **May 2, 2007**

Case Number: **TBU-0065**

Donald E. Searle (Searle or the complainant) appeals the dismissal of his complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.

I. Background

During the period in question in this case, the complainant was an employee of UT-Batelle, LLC (UT-Batelle), the contractor responsible for operating the DOE's Oak Ridge National Laboratory (ORNL). He claimed that in the spring and summer of 2005 he made protected disclosures to his supervisor regarding beryllium handling at his work site. He further indicated that in September 2005 that same supervisor informed him that he was to be laid off. His final day of employment was February 28, 2006. He stated that he was rehired by UT-Batelle on May 15, 2006, although at a reduced salary and pay grade.

On January 4, 2007, Searle filed a complaint of retaliation under Part 708 with the Employee Concerns Manager (EC Manager) of the DOE's Oak Ridge Office. In that complaint, Searle claimed that the February 28, 2006 termination and the May 15, 2006 rehiring at a lower pay level were retaliations for the protected disclosures that he made concerning the beryllium handling. On April 9, 2007, the EC Manager determined that jurisdiction of the complaint should be accepted, and it was forwarded to the Office of Hearings and Appeals (OHA) for investigation. On April 11, 2007, the Office of Hearings and Appeals received Searle's Complaint of Retaliation and Request for Investigation. Pursuant to Section 708.22, an OHA investigator was appointed.

After reviewing the record in this matter, the OHA investigator determined that the complaint and the accompanying request for investigation should be dismissed for failure to file in a timely manner. 10 C.F.R. § 708.17(a). April 17, 2007 Letter of Thomas L. Wieker to Donald E. Searle. I have set out a summary of the investigator's rationale below.

The investigator first noted that Section 708.14(a) provides that a complainant must file his complaint by the 90th day after the date he knew or reasonably should have known of the alleged retaliation. The investigator pointed out that Searle indicated that he first realized that UT-Batelle retaliated against him during the period of his unemployment, between the February 28, 2006 termination and the May 15, 2006 rehiring. *See Undated Letter to Jeff Smith* at 3. Therefore, the OHA investigator stated that the complaint of retaliation under Part 708 should have been filed no later than August 11, 2006.

The OHA investigator also considered whether Searle had good reason for not filing within the 90-day period. 10 C.F.R. § 708.14(d). The investigator reviewed Searle's assertion that UT-Batelle officials offered to resolve his complaint informally and Searle's contention that this suggests that UT-Batelle believed the complaint was valid. Searle claims that UT-Batelle was trying to "stall" these proceedings. The investigator found that this assertion did not provide any valid reason why Searle could not have filed his claim on time. He believed Searle's views as to UT-Batelle's motivations are irrelevant to the issue of whether Searle could have filed on time.

The investigator also considered the complainant's claim that he made complaints to a number of officials regarding this matter, including the "Director of Human Resources," and to the DOE Office of Inspector General (OIG), and that after the issuance of an OIG report on September 9, 2006, he "finally had evidence to support [his] contentions." The investigator rejected this reasoning on the grounds that under Part 708, a complainant is not required to wait until he has "official" evidence in order to file a complaint of retaliation. The investigator noted that the complaint must be filed within 90 days from the date that the employee knew or reasonably should have known of the adverse personnel action in question. Since in this case, the complainant knew by May 15, 2006, of the two adverse personnel actions that he alleged took place, and concluded at that same time that these actions were retaliatory, the investigator could discern no legitimate reason why Searle could not file in a timely manner. In this regard, the

investigator pointed out that even if he accepted the September 9 date as the relevant date, Searle's January 4 filing would still have been untimely, based on the 90-day filing period.

Finally, the investigator considered the complainant's contention that he was unaware of the existence of the Office of Employee Concerns, and, by implication the Part 708 process, until he again contacted the OIG in January 2007. The investigator found that the fact that Searle may not have learned of the existence of Part 708 protections until many months after his termination is simply not a sufficient excuse for the late filing, and does not constitute a good reason to accept the untimely submission. Individuals are generally expected to know and understand their rights and obligations under applicable DOE regulations. *Caroline Roberts*, Case No. TBU-0040 (February 23, 2006).

Based on the above considerations, the investigator concluded that the EC Manager incorrectly determined that jurisdiction should be accepted for further processing and investigation by the Office of Hearings and Appeals. He therefore reversed the EC Manager's decision and dismissed the complaint. However, the investigator stated that Searle could request that the Acting Director OHA review this finding. See 10 C.F.R. §708.18. On May 2, Searle filed a request seeking a reversal of the investigator's determination. He also submitted a letter dated April 25, in which he offered several additional contentions regarding why his complaint of retaliation should be accepted. I consider below Searle's response to the investigator's letter and the assertions raised in the April 25 letter.

II. Searle's Arguments Regarding Why His Complaint Should Be Accepted In Spite of Its Untimeliness

A. Searle's Response to the Investigator's Letter

The complainant asserts that on September 26, 2007, he revealed to Jeff Smith, Deputy Director of ORNL the essence of the retaliation that is under consideration here. Searle's undated letter to Mr. Smith documenting their meeting is part of the file in this case. However, the letter cannot stand as an acceptable substitute for filing a complaint of retaliation with the EC Manager, as required by Section 708.10. Moreover, even if it were considered to be such a complaint, it was filed after the 90-day period since he was terminated and rehired.

Searle points to Section 708.14(b), which provides that the "time period for filing a complaint does not include time spent attempting to resolve the dispute through an internal company grievance-arbitration procedure." Searle argues that his discussion with Mr. Smith should be considered an attempt to resolve this dispute informally, and therefore falls within Section 708.14. This is incorrect. The term "grievance-arbitration procedure" used in the context of Part 708 has a specialized meaning related to procedures negotiated by employees and management under labor agreements. *Darryl H. Shadel*, 27 DOE ¶ 87,561 (2000). See also 64 Fed. Reg. 12862 at 12868 (March 15, 1999). The time frames set forth in Section 708.14 simply do not apply to informal discussions by an employee to resolve an alleged retaliation with his contractor employer.

Searle next argues that the DOE should be interested in investigating the fact that his supervisor, whom he characterizes as unqualified and vindictive, was given a position by UT-Batelle. He reiterates the importance and the "gravity" of his disclosure regarding beryllium safety, and DOE's purported indifference to that disclosure. He claims that he came to believe that he was being silenced by UT-Batelle personnel. He believes that the Office of Inspector General (OIG) should have the opportunity to investigate this entire matter.

As an initial matter, as Searle has previously indicated, the OIG has already investigated the issue of the ORNL's handling of beryllium. *Beryllium Controls At The Oak Ridge National Laboratory*, September 2006, DOE/IG-0737. Thus, Searle's concerns about the overall viability or possibility of an OIG investigation are unfounded. The OIG, a separate entity from OHA, does not perform its responsibilities pursuant to the limitations of Part 708. The OIG is certainly free to investigate further whether a DOE contractor acted improperly or irresponsibly, apart from any determination OHA reaches in this Part 708 proceeding. In fact, the OHA's investigation of Searle's complaint would not reach the issue of whether UT-Batelle, his contractor employer, actually acted inappropriately in its handling of beryllium. With respect to UT-Batelle's actions, our focus under Part 708 would involve only the issue of whether the personnel actions cited by Searle were retaliatory and violated Part 708 prohibitions against such actions. Similarly, the OIG could also investigate whether the Searle personnel actions taken by UT-Batelle were improper. An OIG investigation is not precluded or limited in any way by a jurisdictional determination dismissing Searle's complaint of retaliation made by the OHA pursuant to Part 708.

I also find no merit in Searle's position that the "gravity" of the subject matter of his protected disclosure, beryllium handling at ORNL, should be given some special consideration here. There is nothing in Section 708.14 that leads me to conclude that it is appropriate to give any weight to the nature of the protected disclosure itself in assessing whether a complainant has shown a good reason that he could not file his complaint within the 90-day period. The issue before OHA at this point is not whether Searle made an important protected disclosure or whether his contractor employer was irresponsible in its handling of beryllium. It is whether Searle had a good reason to delay filing a complaint of retaliation. The purported importance of the disclosure in and of itself does not explain why he delayed or provide a reason to disregard the limitations of Section 708.14.

B. Searle's April 25 Letter

In this submission, Searle again highlights what he believes is the importance of his disclosure regarding beryllium handling. He also mentions that it was during the period just after his termination that he became "suspicious of a link between my personal conflict with the supervisor who filed me and the dispute (albeit low-key) over beryllium handling. . . . You must appreciate that though this was very convincing to me, I still felt I had no grounds to make an accusation this bold with any further corroborating evidence." This statement once again suggests that shortly after his termination the complainant actually did believe that his firing was a retaliation. He is not required to have any actual or official corroborative evidence of the motive in order to file a complaint under Part 708. The letter confirms the overall conclusion here that shortly after the termination and rehiring took place, Searle came to believe it was retaliatory. Accordingly, I see nothing in the April 25 letter that would cause me to reverse the dismissal.

III. Conclusion

In sum, the complainant's arguments here reflect his belief that he should have been accorded extra time to file his Part 708 complaint of retaliation because his protected disclosure involved an important and "grave" subject. I cannot agree with this proposition, which is simply not provided for under the Part 708 regulations. In this regard, I find that in spite of the additional opportunity he has been granted to explain why he should be accorded an exception to the time limitation set out in Section 708.14, Searle has not provided a single substantial reason why he

could not file in a timely manner. Accordingly, I find that the complainant has not shown that good cause exists for his failure to file his Part 708 complaint in a timely manner. Accordingly, the dismissal by the investigator should be sustained and the instant Part 708 complaint should be dismissed.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Donald E. Searle (Case No. TBU-0065) is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.19.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: May 16, 2007

May 10, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Charles Montano**

Date of Filing: **April 27, 2007**

Case Number: **TBU-0067**

Charles Montano (the complainant), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. The complaint was dated January 30, 2007. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.

I. Background

The complainant, an auditor, has been an employee of the DOE's Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico since 1978. Until June 2006, the University of California (UC) held the management and operations (M&O) contract to run LANL for the DOE. On June 1, 2006, Los Alamos National Security (LANS) LLC assumed control of the management and operations of LANL. In his complaint, the complainant claims that during the period from 1995 through approximately 2004 he made disclosures that are protected under Section 708.5. These disclosures included revelations regarding salary disparities involving women and minorities, as well as procurement improprieties and irregularities at LANL. He claims that in retaliation for these protected disclosures he has been kept in "dead-end" positions and "underutilized" at the Laboratory, because he has not been assigned to work as an auditor, as he was trained to do. He further claims that, he has been blacklisted for career openings and interviews at LANL, and has been kept in a position for which there is no advancement possibility.

In a letter of April 2, 2007, the Whistleblower Concerns Program Manager at the National Nuclear Security Administration Service Center (NNSA) (Program Manager) dismissed the complaint. There were two bases for the dismissal. First, the Program Manager noted

that Section 708.14 provides that a complaint must be filed within 90 days after the complainant has knowledge of the alleged retaliation. The Program Manger determined that the complainant's January 30, 2007 complaint was untimely because the last employment action that the complainant identified occurred when he was reassigned to his present organization in August of 2004, more than two years earlier. In her letter, the Program Manager found this to constitute a basis for dismissing the complaint as untimely. 10 C.F.R. § 708.14.

The Program Manager's April 2 letter gave as a second basis for the dismissal the fact that the complaint raised the same issues that are raised in his current Part 708 complaint in a complaint filed in the Federal District Court for the District of New Mexico. Accordingly, the Program Manager determined that the Part 708 complaint should be dismissed pursuant to Section 708.17(c), which in relevant part provides that:

> Dismissal for lack of jurisdiction or other good cause is appropriate if:
>
> . . .
>
> (3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this regulation;
>
> . . .

On April 19, 2007, the complainant filed a "Request for Reconsideration" of that dismissal with the Program Manager. Interpreting that submission as an appeal of the dismissal, she forwarded the request to the Office of Hearings and Appeals (OHA), which is the office responsible for considering appeals of dismissals of complaints for lack of jurisdiction under Part 708. 10 C.F.R. § 708.18. Accordingly, we will consider the complainant's Request for Reconsideration as an appeal under Section 708.18, and will perform a review of the dismissal based on the record transmitted to us by the Program Manager.

II. Analysis

A. Was the Complaint Timely Filed

Section 708.17(a) provides that a complaint of retaliation may be dismissed by the Head of Field Element or EC Director for lack of

jurisdiction. Section 708.17(c)(1) provides that untimeliness is an appropriate basis for dismissal on grounds of lack of jurisdiction. However, Section 708.14(d) provides a complainant with the "opportunity to show any good reason [he] may have for not filing within that period and the [appropriate DOE official] may, in his or her discretion, accept [the] complaint for processing."

In this case, the Program Manager asked the complainant to provide a reason for the untimely filing, and in an E-mail filing dated February 12, 2007, the complainant provided his reason. Specifically, the complainant asserted that in January 2007 he concluded that his "new" employer, LANS, was retaliating against him in the same manner as his former employer UC had. In the February 12 submission, the complainant indicated that in a January 13, 2007 E-mail message that he sent to a LANS manager, he inquired about whether he had been selected for a position for which he had applied. His message further indicates "I'm more convinced than ever that I'm in a dead end situation, and for this reason am hoping more than ever to return to the audit arena." Thus, he contends that the date on which he became aware of the retaliation was January 18, 2007. Since he filed his complaint of retaliation on January 30, he believes the complaint was submitted well within the 90-day period required by Section 708.14(a). In her dismissal letter, the Program Manager found that the January 18 E-mail did not set forth any actual retaliation, and was simply an ongoing discussion of the complainant's Individual Performance Objectives (IPO).

After reviewing the entire record on this issue, I find that the Program Manager's determination was correct. As an initial matter, the January 18 E-mail certainly does not set forth any new retaliation. It simply reflects the complainant's ongoing concern, which he has had since approximately 2003-2004, that his career has been "stifled."

The complainant also indicates that he waited to raise this complaint against LANS because he was concerned that he might be considered "unreasonable by not giving LANS sufficient time to fix the problem" he had already raised in April of 2006.

A Part 708 complainant is not entitled to delay filing his complaint beyond the 90-day filing period in order to assure himself that his employer has had appropriate time to "fix" the problem. Moreover, as the complainant states, the LANS managers include many of the same managers in place prior to the LANS transition. Therefore, when LANS took over from UC in June 2006,

the complainant had no reason to believe that the "career-stifling retaliations" he complains of would cease. In fact, the retaliations the complainant raises are simply part of the ongoing purported "career-stifling" that he has alleged has been in existence since 2003-2004.[1] In sum, I find that the complainant improperly delayed filing his Part 708 complaint and has failed to provide any good reason for this delay.

B. Is the Part 708 Complaint Precluded Because of the Complaint Filed With the New Mexico Federal District Court

The second basis on which the Program Manager dismissed the instant Part 708 complaint was that the complainant had previously filed a court complaint based on "the same or substantially the same issues." Under Part 708, dismissal is appropriate if a complainant filed a "complaint under State or other applicable law with respect to the same facts as alleged under this regulation." 10 C.F.R. §708.17(c)(3). *See, Gary S. Vander Boegh*, 29 DOE ¶ 87,010 (2006). As discussed below, I find that the Program Manager's determination on this issue was correct.

In October 2005, the complainant filed a complaint with the Federal District Court for the District of New Mexico. ***Hook v. The Regents of the University of California,*** No. CIV.05-356 (D. N.M. March 6, 2007)[hereinafter ***Hook***]. The claim raised by the complainant was that due to his ongoing protected disclosures, UC continued to retaliate against him in his work assignments, pay, and performance evaluations, in violation of the California Whistleblower Protection Act. Cal. Gov't Code Ann. §§ 8547-8547.12. UC counterclaimed that the complainant had breached a release and settlement agreement with UC by filing the complaint with the district court.

1/ The complainant alludes to one position for which he allegedly applied but was not selected. He states that he learned on December 13, 2006 that he was not selected for that position. He seems to believe that this "non-selection" constitutes a new and different retaliation in the context of this proceeding. I do not agree. I find that this unsupported claim in and of itself does not constitute any new retaliation in the scheme of this complainant's overall claims of retaliation. It falls within the "continuing" stream of claims of "career-stifling." In this regard, mere failure to be awarded a new position, in the context of this case, does not constitute a new retaliation.

As the court noted in its dismissal of the complaint, in 1996, the complainant had filed a whistleblower complaint against LANL with the DOE (under Part 708). According to the court, the protected disclosures involved the complainant's revelations about mismanagement of LANL by UC, including improper application of costs, and UC's failure to comply with Equal Employment Opportunity requirements. The complainant alleged, among other retaliations, that UC denied him opportunities for advancement within LANL. The court noted that on May 11, 2000, the complainant and UC reached a settlement of this matter.[2] The court rejected the complainant's claims that he had suffered new retaliations for new protected disclosures taking place after the settlement date. The court found that the claims set forth in his complaint "arise from, result from, and relate to Defendants' pre-Release actions. . . . Stated another way, Montano's Amended Complaint alleges that pre-Release events motivated the Defendants' alleged post-Release retaliation; therefore, [the] post-Release claims are necessarily a 'continuation of the effects of' pre-Release events and are barred by Paragraph 12 of the Release." ***Hook***, slip op. at 11. [3]

I find that the protected disclosures and alleged retaliations considered in ***Hook*** are the very same ones that the complainant attempts to resurrect in the instant case. I reject the complainant's attempt to circumvent the clear prohibition of Section 708.17, which precludes such an action, by claiming a new M&O contractor, LANS, is now the offending employer. The core facts, as I see them, are the same in this case and the New Mexico Federal District Court proceeding: in the 1990s, the complainant made protected disclosures regarding improper cost accounting and

---

2/ This settlement was reached in the context of an earlier Complaint of Retaliation filed by Montano under Part 708. Based on the settlement with UC, the complainant's previous Part 708 complaint was dismissed. Charles Montano, Case No. VWA–0042, dismissed January 27, 2000.

3/ I am not reviewing here the merits of the court's determination that the issues in the complaint before it are barred by Paragraph 12 of the release. The scope of my decision pertains solely to whether the complainant filed a complaint under "State or other applicable law" with respect to the same facts that are at issue here. As discussed in the text, I find that the issues in the Part 708 complaint and the New Mexico Federal District Court complaint are virtually identical.

improper pay disparities at LANL and, as a result, was kept in a dead-end job. The fact that a new M&O contractor may have stepped in at LANL in the interim does not change these core facts in any meaningful way so as to permit the complainant to avoid the prohibition stated Section 708.17. The complainant has had a determination on the merits of his case by a federal district court with respect to the same issues that he raises here under Part 708. He is therefore precluded from pursuing this matter further with the DOE. 10 C.F.R. § 708.15(a)(1).

III. Conclusion

Accordingly, I find that the complainant has not shown that good cause exists for his failure to file his Part 708 complaint in a timely manner. I further find that his complaint should be dismissed because he has filed a complaint under State or other applicable law with respect to the same facts as alleged in the instant Part 708 complaint, and that the complaint filed in the New Mexico Federal District Court was not dismissed for lack of jurisdiction. 10 C.F.R. §§708.15(a)(1), .17. Accordingly, the Program Manager's determination was correct and the instant Part 708 complaint should be dismissed.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Charles Montano (Case No. TBU-0067) is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.19.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: May 10, 2007

May 23, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Delbert F. Bunch**

Date of Filing: **May 7, 2007**

Case Number: **TBU-0068**

Delbert F. Bunch (Bunch or the complainant), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. The complaint was dated September 6, 2006. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.

I. Background

The complainant was an employee with Bechtel SAIC Company LLP (BSC), the prime contractor to the DOE Office of Civilian Radioactive Waste Management (OCWRM) Yucca Mountain Project. The DOE OCRWM has been tasked to develop and manage a safe system to dispose of spent nuclear fuel and high-level radioactive waste. In his September 6 complaint of retaliation, Bunch states that he was a BSC manager assigned the responsibility for assuring completion of a number of documents required in support of an update or revision of the 2004 CD [conceptual design]-1. Bunch indicates that on "March 17, 2006, after numerous attempts to assure that BSC's CD-1 Revision reports were in conformance with DOE requirements (including those under part 830), I refused to concur in the release of those documents. The morning of March 30, 2006, the second day after I returned from leave, I was handed a letter . . . advising me that my last day of work would be that day."

In his complaint, the complainant sets forth in detail the subject matter of the conceptual design reports that are involved here. In this regard, he stated that he participated on a team that reviewed a "draft license application." According to Bunch, "there were a number of specific comments and suggestions developed as a result of that review and several major criticisms and comments. One was that the analysis of aircraft risks raised issues that needed to be

brought to the attention of DOE [1]. . . . The concern for Yucca Mountain was that risks were to be reduced by negotiating a flight limitation with the Air Force. Making marginal improvements just to meet a numerical limit is a practice discouraged by the NRC [Nuclear Regulatory Commission]. This view was made known to the General Manager."

A second concern cited by Bunch involved the fact that on December 19, 2005, the "DOE issued a stop work order on BSC's quality affecting engineering and pre-closure safety analysis work, because of deficiencies in BSC's requirements management system . . . . The concern that existed had to do with continuing systemic failings in managing requirements . . . . The general matter of management of substantive requirements will be a matter for DOE and NRC to address in connection with the license application."

Bunch's third concern involved "lack of configuration management." Bunch states that DOE had issued "direction" regarding the basis for design in a CD-1 revision. "However, the BSC engineering organization departed from that direction and made changes from the BSC recommended design solution (some of the changes were contrary to the DOE's direction)." Bunch contends that "the Conceptual Design Report prepared for the CD-1 Revision contained deviations from the previous submittal, without item explanation."

Bunch's fourth stated concern involved the lack of adherence to DOE-mandated Integrated Safety Management requirements. In this regard, Bunch claims that the "introduction of a disposal tunnel off of the South Portal created safeguards, security and safety concerns that were completely avoidable by alternatives that fully met DOE requirements. . . . No changes were made when this concern and the other concerns (summarized above) were brought to the attention of the engineering organization . . . Moreover, when I refused to concur in the release of the CDR [Conceptual Design Report], the document was released by my management over my objections, without . . . conveying any of my Part 708.5(c) concerns to DOE."

As stated above, Bunch claims that in retaliation for engaging in a protected activity under Section 708.5, he was fired from his position with BSC on March 30, 2006. He filed a Complaint of

---

1/ Bunch asserts that airplane risks was his area of special competency.

Retaliation with the DOE on September 6, 2006. In a letter of April 17, 2007, the Director, Office of Civilian Radioactive Waste Management of the DOE (OCRWM Director) dismissed the complaint.

The April 17 Dismissal Letter

The OCRWM Director gave two bases for the dismissal. The first basis was that the complaint was untimely filed. The second basis was the complainant's failure to show that he had engaged in an activity protected under Section 708.5.

With regard to the timeliness issue, the OCRWM Director noted that Section 708.14 provides that a complaint must be filed within 90 days after the complainant knew or should have known of the alleged retaliation. The OCRWM Director determined that the complainant's September 6, 2006 complaint was untimely because it was filed 160 days after the March 30, 2006 termination. In this regard, the OCRWM Director noted that he had provided the complainant the opportunity to show why he filed the complaint beyond the 90-day time period. The complainant provided some additional information regarding the September 6 filing date in the filing of October 13. Based on the October 13 submission, the OCRWM Director indicated that the complainant had purportedly reached the conclusion that his termination was retaliatory only after reading the OCRWM Director's July 19, 2006 testimony before the U.S. House of Representatives Subcommittee on Energy and Air Quality. The OCRWM Director indicated that he could not "find any language in my testimony that would lead you to believe that you were terminated in retaliation for your protected activities. Therefore, I find that the date on which you knew or reasonable should have known of the alleged retaliation was March 30, 2006, when you were terminated." Accordingly, the OCRWM Director found that the September 6 complaint, filed 160 days after the termination, was untimely and should be dismissed.

As a second basis for the dismissal, the OCRWM Director's April 17 letter noted the failure of the complainant to allege engagement in a protected activity. In this regard, the OCRWM Director cited Section 708.5, which provides that the following conduct is protected from retaliation by an employer:

> a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your

> employer, or any higher tier contractor, information that you reasonably believe reveals--
>
> (1) A substantial violation of a law, rule, or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --
>
> (1) Constitute a violation of a federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

The OCRWM Director stated that he had examined each of the protected acts explained in detail in the complainant's October 13, 2006 submission, and found that none of them qualified as a protected activity under 10 C.F.R. § 708.5. Accordingly, the OCRWM Director dismissed Bunch's complaint.

On May 7, 2007, the complainant filed an appeal of the dismissal by the OCRWM Director. I have reviewed that appeal, and as discussed below, I find that the OCRWM Director's dismissal should be sustained and the appeal denied.

II. Analysis

A. Whether the Complaint Timely Filed

Section 708.17(a) provides that a complaint of retaliation may be dismissed for lack of jurisdiction. Section 708.17(c)(1) provides that untimeliness is an appropriate basis for dismissal on grounds of lack of jurisdiction. However, Section 708.14(d) provides a complainant with the "opportunity to show any good reason [he] may have for not filing within that period and the

[appropriate DOE official] may, in his or her discretion, accept [the] complaint for processing."

In this case, the OCRWM Director asked the complainant to provide a reason for the untimely filing and, in the October 13 filing referred to above, the complainant provided his reason. He asserts that the termination letter which he was given on March 30, 2006, stated only that "business conditions are such that we must implement an Involuntary Reduction-In-Force (IROF) program." The complainant claims that he was later made aware of facts that led him to conclude that a "primary reason for the action was retaliation." In this regard, he asserts that he learned in July that no other senior manager had been terminated, and further that upon "reading the July testimony of the Director of OCRWM, I . . . concluded that I had been terminated primarily in response to my expressed concerns." Bunch indicates that he then decided to file his Part 708 complaint of retaliation. According to Bunch, the September 6 filing was well within the 90-day period and therefore timely.

I am not persuaded by this position, which is not supported by the rest of the Bunch filing. In his October 13 letter, Bunch also states that the "business conditions" statement in his termination letter was not legitimate because, since he was "Manager for Program Integration, directly reporting to the General Manager, my position would normally be funded using Indirect Funds, accounted for in the rates developed and submitted to DOE. Moreover, in my case, direct funds were available and properly chargeable by me for work requested by DOE letter of September 22, 2005. . . ; there was adequate funding available for me to meet all requested actions by DOE. I am aware of no prior plan for my removal." These statements indicate that the complainant did indeed have good reason to believe that his termination was retaliatory. Specifically, he indicates that he believed at the outset that there was sufficient funding for his position. He stated that he knew funds for his position were already allocated in 2005. Thus, he had good reason to suspect that "business conditions" might not be the true reason for his termination.

Bunch also states in his October 13 letter, "I was present at several FOCUS committee meetings to discuss plans for transitioning subcontractor work to BSC self-performed work, but at no time was I led to believe that there were any plans for reorganizing or dissolving my organization. . . ." Here, the complainant indicates that he had participated in meetings where

it was clear that there was no plan to reorganize his organization. In this regard, Bunch suggests in his October 13 filing that his termination was effectuated in a manner that did not follow normal BSC procedure. This out-of-the-ordinary termination process, which came unexpectedly and immediately after his refusal to obey a BSC directive, should certainly have alerted Bunch that the termination might have been retaliatory.

In addition, the complainant states, "As I was leaving the BSC office on March 30, I happened to see Mr. Peter Rail, who said that he had participated in a FOCUS committee meeting regarding my situation. After mulling his remarks, I sent him an e-mail (on April 2, 2006) asking him if my concerns had been made known to the FOCUS group." Thus, on the very day of his termination, the complainant heard from a colleague that his "situation" had been discussed at a FOCUS committee meeting. The complainant apparently became suspicious at that point because he immediately began to mull over his colleague's remarks. Thus, I am not persuaded that at the very time he was terminated the complainant did not already have some reason to believe employer retaliation could have occurred.

In fact, in the October 13 submission, Bunch himself summarizes his reasons for believing that the termination was retaliatory as follows: "In light of the apparent failure to follow procedure for my termination, the absence of business conditions impacting my continuance as an employee of BSC, and the legitimate concerns expressed by me prior to my termination . . . I conclude that a primary reason for the action was retaliation." Thus, based on these remarks by Bunch, I believe that he did indeed reach the conclusion contemporaneous with his termination that this action could well be retaliatory. As discussed above, Bunch was aware on the very day of his termination of each of these considerations: the failure to follow procedure; the absence of business conditions for his termination; and the types of concerns he had previously expressed. I fail to see here any reason why the purported retaliatory nature of the termination did not become known to him until July.

On the other hand, I find wholly unconvincing Bunch's assertion that he did not learn of the true reason for his termination until reading the OCRWM Director's July 19 testimony [before the U.S. House of Representatives]. In his appeal, the complainant claims that it was through reading this testimony that he first learned of the differences in "culture" and "priority" between BSC and OCRWM. I find this unpersuasive. Bunch consistently

portrays himself as BSC "senior management," and further notes that he is a "former [DOE] Deputy Assistant Secretary for Safety, Health and Quality Assurance." He is therefore a high-level employee with considerable experience and sophistication in the realms of both government service and government contracting. Further, he indicates in his October 13 submission that in October 2005, he understood that "a strong motivation [for BSC to satisfy DOE] was to enable BSC's financial profitability." Thus, it is simply not plausible for a knowledgeable employee, such as Bunch, to maintain that it was not until he read the OCRWM Director's testimony that he could piece together the entire picture of differing priorities of the DOE and BSC. He should have known all along that the goals of the two organizations were not necessarily identical in every respect and, in this regard, that BSC is a for-profit organization while the DOE is not. In fact, Bunch does state that in November 2005 he was assigned to lead an effort to prepare a revised CD-1 package consistent with redirection from the DOE. He noted that responding satisfactorily to that redirection was regarded as essential. In this regard, he stated "I understood that a strong motivation for that was to enable BSC's profitability." Thus, in 2005, Bunch was already well-aware that a key factor for BSC was profitability. It was thus obvious to him, even in 2005, that the goals of DOE and BSC were not identical. He certainly did not need the OCRWM July 2006 testimony to learn that BSC culture and DOE culture were not uniform.

Bunch also argues that his filing should be accepted even if it is considered untimely. In the October 13 filing, Bunch claims that "it is unreasonable to expect filing by a senior manager who attempts to 'work within the system,' until a more complete basis is developed." In his May 7 appeal, he states there "is no requirement that a pre-emptive filing must be made, even before sufficient facts are acquired. Important facts and circumstances arose in July 2006, when the result of the SCWE survey were made known to me by former co-workers who were familiar with the prevailing negative attitude in BSC towards those who raised concerns, and when I learned that no other person appeared to have been terminated after me, even though the termination letter cited business conditions as the cause. This could not have been known on March 30. . . .[The reference to text in the testimony on July 2006 was to note the contrast between OCRWM's determination to 'develop the culture and processes expected of an NRC licensee' with my growing awareness of the culture and processes with BSC. Before that point it was not abundantly

clear that OCRWM top management's priority for safety was difference from BSC's top management apparent lack of priority]."

The complainant sets out an incorrect standard here for when a claim must be filed. He contends that prior to July 30, the motive for retaliation was not "abundantly clear to him." He asserts that senior management should be entitled to delay filing a Part 708 complaint until "a more complete basis is developed," indicating that such individuals should be accorded the opportunity to "work within the system." Section 708.14 simply does not provide this type of approach. The standard of "abundantly clear," "complete basis," or time to "work within the system" is not applicable. The standard under Part 708 is "knew or should have known." As discussed above, I find that the complainant had sufficient knowledge for purposes of this proceeding that his termination could have been retaliatory that he should have come forward with his complaint within 90 days of that termination. Waiting until the facts are clearer is simply not within the regulatory framework here. ***Donald E. Searle,*** Case No. TBU-0065 (May 16, 2007)(complainant not required to have any actual or official corroborative evidence of motive in order to file a complaint under Part 708.) [2]

Bunch also asserts that if this complaint proceeding does not go forward, there could well be some negative impact on BSC employees. He raises concerns regarding the possible impact of alleged BSC performance shortcomings on "representations before NRC as well as DOE." These concerns, while they may be genuine enough, are beyond the purview of Part 708. These regulations provide a remedy only when a contractor employee is subjected to retaliation for engaging in protected behavior. The issue of whether the alleged disclosures made by a complainant are true, and therefore whether a contractor should be required to take corrective action related to the subject of the alleged disclosures, is not considered in a Part 708 complaint of retaliation proceeding. Similarly, whether other employees may be adversely affected, is not a matter considered in connection

---

2/ Contrary to Bunch's assertion, there is an opportunity for an employee to "work within the system" to resolve his concerns. Section 708.20 specifically allows an employee and the DOE contractor some time to attempt to mediate a complaint. However, this option is only available once a complaint has been filed. Thus, it is not an avenue which would permit an individual to delay filing his Part 708 complaint.

with a employee's filing of a complaint of retaliation under Part 708.

In sum, I find that the complainant improperly delayed filing his Part 708 complaint, and he has failed to provide any good reason for this delay.

B. Whether the Part 708 Complaint Is Precluded Because the Complainant Failed to Establish that He Engaged in Protected Activity

The second basis on which the OCRWM Director dismissed the instant Part 708 complaint was that the complainant had not engaged in an activity described in Section 708.5. I have thoroughly reviewed the record in this case and I find that the OCRWM Director was correct. In his May 7 appeal, the complainant indicated that he refused to "concur in documents that [he] regarded as contrary to both NRC and DOE regulations." This refusal is not a protected activity under Section 708.5. As stated above, Section 708.5(c) provides that the following conduct is protected from retaliation by an employer:

> Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --
>
> (1) Constitute a violation of a federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

Bunch's refusal to concur in the conceptual design report simply does not fall within the purview of this subsection. As an initial matter, even if Bunch believed that the conceptual design report violated NRC or DOE regulations, his concurrence with the report would not in and of itself violate a federal health or safety law, or cause him to have a fear of serious injury to himself or others. Concurrence per se is not an activity that violates a federal health or safety law, or causes harm to the complainant or others. In fact, this regulation was designed in order to allow workers to refuse to engage in an activity that could cause them or others immediate bodily harm, and not to

protect an employee who does not believe that his supervisor's decisions or directives are lawful. [3]

In this regard, Section 708.6 indicates that "participation in an activity, policy or practice may cause an employee to have a reasonable fear of serious injury that justifies a refusal to participate if: (a) a reasonable person, under the circumstances that confronted the employee, would conclude that there is a substantial risk of a serious accident injury, or impairment of health or safety resulting from participating in the activity, policy, or practice; or (b) an employee, because of the nature of his or her employment responsibilities, does not have the training or skills needed to participate safely in the activity or practice." Clearly, Bunch could not have reasonably believed that he or others would have faced a substantial risk of accident, injury or health impairment if he merely signed the conceptual design report. There were other methods by which he could make his concerns about the report known to the DOE.

Moreover, Sections 708.5 and 708.6 do not provide an employee with the right to make a unilateral decision not to participate. In "refusing to participate," a complainant must also comply with Section 708.7, which provides that before refusing to participate a complaint must ask his employer to correct the violation or remove the danger, and his employer must have refused; and further the complainant, by the 30th day after refusing to participate, must have reported the violation or dangerous activity to a DOE official, member of Congress, another government official with the responsibility for the oversight of the conduct of operations at the DOE site, his employer, or any higher tier contractor, and stated the reasons for refusing to participate. Bunch does not allege that he met the requirements of Section 708.7. I therefore find that his refusal to concur in the concept design report does not provide Bunch protection under Section 708.5(c). [4]

3/ One way for a contractor employee to handle a situation in which he believes that his employer has asked him to do something that is illegal is to raise this issue with the DOE. This approach could provide the employee with some protection from retaliation under Part 708.

4/ This is not to say that Bunch is required to sign a document that he reasonably believes is illegal. The circumstances of

(continued...)

Finally, the October 13 submission and May 7 appeal do not indicate that Bunch himself actually made any *disclosures* of information to his contractor that would qualify for protection under Section 708.5(a) or (b). For example, in his May 7 appeal, he enumerates four categories of alleged violations of "law, rule, or regulation" that were identified in the October 13 filing. While he explains which rules and regulations he believes were violated by the conceptual design report, he does not state that he ever actually informed anyone of his beliefs. He certainly does not indicate the name of the person he informed, or indicate the time, place and circumstances of any discussion in this regard. This is evident from Bunch's own descriptions of the purported disclosures, which were cited virtually in their entirety above. For example, in his list of "Protected Acts" set forth in his complaint, Bunch states "concerns were brought to the attention of the engineering organization." He indicates that another concern "was made known to the General Manager." Neither of these assertions indicates that Bunch himself made any disclosure whatsoever. In sum, I can find no reason to conclude that Bunch engaged in any activity protected under Section 708.5(a)(1),(2) or (3); or Section 708.5(b). I therefore find that the OCRWM Director correctly found that Bunch did not engage in protected activity under Part 708.

III. Conclusion

For the reasons set forth above, I find that the complainant has not shown that good cause exists for his failure to file his Part 708 complaint in a timely manner. I further find that his complaint should be dismissed because he has not shown that he has engaged in an activity that is protected under Section 708.5. Accordingly, the OCRWM Director's determination was correct, and the instant Part 708 complaint should be dismissed.

4/ (...continued)
this case indicate that he is not entitled to protection from adverse personnel actions under Part 708 if he refuses to do so. However, there may well be other protections available to him.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Delbert F. Bunch (Case No. TBU-0068) is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.19.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: May 23, 2007

July 16, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Sharon M. Fiorillo**

Date of Filing: **July 5, 2007**

Case Number: **TBU-0070**

Sharon M. Fiorillo (the complainant), appeals the dismissal of her complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. The complaint was filed on May 4, 2007. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.

I. Background

The complainant was a secretary with a DOE contractor, Performance Results Corporation (PRC), located at the DOE's National Energy Technology Laboratory (NETL) in Pittsburgh, Pennsylvania. The complainant claims that on February 5, 2007, she disclosed an incident of workplace violence to an employee of the DOE's Inspector General, Office of Inspection and Special Inquiries, Northeast Region (DOE/IG). According to the complainant, the violent incident took place during a February 2 three-way telephone conversation that included a fellow employee, Holly Biddle, herself and their supervisor, who was attempting to mediate a misunderstanding between the complainant and Biddle. The complainant states that she said to Biddle, "Holly, you could have talked to me about this." According to the complainant, Biddle replied, "If I would have seen you, I would have spit in your face."

The complainant indicated to the DOE/IG that the supervisor thereafter did nothing to protect her from the threatening work environment created by this remark. The complainant believes that providing information about workplace violence to the DOE/IG constitutes a protected disclosure because she revealed a violation of law [the McNamara O'Hara Service Contract Act, Section 2(a)(3)]: the "potential safety danger to myself in having to work in a

hostile work environment." She also believes that she reported a substantial violation of the PRC Employee Handbook pertaining to a hostile work environment, and that the workplace violence she experienced violated OSHA, NIOSH and FBI policy statements on the issue of workplace violence. Further, she believes that the fact that her supervisor did nothing to protect her was evidence of gross mismanagement and abuse of authority.

She claims that in retaliation for the disclosure of this incident to the DOE/IG, she was terminated from her position at PRC on February 5, 2007, the very day of the disclosure.

In a letter of June 22, 2007, the Director of NETL dismissed the complaint. The NETL Director found that the complainant's disclosure did not fall within the purview of Part 708. Specifically, he stated that the complainant did not disclose information "concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in congressional proceedings; or for refusal to participate in danger activities. Therefore, in accordance with 10 C.F.R. § 708.17(c)(2), your complaint must be dismissed."

Section 708.17(c)(2) in relevant part provides that:

> Dismissal for lack of jurisdiction or other good cause is appropriate if:
>
> . . .
>
> (2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this regulation;
> . . .

On July 5, 2007, the complainant filed an appeal of the dismissal by the NETL Director with the Office of Hearings and Appeals. 10 C.F.R. § 708.18.

II. Analysis

In her appeal, the complainant claims that the dismissal was erroneous because: (i) NETL improperly minimized the seriousness of the violent situation she revealed; (ii) she was not provided with a copy of PRC's response to her complaint; (iii) PRC has not acted truthfully in connection with her claims for Pennsylvania unemployment compensation; and (iv) she does not believe a

sufficient review of her complaint has been performed, including the opportunity to show that PRC's accusations against her are "false and slanderous." Of these four objections, only the first has any relevance here. Accordingly, my attention here will be devoted solely to the issue of whether the complainant's report to the DOE/IG that a co-worker stated that if she had seen the complainant, she would have spit in the complainant's face is a disclosure of workplace violence entitled to protection under Part 708.

The answer is "no." This is a trivial, frivolous claim which merits summary dismissal. There was no workplace violence reported. The purported threat was hypothetical. It did not describe any future intent by Biddle. I find that no reasonable person would find herself in real fear of any meaningful danger, present or future, if she heard the statement at issue here, especially since it was made via telephone. Reporting this statement to the DOE/IG simply does not constitute reporting of workplace violence. Consequently, while I agree with the NETL Director that this complaint merits summary dismissal, I find that it falls more properly within the purview of Section 708.17(c)(4), which provides that a complaint may be dismissed if it "is frivolous or without merit on its face . . . ." The statement at issue here most assuredly meets that test.

Accordingly, the dismissal by the NETL Director was correct and the instant Part 708 appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Sharon Fiorello (Case No. TBU-0070) is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.19.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: July 16, 2007

August 30, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Jeffrey R. Burnette**

Date of Filing: **August 23, 2007**

Case Number: **TBU-0071**

Jeffrey R. Burnette (Burnette or the complainant), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. The complaint was dismissed for lack of jurisdiction under Section 708.17. As explained below, the dismissal of the complaint should be sustained, and the appeal denied. [1]

I. Background

This complainant's Part 708 history dates from 2001. A brief summary of the relevant facts is set forth below.

A. 2001 Complaint of Retaliation, Request for Investigation and Hearing

As of October 10, 1999, the complainant was an employee with J.A. Jones Construction Company (Jones), a sub-contractor to Bechtel Jacobs Corporation, LLC (BJC), the Management and Operations (M&O) contractor at the DOE's Oak Ridge National Laboratory (ORNL) Y-12 site. On May 21, 2001, Burnette filed a complaint of retaliation with the Manager of the Diversity Programs and Employee Concerns (EC Manager) for the DOE's Oak Ridge Operations Office. Burnette claimed that beginning in October 1999 he began disclosing to his site manager that he was placed in a job for which he was unqualified and that this raised health and safety concerns. He states that he requested training for this position, but that his request was denied. Burnette alleges the following retaliations in

---

1/ On August 24, 2007, the Acting Director of the Office of Hearings and Appeals authorized me to render a decision on Burnette's complaint.

connection with raising his health and safety concerns. He states that in November 2000 he interviewed for a management position with Jones, but that he was not selected. He also indicates that he received poor performance evaluations. Burnette claims that during April and May 2001, he raised some additional health and safety concerns with his employer regarding asbestos and mold in his work place. In June 2001 he was terminated by Jones.

On September 14, 2001, his May 21 complaint of retaliation was transmitted to the Office of Hearings and Appeals for investigation (OHA Case No. VBI-0076). On November 13, 2001, the complainant's attorney requested that the matter proceed immediately to a hearing under Part 708. Accordingly, the request for investigation was dismissed.

An OHA hearing proceeding was initiated on November 19, 2001 (Case No. VBH-0076). During the pendency of this proceeding, Burnette was offered a position with BWXT LLC Y-12, the new M&O contractor at the Y-12 site, and an agreement was reached with Jones to settle the complaint, and dismiss the OHA hearing proceeding. Accordingly, on March 4, 2002, that proceeding was dismissed.

B. 2002 Complaint of Retaliation

On July 18, 2002, Burnette filed another complaint of retaliation with the EC Manager. In this complaint, he alleged that BJC retaliated against him in the transition process into his new position with BWXT Y-12. The retaliations purportedly include delaying starting date for the new employment, and failure to provide him with compensation for accrued vacation days dating from his termination on June 15, 2001 through February 11, 2002 when he began employment with BWXT. Burnette also contended that BWXT conditioned its employment of him in his new position with the firm on his dismissal of his hearing proceeding with the OHA. Burnette believed that this condition amounts to coercion and suggested that there was collusion between the contractors.

On October 2, 2002, the EC Manager dismissed this complaint. The EC Manager noted that 10 C.F.R. § 708.14(a) required that a complainant must file his compliant by the 90th day after the date he knew or reasonably should have known of the alleged retaliation. The EC Manager stated that since the July 2002 complaint was filed more than 90 days after the February 2002 settlement, it was untimely.

The EC Manager advised Burnette that the dismissal of his complaint could be appealed to the Director of OHA. 10 C.F.R. § 708.18. However, the complainant did not file such an appeal.

C. 2006 Complaint of Retaliation

Burnette filed a third complaint of retaliation in 2006. It is the dismissal of this complaint that is under consideration in the instant case. The record in this case does not present a clear date on which Burnette filed this complaint. However, the record does show that on December 7, 2006, the Whistleblower Program Manager (WP Manager) of the DOE's National Nuclear Security Administration (NNSA) Service Center requested that Burnette provide some additional information regarding an undated new complaint letter, which was forwarded to her by a BWXT Y-12 supervisor. Burnette responded in a letter of February 20, 2007. In that letter, Burnette again asserted that he experienced retaliations by his contractor employers. The retaliations included those he had previously raised: coercion by the contractors to settle his previous Part 708 proceeding; delay of BWXT Y-12 employment; harassment and isolation "beginning early at Y-12;" denial of a pay raise and employment opportunities; loss of seven months salary and two weeks of accrued vacation [during period of unemployment between the Jones position and the BWXT Y-12 position]; and lost reputation.

The WP Manager indicated two grounds for her dismissal of this complaint. First, she found that retaliations associated with the 2001 and 2002 complaints are now time barred. She also found that the requirement that Burnette dismiss his Part 708 hearing in connection with the BWXT Y-12 job offer was not a retaliation. The WP Manager found that Burnette had agreed to that condition as part of his settlement. Based on these determinations, the WP Manager dismissed the 2006 complaint, citing 10 C.F.R. § 708.17.

On August 23, 2007, the complainant filed the instant appeal of the dismissal by the WP Manager. I have reviewed that appeal, and as discussed below, I find that the dismissal should be sustained and the appeal denied.

II. Analysis

A. Whether Burnette Engaged in Protected Activity

Section 708.5, provides in relevant part that the following conduct is protected from retaliation by an employer:

> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation;

As is clear from history of this case outlined above, during 2001-2002, Burnette participated in proceedings under Part 708, by filing complaints of retaliation and requesting an investigation and a hearing. He has also filed the 2006 complaint of retaliation. Accordingly, he has engaged in protected activity, and his employer may not retaliate against him for this activity. I must next consider what, if any, retaliations occurred.

B. Alleged Retaliations

In the instant proceeding, virtually all of the retaliations alleged by Burnette are associated with the 2002 settlement agreement and the initial conditions of his employment with BWXT Y-12. This includes the allegations of collusion, the delayed start time for his position with BWXT Y-12, denial of compensation due to lack of employment for seven months, denial of compensation for two weeks of paid vacation, and denial of a pay raise at the outset of his BWXT Y-12 employment. He also complains of harassment, isolation, and lost reputation.

C. Whether the Complaint Is Timely Filed

Section 708.17(a) provides that a complaint of retaliation may be dismissed for lack of jurisdiction. Section 708.17(c)(1) provides that untimeliness is an appropriate basis for dismissal on grounds of lack of jurisdiction. However, Section 708.14(d) provides a complainant with the "opportunity to show any good reason [he] may have for not filing within that period and the [appropriate DOE official] may, in his or her discretion, accept [the] complaint for processing."

A complainant is expected to file a complaint within 90 days of the date he knew or reasonably should have known of the alleged retaliation. 10 C.F.R. §708.14(a). In this case the alleged retaliations took place during the period surrounding the 2002 settlement agreement. Therefore the instant 2006 complaint is filed well beyond the 90 day period. Burnette has provided no reason why he could not file his complaint on these matters in a timely manner. Further, Burnette has alleged no specific retaliation that has taken

place within the 90 days preceding the filing of the 2006 complaint. Accordingly, the complaint is time barred.

Moreover, even if his complaint were timely filed, I see no merit to Burnette's other claims.

D. Alleged Collusion by DOE Contractors

I summarily reject Burnette's assertion that the DOE contractors involved in this case acted improperly in expecting him to drop his Part 708 request for a hearing in exchange for offering him new employment. I do not believe this constitutes collusion or retaliation. Rather, I have concluded that this was simply part of ordinary settlement negotiations and conditions that Burnette was free to reject or accept. He could certainly have decided to proceed with his Part 708 hearing, but instead decided to accept the job offer, and agree to the dismissal of his request for a Part 708 hearing. I see nothing wrong with this type of negotiation. In fact, in Part 708, settlement agreements virtually always result in the dismissal of the Part 708 proceeding before OHA. There is nothing improper here at all.

E. Other Claims of Retaliation

Burnette's other claims of retaliation including isolation, harassment and lost reputation are quickly disposed of. They are too vague to warrant consideration here. In any event, there is no relief under Part 708 for lost reputation or non-specific claims of "isolation."

III. Conclusion

For the reasons set forth above, I find that the complainant has not shown that good cause exists for his failure to file his Part 708 complaint in a timely manner. I further find that his complaint should be dismissed because he has not shown any recent retaliation that is cognizable under Part 708. Accordingly, the WP Manager's determination was correct, and the instant Part 708 complaint should be dismissed.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Jeffrey R. Burnette (Case No. TBU-0071) is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.19.

Thomas L. Wieker
Deputy Director
Office of Hearings and Appeals

Date: August 30, 2007

May 2, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Fred Hua

Date of Filing: April 3, 2008

Case Number: TBU-0078

Fred Hua (the complainant), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. The complaint was filed on January 22, 2008, and was dismissed on March 18, 2008. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.

I. BACKGROUND

The complainant was an employee of AREVA NP, Inc. (AREVA), a subcontractor to Sandia National Laboratories (Sandia) at the DOE Yucca Mountain Project (YMP) in Nevada. Although the complainant was an AREVA employee, his on-site manager was Cliff Howard (the supervisor), the manager of Sandia Lead Lab Engineered Systems. In early September 2007, Sandia informed AREVA that the complainant would be released from YMP, effective September 28, 2007.

The complainant filed a Part 708 complaint with the National Nuclear Security Administration (NNSA) Whistleblower Program Manager (the WP Manager). In his complaint, the complainant states that he was released from YMP in retaliation for making protected disclosures. Specifically, the complainant alleges that he was released from YMP because he raised concerns during various Performance Assessment Systems Integration Team (PASIT) meetings, which were attended by other Sandia employees, as well as individuals from the DOE and Department of the Navy.

According to the complainant, he raised concerns at the PASIT meetings "regarding obstacles for a timely and quality document completion." Complaint at 8. Among the concerns raised by the complainant were the following: (i) a Technical Work Plan (TWP) was rushed to completion and was later found to have errors; (ii) resources were wasted in correcting errors caused by technical editors because the complainant was not allowed to train the technical editors on the use of an advanced feature in Microsoft Word; (iii) the complainant and his colleagues were unable to adequately utilize a Features and Events Process (FEP) document management software program, Sharepoint, causing problems with the FEP procedure within the Engineered Systems

department; and, (iv) the supervisor refused to provide a courtesy copy of a document to his DOE counterpart prior to making his final submission of the document, requiring Sandia staff to spend time making DOE-required changes after the final submission of the document. Complaint at 12, 15 - 17.

On March 18, 2008, the WP Manager dismissed the complaint for "lack of jurisdiction." As a basis for the dismissal, the WP Manager stated that the complaint "fail[ed] to describe a 'protected activity' under 10 C.F.R. § 708.5." Specifically, the WP Manager determined that "the facts alleged do not rise to the level of (1) a substantial violation of law, rule or regulation, (2) a substantial and specific danger to employees or public health and safety, or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority." Therefore, the WP Manager dismissed the complaint, pursuant to 10 C. F. R. § 708.17.

On April 3, 2008, the complainant filed an appeal of the dismissal by the WP Manager with the Office of Hearings and Appeals. 10 C.F.R. § 708.18.

II. ANALYSIS

Section 708.17 provides, in relevant part, that "dismissal for lack of jurisdiction or other good cause is appropriate if … the facts, as alleged in [the] complaint, do not provide issues for which relief can be granted" under Part 708. 10 C.F.R. § 708.17 (c) (2).

A. The Complaint

We have reviewed the complaint and the WP Manager's dismissal. Based on the information contained in the complaint, we find no error in the WP Manager's determination that the complainant failed to make disclosures protected under Part 708.

1. The Technical Work Plan

The complainant's allegation that his disclosure of the flawed TWP reveals "gross mismanagement" on the part of the supervisor is not persuasive. In a prior decision, OHA stated that gross mismanagement is characterized by

> more than *de minimis* wrongdoing or negligence. It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. Therefore, gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission.

Roger Hardwick, OHA Case No. VBA-0032, 27 DOE ¶ 87,539 (1999); *see also Carolyn v. Dep't of the Interior*, 63 M.S.P.R. 684 (1994). In his complaint, the complainant gave a long narrative of various difficulties he encountered in his work as the result of the supervisor's decision to prepare the TWP in a certain manner.

While the information in the complaint indicates that the complainant believed that the supervisor's approach to completing the TWP was incorrect, this does not, without more, rise to the level of mismanagement, much less gross mismanagement. There is no indication in the complaint that the project came to a standstill or that the flaws in the document compromised YMP's ability to complete its mission. Therefore, there is no basis for concluding that the WP Manager erred on this point.

2. Disclosures Regarding Software Applications

As to the complainant's arguments regarding his colleagues' inability to use advanced features in Microsoft Word and Sharepoint, the complainant has failed to establish that the supervisor's decisions concerning those software applications constituted gross mismanagement or resulted in gross waste of funds. Just as gross mismanagement constitutes more than merely a debatable managerial decision, gross waste of funds constitutes a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *See Erika D. Jensen v. Dep't of Agriculture*, 104 M.S.P.R. 379 (2007).

The complainant maintains that there was a "significant waste of project funds" that resulted from the problems with the software applications. He states that had the supervisor followed his recommendations, "millions of dollars" could have been saved. Complaint at 10. However, the complainant provides no details, in either his complaint or his appeal, regarding the alleged waste or mismanagement. The complainant discusses the inconvenience to him and his colleagues of working under conditions with which the complainant disagreed. Other than his own assertions, the complainant does not specify the amount of funds needlessly spent or the difficulties that significantly compromised YMP's ability to accomplish its mission. Stating broadly that "millions of dollars" could have been saved is vague and inadequate. The complainant's assertions do not disclose gross waste of funds or gross mismanagement. Rather, they reveal his disagreement with managerial decisions on the allocation of funds and manpower. On this point, the WP Manager correctly determined that the complainant did not describe a disclosure protected under Part 708.

3. The Supervisor's Refusal to Provide Courtesy Copy of Document

Finally, the complainant's disclosure regarding the supervisor's refusal to provide a courtesy copy of a document to his DOE counterpart prior to making his final submission of the document, does not constitute a disclosure of gross mismanagement. It appears that the submission of the document to the DOE counterpart was not a requirement, but rather a courtesy. The supervisor did not follow that course. While the complainant may have disagreed with the supervisor's decision, it does not constitute mismanagement, much less gross mismanagement. In addition, there is no indication that, even had a copy of the document been provided to the DOE counterpart prior to its final submission, the complainant and his colleagues would not have been required to spend time revising the document. Consequently, we find this purported disclosure to be frivolous on its face. There is no error in the WP Manager's determination on this point.

B. The Appeal

In his appeal, the complainant presents arguments that he did not make in his complaint. Specifically, in addition to his arguments that his disclosures reveal gross mismanagement and gross waste of funds, the complainant now states in his appeal that the supervisor's preparation of the TWP also posed a danger to public health or safety and constituted a violation of law, rule, or regulation. It appears that these arguments are an effort on the part of the complainant to use the same language used by the WP Manager in her dismissal in order to meet the requirements of 10 C.F.R. § 708.5, and overcome the deficiencies the WP Manager cited under 10 C.F.R. § 708.17. These arguments were not raised during the initial complaint. However, in order to give this case thorough consideration, we will exercise our discretion and review the new arguments.

1. Danger to Public Health or Safety

The complainant maintains in his appeal that his disclosures were not mere disagreements between him and the supervisor. Rather, according to the complainant, his disclosures revealed a danger to public health and safety. Appeal at 6.

I find no merit in this argument. Under Part 708, a disclosure is protected if it reveals "a *substantial and specific* danger to employees or to public health or safety." 10 C.F.R. 708.5 (a) (2) (emphasis added). Vague and indistinct allegations of government wrongdoing do not amount to protected conduct. *See Julie K. Johnston v. Merit Systems Protection Board*, 518 F.3d 905 (Fed. Cir. 2008). In *Johnston*, the court determined that the petitioner's allegations were detailed and well-supported. Johnston disclosed a substantial and very specific danger regarding the threat of serious injury to employees during training should inadequately trained personnel be tasked with managing training activities. *Id*. at 910. Such is not the case here. The danger that the complainant alleges is neither substantial nor specific.

In his appeal, the complainant gives a long narrative of the relationship between his work and the public welfare. He maintains that the flawed TWP was a direct input into other, more important, models and reports. He states that those models and reports are used in projects which may directly impact public health and safety. Therefore, according to the complainant, preparing a flawed TWP is tantamount to creating a danger to public health and safety.

The alleged relationship between the TWP and health and safety is far removed. Moreover, the complainant does not allege any *specific* danger resulting from the flaws in the TWP. Alleging a general and remote danger, that may or may not occur, simply does not meet the Part 708 standard of disclosing information which reveals a *substantial and specific* danger to employees or to public health or safety.

2. Violation of Law, Rule, or Regulation

In his appeal, the complainant cites to various DOE and Nuclear Regulatory Commission (NRC) quality assurance regulations that are intended to protect the public. He maintains that the fact that there were errors in the TWP, which he says was "rushed" to completion, indicates that the supervisor violated the DOE and NRC quality assurance regulations. This broad statement is not

supported by any factual references in the appeal. Even if the TWP may have contained errors, and required subsequent revisions, this does not indicate a substantial violation of law, rule or regulation.

First, the complainant did not point to any specific provision of the regulations that the allegedly flawed TWP violated. Rather, he gave a long, circuitous discussion of the connection of the TWP to other documents and procedures, and of those documents and procedures to other models and reports, and of those models and reports to other work at YMP which is, in fact, governed by the quality assurance regulations. That purported connection is so vague and remote that we cannot conclude that an allegedly flawed TWP is a violation of the regulations. Second, even assuming that the regulations do remotely apply to producing TWPs, the complainant has not shown with any specificity either that the alleged flaws in the TWP were anything more than minor errors, or that the subsequent revisions to the TWP did not correct the purported violations. The complainant's argument therefore fails to establish a *substantial* violation of law, rule or regulation, as set forth in 10 C.F.R. § 708.5 (a) (1).

As a final matter, we fail to see why, if the complainant did believe that his concerns disclosed both a danger to public health or safety and a substantial violation of law, rule, or regulation, he did not make those arguments in his initial 32-page complaint. As stated above, the complainant's arguments in his complaint were that his concerns disclosed gross mismanagement and gross waste of funds. His failure to raise arguments concerning an alleged danger to public health or safety and an alleged violation of law, rule or regulation in his complaint suggests that these new arguments on appeal are nothing more than the complainant's attempt to bolster his disclosures in light of the WP Manager's dismissal. Having considered these arguments, however, we see nothing in the appeal which would warrant reversing the WP Manager's dismissal and accepting jurisdiction over the complaint.

III. CONCLUSION

As stated above, we find that the complainant's arguments in his complaint reflect his disagreement with managerial decisions, and do not disclose gross mismanagement or gross waste of funds. Therefore, the complainant has failed to establish that he made disclosures protected under section 708.5, and the WP Manager properly dismissed the complaint. In addition, the complainant's new arguments on appeal do not indicate that the complainant disclosed information which revealed either a substantial violation of law, rule or regulation or a substantial and specific danger to employee or public health or safety. No matter how argued, there is no getting around the fact that, in this case, there was no protected disclosure. Accordingly, the arguments on appeal do not establish that the complainant made disclosures protected under section 708.5. Based on the foregoing, we find that the determination of the WP Manager should be sustained, and the instant appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Dr. Fred Hua, Case No. TBU-0078, is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision, pursuant to 10 C.F.R. § 708.19.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 2, 2008

July 25, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Donald Searle

Date of Filing: July 8, 2008

Case Number: TBU-0079

Donald E. Searle (Searle or the complainant) appeals the dismissal of his complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint should be affirmed.

I. Background*

The complainant is an employee of UT-Batelle, LLC (UT-Batelle), the contractor responsible for operating the DOE's Oak Ridge National Laboratory (ORNL). He claimed that in the spring and summer of 2005 he made protected disclosures to his supervisor regarding beryllium handling at his work site. He further indicated that in September 2005 that same supervisor informed him that he was to be laid off effective February 28, 2006. He was rehired by UT-Batelle on May 15, 2006, although at a reduced salary and pay grade.

On January 4, 2007, Searle filed a complaint of retaliation under Part 708 with the EC Manager (Complaint I). In Complaint I, Searle claimed that the February 28, 2006, termination and the May 15, 2006, rehiring at a lower pay level were retaliations for the protected disclosures that he made to his superiors concerning the beryllium handling. On April 9, 2007, the EC Manager determined that jurisdiction of Complaint I should be accepted, and it was forwarded to the Office of Hearings and Appeals (OHA) for investigation. On April 11, 2007, the Office of Hearings and Appeals received Complaint I. Pursuant to 10 C.F.R. § 708.22, an OHA investigator was appointed.

After reviewing the record in this matter, on April 17, 2007, the OHA investigator determined that Complaint I and the accompanying request for investigation should be dismissed for failure to file

*The portion of this section dealing with the history Searle's various Part 708 complaints from January 2007 to May 2007 is taken mostly *verbatim* from a previous Part 708 jurisdictional appeal decision concerning Searle, *Donald E. Searle*, 29 DOE ¶ 87,025 (May 2, 2007) (*Searle I*).

in a timely manner pursuant to 10 C.F.R. § 708.14(a) (90-day deadline for filing complaint from the date of the alleged retaliation).

Searle appealed the investigator's determination that Complaint I should be dismissed for failure to file in a timely manner. On May 16, 2007, the Acting Director of OHA issued a decision regarding Searle's appeal. In *Searle I*, after reviewing Searle's reasons for the late filing of Complaint I, the Acting Director of OHA found that Searle had not "provided a single substantial reason why he could not [have] file[d] in a timely manner." *Searle I* at 29 DOE at 89,132. The Acting Director consequently dismissed Searle's jurisdictional appeal.

On April 7, 2008, Searle filed another complaint of retaliation under Part 708 with the EC Manager. April 7, 2008, Employee Concerns Complaint filed by Donald Searle (Complaint II). His complaint began by asserting that, on receiving his "salary increase card" on January 25, 2008, he "remains in the extreme low end of a pay scale which no longer reflects my job title." Complaint II at 2. Complaint II then details the circumstances of his rehiring in May 2006 at a lower salary and the increasing responsibilities he eventually began to be assigned. His complaint then asserted that he had only been given a 15 percent pay raise in January 2007, thus making his salary only 75 percent of what it had been one year earlier before his discharge. He then relates in Complaint II that during 2007 he began to perform different employment responsibilities from those for which he had been hired and that sometime in 2007 his supervisor "in recognition of his accomplishments and value" reclassified his job title as "Design Engineer." Nevertheless, he asserts that for pay purposes he is still classified as a "Facility Engineer" and is still "well below the midpoint in that pay scale." Complaint II at 2.

Searle alleges in Complaint II that "my salary languishes at the bottom end of the pay scale and at a level less than I was making over two years ago" and that he considers this an act of reprisal for having filed Complaint I. Complaint II at 2. As additional evidence of his employer's animus towards him, he also alleges that, despite having spent considerable time as a community volunteer, he has never been selected by UT-Battelle to be honored, as others have been, for his volunteer efforts.

On June 5, 2008, the EC Manager informed Searle than DOE was dismissing Complaint II because it too was also untimely. The EC Manager believed that the gravamen of Complaint II concerned Searle's "salary disparity" originating from the date when UT-Batelle rehired Searle in May 2006. The EC Manager found that Searle knew of this "salary disparity" in May 2006, when he accepted the new UT-Battelle job and thus, Searle's Complaint II, filed on April 7, 2008, was filed outside the 90-day deadline as provided in 10 C.F.R. § 708.14(a).

II. Analysis

In a submission dated June 30, 2008, Searle appealed the EC Manager's determination dismissing Complaint II. In this submission, Searle argues, in effect, that his substandard pay is a continuing reprisal for his filing Complaint I. Complaint II specifically referenced his January 25, 2008, salary increase card that provided for a less than adequate raise that did not place him above the low end

of his position's pay scale, despite his increasing professional responsibilities in 2007. Because he did not get notice of his new salary until January 25, 2008, he alleges that his filing of Complaint II on April 7, 2008, falls within the 90-day deadline. Further, he alleges that he did not discover until a April 2008 meeting with the UT-Battelle Employee Concern Officer that his salary was not weighted against the collective sum of all other Engineer salaries at UT-Battelle but only with the other seven members of his peer group. Searle alleges that this fact is additional information indicating that his salary has been "unduly suppressed." Appeal Letter from Donald Searle to Poli Marmolejos, Director, OHA (June 30, 2008) at 2. While Searle specifically does not allege that his initial salary on rehire was retaliatory, he states that, given the facts alleged in his complaint, his January 25, 2008, salary increase should have raised his salary to a level reflecting his current increased job responsibilities. He argues that he has presented sufficient information to mandate that OHA conduct a whistleblower investigation to determine if there is a possibility that his less than adequate raise was in retaliation for previously filing a whistleblower complaint.

We concur with the EC manager's overall determination that Complaint II should be dismissed. However, as discussed below, we have adopted a different rationale as the basis for this dismissal. Section 708.17(b)(4) of 10 C.F.R. provides for dismissal where a complaint is frivolous or without merit on its face. In the present case, Searle claims that he has been subject to retaliation for participating in a Part 708 proceeding. Such retaliation is prohibited under 10 C.F.R.§ 708.5(b). For a complainant to sustain a whistleblower complaint, he or she must prove by a preponderance of the evidence that the protected activity was a contributing factor in the alleged retaliatory act. 10 C.F.R. § 708.29. In the substantial majority of Part 708 cases, this contributing factor showing is made through establishing a time proximity between the protected activity and the alleged retaliation. *See, e.g., Curtis Hall*, 30 DOE ¶ 87,001 (2008). In the present case, the period of time from the date when Searle filed Complaint I (January 2007) to the date of the alleged retaliation described in Complaint II (January 2008) is approximately 12 months. This is an unusually extended period of time. Searle has not made even a perfunctory showing of a contributing factor here. *See Elaine M. Blakely,* 28 DOE ¶ 87,039 (2003) (no connection found between a protected activity and alleged retaliation 13 months later). Moreover, in this case, we note that UT-Battelle voluntarily rehired Searle after he made the protected disclosure referenced in Complaint I. Consequently, we find that Searle's complaint is without merit on its face and should be dismissed.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Donald E. Searle (Case No. TBU-0079) is hereby denied.

(2) This decision is the final decision of the Department of Energy unless, by the 30th day after receiving the appeal decision, a party files a petition for Secretarial review.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 25, 2008

September 18, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Leslie D. Cumiford

Date of Filing: September 3, 2008

Case Number: TBU-0081

Leslie D. Cumiford ("the Complainant"), appeals the dismissal of her complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy ("DOE") Contractor Employee Protection Program. The complaint was filed on October 10, 2006, and was dismissed on August 12, 2008. As explained below, the dismissal of the complaint should be affirmed, and the appeal denied.

I. BACKGROUND

The Complainant was an employee of Sandia National Laboratories ("Sandia") in Albuquerque, New Mexico, from 1995 until July 14, 2006, when Sandia terminated the Complainant's employment.

The Complainant filed a Part 708 complaint with the Whistleblower Program Manager ("the Manager") at the National Nuclear Security Administration Service Center in Albuquerque, New Mexico ("NNSA"). The complaint stated that Sandia terminated the Complainant's employment in retaliation for making protected disclosures. Complaint at 2. Specifically, the Complainant alleged that her employment was terminated because she raised concerns in a letter to the DOE Inspector General ("IG") regarding practices at Sandia. *Id*. According to the Complainant, she raised concerns to the DOE IG regarding "procurement irregularities and a conflict of interest" on the part of a Sandia director. *Id*. According to the Part 708 complaint, she also alleged in her letter to the DOE IG that she was exposed to significant amounts of arsenic in the workplace in retaliation for appearing as a witness on behalf of a co-worker in a discrimination and retaliation case against another Sandia director. *Id*.

The Complainant further requested that the Manager hold the complaint in abeyance while the Complainant pursued a claim for "EEO (Equal Employment Opportunity) Retaliation" with the State of New Mexico Department of Labor, Human Rights Division ("NMHRD"). Complaint at 1. The Complainant stated that she was "informed that both complaints cannot be simultaneously pursued." Complaint at 1. She added, "otherwise, at this time I am not pursuing any other avenues for remedy under State or other applicable law." *Id*. Following an

investigation by NMHRD, the Complainant filed a claim in State of New Mexico District Court, Bernalillo County ("New Mexico state court") in March 2008. Appeal at 1.

The Manager took no action on the Part 708 complaint until August 12, 2008, when she dismissed the complaint for "lack of jurisdiction." As a basis for the dismissal, the Manager stated that the Complainant "filed a complaint in another forum with respect to the same facts alleged in [her Part] 708 Complaint." Therefore, the Manager dismissed the complaint, pursuant to Section 708.17(c)(3).

On September 3, 2008, the complainant filed an appeal of the dismissal by the Manager with the Office of Hearings and Appeals. 10 C.F.R. § 708.18.

II. ANALYSIS

Section 708.17 provides, in relevant part, that "dismissal for lack of jurisdiction or other good cause is appropriate if … [the complainant] filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint filed under [Part 708]." 10 C.F.R. § 708.17 (c) (3); *see also, Gary S. Vander Boegh*, 29 DOE ¶ 87,010 (2006). We have reviewed the complaint and the Manager's dismissal. Based on the information contained in the complaint and other information gathered in this proceeding, we find no error in the Manager's determination that the Complainant's Part 708 complaint was based on the same facts as alleged in her filing in New Mexico state court and, therefore, should be dismissed.

In her appeal, the Complainant maintains that she believed the prohibition on pursuing a Part 708 claim while pursuing a claim alleging the same facts in another forum applied only to "State investigations" and not "legal cases." Appeal at 1. The Complainant further states that, in July 2008, she instructed her attorney to withdraw the claim pending in New Mexico state court, but he failed to carry out her instructions. After dismissing her attorney, the Complainant filed a motion to dismiss the state claim on August 25, 2008. *Id*. However, the record does not indicate that the state claim has been dismissed as of the date of the appeal.

The Complainant's argument on appeal that she was unaware that she could not simultaneously pursue a Part 708 case and a State claim is unpersuasive. When she filed her complaint with the Manager, the Complainant signed an affirmation which stated, *inter alia*, that she had "not pursued a remedy available under State or other applicable law." *See* Complainant's Affirmation, dated October 10, 2006. The Complainant gives no reason as to how she could have misinterpreted this plain language. Further, as noted above, the Complainant expressly stated in her complaint that she knew she could not pursue two claims simultaneously. Her current assertion that she believed that prohibition applied only to "State investigations," and not other legal proceedings, is disingenuous.

However, as noted above, Section 708.17(c)(3) only precludes a filing under State or other applicable law "with respect to the same facts alleged in the [Part 708] complaint…. " 10 C.F.R. § 708.17(c)(3). Therefore, in order to give the instant appeal thorough consideration, we have reviewed the state claim currently pending in New Mexico state court in order to ascertain whether the claims allege the same facts as set forth in the Part 708 Complaint. *See* E-mail from

Michele Rodriguez de Varela, NNSA, to Diane DeMoura, OHA, September 4, 2008 (attaching copy of the Complainant's filing in New Mexico state court). The Complainant refers to her state filing as a claim for "EEO Retaliation and Wrongful Termination." *See* Appeal at 1; Complaint at 1. In past Part 708 cases, we have found that, because the factual prerequisites in Part 708 cases and EEO claims differ, they should not be considered to be based upon "the same facts" for the purposes of 10 C.F.R. § 708.17(c)(3). *See Gilbert J. Hinojos*, 28 DOE ¶ 87,037 (2003), citing *Carl J. Blier*, 27 DOE ¶ 87,514 (1999) (Americans with Disabilities Act and Rehabilitation Act (ADA/RA) complaints do not bar Part 708 complaint since ADA/RA complaints require different factual motivation for employer's adverse personnel action), and *Lucy B. Smith*, 27 DOE ¶ 87,520 (1999) (Age Discrimination in Employment Act (ADEA) complaint does not bar Part 708 complaint since ADEA complaint requires different factual motivation for employer's adverse personnel action). Therefore, in this case, if the Complainant's state claim is an EEO claim – that is, a claim alleging that she was retaliated against based on race, religion, sex, national origin or other similar basis – her Part 708 claim should not be dismissed under 10 C.F.R. § 708.17(c)(3).

Although the Complainant refers to the New Mexico state court filing as a claim for "EEO Retaliation and Wrongful Termination," the claim is not based on EEO grounds. Rather, the filing is, in fact, virtually identical to her Part 708 complaint, alleging retaliation and wrongful termination on the same grounds as those cited in her Part 708 complaint. The Complainant has alleged no facts or circumstances that relate to EEO matters in the state filing. Given that the New Mexico state court proceeding, alleging the same facts as the Part 708 complaint, is currently pending, the Part 708 complaint was properly dismissed under 10 C.F.R. § 708.17(c)(3). Accordingly, we find that the determination of the Manager should be sustained, and the instant appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Dr. Leslie D. Cumiford, Case No. TBU-0081, is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision, pursuant to 10 C.F.R. § 708.19.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 18, 2008

October 6, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Thomas L. Townsend

Date of Filing: September 15, 2008

Case Number: TBU-0082

Thomas L. Townsend (Townsend) appeals the dismissal of his complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708[1] by the Oak Ridge Operations Office (OR) of the Department of Energy (DOE). As explained below, the dismissal of the complaint should be upheld.

I. Background[2]

Townsend was an employee of LeGacy Resource Consulting Corporation (LRCC), a contractor at the DOE's Oak Ridge facility. In his position, he analyzed the suitability of employees to receive and maintain security clearances. On December 12, 2006, Townsend sent an E-mail (12/12 E-mail) to the Secretary of Energy (Secretary) in which he praised the performance of two federal employees, one of whom was his supervisor. In the 12/12 E-mail he urged that both employees be given promotions to a higher federal pay grade and alleged that "[t]his operations office has held back people for reasons you are not aware of." September 7, 2007, complaint submitted by counsel for Townsend, Loring E. Justice, to Gerald Boyd, Manager, Oak Ridge Operations Office (Complaint) at 2. Later, on February 15, 2007, Townsend sent another E-mail (2/15 E-mail) to the Secretary of Energy in which he urged the Secretary during his visit to Oak Ridge to talk to personnel security analysts at Oak Ridge. Such discussion, he goes on to state, would convince the Secretary of the need for "centralization of personnel security." Complaint at 2. He goes on to allege, "I am not crying wolf but I think you need to hear the real story from people [who] have for years thought about this situation and been told to keep quiet [and] are ordered to grant and continue cases that the headquarters staff would disapprove." Complaint at 2.

---

[1]The DOE Contractor Whistleblower Program, 10 C.F.R. Part 708 prohibits employers from retailiating against contractor employees who engage in various defined protected activities such as, reporting a substantial violation of law, gross mismanagement or waste of funds, or a substantial and specific danger to employees or public health and safety. *See* 10 C.F.R. § 708.5.

[2]This section relies on the facts alleged in Townsend's September 7, 2007, complaint and in his Appeal submission submitted September 15, 2008.

On May 30, 2007, Townsend received a letter from the Deputy Manager of the Oak Ridge Operations Office. The letter acknowledged a January 31, 2007, E-mail from Townsend praising his supervisor and informed him that his supervisor was receiving a "desk audit" in connection with a possible increase in federal pay grade level.

On June 11, 2007, Townsend sent the Secretary another E-mail (6/11 E-mail) in which he informed the Secretary that due to a lack of funding, Townsend would not be retained in his employment past June 22, 2007, despite the fact that a backlog of security cases had not been completely resolved. He goes on to state his belief that his impending termination was prompted in part by his previous three E-mails[3] to the Secretary. Complaint at 3. He goes on to urge the Secretary to consider his supervisor's request for additional funding especially given that "inspection reports" identified a lack of staff for his supervisor. He then states:

> It is hard for me to understand why you pay a contract[or] $53.19 an hour and the person doing the work gets only $30.00 [per hour]. I understand the need for minority contracts but when an organization is short handed, has backlogs and looks at what is coming up, such as caseloads from OPM, it is hard to understand why she would not be allowed to hire someone on a personal services contract and save the Department a lot of money. Again it was a pleasure working for your organization and if someone finds more money for [his supervisor] maybe I would consider returning to help her.

Complaint at 3.

On June 11, 2007, Townsend was asked by a LRCC supervisor whether he had sent the Secretary an E-mail, to which he replied in the affirmative. The supervisor then instructed Townsend not to send another E-mail to the Secretary. The next day, June 12, the LRCC supervisor went to see Townsend and asked when was the last time he had E-mailed the Secretary. Townsend replied that he had sent an E-mail "yesterday." The LRCC supervisor then asked for a copy of the E-mail. Later that day, Townsend was informed by the LRCC supervisor that he had been terminated from his position at LRCC. September 15, 2008, Appeal submission from Thomas L. Townsend (Appeal) at 2. Townsend subsequently received a letter from LRCC dated June 14, 2007, informing him of the grounds for his termination from LRCC. The letter specifically alleged that Townsend, in three E-mails, had "lobb[ied] on behalf of a federal employee" and had disclosed the firm's billing rate as well as his own pay rate.[4] These disclosures, the letter stated, violated company policies regarding Conflict of Interest, Confidential and Company Sensitive Information and E-mail Access and disclosure. June 14, 2007, letter from LRCC Director of Human Resources to Tom Townsend.

---

[3]It is uncertain from the Complaint which three previous E-mails Townsend is referring to in this E-mail.

[4]Presumably LRCC's reference to lobbying referred to Townsend's advocacy in the 12/12 E-mail for a higher pay grade for his supervisor and for another federal employee.

In his Complaint, dated September 7, 2007, Townsend alleged that he had been terminated from his employment because of his previous E-mail communications with the Secretary. The Complaint alleged that his E-mail communications "raised issues relating to substantial violations of law, rule or regulations, dangers to employees and public health and safety and in particular fraud, gross, mismanagement, gross waste of funds and abuse of authority." Complaint at 5. The Manager of the Oak Ridge Operations Office delegated review of the Complaint to the Office of Chief Counsel.[5]

On September 5, 2008, Wendy E. Bryant (Bryant), an attorney with the OR Office of Chief Counsel, on behalf of OR, issued Townsend a letter dismissing the Complaint. The letter details the author's investigation of the Complaint including discussions the author had with Townsend and other individuals mentioned in his E-mails. It went on to state that Townsend, at a meeting with Bryant, alleged that he had reported wronging to the Secretary "in other E-mails" but would not tell the author anything specific about the alleged wrongdoing. September 5, 2008, Letter from Wendy E. Bryant, Office of Chief Counsel, OR, to Thomas L. Townsend at 3 (Dismissal Letter). The Dismissal Letter also described how Bryant reviewed a transcript of Townsend's unemployment compensation hearing. As a result of the Bryant's review of the available information, Townsend's Complaint was dismissed. Bryant found that the information contained in Townsend's E-mail communications did not constitute a protected activity under Part 708. Specifically, Bryant found that the difference between what Townsend was paid versus what LRCC charged the DOE "did not demonstrate fraud, waste or abuse." Dismissal Letter at 3. Additionally, Bryant found no evidence that a DOE official had abused his or her authority. Dismissal Letter at 4. Bryant further found that Townsend's employer had a "clear basis for terminating your employment" and cited the unemployment compensation tribunal's Decision in favor of LRCC. In this regard, Bryant cited the tribunal's finding that Townsend, in his E-mail communications, was "lobbying" for his supervisor as well as himself. Dismissal Letter at 3. The Dismissal Letter did not specify under what regulatory provision the Complaint was being dismissed, although the letter provided Townsend with a copy of the regulations for appealing a dismissal of a whistleblower complaint for a lack of jurisdiction or other good cause.

In his Appeal submission of September 15, 2008, Townsend cites a number of instances where he disagrees with the facts and conclusions reported in the Dismissal Letter and with the summation of his discussion with the author of the Dismissal Letter. He reasserts his belief that "Oak Ridge Management told [LRCC] to get rid of me." September 15 2008, Appeal submission from Thomas L. Townsend to Poli A. Marmolejos, Director, OHA, (Appeal) at 3. He also asserts that he did not discuss the nature of the wrongdoing with Bryant because she worked for OR Management. However, he later reported these concerns to DOE's Office of the Inspector General. He asserts his belief that the Secretary, as the official responsible for all DOE operations, was authorized to receive the pay data he sent in the 6/11 E-mail. He also cites an April 11, 2006, Memorandum from the Secretary stating that DOE contractor personnel have the right to report safety and management

[5]The Manager delegated review of the Complaint from the Employee Concerns Manager (EC Manager) at Oak Ridge because of an allegation by Townsend that the EC Manager might have of conflict of interest with regard to the Complaint. *See* September 16, 2008, E-mail from Rufus Smith, EC Manager to Richard A. Cronin, Jr., Attorney-examiner, OHA.

concerns to DOE. Townsend also argues that, with regard to the allegation that he was lobbying for a job, he had previously been in discussion with another firm that would employ him to do similar work. He also challenges LRCC's assertion that it lacked funding to employ him past June 22, 2007, by noting that LRCC has already hired another person for his former position.

II. Analysis

Section 708.17(c) authorizes a DOE EC-Manager to dismiss a whistleblower's complaint in the following circumstances:

> (1) Your [the whistleblower] complaint is untimely; or
>
> (2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this regulation; or
>
> (3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this regulation; or
>
> (4) Your complaint is frivolous or without merit on its face; or
>
> (5) The issues presented in your complaint have been rendered moot by subsequent events or substantially resolved; or
>
> (6) Your employer has made a formal offer to provide the remedy that you request in your complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this regulation.

10 C.F.R. § 708.17(c). The Dismissal Letter does not explicitly state under which provision under section 708.17(c) the Complaint was dismissed, but from the content of the letter it apparently was dismissed because the Complaint was "frivolous or without merit on its face."[6] *See* 10 C.F.R.§ 708.17(c)(4).

After reviewing Townsend's complaint, we find that OR properly dismissed it since the Complaint was without merit on its face.

Section 708.5 provides in relevant part that protected conduct includes disclosure of information that an employee reasonably believes reveals - a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). As discussed

[6]We note that the Complaint appears to have been filed in a timely manner. The Dismissal Letter did not allege that the Complaint had been untimely filed. Townsend was terminated on June 11, 2007, and the Complaint was dated September 7, 2007. Accordingly, the 90-day deadline for filing a whistleblower complaint set forth in 10 C.F.R. § 708.14 seems to have been satisfied. Nor does this appear to be a case where relief could not be granted.

above, OR found that the E-mails referenced in Townsend's complaint did not meet the requirements for protected conduct.

To the extent that Townsend's 12/12 E-mail might attempt to identify an abuse of authority, a violation of law, rule, or regulation or a substantial and specific danger to employees or to public health and safety by virtue of its statement that "[t]his operations office has held back people for reasons you are not aware of," we find that this allegation is too vague to be considered a protected disclosure. The E-mail does not specify the nature of the alleged wrongdoing or the parties involved. In this regard, the Dismissal Letter records OR's request that Townsend disclose details as to alleged wrongdoing, yet Townsend failed to provide any information to the OR attorney processing his Complaint. The 12/12 E-mail fails to reasonably identify a violation of law, a substantial and specific danger to employees or public health and safety, gross mismanagement or a gross waste of funds. Consequently, OR properly found that 12/12 E-mail did not constitute a protected disclosure under Part 708.

The 2/15 E-mail alleges that various OR security supervisors instructed security personnel to grant security clearances to personnel despite the analyst's view that the clearance should not be granted. This disclosure might conceivably describe a substantial violation of a law, rule, or regulation or reporting an abuse of authority. 10 C.F.R. § 705(a)(1),(3).[7] However, the 2/15 E-mail does not contain any specific details as to who allegedly was pressuring analysts to grant inappropriate security clearances or the extent of the perceived problem. The 2/15 E-mail does not contain any facts as to the nature or identity of the rule, regulation or law which is alleged to have been violated. Consequently, we cannot find that the 2/15 E-mail disclosed a "substantial violation of law, rule or regulation."

Nor can we find that the 2/15 E-mail sufficiently describes an abuse of authority to sustain Townsend's Complaint. An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons. *See Frank E. Isbill*, 27 DOE ¶ 87,529 at 89,159 (Case No. VWA-0034) (September 27,1999). As discussed earlier, the Complaint does not contain any specific details regarding the pressuring of analysts to grant inappropriate security clearances. A disagreement between a supervisor and an analyst regarding security clearance eligibility does not, by itself, reflect an abuse of authority. Consequently, we agree with OR's determination that the 2/15 E-mail can not be considered a protected disclosure referencing an abuse of authority. [8]

The 6/11 E-mail references a potential waste of funds regarding the contracting out of security functions. As noted above, the Part 708 regulations provide that an employee may not be retaliated against for reporting a "gross" waste of funds. 10 C.F.R. § 708.5(a)(3). OHA has defined a "gross

---

[7]The 2/15 E-mail does not reference a specific danger to employees or to public health and safety.

[8]Townsend later reported his concerns to the Inspector General but such a subsequent disclosure does not make the 2/15 E-mail a protected disclosure referencing a "substantial" violation of law, rule or regulation for Part 708 purposes.

waste of funds" as "a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." *See See Fred Hua*, 30 DOE ¶ _____ (Case No. TBU-0078) (May 2, 2008) (*Hua*) (*citing Jensen v. Dep't of Agriculture*, 104 M.S.P.R. 379 (2007)).

While Townsend did identify specific per hour cost figures contrasting the difference between what his contractor employer charged the government and what they actually paid their employees, the 6/11 E-mail is essentially silent as to how this is a waste of funds, much less a "gross" waste of funds. As OR noted in its dismissal letter, it is a normal contracting practice to pay a contractor more than it pays its employees. Even though there might be more economical ways to perform the services involved, such as through a personal services contract, there is no information here to suggest any waste at all, much less an expenditure out of proportion to the benefit to be gained. Consequently, we find that OR properly found that the 6/11 E-mail did not constitute a protected disclosure as to a gross waste of funds. *See Hua*, slip op. at 3 (complaint stating only that "millions of dollars" could have been saved found to be vague and inadequate for purposes of determining that it fell under section 708.5(a)(3), or could survive dismissal pursuant to section 708.17).

Given the preceding considerations, we find that OR properly determined that the E-mails referenced in Townsend's Complaint could not be considered protected disclosures and thus properly dismissed the Complaint as being without merit on its face.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Thomas L. Townsend (Case No. TBU-0082) is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision, pursuant to 10 C.F.R. § 708.19.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 6, 2008

January 26, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: Clarrisa V. Alvarez

Date of Filing: January 5, 2009

Case Number: TBU-0084

Clarissa Alvarez, an employee of NetGain Corporation (NetGain) in Albuquerque, New Mexico, appeals the dismissal of her whistleblower complaint (the Complaint) filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. On December 1, 2008, the Whistleblower Program Manager at the DOE's National Nuclear Security Administration Service Center, Albuquerque, New Mexico (NNSA/Albuquerque) dismissed the Complaint. As explained below, dismissal of the Complaint is reversed, and the matter is remanded to NNSA/Albuquerque for further processing.

I. Background

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, the DOE office initially receiving a complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

Ms. Alvarez was employed as a "Personnel Security Specialist II" by NetGain at the NNSA Service Center in Albuquerque. After being terminated, Ms. Alvarez filed a Part 708 complaint with NNSA/Albuquerque, alleging that she had been terminated in retaliation for raising concerns to NetGain Management about the inappropriate dissemination of personal information from her Personnel Security File. Ms. Alvarez also alleges that her termination occurred in retribution for reporting "harassment" by her co-workers and supervisors.

On December 1, 2008, the Whistleblower Program Manager at NNSA/Albuquerque dismissed the Complaint. Letter from Michelle Rodriguez de Varela, Whistleblower Program Manager, NNSA/Albuquerque, to Clarissa V. Alvarez ("Dismissal Letter"). The Dismissal Letter states, in pertinent part:

> I find that your complaint fails to demonstrate that you were retaliated against for disclosing a 'protected activity' under 10 C.F.R. § 708.5 to a DOE Official, Member of Congress, a responsible government oversight official. The facts alleged do not rise to the level of (1) a substantial violation of law, rule or regulation, (2) a substantial and specific danger to employees or public health or safety, or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.
>
> There is not any evidence to support that NetGain violated disclosure of sensitive information. Information in the Personnel Security files are only released with those with a need to know and the files and access is also controlled with a need to know. There is not any other evidence presented to support any other violation of any laws covered by 10 C.F.R. Part 708.
>
> None of these allegations you allege constitute a protected activity as described in §708.5 and therefore your complaint is dismissed for lack of jurisdiction per §708.17.

Dismissal Letter at 1.

In her Appeal, Ms. Alvarez contends that the Complaint was wrongly dismissed and requests an extension of time in which to supplement her appeal. Appeal at 1-3.

II. Analysis

Part 708 provides that the DOE may dismiss a complaint for "lack of jurisdiction or for other good cause . . ." 10 C.F.R. § 708.17.

> Dismissal for lack of jurisdiction or other good cause is appropriate if:
>
> (1) Your complaint is untimely; or
>
> (2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this regulation; or
>
> (3) You filed a complaint under State or other applicable law with respect to the same facts alleged in a complaint under this regulation; or
>
> (4) Your complaint is frivolous or without merit on its face; or

(5) The issues presented in your complaint have been rendered moot by subsequent events or substantially resolved; or

(6) Your employer has made a formal offer to provide the remedy that you request in your complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this regulation.

10 C.F.R. § 708.17(c).

As an initial matter, the Whistleblower Program Manager does not specify which, if any, of the reasons listed in section 708.17(c) provides the basis for dismissing the Complaint. Instead, the Dismissal Letter appears to address the ultimate validity of Ms. Alvarez's allegations rather than considering whether Ms. Alvarez "reasonably believed" these allegations constituted protected activity under Part 708.

Part 708 protects a DOE contractor employee from retaliation for, among other things, disclosing to her "employer . . . , information that [she] reasonably and in good faith believe reveals . . . a substantial violation of a law, rule, or regulation." 10 C.F.R. § 708.5(a)(3). At the heart of Ms. Alvarez's Complaint are her contentions that her termination resulted from her alleging, in a series of electronic mail messages to Thorne A. Davis, Program Administrator, NetGain Corporation, that she was being harassed by NetGain employees and that this alleged harassment resulted in part from the inappropriate disclosure of derogatory information contained in her Personnel Security File by NetGain employees who had participated in the adjudication of her DOE security clearance.

After carefully reviewing the subject Complaint, I do not find it to be frivolous or without merit on its face. It is possible with further factual development that Ms. Alvarez might meet her evidentiary burden of showing that her allegations constituted protected disclosures under Part 708 as "a substantial violation of a law, rule or regulation." These kinds of matters are the very type of issues that OHA is charged with investigating under 10 C.F.R. § 708.22 and considering through the hearing process described in 10 C.F.R. § 708.28. Accordingly, I conclude that the Whistleblower Program Manager erred in dismissing the Complaint. For this reason, I reverse that dismissal and remand the Complaint for further appropriate processing. [1]

III. Conclusion

As indicated by the foregoing, I find that NNSA/Albuquerque incorrectly dismissed the complaint filed by Ms. Alvarez. Accordingly, I direct that the Complaint be accepted for further consideration.

This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of a petition for Secretarial review or upon

[1] Since I have found in Ms. Alvarez's favor on the existing record, her request for an extension of time in which to supplement the record is denied.

conclusion of an unsuccessful petition for Secretarial review, the decision and order shall be implemented by the affected NNSA element, official or employee, and by each affected contractor.

It Is Therefore Ordered That:

(1) The Appeal filed by Clarissa V. Alvarez (Case No. TBU-0084) is hereby granted and her Part 708 complaint is hereby remanded to the National Nuclear Security Administration Service Center, Albuquerque, for further processing as set forth at 10 C.F.R. Part 708.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 26, 2009

June 18, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Melinda Gallegos

Date of Filing: June 9, 2010

Case Number: TBU-0103

Melinda Gallegos (Gallegos or the complainant) appeals the dismissal of her complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint should be affirmed.

I. Background

The complainant states that during the period 1989 until 1998, she was an employee of the Los Alamos County Fire Department (LACFD), which she states was at that time a DOE-subsidized subcontractor at the DOE's Los Alamos National Laboratory (LANL). She asserts that in 1995, she expressed safety concerns to her supervisor about a Criterion Task Test, and that she received a two-day suspension for refusing to participate in the test. She states that in 1996 she suffered a disabling injury on the job and was placed on leave without pay for two years, without compensation or disability benefits, and that her employment was terminated by the LACFD in 1998.

On April 15, 2010, Gallegos filed a complaint of retaliation under Part 708 with the Whistleblower Program Manager of the DOE's National Nuclear Security Service Center (the WP Manager). The complainant alleges that due to her protected disclosures and activity, she was provided no compensation or disability benefits for her job related injury. She seeks relief for the expenses that she incurred, including two years salary, attorneys fees, medical expenses, and mileage. Gallegos Part 708 Complaint at 1-3.

On May 20, 2010, the WP Manager informed Gallegos that DOE was dismissing her Part 708 Complaint because it was untimely. The WP Manager states that 10 C.F.R. § 708.14(a) establishes a filing deadline of 90 days from the date that Gallegos knew or reasonably should have known of the alleged retaliation. The WP Manager finds that the period of 12 years from Gallegos' termination by LACFD until her filing of a Part 708 Complaint "far surpasses" this time frame. May 20, 2010 letter from WP Manager to Gallegos.

II. Analysis

In a submission dated June 4, 2010, Gallegos appealed the WP Manager's determination dismissing her Part 708 Complaint. In this submission, Gallegos argues that her health issues were due to "illegal and egregious prohibited personnel employment practices" to which she was subjected by the DOE from "1987 to 1991" and by LACFD from 1991 until 1998. She asserts that she is twelve years late filing a Part 708 Complaint because she was incapacitated after her 1998 termination, and is presently suffering from the same progressive, disabling condition, a muscle spasm affecting the eyelid known as blepharospasm, that initially was diagnosed in 1996. She states that she was unable to appropriately respond with a Part 708 Complaint within the allowed time due to the heavy medication prescribed by her treating physician. June 4, 2010 Appeal Letter at 1-2.

As a general matter, the DOE has found that relaxing the 90 day filing requirement for Part 708 Complaints is not appropriate and does not serve to enhance whistleblower protection. As the Hearing Officer observed in *Steven F. Collier*, Case No. VBH-0084 (2003), the DOE wants to encourage complainants to raise allegations soon after retaliatory actions occur, so that the allegations may be investigated promptly, and so that employers need not fear open-ended exposure to liability from complainants that perceive retaliation years after the alleged retaliatory actions occurred. *Id.* at 9. Further, we have consistently found that it is the individual's burden under Part 708 to know and to meet Section 708.14 filing requirements. *See Caroline Roberts*, Case No. TBU-0040 (2006).

Nevertheless, 10 C.F.R. § 708.14(d) provides DOE with some discretion to accept late filings of Part 708 complaints if it determines that there is a good reason for the delay. However, in the present case, Gallegos has filed her Part 708 Complaint approximately 12 years after her termination by LACFD. It is difficult to conceive of any circumstances that would justify such a lengthy delay. In her Appeal, Gallegos asserts that she waited 12 years to file her complaint because she has been incapacitated with blepharospasm during this entire period, and that the medications prescribed by her doctors for this condition prevented her from appropriately filing within the allowed time frame. June 5, 2010 Gallegos Appeal letter at 1-2. We have reviewed the medical reports attached to Gallegos' Appeal, and we find that the medical conditions and medications documented in these reports are insufficient to justify her delay in filing her complaint. The medical data submitted by Gallegos with her Appeal indicates that in August, 1996, a LANL physician found that she was suffering with blepharospasm of the left eye, which interfered with her vision, and incapacitated her from working as a firefighter. Appeal Attachment 9. In 1997, her personal physician's medical records indicate that her physician diagnosed Gallegos as suffering from muscle spasms in her left eyelid (blepharospasm). These records indicate that at that time, Gallegos was taking medication as treatment for the blepharospasm, and also had received some botox injections to treat the condition. In her report, Gallegos' doctor notes that "[s]he's been running most days in spite of the cold weather." She summarized her medical advice to Gallegos as follows:

> We have discussed the fact that this condition can go on for a long time and that keeping good control so that she can function normally is the most likely outlook. She is to continue her exercise . . . . [Followup] in 3 months.

Appeal Attachment 12. Finally, the September 2009 notes of an examination of Gallegos by her eye doctor indicate that Gallegos reported spasms in her left eye as ongoing for several years, reported mild spasms in her right eye beginning about three weeks earlier, and was being treated with botox injections. Appeal Attachment 13.

While the discomfort caused by Gallegos' blepharospasm is evident from these medical reports, it appears that she has been able to exercise and to lead a fairly normal life despite her blepharospasm and her use of medication or injections to reduce or control it. Accordingly, we find that her ongoing medical condition as documented in her Appeal does not justify the extension of the Part 708 filing requirements that she seeks. We therefore find that the WP manager's determination that Gallegos' Part 708 Complaint should be dismissed as untimely filed is correct, and that the Appeal should be denied. *See Charles Montano*, Case No. TBU-0067 (2007).

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Melinda Gallegos (Case No. TBU-0103) is hereby denied.

(2) This decision is the final decision of the Department of Energy unless, by the 30th day after receiving the appeal decision, a party files a petition for Secretarial review.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: **June 18, 2010**

December 6, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Greta Kathy Congable

Date of Filing: November 8, 2010

Case Number: TBU-0110

Greta Kathy Congable (the Appellant) appeals the dismissal of her complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program.[1] As explained below, the Appeal should be granted in part and remanded for further processing.

I. Background

The Appellant is an employee of Sandia Corporation (Sandia)[2], the contractor responsible for operating the DOE's Sandia National Laboratory (SNL). On September 14, 2010, the Appellant filed a complaint of retaliation under Part 708 with the National Nuclear Security Administration Service Center (NNSA/SC) in Albuquerque, New Mexico. In her complaint, the Appellant asserts that she made the following protected disclosures:

(1) In September 2008 she reported the "loss of control" of Personal Identification Information (PII) contained in collaborative share folders in SNL's internal computer network to her management and to the Sandia legal department (Disclosure 1);

(2) She provided testimony on behalf of two co-workers, Pat O'Neill and Mark Ludwig, who had raised concerns regarding possible misconduct in a formal ethics investigation conducted by Sandia/Lockheed Martin (Disclosure 2).[3]

Because of these alleged protected disclosures, the Appellant further asserted that effective on June 18, 2010, she was transferred from her position as an administrative assistant in the Corporate Investigations Department of Sandia to another department.

---

[1] OHA reviews jurisdictional appeals under Part 708 based upon the pleadings and other information submitted by the Appellant. *See* 10 C.F.R. § 708.18(b) (appeal must include a copy of the notice of dismissal, and state the reasons why you [the Appellant] think the dismissal was erroneous).

[2] Sandia is a wholly owned subsidiary of Lockheed Martin.

[3] Neither the Appellant nor the NNSA/SC's Whistleblower Program Manager (WP Manager) specified what were the exact nature of the ethics investigation disclosures.

In a letter dated October 27, 2010, the WP Manager dismissed the Appellant's Part 708 complaint. With regard to Disclosure 1, the WP Manager found that there was no causal connection between the Appellant's disclosure in September 2008 and her subsequent transfer in 2010. Specifically, the WP Manager found that the significant amount of time that elapsed between the two events ("a lack of temporal proximity") led to the conclusion that the two events were unrelated. Accordingly, she found that, to the extent that the complaint was based on Disclosure 1, it should be dismissed.

With regard to Disclosure 2, the WP Manager again found that there was no causal connection between the Appellant's participation in the ethics investigation and the Appellant's 2010 lateral transfer.[4] In making this finding, the WP Manager cited the Lockheed Martin investigator's finding that no misconduct could be substantiated. Thus, according to the WP Manager, none of the disclosures made during the investigation could be considered a "protected disclosure" as defined by Part 708. The WP Manager went on to state that there was no other basis to conclude that the Appellant's lateral transfer was based upon any reason other than the recommendation by the Lockheed Martin investigator that the Appellant be transferred because her relationship with her manager was "irreparably broken." Accordingly, the WP Manager found that, to the extent that the complaint was based on Disclosure 2, it should also be dismissed. [5]

II. Analysis

A. Disclosure 1

In her appeal, the Appellant argues that the WP Manager was incorrect in finding that there was insufficient temporal proximity between her disclosures in September 2008 and her transfer in June 2010 to permit an inference of a causal connection between the two events.

Section 708.17(b) (4) of 10 C.F.R. provides for dismissal where a complaint is frivolous or without merit on its face. In the present case, the Appellant claims that she has been subjected to retaliation for making a protected disclosure (Disclosure 1). Such retaliation is prohibited under 10 C.F.R. § 708.5(a). For a complainant to sustain a whistleblower complaint, he or she must prove by a preponderance of the evidence that the protected activity was a contributing factor in the alleged retaliatory act. 10 C.F.R. § 708.29. In the present case, the Appellant has alleged no basis for us to conclude that her September 2008 disclosure was a contributing factor in her June 2010 transfer.

A relevant consideration is time proximity between the protected activity and the alleged retaliation. *See, e.g., Curtis Hall*, Case No. TBA-0042 (February 13, 2008).[6] In the present case,

[4] None of the material available to us indicates when the Appellant participated in the ethics investigation.

[5] The WP Manager also justified dismissal of the Appellant's complaint based upon the fact that the Appellant had requested retirement from her position and thus her complaint was rendered moot. The Appellant has since withdrawn her retirement request and thus her complaint cannot now be considered moot.

[6] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case

the period of time from the date when the Appellant made her disclosure about the loss of control of PII material, September 2008, to the date of the alleged retaliation – her June 2010 transfer - is approximately 20 months. This is an unusually extended period of time which does not support an inference that a causal connection exists between the September 2008 disclosure and the Appellant's transfer in June 2010. *See Donald Searle,* Case No. TBU-0079 (July 25, 2008) (no connection found between a protected activity and alleged retaliation 12 months later).

In her Appeal, the Appellant directs our attention to *Sue Rice Gossett*, Case No. VBZ-0062 (May 8, 2002) (*Gossett*), and *Russell P. Marler*, Case No. VWA-0024 (August 31, 1998) (*Marler*), for the proposition that a finding of temporal proximity may be found between protected conduct and retaliation occurring as much as a one and one-half years and four years apart, respectively. In *Gossett*, however, the whistleblower made a series of disclosures during her one and one-half year tenure with her employer and had a series of reassignments leading to her termination. Thus, unlike in the present case, there was not a one and one-half year gap between the protected activity and the alleged retaliation. With regard to *Marler,* we note that the decision was an initial agency decision issued by a hearing officer. Subsequent appellate decisions issued by various Directors of OHA, as cited above, have declined to follow the finding made in *Marler*. Consequently, we find reliance on *Gossett* and *Marler* to be unpersuasive.

Based on the foregoing, we affirm the WP Manager's finding that the September 2008 disclosure (Disclosure 1), as a matter of law, cannot be considered a contributing factor to the Individual's subsequent transfer in June 2010. Accordingly, to the extent that the Appellant's Part 708 complaint is based upon this disclosure, the WP Manager correctly determined that the complaint should be dismissed.

B. Disclosure 2

In her October 27, 2010, determination letter, the WP Manager found that there was no causal connection between Disclosure 2 and the Appellant's subsequent transfer. This finding was based upon the WP Manager's reasoning that the Lockheed Martin investigation found that the allegation of misconduct that was the subject of the investigation "could not be substantiated" and therefore "any disclosures [the Appellant] made during the investigation [were] not 'protected disclosures' within the meaning of 10 C.F.R. § 708.5(a)(1)-(3)."[7] Letter from Michelle

---

number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[7] We were not presented a copy of the investigation or any information related to the nature of the disclosures the Appellant made during the ethics investigation. Nonetheless, in reviewing cases such as this we consider all materials in the light most favorable to the party opposing the dismissal. *See Billie Joe Baptist*, Case No. TBZ-0080, *slip op.* at 5 n. 13 (May 7, 2009) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). Consequently, we will consider that, for the sole purpose of deciding this appeal, the substance of the Appellant's alleged disclosures in the ethics investigation is of a nature that would meet the requirements for a protected disclosure pursuant to 10 C.F.R. § 708.5(a) (A Part 708 protected disclosure must reference: a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority). In this regard, we note that the WP Manager did not make a finding that the substance of the Appellant's failed to meet the requirements of section 708.5(a). If this matter proceeds to

Rodriguez de Varela, Whistleblower Program Manager, NNSA, to Greta Kathy Congable (October 27, 2010). We disagree.

Section 708.5(a) of Part 708 defines the act of making a "protected disclosure" as follows:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--
> (1) A substantial violation of a law, rule, or regulation;
> (2) A substantial and specific danger to employees or to public health or safety; or
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority;

As subsection (a) reveals, the only qualification for a disclosure to be protected under Part 708 is that the whistleblower "*reasonably believes*" that the substance of the disclosure reveals a substantial violation of a law, rule or regulation; a substantial and specific danger to employees, public health or safety; or fraud, gross mismanagement, gross waste of funds or abuse of authority. 10 C.F.R. § 708.5(a). The ultimate truth of protected disclosure is immaterial with regard to Part 708 if the whistleblower reasonably believed that his or her disclosure referenced one of the concerns listed in section 708.5(a). Consequently, the findings of the Lockheed Martin investigation are not determinative on the issue of whether the Appellant's disclosures in the investigation are protected under Part 708. We thus remand this matter to the WP Manager for further processing of the Appellant's complaint with regard to Disclosure 2 alone.

This decision and order has been reviewed by the NNSA, which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by each affected NNSA element, official or employee and by each affected contractor.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Greta Kathy Congable (Case No. TBU-0110) is hereby granted in part and her Part 708 complaint is hereby remanded to the National Nuclear Security Administration Service Center, Albuquerque, for further processing as set forth at 10 C.F.R. Part 708 as set forth above.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.18(d).

---

investigation, the OHA investigator can examine the content of these alleged disclosures to make a factual finding regarding the sufficiency of these disclosures to support a Part 708 claim.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 6, 2010

March 3, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Gennady Ozeryansky

Date of Filing: January 27, 2011

Case Number: TBU-0113

Gennady Ozeryansky (hereinafter referred to as the complainant) appeals the dismissal of his complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the Appeal should be dismissed without prejudice and the matter should be remanded for further processing.

I. Background

During the period 2006 until 2009, the complainant was an employee of SupraMagnetics, Inc. (SupraMagnetics). SupraMagnetics designs and develops semiconductors for use in particle acceleration applications. The complainant states that during the period of his employment, SupraMagnetics received grants from the DOE's Small Business Innovation Research (SBIR) funding stream. The complainant contends that this funding brings SupraMagnetics under the jurisdiction of 10 C.F.R. Part 708. In March 2008, SupraMagnetics gave the complainant a written warning not to make unauthorized contact with DOE officials. On April 16, 2009, the complainant e-mailed DOE contracting officials and expressed concerns that SupraMagnetics had not provided him with information accounting for DOE funds connected with a failed project that the complainant halted in April 2008. On June 2, 2009, SupraMagnetics discharged the complainant for contacting the DOE on this matter.

On April 26, 2010, the complainant contacted the DOE's Employee Concerns Program Manager (the ECP Manager) and made a complaint of retaliation under Part 708 (the Part 708 Complaint). The complainant alleges that due to his protected disclosures, he was terminated from his employment with SupraMagnetics. He seeks relief from the DOE for this termination.

On December 29, 2010, the ECP Manager informed the complainant that the DOE was dismissing his Part 708 Complaint because it was untimely. In this regard, the ECP Manager finds that 10 C.F.R. § 708.14(a) establishes a filing deadline of 90 days from the date that the complainant knew or reasonably should have known of the alleged retaliation. The ECP Manager finds that the period of nine months from the complainant's termination by SupraMagnetics until his filing of a Part 708 Complaint surpasses this required time frame. The ECP Manager also finds that 10 C.F.R. § 708.15 (c) does not permit the processing of a Part 708 complaint if, with respect to the same facts, a complainant chose to pursue a remedy under state or other applicable law. In this regard, the ECP Manager finds that the complainant pursued his termination case with the State of Connecticut Employment Security Appeals Division Board of Review, and subsequently received a decision on the merits of his case.

II. Analysis

In a submission dated January 12, 2011, and received by the DOE on January 27, 2011, the complainant appealed the ECP Manager's determination dismissing his Part 708 Complaint (the Appeal). In the Appeal, the complainant contends that his termination case before the State of Connecticut and his delay in filing his Part 708 Complaint should not preclude the DOE from accepting jurisdiction of his complaint.

Ordinarily, I would conduct an analysis of the substance of the ECP Manager's findings and the information and arguments provided in the complainant's Appeal, and would issue a determination based on that analysis. However, information contained in SupraMagnetics' response to the Appeal and in the complainant's reply to that response leads me to conclude that it would be inappropriate for me to proceed. In its response, SupraMagnetics contends that during the time period relevant to this proceeding, it was not a DOE subcontractor subject to Part 708 or the DOE's notification provisions for employee concerns under DOE Order 442.1A. The complainant contends that SupraMagnetics was a DOE subcontractor, because it received SBIR grants from the DOE, and because it also supplied materials to the DOE's Brookhaven National Laboratory. I find that resolving this preliminary jurisdictional issue will require further investigation by the DOE. Accordingly, I find that it is premature to consider the issues raised by the ECP Manager in his December 29, 2010, letter and in the complainant's Appeal. For that reason, this matter will be remanded to the ECP Manager for further processing to address the issue whether SupraMagnetics was a "subcontractor" within the meaning of Part 708 at the time that the alleged protected activity and the alleged retaliation took place. The complainant's Appeal is dismissed without prejudice to refiling after the ECP Manager has issued a revised determination.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Gennady Ozeryansky (Case No. TBU-0113) is hereby dismissed without prejudice and his Part 708 complaint is hereby remanded to the Department of Energy's Employee Concerns Program Manager, for further processing as set forth in this Decision and Order.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 3, 2011

March 30, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Dennis Rehmeier

Date of Filing: March 1, 2011

Case Number: TBU-0114

Dennis Rehmeier (hereinafter referred to as the Complainant) appeals the dismissal of his complaint of retaliation and request for investigation (the Complaint) filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the Complaint is affirmed, and the Appeal denied.

I. Background

The Complainant was an employee of Sandia Corporation (Sandia) in Livermore, California, from 2007 until August 27, 2010, when Sandia terminated the Complainant's employment. The Complainant was Deputy Program Manager for the Sandia Counter-intelligence Program. In his position, Complainant had specific responsibility to implement the Counter-intelligence Program at Sandia's site at Livermore, California. Complaint at 1-2.

The Complainant's Counsel filed the Complaint with the Whistleblower Program Manager ("the Manager") at the National Nuclear Security Administration Service Center in Albuquerque, New Mexico (the "NNSA"). The Complaint stated that Sandia terminated the Complainant's employment and engaged in other adverse personnel actions against the Complainant in retaliation for making protected disclosures. Complaint at 2. Specifically, the Complainant alleged that these adverse actions were taken by Sandia because he raised concerns regarding the management of the Sandia Counter-intelligence Program. The Complaint identifies the Complainant's alleged disclosures as follows:

> (1) Complainant raised concerns starting in October 2009 about Sandia's under resourcing of Complainant's budget to allow his office to have sufficient analytical staff to conduct foreign national counter-intelligence in the Sandia's California office.
>
> (2) As a secondary protected activity, Complainant objected to the hiring of a counter-intelligence manager at Sandia who had less than one year employment at Sandia, and who was therefore not eligible under Sandia policies to bid for the

> position without a waiver, and presumptively not sufficient [sic] qualified for said counter-intelligence position.

Complaint at 2. The Complaint also states that the Complainant complained about improper interference in his employment by his former Sandia manager after that manager took an employment position with the DOE in December 2009. *Id.* at 3. The Complaint states that the Complainant made his disclosures internally to Sandia Human Resources, the Sandia Ombudsman, and Sandia's parent corporation, Lockheed Martin. *Id.* at 5. The Complaint states that these disclosures were protected under 10 C.F.R. § 708.5(a) because he reasonably believed that they revealed the following:

> . . . violation of law, rule, or regulation (*i.e*., executive orders and directives, and DOE order and policies); (2) a substantial and specific danger to public safety (*i.e*., threats to national security); and/or (3) gross mismanagement, gross waste of funds, and abuse of authority.

Id. at 2.

On January 18, 2011, Sandia filed a Motion to Dismiss Complaint with the Manager. In that Motion, Sandia asserted that it terminated the Complainant for violation of Sandia policies. Sandia also contended that the Complainant made no protected disclosures under Part 708, nor showed that Sandia retaliated against him. Sandia requested that the Manager dismiss the Complaint without further investigation or hearing for failure to state a claim under Part 708. Sandia Motion to Dismiss at 13.

On February 18, 2011, the Manager issued a letter dismissing the Complaint. The Manager refers to the Complainant's two alleged disclosures quoted above and concludes that "[n]one of these allegations you allege constitute protected activity as described in § 708.5 and therefore your complaint is dismissed for lack of jurisdiction per § 708.17." Manager's February 18, 2011, letter at 1.

On March 1, 2011, the Complainant's Counsel filed an appeal (the "Appeal") of the dismissal by the Manager with the Office of Hearings and Appeals. 10 C.F.R. § 708.18. On March 15, 2011, Sandia filed a "Renewed Motion to Dismiss Complaint and Appeal" (Sandia's "Renewed Motion"); on March 22, 2011, Complainant's Counsel filed an Opposition to this Motion; and, on March 29, 2011, Sandia filed a Reply to Complainant's Opposition.

II. Analysis

We have reviewed the Complaint, the Manager's Dismissal, and the Complainant's and Sandia's filings in this proceeding. Based on the information contained in the Complaint, we find no error in the Manager's determination that the Complainant's "allegations" are not disclosures protected under § 708.5(a), and, therefore, the Complaint must be dismissed pursuant to § 708.17. Specifically, we find that dismissal for lack of jurisdiction or other good cause was

appropriate because the Complainant's contention that his allegations were protected disclosures under § 708.5(a) is "without merit on its face." 10 C.F.R. § 708.17(c)(4).
As an initial matter, we note that the Complainant contends in his Appeal that the Manager did not fulfill her responsibilities in the initial processing of the Complaint. Specifically, the Complainant maintains that the Manager should not have dismissed the Complaint without undertaking an investigation and giving the Complainant an opportunity to respond to Sandia's Motion to Dismiss. These arguments are without merit. The Employee Concerns Director or head of field element can dismiss a complaint on his or her own initiative or at the request of a party. 10 C.F.R. § 708.17(a). There is no requirement that the cognizant official allow a complainant to submit comments prior to a dismissal sua sponte or prior to a dismissal based on a contractor response or motion. Similarly, there is no requirement that the cognizant official investigate a complaint. That function resides with the Office of Hearings and Appeals. 10 C.F.R. § 708.21(a)(2). Based on the foregoing, we find no error in the Manager's processing of the Complaint.[1]

The Complainant also contends in his Appeal that the Manager failed to provide an adequate basis for her dismissal of the Complaint. Section 708.17(b) requires that the field element provide "specific reasons" for the dismissal. In this case, the Manager stated that the Complainant's allegations do not rise to the level of protected disclosures. This clearly indicates a basis for dismissal pursuant to § 708.17(c)(4), which applies to a complaint that is "frivolous" or "without merit on its face." This is a sufficient basis upon which to file an Appeal.[2] Accordingly, we will proceed to a consideration of the Complainant's substantive arguments.

In his Appeal, the Complainant contends that the Manager erroneously concluded that the concerns that he raised to Sandia and Lockheed Martin management were not protected disclosures under Part 708. We do not agree with this contention. In his Complaint, the

---

[1] This conclusion is not inconsistent with two OHA decisions cited by the Complainant. *See Clarrisa V. Alverez*, TBU-0084 (2009); *Clint Olson*, TBU-0027 (2004). In *Alverez*, the field element (i) failed to identify the subsection of § 708.17(c) providing the basis for dismissal, and (ii) erroneously cited the lack of evidentiary support for the allegations as the basis for dismissal. In *Olson*, the field element failed to give the complainant an opportunity to clarify ambiguities in the complaint. Those circumstances are not present in the instant case. Here, the specific subsection of § 708.17(c) used as the basis for dismissal is readily identifiable from the Manager's findings. Moreover, the field element based the dismissal on the lack of sufficiency of the Complainant's allegation, rather than any examination of the evidentiary support for those allegations. Finally, there were no ambiguities in the Complaint requiring "clarification."

[2] Although the Appellant contends that OHA precedent requires that this matter be remanded to the field element for a more specific description of the basis for dismissal, the cited decisions do not support that result. *Greta Kathy Congable*, TBU-0110 (2010) (portion of dismissal based on actual accuracy of protected disclosure reversed); *Cor*, TBU-0045 (2006) (dismissal based on assessment of merits of assertions reversed); *Caroline C. Roberts*, TBU-0040 (2006) (dismissal upheld, although field element should have been more specific in basis for dismissal); *Kuzwa*, TBU-0028 (2004) (dismissal reversed where complainant's allegations fell within Part 708); *Charles L. Evans*, TBU-0026 (2004) (dismissal based on validity of retaliation claim reversed).

Complainant asserts that, starting in October 2009, he "raised concerns" that Sandia's "under resourcing" of his budget would not allow his office to have sufficient analytical staff to conduct foreign national counter-intelligence in Sandia's California office. He states that in September 2009, the counter-intelligence analyst assigned to Sandia's Livermore facility resigned, and that Sandia refused, on grounds of inadequate budget, to fill this position. Complaint at 1, 3. The Complainant further asserts that he believed that effective performance of Sandia's counter-intelligence operations at Livermore was heavily dependent upon maintaining uninterrupted expert services from this intelligence analyst position, and that the failure to fill this position created a "substantial and specific danger" to public safety because he believed that Sandia's Livermore, California, facility was vulnerable to foreign intelligence threats. As a basis for this belief, the Complaint refers to a high percentage of foreign nationals in the population of the Livermore, California, area and to the increase in access by foreign nationals to Sandia's Livermore site resulting from the development of the Livermore Valley Open Campus (LVOC). *Id.*

The Complaint does not indicate that the Complainant disclosed to Sandia and Lockheed Martin management his reasons for believing that the funding for counter-intelligence staffing at Sandia's Livermore facility was inadequate. However, even if he presented the information described in the Complaint as the basis for his concern that he had insufficient analytical staff to counter foreign intelligence threats, his statements would not rise to the level of a "substantial and specific danger" to public safety. In an analogous case decided under the Whistleblower Protection Act (WPA), upon which Part 708 is modeled, the Merit Systems Protection Board (the Board) addressed the question of whether a party expressing concerns about funding for protective services had made disclosures that revealed a "substantial and specific danger" to public safety. *Chambers v. Dep't of the Interior*, No. 2011 M.S.P.B. 7 (2011).

In *Chambers*, the appellant had filed a Complaint alleging that the agency retaliated against her for disclosing on a number of occasions that the agency's decision to reduce park police patrols had endangered persons using public parks and parkways. The Board analyzed these disclosures using the following factors: "(1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm – potential consequences." *Chambers, slip op.* at 13, *citation omitted*. Based on this analysis, the Board found that some of Chambers' disclosures were protected disclosures under the WPA while others were not protected disclosures. The Board found that disclosures were protected when they revealed specific threats to public safety that were likely to occur. For example, the Board found that Chambers' disclosure that residents were complaining of increased drug-related activity in certain urban parks was a protected disclosure because it described a specific, serious consequence that Chambers reasonably believed had already resulted from fewer park police patrols. *Id*. However, the Board rejected protected disclosure status for Chambers' statement that inadequate park police staffing will result in the loss of life or destruction of a national monument. It found these concerns to be "too speculative," stating that:

> These statements are divorced from any additional information by which the appellant's predictions can be judged. There may well be a staffing level below which reasonable predictions of likely harm could be made, but there is nothing in the appellant's statements to indicate that she reasonably believed that level had been reached.

Id. at 15.

In the present case, the allegations of harm described in the Complaint are similarly speculative. The Complaint does not identify specific foreign intelligence activities at Sandia's Livermore facility, nor why the Complainant believed that they were likely to increase in the absence of an intelligence analyst employed at the site. Nor does the Complaint suggest that there is more specific information that can only be disclosed in a classified setting. The Complaint merely alleges that the "effective performance" of Sandia's counter-intelligence program at Livermore was "heavily dependent" on the intelligence analyst position. We find that a person could not reasonably believe that the failure to fill the vacancy was information that indicated a "substantial and specific" danger to employees or to public health or safety.

Similarly, a person could not reasonably believe that the ongoing vacancy of the intelligence analyst position at Livermore evidenced the failure of Sandia to fulfill specific counter-intelligence obligations to the DOE. Accordingly, the assertions in the Complaint, even if proven, would not show that the Complainant reasonably believed that Sandia's decisions concerning the staffing of counter-intelligence operations at Livermore had violated Sandia's obligation to provide adequate counter-intelligence services to the DOE, or that Sandia had committed an act of gross mismanagement or abuse of authority in allocating counter-intelligence funds received from the DOE.

We also reject the Complainant's assertion that he made a protected disclosure when he objected to the hiring of a counter-intelligence manager at Sandia who had less than one year of employment at Sandia. Even if Sandia's company policy stated that this individual was not eligible to bid for the position without a waiver, this type of contractor personnel policy is not a "law, rule, or regulation" for purposes of § 708.5(a)(1). Nor would the failure of an applicant to meet this company requirement provide a reasonable basis for concluding that Sandia was hiring someone insufficiently qualified for the counter-intelligence position. Finally, with respect to the allegations of improper conduct by the Complainant's former Sandia manager after that manager became employed by the DOE, we note that Part 708 provides no relief concerning actions by DOE officials.

Accordingly, we find that the Manager acted correctly in finding that none of the allegations in the Complaint constitute protected activity as described in § 708.5. Accordingly, we find that the determination of the Manager should be sustained, and that the instant appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Dennis Rehmeier, Case No. TBU-0114, is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision, pursuant to 10 C.F.R. § 708.19.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 30, 2011

Department of Energy
Washington, DC 20585

JUN - 3 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner:	Gordon Michaels
Dates of Filing:	May 2, 2011 May 20, 2011
Case Numbers:	TBU-0117 TBU-0118

Gordon Michaels appeals the dismissal of his whistleblower complaint filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. Two offices having jurisdiction over the complaint, the DOE's National Nuclear Security Administration Service Center (NNSA/SC) and the DOE's Oak Ridge Office (ORO), dismissed the complaint, on April 12, 2011, and May 10, 2011, respectively. As explained below, we affirm the dismissals of the complaint, and deny the appeals therefrom.

I. Background

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations. Under Part 708, the DOE office initially receiving a complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

Michaels was an employee of UT-Battelle, LLC, the firm that manages and operates the DOE's Oak Ridge National Laboratory (ORNL), until he retired on January 31, 2009. Beginning on May 1, 2009, Michaels began working, under a "purchase order/contract," for Honeywell Federal Manufacturing & Technologies, LLC (Honeywell), the firm that manages and operates the DOE NNSA's Kansas City Plant (KCP). Purchase Order/Contract between Honeywell and Gordon Michaels (May 1, 2009) (Contract).

Though Michaels contracted with Honeywell, based in Kansas City, Missouri, a Statement of Work (SOW) incorporated by reference into the contract required Michaels to maintain a "remote business office," and stated that "[m]ain office accommodations" would be provided by ORNL, located in Oak Ridge, Tennessee, "for day to day activities." Id. at 3; Statement of Work, Gordon Michaels, Technology Specialist (March 30, 2009). Michaels alleges that, in July 2010, UT-Battelle revoked his access to the ORNL site in retaliation for actions, protected under Part 708, that he took while employed by ORNL prior to January 31, 2009.

On November 19, 2010, Michaels filed a Part 708 complaint with the Deputy Director of the DOE Office of Civil Rights and Diversity at DOE Headquarters, who referred the matter to the two DOE offices having jurisdiction over the complaint, NNSA/SC and ORO. As indicated above, both offices dismissed the complaint, NNSA/SC as to Honeywell, and ORO as to UT-Battelle, and in doing so both cited as a basis for dismissal that Michaels is not an "employee" as that term is defined in the Part 708 regulations. Letter from Michelle Rodriguez de Varela, Whistleblower Program Manager, NNSA/SC, to Billie P. Garde, Clifford & Garde, LLP (April 12, 2011); Letter from Rufus H. Smith, Employee Concerns Manager, ORO, to Billie P. Garde, Clifford & Garde, LLP (May 10, 2011).[1] In his appeal, the complainant contends that the protections of Part 708 do not "only apply to employees of contractors." For the reasons set forth below, we disagree.

II. Analysis

The Part 708 regulations provide that complaints may be filed by "an employee of a contractor, . . ." 10 C.F.R. § 708.5. The regulations define "employee" as "a person employed by a contractor, and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in § 708.5 of this subpart." 10 C.F.R. § 708.2. We find below that Michaels is not an employee, as that term is defined in Part 708, of either Honeywell or UT-Battelle.

A. The Complainant is not an Employee of Honeywell

Michaels contends that he should be considered a "covered employee" under Part 708 based upon the circumstances of his current work for Honeywell. Appeal at 4. Though acknowledging that he is, "by the terms of his contract with Honeywell FM&T, an independent contractor to" Honeywell, the complainant contends he is "protected under 10 CFR Section 708 from retaliation by an entity which, although not his direct or immediate employer, is nonetheless a covered employer." Appeal at 2, 3.

The complainant is correct that DOE contractors, such as Honeywell and UT-Battelle, are subject to the provisions of Part 708, and in this sense are "covered employers" under those provisions. This clearly does not mean, however, that *any person* is entitled to file a Part 708 complaint against a DOE contractor. The regulations, very specifically, only afford that right to "employees" of DOE

[1] Both offices also cite a lack of temporal proximity between Michaels's alleged protected conduct and the alleged retaliation. *Id.* We need not, however, address this issue, which bears on the merits of the complaint, as we find the complaint does not meet the threshold jurisdictional requirements of Part 708, as explained below.

contractors. 10 C.F.R. § 708.5. The issue, then, is whether the complainant is an "employee" of Honeywell, as that term is used in Part 708.

The definition of "employee" set forth in section 708.2 is of little help in resolving this issue, as it merely provides, as noted above, that an employee is a "person employed . . . or previously employed by a contractor . . . ." 10 C.F.R. § 708.2: Faced with interpreting the term "employee" in a statute with a similar definition, the Supreme Court adopted "a common law test for determining who qualifies as an 'employee' . . . ." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (finding that the Employee Retirement Income Security Act's "nominal definition of 'employee' as 'any individual employed by an employer,' is completely circular and explains nothing"). Given the somewhat similarly circular definition of "employer" in Part 708, we find that it is appropriate to apply the *Darden* test here.[2]

The Court set forth that test as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-24.

UT-Battelle and Honeywell filed a response to the present appeal, in which they cite certain provisions of the contract between Michaels and Honeywell, including those stating that Michaels shall not be an "employee" of Honeywell, and that he "shall not be entitled to nor" claim "any benefits or rights accorded to employees" of Honeywell. Joint Response of UT-Battelle and Honeywell FM&T to Jurisdictional Appeal of Gordon Michaels (May 13, 2011) (Joint Response) at 6 (quoting Contract at 6).

---

[2] The Department of Labor, under whistleblower authority analogous to the DOE's under Part 708, has applied the Court's analysis in *Darden* to interpret the term "employee" as used in the whistleblower protection provisions of various statutes, including the Energy Reorganization Act (ERA), which protects "any employee" from retaliation by a licensees of the Nuclear Regulatory Commission, or by a contractor or subcontractor of such a licensee. 42 U.S.C. § 5851; *see, e.g., Demski v. Indiana Michigan Power Company,* No. 02-084, 2004 WL 785547 (2004); *Kesterson v. Y-12 Nuclear Weapons Plant, et al.,* No. 96-173, 1997 WS 180394 (1997); *Boschuk v. J & L Testing, Inc.,* No. 97-020, 1997 WL 591351 (1997); *Varnadore v. Oak Ridge Nat'l Lab. And Lockheed Martin Energy Sys.*, Nos. 1992-CAA-2 and 5, 1993-CAA-2 and 3, 1995-ERA-1, 1996 WL 363346 (1996).

First, that the contract in question explicitly states that Michaels's work was "not as an employee" of Honeywell is but one factor to be considered, and is not dispositive of the issue before us. The Court in *Darden* stated that, because "the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden,* 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America,* 390 U.S. 254, 258 (1968)). Other relevant terms of the contract, however, read in light of the factors set forth in *Darden*, also support a conclusion that Michaels is not an employee of Honeywell under the common-law definition of that term.

Here, Honeywell contracted for the work of a technology specialist, a highly skilled technical employee, for a period of limited duration, specified as one year, with the option of renewal, but not to exceed two years. *Id.* at 2, 4. The work was to be performed primarily at a remote location, away from the direct and day-to-day supervision of Honeywell. SOW at 2. There is no language in the agreement that specifies Michaels's work schedule, or a minimum number of hours of work required. Rather, the agreement sets only a maximum number of hours allowed to be billed per year. SOW at 3. As noted above, the contract explicitly disclaims any entitlement by Michaels to "benefits or rights accorded to employees" of Honeywell. Contract at 6. It provides no pay for sick leave, vacation, holidays, or overtime. *Id.;* Terms and Conditions of Purchase, Time and Material or Labor Hour Purchase Order/Contract (incorporated by reference into Contract) at 2. As to the tax treatment of the hired party, the Contract provides that Michaels "shall be solely responsible for any legal obligations relating to, but not limited to, provision of employee benefits and compliance with state and federal laws including the Internal Revenue Code." Contract at 6.

There are, on the other hand, limited indicia of an employer-employee relationship between Honeywell and Michaels. Specifically, the statement of work provides that Honeywell may assign unspecified "[o]ther duties within the intent of this scope of work . . . ." SOW at 2. In addition, the statement of work anticipates that Honeywell is to furnish certain information necessary to the accomplishment of Michaels's work. SOW at 3. And while the statement of work states that "no equipment will be provided" by Honeywell, *id.*, Honeywell acknowledges that it paid for work space at ORNL through an "administrative transfer of funds" between Honeywell and UT-Battelle. Joint Response at 3. However, on balance, considering all of the relevant factors set forth in *Darden,* we cannot find that the complainant has demonstrated that he is an "employee" of Honeywell, as that term is used in Part 708.

B. The Complainant is not an Employee of UT-Battelle

There is no dispute in this case that the complainant was *previously* employed by UT-Battelle. As we note above, the definition of "employee" under Part 708 includes "any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in § 708.5 of this subpart." 10 C.F.R. § 708.2. However, because Michaels retired from UT-Battelle and does not allege that the company terminated his employment, he clearly does not meet the definition of "employee," by virtue of being a former employee of UT-Battelle, under the wording of section 708.2.[3]

[3] The complainant cites a prior decision of our office in which we found that "continuation of past retaliation by

As for the fact that, more recently, Michaels was allowed to use ORNL facilities, this certainly would not, under a *Darden* analysis, make Michaels an employee of UT-Battelle. There is no evidence of any contractual relationship between the complainant and UT-Battelle, such as exists between Michaels and Honeywell. The Court in *Darden* is clear that, to be considered "an employee under the general common law of agency," one must be first be a "hired party," and Michaels was not "hired" by UT-Battelle at any time after he retired on January 31, 2009.

In sum, while we agree with the complainant that both Honeywell and UT-Battelle are "covered employers" under Part 708, we cannot find that Michaels is an employee of either contractor. On this critical issue, the complainant offers nothing that would lead us to a different conclusion. In a reply to the Joint Response, the complainant notes that the Contract incorporated by reference a provision of the Department of Energy Acquisition Regulations requiring that "the Contractor shall comply with the requirements of 'DOE Contractor Employee Protection Program' at 10 CFR part 708 for work performed on behalf of DOE directly related to activities at DOE-owned or-leased sites." 48 C.F.R. § 952.203-70; Reply to Joint Response of UT-Battelle and Honeywell FM&T to Jurisdictional Appeal of Gordon Michaels (May 26, 2011) (Reply) at 9. However, this standard contractual provision merely provides that the contractor, in this case Michaels, is bound by the terms of Part 708, just as Honeywell is similarly bound by the terms of its management and operating contract with the DOE. In no way does this provision bolster the complainant's claim to treatment as an "employee" under those regulations.

The complainant also argues that "excluding an entire class of employees, *i.e.,* independent contractors, only leaves a gaping hole in the balloon of protection DOE has adopted to identify waste, fraud and abuse and protect those who reveal it." Reply at 2. However, had the DOE intended to extend the protections of Part 708 to independent contractors, it could have done so by simply using a term broader than "employee." For example, the regulations governing the DOE's chronic beryllium disease prevention program explicitly apply to any "current DOE employee, DOE contractor employee, or other worker at a DOE facility" and define "worker" as "a person who performs work for or on behalf of DOE, including a DOE employee, an independent contractor, a DOE contractor or subcontractor employee, or any other person who performs work at a DOE facility." 10 C.F.R. §§ 850.2, 850.3. By contrast, policy arguments notwithstanding, the language of the Part 708 is clear in providing protection only to employees and certain former employees of DOE contractors, not to independent contractors.

III. Conclusion

As explained above, the complainant has not demonstrated, or even alleged facts that would demonstrate, that he is an employee, under Part 708, of either Honeywell or UT-Battelle. We

---

a subsequent DOE contractor would be actionable under Part 708." *Harry T. Greene*, Case No. TBU-0010 (2003). The complainant incorrectly describes *Greene* as a "case of a DOE contract employee bringing a claim against a former employer, ..." Reply to Joint Response of UT-Battelle and Honeywell FM&T to Jurisdictional Appeal of Gordon Michaels (Reply) at 15. In fact, the complainant in *Greene*, though having previously worked for a DOE contractor, filed his complaint against his current employer, also a DOE contractor.

therefore find that NNSA/SC and ORO correctly dismissed the complaint filed by Gordon Michaels. Accordingly, the present Appeals should be denied.

It Is Therefore Ordered That:

(1) The Appeals filed by Gordon Michaels, Case Nos. TBU-0117 and TBU-0118, are hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review within 30 days after receiving this decision. 10 C.F.R. § 708.18(d).

for Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date:

JUN - 3 2011

August 29, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Gennady Ozeryansky

Date of Filing: August 2, 2011

Case Number: TBU-0119

Gennady Ozeryansky (Ozeryansky), a former employee of SupraMagnetics, Inc. (SupraMagnetics), appeals the dismissal of his retaliation complaint filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program.[1] The DOE's Employee Concerns Program Manager (the ECP Manager) dismissed Ozeryansky's complaint on July 13, 2011. As explained below, the Appeal should be denied.

I. Background

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

During the period 2006 until 2009, Ozeryansky was employed by SupraMagnetics, Inc. (SupraMagnetics), a DOE grant recipient. On April 16, 2009, Ozeryansky e-mailed DOE contracting officials and expressed concerns that SupraMagnetics had not provided him with information to account for DOE funds connected with a failed project. On June 3, 2009, SupraMagnetics discharged Ozeryansky for contacting the DOE on this matter.

On April 26, 2010, Ozeryansky filed a Part 708 complaint with the DOE's Employee Concerns Program Manager (the ECP Manager).[2] Ozeryansky alleged that because of his April 16, 2009, E-mail to DOE, which was a protected disclosure under Part 708, he was terminated from his employment.

[1] OHA reviews jurisdictional appeals under Part 708 based upon the pleadings and other information submitted by the Appellant. *See* 10 C.F.R. § 708.18(b) (appeal must include a copy of the notice of dismissal, and state the reasons why the Appellant thinks the dismissal was erroneous).

[2] The ECP Manager's December 29, 2010, dismissal letter erroneously refers to this date as April 26, 2009.

On December 29, 2010, the ECP Manager informed Ozeryansky that the DOE was dismissing his Part 708 complaint because it was untimely. Specifically, Ozeryansky had not filed his Part 708 complaint within 90 days from the date of his termination as required by 10 C.F.R. § 708.14(a). The ECP Manager also found that, because Ozeryansky had filed a complaint regarding his termination in a State Board of Review, section 708.15(c) of Part 708 barred further consideration of his case under Part 708.[3]

In a submission received by the DOE on January 27, 2011 (the January 27 Appeal), Ozeryansky appealed the ECP Manager's determination dismissing his Part 708 complaint. In the January 27 Appeal, Ozeryansky contended that his case before a State Board of Review was only in regard to unemployment benefits and did not involve a claim for wrongful termination. Ozeryansky also contended that SupraMagnetics was a DOE subcontractor because it received DOE Small Business Innovation Research (SBIR) grants and because it also supplied materials to the DOE's Brookhaven National Laboratory (BNL).[4] On March 3, 2011, we remanded Ozeryansky's January 27 Appeal to the ECP Manager to obtain additional information and make a new determination with regard to Ozeryansky's Part 708 complaint as to the issue of whether SupraMagnetics was a "subcontractor" within the meaning of Part 708 at the time that the alleged protected activity and the alleged retaliation took place. *See Gennady Ozeryansky*, Case No. TBU-0113 (March 3, 2011) *slip op*. at 2.[5]

The ECP Manager issued a new determination on July 13, 2011 (July 13 Determination), in which he first stated that SupraMagnetics had provided the ECP Manager with documentation establishing that its only relationship with DOE was as a recipient of Assistance Agreement Awards (financial grants) through the DOE's SBIR program. July 13, 2011 Letter from William A. Lewis, Jr., Employee Concern Program Manager, DOE, to Gennady Ozeryansky (July 13 Determination) at 1. The ECP Manager then stated that, as a "grant recipient," SupraMagnetics was not a contractor or subcontractor as defined in section 708.2 of the Part 708 regulations. Consequently, the ECP Manager found that Ozeryansky could not avail himself of the protections of Part 708. July 13 Determination at 2.

In his July 29, 2011, appeal of the July 13 Determination (July 29 Appeal), Ozeryansky argues that the dismissal of his complaint was inappropriate.[6] Ozeryansky asserts that the title page of the SBIR award notification states that 10 C.F.R. Part 600 is applicable to the grant and that this regulation specifies that the grant recipient must have an internal controls structure that provides reasonable assurance that the grant recipient is managing the award funds in compliance with all federal laws and regulations. Because Ozeryansky was never given monthly account activity statements, SupraMagnetics could not have an effective internal controls system as mandated by 10 C.F.R. Part 600. Ozeryansky apparently argues that because 10 C.F.R. Part 600 was

[3] Section 708.15(c) bars processing of a Part 708 complaint if a complainant chooses to pursue a remedy, based upon the same facts, under state or other applicable law.

[4] The ECP Manager did not further press the untimeliness of Ozeryansky's Part 708 complaint as a ground to dismiss. *See infra*.

[5] OHA decisions issued after November 19, 1996, may be accessed at http://www.oha.doe.gov.

[6] The Appeal was dated July 23, 2011, but was not received by OHA until July 29, 2011.

applicable to SupraMagnetics, Part 708 likewise is applicable to the firm. Ozeryansky also argues that SupraMagnetics' purchase order to supply materials to BLN should provide jurisdiction under Part 708 to hear his complaint.

II. Analysis

For a complaint to be covered under Part 708, it must be filed by an *employee of a contractor* that performs work on behalf of DOE, directly related to activities at a DOE-owned or -leased site, if the complaint stems from a disclosure, participation, or refusal described in section 708.5 of Part 708.[7] 10 C.F.R. § 708.3 (emphasis added).

Section 708.2 defines a contractor as follows:

> *Contractor* means a seller of goods or services who is a party to:
>
> (1) A management and operating contract or other type of contract with DOE to perform work directly related to activities at DOE-owned or -leased facilities, or
>
> (2) A subcontract under a contract of the type described in paragraph (1) of this definition, but only with respect to work related to activities at DOE-owned or -leased facilities.

10 C.F.R. § 708.2. As a grant recipient, SupraMagnetics was not a "seller" of goods or services to the DOE. In this role, SupraMagnetics was not trying to complete a commercial transaction for goods or services with the DOE but instead sought funds from DOE to assist it in its own research without any *quid pro quo* or repayment. Consequently, we concur with the ECP Manager's determination that SupraMagnetics' acceptance of grant money did not make it a contractor for purposes of section 708.2 of the Part 708 Contractor Employee Protection Program. Thus, Ozeryansky can not sustain a Part 708 complaint based upon SupraMagnetics' grant awards.

We note, however, that DOE signed a purchase order with SupraMagnetics on September 18, 2007, to supply DOE with 2000 feet of superconducting wire. *See* January 27 Appeal (BNL Purchase Order No. BNL-0000106985 under Contract No. DE-AC02-98CH10886). Nonetheless, this contract is also not sufficient to confer Part 708 jurisdiction to Ozeryansky's complaint.

SupraMagnetics is not a party to a management and operating contract with the DOE. Nor is it a party to a contract with DOE or a DOE contractor requiring it to perform work directly related to activities at a DOE-owned or –leased facility. Consequently, SupraMagnetics cannot be a "contractor" pursuant to section 708.2. A purchase order for project-specific goods or services might, in some circumstances, qualify a firm as a subcontractor to a management and operating contractor as defined in section 708.2. However, such circumstances are not present in this case. To be considered as a subcontractor under Part 708.2 a firm must *perform work related to activities* at DOE-owned or -leased facilities. 10 C.F.R. § 708.2. A one-time sale of 2000 feet of superconducting wire cannot be considered performing work related to activities at a DOE-

[7] We will assume for the purpose of this jurisdictional appeal that Ozeryansky's April 16, 2009, E-mail met the subject-matter requirements of section 708.5.

owned or -leased facility. *See* 10 C.F.R. § 708.2. In selling superconducting wire to BNL, SupraMagnetics sells a product which does not have a direct nexus with any specific BNL project or research. Consequently, we find that the purchase order is not a subcontract that would make SupraMagnetics a "subcontractor" for Part 708 purposes. Because SupraMagnetics is not a contractor or subcontractor as defined by section 708.2, there is no jurisdiction under Part 708 for consideration of Ozeryansky's complaint. Thus, his July 29 Appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Gennady Ozeryansky (Case No. TBU-0119) is hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 29, 2011

May 28, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Case: Gilbert J. Hinojos

Date of Filing: April 21, 2003

Case Number: TBZ-0003

This determination will consider a Motion to Dismiss filed by Honeywell Federal Manufacturing & Technologies (Honeywell) on April 21, 2003. Honeywell seeks dismissal of the underlying complaint filed by Gilbert J. Hinojos under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708.

I. Background

Mr. Hinojos was employed by Honeywell as a "Material Control Coordinator, Sr." at a DOE facility in Albuquerque New Mexico. Initially, Mr. Hinojos alleges that he was subject to two acts of retaliation from Honeywell due to his having filed several complaints with the Equal Employment Opportunity Commission (EEOC) and the New Mexico Human Rights Division (NMHRD) against Honeywell alleging discrimination based on national origin. First, Mr. Hinojos was denied permission to attend classes during his duty hours beginning in June 2002 despite the fact that Honeywell had previously granted him permission in the past to attend classes. The second act of alleged retaliation occurred when a Honeywell official asked Mr. Hinojos to stop circulating a letter among his co-workers seeking support for his initial request to attend the classes. An Office of Hearings and Appeals Investigator conducted an investigation as to Mr. Hinojos's claims and issued a Report of Investigation on December 20, 2002 concluding that Mr. Hinojos had not engaged in any conduct protected by Part 708 since the Contractor Employee Protection Program does not cover complaints based upon EEOC complaints. *See* Report of Investigation, Case No. TBI-0003 (December 20, 2003) (Report). The Report also found that even if Mr. Hinojos had engaged in protected conduct, there was clear and convincing evidence that Honeywell's refusal to let Mr. Hinojos attend the classes was unrelated to his alleged protected conduct in filing the EEOC complaints.

During the pendency of this matter, Mr. Hinojos was discharged from his position with Honeywell. Mr. Hinojos then requested and was granted permission to amend his Part 708 complaint to include his termination as an additional act of retaliation.

In a Motion dated April 2, 2003, Honeywell argues that section 708.4 bars Mr. Hinojos's complaint. Section 708.4 states:

> If you are an employee of a contractor, you, you may not file a complaint against your employer under this part if:
>
> (a) The complaint is based upon race, color, religion, sex, age, national origin, or similar basis . . .

10 C.F.R. § 708.4. Honeywell asserts that Mr. Hinojos's sole claim as to the disclosure which prompted the alleged retaliation against him was his filing of his EEOC and NMHRD complaints alleging discrimination based on national origin. Consequently, Honeywell argues that section 708.4 bars Mr. Hinojos's complaint and Honeywell's Motion to Dismiss should be granted. Honeywell also argues Mr. Hinojos's complaint should be dismissed because he is continuing to seek redress for his alleged retaliation in two forums - the EEOC and OHA. Honeywell directs our attention to section 708.17(c)(3), which bars a Part 708 complaint where a party has filed a complaint under State or applicable law with respect to the same facts as alleged in a Part 708 complaint. *See* 10 C.F.R. § 708.17(c)(3).

II. Analysis

With regard to Mr. Hinojos's claim regarding the first two alleged acts of retaliation, he has steadfastly alleged that the actions were taken against him because he had filed complaints with the EEOC and the NMHRD against Honeywell alleging discrimination based upon national origin. I agree with Honeywell that section 708.4 bars the consideration of these alleged acts of retaliation under Part 708. Mr. Hinojos's complaint regarding the first two acts of retaliation is based upon the EEOC and NMHRD complaints alleging discrimination based on his national origin. As such they are barred from consideration pursuant to section 708.4. I will therefore grant Honeywell's Motion, in part, regarding Mr. Hinojos's complaint concerning Honeywell's decision to deny Mr. Hinojos time off to attend classes in June 2002 and Honeywell's actions in stopping him from circulating a letter to co-workers concerning that decision.

With regard to Mr. Hinojos's claim of retaliatory discharge, Mr. Hinojos contends that the discharge was motivated both by his filing EEOC claims and by his filing a Part 708 complaint. *See* Letter from Gilbert Hinojos to Richard Cronin, Hearing Officer (May 4, 2003) at 2. Section 708.4 does not bar Mr. Hinojos's claim concerning his discharge since he is alleging that his prior filing of a Part 708 claim was potentially the motivation for his discharge. Filing a Part 708 claim is protected conduct pursuant to section 708.5. *See* 10 C.F.R. § 708.5(a)(1) ("[d]isclosing to a DOE official . . . information that you reasonably and in good faith believe reveals . . . A substantial violation of a law rule or regulation" is employee conduct protected from retaliation). Consequently, I will deny

Honeywell's Motion with regard to Mr. Hinojos's Part 708 claim that he was terminated in response to his filing a prior Part 708 complaint. 1/

Honeywell's remaining argument as to why Mr. Hinojos's complaint should be dismissed in its entirety is unavailing. Section 708.17(c)(3) states: (c) Dismissal for lack of jurisdiction or other good cause is appropriate if . . . . (3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this part . . . ." 10 C.F.R. § 708.17(c)(3). Thus, if Mr. Hinojos's EEOC and Part 708 claims are based on the same facts, the Part 708 claim should be dismissed. However, I do not find that Mr. Hinojos's EEOC claim and Part 708 claim are based upon the same facts. Mr. Hinojos's latest claim under the EEOC is based upon his assertion that he was fired due to his national origin and in retaliation for his having filed four previous EEOC complaints, practices which are prohibited pursuant to *Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e (*Title VII*). *See* Attachment to Letter from Jill Marchant, counsel for Honeywell to Richard Cronin, Hearing Officer (April 23, 2003). To prevail in his EEOC complaint, Mr. Hinojos must establish that adverse employment action was taken against him by reason of his national origin or his filing previous EEOC complaints. *See, e.g., Edwards v. Interboro Institute*, 840 F. Supp 222 at 227 (E.D.N.Y. 1994) (an element of *prima facia* case in *Title VII* discriminatory discharge cause of action is that individual belong to a protected class); *see* 42 U.S.C. § 2000e-3(a) (statutory protection from retaliation arising from filing an *Title VII* complaint). However, for Mr. Hinojos's Part 708 complaint to succeed, his termination must have been motivated by his filing a Part 708 complaint. *See* 10 C.F.R. § 708.5. Because the necessary factual prerequisites differ in the Part 708 and EEOC complaints, I find the complaints are not based upon the "same facts" for section 708.15(c)(3) purposes. *See Carl J. Blier*, 27 DOE ¶ 87,514 (1999) (Americans with Disabilities Act and Rehabilitation Act (ADA/RA) complaints do not bar Part 708 complaint since ADA/RA complaints require different factual motivation for employer's adverse personnel action); *Lucy B. Smith*, 27 DOE ¶ 87,520 (1999) (Age Discrimination in Employment Act (ADEA) complaint does not bar Part 708 complaint since ADEA complaint requires different factual motivation for employer's adverse personnel action).

With my decision regarding Honeywell's Motion to Dismiss there remains only one alleged retaliatory action before me - Honeywell's discharge of Mr. Hinojos purportedly motivated by reason of Mr. Hinojos having filed a Part 708 complaint. 2/ Consequently, at the hearing, Mr. Hinojos must prove by a preponderance of the evidence that he filed a Part 708 complaint and that this action was a contributing factor in Honeywell's decision to remove him from his job. If Mr. Hinojos can make this showing, the burden will shift to Honeywell to prove by clear and convincing evidence that it

---

1/ I will however grant Honeywell's motion with regard to that portion of Hinojos's claim of retaliatory discharge that is based upon his filing prior EEOC complaints.

2/ Because this allegation occurred after the Report of Investigation was issued in this matter, I will allow both parties sufficient time to conduct discovery on this issue.

would have removed Mr. Hinojos notwithstanding his filing of a Part 708 complaint. *See* 10 C.F.R. § 708.29.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Honeywell Federal Manufacturing & Technologies on April 21, 2003 is hereby granted in part as specified in Paragraph (2).

(2) All Part 708 claims relating to Honeywell's failure to grant Gilbert Hinojos permission to attend class in June 2002 are dismissed. All Part 708 claims relating to Honeywell's action in stopping Gilbert Hinojos from circulating a letter to his co-workers in support of his request to attend the class are dismissed. All Part 708 claims relating to Honeywell's termination of Mr. Hinojos's employment which are based on his filing prior EEOC complaints are dismissed.

(3) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: May 28, 2003

May 30, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion To Dismiss

Name of Case:	Casey Von Bargen
Date of Filing:	June 15, 2005
Case Number:	TBZ-0034

This Decision concerns a Motion To Dismiss that was filed by Sandia National Laboratories (hereinafter referred to as "SNL" or "the Respondent"). In this Motion, SNL seeks the dismissal of a complaint that was filed by Casey Von Bargen (hereinafter referred to as "Mr. Von Bargen" or "the Complainant") under the Department of Energy's (DOE) Contractor Employee Protection Program (or "Whistleblower") regulations found at 10 C.F.R. Part 708. This complaint is currently under investigation by the Office of Hearings and Appeals (OHA) (Case No. TBI-0034).

I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against its employee because the employee has engaged in certain protected activity, including when the employee has

> (1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences—
>
> (i) A violation of any law, rule, or regulation;
>
> (ii) A substantial and specific danger to employees or public health or safety; or
>
> (iii) Fraud, mismanagement, gross waste of funds, or abuse of authority;

57 Fed. Reg. at 7542 (1992).(1)

The Complainant was an employee of SNL from June 2, 2003 until September 20, 2004. In his complaint, he alleges that he was fired in retaliation for making disclosures to SNL management that

are protected under the Part 708 regulations, and for reporting alleged sexual harassment directed at him by certain female SNL employees.

II. SNL's Motion To Dismiss

In its Motion, SNL argues that the facts, as alleged in the complaint, do not present issues for which relief can be granted under the Part 708 regulations. The Respondent specifically contends that Mr. Von Bargen's allegations of sexual harassment and his associated claims of retaliation must be dismissed because they are not covered by the Part 708 regulations. SNL also claims that the Complainant's safety-related disclosures are not protected under Part 708 because Mr. Von Bargen could not have reasonably believed that they revealed a substantial violation of a law, rule, or regulation, a substantial danger to employees or to public health or safety; or fraud, gross mismanagement, or abuse of authority. Finally, the Respondent states that the complaint must be dismissed because even if the disclosures were protected under Part 708, there is no demonstrable nexus between them and the Complainant's termination.

III. Analysis

Under the Part 708 regulations, dismissal of a complaint for lack of jurisdiction or other good cause is appropriate if (i) the complaint is untimely, or (ii) the facts, as alleged in the complaint, do not present issues for which relief can be granted under Part 708, or (iii) the Complainant filed a complaint under state or other applicable law concerning the same facts that are alleged in the Part 708 complaint, or (iv) the complaint is frivolous on its face, or (v) the complaint has been rendered moot by subsequent events, or (vi) the Respondent has made a formal offer of relief that is equivalent to what could be provided as a remedy under Part 708. 10 C.F.R. § 708.17(c). The OHA has previously stated that dismissal "is the most severe sanction that we may apply," and should be used sparingly. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994). Accordingly, Motions to Dismiss should be granted only if supported by "clear and convincing" evidence. *Fluor Daniel Fernauld*, 27 DOE ¶ 87,532 at 89,163 (1999). For the reasons that follow**,** I will deny SNL's Motion To Dismiss.

As indicated above, SNL primarily contends that the facts, as alleged in Mr. Von Bargen's complaint, do not present issues for which relief can be granted under Part 708. The Respondent does not claim that any of the other grounds for dismissal under section 708.17(c) are applicable, and indeed, I conclude that they are not. With regard to SNL's argument that all of Mr. Von Bargen's allegations regarding sexual harassment must be dismissed, the Respondent correctly points out that section 708.4 of the "Whistleblower" regulations provides that an employee may not file a claim under Part 708 if that "complaint is based on race, color, religion, sex, age, national origin, or other similar basis." However, assuming, without deciding, that this prohibition also includes claims based on sexual harassment, I find that it would be premature to dismiss these allegations prior to a full investigation into Mr. Von Bargen's complaint. If, for example, an

investigation was to show that sexual harassment did occur, that the Complainant's supervisors knew of this harassment, and that they took no remedial actions in retaliation for Mr. Von Bargen's having made protected disclosures, this would constitute a cause of action for which relief could be granted under Part 708. I will therefore not dismiss the Complainant's allegations of sexual harassment at this time.

Regarding Mr. Von Bargen's allegations of retaliation for making safety-related disclosures, section 708.5 of the "Whistleblower" regulations states that, in order for a disclosure to be protected, the complainant must have reasonably believed that the information disclosed revealed "a substantial violation of a law, rule or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a)(1) - (3). Therefore, in order to prevail in its Motion to Dismiss on the grounds that the disclosures that Mr. Von Bargen made were not protected, SNL would have to show, by clear and convincing evidence, that the Complainant did not have a reasonable belief that his disclosures revealed a substantial violation of a law, rule or regulation or a substantial and specific danger to employees or to public health or safety. The record in this proceeding, as it currently exists, will not support such a showing.

The alleged disclosures for which Mr. Von Bargen claims Part 708 protection are that the Lock Out-Tag Out (LOTO) procedures for certain 277 volt lighting systems at SNL are inadequate, and that 14 contractor service companies did not have site-specific safety plans on file with SNL. In its Motion, SNL claims that Mr. Von Bargen did not allege violations of rules or regulations in his complaint. SNL Motion at 7, 9. These SNL claims are clearly erroneous. In his complaint, Mr. Von Bargen said that he "told the Facilities ESH Coordinator that 29 C.F.R. § 1910.147 does not allow control devices to be used as a . . . LOTO point (this discussion was related to using light switches as . . . LOTO points for locking out 277 volt lighting systems). . ." He went on to state that the "second safety concern consisted of 14 violations of DOE Order 440.1A pertaining to nonexistent approved site specific safety plans for 14 companies having contracts to perform work at Sandia." Complaint at 1. Whether his belief that substantial violations occurred is reasonable, or whether he reasonably believed that his disclosures revealed substantial and specific dangers to employees or the public can only be decided after a full investigation of all of the available facts. SNL's Motion to Dismiss is therefore denied.

Robert B. Palmer

Investigator

Office of Hearings and Appeals

Date: May 30, 2006

November 21, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Motion for Summary Judgment

Name of Case: Battelle Energy Alliance, LLC

Date of Filing: September 6, 2007

Case Number: TBZ-0047

This decision concerns a Motion for Summary Judgment filed by Battelle Energy Alliance, LLC ("BEA," "the contractor," or "Respondent") on September 6, 2007. The motion relates to five pending complaints filed by one of its employees, Dennis Patterson ("Mr. Patterson" or "the complainant"), under the Department of Energy (DOE) Contractor Employee Protection Regulations codified at 10 CFR Part 708.[1] In the motion under consideration, BEA requests that I dismiss two of the five Part 708 complaints. [2]

I. Procedural Background

The complainant was formerly the Manager of Employee Concerns and Business Ethics of BEA, the management and operations contractor of the DOE Idaho National Laboratory (INL). He filed five complaints under Part 708 alleging that he had engaged in protected activity and that BEA retaliated against him for that activity by, among other things, demoting him to a non-managerial job in the Engineering Design and Drafting Services group of INL. After I scheduled the hearing on the five complaints, BEA filed this Motion for Summary Judgment which pertains only to the first and second complaints. Patterson filed a Response and BEA then filed a Reply to the Response. [3] *See* Complainant's Response to BEA Motion for Summary Judgment (September 11, 2007) (Response); BEA Reply to Response to Motion for Summary Judgment (September 13, 2007) (Reply).

---

[1] The purpose of the Department of Energy Contractor Employee Protection Program is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations provide procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers. 65 Fed. Reg. 6319 (2000).

[2] Mr. Patterson's complaints were consolidated and assigned one case number, Case No. TBH-0047. The hearing on Mr. Patterson's complaints is scheduled for November 27, 2007, in Idaho Falls, Idaho.

[3] Complainant contends that he did not have all documents and information necessary to respond to BEA's Motion for Summary Judgment because BEA had not yet responded to his discovery requests. Response at 8.

I. The Contractor's Motion for Summary Judgment

In its Motion, the contractor argues that two of Mr. Patterson's complaints should be dismissed for the following reasons:

1. Five of the six alleged retaliations in the First Complaint are time-barred by the 90 day limitation in Part 708;

2. Mr. Patterson filed a complaint with the Idaho Human Rights Commission (IHRC) and the Equal Employment Opportunity Commission (EEOC) with respect to the same facts alleged in his Part 708 complaint; and

3. The 2006 security investigations and the merit increase awarded to the complainant on March 14, 2006, are not retaliations under Part 708.[4]

Motion for Summary Judgment at 8.

The Part 708 regulations do not include any procedures governing summary judgment motions. However, the Federal Rules of Civil Procedure provide guidance on this matter. *See Edward J. Seawalt*, Case No. VBZ-0047, 28 DOE ¶ 87,005 (2000). In that regard, federal courts have stated that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). S*ee also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To determine which facts are material, a court must look to the substantive law on which each claim rests. *Heartland Regional Medical Center v. Leavitt*, No. 00-2802 (RMU), 2007 WL 2471727, at *2 (D.D.C. Sept. 4, 2007) (citing *Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 248 (1986)). A genuine issue is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248. Thus, in order to prevail on the instant motion, BEA must show that Mr. Patterson failed to make a showing sufficient to establish the existence of an element essential to his case, and on which Mr. Patterson bears the burden of proof at the hearing. *Celotex*, 477 U.S. at 322.

This office has previously held that a motion for summary judgment should only be granted if it is supported by "clear and convincing" evidence. *Edward J. Seawalt*, 28 DOE at 89,044. *See also Fluor Daniel Fernald*, Case No. VBZ-0005, 27 DOE ¶ 87,532 at 89,163 (1999) (motion to dismiss should only be granted where there are clear and convincing grounds for dismissal); *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at

[4] In the First Complaint, Mr. Patterson's sixth allegation of retaliation is that the percentage merit increase he received in March 2006 is lower than his previous increases. In the Second Complaint, Mr. Patterson alleges two retaliatory actions--two investigations by BEA, one for misuse of government property and another for bias during an investigation.

89,005 (1994) (describing dismissal as "the most severe sanction that we may apply" and thus to be used sparingly). For the reasons discussed below, I will grant the motion for summary judgment in part.

A. Whether Five of the Six Alleged Retaliations are Time-barred by Part 708

BEA argues that five of the six allegations of retaliation in the complaint should be barred from further consideration by the time requirements of Part 708 which states that "You [the complainant] must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14 (a). The five allegations at issue are: (1) a comment by Mark Olsen, General Counsel of BEA, on July 27, 2005; (2) an August 12, 2005, memorandum from Juan Alvarez, Deputy Laboratory Director, that contained criticism of Mr. Patterson's behavior during the investigation of the Mitchell incident; (3) an investigation into the effectiveness of the investigation function of the Ethics Office that was requested by Art Clark, Deputy Laboratory Director for Operations, INL in October 2005 and completed on February 10, 2006; (4) a change in Mr. Patterson's job classification on February 24, 2006; and (5) a performance evaluation on February 24, 2006, that was less favorable than previous evaluations. Because Mr. Patterson filed his complaint on June 1, 2006, any alleged retaliatory events pertinent to his complaint should have occurred no later than March 4, 2006.[5] However, the five items of alleged retaliation noted above occurred prior to March 4, 2006, i.e., more than 90 days before Mr. Patterson's complaint was filed.

In his Response, Mr. Patterson counters that all of the alleged retaliatory events are timely "because [he] did not know or have reason to know that BEA's actions were retaliatory until [he] learned of the lower merit increase." [6] Complainant's Response at 8. Mr. Patterson states that when he suggested to his immediate manager in February 2006 that the lower performance evaluation appeared to be retaliatory, the manager agreed to reconsider and then raised the rating. Mr. Patterson then submits that he could not discern any evidence of retaliation until he received a lower merit increase almost two weeks later. Response at 10-11. At that time he concluded that the five events under discussion were sequential elements of BEA's retaliation against him for making protective disclosures. Response at 9.

Our previous cases require that I consider the totality of the circumstances during this period in order to determine whether he knew or should have known that retaliation occurred. The critical inquiry at this juncture is at what point a reasonable person would recognize the five events at issue as Part 708 retaliation. We have stated in the past that the complainant should be allowed sufficient time to recognize that a personnel action taken by management was indeed retaliatory in nature. *See Franklin Tucker*, Case No. TBH-0023, 29 DOE ¶ 87,021 at 89,089-90 (2007); *Steven F. Collier*, Case No. VBH-

[5] The sixth allegation of retaliation, a lower merit increase, occurred within the 90-day regulatory window.
[6] Mr. Patterson received a 4.05% merit increase in March 2006. His average merit increase for the previous five years was 5.22% according to Mr. Patterson (but 4.73% according to BEA). Motion for Summary Judgment at 10, fn 60; Reply in Support of Motion for Summary Judgment at 18-19, 21-23.

0084, 28 DOE ¶ 87,036 at 89,257 (2003); *Gary S. Vander Boegh*, Case No. TBH-0007, 28 DOE ¶ 87,040 at 89,283-84 (2003) (certain personnel actions, while not regarded as neutral in their impact by the complainant, were not so overtly punitive in nature that a reasonable person "should have known" that they were Part 708 retaliations at the time that they took place). However, the complainant is not required to have any actual or official corroborative evidence of motive in order to file a complaint under Part 708. *See Delbert F. Bunch*, Case No. TBU-0068, 29 DOE ¶ 87,026 at 89,135 (2007).

I conclude that Mr. Patterson recognized or should have recognized retaliation prior to March 2006, and base this conclusion on his own pleadings. In November 2005, Mr. Patterson mentioned to the BEA investigators that he suspected he was being retaliated against for making a protected disclosure. Complaint at 1 ("On November 2, 2005, I reported concerns that I had been the victim of intimidation and retaliation…"). In February 2006, upon receiving a 2005 performance appraisal that was two levels lower than his ratings for the past seven years, Mr. Patterson told his immediate manager "you know what this looks like don't you." Complaint at 5; Response at 9. It is clear from the record that Patterson had more than a mild suspicion of retaliation against him as early as November 2005, and I find that at this time, he "knew or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.13. As explained above, Mr. Patterson first recognized retaliation seven months prior to filing his complaint. [7] Accordingly, the first five allegations of the complaint are dismissed pursuant to 10 C.F.R. § 708.14 (a).

B. Whether Mr. Patterson's Part 708 Complaint Is Based on the Same Facts as his Idaho Human Rights Commission and Equal Employment Opportunity Commission Complaint

Patterson filed a complaint with the Idaho Human Relations Commissions (IHRC) and the Equal Employment Opportunity Commission (EEOC) on March 14, 2006. Mr. Patterson alleges that he was discriminated against on the basis of race and retaliation between July 17, 2005, and February 24, 2006. *See* Supplemental Declaration of Katherine L. Moriarty In Support of BEA's Motion for Summary judgment, IHRC Complaint (March 14, 2006). He alleges violations of Title VII of the Civil Rights Act of 1964 and Title 67, Chapter 59 of the Idaho Code. According to Mr. Patterson, during 2005 he communicated ethical and discrimination concerns to BEA senior management and as a result became the subject of discrimination and retaliation. He withdrew the complaint prior to any action by the IHRC or the EEOC. Response at 12.

BEA argues that the "core facts" in both complaints are the same – that Mr. Patterson made protected disclosures relating to his investigation of the site access revocation incident and as a result suffered adverse personnel actions. BEA contends that even though the alleged disclosures in the IHRC complaint differ from those in the DOE complaint, they "fall within the same retaliatory stream" as that engendered by the

[7] Moreover, he was the Manager of Employee Concerns for many years and can reasonably be expected to be more familiar than the average employee with the Part 708 process and the many faces of retaliation in the workplace.

revocation disclosures and which culminated in the same alleged adverse personnel actions. Motion for Summary Judgment at 25.

In order to prevail in his IHRC/EEOC complaint, Mr. Patterson must prove that he was discriminated against based on his race and also because he reported racial discrimination to the contractor. However, because "the pleading and underlying facts that would support this type of claim are different from those that would underlie a complaint filed under Part 708 . . . ," I find that the complaints are based on different facts, and Mr. Patterson's Part 708 complaint may proceed. *See Lucy B. Smith*, Case No. VWZ-0012, 27 DOE ¶ 87,520 (1999) (finding that age discrimination complaint filed with EEOC and South Carolina Human Affairs Commission did not preclude Ms. Smith from proceeding with her Part 708 complaint because the complaints were not based on the same facts). Mr. Patterson's Part 708 claim alleges retaliation for making a protected disclosure that differs from the protected conduct in the IHRC/EEOC case. Different facts are required to establish a prima facie case in the two complaints. In order to prevail on his Part 708 claim, Mr. Patterson must prove that his demotion and lower salary increase were the negative consequences of making protected disclosures to BEA management. Part 708 does not contain a cause of action for racial discrimination. I, therefore, find that Mr. Patterson's Part 708 complaint is not based on the same facts as his IHRC/EEOC complaint.

C. Whether the Merit Increase and Security Investigations Are Retaliatory Actions

BEA argues that neither the merit increase nor the 2006 security investigations can be considered retaliation under Part 708.[8] Motion for Summary Judgment at 27-31. BEA contends that an employment action is not retaliation unless it results in a materially adverse change in employment conditions comparable to a termination of employment, a demotion evidenced by decrease in wages or other negative action with respect to the compensation, terms, condition or privileges of employment. According to BEA, there was no tangible negative effect on the terms and conditions of the complainant's employment because the merit increase was actually a positive effect, since it increased the complainant's salary. As for the investigations, BEA maintains that the complainant has failed to state a cause of action for which relief can be granted because there is no relief available under Part 708 to require BEA to cease and desist from conducting an investigation. Further, conducting an investigation into alleged irregularity is the duty of a government contractor. Motion for Summary Judgment at 27-31.

The complainant argues that the lower merit increase and the two security investigations in question are indeed materially adverse changes in his employment conditions. Response at 18-23. Patterson thought that the first investigation would be a routine inquiry into the Mitchell incident, but he learned from the contractor's response to his IHRC/EEOC complaint that his own actions were the focus of the investigation. Response at 3. Mr. Patterson contends that an investigator confirmed that BEA was

[8] BEA investigated Mr. Patterson in June 2006 for misuse of government time and equipment in connection with his IHRC/EEOC complaint, and in July 2006 for alleged bias during an Employee Concerns investigation. Response at 19-23.

actually investigating Mr. Patterson for preparing a Part 708 complaint, corresponding with the IHRC, and corresponding with a community organization. Response at 6. As regards the second investigation, the manner in which BEA conducted the inquiry into his alleged misconduct during an Employee Concerns investigation caused him great concern because it was different from any previous investigation into his duties. As an employee concerns manager, he himself had been the subject of investigations into how he handled cases in the past. Typically, his manager would review the case file and then discuss with Mr. Patterson how the investigation was conducted. However, in the investigations at issue, security personnel performed the investigations and they did not ask to see his files.

1. The Merit Increase is not Retaliation under Part 708

I find that the 2006 merit increase is not a retaliation because it did not result in a materially adverse change in Mr. Patterson's employment conditions comparable to the examples cited in Part 708.2. It is true that Mr. Patterson's 4.05% increase in March 2006 was lower than his previous five year average (either 5.22% according to Patterson or 4.73% according to BEA). Response at 18. However, even assuming arguendo that his previous five year average increase is 5.22%, I cannot find under the specific facts of this case that a reduction to 4.05% is a materially adverse change in the conditions of his employment. It is important to note that Mr. Patterson received the highest percentage merit increase of the nine employees who reported to his immediate manager. There may be situations where a reduction in salary increase indicates a materially adverse change in a complainant's employment conditions. However, this case does not present such a scenario. The difference in the 2006 increase compared to the historical average increase is minimal, and Patterson received the highest percentage merit increase of all employees reporting to his immediate manager. Because I cannot discern a negative effect on his employment, I find that the 2006 merit increase is not Part 708 "retaliation."

2. The Security Investigations May be Retaliation under Part 708

Based on the record I conclude that a reasonable person could consider the two security investigations to be retaliatory actions. It is well within the realm of possibility for an employer to use an investigation as an act of retaliation against an employee. *See Bernard Cowan*, Case No. VBH-0061, 28 DOE ¶ 87,023 at 89,171 (2002) (finding that while a report was not an adverse personnel action, the use of that report to penalize a complainant could constitute adverse action). This was certainly not the first time that Patterson's actions as the manager of Employee Concerns had been investigated, but the two investigations in question seemed to follow a different procedure and have a different focus. The investigations arguably resulted in a materially adverse change in his employment conditions—he was the subject of two investigations within a short period of time after filing whistleblower and civil rights claims, and both were subject to more rigorous examination than past inquiries. The investigations are more than the type of trivial annoyances common to all workplaces, and could reasonably be considered deterrents to filing a Part 708 complaint. *See Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405, 2415 (2006) (stating that a materially adverse action is one that may dissuade a reasonable worker from filing a complaint against an employer).

Given these facts, the investigations could be considered acts of retaliation. Thus, at this stage in the proceeding, there is not clear and convincing evidence that the investigations were not retaliatory.[9] Accordingly, this part of the motion is denied.

II. Conclusion

For the reasons stated above, I conclude that Mr. Patterson's first Part 708 complaint will be dismissed in its entirety because (1) the first five allegations of retaliation are time-barred by the 90-day rule of Part 708.14 and (2) the 2006 merit increase, the sixth and final allegation, does not constitute a negative personnel action under Part 708.2. In light of this finding, that portion of the Motion for Summary Judgment will be granted. As regards Mr. Patterson's second Part 708 complaint (the two security investigations), I am not persuaded by the contractor's arguments and will therefore entertain the issues in that complaint at the hearing.

It Is Therefore ORDERED That:

(1) The Motion for Summary Judgment filed by Battelle Energy Alliance on September 6, 2007, OHA Case No. TBZ-0047, be and hereby is granted in part as set forth in Paragraph 2 below, and denied in all other respects.

(2) The First Complaint filed by Dennis Patterson under 10 C.F.R. Part 708 on June 1, 2006, be and hereby is dismissed in its entirety.

(3) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: November 21, 2007

[9] BEA argues that Mr. Patterson's claim must fail because Part 708 cannot order a contractor to discontinue investigations. However, the complaint does not request a remedy of a ban on future BEA investigations.

March 26, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motion for Summary Judgment

Name of Case: James J. Myers

Date of Filing: March 6, 2009

Case Number: TBZ-0083

This Decision will consider a Motion for Summary Judgment which relates to a pending complaint filed by Mr. James J. Myers (hereinafter referred to as "Mr. Myers" or "the Complainant") on August 11, 2008, against his former employer, ENVIRO AgScience (hereinafter referred to as "EAS"), a subcontractor at the Department of Energy's (DOE) Savannah River Site in Aiken, South Carolina, under the DOE's Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708. *See* Report of Investigation, OHA Case No. TBI-0083 (2009). 1/ EAS seeks dismissal of Mr. Myers' complaint.

I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste, and abuse" at DOE's Government-owned or - leased facilities. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862 (March 15, 1999) (interim final rule). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their

---

1/ Pursuant to Part 708, an OHA attorney conducted an investigation of the present complaint and issued a Report of Investigation (ROI) on January 9, 2009, in which he concluded that the complainant could not have reasonably believed that he revealed a substantial and specific danger to employees or to public health or safety. I was appointed the Hearing Officer to conduct a hearing on the Complaint. In a letter dated January 21, 2009, I directed the complainant to submit a brief that addressed why the statements that he made to Dr. James Lynn, EAS President, could be properly characterized for purposes of 10 C.F.R. Part 708 as evidence of "a substantial and specific danger to employees or to public heath or safety." I further indicated to the complainant that he was free to submit additional documentary evidence to show that his alleged disclosures fall within the ambit of the Part 708 regulations. I also directed EAS to file a responsive brief and indicated that I would entertain a Motion to Dismiss the Complaint if I determined that Mr. Myers' brief and documentary evidence did not support a finding that he made at least one protected disclosure. Upon my direction, EAS filed a Motion to Dismiss the subject Complaint. After reviewing EAS' submissions and the standards governing summary judgment motions, I have recharacterized EAS' Motion to Dismiss as a Motion for Summary Judgment.

employers. The Part 708 regulations prohibit discrimination by a DOE contractor against its employee because the employee has engaged in certain protected activity, including when the employee has

> (a) Disclosed to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals-
>
> (1) A substantial violation of a law, rule or regulation;
> (2) A substantial and specific danger to employees or to public health or safety; or
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority . . . .

10 C.F.R. § 708.5(a).

EAS is the grounds maintenance sub-contractor at the Savannah River Site in Aiken, South Carolina. On April 30, 2008, EAS hired Mr. Myers as a lawn equipment operator. *See* ROI at 2. As part of his duties, Mr. Myers operated a riding tractor, weed eater, lawn mower, chain saws, and an edger. *Id.* On May 1, 2008, his first day of work, Mr. Myers operated a walk-behind mower. At an employee meeting on May 2, 2008, Dr. Louis Lynn, President of EAS, reviewed the previous day's employee performance and said, "[T]he mower could have [been] run faster . . ." Having run the mower, Mr. Myers responded that it was "unfamiliar" and that he "ran it as fast and safe as [he] could with others and [his] safety in mind." Dr. Lynn replied, "[W]e are all suppose[d] to be professional operations and [I am] paying [you] good money to do the job and if [you can't, I will] get someone who [can] and for less than [I am] paying [you]." *Id.* at 3. On June 13, 2008, EAS suspended Mr. Myers and, on June 20, 2008, they terminated him. *Id.* On August 11, 2008, Mr. Myers filed a Complaint with the Employee Concerns Program of the Office of Civil Rights, Savannah River Operations Office. In his Complaint, Mr. Myers alleges that EAS terminated him because he brought to management's attention a "potential safety concern regarding work-related duties in the use of a certain piece of equipment on May 1, 2008." *Id.* EAS denies that Mr. Myers made a protected disclosure.

II. Analysis

The Part 708 regulations do not include procedures and standards governing motions for summary judgment. I note that the Federal Rules of Civil Procedure provide that such a motion shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Cattrett*, 477 U.S. 317, 322 (1986). While the Federal Rules do not govern this proceeding, Rule 56 has been used as a guide in the evaluation of Motions for Summary Judgment filed in a Part

708 proceeding. *See Edward J. Seawalt*, Case No. VBZ-0047 (August 20, 2000) 2/ Prior cases of this office considering Motions for Summary Judgment instruct that such a motion should only be granted if it is supported by "clear and convincing" evidence. *Fluor Daniel Fernald*, Case No. VBZ-0005 (October 4, 1999).

To prevail in a whistleblower complaint, a complainant has the burden of establishing by a preponderance of the evidence that he reasonably believed that he made a protected disclosure. If the employee meets this threshold burden, then he must prove that the disclosure was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action in the absence of the employee's disclosure. *Id.* For the reasons discussed below, I find that there is no genuine issue as to any material fact in the case and that the complainant has not made a protected disclosure. Thus, I will grant the motion for summary judgment before me.

In its Motion, EAS asserts that there is no factual or legal basis for the complainant's allegation, specifically that "none of the purported incidents Mr. Myers identified in his allegations are reasonably characterized as voicing a safety concern or the exercise of protected activity within the scope of Part 708." *See* EAS Motion to Dismiss at 3. EAS further asserts that Mr. Myers did not describe any present or future danger and that as noted in the ROI, Mr. Myers claimed to have "operated the mower in question only once and only at a safe speed (Mr. Myers operated [the mower] only in first gear, the slowest which he felt safe doing.)." *Id.* at 4. Therefore, EAS asserts that there was no actual danger to Mr. Myers, or to anyone else, at any time. *Id.* Finally, EAS asserts that Mr. Myers "retroactively" alleges that "I raised a safety concern" after having a discussion with Dr. Lynn regarding the mower and that Mr. Myers failed to explain or support his assertion of a "safety concern." *Id.* at 5.

EAS' assertions are supported by the following facts in the record. First, Mr. Myers admitted that he had been trained by another employee to operate a walk-behind mower and was instructed to only use the gears that he felt comfortable using. ROI at 5. Mr. Myers further admitted that he operated the walk-behind mower in first gear, which was the slowest gear and the gear which he felt safe operating. *See* Complaint. Second, in his discussion with Dr. Lynn, Mr. Myers did not describe a danger, present or future, and admitted that he did not feel that he was in any danger operating the mower. ROI at 5. Rather, Mr. Myers admitted that EAS never instructed, pressured, or threatened him to operate the mower faster that he felt safe doing. In addition, Mr. Myers stated that he understood Dr. Lynn's comment "to mean that If Mr. Myers could not operate the mower at the speed that Dr. Lynn desired, EAS would remove him from the machine and assign it to an employee who could operate it as fast as Dr. Lynn would have liked." *Id.* at 6. Further, Mr. Myers admitted that he did not take Mr. Lynn's comment as a threat that he would suffer adverse employment action if he did not operate the walk-behind mower faster. *Id.* Third, other than recounting the relevant

---

2/ Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

conversation he had with Dr. Lynn, Mr. Myer has not explained nor has he provided additional information regarding his allegation of a "safety concern." In light of this information in the record, there is no genuine issue as to any material fact in this case. I therefore find, as a matter of law, that Mr. Myers could not prove that he had a reasonable belief that his disclosure revealed a substantial and specific danger to employees or to public health or safety. Accordingly, I will grant EAS' motion. The granting of EAS' motion requires me to dismiss the underlying complaint.

It is Therefore Ordered That:

(1) The Motion for Summary Judgment filed by ENVIRO AgScience on March 6, 2009, OHA Case No. TBZ-0083, is hereby granted.

(2) The Complaint filed by James J. Myers under 10 C.F.R. Part 708 on August 11, 2008, OHA Case No. TBH-0083, is hereby dismissed in its entirety. This Order may be appealed to the Director of OHA.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: March 26, 2009

November 24, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motion to Dismiss

Names of Petitioners:	Hansford F. Johnson B&W Pantex LLC
Dates of Filings:	November 1, 2010
Case Numbers:	TBZ-0104

This Decision will consider a Motion to Dismiss filed by B&W Pantex LLC (B&W), the Management and Operating Contractor for the Department of Energy's (DOE) Pantex Plant (Pantex), in connection with the pending Complaint of Retaliation filed by Hansford F. Johnson against B&W under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The Office of Hearings and Appeals (OHA) assigned the hearing component of Mr. Johnson's Part 708 Complaint proceeding, Case No. TBH-0104, and B&W's Motion to Dismiss, Case No. TBZ-0104. For the reasons set forth below, I will grant B&W's Motion in part and dismiss Mr. Johnson's Complaint as to certain alleged retaliations.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1)-(3). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower Complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

Mr. Johnson filed a Part 708 Complaint on September 8, 2008, with the Whistleblower Program Manager at the National Nuclear Security Administration's Service Center in Albuquerque, New Mexico. He filed an amendment to his Complaint on November 20, 2008. In his Complaint, Mr. Johnson alleged that he had made protected disclosures and, as a result of his so doing, B&W engaged in a series of retaliatory actions against him, including threatening to fire him and subjecting him to an internal audit. B&W filed its response to the Part 708 Complaint on December 10, 2008, contesting that Mr. Johnson had engaged in any conduct protected under Part 708, and arguing that his Complaint did not identify any acts of retaliation. The Whistleblower Program Manager transmitted the Complaint to OHA for an investigation, to be followed by a hearing, when informal resolution of the Complaint proved unsuccessful. While the case was pending before an OHA Investigator, Mr. Johnson requested that his Complaint be dismissed. On June 4, 2009, the OHA dismissed his Complaint.

On April 14, 2010, after leaving his employment with B&W on March 24, 2010, Mr. Johnson filed a new Part 708 Complaint with the Whistleblower Program Manager. In this Complaint, he referenced his earlier alleged protected disclosures and his previous Part 708 Complaint, and alleged that B&W management had retaliated against him by harassing and constructively discharging him. B&W filed a response to the Complaint on April 23, 2010, requesting that the Complaint be dismissed because Mr. Johnson was improperly attempting to reinstate his prior Complaint, which had been dismissed at his request, and because Mr. Johnson had not alleged an act of retaliation for which relief could be granted under Part 708. The Whistleblower Program Manager subsequently transmitted the Complaint to OHA for an investigation followed by a hearing.

On June 28, 2010, the OHA Director appointed an Investigator (OHA Investigator), who conducted an investigation into the allegations contained in Mr. Johnson's Complaint. The OHA Investigator issued a Report of Investigation (ROI) on September 17, 2010. In the ROI, the OHA Investigator noted that the filing of Mr. Johnson's previous Part 708 Complaint would constitute a protected activity under the regulations, which protect from retaliation conduct including "[p]articipating in . . . an administrative proceeding conducted under this regulation; . . . ." 10 C.F.R. § 708.5(b). However, the Investigator concluded that it was uncertain whether there was sufficient temporal proximity between the filing of Mr. Johnson's 2008 whistleblower Complaint and the harassment he allegedly experienced beginning in January 2010 to permit an inference that the Complaint was a contributing factor to the alleged retaliation. In addition, the Investigator, though finding that the OHA has held that a constructive discharge can form the basis for relief under Part 708, reached no conclusion as to whether the facts alleged by Mr. Johnson in this case would constitute a constructive discharge.

Immediately after the ROI was issued, the OHA Director appointed me the Hearing Officer in this case. On October 8, 2010, I sent a letter to the parties and asked them to submit briefs discussing the ROI, specifically identifying the parts of the ROI with which each party agreed and disagreed, and identifying facts in the record supporting the party's position. On October 28, 2010, B&W submitted its brief, in which it requested that the Complaint be dismissed. Mr. Johnson tendered his brief and a response to the Motion to Dismiss on November 9, 2010.

C. Factual Overview

Mr. Johnson alleges that, in 2007 and 2008, he made disclosures protected under Part 708 regarding the implementation of an Energy Savings Performance Contract (ESPC) at Pantex, including by filing a Complaint with the DOE Office of Inspector General (IG). An ESPC is a partnership between a Federal agency and an energy service company (ESC). The ESC conducts a comprehensive energy audit for the Federal facility and identifies improvements to save energy. In consultation with the Federal agency, the ESC designs and constructs a project that meets the agency's needs and arranges the necessary financing. The ESC guarantees that the improvements will generate energy cost savings sufficient to pay for the project over the term of the contract. After the contract ends, all additional cost savings accrue to the agency. Contract terms up to 25 years are allowed. Federal Energy Management Program: Energy Savings Performance Contracts, http://www1.eere.energy.gov/femp/financing/espcs.html.

Mr. Johnson claims he was subject to retaliation for his advocacy of the ESPC by virtue of an audit requested by Pantex Manager Dan Swaim. In March 2008, Mr. Swaim requested an internal audit of the ESPC, to review several issues, including Mr. Johnson's relationship with the owner of NORESCO, LLC, the ESC chosen for the Pantex ESPC. Mr. Johnson further alleges that, in late August 2008, he experienced "emotional distress" from negative interactions with his supervisor, Dale Stout, and that Mr. Stout gave him an increased workload and increasingly shorter deadlines to comply with. Allegedly pursuant to a Complaint by Mr. Stout about Mr. Johnson's performance, Mr. Johnson was subsequently asked by Pantex HR to respond to a Complaint about his work performance.

As noted above, Mr. Johnson filed a Part 708 Complaint in September 2008, but withdrew the Complaint in June 2009, after the Whistleblower Program Manager referred the Complaint to the OHA. Mr. Johnson alleges that he dropped this Complaint because he feared for his job.

In his present Complaint, Mr. Johnson alleges that he began to notice, in approximately January 2010, that Mr. Stout was again retaliating against him by demanding that major documents be finished within one day. Johnson also alleges that Mr. Stout would angrily ask a few hours later what Mr. Johnson was doing or why he was doing a particular function. It seemed to Mr. Johnson that Mr. Stout's conduct was "angrier and louder" every day. These incidents allegedly increased in frequency.

In March 2010, Mr. Johnson went to his physician regarding the stress he was experiencing on the job. His physician prescribed a tranquilizer and recommended that Mr. Johnson stay at home for one week. Mr. Johnson stayed home on sick leave during the week of March 15. Mr.

Johnson alleges that, on March 22, 2010, his physician wrote on a Return to Work Form (Form 53-B) that Mr. Johnson should not be returned to his previous work environment.

On March 23, 2010, Mr. Johnson met with Jeff Flowers, Mr. Stout's supervisor, and expressed his desire to work in a different location. Mr. Flowers instructed Mr. Johnson to report to him the following day. Mr. Johnson describes the March 24th meeting as follows:

> I went to Mr. Flower's office at 8 am. He told me to come in and shut the door. He said, "So are you ready to go back to work?" I said, "Yes. Where am I going? He said, "Back to your cubicle." At this point I went into shock. I was dazed, and stayed that way for several weeks. I said, "Back to that same environment? No, I'm not going back there. Haven't you seen the doctor's restrictions? Haven't you seen the 53-B? I am under doctor's orders not to go back to that environment." He said "Reconsider." I said, "No. I can't." He said "Again, reconsider." I said, "No. You surely know I can't go back there." He turned around and grabbed a sheaf of papers. He put them in front of me. Without looking at them, I said "Are you firing me?!" He said, "No. I'm retiring you. Sign at the bottom." I said, "I don't want to retire. I can't afford to retire." He said, "Sign your name at the bottom." I said I can't retire. I'll lose my house." He said, "Sign." I signed, in shock. The rest of the day was a blur.

ROI at 9.

II. Analysis

In its pre-hearing brief, B&W argues that Mr. Johnson's Complaint "does not present issues for which relief can be granted pursuant to 10 CFR 708. For this reason, the Company respectfully requests that the Complaint be dismissed." B&W Brief at 2. More specifically, B&W contends that the Complaint fails to identify "any protected disclosure or protected activity that falls within the scope of Part 708, and in the alternative, it fails to identify any act of retaliation that is covered by the regulations." *Id.*

The Part 708 regulations do not include procedures and standards governing motions to dismiss. In the absence of such standards, the Federal Rules of Civil Procedure, though not governing this proceeding, may be used for analogous support. *See, e.g. Billy Joe Baptist*, Case No. TBH-0080 (2009); *Edward J. Seawalt*, Case No. VBZ-0047 (2000) (applying standards of Fed. R. Civ. P. 56 to Motion for Summary Judgment). The motion to dismiss filed by B&W in the present case is most analogous to what would, under the Federal Rules, be a motion to dismiss for "failure to state a claim upon which relief can be granted . . . ." Fed. R. Civ. P. 12(b)(6).

The Supreme Court has held that, to survive a Rule 12(b)(6) motion to dismiss, a Complaint must plead "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While the Complaint "does not need detailed factual allegations, . . . [f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the Complaint's allegations are true (even if doubtful in fact), ..." *Id.* at 555 (citations omitted).

In addition, prior cases of this office instruct that such a motion should be granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact on a more complete record. *Curtis Broaddus,* Case No. TBH-0030 (2006); *Henry T. Greene*, Case No. TBU-0010 (2003) (decision of OHA Director characterizing this standard as "well-settled"); *see also David K. Isham*, Case No. TBH-0046 (2007) (complaint may be dismissed where it fails to allege facts which, if established, would constitute a protected disclosure); *accord Ingram v. Dep't of the Army*, 114 M.S.P.R. 43, 47 (2010) (finding Merit Systems Protection Board jurisdiction under federal Whistleblower Protection Act where complaint makes non-frivolous allegation that he engaged in whistleblowing activity by making a protected disclosure, and the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action).

Applying the relevant standards, for the reasons explained below, I will dismiss the present Complaint only to the extent that it alleges acts of retaliation for which relief cannot be granted because the Complaint was not filed "by the 90th day after the date [the employee] knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14. In all other respects, however, the Complaint presents enough facts to state a plausible claim for relief, assuming that all of the Complaint's allegations are true. There are clearly disputes as to a number of the allegations in the Complaint, and the hearing in this matter will provide an opportunity to resolve the disputed issues of fact on a more complete record.

A. Acts of Retaliation Alleged in Mr. Johnson's Previous Part 708 Complaint

First, B&W argues in its brief that "Mr. Johnson's relating back to his 2008 claim (OHA Case No. TBI-0086) is improper because that Complaint was dismissed on June 4, 2009 . . . at the request of Mr. Johnson." B&W Brief at 4. The company contends that the present Complaint "is completely based on a previously voluntarily resolved Complaint" and that, therefore, "Mr. Johnson cannot simply re-urge it at this later date." *Id.* At 2.[1]

In a analogous case decided under the Whistleblower Protection Act (WPA), upon which Part 708 is modeled, the Merit Systems Protection Board addressed the question of whether a party was barred from bringing an action concerning matters that "were the subject of a prior Board appeal that was dismissed with prejudice pursuant to the appellant's request." *Greenspan v. Dep't of Veterans Affairs*, 94 M.S.P.R. 247, 249 (2003).

In *Greenspan,* the appellant had filed a Complaint alleging that the agency retaliated against him by proposing a one-day suspension for alleged disclosures made during a March 1999 staff meeting. *Id.* The appellant filed an appeal with the Board, but later withdrew the appeal. After the first appeal was filed, the agency "reprimanded the appellant for his March 1 conduct in lieu of the suspension." *Id.* at 255. The employee subsequently filed a second appeal, this one based

[1] In support of its argument, B&W cites 10 C.F.R. §§ 708.17(c)(5) and 708.23(c). B&W Brief at 2. However, section 708.17 concerns when a "Head of Field Element or EC Director" may dismiss a Complaint, i.e., prior to the referral of a Complaint to the OHA, and section 708.23 describes procedures for issuance of a Report of Investigation. Thus, neither of the cited provisions are applicable at this stage of the present proceeding.

on the reprimand, and the agency argued that the employee's withdrawal of his first "appeal with prejudice bars the current appeal under the doctrines of collateral estoppel or res judicata." *Id.*

The Board disagreed, noting that the first appeal could not have concerned the reprimand because the agency had not yet taken that action, and that the appellant filed his first Complaint months before the reprimand occurred. "While both the reprimand and the suspension were based upon the same events, the proposed one-day suspension is a different action than the agency's ultimate actions—a letter of reprimand. Thus, neither collateral estoppel nor res judicata apply." *Id.* at 255-56.

Similarly, in the present case, Mr. Johnson alleges new acts of retaliation by B&W, beginning in January 2010, that occurred *after* he withdrew his first Part 708 Complaint, in June 2009. As in *Greenspan,* simply because Mr. Johnson alleges that these new actions were based, at least in part, on the same disclosures that he alleged in his first Complaint does not mean that his new Complaint must be dismissed.

In addition, Mr. Johnson's new Complaint is based on a separate allegation that he engaged in conduct protected under the Part 708 regulations when he filed his first Complaint. The OHA Investigator found, correctly, that filing a Part 708 Complaint constitutes a protected activity under the regulations, which protect from retaliation conduct including "[p]articipating in . . . an administrative proceeding conducted under this regulation . . . ." 10 C.F.R. § 708.5(b).

Moreover, because the June 4, 2009, letter dismissing Mr. Johnson's first Complaint did not state that the Complaint was being dismissed "with prejudice," it is not clear that this dismissal would bar Mr. Johnson from raising again *even the same* allegations of retaliations in a new Complaint. Letter from Steven L. Fine, Investigating Attorney, OHA, to Fred Johnson (June 4, 2009). However, I need not reach this issue, as the present Complaint was filed on April 14, 2010, and the Part 708 regulations require that an employee must file a Complaint "by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14. Thus, Mr. Johnson is clearly time-barred from alleging, in his April 14, 2010, Complaint, any acts of retaliation that he alleged in his first Complaint, since he clearly knew of those acts at the time he filed his first Complaint in September 2008.

Indeed, other than the alleged retaliations of harassment and constructive discharge in 2010, Mr. Johnson alleges no retaliations of which he only became aware within the 90 days preceding the filing of his Complaint. Accordingly, I will dismiss the current Complaint to the extent that it alleges any acts of retaliation other than the harassment and constructive discharge Mr. Johnson alleged occurred in 2010.

B. Allegation of Constructive Discharge

As noted above, Mr. Johnson alleges that B&W constructively discharged him on March 24, 2010. In its brief, B&W references an occasion where Mr. Johnson's supervisor, Mr. Stout, "verbally counseled Mr. Johnson for reading the newspaper when Mr. Johnson was responsible for supporting Mr. Stout on an important deadline." B&W Brief at 3. B&W contends that "Mr. Johnson must prove that the isolated verbal exchange . . . arose from Mr. Stout's desire to

encourage his voluntary retirement." *Id.* at 4. The company contends that there "is simply no authority that an employee who is subjected to necessary verbal counseling by his supervisor for reading a newspaper during a pending work deadline is acting reasonably when he decides to voluntarily take retirement." *Id.*

The OHA has held that a constructive discharge can form the basis for relief under Part 708. *Richard L. Urie*, Case No. TBH-0063 (May 21, 2008). In *Urie*, the hearing officer used the standard articulated in a Supreme Court case, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), as the standard to establish constructive discharge in the Part 708 context. Consequently, for a whistleblower to establish that he or she was constructively discharged, the whistleblower must prove by a preponderance of the evidence that his or her working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Urie* at 11. This is an objective "reasonable employee" standard which cannot be triggered by an employee's subjective beliefs. *See Roman v. Porter*, 604 F. 3d 34, 42 (1st Cir. 2010); *accord Heining v. General Serv. Admin.*, 68 M.S.P.R. 513, 519 (1995) ("presumption of voluntariness may be rebutted if the employee can establish that the resignation or retirement was the product of duress or coercion").

Nonetheless, in considering this issue for purposes of ruling on B&W's motion to dismiss, my decision must be based "on the assumption that all of the Complaint's allegations are true (even if doubtful in fact)," *Twombly,* 550 U.S. at 555, and the facts alleged in the present Complaint are significantly more severe than portrayed in B&W's brief. The ROI describes allegations by Mr. Johnson of not just one incident of verbal counseling, but rather conduct by Mr. Stout that became "'angrier and louder' every day" and "increased in frequency." ROI at 6. Moreover, as set forth above, Mr. Johnson alleges that, in their March 24, 2010, meeting, Mr. Flowers told him that he had to return to his former work environment, and when Mr. Johnson complained that he was under doctor's orders not to do so, Mr. Flower's told Mr. Johnson that "I'm retiring you." ROI at 9.

B&W's position on this issue is very similar to one advanced by a DOE contractor is a prior Part 708 case, *Boeing Petroleum Services*, Case No. LWZ-0026 (1994). Prior to the hearing in that case, Boeing argued, in response to a claim of constructive discharge, that the complainant "voluntarily resigned from his position . . . ." *Id.* However, the Hearing Officer noted that the complainant "maintains that his resignation was precipitated by being 'belittled and harassed by management personnel' and therefore did in fact constitute a 'constructive discharge,' . . . ." *Id.* The Hearing Officer concluded that because "this is a factual matter that is in dispute, it is premature for us to rule upon whether [the complainant] has established the existence of circumstances amounting to a 'constructive discharge' from his position." *Id.*[2] For the same reason, I find here that, based on the stark factual dispute in the present case, it would be premature to dismiss the present Complaint, which I find clearly alleges "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

[2] The Hearing Officer in *Urie* reached a similar conclusion regarding a pre-hearing Motion to Dismiss the claim of constructive discharge in that case, finding "that unresolved issues of fact remained regarding these claims, and that the goals of the Part 708 Contractor Employee Protection Program would best be served by resolving these issues on a more complete record." *Urie* at 4-5.

C. Nexus Between Alleged Protected Conduct and Alleged Retaliation

Under Part 708, a complainant must prove that his alleged protected act was a contributing factor to a retaliatory action. 10 C.F.R. § 708.29. One way a complainant can meet this evidentiary burden is to provide evidence that "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in a personnel action." *See David Moses*, Case No. TBH-0066 (2008), *Ronald Sorri*, Case No. LWA-0001 (1993).

B&W contends that the 15-month period between the filing of Mr. Johnson's first Part 708 Complaint in September 2008 and the alleged harassment beginning in January 2010 "argues against allowing a presumption that the 2008 whistleblower complaint was a contributing factor in the alleged constructive discharge." B&W Brief at 4-5. This argument echoes the finding of the ROI which, as does the brief, cited as support a decision of the OHA on a Part 708 jurisdictional appeal. *See Donald Searle*, Case No. TBU-0079 (2008).

In *Searle*, we upheld the dismissal of a Part 708 Complaint by an Employee Concerns Director. We found that dismissal was warranted in that case, in part because the twelve months between the filing of an earlier Part 708 Complaint and the alleged retaliation was "an unusually extended period of time." *Id.* However, the present case is readily distinguishable from *Searle* in two respects. First, in *Searle*, the OHA cited as an additional basis for its decision the fact that the company in question "voluntarily rehired Searle after he made the protected disclosure referenced in Complaint I." *Id.*

Second, *Searle* relied on a prior decision of an OHA Hearing Officer in *Elaine M. Blakely,* Case No. VBH-0086 (2003). In *Blakely*, the alleged retaliation occurred 13 months after the official who took the alleged retaliatory action became aware of the complainant's protected disclosures, the Hearing Officer further finding that the official would not have been reminded of those disclosures in the intervening months. *Id.* Here, although 15 months elapsed between the filing of Mr. Johnson's September 2008 Complaint and the alleged retaliation beginning in January 2010, the complainant's protected activity was not limited to merely the *filing* of his first Complaint. The Part 708 regulations specifically protect employees from retaliation for "[p]articipating in . . . an administrative proceeding conducted under this regulation; . . . ." 10 C.F.R. § 708.5(b). Mr. Johnson's participation with regard to his first Part 708 Complaint continued until June 2009, when he withdrew the Complaint. Thus, in fact, only about seven months had lapsed between Mr. Johnson's protected activity and the January 2010 alleged retaliations, which is a shorter period than that found sufficient to meet the complainant's burden in prior cases. *See, e.g. Barbara Nabb,* Case No. VBA-0033 (2000) (over seven months); *Luis P. Silva*, Case No. VWA-0039 (2000) (nine months). [3]

[3] This same distinction became important in the Appeal of the Hearing Officer's decision in *Blakely*, where the OHA Director disagreed with the Hearing Officer's finding that the official taking the alleged retaliatory action was not aware of a previous Part 708 Complaint filed by the complainant. *Elaine M. Blakely,* Case No. VBA-0086 (2004). The Director found that, regardless of the official's actual knowledge, it was "appropriate to impute knowledge of this earlier Part 708 proceeding to" the official. *Id.* And though the earlier Complaint was *filed* 12 months before the alleged retaliation in that case, the Director found that it was "in and of itself sufficient to permit a finding that" the employee's *participation* in the previous Part 708 proceeding "was a contributing factor in her termination, which took place within a matter of days after that initial Part 708 proceeding was concluded." *Id.*

D. Summary

For the reasons set forth above, I find that, with respect to each of the bases for dismissal advanced by B&W, the Complaint in this case presents enough facts to state a plausible claim for relief, assuming that all of the complainant's allegations are true. However, I will grant the company's Motion to Dismiss to the extent that the present Complaint alleges any acts of retaliation other than the harassment and constructive discharge Mr. Johnson alleged occurred in 2010.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by B&W Pantex LLC on November 1, 2010, Case No. TBZ-0104, be and hereby is granted as set forth in paragraph (2) below and denied in all other respects.

(2) The Complaint filed by Hansford F. Johnson against B&W Pantex LLC on April 14, 2010, Case No. TBH-0104, be and hereby is dismissed as to any acts of retaliation other than the harassment and constructive discharge alleged to have occurred in 2010.

(3) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the Complaint.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: November 24, 2010

November 17, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motions to Dismiss
Initial Agency Decision

Name of Case:	David M. Widger Safety & Ecology Corp.
Dates of Filing:	June 10, 2010 July 12, 2010 July 22, 2010
Case Numbers:	TBH-0097 TBZ-1097 TBZ-2097

This Decision will consider two Motions to Dismiss filed by Safety & Ecology Corp. (SEC), a Department of Energy (DOE) contractor located in upstate New York. SEC seeks dismissal of a Complaint that David M. Widger filed against it on October 19, 2009, under the DOE's Contractor Employee Protection Program, set forth at 10 C.F.R. Part 708. OHA has assigned Mr. Widger's Complaint Case No. TBH-0097 and the present Motions to Dismiss Case Numbers TBZ-1097 and TBZ-2097. For the reasons set forth below, I have determined that SEC's First Motion should be denied and its Second Motion should be granted. Accordingly, I find that Mr. Widger's Complaint should be dismissed.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program provides an avenue of relief for contractor employees who experience retaliations as a result of engaging in protected activity. *See* 10 C.F.R. Part 708. Protected activity includes disclosing to a DOE official information that the employee reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority. *Id*. at § 708.5(a). Protected activity also includes filing a Part 708 Complaint. *Id*. at § 708.5(b); *see also Thomas T. Tiller*, Case No. VWA-0018 (1998).

Part 708 sets forth the procedures for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) investigates complaints, holds hearings, issues

decisions, and considers appeals. 10 C.F.R. Part 708, Subpart C. Remedies authorized under the Part 708 regulations include reinstatement, back pay, transfer preference, and other appropriate relief. *Id*. at §§ 708.36(a)(1)-(5).

B. Factual Background

Washington Group Int'l (WGI) is the prime contractor at the Separations Process Research Unit (SPRU). Memorandum from Regina Neal-Mujahid to Poli A. Marmolejos, January 11, 2010 [Neal-Mujahid Memorandum]. As a sub-contractor to WGI, SEC supports the SPRU at the Knolls Atomic Power Laboratory in upstate New York. *Id*.

In August 2008, Mr. Widger began working for SEC as a Radiological Controls Technician. Report of Investigation at 2-3. He supported the SPRU's Deactivation and Demolition Project. He monitored work packages and tested for contamination. In February 2009, he became the coordinator of the "As Low As Reasonably Achievable" (ALARA) program. As coordinator, he wrote and revised procedures to contain radioactive materials. *Id*.

Mr. Widger filed one Part 708 Complaint on October 19, 2009, and one on November 10, 2009.[1] He alleges that he made 24 protected disclosures, including SEC's failure to comply with a Beryllium Controls Plan and the Respiratory Protection Program, inadequate training, falsification of documents, and inadequate effluent system maintenance and monitoring.

Mr. Widger alleges that as a result of making his protected disclosures, he faced retaliation that included a hostile work environment resulting in his constructive discharge on November 16, 2009.

II. PROCEDURAL HISTORY

On October 19, 2009, Mr. Widger filed a Part 708 Complaint with the Federal Project Director of the SPRU Field Office. WGI and SEC investigated Mr. Widger's concerns and concluded that he had not made a protected disclosure and had not suffered retaliation. *See* Neal-Mujahid Memorandum. On November 10, 2009, Mr. Widger filed his Second Complaint.

In January 2010, the DOE's Environmental Consolidated Business Center sent OHA Mr. Widger's request for an investigation and a hearing. On June 10, 2010, the OHA Investigator issued her Report of Investigation. She concluded that Mr. Widger had not made any protected disclosure. On the same day that the OHA Investigator issued her Report of Investigation, I was assigned the Hearing Officer. Immediately thereafter, I asked the parties to brief the issues of whether Mr. Widger had made a protected

[1] I refer to Mr. Widger's two filings variously as his First Complaint, his Second Complaint, and together as his Complaint. OHA accepted the Complaints as one case file, TBH-0097.

disclosure regarding a substantial and specific danger to employees or to public health or safety and whether he faced retaliation for doing so. The parties filed their briefs on July 8, 2010, and July 22, 2010, respectively.

On July 12, 2010, and July 22, 2010, SEC filed the two Motions to Dismiss currently at issue.

III. ANALYSIS

A. SEC's First Motion to Dismiss (Case No. TBZ-1097)

SEC first moved to dismiss the pending Part 708 Complaint because after Mr. Widger had filed his Part 708 Complaint, he filed a complaint with the DOE's Office of Inspector General (IG) and the U.S. Equal Employment Opportunity Commission (EEOC). First Motion at 3.

SEC correctly stated that a complainant may not pursue a remedy under Part 708 if, "with respect to the same facts, [the complainant] . . . pursue[s] a remedy under State or other . . . law. . . ." 10 C.F.R. § 708.15(a). If so, the Part 708 complaint will be dismissed. *Id*. at § 708.17(c)(3).

On July 1, 2010, I contacted Mr. Widger to ask him whether he wished to proceed under Part 708 or with the IG. On July 2, 2010, Mr. Widger advised that he intended to proceed under Part 708 and requested that his IG complaint be dismissed. OHA advised the IG of Mr. Widger's request and the IG subsequently dismissed Mr. Widger's pending complaint. Therefore, that portion of SEC's First Motion to Dismiss, which is based on Mr. Widger's having filed with the DOE's IG, is moot.

Regarding Mr. Widger's filing with the EEOC, OHA has previously found that if the "necessary factual prerequisites differ" in the Part 708 complaint and the complaint under State or other law, "the complaints are not based upon the 'same facts' for . . . purposes" of Part 708. *Gilbert J. Hinojos*, Case No. TBZ-0003 (2003) (citations omitted). Under Part 708, a complainant must show that they made a protected disclosure or engaged in protected conduct. Under the EEOC, a complainant must show that they suffered an adverse employment action due to a protected status or the filing of an action with the EEOC. *See* 42 U.S.C. § 2000e, *et seq*. Thus, a Part 708 complaint and an EEOC complaint are not necessarily based on the "same facts" for purposes of Part 708. *Gilbert J. Hinojos*, Case No. TBZ-0003 (2003). Following *Gilbert J. Hinojos*, I find that Mr. Widger's Part 708 Complaint and his EEOC complaint are based on different facts for Part 708 purposes. Therefore, I will deny that portion of the First Motion to Dismiss based on Mr. Widger's filing a complaint with the EEOC.

B. SEC's Second Motion to Dismiss (Case No. TBZ-2097)

In its Second Motion to Dismiss, SEC argues that Mr. Widger cannot prove that he made any protected disclosure because his allegations are "vague and broad in scope," "non-specific," and not "significant or substantial enough to constitute protected disclosures." Second Motion at 4-6. It also argues that his alleged protected disclosures fail because Mr. Widger "outline[d] the alleged concerns and circumstances of employees other than [himself]." *Id*. at 7.

I accept SEC's Second Motion as a Motion to Dismiss for Lack of Jurisdiction. OHA has jurisdiction to conduct a hearing when the employee, among other things, makes a non-frivolous allegation that (i) he or she has made a protected disclosure; and (ii) the protected disclosure was a contributing factor to a retaliation. *Ingram v. Dep't of the Army*, 114 M.S.P.R. 43, 47 (2010) (citation omitted); *see also* 10 C.F.R. § 708.17(c)(4) (stating that a complaint may be dismissed if it is "frivolous or without merit"); *accord David K. Isham*, Case No. TBH-0046 (2007) (holding that if a complaint fails to allege facts which, if established, would constitute a protected disclosure, the complaint may be dismissed).

To allege a protected disclosure, an employee must disclose to a DOE official information that the employee reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). The Hearing Officer evaluates reasonable belief objectively. *See Ingram*, 114 M.S.P.R. at 48 (citation omitted).

For information to qualify as a non-frivolous allegation of a protected disclosure, "an employee must communicate the information either outside the scope of his normal duties *or* outside of normal channels." *Kahn v. Dep't of Justice*, 2010 WL 3489378, at *6 (C.A. Fed. Sept. 7, 2010) (citation omitted) (emphasis added). Outside of normal channels means outside of the chain of command. *Layton v. Merit Sys. Prot. Bd.*, 2010 WL 3516675, at *5 (C.A. Fed. Sept. 9, 2010) (finding that a disclosure was not made outside of normal channels because the "record contains no evidence" that the disclosure was made "to anyone other than his superiors . . . who initially tasked . . . [the] assignment"); *Johnson v. Dep't of Health & Human Serv.*, 93 M.S.P.R. 38, 45 (2002) (finding that a disclosure was made outside of normal channels when made to an Inspector General after being made to supervisors, who ignored it).

To determine whether the employee has presented a non-frivolous allegation, the Hearing Officer evaluates the written record. *Ingram*, 114 M.S.P.R. at 48. The Hearing Officer may consider the documentary evidence but may not weigh evidence to resolve conflicting assertions. (The individual need not prove the truth of the allegations.) *Id*. *Pro se* pleadings are construed liberally. *Id*. at 49 (citation omitted). Doubt should be resolved in favor of finding a non-frivolous allegation. *Id*. at 48 (citation omitted).

1. Mr. Widger's Alleged Protected Disclosures

Mr. Widger alleges that from July 2008 to October 2009, he made protected disclosures regarding the following:[2]

1. Multiple 10 CFR Part 835 Violations – Past, Present, Pending
2. ALARA Program – Non existent, Project Dose Goals
3. Work Planning – Nuclear Safety Non Compliant
4. Procedural Non Compliance – All areas
5. Unqualified Project Personnel – Superintendents, Work Planners – Nuclear Safety
6. Radiological Deficiency Reports (RDR) – Not Being generated
7. Hostile Work Environment – chilling effect-Management[3]
8. Training Inadequate – No ALARA Training Matrix – Unqualified Instructors
9. Beryllium Controls Plan – Not being followed
10. Falsification of Documentation – Work Packages – Radiological Surveys
11. Inadequate radiation, contamination, and airborne radioactivity surveys
12. Inadequate effluent system maintenance and monitoring
13. Waste Shipments – Packaging – Sampling – Containers
14. Waste, Fraud and Abuse
15. Unqualified Perdiem Payout
16. Time Card Fraud
17. White Wash Audit Teams – WV
18. Work Area Safety – several injuries and near miss 480
19. Dosimetry Issue and Control – Bioassay
20. Respiratory Protection Program
21. Inadequate Radiological Survey and Analytical Equipment
22. Inadequate Work Force Confines
23. No Formal Schedule Released
24. No Formal Organizational Chart released

First Complaint at 5. I address each numbered allegation in turn.

a. *Alleged Protected Disclosures #1 and #4*

---

[2] This list of 24 disclosures appears in Mr. Widger's First Complaint. In Mr. Widger's Second Complaint, he repeats five alleged protected disclosures from his First Complaint.

In Mr. Widger's Second Complaint, he makes a sixth allegation regarding "discriminatory compensation." Mr. Widger alleges that he has assumed additional responsibilities for which he has "yet to be duly compensated." Second Complaint at 21. Further, he said that some co-workers had been "promoted and hired with commensurate compensation," which he "view[s] . . . as direct discrimination towards [himself]." *Id*. I do not address this allegation because compensating employees at different rates, by itself, violates no law. Mr. Widger has not alleged that SEC based his disparate pay upon his race, religion, sex, national origin, or other protected basis. Even if he had, Part 708 is not the proper forum to address that alleged discrimination. 10 C.F.R. § 708.4(a).

[3] I address this allegation below, in the section under retaliation.

Regarding Allegation #1 – "Multiple 10 CFR Part 835 Violations – Past, Present, Pending" and Allegation #4 – "Procedural Non Compliance – All areas" – Mr. Widger fails to provide enough information for me to evaluate the seriousness of many of the allegations or whether he reasonably believed that they are true. For example, Mr. Widger states that he "notic[ed] many procedural and regulatory violations and [brought] them forward to management's attention." First Complaint at 2. He does not state which violations he noticed, when, and why the conditions constituted violations. He repeats the allegation but again fails to add any specific descriptive information. *Id*. at 3. Mr. Widger states that he disclosed "a fire loading problem . . . that violated procedure and safety," but he did not describe the problem. *Id*. He also states that on August 6, 2009, he spoke with a particular member of management to discuss "RadCon issues that surfaced from above events." *Id*. at 4. But he provides no further detail about the discussion. Therefore, I find that these portions of Allegation #1 and Allegation #4 do not constitute non-frivolous allegations of protected disclosures.

Mr. Widger states that between April 16, 2009, and June 4, 2009, he found "wide spread radiological contamination . . . during a random . . . sampling." *Id*. at 2. But he does not state that he disclosed this issue to management. Therefore, I find that this portion of Allegation #1 and Allegation #4 does not constitute a non-frivolous allegation of a protected disclosure.

Mr. Widger also alleges that in July 2009, he told Stacey Johnson, D&D Manager, that while working in the field, he observed a "non posted asbestos area." *Id*. at 3. But he does not provide contextual details to support a reasonable belief that the area should have been posted. Therefore, I find that this portion of Allegation #1 and Allegation #4 does not constitute a non-frivolous allegation of a protected disclosure.

b. *Alleged Protected Disclosure #2*

Regarding Allegation #2 – "ALARA Program – Non existent, Project Dose Goals" – Mr. Widger states that on August 12, 2009, he e-mailed a particular member of management and "documented what was wrong with the ALARA program and how to fix [it]." Opening Brief at 2. Mr. Widger also states that the ALARA coordinator position is unfilled, and "[n]ot having this position filled deprives the project of expertise needed to reduce overall exposure and to be another set of eyes in planning radiological work." *Id*.

Mr. Widger identifies nothing "wrong" with the ALARA program. Rather, he states that he is "working towards forming our ALARA process and site ALARA dose goals." E-mail from David M. Widger to Larry Hayes, Robert Massengill, Tristan Tritch, and Rich Hazard, August 12, 2009. Next, he does not allege facts to suggest that the position vacancy constitutes a substantial threat to human health or public safety or a significant violation of any law, rule, or regulation. Therefore, I find that Allegation #2 does not constitute a non-frivolous allegation of a protected disclosure.

c. *Alleged Protected Disclosures Nos.* 3, 6, 8-9, 14-16, 19, 21, 23-24

Mr. Widger failed to provide any information to describe these allegations. Therefore, I cannot conclude that they constitute non-frivolous allegations of protected disclosures.[4] *See, e.g.*, *Huffman v. Office of Pers. Mgmt.*, 92 M.S.P.R. 429, 433 (2002) ("An appellant's statements regarding his protected disclosures can be so deficient on their face that [the Hearing Officer] will find that they fail to constitute a non-frivolous allegation of a reasonable belief, and thus require dismissal for lack of jurisdiction.") (citation omitted).

d. *Alleged Protected Disclosure #5*

Regarding Allegation #5 – "Unqualified Project Personnel – Superintendents, Work Planners – Nuclear Safety" – Mr. Widger alleges that in August 2009, an unqualified technician completed a survey. First Complaint at 35-37. He also alleges that on October 8, 2009, contractors installed temporary lighting in a "known . . . contaminated area." Second Complaint at 3. He alleges that the contractors lacked the training and equipment to work in the area, which violated DOE regulations. *Id*.

Approximately two months lapsed between the first alleged violation (August 24, 2009) and when Mr. Widger filed his First Complaint (October 19, 2009). Approximately a month lapsed between the second alleged violation (October 8, 2009) and when Mr. Widger filed his Second Complaint (November 10, 2009). In each case, the space of time suggests that Mr. Widger did not reasonably believe that he witnessed a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health or safety. If he had, he would not have waited more than a month to report them. Therefore, I cannot conclude that Allegation #5 constitutes a non-frivolous allegation of a protected disclosure.

e. *Alleged Protected Disclosures #10 and #11*

Regarding Allegation #10 – "Falsification of Documentation – Work Packages – Radiological Surveys" – and Allegation #11 – "Inadequate radiation, contamination, and airborne radioactivity surveys" – Mr. Widger alleges that he told management of "inadequacies" in a document entitled, "Radiological Survey Report and Map." First Complaint at 35, 37. He also alleges that the document was edited, which constitutes falsification. *Id*. at 35. He provided two different copies of ostensibly the same document, but failed to explain why they contain inadequacies or why the edits constitute a substantial violation of a law, rule, or regulation. *Id*. at 37-40. Therefore, I find that this portion of Allegation #10 and Allegation #11 does not constitute a non-frivolous allegation of a protected disclosure.

Further, Mr. Widger states that in October 2009, a radiological survey was performed regarding the above-referenced installation of lights in an allegedly contaminated area.

[4] Mr. Widger flooded the record with irrelevant information. Mr. Widger's Complaint consists of 82 pages, much of which does not purport to demonstrate that he made a protected disclosure. For example, Pages 11-14 consist of an excerpt from an ALARA Program Manual from the SPRU. Pages 15-32 consist of the DOE's Occupational ALARA Program Guide. Pages 41-76 consist of materials documenting an unrelated protected disclosure at a separate DOE facility.

Second Complaint at 12. Mr. Widger reviewed the survey as part of his job responsibilities as ALARA Coordinator. Widger Telephone Memorandum, March 1, 2010. He concludes that the "survey did not provide adequate information," but does not explain why. Second Complaint at 12. Therefore, I find that this portion of Allegation #10 and Allegation #11 does not constitute a non-frivolous allegation of a protected disclosure.

Lastly, Mr. Widger states that when he audited the survey, he found that it was performed without an approved radiation work permit. *Id*. at 12-15. Performing a radiological survey without an approved radiation work permit may reasonably constitute a substantial violation of a law, rule, or regulation. Further, in November 2009, he disclosed the omission to SPRU Environmental Safety & Health Manager Frances Alston – a member of management outside of his chain of command. *Id*. Therefore, I find that this portion of Allegation #10 and Allegation #11 constitutes a non-frivolous allegation of a protected disclosure.

f. *Alleged Protected Disclosure #12*

Regarding Allegation #12 – "Inadequate effluent system maintenance and monitoring" – Mr. Widger alleges that a "lack of maintenance and or regulatory compliance on the effluent system could produce a radioactive uncontrolled release to the public." Opening Brief at 4.

Mr. Widger fails to allege how the system lacks maintenance or compliance and how that may produce a radioactive release. Further, he does not allege that he disclosed these problems to management. Therefore, I find that Allegation #12 does not constitute a non-frivolous allegation of a protected disclosure.

g. *Alleged Protected Disclosure #13*

Regarding Allegation #13 – "Waste Shipments – Packaging – Sampling – Containers" – Mr. Widger alleges that the wife of a member of management "knowingly shipped . . . contaminated material and equipment to the SPRU project." *Id*. Also, the equipment "was later determined to have potentially exposed an unsuspecting SPRU workforce" to contamination. *Id*.

For support, Mr. Widger submits a September 2009 shipping label ostensibly from the wife of a member of management. Opening Brief, Attachment 3 at 82. The label does not describe the contents of the package. Nor does it support Mr. Widger's allegation that the workforce was exposed to contamination. Lastly, Mr. Widger does not state that he made this disclosure to management. Therefore, I find that Allegation #13 does not constitute a non-frivolous allegation of a protected disclosure.

h. *Alleged Protected Disclosure #17*

Regarding Allegation #17 – "White Wash Audit Teams – WV" – Mr. Widger alleges that in November 2009, the senior management of the SPRU issued a memorandum affirming its commitment to meeting ALARA standards. Second Complaint at 31-32. Mr. Widger alleges that the memorandum "was and is meant for DOE eyewash" and that management "has failed once again in their duties to protect the health and safety of the workforce and the general public." *Id*. at 30.

Mr. Widger does not describe how, in issuing the memorandum, the SPRU "failed . . . to protect the health and safety of the workforce and the general public." Therefore, I find that Allegation #17 does not constitute a non-frivolous allegation of a protected disclosure.

i. *Alleged Protected Disclosure #18*

Regarding Allegation #18 – "Work Area Safety – several injuries and near miss 480" – Mr. Widger included three photographs in his First Complaint that, he alleges, "reveal unsafe working conditions." First Complaint at 77, 79-81.

The photos show miscellaneous debris. But Mr. Widger does not state who has access to those work areas, if and how those areas are used, and how the debris may cause harm. Without this context, I cannot conclude that the debris poses a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health or safety. Nor does Mr. Widger state that he disclosed these conditions to management. Lastly, Mr. Widger does not describe the "several injuries and near-miss 480" or whether he disclosed those incidents to management. Therefore, I find that Allegation #18 does not constitute a non-frivolous allegation of a protected disclosure.

j. *Alleged Protected Disclosure #20*

Regarding Allegation #20 – the "Respiratory Protection Program" – Mr. Widger states that "several times," he "brought forward . . . many issues of concern." Opening Brief at 2. First, he cites an e-mail that he sent to management in July 2009. In it, he "presents several potential issues," including the lack of inventory control numbers and his observation that fewer than 10% of respirators were "survey[ed]." E-mail from David M. Widger to Robert Massengill and Richard Hazard, July 21, 2009. Second, he cites an e-mail that he sent in August 2009. In it, he recommended surveying 100% of the respirators because the 10% survey practice uncovered a disproportionate number of defective respirators.[5] E-mail from David M. Widger to Robert Massengill, August 3, 2009.

Mr. Widger does not state or present information to suggest that the lack of inventory control numbers is a substantial violation of a law, rule, or regulation or a substantial and

[5] Mr. Widger also alleges that (i) unprotected workers were exposed to radiation; and (ii) the SPRU failed to meet the procedural requirements of the respiratory protection program. Opening Brief at 2. Because I addressed these issues above, I do not address them again here.

specific danger to employees or to public health or safety. Nor does he state that the rate at which the respirators are surveyed is a substantial violation of a law, rule, or regulation. Therefore, I find that these portions of Allegation #20 do not constitute a non-frivolous allegation of a protected disclosure.

Mr. Widger does present a reasonable belief that the low percentage of respirators surveyed – given the number of defective respirators discovered – is a substantial and specific danger to employees or to public health or safety. A member of management also recommended that until the issues with the defective respirators are addressed, 100% of the respirators should be surveyed. E-mail from Robert Massengill to Rich Hazard and David M. Widger, August 3, 2009. Further, Mr. Widger communicated the information outside of his chain of command because he communicated it to Robert Massengill, Manager of the SPRU Site, who never directly supervised him. Massengill Telephone Memorandum, May 14, 2010. Therefore, Mr. Widger communicated the information outside of normal channels. For this reason, I find that this portion of Allegation #20 constitutes a non-frivolous allegation of a protected disclosure.

k. *Alleged Protected Disclosure #22*

Regarding allegation #22 – "Inadequate Work Force Confines" – Mr. Widger alleges that an unqualified employee was instructed to remove warning signs so that an unsuspecting outside contractor would mow a contaminated area.[6] First Complaint at 33. This event took place several months before he disclosed it by filing his First Complaint in October 2009. *Id*. His failure to disclose it immediately suggests that he did not reasonably believe that he witnessed a substantial violation of a law, rule, or regulation, or a substantial and specific danger to employees or to public health and safety. Therefore, I cannot conclude that this constitutes a non-frivolous allegation of a protected disclosure.

l. *Summary*

In conclusion, I find that Mr. Widger has made the following non-frivolous allegations of protected disclosures:

- In August 2009, Mr. Widger recommended surveying 100% of the incoming respirators because the 10% survey practice uncovered a disproportionate number of defective respirators. The low number of respirators surveyed may constitute a substantial and specific danger to employees or to public health or safety [Allegation #20]; and

- In November 2009, Mr. Widger stated that a recent radiological survey had been performed without a radiation work permit. This may reasonably constitute a

[6] Mr. Widger did not specify what he meant by "inadequate work force confines." Under my reading of the case file, the removal of the warning signs most closely approximates "inadequate work force confines." To the extent that Mr. Widger intended different information to constitute "inadequate work force confines," I find that Mr. Widger has not presented sufficient information to make a non-frivolous allegation of a protected disclosure.

substantial violation of a law, rule, or regulation [Allegation #10 and Allegation #11].

2. The Filing of the Complaint as Protected Conduct

Mr. Widger also alleges that he suffered retaliation for having filed his Part 708 Complaint. The filing of a Part 708 Complaint constitutes protected conduct. 10 C.F.R. § 708.5(b); *see also Thomas T. Tiller*, Case No. VWA-0018 (1998). Therefore, I find that Mr. Widger engaged in protected conduct when he filed his Complaints on October 19, 2009, and November 10, 2009.

3. The Alleged Retaliations

Mr. Widger alleges that he suffered four acts of retaliation as a result of having made protected disclosures or engaged in protected conduct. The alleged retaliation includes that (i) he was constructively discharged; (ii) he was directed to fix the issues that he brought forward; (iii) he was subject to excessive meetings with management; and (iv) he was not adequately compensated. In its Second Motion to Dismiss, SEC argues that Mr. Widger cannot prove that he suffered any retaliation. Second Motion at 11-15.

a. *The Alleged Constructive Discharge*

Mr. Widger alleges that on November 16, 2009, he resigned due to a "hostile working environment." Report of Investigation at 3. I must determine whether he alleges a constructive discharge, which would constitute a non-frivolous allegation of retaliation.

Resignations are presumed voluntary. *Heining v. General Serv. Admin.*, 68 M.S.P.R. 513, 519 (1995). The employee may rebut the presumption of voluntariness if he or she "can establish that the resignation . . . was the product of duress . . . brought on by" the employer. The employee may establish duress "when the . . . employer deliberately takes actions that make working conditions so intolerable for the employee that he or she is driven into an involuntary resignation." *Id*. (citation omitted). The voluntariness of the resignation is "based on whether the totality of the circumstances" supports the conclusion that the employee was "deprived of free choice." *Id*. at 519-20. Circumstances are evaluated objectively, not based on the employee's subjective belief. *Id*. at 520.

Mr. Widger alleges that he faced the following intolerable working conditions:

- A manager stated, "I . . . hate my job and . . . the people I work with !!!";
- A manager "pitted half his work crew against the other half on a daily basis through treatment, conflict, slander and work assignments";
- When he saw a manager one morning, he "said good morning, there was not a reply";
- The contractor failed to resolve his First Complaint;
- His manager did not communicate with him;

- He was instructed to "not do anything unless directed";
- He received no direction on the ALARA program;
- His management refused to take his input seriously;
- Management limited his computer access; and
- He felt that he was being targeted for termination.

Complaint at 2, 4, 78; Widger Telephone Memorandum, March 1, 2010; Opening Brief at 5-6. I address these allegations in turn.

First, Mr. Widger's allegations describe an impolite workplace with obvious personality conflicts. But I find that rudeness and personality conflicts, as described in Mr. Widger's Complaint, without more, do not constitute an allegation of duress that would deprive an employee of free choice regarding his or her continued employment.

Second, when Mr. Widger resigned, his First Complaint had not been resolved. Part 708 complaints commonly take many months to work through the administrative system. He resigned less than a month after he filed the Complaint. No reasonable person would consider a one month delay to resolving an extremely complex Complaint to constitute an allegation of "duress."

Third, Mr. Widger's e-mail correspondence discredits his allegation that he suffered the duress of limited access to e-mail. The e-mails included in Exhibit 3 of the Second Motion to Dismiss show that Mr. Widger exchanged e-mails with management on October 27th, 28th, 29th, and 30th, November 2nd, and November 16th. The e-mails attached to Mr. Widger's Opening Brief show that Mr. Widger also used his e-mail account on October 20th, October 21st, November 3rd, November 4th, November 5th, and November 10th.

Fourth, the above e-mails also discredit Mr. Widger's allegation that he suffered the duress of being told "not to do anything unless directed" and management indifference to his concerns. In an October 27th e-mail to a member of management, Mr. Widger states, "I have been directed . . . do [sic] do nothing . . . *except what I am given direction by Management to do*." Exhibit 3, Second Motion (emphasis added). Any given employee may reasonably expect to have management prioritize their work. Moreover, in her reply, the member of management reminded Mr. Widger of certain tasks that he had been assigned. She also stated that his concerns would be "identified through [SEC's] corrective action process." *Id*. An e-mail dated November 16th – the day that Mr. Widger resigned – shows that management wanted him "to continue working on" his assignments. *Id*.

Fifth, the record shows that Mr. Widger chose to stop working. In his interview with the OHA investigator, he stated that he resigned on November 16th. Widger Telephone Memorandum, March 1, 2010. Mr. Widger later stated that he "was no longer employed at SPRU" after Tuesday, November 10th. E-mail from David M. Widger to David M. Petrush, October 28, 2010. Although the SPRU did not observe Veterans' Day on November 11th, Mr. Widger took the 11th off along with Thursday the 12th and

Friday the 13th, and later requested "paid time off" for these days. Exhibit 6, Second Motion. The following Monday, Mr. Widger resigned without notice. Personnel Action Request, November 16, 2009. The above-referenced e-mail from November 16th, asking Mr. Widger to continue working, shows that management had not anticipated his resignation on November 16th.

Lastly, as support for the alleged duress consisting of his fear that management sought to terminate him, Mr. Widger cited an e-mail from a former co-worker, who speculated that management planned to terminate him. E-mail from Robert Massengill to Tristan Tritch, March 13, 2010. The e-mail suggests that other SEC employees also believed that management did not care for Mr. Widger. But that does not contribute to a reasonable objective basis for a constructive discharge. The e-mail does not represent the opinions of management. Nor does it state an imminent employment action.

Considered objectively, the totality of the circumstances suggests that Mr. Widger did not resign under duress. Therefore, I find that Mr. Widger has not made a non-frivolous allegation that he suffered retaliation due to a constructive discharge. In other words, I find that he resigned voluntarily.

b. *Other Alleged Retaliations*

Mr. Widger alleges that he faced the retaliation of (i) "being directed to fix all of the problems that [he] brought forward"; (ii) being "subjected to countless meetings . . . with management" and (iii) not being adequately compensated.[7] Opening Brief at 5.

Mr. Widger's job requirements included meeting with management and addressing the issues that he brought forward. Second Motion at 11. Further, management had stated that by November 13th, it would re-evaluate Mr. Widger's compensation.[8] E-mail from Andrew Henderson to David M. Widger, November 4, 2009. By this time, Mr. Widger had removed himself from the SPRU. Therefore, I find that the above three allegations do not constitute non-frivolous allegations of retaliation.

Because I found that Mr. Widger has not made a non-frivolous allegation of retaliation, I need not conduct the contributing factor analysis or discuss remedies.

IV. CONCLUSION

[7] Mr. Widger also alleges that in February 2009 and June 2009, management retaliated against him by moving him "from the field" to "drafting procedures for the project." Complaint at 2. I do not address this alleged retaliation, however, because it takes place prior to any non-frivolous allegation of a protected disclosure.

[8] SEC argues that it had offered Mr. Widger a pay increase. Second Motion at 11. Mr. Widger denies this. E-mail from David M. Widger to David M. Petrush, October 28, 2010.

I find that Mr. Widger made two non-frivolous allegations of protected disclosures and engaged in protected conduct. However, because Mr. Widger has not made a non-frivolous allegation of retaliation, he is entitled to no remedy. Therefore, I will grant SEC's Second Motion to Dismiss.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Safety & Ecology Corp. on July 12, 2010, Case No. TBZ-1097, is hereby denied.

(2) The Motion to Dismiss filed by Safety & Ecology Corp. on July 22, 2010, Case No. TBZ-2097, is hereby granted.

(3) The Complaint filed by David M. Widger on June 10, 2010, Case No. TBH-0097, under 10 C.F.R. Part 708, is hereby dismissed.

(4) This is an Initial Agency Decision, which shall become a Final Decision of the Department of Energy unless a party files a Notice of Appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

David M. Petrush
Hearing Officer
Office of Hearings and Appeals

Date: November 17, 2010

Case No. VBA-0005

July 24, 2000

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Thomas Dwyer

Date of Filing: May 23, 2000

Case Number: VBA-0005

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on May 2, 2000, involving a complaint filed by Thomas Dwyer (Dwyer or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Dwyer claims that Fluor Daniel Fernald (FDF), a DOE contractor, suspended and then terminated his employment in retaliation for his making disclosures that are protected under Part 708. In the IAD, however, the Hearing Officer determined that FDF had shown that it would have terminated the complainant for his misconduct, even in the absence of the protected disclosures. As set forth in this decision, I have determined that Dwyer's Appeal must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (amended regulations) (definition of retaliation).

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included fact- finding by the DOE Office of Inspector General, followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint. Thereafter, the complainant could request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision.

On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12862 (March 15, 1999). Under the revised regulations, review of an Initial Agency Decision, as requested by Dwyer in the present Appeal, is

performed by the OHA Director. 10 C.F.R. § 708.32.

B. Complaint Proceeding

The events leading to the filing of Dwyer's complaint are fully set forth in Thomas Dwyer, 27 DOE ¶ 87,560 (2000)(Dwyer). I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Dwyer was employed by FDF as a pipefitter from January 1996 to October 1997. In December 1997, Dwyer filed a complaint under Part 708 with the DOE Office of Inspector General's Office of Inspections. After the completion of an investigation, Dwyer requested and received a hearing on this matter before an OHA Hearing Officer. There were 28 witnesses and the hearing lasted two days. After considering the testimony at the hearing and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

C. The Initial Agency Decision

In the IAD, the Hearing Officer cited the burdens of proof under the Contractor Employee Protection Regulations. (1) They are as follows:

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

10 C.F.R. § 708.9(d). See Dwyer, 27 DOE at 89,329.

The Hearing Officer analyzed two disclosures and two activities in which the complainant was involved, to determine whether they were protected under Part 708. The Hearing Officer first reviewed an incident in which Dwyer left his work area because liquid came out from a pipe which was being cut. The Hearing Officer referred to this as the April 1996 Refusal to Participate. In finding the refusal to participate was not protected under Part 708, the Hearing Officer noted that Dwyer had not alleged that continuing to work was dangerous or constituted a federal health or safety violation, as required by Section 708.5(a)(3). The Hearing Officer pointed out that Dwyer had also not notified his employer of the danger prior to refusing to work, or within 30 days of the refusal reported the danger or violation to his employer or other appropriate official, as required by Section 708.5(a)(3).

The Hearing Officer next analyzed an incident in which the complainant stopped a walkthrough of a building because of a lack of respirators (August 1996 Job Stop). The Hearing Officer pointed out in his Opinion that the witnesses who testified at the hearing could not recall this incident, and he found them to be more credible than the complainant. The Hearing Officer also noted that this activity, like the refusal to participate discussed above, failed to meet the requirements of Section 708.5. Therefore he found that the job stop did not constitute a protected disclosure or activity.

The Hearing Officer also reviewed a number of internal company grievance notices filed by Dwyer, which involved alleged harassment by employees of FDF's medical department and complaints about the persons assigned to hear the grievances (Internal Company Grievances). The Hearing Officer found these complaints to constitute a minor dispute over the employee's qualification for medical leave and did not rise to the level of a protected disclosure of mismanagement, as that term is used in Part 708. Dwyer, 27 DOE at 89,331.

Finally, the Hearing Officer considered several complaints involving disclosures of alleged safety concerns (September 1997 Disclosures). He rejected Dwyer's claim that laundry bags left on a hallway floor presented a tripping hazard. The Hearing Officer did find that Dwyer's complaint of dust falling from rafters in a plant in which asbestos abatement was taking place to be a protected disclosure of a substantial and specific danger to employee safety. Id. at 89,334.

The Hearing Officer next found that there was temporal proximity between Dwyer's protected disclosure regarding the falling dust and his suspension and termination by FDF less than one month later. He also noted that at least one of the two deciding officials had actual knowledge of the protected disclosure. The Hearing Officer concluded that the disclosure was a contributing factor to his suspension and dismissal by FDF. Accordingly, the Hearing Officer determined that Dwyer had met his initial burdens under § 708.9(d), thereby shifting the burden to FDF to prove by clear and convincing evidence that it would have taken the same actions without Dwyer's protected disclosure. Dwyer, 27 DOE at 89,334.

The Hearing Officer next addressed whether FDF had shown that it would have suspended and terminated Dwyer even in the absence of the protected disclosure. FDF's stated bases for terminating Dwyer were his insubordination and his hampering or interfering with company work. Under FDF company policy, these are considered Category "A" violations of rules of conduct, which may result in immediate discharge.

The insubordination incident involved Dwyer's refusal to accept an assignment. With respect to the charge of interfering with company work, the Hearing Officer pointed to the testimony of an FDF manager, who cited instances in which the individual avoided work by disappearing from the job site, by spending inordinate time in the rest room or by frequently reporting to the medical department just after jobs were assigned. Id. at 89,335. This testimony was supported by FDF workers who also believed that Dwyer avoided work. Id. at 89,336. The Hearing Officer found this testimony to be convincing. He further pointed out that in the five year period ending in 1999, FDF had terminated 15 other employees for Category "A" violations, such as those committed by Dwyer. Id. at 89,337.

Based on the above considerations, the Hearing Officer determined that FDF had clearly and convincingly demonstrated that it would have terminated Dwyer even in the absence of the protected disclosure.

II. The Dwyer Appeal

In connection with his Appeal, Dwyer filed a statement identifying the issues on which he wished the Director of the Office of Hearings and Appeals to focus in this phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). 10 C.F.R. § 708.33. The Statement presents the following issues for my review: (i) the Hearing Officer improperly failed to recognize all the relevant actions/disclosures as protected under Part 708; (ii) the Hearing Officer overlooked the importance of the timing of the Dwyer discharge versus the protected activities/disclosures; (iii) the Hearing Officer improperly found that Dwyer was insubordinate and hampered work; and (iv) the Hearing Officer erred in finding Dwyer less credible than FDF witnesses.(2) As discussed below, I do not find any merit to the matters raised for my review. Consequently, I will not reverse the Hearing Officer's determination.

1. Failure to Acknowledge All Cited Activity as Protected

The Statement alleges that the Hearing Officer erred in determining that only one of Dwyer's several activities/disclosures was considered protected under Part 708. Dwyer argues that the Refusal to Participate, the Job Stop, and the disclosure that laundry posed a tripping hazard should all be deemed protected by Part 708. This contention lacks merit.

As an initial matter, after reviewing the record, I see no error in the Hearing Officer's findings with respect to Dwyer's unprotected activities/disclosures. However, an in depth discussion of each of those determinations would be superfluous here. As stated above, the Hearing Officer did find one of Dwyer's

disclosures to be protected. Dwyer, 27 DOE at 89,334. Therefore, he concluded that Dwyer made the required regulatory showing on this point. I see no prejudice to the complainant arising from the fact that there may have been other protected disclosures that the Hearing Officer did not consider to be protected. Once a finding is made that there was a protected activity or disclosure that was a contributing factor to a retaliation, it is irrelevant in a Part 708 proceeding if there were additional protected activities. The inclusion of additional protected activities or disclosures in this case would not alter the result in the Initial Agency Decision or in any other manner work to Dwyer's advantage. Nor does their exclusion create a disadvantage for Dwyer. (3) I find that the inclusion of additional protected disclosures would make no difference in this case whatsoever. John Gretencord, 27 DOE ¶ 87,552 (2000).

2. The Timing of the Discharge

The Statement claims that the Hearing Officer overlooked the importance of the timing of Dwyer's discharge vis-a-vis the disclosure in this case. He implies that the coincidence of the disclosure and his termination is suspicious.

As discussed above, under Part 708, the complainant has the burden of establishing by a preponderance of the evidence that a protected disclosure that he made was a contributing factor to a retaliation by his employer. In our cases, we have repeatedly indicated that the "contributing factor" showing can be made by time proximity, that is, by establishing that the retaliation took place shortly after the protected disclosure was made, and by showing that the official taking the action has actual or constructive knowledge of the disclosure. E.g., Don W. Beckwith, 27 DOE ¶ 87,534 (1999).

The Hearing Officer followed that precedent in the instant case. Specifically, he found that "there is fairly clear temporal proximity between Mr. Dwyer's protected disclosure in Plant 6 on September 23, 1997, and his subsequent suspension on October 6, 1997, and termination on October 16, 1997." Dwyer, 27 DOE at 89,334. He also found that at least one of the managers responsible for the termination knew of the protected disclosure. Based on these findings, the Hearing Officer determined that Dwyer's showing with respect to the "contributing factor" element had been satisfied, and that the burden had shifted to FDF to show by clear and convincing evidence that it would have taken the same actions without Dwyer's protected disclosures. Id.

The Statement suggests, however, that the Hearing Officer should in some way have given extra consideration or additional weight to the coincidence of the disclosure and the termination. The complainant even seems to imply that the Hearing Officer's finding that the disclosure was a factor contributing to the termination is in and of itself sufficient to warrant a reversal of the outcome in this case.

Part 708 clearly provides otherwise, and the complainant is therefore incorrect. By shifting the burden of proof to the contractor, the Hearing Officer accorded the proper weight to timing of the termination vis-a-vis the disclosure. I cannot discern in what way the facts referred to by the Statement could have been properly accorded more weight, so as to change the outcome in this case. John Gretencord, 27 DOE at 89,284. Part 708 certainly does not provide that a complainant may prevail simply by establishing that a protected activity contributed to a retaliation. The regulations plainly afford the contractor the opportunity to establish by clear and convincing evidence that it would have taken the same action even absent the protected activity. 10 C.F.R. § 708.9(d).

3. Dwyer's Insubordination and Work Hampering

As indicated above, the Hearing Officer reached the overall conclusion that FDF had clearly and convincingly demonstrated that it would have terminated Dwyer even in the absence of the protected disclosure. According to the Hearing Officer, FDF made this showing by bringing forth persuasive testimony substantiating that Dwyer refused an assignment, and furthermore, avoided work by frequently reporting to the medical department, spending excessive time in the rest room, refusing to obtain training

necessary for job performance and failing to fully perform assigned tasks when at a work site. Dwyer, 27 DOE at 89,335-37. Thus, the Hearing Officer set forth quite clearly the bases for his determination that FDF had satisfied its burden of proof in this case.

Dwyer specifically alleges error regarding one finding from among these many important conclusions of fact and law. The complainant refers to the finding that he was insubordinate because he refused to accept an assignment as a porter when he returned to work after medical leave. (4) Dwyer claims that medical restrictions did not permit him to perform any job that required him to be on his feet. Dwyer believes that he had a legitimate excuse for refusing the assignment and was therefore not insubordinate.

There is nothing in the record to support such an assertion. As the Hearing Officer indicated, a note from Dwyer's doctor stated only that he was not to climb or lift any weight of over ten pounds. An FDF manager testified that the porter's job involved no climbing, and that Dwyer would be able to control how much weight he lifted in the porter assignment. Accordingly, when Dwyer refused that assignment, she found it appropriate to suspend him for insubordination. Dwyer, 27 DOE at 89,335.

Dwyer claims in his Statement of Issues that he could not walk at all. He states that had a verbal agreement with his physician to the effect that if his ankle continued to hurt him that he should return to the physician. He also states that after his suspension by FDF, he saw two doctors who each gave him written excuses that would have kept him off his feet for an extended period. He maintains that because he has these medical excuses he could not have been insubordinate.

These contentions are baseless. I have reviewed the doctor's note regarding Dwyer's medical condition at the time of this incident. The note states that Dwyer is prohibited from climbing and from lifting weights of over 10 pounds. There is no restriction on his ability to walk. Further, there is absolutely no support for Dwyer's claim that he had a verbal agreement with his doctor that overrode anything in the note. In fact, Dwyer admits in his Statement that the verbal agreement only urged him to return to his doctor if his ankle continued to hurt him. Furthermore, the later notes from other physicians that Dwyer alludes to are irrelevant, since they were not in effect at the time of the insubordination. It is abundantly clear that Dwyer had no support whatsoever for his claim of a medical excuse for refusing the porter's assignment. Thus, I am in agreement with the Hearing Officer that the FDF managers rightfully found Dwyer to be insubordinate for failing to accept the porter's assignment.

Dwyer also offers a rather perfunctory denial of hampering or interfering with any FDF work activity. He provides no new evidence on this point, and after reviewing the record I find ample testimony to support the Hearing Officer's conclusion that this complainant routinely engaged in work avoidance tactics that amounted to hampering or interfering with FDF's mission. I therefore see no error by the Hearing Officer on this issue.

Finally, based on my examination of the entire record in this case, I am fully persuaded that FDF would have terminated Dwyer for insubordination and hampering work, even absent the protected disclosure. I therefore believe that the Hearing Officer correctly determined that FDF satisfied its burden of proof in this proceeding.

4. Objections to the Hearing Officer's Finding Regarding Credibility

Lastly, the Complainant raises some very general objections to the Hearing Officer's overall finding that his credibility is not as good as that of the other witnesses in this case. Dwyer insists that he has told the truth, and that he has passed a lie detector test as part of his application for a position with a county sheriff's department. I am not persuaded by his insistence. His lie detector tests are irrelevant here. Furthermore, Dwyer has shown absolutely no reason for me to question the soundness of the determinations as to credibility by the Hearing Officer, who is expected to make this very type of judgment in Part 708 cases. Dwyer understandably disagrees with the result in this proceeding. This does not mean, however, that there is any error at all in the IAD.

III. Conclusion

On the basis of the foregoing, I conclude that Dwyer has failed to show in his Appeal that the determination reached in the Initial Agency Decision is erroneous as a matter of fact or law. I concur with the determination that FDF has shown by clear and convincing evidence that it would have terminated Dwyer even in the absence of the protected disclosures. Accordingly, Dwyer's Appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Thomas Dwyer on May 23, 2000, of the Initial Agency Decision issued on May 2, 2000, is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Thomas Dwyer on under the Contractor Employee Protection Program, 10 C.F.R. Part 708, is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals, within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 24, 2000

(1)With respect to the burden of proof, the Hearing Officer cited to the prior version of Part 708. In connection with my review of the burden of proof, I shall therefore also refer to that earlier version. 57 Fed. Reg. 7533 (March 3, 1992). However, the procedures applicable to this appeal proceeding are set forth in the current version of Part 708, effective April 14, 1999. 64 Fed. Reg. 12862 (March 15, 1999). I shall cite to the current regulations in all matters not related to the burden of proof.

(2)FDF filed a response to the Statement of Issues, contending that the Hearing Officer's determination should be sustained.

(3)This is particularly so in view of the fact that FDF does not challenge the Hearing Officer's determination that Dwyer made one disclosure that is protected under Part 708. There is thus no risk that the Hearing Officer's finding that the disclosure regarding falling dust is protected will be reversed on appeal, leaving Dwyer with no protected disclosure in this case.

(4)A porter performs routine cleaning duties.

Case No. VBA-0007

December 15, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Salvatore Gionfriddo

Date of Filing: October 13, 1999

Case Number: VBA-0007

On October 13, 1999, Salvatore Gionfriddo ("Appellant" or "Complainant") filed a Notice of Appeal from an Initial Agency Decision by a Hearing Officer from the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). In the Initial Agency Decision, the Hearing Officer dismissed a complaint filed by Mr. Gionfriddo under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Salvatore Gionfriddo, 27 DOE ¶ 87,528 (1999).

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor- operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708.

B. Factual Background

The relevant facts in this case as found by the Hearing Officer are not in dispute. Mr. Gionfriddo's former employer, Energy Research Corporation (ERC) ("Respondent"), engages in the research and development of advanced carbonate fuel cells and batteries used to generate and store electric power. Fuel cells convert fuels, such as natural gas, to electricity through an electrochemical reaction. ERC August 2, 1999 Brief at 2. According to the firm, this technology was developed by ERC through funding by many sources, including a series of research and development contracts, grants and cooperative agreements that ERC entered into with federal and state agencies including the DOE, contracts with public utilities, associations and commercial organizations and internally sponsored independent research and development efforts. ERC August 2, 1999 Brief at 1.

The Complainant was employed by ERC in the fuel cell area beginning in March 1982. In September 1998, he was given an assignment to compare a short fuel cell stack with a tall fuel cell stack, and in his report concluded that "unless the trend of cell shrinkage changes drastically, the loss of compressive load

for tall stacks is highly probable." June 23, 1999 Report of Investigation at 4. On October 23, 1998, ERC terminated the Complainant's employment.

C. Procedural Background

Mr. Gionfriddo filed his complaint on December 28, 1998, alleging that he made a protected disclosure under Part 708 and that ERC retaliated against him by terminating his employment. On July 19, 1999, ERC filed a Motion to Dismiss the complaint. The firm claimed that its relationship with the DOE was in the form of a "Cooperative Agreement" that is not covered by Part 708, and that the firm is therefore not obligated to participate in proceedings under this Part. The Complainant filed a Memorandum in Opposition to the Motion on August 3. Thereafter, the Hearing Officer requested that ERC submit a complete copy of its agreement with the DOE, and the firm filed this document on August 5. The Hearing Officer received further briefs on the Motion on September 7 and 14. On September 27, 1999, the Hearing Officer granted the Motion and dismissed Mr. Gionfriddo's complaint. Salvatore Gionfriddo, 27 DOE ¶ 87,528 (1999).

After filing his Notice of Appeal, the Complainant filed a statement identifying the issues he wishes the OHA Director to review on October 27, 1999. 10 C.F.R. § 708.33(a). On November 22, 1999, the Respondent filed its response. Id. The issues identified by the Complainant all relate to the Hearing Officer's conclusion that the Respondent is not subject to the provisions of Part 708.

II. Analysis

The Complainant seeks review of the Hearing Officer's interpretation of the scope of the Part 708 regulations. Unlike a Hearing Officer's findings of fact, which are entitled to deference unless clearly erroneous, Oglesbee v. Westinghouse Hanford Co., 25 DOE ¶ 87,501, 89,001 (1995); O'Laughlin v. Boeing Petroleum Services, Inc., 24 DOE ¶ 87,513, 89,064 (1995), a Hearing Officer's conclusions of law, such as those made by the Hearing Officer in the present case as to the scope of Part 708, are reviewable de novo. See Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."). After considering the issues raised by the Appellant, I agree with the Hearing Officer that the Respondent is not subject to the provisions of Part 708.

The first three issues raised by the Appellant concern (1) whether revisions to Part 708 that took effect on April 14, 1999, when the Appellant's complaint was pending, apply to the present case; (2) whether the Respondent was subject to the regulations prior to the revisions; and (3) whether the Respondent is subject to the revised regulations. The Appellant contends that the revised Part 708 applies to the present case, and that in any event the Respondent is subject to the regulations both as they existed prior to the revisions and in their current form. The Respondent maintains that the prior version of Part 708 applies to this case, but no matter which version is applied, it is not a "contractor" subject to the regulations.

For ease of analysis, we first consider below whether the Respondent is a "contractor" as that term is defined under the regulations prior to their revision. We find that ERC is clearly not a "contractor" under the prior regulations. For this reason, and because the alleged reprisal in this case occurred prior to the revision of the regulations, we need not consider whether the Respondent is a "contractor" under the revised regulations. As we explain below, even if the Respondent met the definition of "contractor" under the revised regulations, to retroactively apply the regulations would clearly prejudice the Respondent, and therefore the revised regulations could not be applied to the present case.

A. Whether the Respondent is Subject to the Prior Version of Part 708

Before its April 14, 1999 revision, Part 708 was "applicable to employees (defined in § 708.4) of

contractors (defined in § 708.4) performing work on-site at DOE-owned or -leased facilities, . . .” 57 Fed. Reg. at 7541. Under those regulations, “contractor” was defined as

a seller of goods or services who is a party to a procurement contract as follows:

(1) A Management and Operating Contract;

(2) Other types of procurement contracts; but this part shall apply to such contracts only with respect to work performed on-site at a DOE-owned or -leased facility; or

(3) Subcontracts under paragraphs (1) or (2) of this definition; but this part shall apply to such subcontracts only with respect to work performed on-site at a DOE-owned or -leased facility.

Id.

The Respondent contends that its cooperative agreement with the DOE is not a “procurement contract” and therefore the firm is not a “contractor” as defined in the previous version of Part 708. Response at 12. On this point, we agree with the Respondent and the Hearing Officer, who found in her opinion “persuasive evidence” that procurement contracts and cooperative agreements “are distinct and different devices, and that these differences are not just technicalities.” Salvatore Gionfriddo, 27 DOE ¶ 87,528 at 89,147. The Hearing Officer pointed out that the DOE entered into its cooperative agreement with ERC under the authority of Federal Grant and Cooperative Agreement Act, the provisions of which specifically distinguish “cooperative agreements” from “procurement contracts.” Id; 31 U.S.C. § 6303 (1999) (purpose of procurement contracts); id. at § 6305 (purpose of cooperative agreements).

The Appellant does not contend that the cooperative agreement in question is a “procurement contract,” but argues that the “respondent’s emphasis on the term ‘procurement contracts’ is misplaced.” Appeal at 5. The Appellant cites provisions of the Federal Acquisition Regulations (FAR) that mandate the insertion into federal contracts of a clause requiring compliance with Part 708, noting that the FAR provisions refer to “contracts” rather than “procurement contracts.” Id. (citing 48 C.F.R. § 922.7100). What the Appellant fails to note however, is that the FAR specifically states that “[c]ontracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301 et seq.” 48 C.F.R. 2.101 (definition of contract).

The Appellant further argues,

To find that Mr. Gionfriddo cannot bring the instant complaint under the Contractor Employee Protection Program defeats the purpose of the program for Mr. Gionfriddo and DOE. It discourages the free flow of information and leaves an employee with no recourse from a contractor’s attempts to silence said employee through termination or other discipline. OHA, therefore, should exercise jurisdiction over this complaint.

Appeal at 5-6. While we share the Appellant’s concern for carrying out the important purpose of Part 708, the primary source to which we must turn to discern that purpose is the plain language of the regulations. As the Appellant admits, “it is whether the respondent is a contractor under 10 C.F.R. section 708.4" that determines jurisdiction under Part 708. Id. at 4. Simply put, if the Respondent does not meet the regulation’s definition of “contractor” by virtue of its cooperative agreement with DOE, then we cannot find that the DOE intended the scope of the Part 708 regulations to reach the Respondent’s actions.

As stated above, we are convinced by the same “persuasive evidence” cited by the Hearing Officer that the cooperative agreement between DOE and ERC is not a “procurement contract” as that term is used in the definition of “contractor” in Part 708. In addition, there is no contention that the relevant agreement is either a “Management and Operating Contract” or a “subcontract” under the contractor definition. Thus, because the Respondent is not a “contractor” under the version of Part 708 in effect prior to April 14, 1999, it is not subject to those regulations.(1)

The Appellant argues in the alternative that, if "OHA determines that cooperative agreements are not covered by the DOE Contractor Employee Protection Program, it must still find that it has jurisdiction over this complaint." Appeal at 16. According to the Appellant, the Motion to Dismiss

must be denied unless the Hearing Officer examines all of the agreements between DOE and respondent and determines that none of them allow for DOE to assert jurisdiction over this complaint. Additionally, even if the Hearing Officer rules that only the agreement(s) to which Mr. Gionfriddo's time was billed apply, respondent must prove that Mr. Gionfriddo only worked on the cooperative agreement in question.

This argument ignores section 708.9(d) of the regulations, which states that the "complainant shall have the burden of establishing by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5," which section describes the protected activities in response to which a "DOE contractor covered by this part" may not engage in retaliation. In other words, the complainant has the burden of establishing that his activities were protected under section 708.5, and the activities described in section 708.5 are protected only against retaliation by a "DOE contractor covered by this part." Thus, it is the complainant, not the respondent, who bears the burden of proving that the respondent is "covered by this part.(2) Here, the complainant offers no evidence to dispute the Hearing Officer's finding that "the Complainant's protected disclosure related solely to fuel cell matters covered by the Cooperative Agreement," Salvatore Gionfriddo, 27 DOE ¶ 87,528 at 89,148, and points to no other agreement between DOE and ERC through which the DOE could assert jurisdiction over the present complaint. Clearly, the complainant has not met his burden.

B. Whether the Revised Part 708 Regulations May be Applied to the Respondent

While under the prior version of Part 708 a "contractor" was defined as a party to "procurement contracts," the revised Part 708 regulations define "contractor" as a party to "contracts." 10 C.F.R. § 708.2 (1999). However, the history of the revision of Part 708 indicates that the drafters did not remove the word "procurement" to alter the meaning of "contractor." The revision of the definition of "contractor" first proposed in a January 1998 Notice of Proposed Rulemaking (NOPR) contained the substantive change found in the April 1999 revisions, "eliminating the requirement that . . . contractors perform[] their work on sites owned or leased by DOE," but still defined "contractor" as a party to "procurement contracts." 63 Fed. Reg. 374 (January 5, 1998). Thus, the change in the definition from the January 1998 proposed revision ("procurement contracts") to the April 1999 revision ("contracts") was largely stylistic, due to the fact that "[s]ince publishing the NOPR, DOE ha[d] rewritten Part 708 in 'plain language' style, consistent with the 'Memorandum on Plain Language in Government Writing' which the President issued on June 1, 1998." 64 Fed. Reg. 12862 (March 15, 1999). It is unlikely, therefore, that the Respondent would meet the definition of "contractor" under the revised regulations.

In any event, having found no basis for asserting jurisdiction over the present complaint under the prior version of Part 708, we need not decide the issue of whether the Respondent meets the definition of "contractor" under the revised regulations. The current regulations do state that the "procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part," 10 C.F.R. § 708.8, and there is no dispute that Mr. Gionfriddo's complaint was pending on April 14, 1999, when the revisions took effect. However, as the preamble to the revisions explains,

It is well established in the law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. DOE will apply the revised procedures to pending cases consistent with the case law.

64 Fed. Reg. 12862, 12865 (citing Landgraf v. USI Film Products, 511 U.S. 244, 275 (1994); Lindh v. Murphy, 117 S. Ct. 2059, 2063-64 (1997); Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 810, 817 n.17 (D.C. Cir. 1982) (citing Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966))).

Thus, the intent of the drafters of the Part 708 revisions is quite clear that the revised regulations apply to

pending cases only "as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party." Because we find above that ERC is not a "contractor" under the prior version of Part 708, and thus was not subject to those regulations, the revised Part 708 cannot retroactively bring within its scope personnel actions taken by ERC prior to those revisions. By subjecting it to a regulatory regime to which it was not previously subject, such a retroactive application would clearly prejudice ERC, contrary to the clear intent of the revisions to the regulations.

For the reasons set forth above, we will deny the Appeal filed by Mr. Gionfriddo and uphold the decision of the Hearing Officer.

It Is Therefore Ordered That:

(1) The Appeal filed by Salvatore Gionfriddo on October 13, 1999, of the Initial Agency Decision issued on September 27, 1999 (Case No. VBH-0007), is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Salvatore Gionfriddo on December 28, 1998, under the Contractor Employee Protection Program, 10 C.F.R. Part 708, is dismissed.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 15, 1999

(1)The Appellant's attempt to find alternative bases for jurisdiction in the regulations is equally unavailing. The Appellant references 10 C.F.R. § 708.2(a), which limits the scope of Part 708 to cases where the "underlying procurement contract" contains one of two clauses that require contractor compliance with Part 708, Appeal at 6-9, and also cites portions of sections 708.2(b) and 708.4 stating that the regulations apply to "contracts" or "contractors" only with respect to work performed "on-site at a DOE-owned or -leased" facility. The Appellant asserts that any of these provisions provide a separate basis for jurisdiction. Appeal at 10-12, 13-16. Thus, according to the Appellant, the Respondent may be subject to Part 708 either by virtue of section 708.2(a) (because of certain clauses in the cooperative agreement) or alternatively via the cited language in sections 708.2(b) or 708.4 (because the respondent may "perform work on behalf of DOE, directly related to activities at a DOE-owned or -leased site"). We do not agree. First, the sections cited by the Appellant each refer either to "contractors (defined in § 708.4)" or "procurement contracts," and we have already found that the cooperative agreement in question is not a "procurement contract" and that the Respondent does not meet the definition of a "contractor" under section 708.4. Second, the language the Appellant refers to clearly is not intended to provide an alternative method of attaching jurisdiction to parties that do not otherwise meet the regulations' definition of "contractor." Rather, the clear intent of these provisions is to provide additional criteria that must be met before a contractor, as defined in section 708.4, is subject to Part 708.

(2)" To place the burden of proof regarding questions of jurisdiction on the complainant is consistent with the principles applied in the federal courts. C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §§ 1350, 1351 (2d ed. 1990 & Supp. 1999) (once a defense of lack of personal or subject matter jurisdiction has been raised, the party asserting jurisdiction bears the burden of proving that jurisdiction exists).

Case No. VBA-0010

March 9, 2001

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jagdish C. Laul

Date of Filing: September 12, 2000

Case Number: VBA-0010

This Decision considers an Appeal filed by Excalibur Associates, Inc. (Excalibur) of an Initial Agency Decision issued on September 1, 2000, on a complaint filed by Jagdish C. Laul (Laul or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Laul seeks compensation for his dismissal by his former employer, Excalibur, allegedly in retaliation for his participation in an activity protected under Part 708. In the Initial Agency Decision, the Hearing Officer determined that the complainant had carried his burden to show that he had engaged in a protected activity and that it was a contributing factor in Excalibur's action in dismissing him. The Hearing Officer further determined that Excalibur had failed to carry its burden to show that it would have taken the same action in the absence of Laul's protected activity. Accordingly, the Hearing Officer directed remedial action from Excalibur in compensation for Laul's claim. As set forth in this Decision, I have determined that Excalibur's Appeal of the Initial Agency Decision must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

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

As initially formulated, the program regulations, codified at 10 C.F.R. Part 708, generally prescribed independent fact-finding by the DOE Office of Inspector General, followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint. Thereafter, the complainant could request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer rendered an Initial Agency Decision. However, on March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised regulations, OHA conducts the investigation of the complaint, if one is requested by the complainant. 10 C.F.R. § 708.22.

Similar to the prior regulations, the Director of OHA then appoints a Hearing Officer who conducts a hearing on the record and issues an Initial Agency Decision. 10 C.F.R. §§ 708.28, 708.30. Parties may seek review of an Initial Agency Decision by the filing of an appeal with the Director of OHA, in accordance with section 708.32.

B. Factual Background

The complainant's former employer, Excalibur, is a subcontractor of Kaiser Hill Company (Kaiser) which is the managing and operating contractor of DOE's Rocky Flats Field Office (Rocky Flats). Laul was hired by Excalibur in November 1997. Laul is an environmental engineer who holds a doctorate in nuclear chemistry, and was given a position as a "Principal Scientist." During the relevant time period, Excalibur's senior management was comprised of Charlie Burns, Chief Executive Officer (CEO), and Wayne Spiegel, Chief Operating Officer (COO). The third member of Excalibur's management team was David Richards, who was employed by Excalibur between October 1997 and May 1999.

Excalibur's primary contract with Kaiser required that Excalibur prepare "Emergency Preparedness Hazards Assessments" (EPHA) and "Emergency Assessment Resource Manuals" (EARM) for most of the sites at the Rocky Flats facility. A building or a work area is considered a site. The EPHA described in detail the risks associated with the release of each hazardous material located within a site. After the EPHA for a given site was prepared by Excalibur and approved by Kaiser, Excalibur prepared the EARM for that site. The EARM provided operational guidance on the appropriate actions to take in the event of the release of each hazardous material located within a site. Mark Spears, Manager of the Hazardous Assessment Committee (HAC), and Wilbert Zurliene, alternate HAC Manager, were the two Kaiser employees with primary responsible for substantively reviewing the EPHAs and EARMs written by the Excalibur employees.

Upon assuming the Principal Scientist position with Excalibur, the complainant was assigned to work primarily on drafting and revising EARMs. Laul initially acted as team leader and reported directly to the Kaiser HAC Managers, Spears and Zurliene. However, this working arrangement changed following a meeting in January 1998, when Laul presented Spears and Zurliene with an initial set of draft EARMs. Spears and Zurliene reported to Excalibur's senior management (Spears, COO) that they were dissatisfied with the quality of work presented by the complainant. Upon receiving this negative feedback, Burns (Excalibur CEO) directed Richards to take the lead in dealing with Kaiser in place of Laul. Thus, in February 1998, Richards became Laul's direct supervisor. The complainant was no longer permitted to sign the documents he prepared, and his interactions with the HAC Managers were substantially limited.

In June 1998, Excalibur entered into a subcontract with Global Business Associates (GBA), and thereby acquired one GBA employee, Ron Beaulieu. Under this contract, GBA was given the responsibility for preparing and maintaining certain EPHAs and EARMs. This contract and the extension of the contract into fiscal 1999 had the effect of reducing the work on EARMs available for employees of Excalibur. Also in June 1998, Excalibur's senior management's performed a rating of each of its twelve analytical employees. In these written evaluations, the complainant was rated the lowest of the twelve Excalibur employees.

The complainant was discharged by Excalibur on October 21, 1998. The October 21, 1998, out processing form provided to the complainant indicates he was discharged because there was "insufficient scope of work" to justify retaining his services.

II. Complaint Proceeding

On December 18, 1998, the complainant filed this complaint with the DOE Office of Inspections of the Office of the Inspector General (IG), claiming that his October 21, 1998 dismissal was a retaliatory act for his participation in a prior Part 708 proceeding. Laul asserts in his complaint that in June 1996, he filed a

whistleblower complaint against Kaiser and his direct employer Tenera, a subcontractor of Kaiser. The final agency decision on that complaint was issued on August 19, 1998. The complainant's believes that Excalibur's decision to terminate him was influenced by Kaiser management officials having knowledge of his prior Part 708 proceeding.

On April 16, 1999, the IG transferred a number of pending complaints, including the subject complaint, to OHA. On April 26, 1999, the OHA Director appointed an investigator to examine and focus the issues raised in the complaint. 10 C.F.R. § 708.22. The investigator conducted an investigation, and issued a Report of Investigation on December 3, 1999. 10 C.F.R. § 708.23. On that same day, the OHA Director appointed a Hearing Officer. On May 10 and May 11, 2000, the Hearing Officer convened a hearing on the Laul complaint in Rocky Flats. 10 C.F.R. §§ 708.25, 708.28.

A. Legal Standards Governing This Case

(1) The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). *See also Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*).

(2) The Contractor's Burden

If the complainant meets his burden, the regulations require Excalibur to prove by "clear and convincing" evidence that it would have terminated the complainant if he had not engaged in protected conduct. 10 C.F.R. § 708.29. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F. Supp. at 1204 n.3. In evaluating whether a contractor has met its burden, the Hearing Officer considers the strength of the contractor's evidence in support of its action and any evidence that the contractor takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

B. The Initial Agency Decision

On September 1, 2000, the Hearing Officer issued an Initial Agency Decision finding in favor of the complainant. *Jagdish C. Laul*, 28 DOE ¶ 87,006 (2000) (*IAD*). There is no dispute that prior to the complainant's dismissal he participated in "an administrative proceeding conducted under part 708." 10 C.F.R. § 708.29(b). That administrative proceeding was initiated in June of 1996 when the complainant filed a whistleblower complaint against Kaiser and his direct employer Tenera, a subcontractor of Kaiser. The final agency decision on that complaint was issued on August 19, 1998. The Hearing Officer therefore turned to the issue of whether Laul's protected activity was a contributing factor to his October 21, 1998 dismissal. For the reasons summarized below, the Hearing Officer concluded that Laul had carried his burden in this regard.

The Hearing Officer initially found that three adverse personnel actions preceded the complainant's dismissal and contributed to the Excalibur's decision to dismiss him. *IAD*, 28 DOE at 89,049. The first personnel action occurred in February 1998 when Burns reduced Laul's authority and directed Richards to take the lead in dealing with the HAC Managers. The second personnel action was Excalibur's decision to enter into a subcontract with GBA in June 1998 that had the effect of reducing the work on EARMs available for Excalibur employees. The third personnel action was Excalibur's senior management's

written rating of the complainant in June 1998, under which the complainant was rated the lowest of the twelve Excalibur employees. Of these three actions, the Hearing Officer found that the written rating was the most important factor in Excalibur's selection of Laul for dismissal. *Id*.

The Hearing Officer ruled as a legal matter that "a complainant can show that protected conduct was a contributing factor by showing that the official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *IAD* at 89,050, *citing* *Barbara Nabb*, 27 DOE ¶ 87,519 (1999). The Hearing Officer determined that there was the requisite temporal nexus since each of the three Excalibur personnel decisions leading to Laul's dismissal occurred during the pendency of his protected participation in the Part 708 proceeding. In addition, the Hearing Officer found that there was a close time nexus between the protected conduct, which concluded in August 1998, and his October 21, 1998 dismissal. *IAD* at 89,050.

The Hearing Officer's finding of constructive knowledge, however, requires greater analysis. In this regard, the Hearing Officer found that although Excalibur had no direct knowledge of the protected conduct, constructive knowledge was properly imputed to Excalibur's management under the circumstances of this case. In reaching this conclusion, the Hearing Officer held that "[u]nder Part 708 case law, a complainant can establish constructive knowledge by showing that the person taking the alleged retaliatory act was influenced by the negative opinions of those with knowledge of the protected conduct." *IAD* at 89,050, *citing* *Am-Pro Protective Services, Inc.*, 26 DOE ¶ 87,511 (1996) *(Am-Pro)*; *Morris J. Osborne*, 27 DOE ¶ 87,542 (1999); *Jimmie L. Russell*, 28 DOE ¶ 87,002 (2000). As described below, the Hearing Officer found in this case that there are two communication linkages which demonstrate that negative information was passed from those with knowledge of the protected disclosure to Excalibur's management.

The Hearing Officer found that the first such communication linkage occurred between Kaiser employees involved in that protected proceeding and the Kaiser HAC managers. The basis for finding a passage of negative information is as follows:

> In this case at least three Kaiser officials were directly aware of the complainant's participation in the protected proceeding. They are R. E. Kell, the deputy manager of the Kaiser Safety Engineering and Technical Service Office (SETS office), Robert Allen, Manager, Kaiser Human Resources, and Dana Dorr, Kaiser Work Force Restructuring Manager (hereinafter referred to collectively as the "directly involved Kaiser employees"). Mr. Kell signed the April 1996 memorandum that directed Tenera, the complainant's employer, to dismiss the complainant. Excalibur Exhibit #17. That dismissal was the adverse personnel action that led to the prior whistleblower proceeding. Mr. Allen and Mr. Dorr worked for Kaiser on investigating and evaluating the prior whistleblower complainant.
>
> The evidence is clear that other Kaiser employees knew of the protected conduct and made negative comments about the complainant. The record indicates that two senior Kaiser/Tenera employees, Mr. Maini, a Tenera employee who headed the Kaiser SETS Office, and Ms. Bateman, made comments that the complainant was a whistleblower and should not be rehired during 1996. In addition the record indicates that Mr. Tony Buhl, Vice President Environment Safety and Health and Assurance, made comments that he would not hire the complainant during 1998.
>
> It is clear that HAC manager Spears worked with various Kaiser employees who had knowledge of the complainant's participation in the protected proceeding. On the organization chart for the SETS Office dated March 1, 1996, Mr. Spears reported directly to Mr. Maini and his deputy Mr. Kell. As mentioned above, Mr. Kell was directly involved in the prior proceeding and Mr. Maini, his supervisor, was found by the Deputy Inspector General to have made negative comments about hiring the complainant. Ms. Bateman is also listed on that

> organization chart. As also mentioned above, she was also found by the Deputy Inspector General to have made comments aimed at assuring the complainant was not hired. Including Mr. Spears, there are six people named on the March 1996 organization chart of the SETS Office. Three of the other five people on the chart were directly involved in the prior protected proceeding. In such an office set up I believe that while Mr. Spears may not have been aware that the complainant was a whistleblower, Mr. Spears would have been aware of the problems being caused by the complainant and the negative feeling of his peers and supervisors toward the complainant.

IAD at 89,051-52 (footnotes omitted). The Hearing Officer further found the Kaiser HAC Managers' "alacrity" in negatively evaluating the complainant to Excalibur management in January 1998, to be additional evidence that they had a preconceived negative bias toward the complainant. The Hearing Officer determined that the HAC Managers did not have a reasonable basis for concluding that Laul's work was not technically competent, and that their testimony concerning this matter was "weak and evasive." *Id.* at 89,052. On the basis of this evidence, the Hearing Officer concluded that "it is more likely than not that the complainant's participation in a prior Part 708 proceeding led various Kaiser employees to make negative comments about the complainant that predisposed the HAC managers to negatively evaluate the complainant to Excalibur." *Id.* at 89,051.

The second communication linkage noted by the Hearing Officer is between the Kaiser HAC managers and Excalibur's management. The record shows that beginning in January 1998, the Kaiser HAC Managers provided negative evaluations of the documents prepared by Laul and that shortly thereafter, Excalibur's management functionally replaced him with Richards. The Hearing Officer concluded:

> Therefore, even though I believe that Excalibur employees were not aware of the complainant's participation in the prior protection proceeding, I find that Excalibur's senior manager received and considered the negative opinions of the HAC managers. These findings lead to the conclusion that Excalibur had constructive knowledge of the complainant's participation in the protected proceeding when it made various personnel decisions regarding the individual. Once there is a reasonable inference that the complainant's participation in the protected proceeding had an effect on the individuals making personnel decisions at Excalibur the complainant has met his burden of showing that his participation in the protected proceeding was a contributing factor to the adverse personnel decisions.

IAD at 89,053-54. The burden therefore shifted to Excalibur to show by clear and convincing evidence that the complainant would have been dismissed absent his participation in the prior Part 708 proceeding. More specifically, the Hearing Officer stated that Excalibur must demonstrate by clear and convincing evidence that it would have taken the personnel actions even if it had not received the HAC Managers' negative evaluation of the complainant's work. *IAD* at 89,054. The Hearing Officer then concluded that Excalibur failed to carry this burden.

The Hearing Officer initially noted that Excalibur had presented no documentation or analysis in the record to show that the complainant's work was not technically competent. While Excalibur attempted to show that there were reasonable business decisions for the personnel actions leading to Laul's dismissal, the Hearing Officer found that Excalibur's senior management's opinions of the complainant were clearly affected in a number of ways by the evaluation of the HAC Managers, and he cited examples to this effect. *See IAD* at 89,053. The Hearing Officer concluded: "Therefore, in order to prevail Excalibur is required to demonstrate that, in the absence of knowledge of the HAC managers' opinions, it would have reached the decision to hire a subcontractor, rate the complainant poorly and then dismiss him. I do not believe the testimony provided by Excalibur comes close to making these showings under the clear and convincing standard." *Id.*

Accordingly, the Hearing Officer concluded that the complainant had participated in an administrative proceeding conducted under Part 708, that Excalibur's dismissal of the complainant was an adverse

personnel action that constituted a retaliatory act under Part 708, and that the complainant is therefore entitled to remedial action from Excalibur. In accordance with the complainant's request for relief, the Hearing Officer awarded him back pay and litigation expenses. The *IAD* specifies that back pay be calculated from October 21, 1998 until the day the complainant accepted a position at Los Alamos National Laboratory, October 12, 1999, at the hourly rate the complainant was paid as a consultant, $39.60. *IAD* at 89,055.

C. Excalibur's Appeal

In its Appeal(1), Excalibur raises a number of arguments in support of its claim that the *IAD* is incorrect as a matter of fact and law. Excalibur's initial challenges are procedural in nature, relating to evidentiary determinations made by the Hearing Officer in the context of the hearing. In this regard, Excalibur claims that the Hearing Officer committed reversible error by: (1) failing to exclude evidence that was irrelevant, Appeal at 3-5; (2) admitting hearsay testimony, Appeal at 5-7; (3) permitting testimony from witnesses that lacked proper foundation, Appeal at 7; and (4) permitting the improper use of deposition testimonial evidence, Appeal at 8. Excalibur argues that "[e]ach of the erroneous rulings regarding the evidence that was admitted at the hearing substantially influenced the decision that was made and must cause the decision to be in grave doubt." Appeal at 10.

Next, Excalibur argues that critical factual findings made by the Hearing Officer are clearly erroneous and mandate reversal of the *IAD*. More specifically, Excalibur challenges the Hearing Officer's findings that: (1) there is a temporal nexus between Laul's protected activity and any adverse personnel action taken against him by Excalibur, Appeal at 11; (2) the HAC Managers, Spears and Zurliene, had constructive knowledge of the complainant's protected activity and the existence of a general animus against the complainant, Appeal at 12-15; (3) Excalibur's management had constructive knowledge of the complainant's protected activity, Appeal at 16; and (4) Excalibur's decision to lay off the complainant was unduly influenced by the negative feedback received from the HAC Managers, Appeal at 16-19. According to Excalibur, "[t]he Complainant failed to prove by a preponderance of the evidence that his protected activity was a contributing factor to the adverse decision [and Excalibur] met its burden by proving by clear and convincing evidence that its decision would stand regardless of Complainant's protected activity." Appeal at 19.

Finally, Excalibur asserts that legal conclusions set forth in the *IAD* are inconsistent with the law and must be reversed. In this regard, Excalibur argues that: (1) the complainant's dismissal is the only retaliation alleged in his complaint, and the Hearing Officer's consideration of other adverse personnel actions (*e.g.*, the low performance ranking) is beyond the scope of his authority, Appeal at 19-20; (2) the Hearing Officer misapplied applicable case law in ruling that constructive knowledge may be demonstrated where the individuals making the personnel decision were influenced by the opinions of those persons with knowledge of the protected conduct, Appeal at 20-21; and (3) the complainant failed to carry his "contributing factor" burden as a matter of law since he did not show that Excalibur had actual or constructive knowledge of his protected activity, Appeal at 21-23.

On December 1, 2000, Laul filed a Response to Excalibur's Appeal (Response) asserting that the *IAD* is legally and factually correct, and that Excalibur's Appeal fails to present any valid reason for setting aside the decision reached in the *IAD*. Excalibur then filed a Reply to Laul's Response on January 9, 2001. The record of this proceeding was closed on January 11, 2001. Excalibur's Appeal is considered below.

III. Analysis

It is well settled that the factual findings of the Hearing Officer are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *Eugene J. Dreger*, 27 DOE ¶ 87,564 at 89,351-52 (2000), *citing Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,501, 89,001 (1995); *O'Laughlin v. Boeing Petroleum Services, Inc.*, 24 DOE ¶

87,513, 89,064 (1995). *Compare Pullman Standard v. Swint*, 456 U.S. 273 (1982), with *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting Federal Rule of Civil Procedure 52(a)). On the other hand, conclusions of law set forth in the *IAD* are subject to *de novo* review. *Kaiser-Hill Company, L.L.C.*, 27 DOE ¶ 87,555 at 89,299 (2000), *citing Salvatore Gian friddo*, 27 DOE ¶ 87,544 at 89,221 (1991); *see Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ?abuse of discretion')."). After considering the issues raised by Excalibur, I have concluded that the determination reached in the *IAD* is correct and must be sustained, and that the complainant is therefore entitled to relief under Part 708.

Excalibur initially raises a number of procedural issues in its Appeal, claiming that substantial evidence was erroneously placed into the record and resulted in undue bias on the part of the Hearing Officer. Below, however, I will first consider the substantive objections raised by Excalibur. For the stated reasons, I conclude that Excalibur has failed to show that the determination reached in the *IAD* is legally or factually incorrect. I will then turn to Excalibur's procedural claims of bias, which will then have been placed in their proper context.

A. Adverse Personnel Actions

Excalibur argues that the Hearing Officer acted beyond the scope of his legal authority in considering adverse personnel actions affecting the complainant, other than his dismissal in October 1998. As explained above, the Hearing Officer found that three adverse actions contributed to the Excalibur's decision to dismiss Laul: (1) the reduction of Laul's authority in February 1998, (2) the decision to enter into a subcontract with GBA in June 1998, and (3) the June 1998 rating of the complainant as the lowest of the twelve Excalibur employees. *IAD*, 28 DOE at 89,049. Excalibur asserts that section 708.14(a) requires that complaint be filed "by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation," and section 708.12(a) requires that the employee specifically identify the alleged retaliation. 10 C.F.R. §§ 708.12(a), 708.14(a). Excalibur argues that since Laul identified only his dismissal as a retaliation in his complaint, the Hearing Officer was legally barred from considering the three adverse personnel actions leading to the complainant's dismissal. I disagree.

Sections 708.12 and 708.14 prescribe the information that must be contained in a valid Part 708 complaint and the time limitation for filing such complaint. These provisions having been satisfied, however,(2) they do not then limit the authority of the Hearing Officer to examine relevant actions taken by contractor leading to an ultimate act of alleged retaliation against the complainant. Such connected personnel actions may serve to establish a pattern of discriminatory acts or a logic to the contractor's actions not evident from examination of each individual act itself, thus adding evidentiary support to the complainant's claim. *See Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993); *Barbara McNabb*, 27 DOE ¶ 87,519 at 89,119-21 (1999). Of course, those related actions could also tend to contradict the complainant's arguments, or support claims of the contractor. It would be unwise to prohibit the Hearing Officer from considering this type of evidence as long as it is potentially relevant. My review of the *IAD* establishes that the Hearing Officer appropriately considered the related personnel actions taken by Excalibur and found them to be material factors leading to the complainant's dismissal. Indeed, it is obvious to me that the Hearing Officer's deliberation of this case would have been incomplete absent a full examination of the circumstances leading to Laul's dismissal.

B. Contributing Factor

(1) Legal Contentions

Excalibur argues that the Hearing Officer misapplied pertinent case law in finding that the complainant carried his burden to show that his protected activity was a "contributing factor" to Excalibur's decision to

dismiss him. In the *IAD*, the Hearing Officer held that "a complainant can show that protected conduct was a contributing factor by showing that the official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *IAD* at 89,050, *citing Barbara Nabb*, 27 DOE ¶ 87,519 (1999). The Hearing Officer further held that "[u]nder Part 708 case law, a complainant can establish constructive knowledge by showing that the person taking the alleged retaliatory act was influenced by the negative opinions of those with knowledge of the protected conduct." *IAD* at 89,050, *citing Am-Pro Protective Services, Inc.*, 26 DOE ¶ 87,511 (1996) *(Am-Pro)*; *Morris J. Osborne*, 27 DOE ¶ 87,542 (1999); *Jimmie L. Russell*, 28 DOE ¶ 87,002 (2000).

Excalibur maintains that the Hearing Officer misapplied this legal standard in finding that constructive knowledge of Laul's protected activity can be attached to Excalibur based upon a showing of constructive knowledge on the part of the HAC Managers. Relying on the law of agency, Excalibur asserts that "an agent of [Excalibur] must have actual knowledge of the protected disclosures for the knowledge to be imputed on one of the officials who took the action against Complainant." Appeal at 21, *citing Torres v. Pisano*, 116 F.2d 625 (2d Cir. 1997); RESTATEMENT (SECOND) OF AGENCY §§ 272, 275. Excalibur claims that "[c]onstructive knowledge cannot be imputed to management by non-employees," Appeal at 21, and that the cases relied upon by the Hearing Officer do not support the legal conclusion reached in the *IAD*. Excalibur therefore argues that since the complainant has failed to show that Excalibur had actual or constructive knowledge as a matter of law, he has failed to establish that his protected activity was a "contributing factor" to his dismissal. Appeal at 22-23. I conclude, however, that the Hearing Officer's holding is amply supported by legal precedent.(3)

Initially, it is well settled that a whistleblower complainant need not prove direct or actual knowledge of a protected activity by the final decision-maker in order to prevail on a claim of prohibited retaliation, where the decision-maker was under the control or influence of persons having such knowledge. *See Frazier v. Merit Systems Protection Board*, 672 F.2d 150 (D.C. Cir. 1982). This principle has been affirmed in whistleblower decisions of the U.S. Department of Labor. *See, e.g., Dean v. Houston Lighting & Power Co.*, 93-ERA-7 (ALJ Apr. 6, 1995)*; Frady v. Tennessee Valley Authority*, 92-ERA-19 (Sec'y Oct. 23, 1995); *Pillow v. Bechtel Construction*, 87-ERA-35 (Sec'y July 19, 1993). Excalibur does not disagree with this principle in general, but argues as a matter of law that constructive knowledge cannot be imputed to Excalibur management under the circumstances of this case since the HAC Managers were neither agents nor employees of Excalibur. I am not at all persuaded by this legal contention.

I find the determination to impute knowledge to Excalibur under the circumstances of this case was an informed and reasonable one which takes account of the way contractors and subcontractors typically interact at DOE facilities. I also find that it is wholly consistent with our ruling in *Jimmie L. Russell*, *supra*, one of several cases cited by the Hearing Officer in the *IAD*. The complainant in that case, a DOE subcontractor employee, made protected disclosures to the prime contractor and to DOE. The contractor (UC) terminated the complainant's work assignment in retaliation for the protected disclosures, and the complainant was then dismissed by his subcontractor employer as a consequence of the contractor's action. The subcontractor (Comforce) argued that it bore no responsibility for the complainant's dismissal since it had no knowledge of the complainant's protected disclosures. In rejecting this claim, the Hearing Officer stated:

> Although I find that Comforce had no role in the UC's decision to terminate Mr. Russell's work assignment at LANL, Comforce admits that it terminated its employment contract with Mr. Russell because the UC ended his work assignment with LANL. As discussed above, the UC's decision to end his work assignment constituted a retaliation against Mr. Russell for activity that is protected under Part 708. Comforce therefore terminated Mr. Russell's employment as a result of Mr. Russell's protected activity, and is jointly and severally liable with the UC for the damages arising from this termination.
>
> As noted above, Part 708 applies to employees of DOE contractors and the term "contractor"

> is specifically defined to include "a subcontract under a contract . . . with respect to work related to activities at DOE-owned or -leased facilities." 10 C.F.R. §§708.1- 2. Mr. Russell was employed by a UC subcontractor, Comforce, to perform a work assignment at LANL. Both the UC and Comforce took actions which directly and negatively impacted the "terms", "conditions" and "privileges" of Mr. Russell's employment at LANL. Accordingly, both the UC and Comforce bear liability to remedy these "retaliations" under 10 C.F.R. §708.2. Although Comforce has shown that it acted against Mr. Russell solely as a result of actions taken by the UC, that showing does not relieve Comforce from liability in this matter. Part 708 contains no provision exempting a subcontractor from liability under such circumstances. To create such an exemption would vitiate the protections for whistleblowers that Part 708 was intended to provide. Accordingly, I find that Comforce is jointly and severally liable, along with the UC, for the damages arising from Comforce's termination of Mr. Russell's employment on March 5, 1999.

28 DOE at 89,026. The Hearing Officer's determination takes account of the special nature of contractor and subcontractor relationships at DOE facilities. Since the overriding objective of the subcontractor is to satisfy the contractor, which has employed the subcontractor and to which the subcontractor is often legally obligated, the contractor is in a position to exert substantial influence in many respects including by affecting the subcontractor's personnel decisions. Thus, the policy objectives underlying Part 708 mandate that the important legal distinctions between DOE contractor and subcontractor not be viewed as a bar to liability where the subcontractor, acting under the influence of the contractor, carries out a retaliation against a whistleblower complainant. Under these circumstances, the contractor's knowledge of a protected activity may be legally imputed to the subcontractor and constitute constructive knowledge(4) of the protected activity.

(2) Factual Contentions

Excalibur also contests the Hearing Officer's factual findings that there was a temporal nexus between Laul's protected activity and his dismissal, and that the HAC Managers had constructive knowledge of Laul's protected activity.(5) According to Excalibur, these findings are "clearly erroneous" and cannot support the complainant's burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in his dismissal. Appeal at 11-15. Again, I must disagree.

Excalibur claims that there is no temporal nexus in this case because Laul filed his first Part 708 complaint against his former employer (Tenera) based upon alleged protected disclosures made in 1995, three years before his dismissal by Excalibur, and there is no continuity of ownership between Tenera and Excalibur. I find Excalibur's temporal analysis untenable. While Laul filed his first Part 708 complaint in June 1996, no final agency decision was issued until August 1998. It was on this basis that the Hearing Officer found a temporal nexus in this case, finding that the three personnel decisions that led to Laul's dismissal occurred during the pendency of the Tenera case and "[t]here is also a close time nexus between the protected conduct, which concluded during August 1998, and his October 21, 1998 dismissal." *IAD* at 89,050. I therefore do not agree that the finding of a temporal nexus is clearly erroneous.

I also reject as equally unfounded Excalibur's charge that the Hearing Officer clearly erred in finding that the HAC Managers had knowledge of the complainant's protected activity. Although the HAC Managers denied such knowledge, this is by no means conclusive evidence on this point. In *Dean v. Houston Lighting & Power Co.*, 93-ERA-7 (ALJ Apr. 6, 1995), the DOL considered a similar issue in a case where the contractor (HL&P) denied knowledge of the complainants' (Dean and Lamb) protected disclosures to the Nuclear Regulatory Commission (NRC). The Administrative Law Judge stated, in pertinent part:

> HL&P has categorically denied knowledge of Dean and Lamb's protected activities by Balcom or anyone else responsible for Dean's and Lamb's terminations. **In such circumstances, proof of such knowledge is necessarily established by circumstantial evidence**. . . . I find that Complainants have proved that HL&P had sufficient knowledge of their protected activities to

> act upon that knowledge, and did so, adversely to Complainants. In the absence of proof of direct knowledge obtained through statements or admissions by the Complainants, HL&P managers and decision makers, or other persons with personal knowledge, knowledge imputable to HL&P may be established by proof that its responsible managers heard rumors, which generated suspicions, or made or acted on assumptions that Complainants had spoken to the NRC about their safety concerns. Proof is sufficient if Respondent's managers either were aware, or strongly suspected, that Complainant had complained to the NRC. . . . In this case the HL&P witnesses denied knowledge of Lamb's and Dean's protected activities, at least to the extent that they involved contacts with the NRC. But it is evident that by "knowledge" they meant virtually absolute certainty, that is the level of certainty that would be established by actual observation, documentary confirmation, or direct disclosure by a reliable person. While none of them may have had that degree of certainty, and so could categorically deny such knowledge, the record establishes that they were amply aware of circumstances, through investigations, discussions, and other interactions, as well as close familiarity with personalities in a small universe, which would have supported strong and reasonable suspicions, or assumptions, which could have affected, and, I find, did affect their conduct, which I find was also tempered by the caution that attends the involvement of legal counsel.

Slip op. at 55-56 (emphasis supplied). In the *IAD*, the Hearing Officer performed exactly this kind of analysis of circumstantial evidence in finding knowledge on the part of the HAC Managers. As examined above, the Hearing Officer found on the basis of testimony and supporting evidence that: (1) at least three Kaiser officials were directly aware of the complainant's participation in the protected activity, (2) other Kaiser employees knew of the protected conduct and made negative comments about the complainant, and (3) it is clear that HAC Manager Spears worked with various Kaiser employees who had knowledge of the complainant's participation in the protected proceeding. *IAD* at 89,051-52. In the latter regard, the Hearing Officer found significant that a March 1996 organization chart showed that Spears worked in Kaiser's Safety Engineering and Technical Service Office (SETS Office) and reported directly to one of the Kaiser officials (Kell) who were directly aware of the complainant's participation in the protected proceeding. Indeed, the Hearing Officer found that of the five Kaiser employees working in the SETS Office, besides Spears, three were directly involved in Laul's protected proceeding. The Hearing Officer further found that the HAC Managers' alacrity in negatively evaluating the complainant in January 1998 under the foregoing circumstance was evidence of preconceived negative bias, and found the testimony of the HAC Managers on this point to be "weak and evasive.(6) On the basis of this substantial evidence, albeit circumstantial, I reject the claim that the Hearing Officer was clearly erroneous in concluding that the HAC Managers had knowledge(7) of Laul's protected activity.

I therefore conclude that Excalibur has failed to show in its Appeal that the *IAD* was either legally or factually incorrect in finding that the complainant carried his burden to show that his protected activity was a contributing factor to his dismissal by Excalibur in October 1998.

C. Contractor's Burden

Excalibur's remaining substantive contention is that the Hearing Officer committed clear error in finding that the firm failed to show by clear and convincing evidence that it would have taken the same personnel action regarding Laul in the absence of his protected activity. Excalibur argues that it presented "un-contradicted evidence" regarding its reasons to lay off the complainant. Appeal at 16. According to Excalibur, its decision to place Richards over the complainant was not an adverse action against Laul but was merely intended to relieve Burns of his duties in overseeing the day-to-day operations of the firm. *Id.* Excalibur further maintains that it fully explained its decision to outsource work to a subcontractor (GBA). *Id.* at 17-18. Excalibur concedes that the HAC Managers provided negative feedback regarding work products received in January 1998, but asserts that it was not specific to the complainant. Excalibur maintains that there is "nothing in the record" to support the finding by the Hearing Officer that Excalibur would have rated the complainant differently but for the input of the HAC Managers. *Id.* at 17. Excalibur similarly argues that the finding that it would have considered other options beside dismissing the

complainant absent such input "is unsupported by any evidence in the record." *Id.* at 18.

However, Excalibur has again missed the point. Once it has been ruled that the complainant successfully carried his burden, it is not then the burden of the complainant or the Hearing Officer to adduce evidence establishing the degree to which Excalibur management was negatively influenced by the HAC Managers(8); rather, it is Excalibur's burden to prove by clear and convincing evidence that it would have taken the same actions in the absence of such negative influence. In finding that Excalibur had failed to meet the clear and convincing standard, the Hearing Officer observed initially that Excalibur had not submitted any documents prepared by the complainant or "provide[d] any analysis to support the position that the complainant's work was not technically satisfactory." *IAD* at 89,054. Then, in considering the explanations for Excalibur's determination to retain GBA, the Hearing Officer found the testimony of Burns "illogical" and "unconvincing." *Id.* at 89,053-54. Finally, the Hearing Officer found that Excalibur had provided no plausible explanation for its determination to consider only Excalibur employees, and not subcontractors, when a work force reduction became necessary. *Id.* at 89,055. Based upon my review of this matter, I find that Excalibur has not shown even by a preponderance of the evidence in its present Appeal that the *IAD* is incorrect in finding that the mitigating explanations proffered by Excalibur failed to rise to the clear and convincing standard of proof.

D. Procedural Objections

I will now turn to the numerous procedural challenges raised by Excalibur that primarily relate to evidentiary determinations made by the Hearing Officer in the context of the hearing. Excalibur claims that the Hearing Officer committed reversible error by: (1) failing to exclude evidence that was irrelevant, Appeal at 3-5; (2) admitting hearsay testimony, Appeal at 5-7; (3) permitting testimony from witnesses that lacked proper foundation, Appeal at 7; and (4) permitting the improper use of deposition testimonial evidence, Appeal at 8. Excalibur acknowledges that in hearings conducted under Part 708, "[f]ormal rules of evidence do not apply, but OHA may use the Federal Rules of evidence as a guide," and broad discretion is conferred upon the Hearing Officer in the conduct of the hearing: "The Hearing Officer may rule on objections to the presentation of evidence; exclude evidence that is immaterial, irrelevant, or unduly repetitious; . . . determine the format of the hearing; . . . ask questions of witnesses; . . . and otherwise regulate the conduct of the hearing." 10 C.F.R. §§ 708.28(a)(4), 708.28(b)(4).

Notwithstanding, Excalibur argues that the cumulative erroneous rulings regarding the evidence admitted at the hearing "caused unfair prejudice against [Excalibur] by confusing the issues" and "substantially influenced the decision that was made and must cause the decision to be in grave doubt." Appeal at 3, 10. In its Reply, Excalibur makes a more serious charge that these rulings "prove that the Hearing Officer had a preconceived negative bias against Excalibur and manufactured a way to find in favor of Laul and against Excalibur." Reply at 2-3. I find these assertions without merit and unsupported by any fair review of the record of this case.

With the luxury of hindsight, it is apparent to me that the Hearing Officer admitted some testimony and evidence which ultimately proved to be irrelevant. However, I perceive no prejudice to Excalibur since such evidence was not relied upon and did not affect the determinations reached in the *IAD*. Nor do I perceive the "confusing of issues" reported by Excalibur. Instead, as discussed above in considering Excalibur's substantive objections, I find that the *IAD* is soundly based on applicable legal precedent, and the factual determinations reached by Hearing Officer were not clearly erroneous as claimed by Excalibur.

Next, Excalibur's claim of "negative bias" on the part of the Hearing Officer is a serious charge and I considered it carefully. Such charges are not sustainable on the basis of mere speculation but must be supported by clear evidence sufficient to overcome the presumption of regularity attached to administrative proceedings. I find no such clear evidence in this case. Rather, it appears that Excalibur's charges of bias simply reflect its displeasure that the Hearing Officer did not reach the determination that the firm seeks. Therefore, no further consideration of this charge is warranted.

IV. Conclusion

On the basis of the foregoing, I conclude that Excalibur has failed to show in its Appeal that the determination reached in the *IAD* is erroneous as a matter of fact or law. Accordingly, Excalibur's Appeal must be denied. The parties shall proceed with the remedial action specified in the *IAD*.

It Is Therefore Ordered That:

(1) The Appeal filed by Excalibur Associates, Inc., on September 12, 2000, of the Initial Agency Decision issued on September 1, 2000 (Case No. VBH-0010), is hereby denied.

(2) Within thirty (30) days of the date of this order, the complainant shall provide Excalibur with the information specified in Paragraphs (2) and (3) of the Initial Agency Decision. Excalibur shall then perform the remedial action specified in Paragraph (4) of the Initial Agency Decision.

(3) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals, within thirty (30) days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 9, 2001

(1)Excalibur initially filed a document entitled "Issues for Appeal" on September 27, 2000, in which the firm itemized 38 objections to determinations made by the Hearing Officer during the complaint proceeding. However, in each instance, Excalibur failed to provide any argument in support of its position. Accordingly, on October 12, 2000, Excalibur was directed to file an Amended Statement of Issues. Letter of October 12, 2000, from Fred L. Brown, Deputy Assistant Director, OHA, to David Zwisler, Esq., Counsel for Excalibur. The Amended Statement of Issues filed by Excalibur on November 2, 2000, shall be referred to as "the Appeal."

(2)Excalibur does not argue that the Laul complaint does not satisfy these procedural requirements. As noted in the background section, Laul filed the present complaint on December 18, 1998, within 90 days of his dismissal on October 21, 1998. The complaint clearly alleges that the dismissal was in retaliation for his participation in a prior proceeding under Part 708.

(3)In reaching this conclusion, I do not necessarily agree with the Hearing Officer's approach in applying the legal standard set forth in *Barbara Nabb, supra*. He held that a "contributing factor" could be established by showing 1) constructive knowledge by Excalibur and 2) temporal nexus. Standing alone, this formulation is unassailable. However, it could be misread if it is viewed as the ONLY way in which a complainant can establish that the protected "act" was a "contributing factor" to a retaliation. A Hearing Officer in Part 708 proceedings can find that the "contributing factor" test has been satisified on the basis that the evidence shows there is a "causal relationship" between the protected act or disclosure and the alleged act of retaliation. In this proceeding, the Hearing Officer found that in dismissing Laul, Excalibur management was negatively influenced by the HAC Managers who had knowledge of Laul's protected activity. The Hearing Officer might therefore have found on this basis alone that there was "sufficient evidence to permit a reasonable person to infer that the protected [activity] was a contributing factor to the determination." *Am-Pro Protective Services, Inc.*, 26 DOE at 89,065, *citing Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *see Frazier v. Merit Systems Protection Board*, 672 F.2d 150 (D.C. Cir. 1982). Notwithstanding, I find no reason to conclude that the Hearing Officer's analysis was incorrect as a matter

of law.

(4)I do not disagree with Excalibur's contention that the Hearing Officer's use of the term "constructive knowledge" with respect to Excalibur does not comport with the general usage of that term, involving instances where appropriate persons "knew or should have known" or "would have known by exercise of reasonable care." Appeal at 20, *citing* Black's Law Dictionary (6th Ed.). However, the term nevertheless seems apt. In the *IAD*, the Hearing Officer extended the term "constructive knowledge" in Part 708 proceedings to instances where, as here, Excalibur was negatively influenced by those having knowledge of protected conduct and thus was vicariously motivated by such knowledge in taking an adverse personnel action against the complainant, although actual knowledge of the particular conduct was not passed on. *Cf. Frazier v. Merit Systems Protection Board, supra.*

(5)Excalibur also argues that the Hearing Officer's "factual finding" of constructive knowledge by Excalibur is clearly erroneous since "there is no evidence of the transfer of the knowledge of the protected activity" from the HAC Managers to Excalibur. Appeal at 16. Here, Excalibur simply misses the point. The Hearing Officer's finding of constructive knowledge by Excalibur was not based upon the transfer of knowledge of the protected activity from the HAC Managers but on the finding that the Kaiser HAC Managers directly influenced the adverse personnel actions taken by Excalibur against Laul. Indeed, the Hearing Officer acknowledged in the *IAD* that "I believe that Excalibur employees were not aware of the complainant's participation in the prior protection proceeding." *IAD* at 89,053.

(6)"Excalibur challenges the Hearing Officer's assessment that the HAC Managers were not candid in their testimony. Appeal at 15, n. 4. However, the Hearing Officer is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony, *Altemose Construction Company v. NLRB*, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975), and I give substantial weight to credibility findings that "rest explicitly on an evaluation of the demeanor of the witnesses," *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983).

(7)I do find, however, that the Hearing Officer's characterization of the HAC Managers' knowledge as "constructive" to be inapt. While it is an inconsequential semantic distinction in this case, the Hearing Officer should have determined on the basis of the record in this case that there was sufficient circumstantial evidence of "actual" knowledge, based upon a finding that it is more likely than not that the HAC Managers knew of Laul's protected conduct. *See Dean v. Houston Lighting & Power Co., supra.*

(8)It is true that the Hearing Officer found that "[i]n this case, Excalibur's senior management's opinions of the complainant were clearly affected in a number of ways by the evaluation of the HAC Managers." *IAD* at 89,054. However, this finding was simply an outgrowth of his preceding determination that Laul had carried his burden to show that his participation in the protected activity was a contributing factor to the adverse personnel decisions. *IAD* at 89,053-54.

Case No. VBA-0011

July 28, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Names of Petitioner:Diane E. Meier

Date of Filing:January 11, 2000

Case Number: VBA-0011

On January 11, 2000, Diane E. Meier (Meier) filed a Notice of Appeal from an Initial Agency Decision by a Hearing Officer from the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The Decision denied the relief which Meier seeks in her complaint against Lawrence Livermore National Laboratory (LLNL) under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. Diane E. Meier, 27 DOE ¶ 87,545 (1999) (Meier). In her Appeal, Meier challenges several aspects of the Initial Agency Decision and requests that her complaint be granted. As set forth in this decision, I have determined that Meier's Appeal must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor- operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Contractors found to have discriminated against an employee for making such a disclosure, or for participating in a related proceeding, will be directed by DOE to provide relief to the complainant.

The regulations governing DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708 and became effective on April 2, 1992. They establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included independent fact-finding by the DOE Office of Inspector General (IG), followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint. Thereafter, the complainant could request a hearing before an OHA Hearing Officer, who would render an Initial Agency Decision, from which an appeal could be taken to the Secretary of Energy or his designee.

On March 15, 1999, DOE amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; see 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised regulations, review of an Initial Agency Decision, as requested by Meier, is performed by the Director of OHA. 10 C.F.R. § 708.32.

B. Factual Background(1)

Meier was employed by LLNL beginning in September 1992 at LLNL's Washington Operations Office (WASHOP) located in Germantown, Maryland. In March 1994, Meier changed jobs and accepted a position working under Thomas Crites (Crites), who in early 1995 became an Associate Program Leader (APL) for Environmental Safety and Health (ES&H). (2) When Meier came under Crites supervision, Crites' wife, Linda Rahm-Crites (Rahm-Crites), worked as an employee performing technical editing and writing for a LLNL subcontractor at WASHOP. In early 1996, under a reorganization, Crites assumed the position as WASHOP APL in charge of general office management.(3)

However, in the Fall of 1997, the relationship between Meier and Crites began to change, when both took on new work assignments as a result of impending budget restrictions imposed by DOE and consequential changes in WASHOP's project priorities. WASHOP managers anticipated that in fiscal year 1998 (beginning October 1997), DOE would significantly cut defense program projects, previously a leading source of WASHOP funding. It appeared, however, that there would be ample funding for an emerging project administered by WASHOP, the Highly Enriched Uranium (HEU) Transparency Program (HEU Project). (4) From January 1996 until September 1997, the WASHOP project manager for the HEU Project was Joe Glazer (Glazer).

In August 1997, Meier completed a project assignment that had previously accounted for a major portion of her time, and Glazer appointed Meier as Training Coordinator for monitor training under the HEU Project. Although Crites, as APL, agreed to the assignment of Meier as Training Coordinator, he expressed reservations since the complainant had no previous training experience. Crites also had reservations about the handling of the HEU Project in general, since during this time frame he had received complaints from the DOE sponsors about Glazer's performance in administering the program. On August 25, 1997, a meeting was held to discuss a proposed HEU Project training plan prepared by a member of Glazer's staff (not Meier). During this meeting, attended by Crites, Meier, Glazer and Rahm-Crites, Crites was caustically critical of the training plan and suggested that his wife, Rahm-Crites, should perhaps rewrite it. Meier states that following the meeting, she telephoned Loquist to complain about Crites' behavior at the meeting as well as his attempt to insert his wife in the HEU Project. Meier asserts that she also expressed these concerns to Crites.

Continuing to be concerned with Glazer's performance, however, Crites decided in late September 1997 that he would assume the position as Program Manager of the HEU Project in place of Glazer, and relinquish his position as APL. Crites assigned his wife, Rahm-Crites, to be the editor of the quarterly report. Subsequently, Meier stated her concerns to Crites in a voice mail message that having Rahm-Crites working directly for him created an improper appearance to DOE sponsors and might cause problems for WASHOP. However, almost immediately after making the appointment, Crites recognized that due to LLNL policy, he could not have his wife working directly under him and consequently removed Rahm-Crites from the HEU Project.

Beginning in October 1997, Pete Prassinos (Prassinos) assumed the position of Acting APL, replacing Crites as manager and director of WASHOP. Following the removal of Rahm-Crites from the HEU Project, Prassinos became increasingly concerned that there was insufficient work to justify retaining Rahm-Crites as an employee in view of the diminishing work and budget available for other WASHOP projects. Prassinos discussed this matter with Meier, who continued to serve as Deputy APL, besides holding the position of HEU Project training coordinator. Prassinos also discussed the matter with WASHOP officials, and LLNL management officials at Livermore. (5) Based upon these discussions, Prassinos recommended that Rahm-Crites be released. LLNL management officials subsequently decided to terminate Rahm-Crites. Prassinos informed Rahm- Crites that she would be laid off effective November 26, 1997.

Meier maintained that once Crites became aware of the determination to terminate his wife, he became

distant and withdrawn in his relations with her and began take various retaliatory actions. First, Meier asserts that in October 1997, Crites informed her that her billable working hours on HEU Project training were being cut to half time. Meier further claimed that when she complained about this training cutback, Crites reminded her that he "had been" intending to recommend Meier as his replacement as APL. Meier states that she took this comment as a threat that Crites no longer intended to do so. In November 1997, Meier asserts that Crites became enraged over a minor disagreement concerning the graphics to be used on the cover of the HEU Annual Report. Specifically, Meier alleges that Crites yelled at her with his hands raised in clenched fists and stormed out of the office. According to Meier, Crites took these actions in retaliation against her because Crites held the complainant responsible for the termination of his wife. Meier maintained that on separate occasions in late 1997, she complained to Loquist and Chou about Crites' behavior.

Meier asserts that during January 1998, Crites continued to exert subtle pressure to undermine her position as HEU Project Training Coordinator. According to Meier, the most egregious example of this occurred on January 30, 1998, when Crites improperly issued an HEU training solicitation letter (training letter incident). At the time the letter was issued, Meier was away in Oak Ridge, Tennessee (Oak Ridge). The January 30, 1998, letter issued by Crites concerned proposed training on the use of specialized uranium testing equipment, referred to as NDA. Upon seeing the letter after returning from Oak Ridge, Meier felt strongly that Crites had transgressed proper procedures by not getting approval from Jamie Benton, the DOE employee responsible for oversight of HEU training, to proceed with the NDA training. Meier was also disturbed that Crites had not discussed the matter with her. According to Meier, Crites refused to discuss the training letter incident with her in private and she therefore confronted Crites with the matter on February 13, 1998, at the monthly HEU Project staff meeting held to discuss action items. Meier states that Crites again attempted to avoid discussing the NDA training letter, stating that it was not an appropriate agenda item for the staff meeting. The complainant states that when she refused to drop the matter, Crites became enraged and told Meier with a hostile expression on his face that he had not involved her in NDA training since she was not competent to conduct training in this technical area, whereupon the complainant left the meeting.

On February 17, 1998, Meier telephoned Strauch and emotionally voiced her concerns that Crites was out of control and destroying the HEU Project, citing the NDA training letter and their confrontation at the February 13, 1998, meeting as examples. The complainant further claimed that Crites was physically threatening to her and was retaliating against the complainant for her involvement in having Rahm-Crites terminated. The complainant insisted that Crites be removed from the HEU Project and warned Strauch that if Crites were not removed, she would go to the DOE Inspector General (IG). In response to this phone call, Livermore officials dispatched a crisis management team to ascertain the causes of the conflict in WASHOP and the legitimacy of Meier's charge that Crites had physically threatened her. The next day, on February 18, 1998, Meier had a private meeting with DOE sponsors overseeing the HEU Project, including Edward Mastel (Mastel), HEU Project Director. Mastel stated that during that meeting, the complainant expressed her discontent with how the HEU Project was being run by Crites, and stated the operational and staffing changes that she would make if she were placed in charge of the project.

The next day, on February 19, 1998, Meier participated in a conference call with LLNL management personnel including Chou and Strauch, in which she vociferously restated her charges against Crites, claiming that she feared for her personal safety. The complainant again threatened that she would go to the IG if Crites were not removed from the HEU Project. Strauch indicated that he would get back to Meier with his decision within a few days.

In the interim, on February 24, 1998, the crisis management team issued a written report of its findings with regard to Meier's allegations, based upon its interviews with employees including those present at the February 13, 1998 meeting. The crisis management team found no basis for the complainant's allegation of "physical threats" by Crites. The report stated that while staff members noted a change in Crites' behavior toward Meier, perhaps attributable to the termination of his wife, "[o]f greater concern to several interviewed is recent behavior by [Meier]" and "[s]everal indicated that they feel she is overreacting to

events and on the edge of losing control." On February 27, 1998, Strauch called Meier and informed her that she would be removed from the HEU Project because of "irreconcilable differences" with Crites. Subsequently, in a letter dated the same day, LLNL removed Meier from the HEU Project stating that: it did not find any significant basis to remove Crites in light of the fact that DOE believed that performance of the HEU Project was improving; Meier's interaction with the DOE sponsors was inappropriate; and Meier's approach conveying her demands to LLNL management that Crites be removed was also inappropriate. (6) At issue in this case are the allegations that Crites and LLNL each retaliated against Meier. Part 708 protects Meier against retaliation based on protected activities.

C. Procedural Background

Meier filed a complaint under Part 708 with the DOE's Office of Inspector General on April 22, 1998. Subsequently, this complaint was transferred to OHA which assigned an investigator to the complaint. The OHA investigator issued a Report of Investigation on June 14, 1999. The investigator found that Meier had arguably made protected disclosures under Part 708 and that there was sufficient temporal proximity between the disclosures and the retaliations alleged by Meier to permit the inference that the disclosures were a contributing factor to the alleged retaliations.

Meier then requested a hearing regarding her complaint.(7) The hearing was duly held, and the Hearing Officer rendered an Initial Agency Decision on December 22, 1999. In this Decision, the Hearing Officer found in favor of LLNL. The Hearing Officer found that Meier made protected disclosures in August and September 1997, when she expressed her concern to LLNL officials about Crites assigning Rahm-Crites, his wife, to perform work on the HEU project. However, the Hearing Officer also found that Meier's February 1998 disclosures to LLNL management officials demanding that Crites be removed from the HEU project were not protected disclosures. The Hearing Officer went on to find that the closeness in time between the August and September 1997 disclosures and the alleged acts of retaliation by Crites beginning in October 1997, and ending with Meier's removal by LLNL from the HEU project in February 1998, supported a finding that Meier's protected disclosures were a contributing factor to the alleged acts of retaliation.

The Hearing Officer then analyzed Meier's claims of retaliation. In his opinion, the Hearing Officer concluded that Meier had failed to prove that Crites had taken any retaliatory action against Meier. With regard to LLNL, the Hearing Officer closely examined the circumstances of Meier's removal and determined that LLNL's action in removing Meier from the HEU project in February 1998 was not in any way related to Meier's disclosures concerning Crites' wife. He also concluded that LLNL had shown clearly and convincingly that Meier's removal was justifiable.

After filing her Notice of Appeal, Meier filed a statement outlining the issues she sought the OHA Director to review. 10 C.F.R. § 708.33(a). LLNL filed a response to the Meier statement. Meier has identified two issues regarding the Hearing Officer's conclusions in his Decision. These two issues are discussed in Section II below.

II. Analysis

In her Statement of Issues, Meier raises two specific grounds for Appeal.(8) First, Meier argues that the Hearing Officer erred in finding that Meier's February 1998 statements, informing LLNL officials that if they did not remove Crites from the workplace she would have to file a complaint with the IG, were not protected disclosures. Second, Meier asserts that the Hearing Officer erred in concluding that LLNL would have taken the same personnel action against Meier absent Meier's protected disclosures. I will discuss these two arguments next. (9)

A. February 1998 Statements

Meier asserts that in her February 1998 conversations with LLNL management, she sought to inform LLNL management that she feared for her physical safety and that she could no longer work with Crites because of his various alleged acts of retaliation. In these conversations, she stated that if Crites were not removed from the workplace, she would have to report Crites' violation of the "near relative" policy and his subsequent retaliation to the IG. Meier argues that these disclosures should be considered a protected disclosure for Part 708 purposes. Meier asserts that her February 1998 statements complained about Crites' prior violation of the "near relative" policy and the alleged continuing retaliation she experienced as a result of her disclosures in August and September 1997 concerning his violation of the near-relative policy. Meier also points out that nothing in the language of 10 C.F.R. § 708.5 indicates that because she had previously pointed out Crites' violation of the "near relative" policy in August and September 1997, her disclosures in February 1998 would not also be protected. I need not address these arguments, since my review of the Hearing Officer's analysis reveals that it is flawed for the reasons discussed below.

In making the determination regarding the February 1998 disclosures, the Hearing Officer essentially concluded that these disclosures were not protected on the following grounds: (1) since Meier's intention was to coerce LLNL to replace Crites on the HEU Project, she could not have been attempting to reveal "reasonably and in good faith" an abuse of authority by Crites; and (2) the subject matters that were at the heart of the February 1998 disclosures, the training letter incident and the alleged physical threats by Crites, did not meet the regulatory criteria defining protected disclosures under Part 708.

The Hearing Officer's first rationale is not correct. I have recently held that in evaluating whether a person has made a disclosure in good faith, the person's motivations for making the disclosure are irrelevant. Beckham; see Howard W. Spaletta, 24 DOE ¶ 87,511 at 89,051 (1995) (Spaletta) (whether the Complainant was motivated to protect his reputation is irrelevant to the question whether the disclosures come within the ambit of Part 708 protection). Consequently, Meier's purpose in making the February 1998 communications could not be used as a criterion to determine if she had made the communication "in good faith" as that term is used in the Part 708 regulations. The Hearing Officer improperly used Meier's motivation in determining that the February 1998 disclosures were not protected under Part 708. (10)

Nevertheless, despite my finding that this aspect of the Hearing Officer's analysis regarding the February 1998 disclosures was erroneous, I find that this error is harmless since I find, as described below, that LLNL has met its evidentiary burden and has shown by clear and convincing evidence that it would have removed Meier from the HEU project in the absence of her protected disclosures.

B. Whether LLNL would have taken the same action toward Meier in the absence of the protected disclosures

As discussed above, I find that the only remaining act of retaliation at issue in this case is LLNL's removal of Meier from the HEU Project. Because Meier's protected disclosures were a contributing factor in her removal from the HEU Project, LLNL can avoid liability only if it shows clearly and convincingly that it would have removed Meier from the HEU Project in the absence of her protected disclosures. Three of the reasons cited by LLNL for its action were: (1) "irreconcilable differences" between Meier and Crites; (2) Meier's inappropriate conduct in lobbying DOE in an attempt to remove Crites; and (3) that in light of DOE's satisfaction with Crites' management of the HEU Project, there was no basis to remove Crites. See April 2, 1998 Complaint Exhibit 2, ¶ 42, and Exhibit 6 (February 27, 1998 memorandum from Strauch to Meier). (11)

Meier argues that the Hearing Officer erred in concluding that LLNL had demonstrated by clear and convincing evidence that it would have removed Meier from her position in the absence of her protected disclosures. Meier cites several OHA and federal court cases for the proposition that an employee cannot be subject to an adverse employment action for reasons rooted in her experience as a whistleblower. See Ronald Sorri, 23 DOE ¶ 87,503 at 89,015 (1993); Pogue v. Dept. of Labor, 940 F.2d 1287 (9th Cir 1991); Passic Valley Sewerage Comm'rs v. Dept. of Labor, 992 F.2d 474 (3rd Cir 1993); Mackowiak v.

University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984) (Mackowiak). In the present case, Meier argues that all of the conduct which LLNL cited in its decision to remove her from the HEU project arose in whole or in part from her protected disclosures in August and September 1997, Crites' subsequent alleged retaliation against her, and from her February 1998 disclosures. Consequently, she claims LLNL can not rely on these reasons to justify her removal from the HEU Project. Meier argues and has cited authority for the proposition that an employer bears the risk of liability if the legal and illegal motives for an adverse action cannot be separated. See Mackowiak. (12)

I disagree with Meier's claim. As I will discuss below, very compelling evidence points to the conclusion that the primary conduct by Meier leading to LLNL's action removing her from the HEU Project had absolutely nothing to do with her protected disclosures. Thus, contrary to Meier's contention, the conduct causing the termination did not arise from those disclosures. As such, there is simply no basis for Meier's assumption that LLNL's "legal and illegal" motives cannot be separated. LLNL's legitimate motives for terminating her clearly form a separate basis for action, and I agree with the Hearing Officer that the separate basis was clearly sufficient to result in her removal, aside from any other factor that may have contributed to the decision.

First, LLNL was concerned about the existence of "irreconcilable differences" between Meier and Crites. The prime example of this conflict, a dispute between the two over the drafting of a training letter, was rooted in a disagreement over Meier's competence to perform and deal with the technical, subject matter aspects of the training letter. Although Meier implicitly argues that Crites' dissatisfaction with her was merely a pretext masking a retaliatory animus, the record strongly indicates instead that Meier and Crites had a genuine disagreement on this point and that the disagreement was in no way related to Meier's protected disclosures. Meier's conduct in the face of this disagreement with her superior is what ultimately led LLNL to remove Meier from the HEU Project. The core of the "irreconcilable differences" between Crites and Meier, the training letter dispute, came to a head during the February 13 meeting between Crites and other staff members concerning the HEU Project. At this meeting, Meier would not let Crites discuss the HEU Project agenda items but continued to press him for an explanation for his actions in issuing the training letter. Tr. at 639-42. Testimony from one of the participants confirms Meier's disruptive, angry behavior at the meeting in which she would not let the meeting participants discuss the HEU agenda items despite pleas from at least one other staff member for Meier to stop. Tr. at 642 (Meier's words to the effect of "No, I want to talk about it now and I want to talk about it here.") After Crites gave in to Meier's request and informed her that he did not consult her regarding the training letter because she was "incompetent" with regard to the technical issues involved, Meier left the meeting. Tr. at 642. In contrast to Meier's behavior, Crites remained calm and did not appear to be angry. Tr. at 643. While there is evidence that Crites' management style could produce stress, it was Meier's differences with Crites, her supervisor, and her conduct at the February 13 meeting that were critical factors in LLNL's decision to remove her from the HEU Project.

The second reason supporting LLNL's action was Meier's attempt to engineer Crites' removal from the HEU Project by going behind the back of LLNL management directly to the DOE sponsor. At her request, Meier met with Mastel, DOE Project Director, on February 18, and informed him of her dissatisfaction as to how the HEU project office was being run and offered her own suggestions as to personnel and operational changes that might be made if she were placed in charge. Tr. at 201-02. The DOE sponsor, Mastel, testified that Meier "was trying to get our support to put her into a position as the project manager . . ." Tr. at 210. Mastel's testimony is supported by Glazier's testimony that in mid-February 1998 Meier had told him that "she was going to take over, you know, the position that Tom [Crites] held, head of the office" and "she [Meier] was going to put me back down as program manager." Tr. at 292. Thus, Meier's communication with the DOE Sponsor was an attempt to obtain DOE support to replace Crites with herself. Additionally, there is no evidence that Meier's attempt to lobby DOE to replace Crites with herself was part of an attempt to communicate her protected disclosures.(13) Not surprisingly, Meier's attempt to circumvent LLNL management alarmed LLNL, and was so contrary to LLNL's position on how the HEU Project should be operated that it was insubordinate. In my view, these actions were entirely motivated by self-interest and would certainly have then resulted in Meier's removal from the HEU Project regardless

of her protected disclosures.

Lastly, DOE was clearly satisfied with Crites' performance. Mastel, the DOE sponsor, testified that "in terms of milestones being met and reported against, we saw marked improvement since [Crites] came on board and was doing the work." Tr. at 211. DOE's perception that Crites was doing a satisfactory job on the HEU Project was unaffected by Meier's disclosures. Meier's direct challenge to Crites' authority was a matter to where LLNL had to respond, and respond quickly.

Thus, given DOE's satisfaction with Crites' job performance, Meier's handling of the conflict with Crites, and Meier's attempt to circumvent LLNL management by talking to the DOE sponsor in order to get Crites' job, I find that LLNL has demonstrated by clear and convincing evidence that it would have removed Meier from the HEU Project in the absence of her protected disclosures. (14) Further, none of these reasons resulted from Meier's protected disclosures.

In sum, I find that the Hearing Officer erroneously determined that Meier's February 1988 communications were not a protected disclosure but that he correctly held that LLNL had shown by clear and convincing evidence that it would have removed Meier in the absence of her protected disclosures. Consequently, the Meier Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Dianne E. Meier, on January 11, 2000, of the Initial Agency Decision issued on December 22, 1999 (Case No. VBA-0011), is hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 28, 2000

(1)The Factual background is taken from the Hearing Officer's Decision in Meier.

(2)In the fall of 1995, Meier assumed the position of Deputy APL under Crites.

(3)LLNL management at Livermore was aware of the potential conflict of interest associated with Rahm-Crites working under her husband, Crites, and was concerned that this arrangement under the reorganization might constitute a violation of LLNL's "near relative" policy. This policy, as described in LLNL's Personnel Policies and Procedures Manual, prohibits employees from working under the supervision of near relatives. During 1996, an administrator responsible for WASHOP staffing matters, Shirley Loquist (Loquist), examined this matter and determined that there was no violation since Rahm-Crites was not supervised by Crites, and he was not responsible for her assignments, salary or appraisal.

(4)Under the HEU Project, DOE provides assistance to Russia in accounting for and disposing of highly enriched uranium. As part of the program, the United States sends individuals acting as monitors to Russia to ensure that highly enriched uranium from nuclear weapons is properly down-blended. Part of WASHOP's mission for DOE under the HEU Project is to design and conduct the training of these monitors.

(5)Among the LLNL management officials Prassinos discussed Rahm-Crites' future employment with

were Loquist, Mark Strauch (Strauch), LLNL's Fission Energy Systems and Safety Program (FESSP) Program Leader, and C.K. Chou (Chou), LLNL Associate Director in charge of FESSP. WASHOP was a satellite office of FESSP.

(6)Meier never returned to work at WASHOP, but went on medical disability leave, apparently on the basis that her workplace experiences had exacerbated a mental condition that prevented her from working. After a year's time, LLNL requested medical documentation of Meier's work restriction, which she refused to provide. Therefore, in a letter to Meier dated June 18, 1999, LLNL separated her from employment based upon Meier's inability to perform the essential functions of her position.

(7)During the pendency of the hearing, the new "whistleblower" regulations took effect. The Hearing Officer relied on the revised regulations in handling this proceeding, citing the new regulatory provisions in his Initial Agency Decision.

(8)Although an issue not expressly raised by Meier on appeal, I must comment on the Hearing Officer's analysis methodology regarding Meier's complaint. After the Hearing Officer determined that Meier made disclosures protected by Part 708, he then should have determined whether Meier had established by a preponderance of the evidence that Crites' or LLNL's alleged retaliatory acts in fact had occurred and whether the disclosures were a contributing factor in LLNL's decision to remove her from the HEU Project. In the Decision, the Hearing Officer did not expressly make any findings regarding whether Crites' alleged reprisals had in fact occurred until he analyzed LLNL's defense asserting that it would have removed Meier regardless of her disclosures. I have reviewed each of the Hearing Officer's findings regarding Crites' alleged retaliatory actions against Meier and I affirm the Hearing Officer's conclusion that the portion of Meier's complaint concerning Crites' alleged retaliatory acts should be dismissed. Specifically, with regard to all of Crites' alleged retaliatory acts except one, Meier failed to present sufficient evidence to establish that the alleged retaliatory act occurred. As to the remaining alleged retaliatory act- reducing Meier's billable training hours - I conclude that her August and September 1997 disclosures were not a factor contributing to her reduction in hours. Thus, the only remaining act of alleged retaliation at issue in this Appeal is LLNL's removal of Meier.

(9)The Hearing Officer cited the pre-revision Part 708 regulations in his Decision but in his analysis regarding the February 1998 disclosures made a finding apparently using the current Part 708 regulations. See Meier at 89,231-32 ("I find nothing to indicate that Meier was attempting to reveal, reasonably and in good faith, an ?abuse of authority' by Crites in February 1998."). The pre-revision regulations do not include a requirement that the disclosure be "reasonable"; instead they only require that the disclosure be in "good faith." See Rosie L. Beckham, 27 DOE ¶ 87,557 (2000) (Beckham). The use of the revised regulations in this respect could cause prejudice to Meier since those regulations interpose a required element of reasonableness for a disclosure to be protected that arguably did not exist at the time she made her disclosures. See Beckham. Accordingly, in evaluating Meier's Appeal, I will use the regulations that existed at the time she communicated her concerns.

(10)Additionally, the Hearing Officer's erred in with respect to his second rationale for finding that the February 1998 disclosures were not protected. The Hearing Officer, after evaluating the factual circumstances surrounding the training letter issue, determined that Crites' actions did not constitute an "abuse of authority" or "mismanagement." The Hearing Officer also found that there was no evidence in the record to substantiate Meier's claims that Crites physically threatened her. However, for purposes of Part 708, it does not matter whether the information a putative whistleblower disclosed is ultimately factually substantiated. See Beckham; Thomas T. Tiller, 27 DOE ¶ 87,504 (1998), affirmed, Thomas T. Tiller v. Wackenhut Services, Inc., 27 DOE ¶ 87,509 (1999); see also Spaletta, 24 DOE at 89,051 (good faith clause is intended to relieve complainants of the burden of proving that their allegations are correct or accurate). Rather, the focus must be on the belief of the individual providing the information. In this case, the inquiry must focus on whether Meier had a good faith belief that Crites was violating a "law, rule or regulation" or was responsible for mismanagement. See 10 C.F.R. § 708.5(a)(i), (iii) (1992). The essential subject matter of Meier's February 1998 disclosures - Crites' handling of the training letter issue

and Meier's complaints that Crites physically threatened her - concern potential mismanagement as well as a potential violation of a "law, rule or regulation." Thus, if Meier had a good faith belief concerning her February 1998 disclosures, they are protected under the Part 708 regulation existing at the time of her disclosure.

(11)Because I find that LLNL has presented clear and convincing evidence that it would have removed Meier from the HEU Project based upon the three reasons discussed infra, I express no opinion as to the merit of the fourth reason LLNL cited in removing Meier, the inappropriateness of Meier's threat to LLNL management that either it remove Crites or she would go to the IG.

(12)LLNL argues that removing Meier from the HEU Project can not be considered an adverse personnel action under Part 708. However, I need not address this argument in light of my finding that LLNL would have removed Meier from the HEU project even in the absence of her protected disclosures.

(13)Mastel testified that he could not specifically recall Meier mentioning any personal difficulties with Crites. Tr. at 211-12.

(14)It should be noted that LLNL only removed Meier from the project and did not fire her from her position. The amount of justification required to establish that an employer would have removed a person from a project, protected disclosures notwithstanding, is less that the justification needed to demonstrate that an employer would have discharged an employee regardless of protected disclosures.

Case No. VBA-0021

June 27, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Eugene J. Dreger

Date of Filing: February 28, 2000

Case Number: VBA-0021

On February 28, 2000, Mr. Eugene J. Dreger (hereinafter referred to as the Appellant) filed a Notice of Appeal from an Initial Agency Decision by a Hearing Officer from the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE).(1) In the Initial Agency Decision, the Hearing Officer determined that the complainant has failed to establish the existence of a violation for which he may be accorded relief under DOE's Contractor Employee Protection Program, codified at Part 708 of Title 10 of the Code of Federal Regulations. 10 CFR Part 708. The Hearing Officer found that the Appellant made protected disclosures, as they are defined in Part 708, and that such disclosures were sufficiently close in time to his termination and to other personnel actions adverse to him to be considered contributing factors to those actions. Nevertheless, the Hearing Officer also found that the evidence clearly and convincingly establishes that the Appellant's employer would have taken those actions in the absence of those protected disclosures. As a result of these findings, the Hearing Officer denied relief to the Appellant. *Eugene J. Dreger*, 27 DOE ¶ 87,549, http://www.oha.doe.gov/cases/whistle/vbh0021.htm (2000) (hereinafter cited as *Dreger*).

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[ ] fraud, mismanagement, waste, and abuse" at DOE's government-owned, contractor-operated (GOCO) facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers. The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has "[d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences [a] violation of any law, rule, or regulation [or] a substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5(a)(1); *see also Francis M. O'Laughlin*, 24 DOE ¶ 87,505 (1994).

In the present case, Appellant worked as a safety inspector for Reynolds Electrical & Engineering Co., Inc. (REECO) at the Nevada Test Site outside of Las Vegas, Nevada, from 1990 to 1994. At the time, REECO was the management and operating contractor there. In September 1994, Appellant was terminated for poor job performance. Appellant alleges that REECO retaliated against him for raising safety concerns in the course of his routine job duties. As remedies, Appellant seeks to be rehired, to have his performance appraisals corrected, to be awarded back pay and Social Security credits, and to be compensated for emotional stress.

After extensive document submission, a hearing was held on November 15, 1999, at which 12 witnesses testified. As noted above, the Hearing Officer agreed with Appellant and found that he had made protected disclosures that, because of proximity of time, were contributing factors to personnel actions including his termination. However, the Hearing Officer also found that the contractor(2) had shown by clear and convincing evidence that REECO would have taken the termination action it took even in the absence of the protected disclosures. Thus, the Hearing Officer concluded that no relief was appropriate.

In concluding that the contractor had shown by clear and convincing evidence that there was no retaliation when it terminated Appellant, the Hearing Officer found all of Appellant's performance evaluations for 1992 through 1994 referred to three deficiencies. First, his supervisors pointed out that Appellant had never mastered the computer skills that he needed to complete reports and to use the deficiency tracking system. They noted the poor quality of his written reports. In this regard, the Hearing Officer found after a lengthy review that his reports were not always understandable because his written communication skills were poor. Second, the Hearing Officer found that the testimony at the hearing supported the statements in the performance evaluations that Appellant applied standards in an inconsistent manner. Third, the Hearing Officer found that the testimony also supported the statements in the performance evaluations that Appellant's "communications skills, overall judgment and behavior towards employees at the worksite fell short of normal expectations." *Dreger* at 89,255.

In light of continuing difficulties with Appellant, the contractor implemented a performance improvement plan, a vehicle that it had used before and that is a fairly standard procedure in large organizations. The Hearing Officer found that testimony at the hearing demonstrated that the contractor performed the reporting and monitoring functions required by the plan in a careful and serious manner, but that Appellant did not fully appreciate the situation:

Dreger never thought the PIP was worth more than a moment of his time. He never mentioned it in his original whistleblower complaint, and he hardly addressed it at all in his questioning and arguments at the hearing I conducted. In fact, he never presented a serious discussion of it. At one point he called the 62-day evaluation period a "sham," "since they are out to terminate me." November 5 Letter at 42. He continues "they could not assist me since my experiences are beyond theirs." *Id.*

Dreger at 89,256-57. Despite Appellant's contention that the performance evaluation process was a sham, the Hearing Officer concluded that Appellant's work-related deficiencies caused the contractor's adverse actions, including Appellant's termination. *Dreger* at 89,257.

Thus, the Hearing Officer found that the contractor had shown by clear and convincing evidence that it treated Appellant like similarly situated employees and that Appellant's work performance deficiencies, including inadequate computer skills, poor communications and interpersonal relations problems, and inconsistency in application of safety standards, constituted valid reasons for the adverse actions taken by the contractor. Accordingly, the Hearing Officer denied relief to Appellant. *Dreger* at 89,258-59.

In his appeal, Appellant challenges each of the findings that the Hearing Officer made. After a brief personal attack on one witness, he has submitted 21 pages of what appear to be his notes reflecting comments on the testimony at the November 15, 1999 hearing. The filing is generally organized by name of the individual testifying together with what appear to be transcript page and line references. However, it is not organized in any systematic way to address the findings and conclusions that the Hearing Officer made. Comments on testimony range from a fragment of a sentence to 15 pages of critique of the testimony of Frank Spenia, Appellant's former supervisor. In general, Appellant argues that Mr. Spenia and Steve Jones, Mr. Spenia's supervisor, testified untruthfully at the hearing.

As noted above, the contractor claims that the adverse personnel actions it took against Appellant were caused by three performance deficiencies: (1) lack of mastery of necessary computer skills, (2) poor written communications skills and inconsistent application of safety standards, and (3) poor communication skills with employees at the work sites he inspected. In response to his former supervisor's

testimony that Appellant had more trouble than other inspectors learning to use a new computer-based tracking system, Appellant claims:

Another ridicule. What does Frank Spenia, Steve Jones know about "having more trouble adjusting." I have been in two wars, and retired from the Naval Reserves; and both of them claim to state I have trouble adjusting. . . . I have been in combat action, most a dozen times that I can remember, and I am considered to be cool & conservative. Their accusations are demeaning when evaluating me. Many in their respective offices lost respect in them both; how long will it take for management to realize their blunder. Is my message loud and clear?

Appeal at 12-13. The above excerpt is typical of the comments in the Appeal. I have reviewed them carefully, and conclude that there is no evidence in the record that would support Appellant's assertions or form the basis for concluding that Appellant did not have serious deficiencies in using the computer-based systems.

The Hearing Officer also found that the evidence supported the contractor's claim that Appellant had poor communications and interrelation skills. In this regard, his supervisors testified, and the Hearing Officer found, that contractor employees who were responsible for making corrections complained that they could not understand the reports that Appellant wrote. There was also testimony that Appellant antagonized line employees, not by finding safety violations (which was his job responsibility), but by the manner in which he went about his inspections.

Appellant also maintains that he was not inconsistent in applying safety codes to work situations that he inspected. In his appeal, Appellant maintains that people had trouble understanding his reports because "some can't read correctly, and some are not capable to understand." Appeal at 11. However, there is no evidence in the record, either written evidence or testimony at the hearing, which would support Appellant's position. He also claims that he and the other three inspectors had to teach his supervisor the safety codes that they applied because "he had no idea what we were doing and why they were applied." Appeal at 9.

It is well settled that factual findings are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,501, 89,001 (1995); *O'Laughlin v. Boeing Petroleum Services, Inc.*, 24 DOE ¶ 87,513, 89,064 (1995). *Compare Pullman Standard v. Swint*, 456 U.S. 273 (1982), with *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting Federal Rule of Civil Procedure 52(a)).

In the present case, the Hearing Officer's findings are not clearly erroneous. In fact, there is substantial evidence in the record that Appellant had considerable problems with the computer-based tracking program that the contractor maintained. Indeed, other than his statements that his computer skills were superior, Appellant did not provide any evidence on that issue. There is substantial evidence that the quality of his written reports was poor and that there were complaints that the Appellant's inspections did not apply the same standards consistently. My review of the Appeal as well as the record confirms that Appellant's written submissions are inarticulate and difficult to understand. Finally, there is substantial evidence in the record that employees complained about the manner in which Appellant conducted inspections and the way he treated them. For these reasons, all of the findings of the Hearing Officer are supported by substantial evidence and are not clearly erroneous. The appeal that Mr. Dreger filed must therefore be denied.

It Is Therefore Ordered That:

(1)The Appeal filed by Eugene J. Dreger on February 28, 2000, of the Initial Agency Decision issued on February 7, 2000 (Case No. VBH-0021) is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Eugene J. Dreger on February 28, 1995, under the Contractor Employee Protection Program, 10 C.F.R. Part 708, is denied.

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

Roger Klurfeld

Assistant Director

Office of Hearings and Appeals

Date: une 27, 2000

(1) The Director of the Office of Hearings and Appeals served as the Hearing Officer in this matter. As a result, when Mr. Dreger filed an appeal, the OHA Director recused himself and delegated to me the authority to act as the OHA Director in deciding this appeal.

(2) Beginning January 1, 1996, Bechtel Nevada, Inc. assumed general responsibility for the Nevada Test Site, and it has also assumed responsibility for litigation relating to the prior period, including defending this action.

Case No. VBA-0032

November 26, 1999

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Roger H. Hardwick

Date of Filing: July 26, 1999

Case Number: VBA-0032

This Decision considers an Appeal of an Initial Agency Decision issued on July 6, 1999, on a complaint filed by Roger H. Hardwick (Hardwick or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Hardwick seeks compensation for alleged retaliatory actions taken against him by Science Applications International Corporation (SAIC), a DOE contractor, and by KenRob and Associates, Inc. (KenRob), his former employer under a subcontract with SAIC, as a result of making an alleged protected disclosure to DOE. In the Initial Agency Decision, however, the Hearing Officer determined that the complainant had failed to show that the matters he relayed to DOE constituted a protected disclosure under Part 708. As set forth in this decision, I have determined that Hardwick's Appeal must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

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

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2,

1992, establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included independent fact-finding by the DOE Office of Inspector General (IG), followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint. Thereafter, the complainant may request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision.

On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural

revisions and substantive clarifications that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12,862 (March 15, 1999). Certain of these amendments have bearing upon the present proceeding. Under the revised regulations, review of an Initial Agency Decision, as requested by Hardwick in the present Appeal, is performed by the OHA Director. 10 C.F.R. § 708.32.

B. Complaint Proceeding

The present case was initiated by the filing of a complaint by Hardwick on December 23, 1994. The factual allegations set forth in Hardwick's complaint, described below, are essentially uncontroverted.

In January 1992, the complainant was employed by KenRob as Telecommunications Manager at the firm's office in Las Vegas, Nevada. In this capacity, Hardwick's mission was to develop a base for new business in the western United States, with a primary emphasis on telecommunications and computer technical support services.

During 1993, SAIC was the prime contractor with the DOE for a Technical and Management Support Services Contract for the Yucca Mountain Site Characterization Project (YMP). Under this contract SAIC was required to perform a wide range of scientific, technical management and administrative support services, including provision of computer support services to both DOE's Las Vegas Office, and DOE's Yucca Mountain Site office, located about 100 miles from the Las Vegas office. On December 6, 1993, SAIC awarded a contract to KenRob, which was staffed solely by Hardwick. Hardwick was named as telecommunications specialist, and his role was to provide computer support services (also referred to as information technology or IT) at the Yucca Mountain Site Office (YMSO). The performance period for this contract was from December 6, 1993, through March 31, 1994.

In January 1994, Hardwick met with John Gandi, DOE Team Leader for Information Resources Management at the Yucca Mountain office and offered his view that improvements in IT support at the YMSO were necessary. Hardwick prepared a draft letter outlining his concerns, and presented the draft to Winfred Wilson, then DOE site manager of the YMSO.

Mr. Wilson adopted Hardwick's draft virtually without change, structured it as a memo from himself to Mr. Gandi, and sent it to Mr. Gandi. The memorandum as drafted seemed to indicate that Mr. Gandi should consider improvements in providing IT support to the YMSO. Copies of the memorandum, which was dated January 18, 1994, were sent to five SAIC employees and three DOE employees, who were located at the Yucca Mountain Site. Approximately two weeks later, Harold Brocklesby, a SAIC manager who received a copy of the memo, told Hardwick that his duties under the SAIC subcontract were over. On May 23, 1994, KenRob was awarded a contract by the DOE's Office of Civilian Radioactive Waste Management (OCRWM) to provide communications network and computer facilities support at Las Vegas, Nevada and Washington, D.C. locations. Hardwick was not offered any position under that contract. On July 13, 1994, KenRob issued a letter to Hardwick advising him that his employment would be terminated in 30 days. His employment was terminated on August 12, 1994.

Following its investigation of the matters described in the complaint, the IG issued a Report of Inquiry and Recommendations on February 19, 1999 (IG Report). The IG Report found that Hardwick made a protected disclosure under 10 C.F.R. Part 708, and that the disclosure was a contributing factor to his removal from the SAIC contract and not being appointed to any position under the OCRWM contract. The IG Report further found that SAIC and KenRob failed to provide clear and convincing evidence that these personnel actions would have been taken in the absence of the protected disclosure.

On March 3, 1999, KenRob submitted a request for a hearing under 10 C.F.R. § 708.9, that was transmitted to OHA on March 8, 1999, at which time a Hearing Officer was appointed by the OHA Director. Following the resolution of various procedural motions, the Hearing Officer convened a hearing in the case on June 8, 1999. However, the Hearing Officer terminated the hearing after all evidence

concerning the nature of Hardwick's disclosure had been received.(1) As subsequently explained in the Initial Agency Decision issued on July 6, 1999, the Hearing Officer determined at an early stage of the hearing that Hardwick had failed to show by a preponderance of the evidence that the disclosure he made during a January 1994 meeting with Mr. Gandi, and later described in the January 18, 1994 memorandum, was protected under 10 C.F.R. Part 708.

The Initial Agency Decision points out that the Contractor Employee Protection Program of Part 708 does not provide protection to employees for every disclosure, but enumerates the specific types of disclosures for which employment retaliation is prohibited. Generally, protected disclosures are those which reveal information concerning gross waste, fraud, abuse, gross mismanagement, substantial violations of law and substantial dangers to employees or to public health and safety. 10 C.F.R. § 708.5. Given the facts of the present case, the Hearing Officer concluded that the matters disclosed by Hardwick in the January 18, 1994 memorandum did not fall within the scope of these types of protected disclosures. Hardwick claimed that his memorandum sets forth protected disclosures relating to gross waste, fraud, abuse and mismanagement on the part of SAIC. The Hearing Officer found, however, that despite these general claims, Hardwick had failed to state with specificity or adequately explain how SAIC's failure to provide what he believed to be the correct level of technical support at YMSO constituted gross waste, fraud, abuse or mismanagement.

Particularly with regard to his purported disclosure of mismanagement,(2) Hardwick argued that he needs only to show that there was "mismanagement," and not "gross mismanagement," as stated in the revised Part 708 regulations effective April 14, 1999. 10 C.F.R. § 708.5(a)(3). The Hearing Officer rejected this contention, however, observing that the insertion of the word "gross" in the regulation was merely a clarification and by doing so, the agency was not adopting a more stringent standard of "mismanagement" to invoke regulatory protection. As pointed out by the agency in the Notice of Proposed Rulemaking, "the criterion of ?gross' mismanagement is consistent with the provisions of the Whistleblower Protection Act of 1989 (5 U.S.C. 2302(b)(8))." 63 Fed. Reg. 733, 734 (January 5, 1998). Furthermore, under established case law preexisting the revision, a disclosure of mismanagement has been required to involve serious matters to receive protection under Part 708, and not just disagreements between managers and employees. *Holsinger v. K-Ray, Inc.*, 26 DOE ¶ 87,506 (1996); *Mehta v. Universities Research Assoc.*, 24 DOE ¶ 87,514 (1995) (*Mehta*). Thus, the Hearing Officer ultimately determined in the Initial Agency Decision that the matters raised by Hardwick in the January 18, 1994 memorandum did not rise to a disclosure of mismanagement within the purview of Part 708. The Initial Agency Decision explains:

Mismanagement does not include a difference of opinion on decisions that are debatable. The mismanagement that is covered by Part 708 involves action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *See Carolyn v. Dep't of the Interior*, 63 M.S.P.B. 684 (1994). The Complainant here cannot, through broad, speculative and unsupported assertions about possible ill-effects of limited IT services, bootstrap his discussion regarding IT improvements into a protected disclosure of serious mismanagement.

Initial Agency Decision at 19-20.

In accordance with section 708.32(a), Hardwick filed a Notice of Appeal of the Initial Agency Decision on July 26, 1999, followed by a Statement of Appeal (Hardwick Appeal) on September 8, 1999. On October 12, 1999, KenRob and SAIC filed their respective Responses to the Hardwick Appeal. 10 C.F.R. § 708.33(a).

II. Analysis

Proceedings under 10 C.F.R. Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the OHA Director. *See David Ramirez*, 23 DOE ¶ 87,505 (1994). The regulations provide, in pertinent part, that a DOE contractor

may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee for "[d]isclosing to a DOE official . . . information that [the employee] reasonably and in good faith believe[s] reveals -- (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a)(3). However, the regulations clearly place the initial burden upon the complainant: "The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . ." 10 C.F.R. § 708.29; *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993). "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). As a result, the complainant has the burden of proving by evidence sufficient to "tilt the scales" in his favor that he made a disclosure protected under Part 708. If the complainant does not meet this threshold burden, he has failed to make a *prima facie* case and his claim must therefore be denied.

A. Hardwick Appeal

In his appeal, Hardwick raises a number of contentions in support of his position that the determination reached in the Initial Agency Decision is incorrect as a matter of fact and law. Hardwick argues: (1) the Hearing Officer's conclusion that Hardwick did not reasonably believe that he was making a protected disclosure is contrary to the IG Report; (2) the Hearing Officer failed to understand the true nature of Hardwick's disclosure; (3) the seriousness of Hardwick's disclosures is verified by Mr. Gandi's response to the January 18, 1994 memorandum; (4) Mr. Gandi's plan to have Hardwick write a letter for Mr. Wilson's signature demonstrates that Hardwick's disclosures identified serious mismanagement; (5) Mr. Gandi's response to Hardwick's disclosures was muted due to personal relationships existing between senior DOE officials and SAIC management. These contentions are addressed successively below.

In support of his Appeal, Hardwick initially points to the IG's finding in its report of investigation that Hardwick "disclosed to a DOE official issues regarding the coordination and communication of SAIC Information Services staff located in Las Vegas and [IT] support staff at the Yucca Mountain Site Office." IG Report at 7. I note, however, that although the IG Report found that Hardwick made a protected disclosure, it does not specifically state or even examine specifically what type of protected disclosure Hardwick is deemed to have made. In any event, the Part 708 regulations provides that in making findings in support of Initial Agency Decision, "the Hearing Officer may rely upon, but is not bound by, the report of investigation." 10 C.F.R. § 708.30(c). Thus, the fact that after a more detailed examination of the issues, the Hearing Officer ultimately reached a different determination than the IG Report does not mean that the Initial Agency Decision is defective.

Turning to the alleged protected disclosure of gross mismanagement, Hardwick argues that "[c]ontrary to the Hearing Officer's decision, [the January 18, 1994 memorandum] clearly identified serious mismanagement in the operation of SAIC's contract to provide [IT] services at the Yucca Mountain Site Office field operations." Hardwick Appeal at 2-3. Borrowing phrases used in the memorandum, Hardwick asserts that "coordination and communication," "significant degradation of service," and "lack of documentation and policies and procedures" are not *de minimis* disclosures. Hardwick further argues that these disclosures must be considered significant and serious in view of the critical importance of the Yucca Mountain project, undertaken as a future depository for high-level nuclear waste, and "having a viable, functional and competent computer network at the project site . . . was essential to the operation." Hardwick Appeal at 3. Nonetheless, having examined the January 18, 1994 memorandum and related record, I must uphold the determination reached in the Initial Agency Decision.

As stated by the DOE Deputy Secretary in considering an analogous complaint, "[e]quating a particular type of disagreement to ?mismanagement' as contemplated by the ?whistleblower' regulation demands a careful balancing lest the term encompass all disagreements between contractor and its employees." *Mehta v. Universities Research Association*, 24 DOE ¶ 87,514 at 89,065 (1995) (complaint dismissed on jurisdictional grounds). In the present case, I believe that when balanced in context, the matters relayed by Hardwick did not constitute a disclosure of mismanagement contemplated for protection under Part 708.

For instance, in *Smith v. Dep't of Army*, Dkt. PH-1221-97-0447-W-1 (November 24, 1998) (*Smith*), the Merit Systems Protection Board (MSPB), considered a whistleblower claim based upon a purported disclosure of mismanagement and reaffirmed the legal principles relied upon by the Hearing Officer in the Initial Agency Decision. In rejecting the whistleblower claim in *Smith*, the MSPB stated:

"Gross mismanagement" is more than de minimis wrongdoing or negligence. *Embree v. Department of Treasury*, 70 M.S.P.R. 79, 85 (1996). It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. *Id.* There must be an element of blatancy. Therefore gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *Id.*

Slip op. at 2; *see also Carolyn v. Dep't of the Interior*, 63 M.S.P.B. 684 (1994). Having reviewed the January 18, 1994 memorandum in detail, I find no direct or indirect charge of mismanagement with regard to SAIC's provision of IT support, but only an itemization of concerns concluding that "if we deal with these issues now it will make growth easier." Hardwick Appeal, Exhibit 4 at 2. Assuming there were adequate funds available to address the problems, it might be argued on the basis of the memorandum that SAIC management had been somewhat negligent with regard to IT support at the YMP. However, as clarified by *Smith*, simple negligence does not amount to mismanagement or nearly begin to approach the threshold "element of blatancy" inherent in a disclosure of gross mismanagement, protected under Part 708. Hardwick maintains that the matters discussed in the memorandum, *e.g.* "coordination and communication," are serious and not *de minimis*. Hardwick has missed the point. That the memorandum discusses serious matters does not mean that the memorandum revealed serious mismanagement with regard to those matters.

We find equally unavailing Hardwick's next contention that the seriousness of his disclosures is demonstrated by Mr. Gandi's May 17, 1994 memorandum to Mr. Wilson (Hardwick Appeal, Exh. 5), which Hardwick claims was in response to the January 18, 1994 memorandum. The May 17, 1994 memorandum details a number of completed and proposed improvements in IT support for the YMSO. According to Hardwick, the "seriousness" of the January 18, 1994 memorandum is "verified" since "these changes and improvements would not have been accomplished but for Hardwick's disclosures." Hardwick Appeal at 4. I note that the record does not fully support Hardwick's claim that the IT support initiatives outlined in the May 17, 1994 memorandum were taken directly in response to the January 18, 1994 memorandum.(3) In any event, the fact that DOE recognized the importance of IT support and took action to make improvements in the area as funds became available does not necessarily mean that Hardwick's prior stated concerns amounted to a disclosure of gross mismanagement. To the contrary, other parties to the discussions leading to the January 18, 1994 memorandum testified that they considered Hardwick's concerns to be positive recommendations for improvement rather than intimating an allegation of mismanagement.(4)

Next, Hardwick argues that his disclosures must have involved a protected disclosure of gross mismanagement because Mr. Gandi "did not discount the validity or importance of his disclosure." Hardwick Appeal at 5. In this regard, Hardwick maintains that "[i]f [his] disclosures weren't significant, Gandi wouldn't have concocted the plan to have Hardwick write a letter for Wilson's signature." Hardwick Appeal at 6.(5) Again, however, I cannot make the logical leap that Hardwick urges. While Hardwick's concerns were ostensibly deemed significant to the degree that they were recommended for documentation in a memorandum, this does not lead us to the conclusion that Mr. Gandi perceived Hardwick's concerns as charges of gross mismanagement. Instead, as recounted by the Hearing Officer, Mr. Gandi testified at the hearing that "he did not see the January 18 memo as ?negative' [but] as pointing out areas which could use some improvement." Initial Agency Decision at 14.

Finally, Hardwick asserts that according to a 1996 report of the General Accounting Office (GAO), two senior DOE officials at the YMP had personal relationships with SAIC employees. Hardwick maintains that "[t]hose relationships would certainly explain the bizarre way that Gandi decided to act upon

Hardwick's disclosures." Hardwick Appeal at 6-7. However, in the absence of any viable evidence that an actual disclosure of gross mismanagement was made, I consider Hardwick's final contention highly speculative, immaterial, and beyond the scope of the Initial Agency Decision. Indeed, as pointed out in KenRob's Response, the Hearing Officer determined early on in the proceeding in an interlocutory letter determination that this apparent charge of an ethical violation raised by Hardwick was "irrelevant to the proceeding." Letter of May 28, 1999, from Virginia A. Lipton, Hearing Officer. I concur with this determination.

B. Conclusion

On the basis of the foregoing, I conclude that Hardwick has failed to show in his Appeal that the determination reached in the Initial Agency Decision is erroneous as a matter of fact or law. I concur with the determination that pertinent matters discussed by Hardwick in January 1994, as later set forth in a memorandum of January 18, 1994, did not constitute a disclosure protected under the provisions of the Contractor Employee Protection Program, 10 C.F.R. Part 708. Accordingly, Hardwick's Appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Roger W. Hardwick on July 26, 1999, of the Initial Agency Decision issued on July 6, 1999 (Case No. VWA-0032), is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Roger W. Hardwick on December 23, 1994, under the Contractor Employee Protection Program, 10 C.F.R. Part 708, is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals, within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 26, 1999

(1)Subsequent to the hearing, the Hearing Officer learned that the court reporter's car had been burglarized, and all the tapes made of the hearing were stolen. Consequently, no transcript of the hearing exists, and the discussion of the hearing in the Initial Agency Decision is based on the Hearing Officer's recollection of the testimony and notes made during the hearing.

(2)The Initial Agency Decision states that during the hearing and in a pre-hearing deposition, Hardwick "virtually admitted" that he had no support whatsoever for his claims of gross waste, and fraud, and thus the Hearing Officer properly determined that the only claim that might have some validity is that of mismanagement. Initial Agency Decision at 19, note 11.

(3)While there is some overlap, the May 17, 1994 memorandum clearly goes beyond the scope of the January 18 memorandum. As further pointed out by the Hearing Officer, Mr. Wilson himself did not perceive the May 17, 1994 memorandum as being in reply to the January 18 memorandum. Initial Agency Decision, at 15 n. 7.

(4)The Hearing Officer recounts that at the hearing, Mr. Gandi, Mr. Wilson and Ms. Mary Ann Jones (Mr. Gandi's Deputy), uniformly testified that at no time during their January 1994 discussions did Hardwick express a concern rising to alleged mismanagement. The Hearing Officer further recounts that Hardwick did not attempt to rebut this testimony when provided an opportunity. Initial Agency Decision, at 19 n. 10.

(5)Hardwick's supposition that Mr. Gandi "concocted a plan" in this regard runs contrary to the testimony presented at the hearing. According to Mr. Wilson, it was his recommendation that Hardwick draft a memorandum reflecting his concerns about IT services. *See* Initial Agency Decision at 15.

Case No. VBA-0033

April 5, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Names of Petitioners:Kaiser-Hill Company, L.L.C.

EG&G Rocky Flats, Inc.

Dates of Filing:August 26, 1999

August 27, 1999

Case Number: VBA-0033

On August 26 and 27, 1999, Kaiser-Hill Company, L.L.C. (K-H) and EG&G Rocky Flats, Inc. (EG&G) respectively filed Notices of Appeal from an Initial Agency Decision by a Hearing Officer from the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). In the Initial Agency Decision, the Hearing Officer granted relief to Barbara Nabb on the basis of her complaint under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. Barbara Nabb, 27 DOE ¶ 87,519 (1999). In their Appeals, K-H and EG&G challenge several aspects of the Initial Agency Decision and request that Ms. Nabb's complaint be denied. As set forth in this decision, I have determined that their Appeals must be granted in part and denied in part.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor- operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Contractors found to have discriminated against an employee for making such a disclosure, or for participating in a related proceeding, will be directed by DOE to provide relief to the complainant.

The regulations governing DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708 and became effective on April 2, 1992. They establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included independent fact-finding by the DOE Office of Inspector General (IG), followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint.

Thereafter, the complainant could request a hearing before an OHA Hearing Officer, who would render an Initial Agency Decision, from which an appeal could be taken to the Secretary of Energy or his designee.

On March 15, 1999, DOE amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; see 64 Fed. Reg. 12,862 (March 15, 1999). Certain of these amendments have a bearing upon the present proceeding. Under the revised regulations, review of an Initial Agency Decision, as requested by K-H and EG&G, is performed by the Director of OHA. 10 C.F.R. § 708.32.

B. Factual Background

The following facts underlying Ms. Nabb's complaint are not in dispute. Ms. Nabb worked as a machinist, and then a production specialist, at DOE's Rocky Flats Environmental Technology Site until November 1994. As Rocky Flats' principal function changed from weapons production to environmental restoration, the machine shop in which Ms. Nabb worked experienced a reduction in workload, and she and her co-workers were temporarily assigned to other work areas. By rotating in and out of the machine shop, they were able to remain fully employed and available for immediate recall to the machine shop should it resume operating at full capacity. Ultimately, however, the machine shop was closed altogether. Due to a reduction in force, Ms. Nabb, along with some 80 other machinists, accepted an opportunity to train to become a radiation control technician (RCT). She began her training in September 1994. She had completed most of her training by July 1995, when the funds allocated for training new RCTs ran out. At that time, Rocky Flats management made a determination that negatively affected Ms. Nabb: all those trainees who were ready for the final step of qualification, the oral examination, would be permitted to take that examination; all those who had not advanced to that stage of readiness, in which group Ms. Nabb found herself, would not be permitted to continue their training.(1) The stated rationale for this distinction was that the orals required little time and cost, and if successfully taken, would permit a trained employee to be fully qualified as an RCT; those not as far along would require considerably more training expense to obtain qualification status. Ms. Nabb filed a grievance with her union in November 1995, regarding the discontinuation of her training. The union ultimately withdrew this grievance in January 1998, when Rocky Flats offered to continue RCT training to all those employees whose training was curtailed in 1995. Ms. Nabb refused that offer, in the belief that she should not sign a settlement agreement while her whistleblower complaint was pending. See Answer to EG&G and Kaiser-Hill Request for Oral Hearing, dated October October 11, 1999, at 2.

C. Procedural Background

In September 1994 Ms. Nabb provided information regarding her Part 708 complaint to the DOE Rocky Flats Field Office's Employee Concerns Manager. She completed the filing of her complaint with a signed affirmation on January 12, 1995.(2) The Inspector General's Report of Inquiry and Recommendations (RIR) identified four actions by Ms. Nabb that constituted conduct that was protected by Part 708. Of the five actions by EG&G and K-H management officials that Ms. Nabb claims to be reprisals for her protected conduct, the RIR determined that she had failed to prove by a preponderance of evidence that four were retaliatory in nature. With respect to the fifth alleged retaliatory action, termination of the training program, the RIR found that, while there was some evidence that Ms. Nabb's protected conduct may have contributed to the decision to stop the training program, the contractors had nevertheless established by clear and convincing evidence that that decision was not retaliatory in nature.

Ms. Nabb then requested a hearing regarding the RIR's findings and proposed disposition.(3) The hearing was duly held, and the OHA Hearing Officer rendered an Initial Agency Decision on August 6, 1999. In this Decision, the Hearing Officer found in favor of Ms. Nabb. There was no dispute that she had engaged in protected conduct (i) when she refused to alter the travel documentation ("travelers") of 29 waste drums, at the direction of an EG&G waste management compliance specialist, in a manner that she believed would render the travelers false, and (ii) when she disclosed this event to her supervisors and managers between September 1993 and December 1994. Initial Agency Decision (IAD) at 8. The Hearing Officer determined that the proximity in time between her protected conduct and the termination of the

RCT training program (less than eight months), and the fact that company officials knew of her protected conduct, established that her conduct was a contributing factor in the decision to terminate her participation in the program. IAD at 11-12. Finally, he determined that EG&G and K-H had failed to prove by clear and convincing evidence that K-H would have made the same decision to cut off Ms. Nabb's training had she not engaged in her protected conduct. IAD at 19-20. As a result of these determinations, the Hearing Officer calculated the amount of monetary damages and ordered that the contractors pay that amount to Ms. Nabb and provide her with an opportunity to complete her RCT training. IAD at 24.(4)

After filing their Notices of Appeal, K-H and EG&G filed statements in which they identified the issues they wish the OHA Director to review. 10 C.F.R. § 708.33(a). Ms. Nabb filed her response to those statements, and each of the appellants then filed replies to Ms. Nabb's response. The issues identified by the appellants relate to several different aspects of the Initial Agency Decision, including the Hearing Officer's conclusions regarding whether the parties met their required burdens of proof and whether the assessment of liability was appropriate, both in terms of the type assessed and the parties held responsible.

II. Analysis

In their statements of issues, EG&G and K-H have raised a number of challenges to the Hearing Officer's Initial Agency Decision. The contractors argue that, as to the retaliation addressed in the Initial Agency Decision, the complaint should be dismissed. In the alternative, they challenge the Hearing Officer's determination that the protected disclosure-- the "travelers" matter-- was a contributing factor in the retaliation the contractors allegedly took against Ms. Nabb-- terminating her participation in the RCT training program. They also contend that the Hearing Officer wrongly found that those employees who made the decision to terminate the training also had knowledge of her disclosures, and that delays in Ms. Nabb's training constituted retaliation. The contractors further maintain that, contrary to the Hearing Officer's decision, they did prove by clear and convincing evidence that they would have taken the same action regarding Ms. Nabb's training even if she had not made her disclosures about the "travelers." Finally, each contractor contests the liability the Initial Agency Decision imposed on it: EG&G objects to being held jointly liable at all, while K-H objects to being ordered to offer Ms. Nabb the opportunity to complete her RCT training. In this section, each of these issues will be addressed. (5)

A. Dismissal

K-H contends that, with respect to the alleged reprisal of terminating Ms. Nabb's RCT training, the complaint should be dismissed. The facts pertinent to this argument are as follows. Ms. Nabb completed the filing of her Part 708 complaint in January 1995, after her RCT training had begun. Her training was terminated in July 1995. Ms. Nabb filed a grievance with her union concerning the termination of her training in November 1995. K-H Exhibit A. K-H offered Ms. Nabb the opportunity to continue her training in November 1997. K-H Exhibit C. The union withdrew the grievance in a January 1998 settlement with K-H, which included a provision that classes for those previously terminated from the training program would begin no later than April of that year. K-H Exhibit B. Ms. Nabb formally rejected the offer to recommence her training in documents dated February 17 and 24, 1998. K-H Exhibit D.

In arguing that dismissal is appropriate, K-H relies on certain provisions of the new version of the Part 708 regulations. Specifically, it contends that sections 708.13, .15, and .17 of the DOE regulations require dismissal of a complaint where the complainant later files a complaint, with respect to the same facts, under state or other applicable law, including final and binding arbitration. Because Ms. Nabb filed a union grievance regarding the termination of her training after she filed her Part 708 complaint, and because the grievance was settled, K-H contends that the matter became moot and the relevant portion of her Part 708 complaint should be dismissed.

Before ruling on this matter, I must consider which set of Part 708 regulations govern the possible

dismissal of any portion of the complaint in this case. The previous version of the regulations was in effect during the period in which both the protected activities and the alleged reprisals took place, and during the investigation stage of this proceeding. The current version did not take effect until April 14, 1999, by which date the Inspector General had already issued its RIR and Ms. Nabb had already filed her request for a hearing. The question before us, therefore, is whether K-H was correct in relying on the current regulations as the foundation for its claim of dismissal.

It is well established in the law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. DOE has stated it will apply the revised procedures to pending cases consistent with the case law. 64 Fed. Reg. 12862, 12865 (citing Landgraf v. USI Film Products, 511 U.S. 244, 275 (1994); Lindh v. Murphy, 117 S. Ct. 2059, 2063-64 (1997); Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 810, 817 n.17 (D.C. Cir. 1982) (citing Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966))).

Thus, it is clear that the drafters of the Part 708 revisions intended the revised regulations to apply to pending cases only "as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party." If applying the new regulations to the case before us would, as K-H contends, require us to dismiss the complaint, their application would clearly "impair the rights of, or otherwise cause injury or prejudice to" Ms. Nabb. Therefore, I must look back instead to the provisions of the regulations in effect at the time she filed her Part 708 complaint and her union grievance. Under the version of Part 708 in effect from April 2, 1992, through April 13, 1999, the provisions pertaining to the dismissal of a complaint due to pursuing a remedy in other forums appear at 10 C.F.R. §§ 708.6(a) and 708.8. See 57 Fed. Reg. 7533, 7542-43. The latter provision lists the grounds for dismissal of a complaint, among which is "[t]he complainant has pursued a remedy available under State or other applicable law." 10 C.F.R. § 708.8(a)(4) (1992). The former provision clarifies when a complaint is deemed to have been pursued under State or other applicable law, and specifically states that "[t]he pursuit of a remedy under a negotiated collective bargaining agreement will be considered the pursuit of a remedy through internal company grievance procedures and not the pursuit of a remedy under State or other applicable law." 10 C.F.R. § 708.6(a). Because Ms. Nabb's union grievance was thus not considered pursuit of a remedy that would have subjected her Part 708 complaint to dismissal under the prior version of Part 708, the revised Part 708 cannot retroactively bring her union grievance within the scope of actions that subject her Part 708 complaint to dismissal at this stage. By subjecting her union grievance to a regulatory regime to which it was not previously subject, such a retroactive application would prejudice Ms. Nabb, contrary to the clear intent of the revisions to the regulations.

For the reasons set forth above, I will deny K-H's motion to dismiss. I will, therefore, perform an appellate review of the Hearing Officer's Initial Agency Decision, paying particular attention to the challenges the contractors have raised in their appeals. I note that the Hearing Officer's findings of fact are entitled to deference unless they are clearly erroneous. Oglesbee v. Westinghouse Hanford Co., 25 DOE ¶ 87,510 at 89,001 (1995). On the other hand, his conclusions of law are subject to de novo review. Salvatore Gianfriddo, 27 DOE ¶ 87,544 at 89,221 (1991); see Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ?abuse of discretion')."). After considering the issues raised by the appellants, I agree with the Hearing Officer's conclusion that Ms. Nabb is entitled to relief under Part 708. In contrast to the Hearing Officer's finding with respect to liability of the parties, however, I find that K-H is solely liable for the remedies he fashioned.

B. The Employee's Burden

Under the regulations applicable to this proceeding, the complainant has the burden of establishing by the preponderance of the evidence that she engaged in protected conduct, and that such conduct "was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d) (1992).(6) The contractors, EG&G and K-H, have not challenged the threshold matter of

whether Ms. Nabb engaged in protected conduct, including disclosures to supervisors and company officials. IAD at 8. On appeal, however, the contractors challenge the Hearing Officer's finding that the protected disclosure on which the Hearing Officer focused-- Ms. Nabb's allegations of waste drum "traveler" fraud to supervisors and managers from September 1993 through December 1994-- was a contributing factor to any reprisals they may have taken against her. Their arguments are twofold. First, EG&G contends that too much time passed between the last of Ms. Nabb's disclosures about the "travelers," in December 1994, and the termination of the RCT training program in late July 1995. Second, K-H contends that the Hearing Officer improperly determined that the individuals responsible for canceling Ms. Nabb's training were influenced by their knowledge of Ms. Nabb's disclosures.

Since the contractors have conceded that Ms. Nabb engaged in protected conduct, the only remaining burden on Ms. Nabb is to establish that her protected conduct was in fact a contributing factor in the alleged acts of reprisal. As the Hearing Officer explained in the IAD, under our case law a protected disclosure is likely to be a contributing factor in a personnel action where the official taking the action has actual or constructive knowledge of the disclosure and where he acted within a period of time such that a reasonable person could find such a nexus. IAD at 7.

With respect to the timing question, I cannot find that the Hearing Officer erred when he determined that the time that elapsed between Ms. Nabb's last recorded disclosure about the "travelers" and the termination of Ms. Nabb's participation in the RCT training program was short enough to allow the reasonable conclusion that the former contributed to the latter. Applying a reasonable-person standard to this issue requires considering the circumstances of each case. Here, although more than seven months passed between the two events, it is reasonable to conclude that contractor officials did not forget about Ms. Nabb or her disclosures in the interim, particularly in light of the ample evidence of Ms. Nabb's outspoken nature and the number and variety of situations in which she had made her disclosures. Moreover, and contrary to the contractors' contention, this period is not beyond other intervals this office has considered and found to establish "temporal proximity." See, e.g., Luis P. Silva, Case No. VWA-0039 (February 25, 2000) (temporal proximity between July 1997 disclosure and personnel action in early 1998).(7) Because any training delays that the contractors may have caused occurred closer in time to Ms. Nabb's disclosures than the decision to terminate her training did, it was reasonable to conclude that a temporal link exists with them as well.

As stated above, the individual engaging in the alleged reprisal must also have knowledge of the employee's protected conduct in order to support a conclusion that the conduct was a contributing factor in the reprisal. To consider this issue properly, I must address each form of reprisal separately.

On one hand, I find that the Hearing Officer was not clearly in error when he determined that the decision to terminate RCT training was made with knowledge of Ms. Nabb's disclosures. K-H argues in its Statement of Issues that the Hearing Officer created an improper and irrebuttable presumption when he determined that Ms. Nabb's "standing as a known whistleblower is presumed to have influenced Mr. Spears and Mr. Wood," IAD at 19, at the time they decided to terminate the RCT training program in a manner that adversely affected Ms. Nabb. K-H Statement of Issues at 8-9. Although Ms. Nabb never made a direct disclosure to Mr. Spears, as she admitted in her Response to the Statements of Issues, K-H admits that Mr. Spears learned, at a December 1994 meeting with the DOE Rocky Flats whistleblower administrator, that Ms. Nabb was a whistleblower. Response to Statement of Issues (Response) at 5, 10; K-H Statement of Issues at 8. This was roughly six months before Mr. Spears and others began to structure the termination of the RCT training program. Tr. at 463 (Wood testimony). It is clear that Mr. Spears, then in charge of Rocky Flats's radiological control program, knew that Ms. Nabb was a whistleblower at the time he, together with other managers, decided to halt RCT training and set the parameters for students eligible for completing their testing.(8) Moreover, the evidence strongly suggests that they considered the effect of their decision on each of the trainees in the program. Transcript of Hearing (Tr.) at 414, 445 (Spears testimony). Mr. Spears' knowledge of Ms. Nabb's whistleblower status, taken together with the proximity in time between her protected conduct and this decision, is sufficient evidence to meet Ms. Nabb's burden to establish that her protected conduct was a contributing factor in

the decision to halt training.(9)

On the other hand, I find that the Hearing Officer did err when he considered the allegation of training delays as evidence that the contractors had not met their burden of proof. See IAD at 14-17. The Hearing Officer found that "Mrs. Nabb has presented evidence indicating that her failure to complete her RCT training . . . was due, at least in part, to unusual delays in the scheduling of her RCT training and testing." IAD at 17. The Hearing Officer did not, however, consider whether Ms. Nabb's protected conduct was a contributing factor in these delays. Specifically, he failed to consider whether the contractor employees who caused delays in Ms. Nabb's training had knowledge of her protected conduct. Consequently, I must perform this analysis de novo. As stated above, the two essential elements of this analysis are proximity of time between the protected conduct and the delays, and actual or constructive knowledge of the protected conduct by those causing the delays. I have already found proximity of time with respect to the delays. To address the knowledge issue, I have determined that the RCT trainers were responsible for causing any delays in Ms. Nabb's training progress, because they were in control of when Ms. Nabb was tested. However, there is simply no evidence in the record that these individuals had any knowledge about Ms. Nabb's protected conduct. Although Mr. Spears clearly was aware of the protected conduct, as discussed above, there is nothing in the record that indicates that this knowledge was communicated to the RCT trainers. To the contrary, James Wood, another Rocky Flats manager responsible for the termination of the RCT training program, testified that to his knowledge none of his instructors knew "that there was any whistleblower thing." Tr. at 479. Consequently, I find that Ms. Nabb has not shown by a preponderance of the evidence that her protected conduct was a contributing factor in any delays that might have occurred in her training schedule.

C. The Employer's Burden

Once the complainant has met his or her burden of proof, the burden shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same action "absent the complainant's disclosure." 10 C.F.R. § 708.9(d) (1992). (10) "Clear and convincing evidence" is neither so light a burden as "preponderance of the evidence" nor so rigorous as "beyond a reasonable doubt," the standard used in criminal procedures. See id. Both contractors have challenged the Hearing Officer's finding that they did not meet their burden. They maintain that the evidence demonstrates that the funding for the RCT training program expired, and that this fact alone constitutes an independent business reason for terminating the training.

In stating their position, however, the contractors misstate their burden. They ignore its true dimension. As the Hearing Officer explained in the IAD, their burden was not merely to show that they had a legitimate business reason for terminating the RCT training and allowing some but not all participants to complete their qualifying examinations. See IAD at 17-18. I concede that they have established this basis, as did the Hearing Officer. IAD at 19. Their burden is larger in scope. What the Hearing Officer could not find, however, was that on this record they had met their express burden of proof under the Part 708 regulations, which was to show, by clear and convincing evidence, that they would have taken the same action had Ms. Nabb not engaged in her protected conduct. That is the issue I must address here.(11)

The facts necessary to the consideration of this issue are as follows. Due to exhaustion of funds earmarked for the training program in which Ms. Nabb participated, K-H managers were directed to stop the program. The implementation of that directive fell to three managers, including Mr. Spears and Mr. Wood. At that time, according to Mr. Wood, roughly 15 to 20 students had not yet completed the program and qualified as RCTs. Tr. at 464. Rather than stopping the training for all students instantaneously, they devised a plan by which those students who had completed all their work but for their oral boards would be permitted to take their boards, which would complete the qualification process to become RCTs. Those students who had more work to complete would not be permitted to continue their studies. Mr. Wood testified that the cost of oral boards was small-- no more than a few hours of testing per student. Tr. at 471-472. On the other hand, the cost of preparing those even one test short of their oral boards could be several weeks of preparation and testing. Id. The evidence shows that very few students were terminated

from the program along with Ms. Nabb. The Hearing Officer determined, from testimony gathered at the hearing, that six or seven students fell into the same category as Ms. Nabb. IAD at 18; see Tr. at 465, 470 (Wood testimony). According to Mr. Spears, however, there were only perhaps two or three others who shared Ms. Nabb's predicament. Tr. at 415. John Barton, the union grievance committeeman, estimated the same number. Tr. at 46. The RadCon Training records reflect Ms. Nabb and two others never passed their oral boards, while the remaining 84 students on the roster did, including five who passed them after July 24, 1995. IG Exhibit 102 (which corresponds to K-H Hearing Exhibit R). In any event, a very small number of fellow students received the same treatment as Ms. Nabb.

Based on the above evidence, one can presume that K-H management made the decision to permit some students to complete their studies because they saw that decision as advantageous to K-H's business position. Perhaps, for example, the Rocky Flats Site needed more RCTs. If so, there was a legitimate business purpose to "draw the line" among the students to permit some of them to complete their training. Justification for why they drew the line where they did, however, is a matter on which there is very little evidence. The record contains Mr. Wood's statement that preparation for and administration of oral boards cost less per student than the preceding test. What the contractors have shown, if anything, is that the decision they made is logical in a business sense. But without knowledge of the company's needs for RCTs and availability of alternate funding, I cannot find that the line they drew was the only one that had a legitimate business foundation, or even that it was the best option under the circumstances. Therefore, it is difficult to conclude that it was merely coincidental that Ms. Nabb had passed precisely one examination fewer than those students who were permitted to complete the training program and become RCTs.

The Hearing Officer stated that "[m]anagement decisions that impact negatively on a small group of employees that includes a whistleblower must be viewed as inherently suspect in a Part 708 analysis." IAD at 19. I do not necessarily agree with the characterization that such management decisions are "inherently suspect." Nevertheless, they must be closely examined. I find that, after considering the complete circumstances surrounding the decision to terminate Ms. Nabb's training, the contractors have simply not met their regulatory burden to show by clear and convincing evidence that they would have drawn that line where they did if Ms. Nabb had not engaged in protected conduct. Because they have not established that their training decision was the only legitimate business option, or even the best of several under the circumstances, I conclude that they have not shown that they would have made the same decision "absent the complainant's disclosure." Because the contractors have not met their burden and therefore have not overcome the complainant's allegations on this issue, I agree with the Hearing Officer that K-H has failed to show that its termination of Ms. Nabb's training was not a retaliatory act for purposes of Part 708.

D. Remedy Issues

Because I uphold the Hearing Officer's finding that K-H retaliated against Ms. Nabb when it terminated her RCT training, I must now address the remedy fashioned in the IAD.

Of the many allegations of retaliation that Ms. Nabb claimed in her Part 708 complaint and subsequent amendments, I find that Ms. Nabb has prevailed on only one-- the termination of her RCT training.(12) The remedy issues that the contractors have raised on appeal fall into two categories. The first concerns the effect of the settlement of Ms. Nabb's union grievance on one aspect of the remedy fashioned by the Hearing Officer. The second is EG&G's contention that it should not be held jointly and severally liable for any violations of Part 708 that occurred at Rocky Flats after June 30, 1995, the date on which its responsibilities for operating the Rocky Flats facility terminated.

In its Statement of Issues, K-H argues that it should not be required to offer Ms. Nabb another opportunity to complete her RCT training. As discussed in the Dismissal section above, K-H invited Ms. Nabb to continue her training in November 1997 and again in early 1998 in settlement of her union grievance. At that time, Ms. Nabb rejected the offer. Nevertheless, the Hearing Officer ordered K-H to offer Ms. Nabb an opportunity to complete her RCT training. K-H now contends that requiring it to offer training yet

again frustrates Part 708's policy of encouraging resolution of grievances internally when possible. The underlying premise appears to be that requiring K-H to offer the training will reward Ms. Nabb for ignoring the offer at the union grievance level. I do not agree that requiring the contractor to provide training will frustrate the policy of the whistleblower regulations. The Part 708 regulations promote internal resolution of grievances by requiring the complainant to show that he or she has exhausted all applicable grievance-arbitration procedures before filing a complaint. 10 C.F.R. § 708.12(d); see 10 C.F.R. § 708.6(c)(1) (1992) (refers to "internal company grievance procedures" rather than "grievance-arbitration procedures"). Part 708 is therefore intended to govern only after the failure of more "local" processes, which in this case included the procedures Ms. Nabb followed. In a case in which the complainant wrongly initiates a Part 708 action after filing a complaint in another forum, the complaint will be dismissed. However, once Part 708 is properly invoked, as in this case, it is irrelevant whether the remedy happens to coincide with that reached through grievance procedures. I find instead that the policies underlying Part 708 would be frustrated if a hearing officer were prevented from fashioning an appropriate form of relief merely because it had been offered at an earlier stage of a process designed to "restore employees to the position they would have occupied but for the retaliation." 64 Fed. Reg. 12862, 12867 (policy set forth in context of restitutionary remedies authorized under the revised regulations). Consequently, I find that the Hearing Officer did not err when he required K-H to offer Ms. Nabb an opportunity to complete her RCT training program.

Along the same vein, EG&G argues that the Hearing Officer was without jurisdiction to grant any remedy for K-H's retaliatory termination of Ms. Nabb's training, because the union-grievance settlement bound her and was the result of a complaint under "State or other applicable law" that requires dismissal of her Part 708 complaint under the revised regulations at 10 C.F.R. § 708.15(d). As discussed in the Dismissal section above, that provision does not apply to the facts of this case. Because Ms. Nabb's union grievance concerning her training does not dictate dismissal of her Part 708 case, the Hearing Officer was free to fashion a remedy under the regulations.

EG&G also argues that it cannot be held liable for retaliations that occurred after the responsibility for operating Rocky Flats had been transferred from EG&G to K-H on July 1, 1995. This argument takes on significance because the only allegation of retaliation on which Ms. Nabb has prevailed is that of terminating her from the RCT training program, which occurred some time after July 24, 1995.(13) If EG&G is correct in its contention, EG&G bears no liability in this case. The Hearing Officer held both companies jointly and severally liable for the remedies, though he expressed his belief that K-H should be responsible for providing the relief. IAD at 24. He did not, however, express any justification for reaching that conclusion. Although it is clear that Ms. Nabb made several disclosures to EG&G personnel, and that many EG&G personnel were rehired by K-H when it assumed responsibility for operating Rocky Flats, nothing in the record supports a finding that EG&G was involved in any way in the decision to terminate Ms. Nabb's training. Consequently, I find that EG&G should not be held liable for this retaliatory action.

As neither of the contractors has asked for review of the terms of the remedies that the Hearing Officer has fashioned, I need not address them. I will, however, modify the interest provision of the IAD to comport with the calculation methodology that OHA has employed in other Part 708 determinations. This methodology follows the practice of the Merit Systems Protection Board under the Whistleblower Protection Act, employing an Office of Personnel Management regulation found at 5 C.F.R. § 550.806(d), and is outlined in the Sorri case. Sorri, 23 DOE at 89,017. The total amount of interest calculated in this manner is $11,777.23, as set forth in the appendix to this decision. For the reasons stated above, the remedies set forth in the IAD, as modified by this interest calculation methodology, are the sole responsibility of K-H.

It Is Therefore Ordered That:

(1) The Appeal filed by Kaiser-Hill Company, L.L.C., on August 26, 1999, of the Initial Agency Decision issued on August 6, 1999 (Case No. VWA-0031), is hereby denied.

(2) The Appeal filed by EG&G Rocky Flats, Inc., on August 27, 1999, of the Initial Agency Decision issued on August 6, 1999 (Case No. VWA-0031), is hereby granted to the extent that it shall not be held liable for any retaliatory action taken against Barbara Nabb, and denied in all other respects.

(3) Kaiser-Hill Company, L.L.C., shall pay to Mrs. Nabb, by no later than June 30, 2000, the following amounts in compensation for actions taken against her in violation of 10 C.F.R. Part 708:

(i) $498.24 for lost salary for the period September 1, 1995 through April 30, 1998(14);

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

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

(iv) $11,777.23 for interest on the amounts in (i) through (iii) above, for the period September 1, 1995, through June 30, 2000.

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

(5) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 5, 2000

(1)On July 1, 1995, the responsibility for operating the Rocky Flats facility for the DOE passed from EG&G to K-H.

(2)Although Ms. Nabb's complaint was complete in January 1995, several allegations were investigated that she raised after this date, including her termination from the RCT training program in July 1995.

(3)During the pendency of the hearing, the new "whistleblower" regulations took effect, and the Hearing Officer relied on the revised regulations in handling this proceeding, citing the new regulatory provisions in his Initial Agency Decision.

(4)Ms. Nabb's complaint contained several allegations of protected disclosures and retaliations that the Hearing Officer did not analyze fully in the IAD. Before the hearing, Ms. Nabb stated that she no longer wished to pursue one claim of retaliation, that she had been denied funeral leave. The Hearing Officer dismissed two others before the hearing (acid burns and revocation of her access authorization), as actions beyond the scope of Part 708. Letter from Hearing Officer to Ms. Nabb, April 20, 1999. The Hearing Officer ruled that another (temporary assignments to undesirable work locations), along with the two preceding allegations, were actions for which Part 708 offered no remedy, even if she were to prevail. IAD at 20. Finally, the Hearing Officer denied an allegation that Ms. Nabb raised for the first time at the hearing (denial of crewleader pay) for lack of evidence. IAD at 21.

(5)The appellants also requested an opportunity for oral argument at this stage of the proceeding. There is no provision in the regulations that precludes oral argument. On the other hand, the regulations that govern

appeal procedures, at 10 C.F.R. § 708.33, do not provide for oral argument as a matter of right. That provision permits the OHA Director, at his discretion, to obtain additional information that will "advance the evaluation." 10 C.F.R. § 708.33(b)(3). Having studied the voluminous documentation in this case and reviewed the various arguments raised in the appeals, I conclude that oral argument is not necessary to "clarify the evidence and to probe the merits of each party's position," as K-H posited in its November 11, 1999 Reply to Ms. Nabb's Response to the appeal briefs. To the extent that Ms. Nabb has raised new issues and allegations in her Response, I will not consider her Response to be relevant to this appeal determination; such issues may not be raised at this late stage. Ms. Nabb should consider whether they form a proper basis for a new Part 708 complaint.

(6)Although the Hearing Officer relied on the parallel provision in the 1999 regulations, 10 C.F.R. § 708.29, the description of the evidentiary burdens on the parties nevertheless are the same.

(7)EG&G also contends that Ms. Nabb's poor performance on some of the RCT tests, as shown in Kaiser-Hill Exhibits H and I, demonstrates that the contractors could have dismissed her from the training program at earlier stages, and since they did not, it was improper for the Hearing Officer to conclude that her eventual termination from the training program could have possibly been influenced by her disclosures. EG&G Statement of Issues at 4. I find no merit to this argument. Even if it were established that the contractors could have terminated her training earlier, the fact is that they did not. They may have had any number of reasons for postponing their adverse action to a later, more propitious time. I do not know of, and can see no use to ascribe, any particular motive to their inaction before July 1995.

(8)I also note that Mr. Spears was an employee of EG&G before the transfer of operations responsibility to K-H, and an employee of K-H thereafter.

(9)I do not agree with K-H's characterization of the Hearing Officer's "presumption" as irrebuttable and without any basis in the law or regulation. First, I fail to see that the Hearing Officer employed an irrebuttable presumption at all. The fact that the regulations specifically provide a standard for review of the employer's evidence demonstrates that the employer has an opportunity to submit evidence in opposition, and meeting the "contributory factor" test is thus clearly rebuttable. Second, Congress intentionally made the whistleblower's burden relatively easy to meet when it adopted the "contributing factor" test in the 1989 Whistleblower Protection Act (WPA), in order to reduce the "exceptionally heavy burden imposed on the employee." 135 Cong. Rec. S2780, S2784 (daily ed. Mar. 16, 1989) (statement of Sen. Levin), cited in Ronald A. Sorri, 23 DOE ¶ 87,503 at 89,010 (1993) (Sorri). The standards of proof in the WPA are similar to those in Part 708. See Sorri, 23 DOE at 89,009.

(10)Because Ms. Nabb did not meet her burden regarding her allegations of delay, I will not address them in this section.

(11)EG&G argues that I have held that clear and convincing evidence of independent, non- discriminatory reasons for a personnel action is sufficient to sustain the contractor's burden of proof. EG&G Statement of Issues at 5 n.6 (citing Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 at 89,042 (1994)). In Oglesbee, the Hearing Officer reached this conclusion under the specific facts of that case, which included a finding that the alleged retaliatory act-- delaying a promotion-- transpired as the direct outcome of following normal, established personnel procedures. In the present case, as discussed below, the Hearing Officer found retaliation in termination of training as the direct outcome of following procedures that were developed and implemented specifically to address a group of individuals of which the whistleblower was a member. However, it is these procedures which are different from those in Oglesbee. Because these procedures were not already established, but rather created to address precisely the whistleblower's situation, they do not carry the same presumption of objectivity as those in Oglesbee. I further note that the Hearing Officer completed his analysis by considering whether this personnel action would have occurred any differently had there been no knowledge of Ms. Oglesbee's disclosures. Id. at 89,043.

(12)See note 4.

(13)I note again that I have denied any allegation of retaliatory delays in training, which could have transpired while Rocky Flats was in the control of either contractor.

(14)April 14, 1998 is the date on which Ms. Nabb would have reasonably completed her RCT training had she accepted Kaiser-Hill's offer to recommence training, as calculated by the Hearing Officer. See Initial Agency Decision at 22.

Case No. VBA-0038

March 28, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ann Johndro-Collins

Date of Filing: October 29, 1999

Case Number: VBA-0038

This Decision considers an Appeal of an Initial Agency Decision issued on September 27, 1999, on a complaint filed by Ann Johndro-Collins (Johndro-Collins or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her complaint, Johndro-Collins seeks compensation for alleged retaliatory actions taken against her by Fluor Daniel Hanford (FDH), a DOE contractor, as a result of making an alleged protected disclosure to DOE. As set forth in this decision, I have determined that Johndro-Collins's Appeal must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

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

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included independent fact-finding by the DOE Office of Inspector General (IG), followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint. Thereafter, the complainant may request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision.

On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12, 862 (March 14, 1999). Certain of these amendments have bearing upon the present proceeding. Under the revised regulations, review of an Initial Agency Decision, as requested by Johndro-Collins in the present Appeal, is performed by the OHA

Director. 10 C.F.R. § 708.32.

B. Complaint Proceeding

The present case was initiated by the filing of a complaint by Johndro-Collins in July 1997. The factual allegations set forth in the Johndro-Collins complaint, described below, are essentially uncontroverted.

In 1989, the Complainant began working for Westinghouse Hanford Company, a contractor at the Department's Richland Operations Office, as a records management specialist. In August 1994, she attained the position of Project Control Analyst I. On October 1, 1996, FDH acquired the Westinghouse Hanford contract at the Richland Operations Office. The Complainant's duties and chain of supervisors remained essentially unchanged when FDH acquired the contract.

In July 1997, the Complainant filed a complaint with the IG. In her complaint, she alleged that FDH retaliated against her for disclosing "a conflict of interest, waste, fraud, and abuse" by her team leader at FDH. At the time the Complainant made her disclosures, she worked on the Strategic Planning team. The subject of her disclosures was her team leader and her supervisor was Larry Hafer. In July 1997, the Complainant was transferred to the Reporting team, where her team leader was Eileen Murphy-Fitch and her supervisor was Gordon McCleary. This transfer took place because Murphy-Fitch needed additional personnel and had requested the Complainant. In addition, management was aware that Complainant and her team leader were not getting along.

In January 1998, the Complainant was transferred back to the Strategic Planning team. This transfer was made because she had requested reassignment to the group and there was an opening caused by the departure of another employee, Dave Eder. Her supervisor was again Larry Hafer, but her previous team leader had moved to another group. In March 1998, McCleary was promoted to the position of Director of Reporting, where he had supervision over Hafer's Strategic Planning team.

The IG conducted an investigation and issued a Report of Inquiry and Recommendations on March 30, 1999 (IG Report). The IG Report found that the Complainant had established by a preponderance of evidence that she made protected disclosures to FDH management under 10 C.F.R. Part 708. The IG Report further found that in six of seven alleged retaliatory acts, the Complainant failed to establish by a preponderance of the evidence either that the alleged retaliatory acts constituted adverse actions, or that her protected disclosures were a contributing factor to the actions. With regard to one of the alleged retaliatory acts - the Complainant's transfer from the Strategic Planning team to the Reporting team - the IG found that the Complainant's protected disclosures were a contributing factor, but that FDH had provided clear and convincing evidence that the reassignment would have taken place absent the disclosures.

On April 20, 1999, the Complainant submitted a request for a hearing under 10 C.F.R. § 708.9, that was transmitted to the Office of Hearings and Appeals (OHA) on April 27, 1999, at which time a Hearing Officer was appointed by the OHA Director. The Hearing Officer convened a hearing in this case on July 13, 1999, at which the Complainant and six witnesses testified.

Prior to the hearing, the parties stipulated that the Complainant made a protected disclosure as defined by 10 C.F.R. § 708.5. As stipulated by the parties, the Complainant disclosed to management of FDH alleged acts of abuse of authority by her team leader. *See* 10 C.F.R. § 708.5(a)(3). In addition, the Complainant alleged that FDH committed retaliatory acts, as defined by 10 C.F.R. § 708.2, after her protected disclosure. Before the hearing, the parties stipulated that three of the alleged retaliatory acts could be remedied under the Part 708 regulations. These three alleged acts are listed below:

1. In October 1997, the Complainant received an annual performance assessment that allegedly did not accurately reflect her performance. The Complainant claims that the assessment evaluated her work at a lower level than it should have. As a result, the Complainant alleged that she was excluded from

a cash bonus program that rewarded employees for high achievement.
2. The Complainant alleged that in January 1998, she received a promotion from Project Controls Associate Grade I (pay grade 14) to Project Controls Associate Grade II (pay grade 16) without a corresponding pay raise.
3. The Complainant also alleged that in January 1998, she was assigned to a position where she performed duties at a level expected of employees in pay grade 18, while she was compensated at pay grade 16.

As explained in the Initial Agency Decision issued on September 27, 1999, the Hearing Officer determined that the Complainant did not prevail on any of the three allegations of retaliatory acts. *See* Initial Agency Decision, 27 DOE ¶ 87,530 (1999). With regard to the allegation that her FY 1997 performance assessment was inaccurate, the Hearing Officer found that FDH has shown by clear and convincing evidence that it would have given the Complainant the same assessment absent her protected disclosures. With respect to the allegations that the Complainant was given a promotion without a raise and given a work assignment above the level of her pay, the Hearing Officer found that the Complainant has failed to show that these acts occurred as she claimed. The Hearing Officer concluded that the Complainant is not entitled to any relief under 10 C.F.R. Part 708.

In accordance with section 708.32(a), the Complainant filed a Notice of Appeal of the Initial Agency Decision on October 29, 1999, followed by a Statement of Appeal (Appeal) on December 6, 1999. On December 22, 1999, FDH filed a Response to the Appeal.

II. Analysis

Proceedings under 10 C.F.R. Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the OHA Director. *See David Ramirez*, 23 DOE ¶ 87,505 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee for "[d]isclosing to a DOE official . . . information that [the employee] reasonably and in good faith believe[s] reveals -- (3)Fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a)(3). However, the regulations clearly place the initial burden upon the complainant: "The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . ." 10 C.F.R. § 708.29; *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993). "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence §339 at 439 (4th Ed. 1992). Under this standard, the burden of persuasion is allocated roughly equally between both parties. *See Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake.)

A. Complainant's Appeal

In her Appeal, the Complainant raises a number of contentions in support of her position that the determination reached in the Initial Agency Decision is incorrect as a matter of fact and law. The Complainant's contentions focus on the three alleged retaliatory acts. These contentions are addressed successively below.

1. The Complainant's FY 1997 Performance Assessment

In support of her Appeal, the Complainant contends that her 1997 Performance Assessment did not take account of her "excellent work" performing Integrated Site Baseline functions for nine months of the

rating period, thus preventing her from receiving a cash bonus under FDH's "MVP" program. She further contends that the alleged inaccurate assessment is the "direct result of my filing protected disclosures." Complainant's Appeal at 2. The Complainant adds that her manager and team leader believed her FY 1997 work to be "excellent." She disagrees with the Hearing Officer's statement that her assertion that the assessment does not accurately reflect her performance is highly speculative and not supported by the evidence. Id.

I note first that the Complainant made this same argument during the hearing. The Hearing Officer found that FDH gave credible and convincing explanations for why the Complainant's 1997 Assessment emphasized the last three months of the rating period, and that the Assessment would have been written in the same manner absent the Complainant's protected disclosures. The following testimony at the hearing from FDH management officials supports the Hearing Officer's conclusion:

Q. In 1997, after Ms. Johndro-Collins left your supervision and Mr. Fish's lead, during the remaining part of that year did you have any input into Ms. Johndro-Collins' evaluation for the year, fiscal year 1997?

A. Yes

Q. Please describe it.

A. Witness Hafer: Gordon McCleary [Complainant's manager] approached me as he was actually going to give the performance appraisal and asked me for my input. I went to see . . . who was the lead. Frankly, I thought his input was a little overly critical and my input to Gordon McCleary was that she had performed acceptable over the nine months.

. . . . . .

Hearing Transcript at 115.

Q. Did you agree with the section regarding the four categories she was rated acceptable in?

A. Witness Hafer: Yes, I do.

Q. How would you characterize the input you received from Mr. Fish as to what category she should have ended up in that performance appraisal for the first nine months evaluation?

A. Witness Hafer: I didn't ask him [the lead] to actually mark any of the boxes, but my opinion of his input was he would have had at least one or two categories that would have said ?needs improvement'.

. . . . . .

Id. at 117.

Q. The allegation has been made that the first nine months of Ms. Johndro-Collins performance in fiscal 1997 was ignored by management. Is that true?

A. Witness McCleary: No, it's not.

. . . . . .

Q. There has been ample testimony that the company emphasized the last three months of the fiscal 97 period for her performance appraisal, the whole of which you just read a part. Can you tell us, is that accurate to the best of your recollection.

A. Witness McCleary: Yes, it is accurate

Q. Why did the company do that?

A. Ann's performance had not been satisfactory in [the] view of the people who had been supervising her prior to her becoming a member of my team. My opinion was that they were unduly hard about that. My intent was to . . . she was doing good work for me. I wanted to give her a fresh start, focus on the positive, not the negative aspects of the review.

Q. Did you feel the emphasis on the last three months benefited her?

A. Yes.

Id. at 150-151.

I agree with the Hearing Officer's conclusion that FDH management offered convincing explanations as to why the Complainant's Assessment emphasized the last three months of the rating period. As stated in the above testimony, Hafer, the Complainant's manager for the nine month period in question, expressly stated that the Complainant's performance was acceptable, not outstanding during the nine month period. This period preceded the Complainant's protected disclosures. Hafer also suggested that the Complainant's Team Leader would have given input that would have led to a less than "acceptable" rating in two of four categories during this time period. In addition, the testimony also emphasizes that the Complainant's first nine months of performance during FY 1997 were not discounted, but rather the last three months were emphasized because it would benefit the Complainant.

As for the Complainant's contention that she was prevented from receiving a cash bonus, the testimony in the record indicates that an "acceptable" performance appraisal did not prevent FDH employees from receiving cash bonuses. But that rating also did not automatically mean that an employee would get a bonus. In light of this testimony, I find Complainant's contention regarding her FY 1997 Assessment to be without merit, and uphold the Hearing Officer's determination concerning this issue.

2. The Complainant's Promotion Without A Raise

As with the first contention, I find equally unavailing the Complainant's second contention that she received a promotion from a Grade 14 to a Grade 16 without a corresponding pay raise. The Hearing Officer's finding regarding this issue is quite persuasive. He states:

Although the Complainant has characterized her advancement to grade 16 as a promotion without a raise, this characterization is not accurate. The general procedure at FDH is for salary changes to occur once a year, in October. The ceiling for pay increases in FY 1997 was 5%. Approximately 80% of FDH employees received some increase, with most increases in the 3-4% range. The Complainant received a 4% merit raise in October 1997. The following January, the merit raise was re-coded as a promotion, made retroactive to October 1997. Consequently, it is accurate to say that the Complainant received a promotion to grade 16 with a 4% raise, effective in October 1997.

Initial Agency Decision, 27 DOE ¶ 87,530 at 89,160.

As explained in the Initial Agency Decision, the Complainant, as well as other employees, in essence received in January 1998 a "dry promotion" (the process by which an employee is advanced in pay grade while not simultaneously receiving an increase in salary). The testimony in the record reflects that shortly before receiving the dry promotion, the Complainant filed an EEO complainant, alleging gender discrimination. According to FDH management, the EEO complaint elicited a review of the Complainant's work, which in turn led to the dry promotion. Thus, FDH management asserted that the EEO complaint caused it to review the Complainant's performance and consider whether she was qualified for a Grade 16. In addition, the record reflects that rather than being considered a negative personnel action, receiving a dry promotion has its advantages. According to the testimony of Harold Lacher, the

manager of Human Relations for FDH, two benefits of receiving a dry promotion are 1) the employee acquires the potential for greater future pay increases and 2) the employee can accumulate time in the new grade, a consideration when the employee is being considered for future promotion. Based on the foregoing, I find that the Complainant has not shown any negative aspects from her promotion from Grade 14 to Grade 16 and therefore the promotion does not constitute a retaliatory act as defined in 10 C.F.R. § 708.2. I uphold the Hearing Officer's determination regarding this issue.

3. The Complainant's Assignment to a Position Formerly Held by an Employee in Pay Grade 18

Finally, the Complainant asserts that the Hearing Officer disregarded her manager's testimony "where he agrees that work I have done under his direction over the last five years is all currently done by grade 18s." Appeal at 5. In the Initial Agency Decision, the Hearing Officer found that the Complainant's assignment in January 1998 to the Strategic Planning team was not a retaliatory act. The position was offered to the Complainant at a pay grade 16, and she accepted it on those terms. The Hearing Officer further found that there was no evidence that the Complainant is performing work at a pay grade 18 level. He refers to testimony in the record that indicates that the Complainant does not bear the responsibility that grade 18 employees have. The Complainant has referred me to nothing which would controvert his conclusions. The testimony in the record clearly supports the Hearing Officer's conclusions regarding this contention and therefore, it is not necessary to analyze the Complainant's contention further.

B. Conclusion

On the basis of the foregoing, I conclude that the Complainant has failed to show in her Appeal that the determination reached in the Initial Agency Decision is erroneous as a matter of fact or law. I concur with the determination that the Complainant has not prevailed on any of the three allegations of retaliatory acts. Accordingly, the Complainant's Appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Ann Johndro-Collins on October 29, 1999, of the Initial Agency Decision issued on September 27, 1999 (Case No. VWA-0037), is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Ann Johndro-Collins under the Contractor Employee Protection Program, 10 C.F.R. Part 708 , is denied.

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

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 28, 2000

Case No. VBA-0041

March 13, 2000

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: John L. Gretencord

Date of Filing: November 26, 1999

Case Number: VBA-0041

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on November 4, 1999, involving a complaint filed by John L. Gretencord (Gretencord or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Gretencord claims that West Valley Nuclear Services, Inc.(West Valley), a DOE contractor, terminated his employment in retaliation for his making disclosures that are protected under Part 708. In the IAD, however, the Hearing Officer determined that West Valley had shown that it would have terminated the complainant for his aggressive and anti-social behavior even in the absence of the protected disclosures. As set forth in this decision, I have determined that Gretencord's Appeal must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (amended regulations) (definition of retaliation).

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included fact- finding by the DOE Office of Inspector General, followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint. Thereafter, the complainant could request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision.

On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised regulations, review of an Initial Agency Decision, as requested by Gretencord in the present

Appeal, is performed by the OHA Director. 10 C.F.R. § 708.32.

B. Complaint Proceeding

The events leading to the filing of Gretencord's complaint are fully set forth in Gretencord v. West Valley Nuclear Services, Inc., 27 DOE ¶ 87,535 (1999)(Gretencord). I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Gretencord was employed by West Valley as a Senior Quality Control/Quality Assurance Engineer from January 1990 to March 18, 1997. On March 26, 1997, Gretencord filed a complaint under Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In his Complaint, Gretencord alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement. The IG's Report of Investigation (ROI) found that "the evidence is clear and convincing that [Gretencord] was terminated for reasons other than his protected disclosure." Gretencord, 27 DOE at 89,178. After the issuance of the ROI, Gretencord requested and received a hearing on this matter before an OHA Hearing Officer. Gretencord called 13 witnesses, and West Valley called 11 witnesses. The hearing took five days.

C. The Initial Agency Decision

In the IAD, the Hearing Officer cited the burdens of proof under the Contractor Employee Protection Regulations:

"the employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . as described under §708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employer by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure . . . ." 10 C.F.R. § 708.29.

Gretencord, 27 DOE at 89,178.

The Hearing Officer noted that West Valley admitted that Gretencord made at least 14 protected disclosures while employed by the firm. The Hearing Officer further determined that a number of negative personnel actions occurred during that period. These actions included several letters of reprimand, poor performance evaluations, a suspension, and finally an involuntary termination. The Hearing Officer found that since both Gretencord's protected disclosures and the negative personnel actions were interspersed throughout his tenure at West Valley, Gretencord had met his initial burdens under § 708.29, thereby shifting the burden to West Valley to prove by clear and convincing evidence that it would have taken the same actions without Gretencord's protected disclosures.

Gretencord, 27 DOE at 89,178.

The Hearing Officer found that Gretencord exhibited an extraordinary number of personality conflicts, engaged in confrontations and arguments with other members of West Valley's workforce, repeatedly failed to control his temper, issued threats to fellow employees and made bizarre and disturbing statements in the presence of other workers. The Hearing Officer also found that, with only one exception, Gretencord did not deny that any of the cited incidents had occurred. The Hearing Officer concluded that Gretencord failed to respond to the firm's attempts to help him modify his behavior, and that these abusive and frightening actions were the basis for West Valley's adverse personnel actions. Gretencord, 27 DOE at 89,179.

To support these conclusions, the Hearing Officer cited 10 events showing the complainant's outbursts and abusive behavior, as well as three memoranda documenting West Valley's instructions to Gretencord to seek help from the firm's Employee Assistance Program in controlling his behavior. This occurred during the period March 14, 1990, through February 17, 1997. Gretencord, 27 DOE at 89,179-80.

The Hearing Officer then described an event that took place on February 27, 1997. I will refer to this occurrence as the "triggering behavior," because it led to Gretencord's termination one week later. Since the discharge is the key retaliation in this case, this event is very important in this Appeal. I have therefore cited it in full below, as it was set forth in Gretencord.

On February 20, 1997, the Supervisor of West Valley's Electrical Department, Bruce Covert, encountered Gretencord engaged in a conversation in the Electrical Department's offices. Covert asked Gretencord why he was there. Gretencord informed Covert that he was assigned to conduct a surveillance of that department. Gretencord then asked to see some documents. Covert then telephoned Gretencord's supervisor, who informed Covert that Gretencord had not been assigned to conduct a surveillance of the electrical area. Gretencord then became angry. Covert reported that Gretencord said " I am coming back to write you up on paperwork issues and I am going to [West Valley] and DOE with this as you must be hiding something." A co-worker reported that he overheard Gretencord say "I just love doing that sort of thing." Another co-worker reported that Gretencord made a similar statement the next day.

On February 25, 1997, Gretencord met with Tom Crisler of West Valley's Human Resources Department. Crisler recounted that, during this meeting, Gretencord expressed his belief that direct, aggressive and disrespectful conduct was acceptable for a Quality Assurance Engineer. At this meeting, Gretencord was informed that he was being suspended pending an investigation into his conduct.

On February 27, 1997, Gretencord again met with Crisler. Crisler informed Gretencord that his employment with West Valley was being terminated because of his lack of respect for his co-workers. During this meeting, Crisler alleges, Gretencord held out his left arm. Allegedly, Gretencord noted that his arm was very steady and that enabled him to be good at aiming a gun. Crisler further alleged that Gretencord then said he needed to think about becoming a whistleblower.

Gretencord, 27 DOE at 89,180-81.

The Hearing Officer also described the following testimony at the hearing, supporting West Valley's position that Gretencord's behavior was unacceptable:

A number of Gretencord's co-workers testified that they or other co-workers personally feared him. Transcript at 359, 603, 671-672, 818-19, 825-26, 830, 951, 1422-24, 1435. Moreover, a number of Gretencord's co-workers testified that they witnessed Gretencord engaged in disturbing behaviors. Thomas J. Holden testified that he had witnessed Gretencord engaged in loud and threatening confrontations on a few occasions. [Transcript of Hearing, hereinafter Tr.] Tr. at 65-66, 80-81. Vitto Riggi testified that he witnessed Gretencord have violent outbursts on at least two occasions. Tr. at 201-04. Linda Baker testified that she saw Gretencord in a local mall. When Baker asked why he was at the mall he indicated that he was there to bump into little kids or to trip them. Tr. at 362, 424, 432. Baker also testified that she witnessed Gretencord get mad at people and yell and scream at them. Tr. at 423. Jerome E. Hager recounted an incident where Gretencord provoked a fellow employee to slap him by refusing to stop singing a song about that employee. (This song was sung by Gretencord to the tune of the Gilligan's Island theme song). Tr. at 470. Jack Gerber testified that Gretencord joked about stepping on little children's toes in the mall. Tr. at 652. Phil O'Brien testified that Gretencord had told him that he had a vendetta against Bruce Covert. Tr. at 781. Dave Crouthamel testified that Gretencord had talked about poisoning and shooting "little Halloween kids." Tr. at 1150, 1214-15, 1240-42.

Gretencord, 27 DOE at 89,181.

Noting that Gretencord did not even attempt to rebut the veracity of most of these allegations regarding his behavior, the Hearing Officer concluded that the complainant's unacceptable behavior interfered with West Valley's business operations. Accordingly, the Hearing Office determined that the firm had proven by clear and convincing evidence that it would have discharged Gretencord absent the protected disclosures.

II. The Gretencord Appeal

In connection with his Appeal, Gretencord filed a statement identifying the issues on which he wished the Director of the Office of Hearings and Appeals to focus in this phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). 10 C.F.R. § 708.33. The Statement presents the following issues for my review: (i) the Hearing Officer failed to properly credit the key protected disclosures; (ii) the Hearing Officer overlooked the importance of the timing of discharges versus key disclosures; (iii) the Hearing Officer failed to issue a subpoena for a key witness; (iv) the Hearing Officer failed to allow Gretencord access to the West Valley site; (v) the Hearing Officer failed to credit competent rebuttal evidence and (vi) the Hearing Officer failed to give credit to evidence that the complainant had a right to be in the electrical shop at the time of the triggering behavior. (1)

As discussed below, I do not find any merit to the matters raised for my review, and consequently I will not reverse the Hearing Officer's determination.

1. Failure to Acknowledge Key Protected Disclosures

The Statement first alleges that the Hearing Officer failed to properly credit all of the key protected disclosures. On May 12, 1999, the Hearing Officer issued a Decision and Order limiting Gretencord's protected disclosures to 15 protected disclosures. West Valley Nuclear Services Co. Inc., 27 DOE ¶ 87,511 (1999)(WVNS). The Statement sets forth six disclosures in particular that it contends should also been included in the list of protected disclosures.

This objection is unavailing. The Hearing Officer specifically enumerated 15 protected disclosures. WVNS, 27 DOE at 89,080-81. This exceeds the number of disclosures necessary to find that the complainant has made the required regulatory showing on this point. I see no error in the Hearing Officer's determination, or his decision to limit the number of protected disclosures deemed relevant in this case. It was not only proper for the Hearing Officer to limit and define the issues that would be considered in this proceeding, it was imperative for an orderly proceeding for him to do so. See 10 C.F.R. § 708.28(b)(4). It is a vital part of the role of the Hearing Officer in any case brought under Part 708 to refine and structure the issues presented for resolution.

Moreover, there is clearly no prejudice to Gretencord arising from the fact that there may have been other protected disclosures that the Hearing Officer did not consider. Once a finding is made that there was a protected disclosure that was a contributing factor to a retaliation, it is irrelevant if there were additional disclosures. The inclusion of additional protected disclosures in this case would not alter the result in the Initial Agency Decision or in any other manner work to Gretencord's advantage. Nor does their exclusion create a disadvantage for Gretencord. I find that the inclusion of additional protected disclosures would make no difference in this case whatsoever.

2. The Timing of the Discharge

The Statement claims that the Hearing Officer overlooked the importance of the timing of the discharge vis-a-vis the key disclosures in this case. The so-called "key disclosures" to which the Statement alludes involve Gretencord's disclosures regarding his compliance investigation of Report 93-N-117 (Report #93) and other quality problems that he found in West Valley's electrical shop. See Complaint, Vol. 1 at 4-17. (2) The Statement alleges that the Hearing Officer did not give adequate consideration to the fact that Gretencord's termination occurred at "exactly the same time as these key protected disclosures."

As discussed above, under Part 708, the complainant has the burden of establishing by a preponderance of the evidence that a disclosure that he made was a contributing factor to a retaliation by his employer. In our cases, we have repeatedly indicated that the "contributing factor" showing can be made by time proximity, that is, by establishing that the retaliation took place shortly after the protected disclosure was

made. E.g., Don W. Beckwith, 27 DOE ¶ 87,534 (1999).

The Hearing Officer followed that precedent in the instant case. Specifically, he found that the protected disclosures were "interspersed throughout his [Gretencord's] tenure at West Valley, as were the negative personnel actions taken against him." Gretencord, 27 DOE at 89,178-79. Based on this finding, the Hearing Officer determined that Gretencord's showing with respect to the "contributing factor" element had been satisfied, and that the burden had shifted to West Valley to show "by clear and convincing evidence that it would have taken the same actions without Gretencord's protected disclosures." Id. at 89,179.

The Statement seems to allege, however, that there is some error in the fact that the Hearing Officer found that the burden was met through this "interspersion" of protected disclosures and alleged retaliations, rather than by specifically pointing to closeness in time between Report #93 and the subsequent termination. I do not agree. There is no prejudice to the complainant arising from the Hearing Officer's finding. Since, as the Statement itself admits, the Hearing Officer shifted the burden of proof, I fail to see how his "interspersion" analysis makes any real difference to Gretencord.

The Statement implies, however, that the Hearing Officer should in some way have given some extra weight to the fact that the complainant's termination occurred "at exactly the same time as the key protected disclosures and a conflict with a Respondent agent over quality concerns." I believe that the Hearing Officer accorded the proper weight to these facts by shifting the burden of proof to the contractor. I cannot discern in what way the facts referred to by the Statement could have been accorded more weight, so as to change the outcome in this case.

3. Failure to Issue Subpoena for Key Witness

The Statement next contends that the Hearing Officer erred in failing to issue a subpoena for a key witness. According to the Statement, this potential witness is a former co-worker of Gretencord who purportedly has critical information regarding Gretencord's actions in February 1997, when he investigated and disclosed to West Valley non-compliance with respect to Report #93. The Statement alleges that the Hearing Officer orally told Gretencord that he would not issue a subpoena for this witness.

The Statement points to no request by Gretencord for a subpoena for this individual. I see no reference to this matter anywhere in the record. There is thus no basis for me to conclude that the Hearing Officer actually refused to issue a subpoena for this witness. Moreover, I have some doubt that he did refuse. I note that the Hearing Officer readily allowed testimony from 13 witnesses offered by the complainant. The record indicates that he issued a subpoena for each of them. The Statement offers no reason why the Hearing Officer would have refused to issue a subpoena for this particular witness. After reviewing the record, I cannot see any reason that the Hearing Officer would have refused such a request, if it were made. Consequently, the assertion in the Statement of Issues that Gretencord made a request for a subpoena that the Hearing Officer then orally denied seems implausible to me.

In any event, the Statement fails to elucidate the nature of the "key information," other than to state that the individual has direct knowledge of West Valley's threat to terminate Gretencord. The record already reflects that the firm had disciplined Gretencord on several occasions. There is no doubt that West Valley terminated Gretencord from his position with the firm. The existence of information about additional "threats" on the issue of discipline in and of itself would not be surprising or necessarily useful in this case. Accordingly, I find that the Statement has not shown any error with respect to this issue.

4. Failure to Allow Access to West Valley Site

The Statement points out that Gretencord requested access to the West Valley site as part of discovery in this proceeding. See 10 C.F.R. § 708.28(b)(2). The Statement claims that the Hearing Officer improperly refused to "grant Gretencord this right, which could have revealed evidence which rebutted Respondent's

[West Valley's] position that ?Gretencord had not been assigned to conduct a surveillance of the electrical area' and/or evidence illustrating the propriety of Mr. Gretencord's investigation of the electrical area."

This allegation, too, is without merit. As an initial matter, in his April 15, 1999 letter regarding discovery, Gretencord asked permission to enter the West Valley site to inspect electrical and mechanical equipment and documents including surveillance and non- conformance reports. This suggests that his motives for this discovery were to substantiate the legitimacy of his claim that there were irregularities at the site. As the Hearing Officer noted, the validity of Gretencord's claims of safety deficiencies is not a relevant issue in this case, and thus there was no reason to allow him on site for that purpose. Letter of Hearing Officer dated June 3, 1999.

Moreover, ordering discovery in a proceeding under Part 708, is a matter within the discretion of the Hearing Officer. 10 C.F.R. § 708.28(b)(1). Considerable latitude must be afforded a hearing officer in order to allow proper regulation of a whistleblower proceeding. I see no abuse of that discretion here. One purpose of the discovery on the West Valley site as now indicated in the Statement, is newly propounded. The Statement suggests that if Gretencord were allowed to inspect the site, he might have been able to locate evidence that he was assigned to the electrical area. This information would rebut the contractor's stated position that Gretencord was not authorized to be in that area.

The discovery Gretencord seeks would be irrelevant in this case. Even if the complainant could establish that he was authorized to be in the electrical area, the issue in this case is, in part, his behavior when he was told to leave. I find that his behavior towards Bruce Covert on this occasion could not be condoned even if Gretencord had in fact been assigned to the electrical area. See Tr. at 949.

Accordingly, I must reject this claim of error made in the Statement.

5. Failure to Credit Competent Rebuttal Evidence

The Statement cites the testimony at the hearing in this matter of ten witnesses presented by Gretencord, and claims that the Hearing Officer ignored their favorable testimony. I have reviewed this testimony, and find that it is certainly true that this testimony was favorable to the individual. Nevertheless, given the massive amount of testimony in this case, it is obvious that the Hearing Officer could not have reasonably set forth in his decision his views on all the assertions made at the hearing. Of necessity, he could only refer to the key testimony in his Initial Agency Decision.

Overall, however, the one-paragraph of analysis of the testimony of all of the witnesses in this case does appear rather brief, in view of the fact that the hearing lasted five days and the transcript was more than 1,400 pages. The Hearing Officer did not analyze testimony that was favorable to the complainant. He did not specifically weigh and balance the testimony that was favorable and unfavorable to Gretencord. I would have preferred to see a more developed analysis of all of the hearing testimony.

While in some cases such a failure might result in a remand with a direction that the Hearing Officer fully consider the evidence, I will not take that step here. The Hearing Officer's own assessment of the weight of the favorable evidence in this case seems less critical, given the solid and abundant testimony that was adverse to the complainant. That evidence in its totality was compelling, in comparison with the relatively scant evidence that was in Gretencord's favor. Since the vast weight of the evidence in this case supports West Valley's position, and even many of the complainant's own witnesses indicate that he had serious behavioral problems, I am able to make a determination from the record itself that there was no error in the result reached by the Hearing Officer. My detailed analysis is set out below.

I have specifically reviewed the testimony of those witnesses which Gretencord now contends should have been accorded explicit consideration. Although the Statement alleges that there was key favorable evidence to support the complainant, I find that the Statement fails to cite any testimony that supports in any meaningful way Gretencord's position that his termination was improper.

A. The Statement notes that several of the witnesses testified that the complainant's job performance was good. E.g., Tr. at 34, 97-98, 111-112. However, Gretencord's actual performance of his duties is not at issue here. The issue here is whether West Valley has shown by clear and convincing evidence that he was unable to get along with his co-workers and so confrontational that other employees were fearful of him or were unable to work with him. Some of the same employees who gave Gretencord good marks for his overall performance confirmed that he dealt poorly with other employees. E.g., Tr. at 34, 142. The testimony about his good job performance should have been noted, but I do not believe it would have affected the Hearing Officer's ultimate conclusion, nor do I believe it should have.

B. The Statement also claims that the Hearing Officer did not specifically weigh testimony of witnesses who said that they did not see Gretencord ever enter into an altercation with anyone. The fact that a particular employee never actually saw Gretencord involved in an altercation does not discredit the testimony of those who did see such actions. In fact, the very witnesses who testified on this point stated that Gretencord was difficult to get along with and interfered with daily work. Tr. at 232-33, 491. I therefore see no prejudice to the complainant on this issue.

C. The Statement also cites the testimony of one witness who indicated that employees "holler at each other quite often." Tr. at 206. The Statement contends that more weight should have been accorded this testimony, alleging that it shows that Gretencord's actions were not unusual. I do not agree with this assertion. Taken in context, I find this testimony refers only to normal give and take between employees on the job. It does not refer to the type of altercation that Gretencord engaged in, which tended to be much more threatening and confrontational. The evidence on this score remains unaffected by the testimony to which the Statement refers.

In this same vein, the Statement further refers to the testimony of a witness who indicated that there were regular "confrontations" between other West Valley employees. Tr. at 522. The rather passing reference to confrontations made by this witness in no way supports the complainant's position. This witness did not refer to any specific confrontation or actually describe any confrontation at all. Thus, I cannot conclude that this individual witnessed any confrontation that in any way resembled Gretencord's angry, threatening behavior.

The Statement further contends that Bruce Covert, who was directly involved in the incident leading to the triggering behavior, testified that he did not recall Gretencord ever using "vulgar" language. This assertion does not even begin to rebut the ample evidence of the abusive and threatening nature of Gretencord's confrontations with other employees. The fact that one witness claimed that no outright vulgarity was involved hardly absolves Gretencord or rebuts the clear and convincing showing of Gretencord's severe behavioral difficulties made by West Valley.

D. The Statement asserts that the Hearing Officer did not give credit to evidence that Gretencord was authorized to be in the electrical area at the time of the triggering incident. As stated above, this is simply irrelevant. Whether and the extent to which Gretencord's behavior was unacceptable is the key issue here, not whether he was authorized to be in that area.

E. The Statement finally argues that the Hearing Officer failed to give sufficient weight to the fact that there was a 14-month period prior to the triggering behavior during which no behavioral complaints were lodged against Gretencord. Initially, I note that the lack of any complaints for this period, if true, in no way confirms that Gretencord had modified his unacceptable behavior. More importantly, I fail to see how this allegation, if true, provides any meaningful rebuttal to the compelling case of Gretencord's totally inexcusable behavior offered by West Valley. As the record here makes clear, the complainant had a long history of behavioral problems dating from 1990. There was a long period in 1994 when there were no complaints about Gretencord. Nevertheless, there is ample evidence that Gretencord resumed his poor behavior in 1995, and he was terminated from his position at West Valley in 1997. Thus, the existence of a period during which no complaints were made, followed by a resumption of unacceptable behavior, is not unprecedented for Gretencord. From the firm's point of view, the triggering behavior was clearly the final

straw after a long period of difficulty with Gretencord, and repeated warnings to him. Accordingly, I do not see that the 14-month hiatus referred to by the Statement establishes that the determination of the Hearing Officer was erroneous, or should be altered in any way.

After reviewing West Valley's overall showing, I do find it meets the clear and convincing standard set forth at Section 708.29. Nevertheless, I would have preferred the firm to have provided evidence on whether other West Valley employees exhibited behavioral problems, the nature of those problems, and how the firm resolved them.

III. Conclusion

On the basis of the foregoing, I conclude that Gretencord has failed to show in his Appeal that the determination reached in the Initial Agency Decision is erroneous as a matter of fact or law. I concur with the determination that West Valley has shown by clear and convincing evidence that it would have terminated Gretencord even in the absence of the protected disclosures. Accordingly, Gretencord's Appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by John L. Gretencord on November 26, 1999, of the Initial Agency Decision issued on November 4, 1999, is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by John L. Gretencord on March 27, 1997, under the Contractor Employee Protection Program, 10 C.F.R. Part 708, is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals, within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 13, 2000

(1)West Valley filed a Response to the Statement. 10 C.F.R. § 708.33.

(2)Report #93 dealt with the labeling of junction boxes within radiation areas. Gretencord believed that no inspection of the labeling had been done, even though the Report indicated that the inspection had been performed.

Case No. VBA-0042

November 1, 2001

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Richard Sena

Date of Filing: March 15, 2001

Case Number: VBA-0042

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on March 1, 2001, involving a Complaint filed by Richard Sena (Sena or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In this case, Sena made a protected disclosure regarding subcontracator personnel who were using the Internet improperly at the DOE's Sandia National Laboratories. In his Complaint, Sena maintains that his former employer, Sandia Corporation (Sandia), a contractor that operates Sandia National Laboratories on behalf of the DOE, retaliated against him for making that protected disclosure. The retaliation Sena alleges is constructive discharge by Sandia. In the IAD, the Hearing Officer determined that Sena had made a disclosure that is protected under Part 708, and that Sandia created a hostile work environment, causing Sena to go on temporary sick leave and ultimately to retire from Sandia on disability. The Hearing Officer therefore sustained Sena's Complaint, and ordered Sandia to pay Sena an amount that would put Sena in the same position as if he had worked for Sandia until retirement age. *Richard R. Sena*, 28 DOE ¶ 87,009 (2001)(*Sena*). In a separate phase of this proceeding, the Hearing Officer calculated the appropriate amount of that compensation, plus costs and attorney fees, and ordered Sandia to pay a total of $367,088.69. Of that amount, $342,324.77 was awarded to Sena as compensation. The remainder represents attorney's fees and other costs. *Richard R. Sena*, 28 DOE ¶ 87,012 (2001). Sandia filed an appeal of the IAD. 10 C.F.R. § 708.32. As set forth in this decision, I have determined that the IAD should be sustained.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (amended regulations) (definition of retaliation). (1)

B. History of the Complaint Proceeding

The events leading to the filing of Sena's Complaint are fully set forth in *Sena*, and I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant events are as follows. In 1995, as stated above, Sena made a protected disclosure regarding improper use of office Internet connections. Six subcontractor employees were fired. Three years later, two of those employees returned to Sandia and worked in the same area as Sena. Sena found their presence caused him considerable stress and, after a period of sick leave, retired on disability in 1999. He filed a Complaint of Retaliation with the DOE, claiming constructive discharge by Sandia as a retaliation for the protected disclosure. A DOE Investigator performed an investigation of the circumstances surrounding this case and on February 24, 2000, issued a Report of Investigation (ROI). The ROI found that Sena made a protected disclosure, but that it was not a contributing factor to a retaliation by Sandia, and further that Sandia did all that it could reasonably be expected to do to accommodate Sena. After the completion of an investigation, Sena requested and received a hearing on this matter before an OHA Hearing Officer. There were seven witnesses and the hearing lasted two days. After considering the testimony at the hearing and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

C. The Initial Agency Decision

In the IAD, the Hearing Officer cited the burdens of proof under the Contractor Employee Protection Program Regulations. They are as follows:

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

10 C.F.R. § 708.29(d).

The factual findings made by the Hearing Officer are as follows. As stated above, Sena was an employee of Sandia. In 1995 he noticed that a number of subcontractor employees were using the Internet connection in their offices to view sexually explicit materials, in violation of Sandia policy. He reported this information to Sandia, which conducted an investigation and ultimately caused six employees to be fired. At the time of the terminations, Neil Hartwigsen, a Sandia senior manager, told each of these employees that they would not be allowed to work in the same area at Sandia again. He also told Sena that he (Sena) would never have a working relationship or contact with these employees again. On the day of the firing, someone blew up Sena's home mailbox. Shortly thereafter, Sena received several threatening telephone calls at his residence. *Sena*, 28 DOE at 89,069-70.

In July 1998, two of the fired employees (hereinafter "offending employees") returned to the Sandia site as employees for other contractors. They were permitted access to the same general area in which Sena worked. Sena objected to this and immediately told Hartwigsen that he feared for his safety. While Hartwigsen permitted the two individuals to return as subcontractor employees, he did not allow them to have on site offices and computers. *Id*. at 89,070.

Sena could not accept the stress that the presence of the offending employees caused him and, with the approval of Dr. Clevenger, the Sandia Medical Director, went on temporary sick leave for nine days in August 1998. Sena returned to work on August 17. After two working days, Sena returned to sick leave status.(2) While Sena was on sick leave, Hartwigsen offered to transfer Sena first to one job, and then, when Sena rejected that placement, to another job that would put some distance (100 yards) between him and the offending employees. These transfers would have placed Sena in buildings where the offending employees would not have a business reason to visit. When Sena declined the two placements, Sandia agreed not to move him. *Id.*

In September 1998, Sena was evaluated by a private psychologist who determined that he was suffering from Post Traumatic Stress Disorder (PTSD). In November 1998, all medical personnel involved with Sena concluded that he would be unable to return to work at Sandia. In November 1999, Sena's retirement on disability from Sandia was effective. *Id.* at 89,071.

After reaching the above findings of fact, the Hearing Officer reached the following conclusions.

He first found that Sena had made a protected disclosure, by revealing that employees were abusing the office Internet connection. He also found that this disclosure was a contributing factor to an act of retaliation.

The Hearing Officer concluded that Sandia management deliberately created the beginning of a hostile work environment because Hartwigsen sponsored the reinstatement of security clearances for the offending employees. He stated that even if it was not immediately clear that the presence of the offending employees was hurtful to Sena, Sandia management should have realized that the environment was hostile by the time that Sena had been on supervised medical leave for an extended period of time, by early November 1998. The Hearing Officer also found that Sandia had the authority to ban the offending employees from the site. *Id.* at 89,074. The Hearing Officer stated that "Sandia management's failure to remove the offending employees and alleviate the hostile work environment for Sena indicates intent to harm Sena." *Id.* at 89,072. The Hearing Officer concluded that "nothing was done, even though there was clear, simple, straightforward ways to get the situation ?under control:' remove the offending employees." *Id.* at 89,074. Based on these findings, the Hearing Officer sustained Sena's Complaint and granted him relief in the amount of $342,324.77.

II. Sandia's Statement of Issues and Sena's Response

Sandia filed a submission identifying the issues that it wishes the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). 10 C.F.R. § 708.33.

The Statement raises the following four issues for my review:

1. Whether the Hearing Officer erred in refusing to allow Sandia to introduce evidence at the hearing of an offer to remove the offending employees from performance of the contract, thereby preventing them from having contact with Sena in the workplace.

2. Whether the Hearing Officer erred in finding a causal relationship between the alleged retaliation and the disclosure. Sandia states that the only finding by the Hearing Officer in this regard was that Sandia management was aware of the disclosure when it allowed the offending employees to return to Sandia. Sandia believes that mere knowledge of the disclosure at the time that the offending employees returned to Sandia is not enough to establish a contributing factor under 10 C.F.R. § 708.29.

3. Whether the Hearing Officer erred in failing to adopt a "reasonable person" standard to determine whether Sandia subjected Sena to a hostile work environment, leading to the alleged constructive discharge.

4. Whether the Hearing Officer erred in failing to consider the Investigator's findings in the ROI, which were contrary to those in the IAD.

In his Response to the Statement, Sena offers the following reply to the issues Sandia has raised on appeal.

1. Sena states that the Hearing Officer properly excluded Sandia's offer to terminate the offending employees. Sena claims that this offer, which was made in a letter of October 2, 1998, written by Sandia's attorney, was not unconditional, but rather a negotiation position offered in the context of attempts to

settle the case. According to Sena, such a conditional offer is not admissible under Rule 408 of the Federal Rules of Evidence. Sena claims that since Sandia expected assurances from him in return for the firing, it was not unconditional, and therefore not admissible. Sena also claims that this offer was untimely, since it was made after the damage to his mental state was done, when he could never return to work at Sandia.

2. Sena challenges Sandia's claim that the Hearing Officer erred in finding that there was a causal relationship between his disclosure and the firm's treatment of him. In this regard, Sena claims that the real issue here is "whether conduct by non- supervisory or non-managerial fellow workers may constitute actionable retaliation by the employer." Sena maintains that condoning mistreatment of an employee makes it official mistreatment and since "retaliation" includes intimidation and threats by a contractor, Sandia's actions, allowing mistreatment of Sena by other employees, fall within the coverage of the regulations. 10 C.F.R. § 708.2.

3. Sena contends that the Hearing Officer used the correct standard in finding that Sandia created a hostile work environment. In this regard, Sena states that Sandia recognized that it had a responsibility to correct a hostile work environment, but simply did not take adequate steps to remedy the situation.

4. Sena states that the IAD was not arbitrary or capricious and that, after fully reviewing the record, the Hearing Officer was entitled to remain silent on the validity of the findings of the ROI.

III. Analysis

It is by now well-established that a key purpose of the Part 708 regulations is the protection of public and employee health and safety by ensuring that DOE contractor-employees feel secure when they bring forward in good faith evidence of unsafe and unlawful behavior. 64 Fed. Reg. 12862 (March 15, 1999). These protections would have no substance if employers may, by mere inaction, allow an unsafe or hostile workplace to exist, one that would make an employee fearful about disclosing information concerning dangers to public health and safety and other serious violations. Accordingly, in order to ensure that those contractor-employees who do advance such concerns are fully protected, contractor-employers are charged with the responsibility for keeping them safe from harm in the work place. If an employer allows an unsafe or hostile workplace for the whistleblower to exist, even by negligence, that employer breaches his fiduciary duty to protect the whistleblower- worker. It is this duty that is at the very core of Part 708. As discussed below, I find that by allowing a severely threatening work environment to exist in this case, Sandia breached its duty to Sena. There is no dispute that Sena ultimately developed post traumatic stress disorder (PTSD) which incapacitated him and ended his work career. The record also confirms that his PTSD was caused by his work environment. In fact, the Sandia Medical Director testified that had the offending employees not returned to Sandia, Sena would probably not have succumbed to PTSD. Transcript of Hearing (Tr.) at 368. Sandia's breach of its duty to Sena is all the more serious in light of the promise that the firm specifically made to Sena that he would never again have a working relationship or work contact with the offending employees. It is these underlying principles that inform my analysis of the facts and the law in this case.

A. I turn first to the alleged retaliation by Sandia. It is the complainant's burden in Part 708 cases to prove by a preponderance of evidence that his employer retaliated against him for making a protected disclosure 10 C.F.R. § 708.29. Sena claims Sandia retaliated for his protected disclosure by allowing the existence of a hostile work environment which ultimately forced him to leave the company on disability.

The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation, then the employer has committed a constructive discharge. *See Martin v. Cavalier Hotel Corp.,* 48 F. 3d 1343 (4th Cir. 1995)(*Martin*). Thus, in order to prevail in this type of case, a plaintiff must allege and prove two elements: (1) intolerableness (hostility) of the working conditions (hereinafter hostile work environment element) and (2) the employer created the hostile environment in order to cause the employee to resign (hereinafter forced resignation element). *Id.* at 1354.

1. Hostile Work Environment Element

The Supreme Court recently analyzed in detail the elements of a hostile (i.e. intolerable) work environment. *Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1998)(*Harris*). (3) The environment must be severely and pervasively hostile, one that a reasonable person would find abusive, and one that the complainant himself perceives to be so. The conditions of the victim's employment must be altered. *Id.* at 21. The Court stated:

whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is of course relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. at 23.

In addition to establishing the abusive elements that pervaded his workplace, the complainant alleging a hostile work environment must show that the employer knew or should have known of the hostile environment and failed to take appropriate action. *E.g.*, *Moore v. Kuka Welding Systems and Robot Corp.*, 171 F. 3d 1073 (6th Cir. 1999).

After reviewing the record in this case, I find that there are undisputed facts which support a finding that (a) a hostile work environment existed in this case, and (b) Sandia knew of the environment and failed to take prompt, appropriate corrective action.

As the hearing transcript indicates, after the offending employees were rehired to work at the same location as Sena, there were numerous direct confrontations between them and Sena.(4)

There is no question that these repeated, unwanted contacts with the offending employees caused Sena great mental anguish and resulted in his Post Traumatic Stress Disorder. Sena Exh. 5,6,11,12,14,15. There is also no question that a reasonable person would have felt threatened by being forced to work in the same building and on some of the same projects with the very individuals who were terminated as a result of his protected disclosure, particularly if these individuals made a point of appearing in his work space without a reason to do so, and asking him direct questions about the 1995 termination. These actions severely altered Sena's working conditions. They unreasonably interfered with his work performance and his ability to work, to the point that he was obliged to take sick leave. A reasonable person would have found these conditions to be hostile.

Having concurred with the Hearing Officer that Sena's work environment was hostile, I will next turn to a consideration of whether the employer deliberately created this environment, i.e., whether Sandia knew or should have known about the conditions and whether it failed to take prompt remedial action.

Sandia clearly knew about the actions of the offending employees, Sena's working conditions, and the adverse effects on Sena. Sena immediately relayed his concerns to Hartwigsen. Tr. at 438. In fact, the firm did take some remedial actions in an attempt to alleviate the abusive conditions. However, the record indicates that Sandia failed to take prompt, reasonable remedial actions. The steps Sandia took to resolve the hostile work environment were halfhearted, at best. In reality, they provided no meaningful alternative to Sena. For example, Sandia contends that from the outset it limited access by the offending employees to Sena's work area, and did not allow the offending employees to have any office space or computers. Tr. at 442-43, 459, 472-474, 476, 494, 476. Yet, as discussed above, almost immediately after being rehired, one of the offending employees appeared in Sena's work space, even though he had no reason to be there. Although the employee was instructed not to have interaction with Sena, this allegedly preventative measure by Sandia was essentially meaningless.

Sandia stated that it offered Sena two positions in areas away from those in which the offending employees were likely to have business. Tr. at 214, 215-16, 358-60, 385, 386, 397. The first position offered to Sena would have placed him in a building that was less than one block away from his old location. The site would have been accessible to the offending employees. Tr. at 212. Given the fact that the offending employees confronted Sena at the old location when they were not supposed to, Sena had no reason to believe he could avoid them at the new location. Sena had no reason to accept such a position or have any faith in its efficacy.

Sandia offered Sena another position in September 1998, after he had already been absent on sick leave. Letter of August 26, 1999 from Michael Danoff to Ellen Gallegos at 6. This job would have been located in a more distant building, one that was much less comfortable than Sena was accustomed to. The job involved a type of mechanical work that Sena believed would have been difficult for him to perform, given his fibromyalgia. Tr. at 215. Sena described both of these positions as "go-nowhere type of jobs." Tr. at 264. In my view, both job offers were empty, impractical proposals. Further, the fact that they were made after Sena's mental health became severely compromised indicates that the company did not act with due diligence.

As the Hearing Officer noted, there was a clear and rather simple solution to this problem: terminate the offending employees. Why Sandia failed to do this is not apparent to me. Hartwigsen professed not to know that he had such authority, but I am doubtful of this, and in any case, do not believe that his ignorance on this point should be a deciding factor here. (5) Hartwigsen was, in any event, fully aware of Sandia's duty to act if a hostile work environment existed. He testified: "If we have somebody who is in a hostile work environment, I believe it's our responsibility to resolve that hostile work environment. Now, if that means removing somebody, then I think they have to be removed." Tr. at 487-88.

There is some evidence that in a letter of October 2, 1998, Sandia did offer to terminate the offending employees. (6) However, this solution was only a conditional proposal, and in any case came too late. It would have been undertaken only if Sena first agreed to it. He was by that time already diagnosed as suffering from Post Traumatic Stress Disorder. Tr. at 141. I cannot see how Sena could have reasonably agreed to the termination, thereby implicitly making a commitment to return to the site, given the fact that his mental condition had already significantly deteriorated, and it was unclear whether he would ever be able to return to Sandia. Thus, at the point when the contingent offer to terminate the offending employees was finally made, it was no longer a viable solution.

In sum, although Sandia asserts that it made every effort to ensure that the offending individuals would not work directly with Sena, the assertions ring hollow, indeed. Tr. at 442, 443, 459, 473. The evidence is to the contrary. A reasonable person would perceive this work environment as threatening and out of control, and Sena in fact did so. Although Sandia arguably did not know when it first permitted the rehiring of the offending employees that the rehiring would cause such dramatic harm to Sena, it should have realized this very soon. Testimony at the hearing confirmed that Hartwigsen, Sena's supervisor's supervisor, knew of the extent of the trauma to Sena by early November 1998. By that time, all of the Sandia medical personnel also knew that Sena could no longer return to Sandia to work. *Sena*, 28 DOE at 89,074. Based on the above, I find that Sena has established that Sandia allowed a hostile working environment to exist, and that the firm failed to take prompt remedial action to alleviate that hostile environment.

2. Forced Resignation Element

The fact that a hostile work environment existed is not sufficient in and of itself to support a claim for constructive discharge. Once the hostile environment is demonstrated, the complainant must then show that the resignation was coerced, i.e. that the employer deliberately created the intolerable working conditions for the purpose of causing the employee to resign. I agree with the Hearing Officer in this case, who found that Sandia intended to harm Sena. *Sena*, 28 DOE at 89,072. He found that while the precise date when Sena's trauma became evident to Sandia is unclear, Sena's trauma was certainly clear to Sandia by November 1998, and yet it failed to dismiss the offending employees even then. Ultimately, there can

be no doubt that by permitting the offending employees to be hired and allowing them on site, Sandia deliberately created a hostile work environment severely adverse to Sena, one that caused him to resign.

The foregoing conclusion is consistent with prevailing legal authority on the subject.

There are two schools of thought among the U.S. courts of appeals regarding the evidence necessary to establish the forced resignation element of the constructive discharge showing. The majority of circuits focuses almost exclusively on a so-called "objective" standard. (7) This standard asks whether a reasonable person in the employee's position would have felt compelled to resign. It does not actually look at the employer's intent. *Bourke v. Powell Electrical Manufacturing Co.*, 617 F. 2d 61 (5th Cir. 1980). The tenth circuit, in which the instant case arises, has used the majority standard. *Derr v. Gulf Oil Co.*, 796 F. 2d 340 (10th Cir. 1986)(*Derr*)(whether the employer, by its illegal discriminatory acts, has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign). *See also Sanchez v. Denver Public Schools,* 164 F.3d 527 (10th Cir. 1998).

I find that a reasonable person would have felt compelled to resign from Sandia under the circumstances of this case. (8) Sandia promised Sena that the offending employees would never return to Sandia, and further that he would never again have any workplace contact with the offending employees. Notwithstanding the fact that he was severely affected by the violent incident (explosion of his home mailbox) that took place immediately after the firing of the offending employees, Sena relied on Sandia's promises and continued to work for the firm. Suddenly, and without warning to Sena, the offending employees not only are rehired at Sandia, but without any reason to do so, one of them almost immediately appears in Sena's cubicle. They allude to the 1995 incident, and make threatening gestures to Sena. They intentionally cross his path when they have no reason to do so, and even though they are instructed to avoid him. All of this causes Sena great physical and mental stress. Tr. at 468. Under these circumstances, a reasonable person, one whose mental and physical status was severely adversely affected, would have no choice but to resign, rather than suffer continued degradation of his health, and continual fear for his own safety.

I therefore find that Sena has established both elements of the constructive discharge showing: the hostile work environment and the forced resignation.

B. In addition to showing by a preponderance of evidence that an employer retaliated against him, a Part 708 Complainant must establish that the protected disclosure was a contributing factor to the retaliation. 10 C.F.R. § 708.29.

In the case at hand, the Hearing Officer correctly found that Sandia knew of the protected disclosure. However, a complainant must bring forward additional evidence to establish that the disclosure and the alleged retaliation were causally related.

As discussed above, Sandia knew or should have known that rehiring the offending employees would have a severe adverse effect on Sena, but nevertheless allowed those employees to return to the site where Sena worked. Sandia breached its duty to Sena by allowing a threatening work environment to exist. The protected disclosure, the promise by Sandia to keep the offending employees away from the work site, the breach of that promise, the ensuing hostile work environment, Sandia's breach of its duty to Sena and Sena's resignation all spring from the very same incident. This tightly woven pattern of interconnecting events, all directly related to the protected disclosure and flowing from it, demonstrates a causal relationship between the protected disclosure and the retaliation.

C. Sandia objects to the fact that the Hearing Officer failed to consider the findings set forth in the ROI. I find no error here. The findings in the ROI are preliminary and are made after only a limited inquiry. 10 C.F.R. §§ 708.22; .23. They serve as guidance for the Hearing Officer in ascertaining and limiting the issues in the case and in structuring the hearing. They also help the parties to focus on relevant issues at the hearing. They are thus only tentative and not entitled to deference. Reliance on the ROI is

discretionary. Neither the Hearing Officer nor the Director of the Office of Hearings and Appeals is bound by the ROI. 10 C.F.R. §§ 708.30(c); .34(b)(1).

D. Sena has objected to the calculation of the damages awarded in this case. He claims that he should have been awarded a cost of living increase in the calculation of his loss of income, interest on the loss of income and a damages for loss of retirement. Sandia has not filed any objections to the calculations of the remedy performed by the Hearing Officer. I see no merit in any of Sena's objections to the remedy calculated by the Hearing Officer, and I will give them no further consideration.

This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by each affected NNSA element, official or employee and by each affected contractor.

It Is Therefore Ordered That:

(1) The Appeal filed by Sandia National Laboratories on March 15, 2001, (Case No. VBA-0042), of the Initial Agency Decision issued on March 1, 2001, is denied.

(2) The cross appeal filed by Richard Sena on May 1, 2001 is denied.

(3) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial Review with the Office of Hearings and Appeals within thirty days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay
Director
Office of Hearings and Appeals
Date: November 1, 2001

(1)The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications to the April rule. 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12862 (March 15, 1999). Under the revised regulations, review of an Initial Agency Decision, as requested by Sandia in the present Appeal, is performed by the Director of the DOE's Office of Hearings and Appeals. 10 C.F.R. § 708.32.

(2)He never returned to Sandia again and retired on disability effective November 2, 1999.

(3)Harris and most of the other federal cases cited herein were brought under Title VII of the Civil Rights Act of 1964, and not, like the instant case, as a whistleblower protection claim. However, it is by now well-established that the principles set forth in so-called hostile work environment cases under Title VII are applicable to cases brought under whistleblower protection statutes, because Title VII and the whistleblower statutes use similar language to describe the prohibited retaliatory acts. *English v. Whitfield*, 858 F. 2d 957, 964 (4th Cir. 1988). In defining "retaliation," Part 708 adopts language similar to that found in whistleblower protection provisions of statutes, such as the Energy Reorganization Act of 1974. I therefore believe that in some instances it may be useful to refer to Title VII cases in analyzing cases brought under Part 708.

(4) *E.g.*, Tr. at 196, 198, 199, 201, 202, 207, 208, 209. It is most troubling that the offending employees were assigned to work at the same site as Sena. Moreover, Sena was actually assigned to work directly with both offending employees by performing site investigations with them. Tr. at 198, 199. The record contains ample evidence of the adverse effects upon Sena which ensued. Sena had unexpected contact

with the offending employees which was threatening to him. *E.g.*, Tr. at 209. In fact, one of the offending employees appeared in Sena's work cubicle almost immediately after he was rehired. Tr. at 196, 197. Thus, one of the first things that this offending employee did after being rehired was to make his presence known to Sena. This same offending employee appeared in Sena's cubicle on at least one other occasion. Tr. at 201. In another instance when Sena walked by two of the offending employees in the hallway, one of them pulled out a pen knife and made slashing motions. One of the offending employees intruded in a meeting that Sena was having with an inspector and asked Sena directly if he was involved in keeping other offending employees from returning to work at Sandia. Tr. at 208.

(5)As the Hearing Officer pointed out, a full year before the offending employees returned to Sandia, a Sandia manager directed the contractor to remove another offending employee who created a hostile work environment for a whistleblower. *Luis P. Silva*, 27 DOE ¶ 87,550 (2000). I do not believe that Sandia should prevail here simply because one of its managers was ignorant.

(6)The letter was submitted as part of Sandia's Response. Although Sandia offered the letter as evidence during the hearing, the Hearing Officer refused to admit that letter into the record on the grounds that under Federal Rule of Evidence 408, offers of settlement are inadmissible. Tr. at 282-91. I have decided to consider this letter. Even if the proposal to terminate constituted an offer of settlement, I am not convinced that this piece of evidence should be excluded based on that rule. Under Part 708, formal rules of evidence do not apply, but may be used as a guide. 10 C.F.R. § 708.28(a)(4). In Part 708 cases, I believe the Hearing Officer should generally adopt a liberal approach to admission of evidence. Given the fact that adherence to the rules is only advisory, I am not inclined to exclude this evidence unless there is a particularly strong reason to do so, such as unusual or extreme prejudice to the non-offering party. I can see none in this case. Accordingly, I will consider this evidence at this point in the proceeding.

(7)The minority adds a so-called "subjective" prong to the forced resignation element. According to the minority, a complainant must also prove that the actions complained of were intended by the employer as an effort to force the employee to quit. In this aspect of the proof, the key is the employer's subjective intent. Under this subjective prong, a complainant may prove an employer's "intent" by establishing either that (1) the employer consciously intended to coerce the employee's resignation, or (2) the resignation of this employee was the reasonably foreseeable consequence of the employer's actions. *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1353-57 (4th Cir. 1995). *See also*, *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981); *Hukkanen v.International Union of Operating Engineers* , 3 F.3d 281 (8th Cir. 1993)(constructive discharge plaintiffs satisfy the . . . intent requirement by showing their resignation was a reasonably foreseeable consequence of their employers' discriminatory actions).

(8)The illegal act in the instant case is, of course, the retaliation prohibited under Part 708, for the protected disclosure, i.e., the hostile working environment and the constructive discharge. *Derr*, 796 F.2d at 344. As will be discussed more fully below, I find that the protected disclosure was a contributing factor to the creation by Sandia of the hostile environment.

Case No. VBA-0044

April 10, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Rosie L. Beckham

Date of Filing: December 28, 1999

Case Number: VBA-0044

This Decision considers an Appeal of an Initial Agency Decision issued on December 13, 1999, involving a complaint filed by Rosie L. Beckham filed against her former employer, KENROB and Associates, Inc. (KENROB) under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. Rosie L. Beckham, 27 DOE ¶ 87,543 (1999). In her complaint, Ms. Beckham alleges that KENROB, among other things, terminated her employment after she questioned the legality of the company's procurement practices. A Hearing Officer denied relief to Ms. Beckham, finding in the Initial Agency Decision that she had failed to make any disclosures protected under the Part 708 regulations. As set forth in this Decision, I have determined that Ms. Beckham's Appeal must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor- operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation, an independent fact- finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Factual Background

At all times relevant to Ms. Beckham's complaint, KENROB was a DOE subcontractor that provided technical support services to the agency's Office of Civilian Radioactive Waste Management (OCRWM). For the nine month period May 1995 through February 1996, Ms. Beckham worked as a Contracts Specialist at KENROB where she was responsible for procuring computer equipment, system software, and computer-related training from subcontractors for use by OCRWM. In her position, Ms. Beckman

located vendors to provide services or items for OCRWM's use either through competitive solicitations or sole source awards. She then prepared all the documentation necessary for the DOE's review and approval,(1) including purchase requisitions, source selection justification statements, and abstract of offers (cumulatively referred to as "Purchasing Documentation"). See Letter from Maurice Mountain, Counsel for Ms. Beckham, to the Hearing Officer (July 14, 1999). When the DOE approved the procurement, Ms. Beckham completed the requisite purchase order to effectuate the transaction. Id.

Most, if not all, the procurement-related documents Ms. Beckham prepared were "standard" forms containing pre-printed language referring to the Federal Acquisition Regulations (FAR). When Ms. Beckham prepared and forwarded the Purchasing Documentation to the DOE officials for their review and approval, she believed she was certifying that she had followed the applicable instructions or procedures in selecting a vendor as dictated by the FAR. Tr. at 29-30.

In the late summer or early fall of 1995, Ms. Beckham shared with her immediate supervisor articles from the National Contract Management Journal that discussed the government-wide implementation of the Federal Acquisition Streamlining Act of 1994 (FASA).(2) Tr. at 34, 138. Sometime thereafter, Ms. Beckham reviewed Federal Acquisition Circular Number 90- 32 (September 18, 1995), a circular that described some of the changes to the FAR resulting from the enactment of the FASA. Circular Number 90-32 contained the statement that FASA was applicable to solicitations on or after December 1, 1995, but noted that the changes did not apply to micro-procurements, i.e., procurements under $2,500. Exhibit 28.

After reviewing Circular 90-32, Ms. Beckham repeatedly voiced concern to her immediate supervisor that KENROB's standard Purchasing Documentation might not comply with the law since KENROB had not taken affirmative steps to conform its documents to the new FASA requirements. Ms. Beckham was concerned that (1) she could not, in good faith, prepare and transmit documents for DOE's approval without knowing whether that documentation complied with the FAR and (2) she might violate the law because she did not know how the new procurement law applied to the work she was doing. Tr. at 47, 52-53.

In the December 1995 to January 1996 time frame, Ms. Beckham issued three purchase orders for micro-procurements (i.e. purchases less than $2500) using the same standard forms she had used before December 1, 1995. Ms. Beckham testified that she believed her use of the outdated forms vitiated the certification she made to the DOE that the Purchasing Documentation complied with the FAR. Tr. at 69-70.

In early January 1996, KENROB terminated Ms. Beckham for "blatant insubordination and disregard" for her supervisor. KENROB conditionally reinstated Ms. Beckham on January 10, 1996, contingent upon her adhering to a list of performance criteria. In addition, KENROB expanded Ms. Beckham's job responsibilities to include financial work.

On January 26 and 30, 1996, Ms. Beckham sent electronic mail messages to her immediate supervisor requesting guidance about the impact, if any, the FASA would have on six upcoming procurements she would be processing. Exhibits 26 and 27. On February 2, 1996, Ms. Beckham's supervisors met with her and expressed their dissatisfaction with her preparation of financial reports and her computer skills. At that meeting, Ms. Beckham's supervisor ordered her to cancel her attendance at a training seminar focusing on the FASA. Ms. Beckham responded that she believed FASA applied to KENROB's procurements after December 1, 1995, and that she had prepared three purchase orders since that time without knowing whether the documentation complied with the FASA regulations.

On February 9, 1996, Ms. Beckham's immediate supervisor asked the KENROB Project Manager whether KENROB had received any guidance from the DOE regarding how or whether the FASA changes affected KENROB's procurement activities under its contract with the DOE. Exhibit 29. The KENROB Site Manager contacted the cognizant DOE procurement official who, in turn, advised that the FASA-mandated changes did not apply to KENROB. The DOE procurement official further informed KENROB that it

should continue "doing business as usual" without reference to the new FAR requirements until DOE's Policy Office communicated further information to KENROB. Exhibits 8 and 29. KENROB relayed this information to Ms. Beckham on February 9, 1996. Exhibit 29.

On February 23, 1996, KENROB terminated Ms. Beckham, effective March 1, 1996, citing poor performance of her financial reporting duties. Exhibit 22.

C. Procedural Background

1. Ms. Beckham's Part 708 Complaint and the Investigative Report on the Complaint

Ms. Beckham filed her Part 708 complaint on March 27, 1996, with the DOE's Office of Employee Contractor Protection (OCEP), the office that had investigatory jurisdiction over whistleblower complaints at the time.(3) In her complaint, Ms. Beckham alleged that KENROB denied her training opportunities and terminated her employ because she raised concerns that KENROB might not be complying with federal procurement law in its contracting activities.

The IG investigated Ms. Beckham's complaint and issued a report on April 13, 1999 in which it concluded that Ms. Beckham had met her evidentiary burden of proving that she had made protected disclosures regarding KENROB's possible violation of federal procurement law. The IG's Office found, however, that the protected disclosures were not contributing factors in KENROB's decision to deny her training or and to terminate her. Accordingly, the IG recommended that Ms. Beckham's request for relief be denied.

2. The Hearing on Ms. Beckham's Complaint and the Initial Agency Decision

Ms. Beckham requested a hearing on her complaint, and on April 30, 1999, the Director of the Office of Hearings and Appeals (OHA) appointed a Hearing Officer. Prior to the hearing, the Hearing Officer offered her preliminary assessment that Ms. Beckham had not made a protected disclosure. For this reason, the Hearing Officer decided to limit the hearing to one issue, i.e., whether Ms. Beckham had made a protected disclosure cognizable under 10 C.F.R. Part 708. During a pre- hearing telephone conference, the Hearing Officer specifically advised Ms. Beckham that she would be expected to testify at the hearing about her beliefs regarding the legality of the three procurements she had issued after December 1, 1995. On July 22, 1999, the OHA Hearing Officer conducted a hearing in this matter. Ms. Beckham was the only witness that testified at the hearing. Following the hearing, the Hearing Officer allowed the parties to file post-hearing briefs. The Hearing Officer issued an Initial Agency Decision that addressed the sole issue she had designated for hearing.

In the Initial Agency Decision, the Hearing Officer concluded that the disclosures Ms. Beckham made regarding her belief that the FASA applied to KENROB's procurements did not rise to the level of a "protected disclosure" under Part 708. 27 DOE at 89,220. The Hearing Officer held that Ms. Beckham's disclosures involve, at most, insignificant violations of law. Id. at 89,219. Moreover, she explained that the three procurements Ms. Beckham issued after December 1, 1995 all involved de minimus amounts. Id. Further, she held that Ms. Beckham's uncertainty whether the three procurements at issue complied with the FASA is not a disclosure of a "significant" violation of the law under 10 C.F.R. § 708.5(a)(1). Id.

The Hearing Officer also questioned whether Ms. Beckham had a reasonable belief that KENROB was substantially violating the law. The Hearing Officer pointed out that the DOE had opined that the FASA did not apply to KENROB because (1) FASA post-dated the DOE/KENROB contract; and (2) the DOE/KENROB contract did not contain a "flow down clause." Further, the Hearing Officer noted that the three procurements about which Ms. Beckham had concerns were micro- procurements and would have been exempt from the FASA requirements, even assuming arguendo, FASA had applied to those procurements.

In addition, the Hearing Officer was not convinced that Ms. Beckham's disclosures were made in good faith. The Hearing Officer pointed out that KENROB's procurement work was declining, and that Ms. Beckham was tasked with financial reporting responsibilities. It was the Hearing Officer's view that Ms. Beckham's February 2, 1996 disclosure was made in response to negative comments regarding her shortcoming in the financial reporting area. Lastly, the Hearing Officer commented that Ms. Beckham's emotional demeanor during the hearing evidenced an insubordinate attitude. The Hearing Officer then stated that Ms. Beckham's attitude illustrated her unwillingness to accept information communicated to her in February 1996 that the FASA did not apply to KENROB's procurements. The Hearing Officer further commented that if Ms. Beckham held a good faith belief that her supervisor was requiring her to violate the law, she could have documented her belief in a memorandum or raised the matter with a higher level officials or the DOE. The Hearing Officer concluded that Ms. Beckham's failure to take any such actions cast serious doubt on her good faith.

II. The Appeal

On December 28, 1999, Ms. Beckham filed a Notice of Appeal setting forth the reasons why she disagreed with the finding in the Initial Agency Decision. KENROB filed its Response to Ms. Beckham's Notice on February 8, 2000, at which time I closed the record in this case.

In her Appeal, Ms. Beckham raises a number of contentions to support her position that the conclusions reached by the Hearing Officer in the Initial Agency Decision are incorrect as a matter of fact and law. She argues first that the Hearing Officer confused the sequence of events in this case and thereby erroneously concluded that Ms. Beckham did not raise her disclosures in good faith. Specifically, Ms. Beckham alleges that the Hearing Officer focused only on her February 2, 1996 disclosure, ignoring that Ms. Beckham had raised issues relating to the FASA prior to December 1, 1995. In so doing, contends Ms. Beckham, the Hearing Officer ascribed an improper motive to her, namely that she had raised the disclosure in response to criticism of her work performance in January 1996. In addition, Ms. Beckham submits that she continuously raised concerns about the applicability of the FASA to KENROB's procurement activities well before any question arose concerning her performance of newly assigned duties. She suggests that KENROB's change in her duties and later criticism of her work in January 1996 actually stemmed from her disclosures beginning in the fall of 1995.

Second, Ms. Beckham challenges the Hearing Officer's finding that her "testimony about compliance with the prior and new FASA regulations was so weak that [the Hearing Officer] concluded that (i) she did not have the ability to judge the legality of a procurement under either set of regulations, or (ii) she did not testify candidly." Ms. Beckham asserts that it was not her responsibility to make independent judgments on the legality of a particular procurement, but to apply the regulations in accordance with the procedures that KENROB had established with the DOE in their contract. Ms. Beckham states that since she believed KENROB's procedures appeared to be inconsistent with the new requirements of the FASA, she made her disclosures only to obtain guidance on how to comply with the law as she viewed it. She contends that her confusion about how to handle the situation was not the result of any lack of intellect or good faith, but rather the result of inconsistent instructions she received from KENROB.

Third, Ms. Beckham states that the Hearing Officer did not fully comprehend the scope of her disclosure. According to Ms. Beckham, when the Hearing Officer examined the three purchase orders Ms. Beckham processed after December 1, 1995, the Hearing Officer concluded that Ms. Beckham should have known the new FASA regulations did not apply to the three transactions since they were micro-procurements. Ms. Beckham argues that she did not raise her disclosures only in relation to these three micro-procurements, but rather with regard to any future procurement in excess of $2500 she might be required to process.

Finally, Ms. Beckham challenges the Hearing Officer's determination that her disclosures related to "de minimus or insignificant" violations and hence are not protected under Part 708. She argues that the

potential violations of law she first raised in October 1995 were not with reference to any particular procurement in any particular amount. Rather, her concerns related to the process under which KENROB was carrying out its procurement functions, a process that she perceived to be possibly noncompliant with the FASA.

III. Analysis

As noted earlier, Ms. Beckham seeks review of both the Hearing Officer's finding of fact and conclusions of law. It is well settled that factual findings are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. Oglesbee v. Westingouse Hanford Co., 25 DOE ¶ 87,501, 89,001 (1995); O'Laughlin v. Boeing Petroleum Services, Inc., 24 DOE ¶ 87,513, 89,064 (1995). Compare, Pullman Standard v. Swint, 456 U.S. 273 (1982), with Amadeo v. Zant, 486 U.S. 214, 223 (1988), quoting Federal Rule of Civil Procedure 52(a). With respect to a Hearing Officer's conclusions of law, they are reviewable de novo. See Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."").

A. Whether the Revised Part 708 Regulations Apply to the Analysis of the Complainant's Protected Disclosure

Before analyzing Ms. Beckham's specific challenges to the Hearing Officer's findings of fact and conclusions of law, a threshold issue regarding the applicability of the revised regulations to Ms. Beckham's Complaint must be examined. Before the Part 708 regulations were revised effective April 14, 1999, a DOE contractor was prohibited from taking reprisals against an employee who "disclosed to . . . the contractor information that the employee in good faith believes evidences (i) a violation of any law, rule, or regulation . . ." 10 C.F.R. § 708.5(a)(1)(i). When the regulations were revised, the section set forth above was changed to protect employees for "[d]isclosing to . . [his/her] employer . . . information that you reasonably and in good faith believe reveals (1) a substantial violation of a law, rule, or regulation . . ." As is evident from the above, the revised Part 708 regulations require that an employee's disclosure be based on a reasonable belief, not just a good faith belief. (4)

It is well established in law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. 64 Fed. Reg. 12,862, 12,865 (citing Landgraf v. USI Film Products, 511 U.S. 244, 275 (1994); Lindh v. Murphy, 117 S. Ct. 2059, 2063-64 (1997); Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 810, 817, n. 17 (D.C. Cir. 1982) (citing Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966)). Thus, the intent of the drafters of the Part 708 revisions is quite clear that the revised regulations apply to pending cases only "as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party." Salvatore Gionfriddo, 27 DOE ¶ 87,544 at 89,224 (1999). I find that the imposition of the revised regulations would cause prejudice to Ms. Beckham since those regulations interpose an element of reasonableness into the disclosure that did not exist at the time she made her disclosures. Accordingly, in evaluating Ms. Beckham's Appeal, I will use the regulations that existed at the time she communicated her concerns regarding KENROB's procurement activities, not the revised regulations used as the basis of analysis in the Initial Agency Decision.

B. Whether Ms. Beckham Made Protected Disclosures under the Part 708 Regulations in effect in 1995-96.

As an initial matter, I note that the Hearing Officer's analysis of Ms. Beckham's protected disclosures was based, in part, on a finding that Beckham's actions in completing three procurements did not in fact violate procurement law, and that the FASA did not apply to KENROB's contract with the DOE. However, for

purposes of Part 708, it does not matter whether the information a putative whistleblower disclosed is ultimately factually substantiated. See Thomas T. Tiller, 27 DOE ¶ 87,504 (1998), affirmed, Thomas T. Tiller v. Wackenhut Services, Inc., 27 DOE ¶ 87,509 (1999); see also Howard W. Spaletta, 24 DOE ¶ 87,511 at 89,051 (1995) (good faith clause is intended to relieve complainants of the burden of proving that their allegations are correct or accurate). This precept is consistent with that followed in other federal whistleblower cases. See Horton v. Dep't of Navy, 66 F.3d 279 (Fed. Cir. 1995), cert. denied, 516 U.S. 1176 (1996); Paul v. Dep't of Agriculture, 66 M.S.P.B. 643 (1995). Rather, the focus must be on the belief of the individual providing the information. In this case, the inquiry must focus on whether Ms. Beckham had a good faith belief that KENROB was violating federal procurement law at the time she raised concerns about KENROB's procurement activities. Thus, to the extent the Hearing Officer evaluated the evidence in this case based in whole or in part on the fact that no violation of procurement law actually occurred, she erred.

The Hearing Officer also appears to have considered that Ms. Beckham may have made her disclosures in response to KENROB's negative comments about her job performance. In evaluating whether a person has made a disclosure in good faith, however, the person's motivations for making the disclosure are irrelevant. See Howard W. Spaletta, 24 DOE ¶ 87,511 at 89,051 (1995) (whether the Complainant was motivated to protect his reputation is irrelevant to the question whether the disclosures come within the ambit of Part 708 protection). Cases decided under the Whistleblower Protection Act also are in accord with this view. See Bump v. Dep't of Interior 69 M.S.P.R. 354 (1996) (WPA makes no provision for considering whether the employee's personal motivation rendered his belief not genuine), Carter v. Dep't of Army, 62 M.S.P.R. 393, 402 (1994), aff'd, 45 F.3d 444 (Fed. Cir. 1995)(Table); see also Frederick v. Dep't of Justice, 65 M.S.P.R. 517, 531 (1994), rev'd on other grounds, 73 F.3d 349 (Fed. Cir. 1996). Hence, to the extent the Hearing Officer considered Ms. Beckham's motivations in communicating her concerns about KENROB's implementation of the FASA in finding that Ms. Beckman did not make a protected disclosure under Part 708, she erred.

The Hearing Officer also opined that the three procurements Ms. Beckham processed were all under $2500 and hence trivial in amount. To be sure, care must be taken not to waste limited resources addressing minor, insubstantial concerns in the context of Part 708 so that whistleblower protection is available to those workers who legitimately need it. Here, however, the three procurements were in the amounts of $2,475, $1,020, and $148. While I believe this is a close question, I am inclined to find that taken together, these procurements are not trivial. I recognize that these procurements were considered to be microprocurements for purposes of the FASA, but I do not necessarily believe they were so de minimus to warrant a finding, on this basis alone, that they were trivial and outside the purview of Part 708. By focusing on the amount of the procurements, the Hearing Officer appears to have been relying, in whole or in part, on the fact that no violation of law could have occurred since microprocurements were exempt from the FASA. As noted above, however, the factual accuracy of Ms. Beckham's belief is irrelevant on the question of whether her communications are entitled to protected status under Part 708. Moreover, as Ms. Beckham notes in her appeal, the concerns she attempted to voice about KENROB's contracting activities were general ones, i.e., the process by which procurements were being processed, not specific procurements themselves.

After carefully reviewing the record on appeal, I find that the Hearing Officer's use of the revised regulations and the other legal infirmities in her analysis are harmless errors. After reanalyzing the evidence under the regulations in effect at the time Ms. Beckham communicated her concerns regarding KENROB's procurement activities, and the correct legal standards, I simply cannot conclude as a matter of law that Ms. Beckham made a protected disclosure cognizable under Part 708. First, the Hearing Officer's determination that Ms. Beckham did not have a good faith belief at any time relevant to this proceeding that KENROB was violating any law is not clearly erroneous. Second, while the record suggests that Ms. Beckham genuinely believed that she had neither the training, guidance, nor ability to discern whether the FASA applied to the work she was doing under the KENROB/DOE contract, I find that Ms. Beckham's broad, speculative concerns about her admitted lack of information and unfamiliarity with the FASA are not the kind of disclosures that are protected under 10 C.F.R. Part 708. The analysis

leading to these conclusions is set forth below.

1. Communications regarding the FASA prior to December 1, 1995

Ms. Beckham complains in her appeal that the Initial Agency Decision does not recognize that she made protected disclosures to KENROB prior to December 1, 1995. According to the record, Ms. Beckham speculated to her supervisor about the impact of the FASA on KENROB's procurement activities in general and Ms. Beckham's responsibilities in particular on several occasions prior to December 1, 1995. In so doing, Ms. Beckham sought clarification and guidance from her superiors on how to implement the FASA in the future. Appeal at 3.

It is evident from the record that Ms. Beckham's communications during the period prior to December 1, 1995 are not protected under Part 708. Seeking guidance from, and expressing confusion to, one's supervisor on how to handle work-related tasks simply do not equate to the disclosure of information evidencing a violation of law under 10 C.F.R. § 708.5(a)(1)(i). Moreover, the record is devoid of any evidence that would support a finding that Ms. Beckham actually believed that KENROB was violating procurement law during this time frame. The concerns she articulated were vague and speculative, not specific allegations of wrongdoing rising to the level of a Part 708 protected disclosure. The hearing transcript reveals that Ms. Beckham's testimony regarding why she thought KENROB might be violating some law prior to December 1, 1995 is convoluted and unconvincing. In the end, the record on appeal suggests that Ms. Beckham's communications prior to December 1, 1995 can be more accurately described as "cries for help" in which she sought guidance and assistance from her supervisors on how to perform her contracting- related duties, not disclosures of information evidencing a violation of federal contracting law. Accordingly, while the Initial Agency Decision did not directly address whether Ms. Beckham made any protected disclosures prior to December 1, 1995, the record on this point is clear that she did not.

2. Communications regarding the FASA between December 1, 1995 and February 9, 1996

It was during the period December 1, 1995 through February 9, 1996 that Ms. Beckham completed processing three procurements without the benefit of information on how and whether the FASA impacted her work product. Ms. Beckham argues in her appeal that during this time period she was not complaining about the three specific procurements she completed, but rather the process under which KENROB carried out its procurement functions. She further points out that it was not her responsibility as a contract specialist to interpret the law, but rather to follow instructions on how to comply with the law. Further, Ms. Beckham contends that her inability at the hearing to explain how she thought the FASA would affect her job responsibilities stemmed not from her lack of good faith but the inconsistent instructions KENROB required her to follow in preparing the Purchasing Documentation.

After thoroughly reviewing the record in this case, I find that there is substantial evidence to support the Hearing Officer's determination that Ms. Beckham did not prove that she had a good faith belief that KENROB's standard procurement documentation violated any law. At the hearing, the Hearing Officer thoroughly questioned Ms. Beckham about her beliefs regarding KENROB's "process" of completing the standard forms that comprised its Purchasing Documentation. Specifically, the Hearing Officer painstakingly inquired about the FASA's impact on various aspects of the procurement process, including market research, source selection, preference for "labor surplus," price analysis, vendor performance history, and set-asides for women-owned businesses. Tr. at 52- 54, 100-01, 175-83. Ms. Beckham's responses to inquiries on each of these matters was somewhat confusing. For example, Ms. Beckham stated that one of the changes to the FAR was a requirement that a product "ensure the maximum practical use of recovery material and promote energy conservation and energy efficiency." Id. at 93. In responding to the Hearing Officer's question whether Ms. Beckham thought the revised FAR provision would have changed the manner in which she performed her job, Ms. Beckham responded:

I believe it could have. My position is I did not fully understand all of the FAR - - all of these changes

and what they really translated to. That, I did not have the opportunity to discover, but I was trying to keep up with the purchase orders that was mandated be issued, and I was also trying to educate myself on what the changes were, and what

were the differences, and what were the ramifications, and I was trying to get the training I needed to understand this, and much of my concern was that I was doing it in the blind as anything because I'm saying I have -- these purchase orders meet the requirements of the law that had changed, and I didn't know how . . . That's the bind that I was in, and I would like to be able to answer the questions more precisely, but that was the predicament that I was in.

Id. at 94. Moreover, Ms. Beckham revealed at the hearing that she never discussed the details of her concerns regarding the applicability of the FASA to KENROB's standard procurement documents. The most she ever did was to provide a copy of Circular 90-32 to her supervisor with instructions, "look at this, this is what is effective. [w]e need to dig into the specifics." Id. at 125. The Hearing Officer concluded after listening to Ms. Beckham's testimony and observing her demeanor at the hearing that either Ms. Beckham did not have the ability to judge the legality of a procurement under either set of regulations or she did not testify candidly. 27 DOE at 89, 218. Moreover, the Hearing Officer questioned whether Ms. Beckham made her disclosures in good faith, noting that her emotional demeanor at the hearing evidenced an insubordinate attitude. Furthermore, the Hearing Officer opined that she might have been convinced that Ms. Beckham was acting in good faith at the time she made her alleged disclosures had she documented her belief in a memorandum or raised the matter with higher level contractor officials or the DOE. Id., 89,220.

It is well established that factual findings of these types are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier-of-fact's unique opportunity to judge the credibility of the witnesses. Compare, Pullman Standard v. Swint, 45 U.S. 273 (1982), with Amadeo v. Zant, 486 U.S. 214, 223 (1988). Measured against this standard, my review of the Hearing Officer's findings regarding Ms. Beckham's credibility and demeanor at the hearing discloses no basis for overturning these fact-based determinations as "clearly erroneous." The concept of good faith is closely linked to one's honesty. Ronny J. Escamilla, 26 DOE ¶ 87,508 (1996), aff'd, 27 DOE ¶ 87,508 (1997). Similarly, an alleged whistleblower's credibility is quite relevant in assessing whether he/she held a good faith belief that the information disclosed fell within the purview of Part 708. Cf. Harden v. Dep't of Navy, 66 F.3d 279 (Fed. Cir. 1995) (under the Whistleblower Protection Act, a person's credibility is relevant in determining his reasonable belief). In this case, the Hearing Officer expressed reservations about Ms. Beckham's honesty when she suggested that she might not have testified candidly. Further, it is clear from reading the Initial Agency Decision that the Hearing Officer did not find Ms. Beckham a credible witness. (5) The Hearing Officer found Ms. Beckham's testimony to be unclear at points and her demeanor insubordinate. In addition, the Hearing Officer found suspect Ms. Beckham's failure to specifically communicate her concerns to her superior or others. In the end, it was Ms. Beckham's burden to show by a preponderance of evidence that she had a good faith belief that the information she disclosed evidenced a violation of the law. In the Hearing Officer's view, Ms. Beckham did not meet a critical element of her burden, i.e., the good faith showing. There is nothing in the record that requires me to supplant my judgment for the credibility determination of the Hearing Officer.

Even assuming arguendo that Ms. Beckham had convinced the Hearing Officer that she made her disclosures in good faith, the record is clear that the information communicated by Ms. Beckham to her supervisors during the period October 1995 through February 9, 1996 is not the kind of disclosure contemplated for coverage under Part 708. The hearing transcript is replete with testimony from Ms. Beckham that the substance of her communications was nothing more than a request for training and assistance in doing her work. Tr. at 55 (she needed training to fully understand and implement changes to the "boilerplate"); id., 63 ("I was in the process of trying to learn precisely what it is that needed to be done."); id., 68 ("I was trying to apprise KENROB that there [are] all these federal regulations that you've required me to abide by that have been changed, deleted, eliminated. Help me. Sit down now and tell me what to do."); id., 75 (she wanted someone at KENROB to sit down with her and go through every item in

the Procurement Documentation because she did not fully understand it); id., 93 ("My position is I did not fully understand all of the FAR - all of these changes and what they really translated to. . .") Further, Ms. Beckham was simply unable to articulate any credible basis for her belief that KENROB's procurement "process" and purportedly outdated documentation ran afoul of any law. 10 C.F.R.§ 708.5. In the end, Ms. Beckham cannot bootstrap her own admitted confusion about the FASA and her repeated requests for assistance in discerning how to do her job into any kind of disclosure that KENROB was violating the law.

C. Conclusion

On the basis of the foregoing, I conclude that there is substantial evidence in the record to support the Hearing Officer's conclusion that Ms. Beckham failed to meet her evidentiary burden in this case. I therefore concur with the finding that Ms. Beckham did not disclose information in good faith that evidenced a violation of the law under the Part 708 regulations in effect at the time she communicated the information at issue in this case. Accordingly, Ms. Beckham's Appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Rosie L. Beckham on December 28, 1999 (Case No. VBA-0044) of the Initial Agency Decision issued on December 13, 1999 (Case No. VWA-0040) be and hereby is denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Rosie L. Beckham on March 27, 1996, under the Contractor Employee Protection Program, 10 C.F.R. Part 708, be and hereby is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals, within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 10, 2000

(1)Under the terms of the contract between the DOE and KENROB, KENROB was required to obtain the DOE's consent for all purchase orders in excess of $50. Transcript of Hearing (Tr.) at 64.

(2)FASA was enacted "to streamline the acquisition process and minimize burdensome government-unique requirements." Exhibit 34.

(3)Later, OCEP was reorganized and assimilated into the DOE's Office of Inspector General, Office of Inspections.

(4)The revised regulations also require that information disclosed relate to a substantial violation of the law, not just a violation of the law. The Initial Agency Decision does not appear to reject Ms. Beckham's disclosure on the basis that the alleged procurement irregularities do not rise to the level of a substantial violation of the law. Rather, the Initial Agency Decision finds that Ms. Beckham's disclosures did not relate to a "significant" violation of the law. To the extent the Hearing Officer equated the term "significant" with "substantial," she erred. The plain language of Part 708 prior to its revision in 1999 is unambiguous on its face; it neither explicitly nor implicitly required the perceived violation of the law to be substantial or significant. This is not to say, however, that petty, trivial matters would necessarily be encompassed by Part 708. The determination whether a communication regarding a violation of law is petty or trivial turns on the facts of a particular case. See Herman v. Dep't of Justice, 193 F.3d 1375, 1380 (Fed. Cir. 1999) (finding the complainant could not have reasonably believed that his memorandum

concerning the photocopying of telephone logs constituted the disclosure of a non-trivial law, rule, or violation under the Whistleblower Protection Act (WPA)). Cf. Eidmann v. Merit Sys. Protection Bd., 976 F.2d 1400, 1402-03, 1407 (Fed. Cir. 1992) (affirmed the Board's finding that a whistleblower's disclosure of an agency's repeated refusal to enforce even minor rules or regulations, i.e. ban on smoking in general office, can constitute a protected disclosure under the WPA).

(5)In reviewing the Hearing Officer's opinion regarding Ms. Beckham's "good faith," I have discounted the Hearing Officer's comments regarding Ms. Beckham's possible motivation for making her alleged disclosures. I do not believe that the Hearing Officer's findings regarding motivation are so inextricably intertwined with her finding on the "good faith" issue to prevent me from reaching a finding on "good faith." As will be explained, the Hearing Officer had other bases on which she concluded Ms. Beckham had not acted in good faith.

Case No. VBA-0055

October 2, 2000

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Lucy Smith

Date of Filing: July 20, 2000

Case Number: VBA-0055

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on July 11, 2000, involving a Complaint filed by Lucy Smith (Smith or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Smith claims that her former employer, Westinghouse Savannah River Company (WSRC), a DOE contractor, terminated her employment during a reduction in force (RIF), and then failed to rehire her, in retaliation for making disclosures that are protected under Part 708. In the IAD, however, the Hearing Officer determined that WSRC had shown that it would have terminated the Complainant in the RIF, even in the absence of the protected disclosures. As set forth in this decision, I have determined that this matter should be remanded to the Hearing Officer for further consideration.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (amended regulations) (definition of retaliation).

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included fact- finding by the DOE Office of Inspector General, followed by the issuance of a Report of Inquiry setting forth the IG’s findings and recommendations on the merits of the Complaint. Thereafter, the complainant could request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision.

On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that “apply prospectively in any complaint proceeding pending on the effective date of this part.” 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12862 (March 15, 1999). Under the

revised regulations, review of an Initial Agency Decision, as requested by Smith in the present Appeal, is performed by the OHA Director. 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Smith's Complaint are fully set forth in Lucy Smith, 28 DOE ¶ 87,501 (2000). I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Smith was employed as a chemist at the DOE's Savannah River Site (SRS) from September 1973 to March 1997. On March 26, 1997, Smith filed a Complaint under Part 708 with the DOE Office of Inspector General. After the completion of an investigation, Smith requested and received a hearing on this matter before an OHA Hearing Officer. There were 13 witnesses and the hearing lasted two days. After considering the testimony at the hearing and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

C. The Initial Agency Decision

In the IAD, the Hearing Officer cited the burdens of proof under the Contractor Employee Protection Regulations. (1) They are as follows:

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

10 C.F.R. § 708.9(d).

The Hearing Officer found that Smith made a protected disclosure involving a safety concern, by inquiring as to an asphyxiation hazard in a building next to the one in which she worked (October 10 Disclosure). The Hearing Officer determined that Smith made a second safety-related protected disclosure regarding the posting of "Rad-Con" Permits outside a laboratory building (December 9 Disclosure). These permits notify employees as to hazards and safety requirements in radiological areas. Smith's disclosure regarding the Rad-Con permits related to a possible inaccurate labeling of the hazards involved. She also reported that another Rad-Con permit should have stated that personnel are required to wear safety glasses. She further voiced concerns as to accurate measurement of radiation exposure. (2)

The Hearing Officer noted that WSRC stipulated that the October 10 and December 9 Disclosures were contributing factors with regard to the decision to terminate Smith.

The Hearing Officer also concluded that none of the disclosures was a contributing factor in Smith's not being rehired by WSRC. In this regard, the Hearing Officer found that Smith failed to file the appropriate form to keep her name in the firm's "preference- for-hiring" database. The Hearing Officer determined that the fact that WSRC did not rehire Smith for any of three chemist positions that became available after she was terminated was not attributable to her protected disclosures.

The Hearing Officer next considered whether WSRC had clearly and convincingly demonstrated that WSRC would have terminated Smith even in the absence of the protected disclosures. 10 C.F.R. § 708.9(d). In this regard, the Hearing Officer found that the chemists who were retained by WSRC had more experience than Smith. The Hearing Officer determined that WSRC had clearly and convincingly demonstrated that it would have terminated Smith even in the absence of the protected disclosure. The Hearing Officer therefore denied Smith's request for relief under Part 708.

II. The Smith Statement of Issues and the WSRC Response

Smith filed a statement identifying the issues that she wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). 10 C.F.R. § 708.33.

The Statement points out the following conclusion of the Hearing Officer: "I also have determined that several of Smith's disclosures were contributing factors in her termination." Smith seems to believe that this conclusion demonstrates that WSRC retaliated against her for those disclosures and that relief is warranted. She also requests an "objective review" of the Hearing Officer's determination.

In its Response to the Statement, WSRC contends that the Statement of Issues was not timely filed. In this regard, WSRC points to two Part 708 appeal cases considered by the Deputy Secretary of Energy under the prior regulations. Mark H. McCormack v. Westinghouse Savannah River Corp., 27 DOE ¶ 88,029 (1999)(McCormack); Therese Quintana-Doolittle, 27 DOE ¶ 88,035 (1999)(Quintana-Doolittle). See 10 C.F.R. § 708.8(c)(March 1992 regulations). WSRC states that in these two decisions, the Deputy Secretary required that time limitations periods be strictly observed in filing the original Part 708 complaint. WSRC maintains that such an approach should be followed here. WSRC further points out that the Complainant offered no reason for the late filing. Accordingly, WSRC contends that the instant appeal should be dismissed as untimely.

WSRC also asserts that the Statement fails to identify any specific issues that it wishes the Director to review, as provided for in 10 C.F.R. § 708.33. WSRC believes that unless there is a clear demonstration that the Hearing Officer erred or abused his discretion, the Director must affirm the Hearing Officer's Opinion. WSRC maintains that the appeal should be dismissed because the Statement does not set forth any error by the Hearing Officer.

III. Analysis

I will summarily dispose of the two contentions raised by WSRC in its response. I am not convinced by either argument.

With regard to WSRC's timeliness argument, the two cases cited by the firm are inapposite. In Quintana-Doolittle and McCormack, the individuals filed their original Part 708 complaints several months late. Finding no good cause or other appropriate basis had been shown for the lateness, the Deputy Secretary of Energy dismissed the complaints.

In the present case, the Complainant filed her Notice of Appeal in a timely manner. However, her Statement of Issues in the appeal phase was filed four days late. I therefore do not find the cases cited by WSRC to be comparable with respect to the degree of untimeliness.

Further, I believe that the difference between the procedural posture of the instant case and the cited cases is significant. It is appropriate to hold a potential complainant to a stricter standard of timeliness in the initiation of a Part 708 proceeding than in other phases of the Part 708 proceeding. Otherwise, a contractor-employer would lack certainty as to when its period of Part 708 liability for a personnel action taken with respect to any given employee would be closed. On the other hand, with respect to the filing of a statement of issues in connection with an appeal, a respondent is on notice of the request for review by the Director, since the notice of appeal has already been filed. As a general rule, I see no significant detriment to a respondent in the case of a four-day delay in filing a Statement of Issues for review.

Finally, the current regulations authorize me to approve an extension of any deadline related to the investigation, hearing and OHA appeal process. 10 C.F.R. § 708.42. Given the de minimus period of time

at issue here, and the lack of any showing of harm by the contractor, I will use the discretion granted to me under that Section and approve an extension of time to file the Statement of Issues in the instant case.

I further see no merit in WSRC's argument that I must dismiss the appeal because the Complainant has failed to present specific issues for me to address. I believe that my authority in the Part 708 appeal process is broader than WSRC suggests. My role in this regard is not simply to consider those issues specifically identified by an appellant. It is certainly within my discretion for me to review the entire record created through the investigation and the hearing process, and if I find a material error, I believe that it is incumbent upon me to correct it. I believe a unified, consistent approach to rule interpretation and related issues best serves the interests of those parts of the DOE community with a stake in the Part 708 program. Accordingly, I reject WSRC's contention that the instant appeal must be dismissed for failure to raise specific issues to be reviewed.

I turn next to the Complainant's Statement of Issues, which as indicated above, is from a substantive viewpoint quite meager. With respect to the Complainant's allegation that she is entitled to prevail merely because her protected disclosures were a contributing factor to her termination, I find that the Complainant is simply incorrect. Even though a Part 708 complainant may establish that a protected disclosure was a contributing factor to a retaliation, this does not mean that the individual is thereby entitled to relief. As stated above, the regulations clearly allow a contractor to demonstrate that it would have taken the same personnel measures even in the absence of the protected disclosures. 10 C.F.R. § 708.9(d). The Hearing Officer determined that WSRC made this showing. Therefore, in his view, even though the protected disclosure may have been a contributing factor to the RIF, the firm showed that it would have terminated the Complainant anyway. I therefore reject this aspect of the Statement of Issues.

However, as stated above, the Complainant has also asked me to perform an objective review of the record. Given this specific request, and my belief, discussed above, that a unified, consistent approach best serves the interests of the participants in the Part 708 program, I exercised my discretion to give the record in this case a comprehensive review. In so doing, I found a significant issue that was not given thorough consideration, and needs further development.

As I indicated above, the Hearing Officer noted that the Complainant was terminated as part of an overall reduction in force (RIF), in which one lab technician and one chemist were the positions selected for elimination. That selection was a necessary step, preliminary to the selection of the particular individuals within those job categories for termination. Thus, a key issue in this case is how the decision was made to select the positions of chemist and technician for termination. The Hearing Officer did not evaluate the process through which that selection decision was made, and whether it may have been influenced by the fact that the Complainant had made a protected disclosure. As a result, I find that at this point, the IAD does not consider whether WSRC clearly and convincingly established that the termination decision would have been the same absent the protected disclosure.

To facilitate my discussion of this additional issue, I will first describe Smith's workplace organization. During the relevant period, WSRC's Waste Management Laboratory (WML), WML was organized into two separate laboratory organizations, the Effluent Treatment Facility laboratory (ETF lab) and the In-Tank Precipitation Facility laboratory (ITP lab). See Hearing Exhibit W-11. Each laboratory was staffed with one supervisor, two chemists and several technicians. Id. (3) At the time of the RIF, Smith and Kenneth Cheeks were the chemists working at the ITP lab. Thelma Hill-Foster and Linda Youmans were chemists at the ETF lab. Transcript of Hearing (Tr.) at 78.

Early in January 1997, Woody Melton, the Manager of the WML, was notified that WSRC's High Level Waste Division (HLWD) planned to reduce WML's personnel staffing because of a $100,000 cut in funding for each lab. Tr. at 74-77; Hearing Exhibits W-11, W-16 (December 30, 1996 Baseline Change Proposal outlining budget reduction and WSRC divisions to be affected). On January 8, 1997, Melton was asked about the impact on WML if 4 positions (including chemists) were eliminated from the labs. Hearing Exhibit W-11 at 1. The next day, Melton was informed that Dave Amermine, the HLWD deputy

manager, decided to reduce WML by four positions - three lab technicians and one chemist. Id. at 2.

The testimony at the hearing indicated that on January 10, 1997, Melton, along with his supervisor, Jim Collins (Collins), Pat Padezanin (Padezanin), WSRC Manager of Analytical Laboratories, and Lori Chandler (Chandler), Melton's previous supervisor in December 1996, met to discuss the issue of personnel cuts. (4) Tr. at 76- 77, 178, 195. After some discussion with other officials, Padezanin, who was the most senior of the group, concluded that only two employees, a chemist and a laboratory technician, would have to be laid off from WML to meet the budget constraints. Tr. at 175-76. This reduction contemplated that three chemists would provide support to both labs, rather than two chemists supporting each lab. Tr. at 237, 325-27.

These individuals then discussed what criteria would be used to select the one chemist for termination. Tr. at 178. The criteria selected were: performance, current contribution to the organization, potential contribution to the organization and time in position. Id. The managers then considered Smith, Cheeks, Hill- Foster and Youmans. Based on the criteria, they selected Smith for termination. Tr. at 179-80.

There is testimony to support the proposition that once the one position in the chemist category was selected for elimination, it was a virtual certainty that the Complainant would be the employee terminated. For example, Collins testified as follows:

> Q: And was anybody else's name mentioned as a possible candidate for reduction other than Lucy?
>
> A: No that I'm able to recall, no.
>
> Q: So it was sort of from the beginning of the meeting to the end of that meeting that Lucy was going to be the one that had to go? A: That was my understanding, yes.

Tr. at 247. See also, Tr. at 229 (Padezanin testimony).

Given the implication that, if a chemist's position was selected for elimination, the Complainant would be terminated, I believe it is critical for the Hearing Officer to evaluate the evidence regarding the choice of a chemist position for elimination. In order for the contractor to meet its burden of proof, it must establish that the targeting of the chemist's position was based on objective business criteria, and that elimination of the chemist's position was clearly the most viable alternative. I believe the Hearing Officer had substantial justification for his determination that WSRC had clearly and convincingly shown that, based on Smith's qualifications and experience, it would have selected Smith for termination even absent the protected disclosures. However, the Hearing Officer should also have specifically considered whether WSRC demonstrated by clear and convincing evidence that it would have selected a chemist position for elimination absent the disclosures.

I note from the transcript that the witnesses Melton, Padezanin, Collins and Chandler were knowledgeable about the selection of Smith as the chemist who would be riffed, and could describe in considerable detail how they applied the selection criteria. (5) Tr. at 88-92, 179-80, 277-80. However, the record as to how the chemist position itself was selected is thin. For example, Melton stated: "it became obvious that we could cut one of the technicians at ETF, since there were two technicians on days. . . We looked at how we could continue to support operations. . . we decided that we would go down by one chemist and one technician." Tr. at 84-85.

Collins stated: "Given the fact that there were two chemists at each of the facilities, ITP and ETF, . . . our best option was to look at reducing the head count in that particular area and going with a floater or roamer chemist. . . between the two facilities." Tr. at 237. Collins also referred to "being able to continue support for that particular customer." Tr. at 248. Collins further agreed with the assertion that "the way it was going to end up was one of [the chemists] was going to be eliminated. . . .That was the way the meeting started and the way it ended." Tr. at 246.

Padezanin stated that "what we needed to be able to do was continue to provide the same level of support to the customer. . . that goal. . . led us to conclude that it needed to be one chemist and one technician. . . We discussed all options." Tr. at 206.

Chandler stated that "It was decided there would be one exempt and one non-exempt [employee]. And the non-exempt. . . happens to be a lab technician in the lab. . . . And then we looked at. . . who would be let go from the exempt standpoint. Basically, we looked at all four of the chemists who were in that group at the time." Tr. at 274. Chandler repeated this same reasoning later in her testimony: "We had to go down by two head count. One was exempt, one was non-exempt." Tr. at 283.

The testimony itself indicates no support or reasoning for the ultimate determination that elimination of a chemist position was the best option. Most of the testimony on the point of how the chemist position was selected for the RIF is a mere restatement of the outcome. For example, Chandler does not give any reasons why the RIF was based on the selection of one "exempt" and one "non- exempt" position. I also see no support for the Collins/Padezanin rationale. Neither of these witnesses explained why the customer service goal could not be accomplished through the termination of other combinations of employees, or why the option chosen furthered that goal better than other options. Although Padezanin stated that the committee "discussed all the options," she does not describe that discussion. Tr. at 206.

Further, Chandler's rationale appears to be a personnel-oriented solution, and therefore aimed at two particular position classifications. This does not seem wholly consistent with the assertions of Padezanin and Collins that elimination of the chemist and technician positions best served customer needs.

I note that in addition to two chemists, the ETF lab staff included two day technicians and 8 shift technicians. The ITP lab was staffed with one day technician and 8 shift technicians, in addition to two chemists. Thus, a possible option here would have been to terminate two technicians, one from each lab, rather than a chemist and a technician. Yet, there is no discussion at the hearing as to the effect of terminating two technicians, instead of a chemist and a technician.

In this regard, in a memorandum of January 9, 1997, Melton states that if WML were "forced to downsize by two, the ITP day-technician and one of the ETF day-technician positions would be eliminated." Exhibit W-11 at 1. Moreover, the memorandum offers several other proposals for supporting the lab with all four chemists, but with fewer technicians. Id. at 3; Id. Proposal B. I note that the witnesses did not explain why these other possibilities were rejected. In particular, there is no testimony as to why a floater chemist was preferable to maintaining all four chemists, with fewer lab technicians.

In sum, a key element in a finding that WSRC would have terminated the Complainant absent the protected disclosures is that the selection of the chemist position for elimination was the most appropriate option. The Hearing Officer shall make a specific determination on this aspect of WSRC's burden of proof.

Accordingly, this matter will be remanded to the Hearing Officer for further proceedings. If he finds it necessary, the Hearing Officer shall conduct further fact finding with respect to the issue of how the WSRC Managers decided that a chemist position needed to be eliminated from WML in order to accommodate the budget cut. In the alternative, the Hearing Officer may review the current record without further development and assess whether WSRC has met its burden of proof on this issue. With or without further fact-finding, the Hearing Officer shall issue a determination fully considering whether WSRC has shown by clear and convincing evidence that it would have eliminated a chemist position from the WML even in the absence of the Complainant's protected disclosures.

It Is Therefore Ordered That:

The Appeal filed by Lucy Smith on July 20, 2000 (Case No. VBA- 0055), of the Initial Agency Decision issued on July 11, 2000, is hereby granted in part. The Complaint proceeding is remanded to the Hearing

Officer for further action consistent with the above determination.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 2, 2000

(1)With respect to the burden of proof, the Hearing Officer cited to the prior version of Part 708. In connection with my review of the burden of proof, I shall therefore also refer to that earlier version. 57 Fed. Reg. 7533 (March 3, 1992). However, the procedures applicable to this appeal proceeding are set forth in the current version of Part 708, effective April 14, 1999. 64 Fed. Reg. 12862 (March 15, 1999). I shall cite to the current regulations when applicable.

(2)The Hearing Officer found another protected disclosure had been made, but that it was not a contributing factor in the Complainant's selection for termination. In any event, since there were two disclosures that were found to have been contributing factors to her dismissal, the fact that there may have been an additional disclosure is not necessarily relevant to this proceeding.

(3)The ITP Lab was staffed with one day technician and eight shift technicians. The ETF Lab was staffed with two day technicians and eight shift technicians. Id.

(4)A fifth attendee at the meeting, Stephen Lee, who was involved with the budget for the laboratory, did not testify at the hearing. Tr. at 82

(5)These witnesses, who attended the January 10 selection meeting, knew of the Complainant's safety disclosures, although they denied discussing them at the meeting. E.g., Tr. at 61, 102, 204, 244.

May 9, 2002

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Janet L. Westbrook

Date of Filing: January 17, 2002

Case Number: VBA-0059

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on December 21, 2001, involving a Complaint filed by Janet L. Westbrook (Westbrook or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Westbrook claims that her former employer, UT-Battelle, LLC (Battelle or the Company), the DOE contractor that manages the Oak Ridge National Laboratory (the Laboratory), terminated her as part of a reduction in force (RIF) as a retaliation for making disclosures that are protected under Part 708. In the IAD, however, the Hearing Officer determined that Battelle had shown that it would have terminated the Complainant, even in the absence of the protected disclosures. As set forth in this decision, I have decided that this determination is clearly erroneous and that Westbrook should be granted relief.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by Westbrook in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Westbrook's Complaint are fully set forth in the IAD. *Janet L. Westbrook*, 28 DOE ¶ 87,018 (2001)(*Westbrook*). I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Westbrook was employed as a radiation safety engineer at the laboratory from 1989 to December 1, 2000. One of her responsibilities was to perform radiation safety reviews under a principle known as ALARA,

meaning "as low as reasonably achievable," economic and social factors being taken into account. The ALARA engineers group was composed of four persons: one supervisor and three staff engineers, one of whom was Westbrook. During the relevant period the chain of command at the laboratory was as follows: Westbrook's supervisor was Dr. Gloria Mei, the head of the ALARA engineering group. Mei reported to Dr. Ron Mlekodaj, who in turn reported to Dr. Steve Sims, who was the Director of the Battelle Office of Radiation Protection. Sims was in that position until October 2000, when there was a general reorganization within the Environment, Safety, Health and Quality Directorate. After October 2000, Sims became the Deputy Director of the Occupational Safety Services Division of the Directorate. Ms. Carol Scott is the Director of that Division.

On June 8 and 12, 2000, Westbrook met with Scott to discuss concerns that she had about radiation safety at the lab. In August 2000 Scott and Sims decided to reduce the ALARA engineer staff from 3 to 1, as part of a larger lab-wide reduction in force. On December 1, 2000, Westbrook was terminated as part of that RIF.

Westbrook filed a Complaint under Part 708 with the DOE Oak Ridge Operations Office (DOE/OR). After the completion of an investigation, Westbrook requested and received a hearing on this matter before an OHA Hearing Officer. There were 11 witnesses who provided testimony during a hearing that lasted two days. After considering the testimony at the hearing and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

C. The Initial Agency Decision

The IAD cited the burdens of proof under the Contractor Employee Protection Regulations. They are as follows:

> The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure. . . and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. . . .

10 C.F.R. § 708.29.

As the IAD further noted, Section 708.5(a) provides that a disclosure is protected if an employee reasonably believes that she is disclosing a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety. . . .(1) In this case, Westbrook claimed that Company management chose her for dismissal during the RIF because of her long series of protected disclosures, especially the disclosures she made during her June 2000 meetings with Scott.

As the IAD pointed out, there was no dispute that Westbrook disclosed to her employer what she believed to be violations of Laboratory rules governing procedures to be followed when the potential exists for radiation exposure. The Company's position was that no reasonable person, especially a radiation engineer like Westbrook, could have reasonably believed that the problems that she noted revealed a *substantial* violation of law, rule or regulation or a *substantial* and specific danger to employees or the public health and safety. *Westbrook*, 28 DOE at 89,114-115.

The IAD noted that a DOE Investigator found that Westbrook articulated at least six concerns during her June 2000 meetings with Scott. However, as the IAD stated, Westbrook needed to show only that she made one protected disclosure. After reviewing the record and the hearing testimony, the IAD found that Westbrook made a protected disclosure involving the Laboratory's decision to raise the dosage level to 5 rem per hour before an ALARA review was required to be performed, a level that Westbrook noted is significantly higher that the one rem per hour used at other DOE facilities.(2) The IAD concluded that where a radiation safety engineer complains about matters that could lead to higher radiation exposures for

workers at the Laboratory and fellow engineers share her belief, substantial issues are raised that fall within the purview of the Contractor Employee Protection Program.

Westbrook also disclosed to Scott concerns regarding Sims' approval of a waiver of Laboratory rules to implement the change from using engineers to using technicians, to perform certain radiation safety reviews. The IAD found that since the switch could significantly affect employee health and safety, these disclosures raised substantial concerns that were protected under Part 708.

The IAD stated that Scott made her decision as to whom to eliminate in the RIF in August 2000, two months after her June meeting with Westbrook. The IAD determined that the two-month period clearly established a temporal proximity between the disclosure and the retaliation sufficient to meet the regulatory requirement that the employee establish that the protected disclosure was a contributing factor to the retaliation.

The IAD next considered whether the Company had clearly and convincingly demonstrated that it would have terminated Westbrook in the absence of the protected disclosures. 10 C.F.R. § 708.9(d). The IAD noted management's determination to move the ALARA engineering group from an overhead function to a "charge-out" function. This decision was made before Westbrook made her protected disclosures in the June 2000 meetings with Scott. *Westbrook*, 28 DOE at 89,118. The IAD also considered the testimony of Sims and Scott that, based on their knowledge of the engineers' work, they would be able to charge to other programs the work of only two ALARA engineers: the engineer who had supervisory experience (Mei) and one of the three others. The IAD found that in deciding which of the three other ALARA engineers to retain, Scott and Simms had only one consideration in mind: which engineer would be able to charge out his cost. They selected the engineer who had charged out one-third of his time that year and for whom an office using his services had already indicated that it would pay for one-half of his time in the coming year. The IAD pointed out Sims' testimony that no office had expressed a willingness to pay for Westbrook's time and in fact, according to Sims, officials had made negative comments about Westbrook. In summary, the IAD found that Westbrook's discharge occurred because "(i) senior management required the cost associated with positions in her group to be charged to parts of the Laboratory that utilized their services, (ii) management believed that it might be able to charge out time associated with two ALARA engineer positions, and (iii) frictions between potential customers and Westbrook meant her time was the least likely to be able to be charged out to customers." *Id.* at 89,119. Based on these considerations, the IAD concluded that the Company had shown by clear and convincing evidence that it would have terminated Westbrook even if she had not made the protected disclosures.

II. The Westbrook Statement of Issues and the Company's Response

A. Statement of Issues

Westbrook filed a statement identifying the issues that she wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). 10 C.F.R. § 708.33. The Statement raises the arguments set forth below to support Westbrook's contention that the Company did not show by clear and convincing evidence that it would have terminated her in the absence of the protected disclosures.

1. RIF Review Sheets

The Statement notes that Company procedures for selecting employees to be terminated in a RIF require that qualifications of targeted employees be compared through the use of a RIF Review sheet. The RIF Review sheets in this case were compiled by Sims and submitted to Scott on August 23, 2000.

Administrative Record at 224, 226. The Statement contends that according to testimony of Sims, Scott made the decision to terminate Westbrook in a July 21, 2001 meeting, which took place more than one month before Scott compared the qualifications on the RIF Review Sheets. Transcript of Hearing (Tr.) at 391-92.

The Statement also points to testimony of Mei, Westbrook's direct supervisor, who gave Westbrook a score of "6" out of a possible "7" as a performance rating. This rating was given on approximately June 30, and was approved by Mlekodaj, Mei's supervisor. Tr. at 416; 427-28. However, Mei was instructed to change the rating from "6" to "3". Later a compromise rating of "4" was agreed upon. This rating was the one that appeared on the RIF sheets. Tr. at 319, 419, 429-30.

The Statement points out that the RIF review sheets compared the qualifications of the three employees and maintains that under the objectively measurable criteria set out on the RIF sheets, Westbrook should have been the employee who was retained. In this regard, the Statement notes that Westbrook has been with the Lab longer than the retained employee; is over 40 years of age and therefore entitled to extra consideration; and has considerably more overall experience than the retained employee.

2. Charge-Out Justification

The Statement notes that a key reason given for reducing the ALARA staff by two employees and for terminating Westbrook was that all work needed to be charged out in the future and Westbrook performed the lowest level of charge-out work of the three candidates. However, the Statement contends that Scott did not consider that there was considerable other work performed by Westbrook that was not charge-out type work, had been funded by overhead in the past, and would need to be funded by overhead in the future.

The Statement contends that the finding of the IAD that Westbrook was difficult to work with is unsubstantiated by any witnesses and is only provided through hearsay evidence of Scott and Sims.

B. The Company's Response

In its response to the Westbrook Statement of Issues, the Company raises the following contentions. First, the Company sets out what it believes to be the appropriate standard for review in this case. The Company argues that unless the findings of fact are clearly erroneous or without substantial basis, they may not be disturbed on appeal. The Company then responds seriatim to a number of points raised by Westbrook's Statement of issues. I will not detail each response here. However, I will note key Company objections in areas that will be addressed more fully below.

In response to the claim in the Statement of Issues that Westbrook's performance evaluation was unfairly lowered by Scott, the Company contends that Mei did not have unilateral authority to assign a performance rating to Westbrook. The Company also states that the Statement of Issues erroneously claims that Scott did not follow the RIF review process. In this regard, the Company argues that the testimony of all witnesses supports the position that standard RIF procedures were followed. The Company also reiterates its position that Westbrook's low charge-out rate indicates that it would not be able to fully charge her time under the new system. The Company repeats that because Westbrook was difficult to get along with, she was unable to cultivate customers to whom she could charge out her services.

III. Analysis

As I indicated above, the IAD noted that the Complainant was terminated as part of an overall reduction in force (RIF), in which two engineer positions were selected for elimination. Thus, the two key actions to be examined in this case are the decision to eliminate two positions, and the selection of Westbrook's

position as one of the two eliminated. In this regard, the IAD found that management's decision to eliminate two positions was based on its determination that all ALARA work would be charged out in the future. It also found that the Company's decision in selecting which of the three ALARA staff engineers would be "riffed" was based on "who among the three would be able to charge out his cost." *Westbrook*, 28 DOE at 89,118.

After reviewing the entire record in this case I have several concerns about the overall approach of the IAD. I recognize that the IAD found the testimony of Scott and Sims to be candid. I am not reevaluating that determination. However, I believe that the IAD failed to consider some important evidence in the record that refutes the Company's position that it would have terminated Westbrook absent the protected disclosures. Further, the IAD accepted the assertions of Battelle's witnesses that Westbrook would not be able to charge out her work, even though there was weak, if any, corroboration for this point. In my view, the IAD did not adequately evaluate whether the totality of the Company's evidence was sufficient to meet Battelle's burden of proof in this case. As discussed below, after considering these factors and giving them appropriate weight, I find that Battelle has not met its burden to show by clear and convincing evidence that it would have terminated Westbrook in the absence of the protected disclosures. In this regard, I do not attach particular significance to the fact that the decision to charge out ALARA work was made before Westbrook made the protected disclosures. I accept the overall determination that some ALARA functions would need to be charged out was made impartially and without regard to Westbrook. Ultimately, as discussed below, I find Battelle has not supported its position that (i) it would have to discharge two ALARA engineers in order to satisfy the charge-out mandate, and (ii) the selection of Westbrook as one of the discharged engineers was made without consideration of her protected disclosures.

A. Evidence Regarding the Decision to Eliminate Two Positions

I found little support in the record for the Company's stated position that if it adopted a charge-out system, it would be necessary to eliminate two staff engineer positions. According to the evidence, significant non charge-out work was being performed by the staff engineers. In this regard, Mei, Westbrook's direct supervisor, testified that Westbrook had been assigned to projects that were not associated with charge-out functions. Tr. at 422-24. Scott's testimony supported this conclusion. She testified that most of the ALARA work was overhead work, i.e. work that would remain even if some other types of work were to be charged out. However, when asked how this other work would be paid for, she stated that Sims would have to answer this question. Tr. at 354- 55. Sims agreed that even though Westbrook was only using 11 percent of her time towards charge-out functions, she was not working only 11 percent of a full time schedule. There was significant overhead work that she was performing. Tr. at 384. Sims was asked who would perform this other work if two ALARA engineers were terminated. He testified that he was not familiar with that work, and did not know if Westbrook was terminated who would perform it. Tr. at 384, 385, 386. (3)

Thus, according to the testimony, there was a considerable amount of overhead work for the ALARA team at the lab. Yet, Scott and Sims, who made the ALARA RIF determination, were unclear about the basics of the overhead work. They seemed to be unaware of the scope of the overhead work, did not know who performed it or give serious thought as to how this overhead work would be performed after the RIF. Their failure to focus on the overhead work leads me to question the thoroughness of the deliberations leading to the decision to RIF two ALARA engineers. To help meet its burden of proof in this regard, the Company could have explained, through its witnesses, how those overhead functions have been performed since the RIF. The weakness of the Scott and Sims testimony on this point detracts from the Company's position that the RIF of two ALARA engineers was necessary. Without more clarity on the overhead work issue, I am not persuaded that the Company made a rational and informed decision to terminate two ALARA engineers. In light of the fact that there was still essential non charge-out work to be performed, the assertion that two ALARA engineer positions should or could be eliminated seems pretextual.

B. Evidence Regarding the Company's RIF Sheets

There is evidence in the record that suggests that the RIF sheets, which contained the objective information on which the termination selections were to be made, were not given serious attention, and were drawn up to favor a preselected individual. I have reviewed the criteria set out on the RIF sheets and find troubling inaccuracies and manipulation. They lead me to doubt the Company's position that the process by which Westbrook was not selected as the retained employee was unrelated to the protected disclosures.

For example, a key criterion in the RIF selection process appears to have been manipulated by the Company and misapplied to the Complainant. Entitled "transferability of skills," this criterion was one of six set out on the RIF comparison worksheets. The definition of this criterion as set out on the RIF sheet is as follows: "Ability to directly transfer skills or acquire new skills necessary to maintain core competencies, demonstrates flexibility and adaptability to changing needs of business. Has multiple skills to work a variety of functions, seeks opportunities to learn new skills and improve on known skills." "Flexibility" in this context has to do with transferability of substantive skills in order to adapt to changing needs of business. This transferability of skills criterion is not an uncommon RIF criterion. The definition quoted above, and provided for this criterion--ability to transfer skills and acquire new skills necessary to maintaining core competencies--indicates to me that this criterion was given its familiar definition. I assume that this criterion and its definition here were used throughout the Company-wide RIF, and I see nothing unusual in either the criterion or its definition. Both are easy to understand. *See* Tr. at 75-76.

However, I was surprised to see the way this criterion was applied in this case. Specifically, the retained employee's rating has an unusual notation: "His flexibility has led to his *being in demand by customers*." (Emphasis added.) This makes little sense. The stated definition of flexibility relates to acquiring substantive skills to adapt to changing business needs. In actuality, the retained employee had no newly-acquired substantive skill that the complainant lacked. Something else in my view accounts for the more favorable rating on this criterion. I believe it is the Company's other purported concern that Westbrook could not get along with customers and would not be able to charge out work. That concern is unrelated to this criterion. The ability to "get along with customers" does not appear to me to be the type of "skill transference" or "acquisition of new skills" envisioned in this criterion, when properly applied. In fact, one witness at the hearing, a human resources generalist, confirmed that "flexibility" referred to possession of skills that can be used in future assignments and "the ability to transition to different work." Tr. at 76. These "skills" are part of one's substantive competence, not personal style.

In my view, the Company's use of this criterion to assess whether an employee is flexible enough to "satisfy" or "get along with" customers is so strained that it suggests a manipulation of the system to reach a predetermined result. Had this criterion been fairly applied, i.e. squarely judging whether an affected employee showed the ability to improve substantive skills, Westbrook's rating may well have exceeded that of the retained employee. The Company could certainly have incorporated as a discrete criterion an employee's ability to attract non-overhead work through the use of interpersonal skills. However, this was not one of the criteria. Instead, Battelle used the criterion "transferability of skills" in a distorted manner. That leads me to believe its use was an afterthought, one designed to downgrade Westbrook and target her for termination. As such, it detracts from Battelle's position that the RIF was performed impartially with respect to Westbrook.

Further, the RIF sheets set out incorrect information concerning Westbrook's length of Company-credited service and time performing current work. The RIF sheet indicated 10 years for Westbrook, whereas she had actually been employed at the Lab as an ALARA engineer for nearly 12 years. Tr. at 26. *Westbrook*, 28 DOE at 89,113. The retained individual had been in service for only 8 years. Moreover, the RIF sheet states that managers are encouraged to give positive consideration to retention of long service employees who are 40 years of age or older. Westbrook was 50 years old at the time of the RIF, while the retained employee was 35. Thus, in these criteria, Westbrook was superior to the retained employee. The Company has not stated how this information was factored into the overall retention rating, or what weight was given to this factor. *Id.* at 89,118.

Not all information in the RIF record favored Westbrook. The retained employee did have superior performance reviews for 1999 and 1998. He was reviewed as "consistently exceeding expectations" for those years, while Westbrook received a "consistently meets expectations." For the year 2000, Westbrook received a "4" (out of "7" rating), whereas the retained employee received a "5" rating. Thus, in this criterion, the retained employee does at first glance appear to be superior to Westbrook.

However, under scrutiny, Westbrook's low performance rating for the year 2000 is flawed. As noted above, Mei believed that Westbrook should receive a "6" rating for that year. Although Mlekodaj had originally agreed with the "6" rating, Mei was told by Mlekodaj to reduce the rating to a "3." A compromise rating of "4" was eventually assigned to Westbrook. Tr. at 417, 429. Mei's ratings for the other two ALARA engineers were sustained; only her rating for Westbrook was overruled. Mei implied that the overrule came from management at a level above Mlekodaj, which would have been Scott and Sims. Tr. at 416-19. These two latter witnesses did not testify about how this lowered rating came about. Thus, as the record stands, Westbrook's low performance rating for the year 2000 appears to have been dictated by high-level Company management. The unexplained lowered rating detracts from Battelle's position that the RIF was not used to terminate Westbrook improperly.

The RIF sheet also states that Westbrook's unique skills, running "elaborate computer codes," are not a necessary core competency, while the retained employee provides needed support for Oak Ridge divisions. There is little evidence to support this rating for Westbrook. It was not a significant part of the hearing testimony. This aspect of Westbrook's work was not raised as a key reason to terminate her.

There is other evidence that the RIF sheets were more of a pro forma exercise than a real attempt to rate the employees. Sims testified that his notes indicated that Scott proposed Westbrook for termination on July 21, 2000. Tr. at 392. *See also* Notes of Steve Sims, submission of March 15, 2001. However, the RIF documents were not generated until August 2000. Thus, Scott had apparently selected Westbrook before there was an opportunity to compare qualifications on the RIF sheets. Yet, Scott, who at that time had only been on the job for several months, testified that she did not have any special knowledge of the 200 employees in her organization. She stated that she therefore relied on Sims to provide her with information about the employees. Tr. at 317, 319. However, there was some key information that Scott did have about Westbrook. The information was that Westbrook had made protected disclosures to her in June 2000.

In sum, I find that the RIF sheets provide weak if any support for the Company's position that Westbrook's termination came about through legitimate reasons and with appropriate deference to the established RIF procedures. I am left with the distinct impression that the stated criteria were manipulated and not given due consideration in the retention process.(4)

C. Westbrook's Ability to Charge Out and Evidence That Westbrook Was Difficult to Work With

As indicated above, it has been the Company's position that Westbrook was riffed because she was difficult to work with and thus she could not attract customers to whom her work could be charged out. It was the testimony of Sims that only 11 percent of Westbrook's work was the type of work that could be charged out, whereas the scientist who was retained was able to charge out "about one third" of his work. Tr. at 377. (5) Both Sims and Scott testified that the basis for selecting Westbrook was that because she was difficult to work with, she would be less successful in charge-out functions. Tr. at 323-325, 351, 378, 381- 82. However, Sims and Scott did not work directly with Westbrook and provided hearsay evidence that Westbrook was difficult to work with. *E.g.*, Tr. at 325, 349, 358, 361-64, 365-66. (6)

Mei also testified about what she heard. She said she had had complaints about Westbrook, that she had heard that Westbrook was difficult to work with and had requests that she be removed from a job. Tr. at 408, 415. There is also second and third hand evidence from four other witnesses about Westbrook's difficulties in her working relationships. *E.g.*, Tr. at 192, 200, 205, 209, 280, 307, 311, 407, 415. Further,

the record includes copies of a number of E-mails and several memoranda describing the difficulties that some lab employees encountered while working with Westbrook.

There is limited direct testimony about Westbrook's behavior on the job. One safety engineer testified that "Janet has a different style. She's more direct. She tends to be more in their face." Tr. at 239. This witness indicated that the relationship between Westbrook and some team managers was "ineffective." Tr. at 240. She believed Westbrook to "come across very aggressively" and found her approach to be "confrontational." Tr. at 241. On the other hand, another witness testified that he admired Westbrook's attention to detail in the review she performed on his work. He stated that in meetings he attended with her, he never observed her do anything "inappropriate" or "out of the norm." Tr. at 440, 441.

Mei testified that even though some customers did not like Westbrook, others did like her. Tr. at 414, 424. In fact, there were a number of memos in the record that are complementary to Westbrook. Tr. at 424. Thus, there is certainly evidence on both sides of the issue of Westbrook's professional, interpersonal style, and whether she was easy or difficult to work with. I believe that some employees may well have been uncomfortable with her style.

Nevertheless, evidence that some employees may have had objections to Westbrook's working style is not sufficient to establish that a significant number of potential customers would object to using her services, especially if she were the only ALARA engineer available for safety review. (7) Sims identified 11 employees who objected to working with Westbrook and pointed out two projects on which she had difficulties. Tr. at 361-66. She was removed from the projects at the request of those customers. Several other employees who had problems with Westbrook are identified in the copies of E-mail messages included in the record. (8)

However, Sims recognized that Westbrook had professional involvement with "dozens" of laboratory employees. Tr. at 381. Thus, the fact that through hearsay evidence and E-mails, about a dozen employees were identified as having objections to working with Westbrook does not persuade me that the larger group of employees that she had contact with objected to working with her. I am also not convinced that the much greater group of potential customers lab-wide would object to working with Westbrook in the future. In this regard, Scott testified that 500 to 600 people had the potential to use the services of the ALARA engineering group. Tr. at 321. In this light, the dozen or so purportedly dissatisfied customers seems negligible, especially given the evidence in the record that some lab employees respected Westbrook and appreciated working with her.

The testimony of Scott and Sims to the effect that, because of her personality, Westbrook was less likely to be able to attract charge-out customers was unsubstantiated, and in my opinion, without anything more, the type of speculative problem often used to justify dismissal of a whistleblower. Ultimately, there is no significant direct evidence from potential customers on this issue, and it was this type of evidence that, at a minimum, was called for here. The hearsay testimony does not sufficiently support the Company's position. I also consider the documentary material supporting that testimony to be relatively weak. I therefore cannot find the evidence regarding Westbrook's purported inability to attract charge-out customers meets the rigorous standard of proof required in this case.

In sum, it was Battelle's burden to provide clear and convincing evidence to support its position that it would have terminated Westbrook absent the protected disclosures. It attempted to show, through the testimony of Scott and Sims, that Westbrook would not have been able to attract charge-out customers. It should have supported that key point with direct evidence. The Company was certainly in a position to call potential customers as witnesses to explain why they would prefer not to work with Westbrook. The Company also could have presented former Westbrook customers to testify that they found Westbrook difficult to work with and that they would have significant reservations about having her perform future ALARA reviews. (9) These witnesses could also then have clarified the difficulties they perceived working with Westbrook, and how they would accomplish their safety inspection work if Westbrook were the only engineer offered to them. They could also have provided information about how the safety

reviews actually were carried out after the RIF. Such testimonial evidence, had it supported Battelle's position, would certainly have made the Company's position more convincing. The mere say-so of management officials on these key points does not satisfy the burden of proof in this case. The copies of E-mail messages and other memoranda in the record indicating that some employees did not find Westbrook easy to work with also do not measure up to the standard of proof required here. The Company has simply not provided clear and convincing evidence for its position.

IV. CONCLUSION

As indicated by the above discussion, the IAD found that Westbrook made protected health and safety-related disclosures. The IAD also determined that Battelle made the decision to terminate her only two months later, and that this temporal proximity was sufficient to establish that the disclosures were a contributing factor to the termination decision. These facts are no longer disputed, and I believe are well-established by the record. It was therefore the Company's burden to show by clear and convincing evidence that it would have terminated Westbrook absent the protected disclosures. Battelle offered a plausible explanation for the termination, i.e., that under the charge-out system, only two ALARA engineers could be retained and since Westbrook would have difficulty in attracting customers in the new charge-out system, she should be one of the two discharged. However, the Company failed to bring forth adequate substantiation to support this justification. Mere plausibility and reasonability are simply inadequate to meet the rigorous "clear and convincing evidence" standard applicable here.

In fact, there was significant evidence in the record that does not support the Company's position that it would have eliminated two positions and terminated Westbrook even in the absence of the protected disclosures. For example, the record indicates that the decision of the Company to eliminate two positions was made without thorough consideration of the overhead work being performed by the ALARA group. Further, the reduction in Westbrook's performance evaluation, under the noted circumstances, detracts from the Company's assertions that the RIF was objectively performed with respect to the ALARA group. The IAD did not consider that information. Moreover, as noted above, Battelle failed to provide persuasive direct testimony to support its contention that lab personnel would object to paying for Westbrook's services. After weighing and balancing the evidence, I find that the Company has not made a clear and convincing showing that it would have terminated Westbrook in the absence of the protected disclosures. I therefore find that Westbrook is entitled to relief in this case.

Accordingly, Westbrook should submit a statement of the specific relief that she seeks along with appropriate calculations of that relief. This relief may include such items as reinstatement, back pay, costs and attorney's fees. The information should be submitted within 30 days of the date that she receives notice of this determination. The Company will have an opportunity to respond to that statement. I will then issue an order setting forth relief for Westbrook.

It Is Therefore Ordered That:

(1) The Appeal filed by Janet Westbrook on January 17, 2002 (Case No. VBA-0059), of the Initial Agency Decision issued on December 21, 2001, is hereby granted.

(2) Within 30 days of the date that she receives notice of this determination, Westbrook shall submit a detailed statement showing the relief she is claiming in this case, and a justification of her expenses. This relief may include such items as reinstatement, back pay, costs and attorney's fees. The statement shall be served on the attorney for Battelle.

(3) Battelle shall be permitted to submit comments on the statement of relief. The comments shall be due 10 days after receipt of the statement.

(4) This appeal decision shall become a final agency decision unless a party files a petition for secretarial

review with the Office of Hearings and Appeals within 30 days after receiving this decision.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 9, 2002

(1) The regulation provides: "If you are an employee of a contractor, you may file a complaint against your employer alleging that you have ben subject to retaliation for: (a) Disclosing to a DOE official, a member of Congress, or any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--(1) A substantial violation of a law, rule , or regulation; (2) A substantial and specific danger to employees or to public health or safety; . . ." 10 C.F.R. § 708.5(a)(1) and (2).

(2) A rem is "the dosage of an ionizing radiation that will cause the same biological effect as one roentgen of X-ray or gamma- ray exposure." *Westbrook*, 28 DOE at 89,115.

(3) He had no specifics, but said that lab personnel were being "squeezed," and "it was going to be tough." Tr. at 386.

(4) The IAD took the position that whether Westbrook's dismissal complied with rules governing RIFS was not an issue here because this is not an appeal of a dismissal action. Westbrook, 28 DOE at 89,119, Note 5. I disagree. As a rule, if RIF criteria are improperly or unfairly applied, resulting in the termination of a whistleblower, it belies the employer's position that the RIF, as it was applied to the complainant, was legitimate. This, in turn, undermines the company's position that it would have terminated the employee in the absence of the protected disclosure.

(5) The charge-out percentages for the three ALARA engineers were developed at Sims' request by a Battelle finance officer. The time frame Sims requested for the charge-out comparison was from the beginning of the fiscal year through June 2000. Tr. at 384. During the testimony of the finance officer, the Hearing Officer indicated that it was his own understanding that the retained employee "was working on a temporary project for a particular organization at the lab." He further stated: "that would explain, at least, why his charge-out rate was 38 percent and the other two were at 10, 11, 12 percent." He added: "I did not see any footnote. . . to explain that this was an anomaly, and that you cannot compare the 37 (sic) percent rate to the 10 or 12 percent rate. . . ." Tr. at 301- 02. This suggests that Battelle's comparison of charge-out percentage rates may be inapt.

(6) Sims testified that he had agreed to requests to remove Westbrook from a project. He stated he had heard about such a request on another project. Tr. at 366, 383. Copies of several E-mails in the record confirm that such requests were made.

(7) Sims testified that he could not "force people to buy the services of an individual. . . . " Tr. at 376. *See also* Tr. at 390. There is no evidence regarding what would happen if Westbrook were the only ALARA engineer available for safety review.

(8) These other employees seem to be associated with the same two projects that Sims identified as posing difficulties for Westbrook.

(9) As stated above, Sims identified by name several Battelle employees who he stated had experienced difficulties and frictions with Westbrook. Tr. at 361-66.

August 5, 2002
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Robert Burd

Date of Filing: November 16, 2001

Case Number: VBA-0060

On November 16, 2001, BWXT Pantex, as successor to Mason & Hanger Corporation (M&H) (collectively referred to as "the contractor"), filed an appeal of an Initial Agency Decision (IAD) issued by an Office of Hearings and Appeals (OHA) Hearing Officer under the Department of Energy (DOE) Contractor Employee Protection Program, 10 CFR Part 708. *Robert Burd*, 28 DOE ¶ 87,017 (2001). The IAD found that the contractor terminated Robert Burd (the complainant), a former employee at the DOE's Pantex nuclear weapons plant, in retaliation for making disclosures protected under Part 708. The IAD ordered the contractor to reinstate Burd, provide him with back pay, and reimburse him for the reasonable costs and expenses of prosecuting his complaint. *Id*. at 89,113. It further directed the complainant to file a report providing a calculation for back pay, and if there is no immediate reinstatement offer, to update that back pay report every 90 days. *Id*.

As set forth below, I have determined that the contractor has failed to show the IAD was erroneous in finding for the complainant on the issue of retaliation, and that relief should be granted to Burd in the form of costs, expenses, attorney fees, back pay, and other reasonably foreseeable monetary damages incurred as a result of the retaliatory termination, including moving and travel expenses. However, after weighing and balancing the equities in this matter, as required by the applicable DOE case law, I will not order the contractor to reinstate Burd.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or

wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. See 10 CFR § 708.2 (definition of retaliation). Under the DOE regulations, review of an IAD is performed by the OHA Director. 10 CFR § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Burd's Complaint are fully set forth in the IAD, *supra*. I will not reiterate all of the details here. For purposes of the instant appeal, the relevant facts are as follows.

From January 1998 until his termination in September 2000, Burd worked for the contractor as a radiation safety technician (rad tech) in the Non-MAA Section of the Radiation Safety Division at Pantex. Burd's Operations Manager and immediate supervisor was Henry Ornelas. This case centers around an altercation between Burd and Ornelas which led to the termination of both employees.

The incident occurred on September 8, 2000. Burd and two other rad techs, Kendra Bridges and Phil Franks, were waiting for a meeting in their area. Bridges revealed that at that time, Burd's partner, Russell West, was working an overtime shift and had been working for approximately 24 consecutive hours, save for a pre-dawn, two-hour break. Burd strongly objected to West's being permitted to work excess overtime, since the Pantex standard limited an employee to no more than 16 hours. While the three rad techs were discussing the overtime issue, Ornelas arrived, interjected himself into their conversation, and made a statement to the effect that overtime issues were "none of their business." Burd responded that it was unsafe to work for such a long period of time and that the handling of overtime in West's situation was "stupid." Ornelas replied, "Are you calling me stupid?" From there, the conversation quickly became heated, and their voices grew louder and louder until Burd finally told Ornelas to "shut up." Ornelas then ordered Burd to accompany him to the office of their Department Manager, Wayburn Scott Wilson. After Ornelas twice reiterated the order, Burd agreed, and they proceeded toward Wilson's office, with Ornelas following closely on Burd's heels.

Wilson was not there, so Ornelas grabbed Burd's arm to lead him to the office of their Operations Coordinator, Richard Jones. As the employees approached and entered Jones' office, they were both yelling. The cramped space in Jones' small office forced Complainant and Ornelas to stand close to each other, virtually face to face. They remained standing and continued to yell, despite Jones' request that they settle down and explain the situation. According to the IAD, Burd stepped toward Ornelas, this action prompted Ornelas to use his chest to bump Burd away, and in response, Burd yelled "Don't bump me, Hank." Jones then inserted himself between the employees and again admonished them to calm down. Ornelas finally stepped aside, Jones ordered Burd to return to the rad techs' area, and the altercation ended.

Jones reported the altercation to Wilson. On September 11, 2000, Wilson and Michael Knight, Manager of the Radiation Safety Department, reported the altercation to Peter Selde, the Division Manager. With Selde's approval, Knight and Chris Passmore, another member of radiation management, launched an investigation into the altercation, as well as the overtime issue.

On September 18, 2000, Knight and Passmore presented an investigation memo to Selde (the September 18 memo). Attached to the September 18 memo were written statements from Burd, Ornelas and Jones, summaries of oral interviews with them, and summaries of oral interviews with other rad techs who witnessed the portion of the argument that occurred in their meeting area. Contractor's Hearing Exhibit F.

As set forth in the September 18 memo, Knight and Passmore found that (1) Burd told Ornelas to "shut up"; (2) Burd "approached Ornelas and got 'face to face' with him"; and (3) "Ornelas pushed Complainant off of him." *Id*. They further concluded that Burd's and Ornelas' conduct on September 8, 2000 constituted "clear violations" of the Pantex Employee Manual ("the Manual") and Pantex Bulletin 869 (Bulletin 869). *Id*. The Manual prohibits "general," "safety," and "security" misconduct and lists examples of each. Bulletin 869 sets forth a "zero tolerance policy" regarding physical and non-physical confrontations. The first section of Bulletin 869 provides for automatic discharge of employees who engage in physical confrontations. The second section provides for discipline up to and including discharge of employees who engage in non-physical confrontations.

In the following days, Selde consulted several people regarding the appropriate course of action. First, on September 22, 2000, Selde, Knight and Passmore met with Michael Soper, a Labor Relations representative. Pantex procedures require that managers consult Labor Relations when contemplating formal discipline for an employee. During that meeting, Selde requested that Knight further investigate the duration and circumstances leading to the escalation of the confrontation between Burd and Ornelas.

On September 25, 2000, Knight presented Selde with a second investigation memo (the September 25 memo). In the September 25 memo, which is based upon a follow-up interview with Jones, Knight concluded that (1) the confrontation in Jones' office lasted 6-8 minutes, with Burd and Ornelas "face to face" for about 1-2 minutes; and (2) Burd "advanced on Ornelas and got in his face," before Ornelas bumped him away. Contractor's Hearing Exhibit G.

Later on September 25, 2000, Selde, Jones, Wilson, Knight, and Soper met with Robert Rowe, the Human Resources Director. During that meeting, Knight, Wilson, and Jones advised Selde that Bulletin 869 did not require termination for either employee; Soper and Rowe advised that Bulletin 869 required termination for both.

Selde next consulted the general manager of Pantex at the time, Dr. Benjamin Pellegrini. Selde sought Pellegrini's position regarding Bulletin 869, since it had been issued and signed by

Pellegrini's predecessor. Pellegrini advised Selde that he supported strict enforcement of the policy.

Finally, on September 27, 2000, Selde met with the Personnel Evaluation Board (PEB). Pantex procedures require the PEB to review termination decisions. The PEB consisted of 10 members, including Soper, Rowe, and representatives from the employer's Employees Concerns Office and legal department. Also present as witnesses were members of radiation management, including Jones, Wilson, Knight and Chris Cantwell. Neither Burd nor Ornelas attended the meeting, and besides Jones, no other witness to the altercation attended. PEB members had been given copies of the September 18 and 25 memos and all attachments.

The PEB first discussed Ornelas. After short deliberation, Selde recommended that Ornelas be terminated, and the PEB unanimously concurred. Finding that Ornelas engaged in a physical confrontation, by chest-bumping Burd, and insubordination, by disregarding Jones' order to settle down, the PEB agreed that Bulletin 869 called for Ornelas' termination. Ornelas' personnel file contained evidence of two prior disciplinary actions, including a verbal counseling and a documented warning.

The PEB next discussed Burd. After extended deliberation, Selde recommended that Burd be terminated, and again, the PEB unanimously concurred. Finding that Burd engaged in a non-physical confrontation with Ornelas and two acts of insubordination, once by telling Ornelas to shut up, and again by ignoring Jones' initial order to settle down, the PEB agreed with Selde that Burd's conduct fell within the purview of Bulletin 869. Although Bulletin 869 provides for, but does not mandate, termination, the PEB and Selde agreed that Burd's discharge was warranted, because he was the initial aggressor in the altercation with Ornelas and repeatedly insubordinate. Burd had no prior disciplinary actions in his personnel file. Except Selde, every radiation safety manager present at the meeting had recommended a lesser form of discipline for both employees.

The following day, September 28, 2000, Selde presented Burd and Ornelas with draft termination statements, which restated the contractor's investigatory findings regarding the September 8 incident. Given the choice between accepting the termination statements or resigning, both employees resigned.

On October 13, 2000, Burd filed a Part 708 complaint, alleging that the contractor effectively terminated him for raising safety concerns regarding overtime practices. The contractor does not dispute that it forced Burd to resign, but maintains that it would have terminated Burd for violating Bulletin 869, regardless of whether he made a protected disclosure. The complaint was referred to OHA for an investigation. After completion of the investigation, Burd requested a hearing before an OHA Hearing Officer. There were eight witnesses who testified at the day-long hearing held in this matter (including one who testified by videotape), each party submitted several written exhibits, and the Hearing Officer considered the deposition testimony of Selde and Ornelas. After considering the evidence in the record, the Hearing Officer issued the IAD that is the subject of this appeal.

C. The Initial Agency Decision

The IAD cited the respective burdens of proof for the employee and the contractor under Part 708:

> The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure. . . and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. . . .

10 CFR § 708.29. The IAD further noted that under Section 708.5(a), a disclosure is protected if an employee reasonably believes that he is disclosing "a substantial and specific danger to employees or to public health or safety."

In applying these standards to the instant case, the IAD considered the factual record and concluded that Burd had made a protected disclosure when he raised a valid safety concern about rad techs working excessive overtime in a nuclear weapons facility. 28 DOE at 89,107. The IAD further determined that Burd made a prima facie showing that his protected disclosure was a contributing factor to a retaliation, since his termination occurred within a brief period of time, 20 days after the protected disclosure, and all the persons involved in the decision to terminate Burd knew or had constructive knowledge of the fact that he had raised a valid safety concern. *See IAD* at 89,108 and cases cited therein.

Under Section 708.29, the complainant having made a prima facie case of retaliation, the burden shifted to the contractor to prove by clear and convincing evidence that it would have terminated Burd in the absence of the protected disclosure. The IAD considered the contractor's contentions that (1) strict enforcement of Bulletin 869's zero tolerance policy is necessary to ensure the security of Pantex; (2) Burd had fair notice of the policies set forth in Bulletin 869; (3) the employer conducted a fair investigation into the events of September 8, 2000; (4) the investigation revealed that Burd engaged in two acts of insubordination and a non-physical confrontation, as prohibited under Bulletin 869; (5) given the severity of Burd's conduct, Bulletin 869 required his termination; and (6) the employer applied Bulletin 869 fairly and without improper motives to Burd. In response, Burd (1) challenged the integrity of the internal investigation; and (2) maintained that his termination was a form of discipline substantially disproportionate to the discipline imposed on other employees for similar conduct.

The IAD determined that the contractor conducted a thorough investigation and fairly characterized Complainant's behavior, "although non-physical, as confrontational and insubordinate," *Id*. at 89,109. Nevertheless, after examining how over time the contractor had disciplined employees for engaging in confrontations and insubordination, the IAD concluded that even accepting the contractor's description of complainant's behavior, "the employer failed

to show with clear and convincing evidence that it consistently discharged employees for similar misconduct." *Id*.

According to the IAD, a "disciplinary list" provided by the contractor showed that between the August 23, 1999 effective date of Bulletin 869 and Burd's termination on September 28, 2000, the contractor disciplined employees for hostile, disruptive behavior approximately 18 times. All but three of those employees received a lesser form of discipline than termination. The three who were terminated were Ornelas, Burd, and a third employee found to have engaged in a non-physical confrontation. The contractor maintained that when employees have engaged in insubordinate and confrontational conduct rising to the level of Burd's behavior, they have been terminated. The contractor argued that Burd's behavior distinguished his case from the disciplined employees who were not terminated, because his non-physical conduct was particularly egregious, and that he had been the aggressor in the case by advancing on Ornelas and had failed to comply with Jones's order to stop the argument. *IAD* at 89,110.

Burd contended that his behavior was not unusual for the "generally truculent Pantex environment," that he was the victim of aggression by Ornelas, and should not have been terminated. He argued that to the extent his behavior was confrontational and insubordinate, the disciplinary list shows that similarly situated employees have escaped termination. Burd distinguished himself from Ornelas and the third employee terminated under Bulletin 869, both of whom had been disciplined for prior misconduct before termination, because Burd had never received a formal discipline of any kind. *IAD* at 89,111. In addition, Burd claimed that the disciplinary list was not exhaustive, and that numerous confrontations and acts of insubordination were handled "in-house," outside of the formal disciplinary process. Several other witnesses corroborated Burd's assertions that many confrontations were handled on an informal basis. *Id*.

After considering the evidence on the way the contractor disciplined its employees who had engaged in non-physical confrontations and insubordination, the IAD concluded that the contractor had failed to show that it consistently invoked Bulletin 869. The IAD noted that Selde and Soper testified that they first invoked the zero tolerance policy against Burd and Ornelas, and that several other incidents had escaped formal review. In addition, the IAD found that the contractor failed to show that it applied Bulletin 869 in a consistent manner, since it had only terminated Burd and one other person out of the many employees who had engaged in similar non-physical confrontational and insubordinate behavior. The IAD found "nothing particularly egregious in [Burd's] conduct that would warrant singling him out from the other employees who disobeyed, repeatedly cursed and yelled at, and threatened violence toward their supervisors or coworkers, but received lesser penalties." *Id*. Finally, the IAD rejected the contractor's argument that Burd should be treated the same as Ornelas, noting that not only had the latter engaged in a physical confrontation, making him automatically subject to termination under Bulletin 869, but Ornelas had a record tainted by two prior disciplinary actions taken against him at Pantex.

Based on the finding summarized below, the IAD ordered the contractor to reinstate Burd, provide him with back pay, and reimburse him for the reasonable costs and expenses of prosecuting his complaint. *Id*. at 89,113. This appeal followed.

II. The Contractor's Contentions on Appeal and the Complainant's Response

A. The Contractor's Statement of Issues and Appeal Brief

1. Legal Arguments

In its Statement of Issues filed on December 3, 2001, the contractor argued that the IAD was erroneous and should be reversed. However, the contractor complained about the short time allowed by the IAD for submission of the Statement of Issues, and requested permission to file an appeal brief. I granted that request. The contractor's "Original Brief on Appeal,"which superseded the Statement of Issues, was filed on February 22, 2002. In its brief, the contractor makes the following arguments: (1) Section 708.4(b) bars a complaint that involves misconduct the employee "deliberately caused," or in which he "knowingly participated;" (2) the IAD applied the wrong standard for misconduct when it relied on the case of *Dreis & Krump Manufacturing Co. v. NLRB*, 544 F.2d 320 (7th Cir. 1976), when it should have applied the four-point test used in *Atlantic Steel Co.*, 245 NLRB 814 (1979) to determine the complainant's misconduct was so opprobrious as to lose the protection of Part 708; (3) the complainant is only eligible for back pay from the date of discharge until he began subsequent employment, September 29 through October 20, 2000; (4) complainant's subsequent earnings offset the contractor's back pay liability; (5) reinstatement is not an appropriate remedy in this case.

2. Newly Discovered Evidence Relevant to Reinstatement

In addition to the legal arguments summarized above, the contractor's brief raises a new factual issue that was not considered in the IAD, namely, the complainant's failure to list, on the Pantex job application he filed with M&H, a prior job with Nordic Trak, a manufacturer of fitness and exercise equipment. The contractor alleges that Burd was fired from his job at Nordic Trak after he engaged in a physical confrontation with his supervisor. According to the contractor, Burd's failure to disclose this fact is relevant to the reinstatement remedy requested in the present case. Based on its allegations that Burd misrepresented his employment history to hide evidence of a prior physical confrontation that led to his discharge from a prior job several years before the September 2000 incident in this case, the contractor asked to conduct additional discovery, including taking an additional deposition of the complainant.

Using the procedure outlined in Section 708.33(b), I directed the parties to provide additional information regarding Burd's employment with Nordic Trak, and his application for employment

at Pantex that he submitted to M&H. 1/ On April 19, 2002, the contractor submitted a copy of Burd's employment application to M&H, which did not mention the Nordic Trak job. *See* April 19, 2002 letter from Richard Thamer, Attorney for BWXT Pantex. Nor did Burd list the Nordic Trak job on any other pre-employment documents he submitted to M&H. However, as discussed below, Burd did list the Nordic Trak job on the security clearance background questionnaire he submitted to the local DOE security office.

On May 31, 2002, the contractor filed its final submission on the reinstatement issue, including an Affidavit of Kelley D. Young, which states that Young worked as sales manager of Nordic Trak in Amarillo "several years ago," and during that time, he hired Burd to work for him in a full-time position. While at work, Young and Burd "did have a physical confrontation." Young "terminated Burd immediately for the confrontation." Although the complainant gave written authorization for Nordic Trak to release his employment records to the contractor's attorney, the effort to obtain those records failed. *See* May 31, 2002 letter from Richard Thamer, Attorney for BWXT Pantex. The contractor maintains that the DOE security office does not share background information submitted on security questionnaires, so it never learned about Burd's Nordic Trak job until Young came forward in 2002, during the pendency of the present appeal. The contractor also cites Burd's characterization, on his Pantex employment application, of a part-time coaching job he had at a local junior high school as "a position that started out bad that only continued to get worse," when he was fired for improperly disciplining a student, as further evidence that the complainant has "a pattern of workplace confrontation and deception." *Id*. at 2-3.

B. The Complainant's Response

1. Legal Arguments

The complainant filed separate responses to the Statement of Issues and the Original Brief on Appeal. Since the contractor's brief superseded its Statement of Issues, this decision will focus on the complainant's response to the contractor's brief. In his response, the complainant contends that: (1) under OHA case law, the factual findings in the IAD should be sustained since

---

1/ Section 708.33(b) provides that:

> (b) In considering the appeal, the OHA Director:
>
> (1) May initiate an investigation of any statement contained in the request for review and utilize any relevant facts obtained by such investigation in conducting the review of the initial agency decision;
> (2) May solicit and accept submissions from any party that are relevant to the review. The OHA Director may establish appropriate times to allow for such submissions;
> (3) May consider any other source of information that will advance the evaluation, provided that all parties are given an opportunity to respond to all third person submissions; and
> (4) Will close the record on appeal after receiving the last submission permitted under this section.

there has been no showing that they are clearly erroneous; (2) based on the IAD's finding that the complainant made a protected disclosure that was a contributing factor to an act of retaliation by the contractor, and upon consideration of the equities in this case, reinstatement is the proper remedy; (3) the complainant should also receive back pay, the calculation of which should include the average amount of overtime earned by rad techs at Pantex, compensation for the economic loss he experienced when he was forced to maintain two different households as a result of his termination, interest on the amounts awarded for back pay and incidental damages, attorneys fees, and the expenses of pursuing his complaint under Part 708.

2. Newly Discovered Evidence

Initially, the complainant opposed the request for further discovery, arguing that the allegations about Burd's termination from his job at Nordic Trak for a physical altercation were unsupported by any affidavits or competent evidence. In addition, he argued that the contractor had ample opportunity to discover this information when it took Burd's deposition on June 15, 2001, over a month before the hearing, and later at the hearing. The complainant also submitted a copy of "an employment document Burd filed with DOE" that lists Nordic Trak as a former employer. That document is a personnel security questionnaire for the background investigation necessary to determine Burd's eligibility for the access authorization (security clearance) required to work at Pantex, attached as Exhibit A to Complainant's Response to [Contractor's] Original Brief, March 8, 2002.

On April 29, 2002, the complainant filed a response to the contractor's April 19, 2002 submission, in which he admitted working at Nordic Trak, but denied that he engaged his supervisor, Kelley Young, in a physical confrontation. Burd emphasized that he reported the Nordic Trak job on his security questionnaire, and stipulated to the Pantex employment application submitted earlier by the contractor. Burd's April 29 response questioned Young's credibility, implying that Young, who now works for BWXT Pantex, is attempting to curry favor with his employer by coming forward with negative information about Burd. Burd also questioned Young's failure to document his alleged confrontation with Burd in Nordic Trak's employment records. Finally, the April 29 submission argues that the contractor has failed to show that any inequities would result if it were required to reinstate Burd.

On May 31, 2002, the complainant filed his final submission, in which he objected to the Young Affidavit, and asked that it be stricken from the record. He argued that "this Affidavit is self serving and comes from a current BWXT employee who is in a position to brown nose and receive favorable employee benefits," and asserts that there is no other evidence of any improper behavior on Burd's part. This submission also challenged Young's memory because he could not recall the year or any other details about the time when he and Burd worked at Nordic Trak. Finally, the complainant notes that the contractor could have found some other evidence to corroborate Young's claims, and could have asked Burd about "any of these naked allegations," during his pre-hearing deposition. Upon receipt of this submission, I closed the record.

III. Analysis

In considering the arguments raised in this appeal, we will begin with the issue of whether the contractor met its burden under Part 708, and then address remedy issues. The contractor has refined its position from the Statement of Issues to the Original Brief, but on a fundamental level its primary argument remains the same: it maintains that it was justified in terminating Burd, and that the IAD erred in concluding that it failed to show by clear and convincing evidence that it would have fired him in the absence of his protected disclosure.

A. The Contractor's Liability

In its brief, the contractor makes two principal arguments on liability. First, the contractor claims that Section 708.4(b) bars a complaint that involves misconduct the employee "deliberately caused," or in which he "knowingly participated." According to the contractor, Burd's complaint involved misconduct because he was involved in an altercation during which he called Ornelas "stupid," told him to "shut up," and had to be physically separated from Ornelas by Jones. This argument misinterprets Section 708.4(b) and misapplies the rule to the present case. That rule means that an employee whose actions created or contributed to a situation described in Section 708.5, such as "a substantial violation of a law, rule, or regulation, a substantial and specific danger to employees or to public health or safety, or fraud, gross mismanagement, gross waste of funds, or abuse of authority," could not bring a complaint based on a protected disclosure about such situation under Part 708. Burd complained about a safety issue–allowing a colleague to work excess overtime in the inherently dangerous environment of a nuclear weapons plant–he did not create or contribute to a safety problem by his own actions. 2/ After Ornelas heard Burd's complaint, an altercation between the two men ensued. Burd's misconduct was in the altercation, not the complaint, and it was the complaint that the IAD found, and I agree, contributed to Burd's termination. I therefore reject the argument that Burd's complaint is not actionable under section 708.4(b) because it involved misconduct.

Second, the contractor argues that instead of applying section 708.4(b), the IAD erred in applying the standard from *Dreis & Krump Mfg. Co., Inc. v. NLRB (Dreis)*, *supra*, in determining whether Burd's conduct warranted termination. While I have already rejected the contractor's argument that Burd's complaint should be barred under section 708.4(b), I will nevertheless consider its second argument. For the reasons explained below, I find that the labor law cases cited by the contractor as authority for overturning the IAD are inapposite to the present appeal, which is governed instead by the DOE Contractor Employee Protection Program in 10 CFR Part 708, and the case law developed under Part 708.

2/ The contractor's claim in the Statement of Issues that the IAD erred by ignoring the testimony of Brenda Finley, DOE's Employee Concerns Program manager, illustrates the apparent failure at Pantex to recognize the importance of Burd's safety complaint. Finley's hearing testimony shows that she focused on Burd's fear that he might be fired for insubordination, and ignored the underlying safety issue.

Dreis involved an employee who had engaged in protected conduct–filing a grievance under a collective bargaining agreement–who was fired for publicly using mildly disparaging language to describe his supervisor. An arbitrator upheld the firing, the NLRB reversed the arbitrator, and the employer appealed to the United States Court of Appeals for the Seventh Circuit. The Court affirmed the NLRB, and ruled for the employee, holding that "communications occurring during protected conduct remain protected unless . . . so violent or of such serious character as to render the employee unfit for further service." *Dreis, supra, at* 544 F.2d 329. The IAD quoted the forgoing language to support its conclusion that the record did not show anything about Burd's conduct that would distinguish him from other employees who were insubordinate but received lesser penalties.

According to the contractor, the IAD should have applied the four-point test articulated by the NLRB in *Atlantic Steel Co.*, 254 NLRB 814 (1979) to determine whether Burd's conduct was so "opprobrious" as to lose the protection of Part 708. This argument is without merit. Although labor law cases may be instructive on how other adjudicative forums have resolved issues similar to those that arise under Part 708, they are not controlling because Part 708 is designed to effectuate different policy objectives and apply different legal standards that are specifically tailored for the DOE complex. As explained in the preamble to Part 708, the rule is intended to foster the free flow of information about safety at nuclear weapons facilities through the contractor chain of command to DOE and the Congress. *See* 63 Fed. Reg. 373 (Jan. 5, 1998). The governing legal standard is in section 708.29: once the employee makes a prima facie case of retaliation, the burden shifts to the contractor to show by clear and convincing evidence that it would have taken the same action absent the protected conduct. The IAD considered the evidence in the record about the manner in which the contractor had applied its disciplinary policy to similarly situated employees who had engaged in non-physical confrontations and insubordination, and determined that the contractor failed to make that showing. Similarly, a previous OHA decision ruled against a contractor who failed to show by clear and convincing evidence that it consistently applied the same level of discipline to other employees who were similarly situated to the complainant who engaged in protected conduct. *See Morris J. Osborne*, 27 DOE ¶ 87,542 (1999) (*Osborne*). Thus, I find that if the IAD erred in its reliance on *Dreis*, it was harmless error, as the ultimate ruling against the contractor under Part 708 would have remained the same in its absence. Based on my conclusion that the contractor failed to justify Burd's termination under the clear and convincing evidence test, I next consider remedy issues.

B. Remedy Issues

The contractor maintains that (1) the complainant is only eligible for back pay from the date of discharge until he began subsequent employment, September 29 through October 20, 2000; (2) complainant's subsequent earnings offset the contractor's back pay liability; and (3) reinstatement is not an appropriate remedy in this case. The contractor does not contest the IAD's ruling that it pay interest on any amount awarded to the complainant.

In addition to reinstatement, back pay, costs and attorneys fees, the complainant seeks reimbursement of health insurance costs for himself and his family, and "incidental damages" to reimburse him for expenses he incurred as a result of having to move to Los Alamos, New Mexico, where he got a comparable new job as a radiation control technician for a contractor at another DOE nuclear weapons facility. These expenses include temporary lodging in hotels, rent and deposit for an apartment in Los Alamos, and travel between Los Alamos and Amarillo, where the complainant's wife and child lived in the family home. I will address each of the money issues in turn, and then consider whether reinstatement is warranted, in view of the newly discovered evidence.

With respect to the first issue which concerns the period of eligibility for back pay, I agree with the contractor that the complainant is eligible for back pay without any offsets from the date of discharge, September 29 through October 20, 2000, which corresponds to the period during which he was out of work after being terminated by the contractor. 3/ *See Ronald Sorri (Sorri)*, 23 DOE ¶ 87,503 (1993). Accordingly, I will order the contractor to pay Burd $2,318.08 in back pay for this period, and $3,477.12 for lost holiday pay, a related category of monetary damages that can be figured without any offsets. 4/ Since Burd would not have incurred these expenses absent his wrongful termination, I will also direct the contractor to reimburse Burd for $1,883.44 in time off he took for travel to attend the birth of his child in Amarillo, and matters relating to this case including depositions in Albuquerque, and meetings with his attorney and the hearing in Amarillo. *See n. 4, supra*.

Concerning the second issue, I agree that the complainant's subsequent earnings should generally offset the contractor's back pay liability for the period after Burd began his new job. However, prior OHA decisions have recognized that an employee who is the victim of retaliation for conduct protected under Part 708 can lose more than just his base salary as a result of the contractor's action. *See, e.g., Sorri* (lost salary enhancements, lost 401(k) contributions); *Osborne* (lost overtime, lost health insurance benefits). In this case, Burd's new job with Duratek, Inc. pays a higher base hourly rate than Burd's old job at Pantex. In the absence of other factors, that would mean Burd should not receive any back pay after October 20, 2000. But Burd argues that he lost the opportunity to work overtime at Pantex, and that the post-October 20, 2000 back pay calculation must account for the average amount of overtime worked by rad techs at Pantex, and give Burd credit for the overtime earning opportunity he lost when he was terminated. I am persuaded that an adjustment for lost overtime is necessary to restore Burd to the position he would have occupied but for the retaliatory termination. *See Osborne, supra*; 10 CFR § 708.36(a)(5). Accordingly, I will direct the parties to confer with each other and agree

---

3/ I agree with the contractor that there is no "collateral source" issue in this case, as the complainant received no money for a collateral source such as unemployment compensation during the period when he was unemployed after his termination.

4/ See calculations in Complainant's Damages Brief at 2; Complainant's Response to Contractor's Original Brief on Appeal at 7.

upon a proper calculation of back pay for the period after October 20, 2000 that takes account of lost overtime.

In addition to reinstatement (discussed separately below), back pay, costs and attorneys fees, section 708.36(a)(5) authorizes the DOE to order "such other remedies as are deemed necessary to abate the violation and provide a successful complainant with relief." The next issue is whether Burd's claim for reimbursement of medical insurance costs for himself and his family to replace the insurance coverage he lost when terminated, and "incidental damages" to reimburse him for expenses he incurred as a result of having to move to Los Alamos, falls within the purview of this rule. I find that reimbursement for these claims is the type of restitutionary remedy envisioned by the plain language of section 708.36(a)(5), and it should be granted.

A direct OHA precedent exists for restitution of lost medical insurance benefits in *Osborne*, *supra*. I will order the contractor to pay Burd $3,449.08 to compensate him for health insurance he was forced to purchase after his termination. 5/

With respect to the items related to moving for which Burd seeks restitution, I find that it is reasonably foreseeable that in order to mitigate his damages from the contractor's retaliation, Burd would seek employment as a radiation control technician at the closest DOE nuclear weapons facility, Los Alamos. During the pendency of this Part 708 case, it was also reasonable for Burd to maintain his residence in Amarillo, since he had an expectation of returning to work at Pantex, especially after OHA issued the IAD ordering reinstatement in November 2001. Thus, Burd should be reimbursed for the expenses related to maintaining a second residence in Los Alamos, and travel between the two cities. According to the complainant's two damage submissions cited in *n. 4*, *supra*, these expenses totaled $11,784.93 through July 27, 2001.

I will order the contractor to reimburse Burd for attorneys fees and expenses, which totaled $11,020.21 as of July 27, 2001, but which have increased since then. I will direct Burd's attorney to submit an updated, itemized bill, and confer with the contractor to agree upon a proper amount of attorneys fees and expenses.

Finally, I will order the contractor to pay interest at the rate specified in the IAD, one-half percent per month, on all monies paid to the complainant under this Decision. Neither party challenged this interest rate during the course of the appeal.

I turn now to the final issue in this appeal, whether the contractor should be ordered to reinstate Burd by offering to rehire him for a rad tech job at Pantex. At the outset, I reject the contractor's argument that DOE cannot direct BWXT Pantex to hire Burd, since he worked for M&H at the time of his termination, and never worked for BWXT. The Deputy Secretary of Energy has recognized that reinstatement by a successor contractor may be ordered to remedy a violation of

---

5/ Complainant's Damages Brief at 2; Complainant's Response to Contractor's Original Brief on Appeal at 7.

Part 708, depending on a consideration of the equities in a given case. *See Osborne, supra*; *Daniel Holsinger v. K-Ray Security, Inc.* (Decision of the Deputy Secretary), http://www.oha.doe.gov/cases/whistle/dsholsinger.htm.

Before the newly discovered evidence about Burd's job at Nordic Trak, the equities appeared to favor ordering reinstatement, since there was no showing of hardship by the contractor, such as showing that BWXT Pantex, as the M&O contractor at a large DOE facility, would have to displace an innocent employee in order to offer employment to Burd, which was the critical factor considered in the *Holsinger* case. Taken as a whole, however, the newly discovered evidence tips the balance of equities against ordering reinstatement. There are several factors involved. First, there is the allegation in the Kelley Young affidavit that Burd was fired from his job at Nordic Trak after engaging in a physical confrontation with Young, who was then his supervisor. Burd denies this happened, challenges Young's inability to remember other details such as the date, and maintains that Young has a motive for coming forward with evidence against him to "brown nose" his supervisors at BWXT Pantex, where Young now works. Although we have no direct means of resolving the conflict between these two accounts on the basis of the current record, the circumstantial evidence tends to undermine Burd's credibility on this issue. For example, he makes much of the fact that he disclosed the Nordic Trak job to DOE on his personnel security background information questionnaire. However, information reported to the government on personnel security forms is covered by the Privacy Act, and agencies do not share this information with contractors. Burd does not deny that he omitted any mention of the Nordic Trak job on the pre-employment papers he submitted to M&H, nor does he explain why he failed to mention it, except to claim it was a part time, secondary job. In particular, Burd's complaint that the contractor could have discovered this information earlier through due diligence rings hollow. During Burd's pre-hearing deposition on June 15, 2001, the contractor's attorney was questioning Burd about his past employment history, and he asked Burd directly "did you ever get fired from any of these jobs?" June 15, 2001 Deposition at 7. Burd never mentioned the Nordic Trak job that he had omitted from his Pantex application form and from his personal resume. Despite his protestations to the contrary, Burd's repeated efforts to conceal the Nordic Trak matter from the contractor lead me to believe that he thought he had something to hide. This is the most negative aspect of the newly discovered evidence.

Reinstatement is an equitable remedy, and with any equitable remedy, however, an adjudicator "must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Teamsters v. United States, 431 U.S. 324,375 (1977) [quoting Hecht Co. v. Bowles, 321 U.S. 321,329-330(1944)]. The ancient maxim of equity states that one who seeks equity must come into a court of equity with clean hands. With respect to the remedy of reinstatement, the complainant in this case does not have clean hands because he failed to disclose is full job history and he has not dispelled the doubt created by his reluctance to reveal it.

IV. Conclusion

As indicated above, I affirm the IAD, except the portions of the IAD that (1) deny restitution for travel and relocation expenses related to the complainant's having to move to a new town to get comparable employment and thus mitigate his damages from the wrongful termination during the pendency of this action, and (2) order the contractor to reinstate the complainant, which I reverse. I find that the complainant proved by a preponderance of the evidence that he made a protected disclosure when he complained about a radiation control technician being permitted to work excess overtime, and that this was a contributing factor to the contractor's decision to terminate the complaint, which was an act of retaliation. I further find that the complainant's prima facie case of retaliation shifted the burden of showing by clear and convincing evidence that it would have terminated the complainant in the absence of his protected disclosure, and that the contractor failed to meet that burden.

After considering the complainant's damage submissions, and the contractor's arguments on damages, I will direct the contractor to pay the complainant the sum of $33,932.86, representing back pay, restitution for other monetary damages incurred by the complainant as result of his termination, attorneys fees and costs, through July 27, 2001, and interest on that amount calculated at the rate of one-half percent per month. I will also direct the complainant's attorney to submit an updated, itemized bill, and to confer with the complainant and agree on the proper amount of attorneys fees and costs. Finally, this is an interlocutory order that is not appealable until issuance of a Supplemental Order specifying the remedy in full, in the event the parties are unable to reach a settlement.

It Is Therefore Ordered That:

(1) The appeal filed by BWXT Pantex on November 16, 2001 is hereby granted in part and denied in part, as set forth in Paragraphs (2) through (6) below.

(2) The Initial Agency Decision issued on November 1, 2001 is affirmed, except as follows:

> (a) the contractor shall pay restitution to the complainant for all travel, lodging, and relocation expenses incurred as a result of the complainant's having to move to Los Alamos, New Mexico to find comparable employment after being wrongfully terminated in September 2000;
>
> (b) the contractor shall not be required to offer employment to the complainant at the Pantex Plant.

(3) The parties shall confer with each other and agree upon a proper calculation of back pay for the period from October 20, 2000 through the date of this Decision, taking into account the average number of overtime hours worked by radiation control technicians at the Pantex Plant during that period.

(4) The complainant's attorney, Michael A. Warner, shall submit an updated, itemized statement, and confer with the contractor to agree upon a proper amount of attorneys fees and expenses.

(5) This is an interlocutory order that is not appealable until issuance of a Supplemental Order specifying the remedy in full.

(6) This Decision and Order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by each affected NNSA element, official or employee and by each affected contractor.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 5, 2002

February 27, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Petitioner: Bernard Cowan

Date of Filing: July 18, 2002

Case Number: VBA-0061

On July 18, 2002, Argonne National Laboratory-West ("ANL" or "the contractor") filed an appeal of an Initial Agency Decision (IAD) issued by an Office of Hearings and Appeals (OHA) Hearing Officer under the Department of Energy (DOE) Contractor Employee Protection Program, 10 CFR Part 708. *Bernard Cowan*, 28 DOE ¶ 87,023 (2002). The IAD found that the contractor retaliated against Bernard Cowan ("Cowan" or "the complainant"), an employee at ANL, for making disclosures protected under Part 708. The IAD ordered the contractor to reinstate Cowan, provide him with back pay, and reimburse him for the reasonable costs and expenses of prosecuting his complaint. *Id.* at 38-39. It further directed both parties to file a report providing a calculation for back pay and litigation expenses. *See* Appendix to IAD.
As set forth below, I have determined that the contractor has failed to show that the IAD was erroneous in finding for the complainant, but I have rescinded the award of reinstatement.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (definition of retaliation). Under the DOE regulations, review of an IAD is performed by the OHA Director. 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Cowan's complaint are fully set forth in the 39-page IAD. I will not reiterate all of the details here. For purposes of the instant appeal, the relevant facts follow. In 1974, Cowan was hired as an Engineering Technician-Senior in the Operations Division at ANL. In 1989, he was promoted to a Training and Procedures Specialist in the Training Group of ANL. He later voluntarily transferred from the Training Group to the Fuel Conditioning Facility (FCF) as an Engineering Technician-Senior.

In 1997, an incident occurred regarding hazardous material (HAZ-MAT) at the FCF. An alarm went off, and the employees were required to evacuate. A team of HAZ-MAT technicians who were trained to respond to this type of incident were supposed to return to the facility and perform re-entry procedures before others could move back into the building. Tr. at 111. However, during this particular incident, a team member who suffered from claustrophobia refused to wear a respirator and re-enter the building. A manager then called Cowan to replace the claustrophobic employee (Shriver) during the event. Tr. at 111-113. Management informed Cowan's group that an operator had a problem wearing a respirator, and that management was working with the operator. *Id.* 1/

On March 28, 2000, Cowan wrote a letter to the Operations Division Director of ANL expressing several workplace concerns, among them the alleged safety hazard posed by the claustrophobic employee assigned to be a HAZ-MAT technician. IAD at 9. According to Cowan, that employee jeopardized the safety of every team member and raised the possibility of an unsafe re-entry operation. He discussed these concerns with ANL managers on March 28, 2000 and April 7, 2000. The director of the facility ordered an investigation into the incident on April 12, 2000. Later that month, Cowan and other ANL-W employees at the FCF were transferred to the Sodium Processing Facility (SPF). Cowan protested this transfer and was allowed to return to the FCF. On May 18, 2000, the investigation concluded that, despite his claustrophobia, Shriver had been medically certified for HAZ-MAT duty and respirator use for several years without incident, and that no medical restriction was placed on his activities. IAD at 9. The investigation also stated that according to management, no employee was required to be a member of the re-entry team. *Id.* The investigation did not address whether Shriver should continue HAZ-MAT duties.

In May 2000, Cowan applied for a Training Specialist position at ANL, but he was not selected for that position. IAD at 14. On May 18, 2000, ANL management assigned Cowan to place lock out/tag out

---

1/ The HAZ-MAT technicians are ANL employees who are trained and medically certified for this job.

(LO/TO) tags on the FCF's cell lighting circuit breakers. 2/ On June 6, 2000, some of the circuit breakers were found incorrectly tagged and locked in the "on" position. Cowan complained to management that another operator was required to verify Cowans's work, but did not. An ANL occurrence report concluded that Cowan had improperly conducted the LO/TO. Cowan then alleged that someone had sabotaged his work and requested an investigation into this allegation. Both ANL and DOE investigated Cowan's sabotage allegation and found that it could not be substantiated. On June 28, 2000, Cowan was again transferred to the SPF.

Cowan filed a complaint with the Manager of Employee Concerns of the DOE's Chicago Operations Office (DOE/CH) on August 25, 2000. 3/ In the complaint, Cowan alleged that he made a protected disclosure in the March 2000 memorandum that he wrote to the Operations Division Director concerning Shriver, the claustrophobic operator. On March 5, 2001, Cowan was transferred from SPF to the radiological facility (FASB). A DOE investigator conducted an investigation of Cowan's Part 708 complaint and on November 27, 2001, issued a Report of Investigation (ROI).

Early in January 2002, Cowan sent email messages to all ANL employees complaining about his frustration in getting DOE to investigate his allegations of mismanagement and safety. Management concluded that portions of these emails violated company policies and as punishment for the alleged violation, Cowan was suspended for three days without pay.

After completion of the investigation, Cowan requested a hearing before an OHA hearing officer. Eleven witnesses testified at the two day hearing. After considering the evidence in the record, the hearing officer issued the IAD that is the subject of this appeal.

C. The Initial Agency Decision

1. Protected Disclosure

The IAD cited the respective burdens of proof for the employee and the contractor under Part 708:

> [T]he employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . and that such act was a contributing factor in one or more alleged acts of retaliation against the

---

2/ LO/TO is a system of physical and administrative controls that prevents the operation of control devices (electric circuit breakers in this case) to prevent injury to personnel or damage to plant equipment. Investigative Report of ANL LO/TO Event (April 6, 2001) at 3.

3/ DOE/CH is the DOE office designated to receive Part 708 complaints from ANL employees.

> employee by the contractor. Once the employee has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure.

10 C.F.R. § 708.29. In applying these standards to Mr. Cowan's complaint, the IAD considered the factual record and concluded that Cowan's March 2000 disclosure to management that a HAZMAT operator was subject to claustrophobia and thus a danger to his colleagues was protected under Part 708. 4/ The hearing officer found that it was reasonable for Cowan to believe that Shriver's continued participation in the ANL HAZ-MAT response program constituted a substantial and specific danger to employee health and safety.

After concluding that the March 2000 disclosure was protected, the hearing officer then reviewed the six personnel actions that Cowan alleged were made in retaliation for his protected disclosure. The hearing officer found that three allegations met Part 708's criteria for retaliation. First, Cowan alleged he was transferred involuntarily to SPF in June 2000 in retaliation for his protected disclosure. This incident occurred within three months of Cowan's protected activity, and the hearing officer found that based on the temporal proximity between the two events, it was reasonable to conclude that the disclosure was a factor in the personnel action. IAD at 17-18.

The second item of retaliation was Cowan's November 2000 appraisal (the "interim appraisal"). 5/ Although ANL argued that the appraisal was an interim evaluation and did not have a negative effect on Cowan's salary, the hearing officer found that it had a detrimental effect on his employment. The language of the appraisal was written in negative terms, in contrast to Cowan's previous evaluations. The hearing officer found only anecdotal evidence that Cowan's performance had deteriorated. Finally, the hearing officer found that Mr. Cowan's three day unpaid suspension in January 2002 was the third act of retaliation. The hearing officer concluded that ANL did not customarily use suspension as a punishment for violating ANL policy. IAD at 37. The hearing officer based his finding of retaliation on the fact that these actions occurred after Cowan filed his complaint, when ANL management was fully aware of Cowan's alleged whistleblower activity.

4/ In the IAD, the hearing officer stated that Cowan's allegation of sabotage may be a protected disclosure, but that he would only make a determination on this issue on remand if his finding about the HAZ-MAT disclosure were reversed on appeal. IAD at 17.

5/ Although this appraisal was completed in November 2000, it covered Cowan's performance from April through June 2000.

2. The Contractor's Burden

Under Section 708.29, after a finding is made that Cowan made a *prima facie* case of retaliation, the burden shifted to the contractor to prove by clear and convincing evidence that it would have taken these actions against Cowan in the absence of the protected disclosure. The IAD considered the contractor's arguments and concluded that the contractor did not prove by clear and convincing evidence that it would have taken the three personnel actions described above against Cowan in spite of his protected disclosure. IAD at 37-38. The hearing officer rejected ANL's claim that its performance evaluation was a fair estimate of Cowan's performance. IAD at 25. Instead, he found a lack of fairness. The hearing officer concluded that there was no evidence that ANL management would have placed such emphasis on Cowan's tardiness in meeting some deadlines absent his protected disclosure. *Id.* at 25-26. The IAD also found that Cowan's managers displayed a significant level of hostility toward Cowan. With regard to the transfer to FASB in June 2000, the hearing officer again found that the contractor failed to meet its burden. He found that transfer to be an "unusual" method for ANL to use to deal with hostility between co-workers. IAD at 29-33. In fact, there was no evidence that transfers were a routine response to inappropriate behavior of ANL employees, and moreover there was no evidence that the January 2002 suspension was a normal punishment for a violation of the company's email policy.

Based on the findings that Cowan made a protected disclosure in March 2000, and that ANL retaliated against him via a negative appraisal, a transfer in June 2000 and a three day unpaid suspension, the hearing officer granted Cowan's complaint and awarded him the following relief: (1) removal of the final FCF appraisal from his personnel records; (2) reinstatement as a shift operator at FCF; (3) payment of lost wages resulting from his transfer out of FCF; (4) payment of wages for the three day suspension; and (5) the removal of any reference to the suspension from his personnel file. IAD at 27, 33, 37. The hearing officer further directed both parties to provide each other with a calculation of back wages by July 30, 2002. Appendix to IAD. 6/

II. The Contractor's Arguments on Appeal

In its Statement of Issues (or "Statement"), ANL set forth three arguments. 7/ Two of the arguments are based on the premise that Cowan never made a protected disclosure, and thus there could be no showing that the alleged protected disclosure was a contributing factor to an act of retaliation. Statement at 2-8.

6/ To date, neither party has submitted this information.

7/ Complainant sent an extensive amount of material to this office, but did not directly address the issues that ANL presented on appeal. *See* Memoranda and Electronic Mail from Ben Cowan to OHA (August 14-October 13, 2002). Much of the documentation that Complainant submitted was already in the record of this case.

ANL's final argument is that the hearing officer abused his discretion in ordering reinstatement, and did not give proper deference to ANL's responsibility for maintaining a safe work environment. *Id.* at 8-9.

III. Analysis

In previous cases, this office has set forth the standard for consideration on appeal of a hearing officer's findings of fact and conclusions of law. Factual findings are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,501 at 89001 (1995); *O'Laughlin v. Boeing Petroleum Services, Inc*., 24 DOE ¶ 87,513 at 89,064 (1995). A Hearing Officer's conclusions of law are reviewable *de novo*. *See Pierce v. Underwood*, 27 DOE ¶ 87,544 at 89,224 (1999). I will apply these standards to my review of the IAD.

A. The Protected Disclosure

The contractor states that the March 2000 memorandum is not a protected disclosure because: (1) the hearing officer mistakenly believed that Shriver could rejoin the re-entry team; (2) the incident involving Shriver occurred almost two years prior to the disclosure, (3) membership on the re-entry team was voluntary; and (4) Cowan's first level managers were aware of the problem when it occurred. Statement of Issues at 2-4.

The record supports the hearing officer's findings that Cowan reasonably believed that Shriver, the claustrophobic employee, could rejoin the re-entry team. Thus, it was reasonable for Cowan to believe a safety hazard was imminent. Cowan did not know that the employee's participation in re-entry was voluntary. At the hearing, Cowan testified that in March 2000, he was not aware of any actions ANL had taken to resolve the situation with the claustrophobic employee. Tr. at 115. Cowan acknowledged that his first level management resolved the immediate problem in 1997 with Shriver–they decided that they would allow him to work without a respirator. Tr. at 113-114. However, this was not a permanent resolution of the situation since some emergencies may have been severe enough to require the re-entry team to wear respirators. The problem was not resolved until after Cowan's disclosure in 2000, when the investigation report was completed. In fact, ANL management did not investigate the situation until April 2000, and changes were not initiated until the completion of the investigation in May 2000. IAD at 12-13. One of the changes resulting from the investigation was a recommendation to tell all technicians that assignment to the HAZ-MAT team was "purely voluntary." IAD at 14. ANL also removed the requirement of HAZ-MAT qualification from the nuclear facilities operator position (a job that offered lucrative shift work) and recommended that operators immediately inform their supervisor if they have a problem wearing protective gear. IAD at 14. This policy change appeared to address the issue of operators who felt pressured, economically or otherwise, to be on the HAZ-MAT team despite a medical condition. According to the evidence, all of these changes can be traced to Cowan's disclosure. For the

reasons above, I concur with the hearing officer's finding that it was reasonable for Cowan to believe in March 2000 that Shriver's continued participation in the HAZ-MAT program was a substantial and specific danger to employee health and safety.

ANL further argues that because management personnel responsible for the HAZ-MAT technicians knew of the 1997 incident and resolved it at the time, Cowan's disclosure to other management at a later date is irrelevant. This argument is incorrect. Cowan clearly differentiated between his immediate supervisors and "Management" (i.e., more senior level managers such as Gary Lentz, Division Director for Facility Division at ANL). 8/ Cowan testified at the hearing about his disclosure as follows:

> [I]t was brought to their [management's] attention about keeping [the claustrophobic employee] on as a Hazmat team or not. The time that I remember confronting Management in the respirator problem was based on the time frame of, of the Claim, because it was an issue that, you know, we were afraid to even bring up because of retaliation efforts. But it existed. He was still on the team, and during that timeframe, '97, it wasn't reported to, to Management as, you know, a problem.

Tr. at 114. The manager responsible for plant safety, Lentz, was the recipient of the March 2000 memo and confirmed that he was not aware of the situation with the claustrophobic employee until he read the Cowan memo. Tr. at 473. It was the Cowan disclosure that triggered an investigation that resulted in recommendations to make concrete changes in procedures to improve safety (i.e., restricting Shriver's participation on the team, reminding employees that participation on the team was voluntary). Thus, Cowan was able to prove through sworn testimony at the hearing that he disclosed the safety concern to a senior management official (Gary Lentz) and that Lentz was not aware of the incident until Cowan's disclosure in March 2000. Tr. at 473.

Thus, the record does not support ANL's arguments. The details of when and how ANL responded to a safety issue are irrelevant to this Part 708 proceeding. The focus here is on whether the whistleblower's concerns brought to management's attention were reasonable at the time that he reported them. The hearing officer determined that the complainant disclosed to his employer information that he reasonably and in good faith believed described a danger to his fellow employees. 10 C.F.R. §708.5 (a) (2). The key to the hearing officer's decision in this issue is best stated in the IAD as follows:

> While testimony at the Hearing indicates that further study of the situation, and action by management, may have substantially alleviated the safety concern in this area, this factor is not relevant to my inquiry under Part 708, *which is to analyze the reasonability of Mr. Cowan's concerns when he reported them in March 2000.*

8/ Lentz testified that he was the person ultimately responsible for ensuring the safe operation of ANL facilities. Tr. at 434, 473.

IAD at 13 (emphasis added). The hearing officer determined that it was reasonable for Mr. Cowan to be concerned about the potential for a safety problem caused by his co-worker. I agree with the hearing officer's finding.

B. Retaliation

ANL offers two arguments concerning the retaliation that the hearing officer found it committed. First, ANL argues that the hearing officer erroneously relied on temporal proximity between the disclosure and the alleged retaliation in finding that they were related. Statement at 5. The contractor alleges that the hearing officer erroneously failed to require Cowan to make any evidentiary showing that an alleged protected disclosure was a contributing factor in an alleged retaliation.

I reject ANL's argument. Whistleblower cases rarely have a "smoking gun" incident that neatly delivers conclusive evidence to the fact finder. As a result, in whistleblower cases adjudicated by this office, temporal proximity is an accepted means of determining that a protected disclosure is a contributing factor to an act of retaliation. *See, e.g., Timothy E. Barton,* 27 DOE ¶ 87,501 at 89011 (1998) (and cases cited therein). Similarly, federal courts adjudicating whistleblower cases permit an employee to meet his statutory burden to show that an alleged disclosure was a contributing factor to an agency personnel action by proving to the court that the personnel action occurred within a reasonable time after that disclosure. *See Kewley v. Dept. of Health and Human Services*, 153 F.3d 1357, 1363 (Fed. Cir. 1998) (explaining Congressional intent in Whistleblower Protection Act (WPA), 5 U.S.C. § 1221(e)(1)(A) & (B) (1994)) (*Kewley*). 9/

In its second argument, ANL contends that two of Cowan's allegations do not qualify as retaliation under Part 708: (1) Cowan's June 2000 FCF appraisal (the "interim appraisal"); and (2) Cowan's June 2000 transfer from the FCF to SPF. ANL bases its argument about the June 2000 appraisal on its allegation that there was no evidence of a negative trend in Cowan's appraisals, and that the rating was similar to previous ratings. *Id.* Further, ANL argues that the interim appraisal had no negative effect on Cowan's final raise,

---

9/ Legislative history of the Whistleblower Protection Act (WPA) explains that when Congress amended the WPA in 1994, it intended to allow a whistleblower to demonstrate that disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in a personnel action. *See Kewley*, 153 F.3d at 1363. This "knowledge/timing test" was implemented due to Congress' desire that the whistleblower not face an insurmountable burden. *Id.*

and therefore could not be considered retaliation for protected activity. Statement at 6. I consider these two arguments below.

1. The Interim Appraisal

I have examined the hearing officer's reasons for concluding that this event–the interim appraisal--was an act of retaliation, and I find no reversible error here. The June 2000 evaluation (review cycle April 1-June 23, 2000) contains negative language not found in Cowan's other 2000 appraisals, and was completed within three months of Cowan's disclosure in March 2000. IAD at 25. Cowan received two other appraisals in 2000, and neither contained negative comments. Even though the interim evaluation did not have a negative effect on Cowan's salary, its rating (3- on a scale of 5) was lower than his previous ratings of 3+ (for the period October 1, 1999 through March 31, 2000) and the interim appraisal contained fairly negative comments in the "Accomplishments" section. *See* Performance Appraisals, Review Cycle October 1, 1999 to September 30, 2000. The hearing officer questioned the supervisor who prepared Cowan's interim evaluation, and found a "lack of convincing testimony in support of ANL's position." IAD at 26. I agree. The manager who prepared the evaluation relied "almost 100 percent" on input from Cowan's first level supervisor, Belcher, a close friend of the claustrophobic employee. Tr. at 536-37, IAD at 24. The record supports a finding that that relationship colored Belcher's workplace interaction with and his views about Cowan and lowered his evaluation of Cowan's performance. Tr. at 221, 552-553. At the hearing, the manager who prepared the evaluation was not able to explain or support statements in the appraisal about tasks that Cowan allegedly had not completed. Tr. at 536-537.

In conclusion, based on the hearing officer's findings of limited evidence in support of ANL's contention that Cowan's performance had declined slightly, and of a significant level of animosity towards Cowan on the part of his supervisors, I find no error in the hearing officer's finding that the decreased rating contained in the June 23, 2000 appraisal was retaliation against Cowan for protected activity.

2. Transfer from the FCF

ANL contends that Cowan's transfer in June 2000 was not a retaliatory action, but rather a business decision forced on the contractor because Cowan caused dissension in the workplace and ANL had a responsibility to maintain a safe workplace. Statement at 6-7. The hearing officer found that ANL had provided only "anecdotal" evidence that Cowan's activities in the FCF in June 2000 aggravated his colleagues and led to animosity against him and ultimately his transfer. IAD at 29-31. As explained below, my review of the record leads me to conclude that although the evidence regarding hostility toward Cowan due to his own actions is more than anecdotal, it does not rise to the level of "clear and convincing" evidence dictated by ANL's regulatory burden. *See* Section III. C., *infra* (discussion of the level of hostility in the FCF in June 2000).

To make a persuasive defense here, ANL must show that it previously utilized a transfer to ameliorate tension in the workplace of a similar nature. The IAD states that "ANL has not shown that similar activity by another [employee] at FCF would have resulted in the same recommendation that he be transferred to another facility." IAD at 30. After reviewing the record, I agree with the hearing officer. ANL submitted no evidence that it had ever transferred an employee as a result of tension on the floor or a dispute with his supervisor. Tr. at 260. A ten year FCF supervisor testified that he could not remember a personality conflict ever resulting in a transfer. *Id.* Nonetheless, in its Statement, the contractor declared that " . . . the evidence was substantial and undisputed that Cowan's actions had compromised the safety and efficiency of FCF." Statement at 6. This is a somewhat different issue, and the contractor's claim is not supported in the record. Robert Belcher, Cowan's first level supervisor, testified at the hearing that although there was no trust between Cowan and his fellow technicians, and this distrust had a negative impact on Belcher's ability to supervise, nonetheless he found no safety concerns surrounding Cowan's behavior:

> Q. Did [Cowan's poor working relationship with his colleagues] also lead to safety concerns on your part?
>
> A. No, I can't honestly say there were any safety concerns.

Tr. at 247.

The evidence on which ANL relies for support of this issue is not persuasive. Therefore, I find no error in the hearing officer's conclusion that the transfer was an act of retaliation.

C. Reinstatement

The final issue that ANL raises in its Statement deals with the hearing officer's order to reinstate Cowan as a technician in the FCF (his position in June 2000). IAD at 33. The contractor appeals this award based on the safety of ANL employees and the efficient operation of the facility. Statement at 8-9. According to ANL, Cowan has a "history of accusing employees at FCF of criminal conduct" which resulted in a "hostile work environment with a corresponding decrease in morale and efficiency." Statement at 8. The contractor explains that because the prime contract requires ANL to maintain the safety and health of its workers, reinstating Cowan would violate the contract and possibly result in sanctions against ANL. *Id.* Further, because Cowan did not object to his transfer to FASB in June 2001, according to ANL there is no basis to move him from the FASB, his current location. *Id.*

The remedy of reinstatement is an equitable remedy and depends on a consideration of the equities in a given case. *See Robert Burd*, 28 DOE ¶ 87,025, Case No. VBA-0060 (2002); *Morris J. Osborne*, 27

DOE ¶ 87,542 (1999). Although not binding on us here, federal court cases are very instructive in this regard. In reviewing a decision to award equitable relief, federal courts have stated that an appellate body is deferential to the fact finder, and does "not normally find an abuse of discretion absent evidence of a lapse in judgment." *Selgas v. American Airlines*, 104 F.3d 9, 12 (1st.Cir. 1997). *See also Squires v. Bonser*, 54 F. 3d 168, 171 (3rd Cir.1995) (*quoting Langnes v. Green*, 282 U.S. 531, 541, 51 S.Ct. 243 (1931)) (stating that the reviewing tribunal is obliged to require that discretion be exercised in accordance with what is right and equitable under the circumstances and the law) (*Squires*).

ANL asks us to deny reinstatement based on the high level of hostility between Cowan and his FCF colleagues and managers. It is true that courts have denied an award of reinstatement based on findings that the animosity between parties makes such a remedy impracticable. *See Squires*, 54 F. 3d at 172; *Duke v. Uniroyal*, 928 F. 2d 1413, 1424 (4th Cir. 1991) (court must consider whether reinstatement is practical); *Marshall v. TRW*, 900 F.2d 1517, 1523 (10th Cir. 1990). 10/ There are, however, other factors that should be considered, including whether a complainant comes to the court of equity with "clean hands," *Robert Burd*, 28 DOE ¶ 87,025 (2002) (denying reinstatement of complainant who omitted information about previous employment), the unavailability of a position in which to place the complainant, *Coston v. Plitt Theatre*, 831 F. 2d 1321, 1331 (7th Cir. 1987), or a continued reduction-in-force, *McNeil v. Economics Laboratory*, 800 F.2d 111, 118 (7th Cir. 1986). *See also Daniel Holsinger v. K-Ray Security, Inc.*, 26 DOE ¶ 87,506 (1995) (discussing whether reinstatement would require a small contractor to displace an innocent employee). A hearing officer must conduct a full assessment of the equities, and must "look to the practical realities and necessities inescapably involved in reconciling competing interests" in order to determine the "special blend of what is necessary, what is fair, and what is workable." *Daniel Holsinger v. K-Ray Security, Inc.*, 26 DOE ¶ 87,506 at 89,018, *(quoting Lemon v. Kurtzman*, 411 U.S. 192, 200-201 (1973) (plurality opinion of Burger, C.J.)) (*Holsinger*).

I reviewed all evidence of workplace hostility in the record, including hearing testimony and four letters from employees (one letter was anonymous, but purported to be written by an ANL employee). Lentz testified that Cowan's transfer was based on the four letters and a conversation between Lentz and Gary Tarbet, Facility Manager. Tr. at 484. The four letters described the interaction between Cowan and his co-workers in June 2000. Two of the letters, one written by Gene Kurtz, FCF Supervisor, and the other by Robert Belcher, Cowan's first level supervisor at the FCF, are worded very strongly. *See* Memorandum from Robert Belcher to Gary Tarbet, FCF Plant Manager (June 14, 2000); Memorandum from Gene Kurtz to Gary Tarbet (June 23, 2000). They are contemporaneous expressions of a high level of frustration with Cowan's behavior in the workplace, and ask for management assistance in dealing with Cowan. Belcher testified at the hearing that he requested Cowan's transfer after Cowan asked him to arrange a

---

10/ The hostility at the workplace must surpass the normal level of hostility between parties to litigation. *Grantham v. Trickey*, 21 F. 3d 289, 296 (8th Cir. 1994); *EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1462 (7th Cir. 1992).

meeting between Cowan and whoever allegedly "set him up" for punishment in the LO/TO incident. Tr. at 224-225.

I found the letters of Belcher and Kurtz to be credible and enlightening in their descriptions of Cowan's interactions with his colleagues. These employees clearly take their job responsibilities seriously, and were moved by a difficult situation to bring their concerns to the attention of ANL management. 11/ There is additional evidence about Cowan's relationship with his colleagues having deteriorated to an unusual extent. He has accused his colleagues of sabotage, bombarded them with electronic mail complaining about the company, and he has contacted the FBI and police to request an investigation into the company's activities. Tr. at 528-529, 569-570. While I am unable to assess the true level of hostility at FCF without testimony from his peers, the record supports a finding that there is a high level of hostility towards Cowan in the FCF. 12/

There are other factors in the record that weigh against reinstatement. Most important, I find that Cowan's actions have slowed the resolution of his complaint. For example, even after making a serious allegation of criminal sabotage against his co-workers, Cowan refused to cooperate with ANL management in its investigation of the allegation. Tr. at 522. Cowan informed Keith Powers, a Group Leader at FCF, that he (Cowan) actually had proof of the sabotage. Tr. at 522-529. However, when Powers, appropriately concerned about the possibility of criminal activity at a nuclear facility, asked Cowan for the proof, Cowan refused to give Powers any information. Tr. at 523. In fact, Cowan declared that Powers "would have to find it [himself]." *Id.* Cowan's actions obviously impeded the investigation, and consequently I am inclined to draw a negative inference about the complainant's behavior towards his colleagues. Further,

---

11/ The other two letters are less persuasive, and I do not credit the authors with the same earnest intentions. They purport to describe the animosity between Cowan and his peers, but we have not heard directly from his peers--there are no written statements from any of Cowan's colleagues (except Shriver, who was the subject of Cowan's disclosure), and none testified at the hearing.

12/ ANL did not address additional factors that could weigh against Cowan's reinstatement, such as the lack of a current position at the FCF for Cowan, a continued reduction-in-force at the facility, or whether an innocent employee would have to be displaced to comply with the order. In addition, I cannot determine from testimony at the hearing if Cowan's former supervisors are still employed in positions at FCF where they would have to continue to interact with Cowan if he were reinstated. *See Feldman v. Philadelphia*, 43 F.3d 823 (3rd Cir. 1995) (stating that the issue of hostility is moot if the individuals who were a party to the animosity would no longer have dealings with complainant); *Morgan v. the Arkansas Gazette*, 897 F.2d 945, 953 (8th Cir. 1990) (affirming awards of reinstatement where employee responsible for discriminatory comments was no longer employed). Thus, I cannot draw any inference favorable to ANL regarding these factors.

the record reflects unacceptable conduct on Cowan's part. In September 2001, ANL management sent Cowan a letter requesting him to refrain from taking his complaint outside of the framework of DOE's whistleblower process until that process was completed. Tr. at 617. However, he ignored this warning and disseminated a 71 page "Employee Whistleblower Report" with a cover page designed such that the report appears to be an official ANL publication. *Id.* *See* "Employee Whistleblower Report." Further ignoring management's reasonable request, in January 2002 he sent an electronic mail message to all ANL employees regarding his whistleblower complaint. 13/ Tr. at 621.

There is no escaping the impression that Cowan's own actions have contributed to the negative attitude of the ANL managers who did not want him back at the FCF. Since Cowan is at least partially responsible for this situation, and has burned his bridges by refusing to cooperate with those investigating his allegations of sabotage, reinstatement to his former position at the FCF would not, in my view, be a "workable" remedy in this case. 14/

It is Therefore Ordered That:

(1) The Appeal filed by Argonne National Laboratory - West, OHA Case No. VBA-0061, is hereby granted in part and denied in part, as set forth in Paragraph (2).

(2) The IAD issued on June 27, 2002 is affirmed, except the contractor shall not be required to reinstate the complainant to his former position in the Fuel Conditioning Facility.

13/ Cowan also refused to cooperate with a procedure that ANL management had instituted for SPF employees who were to be transferred when that project was completed. Each affected employee was asked to provide management with his or her top three choices for a new assignment. Tr. at 614-616. Cowan refused to participate in this process, but then complained about his new assignment. Tr. at 629-631.

14/ In addition, although ANL's appeal did not address the availability of a position for Cowan at the FCF, there is some testimony in the record about curtailed operations at that facility in 2000 and possibly in succeeding years. Tr. at 613-614.

(3) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 27, 2003

January 8, 2003
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Susan Rice Gossett

Date of Filing: September 13, 2002

Case Number: VBA-0062

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on May 8, 2002, involving a Complaint filed by Susan Rice Gossett (Gossett or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Gossett claims that her former employer, the Safety and Ecology Company (SEC) terminated her as a retaliation for making disclosures that are protected under Part 708. 1/ In the IAD, the Hearing Officer determined that Gossett was entitled to relief. *Susan Rice Gossett*, 28 DOE ¶ 87,020, Case No. VBZ-0062 (2002). The instant determination will consider SEC's appeal of the IAD. As set forth below, I have decided that the IAD should be sustained.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their

---

1/ SEC is a sub-contractor of Bechtel Jacobs Corporation, the DOE's managing contractor at the Portsmouth site in Piketon, Ohio.

employers. Thus, a contractor found to have retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by SEC in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Gossett's Complaint are fully set forth in the IAD. I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Gossett was employed by an SEC predecessor, Bartlett Nuclear Services, as a radiation control technician (RCT) beginning on October 3, 1997. In March 1999, when SEC took over the Bartlett contract at the DOE's Portsmouth site, Gossett was hired by SEC. Gossett stated in her complaint that in her capacity as an RCT, she disclosed numerous safety and health concerns to her SEC supervisors and managers, to Bechtel Jacobs personnel, to DOE officials and to a member of Congress. These disclosures took place from the time she began working as an RCT until December 2000. The health and safety concerns she raised included, among others, bulging and leaking 55-gallon drums at the Portsmouth site and several contamination issues. Gossett was terminated in January 2001, and contended that the termination was a retaliation for the disclosures.

Gossett filed a Complaint under Part 708 with the DOE Oak Ridge Operations Office. After the completion of an investigation, pursuant to 10 C.F.R. § 708.22, Gossett requested and received a hearing on this matter before an OHA Hearing Officer. The hearing lasted three days. After considering the testimony at the hearing and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

C. The Initial Agency Decision

The IAD cited the burdens of proof under the Contractor Employee Protection Regulations. They are as follows:

> The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure. . . and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. . . .

10 C.F.R. § 708.29.

The IAD determined that Gossett had clearly made protected disclosures, because the information she revealed related to substantial health and safety concerns at the Portsmouth site. The IAD further found that Gossett's termination was an adverse personnel action. Further, because that termination took place within about one month of her last protected disclosure, the IAD determined that Gossett had established by a preponderance of the evidence that the disclosure was a contributing factor to the termination. The Hearing Officer also noted that SEC officials who decided to terminate her had actual knowledge of her disclosures.

The IAD next considered whether the SEC had clearly and convincingly demonstrated that it would have terminated Gossett in the absence of the protected disclosures. 10 C.F.R. § 708.9(d). The IAD cited SEC's reason for terminating Gossett: after three successive attempts, she failed to achieve a passing grade on an examination to requalify her for her RCT position. In this regard, the IAD rejected SEC's assertion that it had demonstrated that at the time it terminated Gossett it had a policy under which an RCT was only allowed three attempts at passing a requalification exam (the three strikes rule). In making the determination that SEC had failed to establish such a policy, the IAD noted that there was no evidence that the three strikes rule had ever been applied to any SEC employee before, and there was testimony that Gossett was the only SEC employee ever fired under the rule.

Accordingly, the IAD found that SEC should provide relief to Gossett for the termination. On August 23, 2002, after further briefing, the Hearing Officer issued a Decision setting forth the specific nature of that relief. *Susan Rice Gossett*, 28 DOE ¶ 87,028, Case No. VBH-0062 (2002)(*Gossett*).

II. The SEC Statement of Issues and Gossett Response

SEC filed a statement identifying the issues that it wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). 10 C.F.R. § 708.33. The Statement does not challenge the finding that Gossett made disclosures that are protected under Part 708. Instead, the Statement raises the following three arguments to support its position that Gossett is not entitled to relief: (i) the OHA's interpretation of 10 C.F.R. § 708.29, regarding shifting of the burden of proof to the contractor, violates § 7(C) of the Administrative Procedure Act, 5 U.S.C. § 556(d); (ii) the IAD is not supported by substantial evidence; and (iii) the IAD violated due process in deciding an issue without first providing adequate notice to SEC. 2/ Gossett filed a response to the Statement of Issues, expressing support for the IAD.

II. Analysis

As I stated above, SEC has not convinced me that there is any reason to disturb the IAD in this case.

A. Whether OHA's Interpretation of 10 C.F.R. § 708.29 Violates §7(C)of the Administrative Procedure Act

SEC argues that OHA's interpretation and application of the burdens of proof as set forth in 10 C.F.R. § 708.29 are impermissible.

2/ In its list of "Questions Presented," the Statement referred to two other issues concerning the relief provided in the *Gossett* determination. It argues that the Hearing Officer erred in requiring SEC to reinstate Gossett without requiring her to initially demonstrate that she is qualified for the position involved. It further states that the Hearing Officer erred in establishing the hourly rate of complainant's counsel in connection with the relief phase of this proceeding. Since SEC provided no additional discussion on the second point, I will not give it any further consideration here. The reinstatement issue was considered in a letter of October 30, 2002. SEC did not file any appeal of the determinations reached in that letter, although it was provided with an opportunity to do so. Its arguments, had any been submitted, would have been considered in the instant determination. Accordingly, I consider that matter resolved.

Specifically, the Company refers to OHA's consistent interpretation of that Section to mean that a Part 708 complainant has met his burdens of proof under that section if he has shown (i) he made a protected disclosure, and (ii) that it was in temporal proximity to an adverse personnel action by the employer. We have held that under our Part 708 regulations, once this showing has been made by the complainant, the burden under Section 708.29 shifts to the employer to show that it would have terminated the employee even in the absence of the protected disclosure. SEC claims that under 5 U.S.C. § 556(d) (the Administrative Procedure Act or APA) and judicial interpretations of that Section, the burden of persuasion must be placed on the proponent of an order. SEC contends that under Section 708.29, OHA prematurely shifts the burden of persuasion to the contractor, merely on the basis of temporal proximity between a protected disclosure an adverse personnel action. SEC argues that this is improper, based on judicial interpretations of burdens of proof required under Section 556(d) of the APA.

The applicability of the APA to proceedings under Part 708 is an issue that can be disposed of quickly. As we found in *Janet K. Benson*, 28 DOE ¶ 87,027, Case No. VBA-0082 (2002)(*Benson*), there is no basis for concluding that the APA applies to proceedings under Part 708. The APA states with respect to adjudications that its provisions apply in cases where adjudication is "*required by statute* to be determined on the record after opportunity for an agency hearing. . . ." 5 U.S.C. § 554(a)(emphasis added). Consequently, this provision only applies if another statute requires the adjudication proceeding. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950)(*Wong*). In *Wong*, the Supreme Court stated that "the limitation to hearings 'required by statute' in Section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom or special dispensation; not those held by compulsion." *Id.* at 50.

There is no statutory authority requiring that hearings be held under Part 708. The rule was issued pursuant to the broad authority granted the Agency by the Atomic Energy Act of 1954 and the Department of Energy Organization Act to prescribe such rules and regulations as necessary or appropriate to protect health, life and property. 57 Fed. Reg. 7533 (March 3, 1992). Neither of these Acts requires that the DOE hold hearings regarding the protection of contractor employees from reprisals by their employers for whistleblowing. Since Part 708 hearings are conducted based solely

on authority vested by regulation, they fall squarely within the exception noted in *Wong*. *Benson,* slip op. at 14-15. Accordingly, OHA is not required to adhere to judicial interpretations of the burdens of proof under the APA in cases involving its own Part 708 regulations.

To the contrary, under well-settled case law, an Agency's interpretations of its own regulations are entitled to deference. *See e.g.*, *U.S. v. Mead Corp.*, 533 U.S. 218 (2001); *Auer v. Robbins*, 519 U.S. 452 (1997). Our interpretation and application of the burdens of proof under Section 708.29 are by now well-settled case law, and I see no reason to depart from our precedents. *E.g.*, *Janet Westbrook*, 28 DOE ¶ 87,021, Case No. VBA-0089 (2002); *Barbara Nabb*, 27 DOE ¶ 87,519, Case No. VWA-0031 (1999). The manner in which we have applied Section 708.29 to shift the burden of proof in Part 708 cases serves to promote the DOE's overall goal in its Contractor Employee Protection Program: "ongoing commitment to whistleblower protection." 64 Fed. Reg. 12865 (March 15, 1999). The OHA's application of Section 708.29 is not only reasonable, but fits squarely within the overall purpose of Part 708.

Nevertheless, I am willing to consider whether the Hearing Officer in this case may have improperly applied the shifting burdens of proof as set out in Section 708.29. Accordingly, I have undertaken a review of that aspect of the record. I see nothing improper whatsoever. The Hearing Officer noted numerous Gossett protected disclosures during the period July 2000 through November 2000. Gossett was terminated in January 2001. The temporal proximity is obvious.

The Hearing Officer also noted numerous instances of hostility of SEC management to Gossett, which he determined were associated with her whistleblowing activities. IAD at 89,127-28. He found this pattern of hostility to provide further support for the conclusion that the protected disclosure was a contributing factor to the retaliation.

Once the temporal proximity showing has been made, the finding of the pattern of hostility is not necessary to the overall conclusion that the complainant has made the contributing factor showing. The conclusions in the IAD regarding the pattern of hostility are dictum in this case. *See Benson*, *slip op. at 16, n.6.* The same is true of the Hearing Officer's finding that the terminating officials had knowledge of her disclosures. The temporal proximity of the termination and Gossett's protected activities is ample

evidence to sustain Gossett's burden of proof of contributing factor under Section 708.29.

B. Whether the IAD Is Supported By Substantial Evidence

SEC argues that with respect to retaliation, the employer's motive is a key issue. The firm contends that there is no substantial evidence to support a finding of retaliatory motive or "improper animus" by SEC decision makers. The Statement then describes in detail the actions that the Hearing Officer referred to as "hostile" in his discussion of the contributing factor issue. The Statement proceeds to give alternate explanations for each of those actions in order to establish that they were not in fact motivated by SEC hostility towards Gossett.

SEC's protracted exploration of the motives of its managers is simply irrelevant. The Complainant is not required under Part 708 to establish that a retaliatory motive existed. Moreover, the employer is not necessarily relieved of liability under Part 708 even if it provides evidence that it bore no animus towards a Part 708 complainant. *Jagdish Laul*, 28 DOE ¶ 87,006, Case No. VBH-0010 (2000). *See also*, *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

In assessing whether a disclosure was a contributing factor to an adverse personnel action, we do not need to probe an employer's state of mind, or consider whether a particular action was motivated by hostility. It is true that the term retaliation, as it is most commonly used in everyday speech, may have some extremely negative connotations, including revenge and hostility. However, under Part 708, the term is more neutral, and does not involve the subjective mind-set of the person taking the adverse personnel action. Under Part 708, retaliation is an objective concept. It means "an action. . . taken by a contractor against an employee with respect to employment(e.g., discharge, demotion or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information. . . ." 10 C.F.R. § 708.2. Thus, hostile motivation by the employer is not an element that is necessarily involved under Part 708.

If a complainant were able to show animus, that evidence could be relevant in establishing whether the protected disclosure was a contributing factor to the adverse personnel action, and in considering whether the employer would have taken the retaliatory action in the absence of the protected disclosure. However, the

obverse of that proposition is not true. The absence of hostility does not relieve an employer of liability under Part 708 for its actions. Thus, even if SEC had shown that its managers did not act with hostility towards Gossett, it would not mean that Gossett had failed to meet her burden of proof under Section 708.29.

The Statement also reargues the IAD's determination that SEC failed to show that it had a three strikes rule. It claims that there is no substantial evidence to support the IAD's finding. In this regard, the Statement admits that the three strikes policy was unwritten, but states that the relevant question is rather whether the policy "has been consistently applied." The Statement argues that it has made a showing that the policy has been consistently applied, because no RCT has ever been permitted to take the examination more than three times. The Statement also refers to the assertion in the IAD that SEC did not warn three other RCTs who had twice failed the requalification examination that they would be terminated upon a third failure. The Statement then explains why warnings were not warranted for those other RCTs, and why, in its view, the other RCTs were not given better treatment than Gossett.

I agree with SEC's assertion that it is not required to show that the three strikes rule was memorialized in writing. I also agree with its contention that it is permitted to rely on the testimony of its employees that the three strikes rule was an oral policy that was consistently applied. Nevertheless, the firm's explanations do not demonstrate any error that would cause me to reverse the IAD. SEC has still not established that it had a three strikes policy that was consistently applied.

To support its position, SEC exhaustively reargues the significance of the hearing testimony of a number of its key managers in an attempt to establish that their statements support the contention that the rule was clearly in effect at the time that Gossett was terminated. After reviewing the record, I find that SEC's evidence on this point falls short of the mark, and that the Hearing Officer's determination was correct. In my view, the absence of a written SEC policy on such a serious matter tends to detract somewhat from the overall credibility of SEC's position that the three strikes rule was ever squarely and firmly in effect. However, I believe that the firm could establish through solid testimony that it consistently applied the three strikes policy. Nonetheless, SEC's protestations to the contrary notwithstanding, the hearing testimony was far from clear on whether SEC had an unwritten three strikes policy. For example, Brad Andrie, an SEC manager, testified that the three strikes policy was well-known

among RCTs. Transcript of October 25, 2001 Hearing at 104. However, the company did not bring forth RCTs to support that assertion. Andrie's pronouncement, with nothing more, is hardly convincing evidence on this point, inasmuch as there was contradictory evidence in the record. The very fact that senior site manager Joe Shuman and SEC RCT training coordinator Billie Childers purportedly needed to make several phone calls to determine if such a policy existed or was ever applied, contradicts Andrie's position. *Id.* at 103. It is hard to believe that a company policy regarding RCT requalification examinations would be well-known by RCTs, but not well-known by senior company officials, particularly the RCT training coordinator.

SEC claims that it has demonstrated that the policy was consistently applied because it has established that no RCT has ever been permitted to take the examination more than three times. I am unimpressed by this reasoning. First, SEC has not even shown that this assertion is true. Secondly, even if SEC had established that no RCT had ever taken the test four times, there are a number of other possible explanations unrelated to a three strikes policy. For example, the RCTs that failed three times may have simply opted to find other work. 3/ In any event, SEC's necessary showing here about the three strikes policy is not that no RCT ever took the examination more than three times, but rather that RCTs were consistently denied an opportunity to take the examination a fourth time. The company has not brought forward such evidence.

I believe that SEC should, at a minimum, have produced unambiguous testimony that the three strikes policy was in effect. In the absence of a written policy to this effect, one possible way to do this might have been to provide direct testimony from RCTs that the policy was well-known to them. SEC should also have shown that employees were precluded from taking the examination more than three times. I recognize that it is the firm's position that no other RCT ever needed to take the examination more than three times, and that Gossett was the first person to actually have been terminated under the rule. However, under Part 708, the contractor's obligation here is clear. It must show that the three strikes policy was in effect. This, it has not done. In view of the high level of proof required in Part 708 cases, if that policy had never been applied in the past, SEC may simply be unable to provide clear and convincing evidence that the policy would have

---

3/ This is apparently what happened in the case of Lou Ann Riggs, who found a position with another company.

been applied to Gossett. *See*, *Bernard F. Cowan*, 28 DOE ¶ 87,023 at 89,179, Case No. VBH-0061 (2002)(single instance of a three-day suspension does not indicate the contractor's normal practice was to impose three-day suspensions on employees who improperly used company information system).

Given the overall weak record by SEC on this issue, I find that the firm has fallen well short of showing clearly and convincingly that it had a three strikes policy, and that it would have terminated Gossett under that policy in the absence of the protected disclosures.

C. Whether the IAD Violated Due Process By Deciding a Claim Without Providing Adequate Notice to SEC

SEC points out that prior to being discharged, Gossett filed a Complaint with the DOE field office employee concerns manager claiming that she had been frequently reassigned. SEC contends that during the hearing, the Hearing Officer asked no questions about the reassignments and that Gossett's post hearing brief did not refer to this issue. Yet, as SEC points out, the Hearing Officer did note in the IAD that the "pattern of repeated reassignments constitutes an adverse personnel action, since it served to intimidate and harass Gossett as well as undermine her authority and stature as an RCT." IAD at 89,129. SEC complains that it had no notice that the reassignment of Gossett was an issue in this case and that it was therefore unfairly deprived of the opportunity to provide evidence on this point.

This objection is frivolous. As an initial matter, SEC was well aware that Gossett had been reassigned, since it was the entity that reassigned her. The reassignments were part of the record in this case, as evidenced by the fact that the Hearing Officer referred to them in the Appendix to the IAD. SEC did not dispute the fact that Gossett was reassigned. 4/ It now simply objects to the Hearing Officer's conclusion that the reassignments were adverse personnel actions.

4/ SEC claims that the Hearing Officer never analyzed whether some of the reassignments took place prior to a protected disclosure. SEC does not point to any particular reassignment that may have taken place before any of her disclosures. I will therefore not give an further consideration to that possibility, which, in any event, is irrelevant.

The Gossett reassignments are obviously personnel actions. It is surely not unreasonable for an employee to object to recurrent reassignments. In the context in which they occurred, the reassignments in this case should therefore be considered as adverse personnel actions under Part 708. SEC has not even alluded to any reason to consider them otherwise.

In any event, there was another clearly adverse personnel action in this case, one which is undisputed: the termination. Thus, there would be no change in the outcome here even if the Hearing Officer had not made reference to the reassignments. In this regard, the Hearing Officer did not direct SEC to take any special remedial actions as a result of the reassignments. The firm has not even suggested any harm that it experienced as a result of the Hearing Officer's reference to the reassignments.

Finally, I see nothing to preclude a Hearing Officer in a Part 708 proceeding from weighing and balancing any relevant material in the record in connection with reaching his determination. No special notice to a party is required. SEC's suggestion to the contrary is mere cavil. I therefore find that SEC's claim of error due to the Hearing Officer's purportedly "surprise" reference to the reassignments is a hollow one.

IV. Conclusion

As discussed above, I see nothing in SEC's Statement of Issues that would cause me to overturn the IAD in this case.

It Is Therefore Ordered That:

(1) The Appeal filed by Safety and Ecology Corporation on September 13, 2002, is hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. §708.35.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 8, 2003

August 21, 2002
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Janet K. Benson

Date of Filing: June 10, 2002

Case Number: VBA-0082

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on May 22, 2002, involving a Complaint filed by Janet K. Benson (Benson or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Benson claims that her former employer, Livermore National Laboratory (LLNL or the Laboratory), retaliated against her for engaging in activity that is protected by 10 C.F.R. Part 708, the Department of Energy's Contractor Employee Protection Program. 1/ In the IAD the Hearing Officer determined that Benson made disclosures that are protected under Part 708, but that LLNL had shown that it would have taken the same personnel actions in the absence of the protected disclosures. As set forth in this decision, I have decided that this determination, is with one exception, correct.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed.

1/ The Complainant also named the Regents of the University of California (UC) in her complaint. UC managed and operated LLNL for the United States government under a contract between the Regents of UC and the DOE.

Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation). 2/

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by Benson in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Benson's Complaint are fully set forth in the IAD. *Janet K. Benson*, 28 DOE ¶ 87,022 (2002)(*Benson*). For purposes of the instant appeal, the relevant facts are as follows.

This case came before the Office of Hearings and Appeals on June 2, 1999, when Benson requested that OHA convene a hearing to consider issues that she had raised in a Part 708 Complaint. On June 7, 1999, I appointed Linda Lazarus as Hearing Officer. Ms. Lazarus made a number of preliminary determinations in this

---

2/ The applicable complaint of reprisal in this case was filed in October 1994, pursuant to regulations effective in April 1992. 57 Fed. Reg. 7533 (March 3, 1992). As the Hearing Officer stated, the DOE amended 10 C.F.R. Part 708 in an Interim Final Rule effective April 14, 1999, 64 Fed. Reg. 12862 (March 15, 1999). The revised regulations provide that the procedures in the new Part 708 apply prospectively in any complaint pending on the effective date of the revisions *i.e.* April 14, 1999. However, the substantive changes reflected in the revised regulations will not be applied in this case because to do so would affect the substantive rights of the parties. Therefore this case is adjudicated in accordance with the substantive standards set forth in the original version of Part 708. *Benson*, 28 DOE at 89,144, n.2.

case, issued several interlocutory orders and conducted the hearing in February 2000 and March 2001. On February 12, 2002, I transferred this case from Ms. Lazarus to Ann Augustyn, and delegated to her the responsibility for issuing the Initial Agency Decision in this case. As stated above, on May 22, 2002, Ms. Augustyn issued the IAD that is the subject of the instant appeal.

II. The Initial Agency Decision

A. Factual Findings of the IAD

The factual background of this case involves a long and complex series of events. In the typical Part 708 appeal-phase determination, even the most involved factual basis can be briefly summarized. However, this case requires reference to nearly all of the factual findings of the IAD. Accordingly, even though the factual background in this case is unusually long, for ease of understanding the issues on appeal here, I have recounted the factual foundation below in virtually the same form as it was set out in the IAD. *See Benson*, 28 DOE at 89,147-52. 3/

In September 1989, the Complainant began to work in LLNL's Education Program Division (Education Program) under the supervision of its Director, Dr. Manuel Perry. At the time, the Education Program was housed in a school building leased from the school district, commonly referred to as "the Almond School." In late 1990 or early 1991, Dr. Perry approved a proposal submitted by the Complainant to seek funding from the National Science Foundation (NSF) for a three-year program, the National Physics Education Program Collaboration (NPEPC), that would provide minority undergraduate students with the opportunity to work with laboratory researchers during the summer. In order to implement the program, LLNL entered into a partnership with California State University, Hayward (CSU-H). Under the terms of the partnership, CSU-H was the recipient of NSF funds, and was responsible for the fiscal and logistical requirements of the program such as management, bookkeeping, student transportation, and dormitory facilities. For its part, LLNL handled all student activities, including the assignment and evaluation of projects and mentors for each student. The

---

3/ I have omitted from my summary the IAD's citations to the record.

Complainant and Dr. Charlie Harper, the head of the Physics Department at CSU-H, were designated as the co-project investigators (co-PIs) for NPEPC.

In 1991, NSF approved funding for the first two years of NPEPC. Funding for the third year was conditional upon performance. Midway through the first year of the NPEPC, communication problems arose between the Complainant and Dr. Harper. Sometime in early 1993, Dr. Harper suggested that the third year of NPEPC be modified to include a college course on laboratory research techniques. The Complainant believed at the time that the suggested modification violated LLNL and NSF rules and regulations, and would result in the diversion of funds to CSU-H. The Complainant first memorialized several concerns in this regard in a February 1993 memorandum to Dr. Perry.

As time went on, the problems between the Complainant and Dr. Harper escalated, and Dr. Perry removed the Complainant as co-PI. On July 27, 1993, Perry replaced the Complainant with Eileen Vergino. LLNL had hired Vergino in early July 1993 as the Deputy Manager of LLNL's Education Program. Dr. Perry told her that she was taking over the Complainant's position because of the "animus" between Dr. Harper and the Complainant.

In the fall of 1993, Ms. Vergino took over the Education Program because Dr. Perry retired. In September 1993, the Complainant wrote to Ms. Vergino complaining about her removal as co-PI of NPEPC. During the latter part of 1993, performance issues with the Complainant began to surface. According to Ms. Vergino, the Complainant was not completing her work on time, was only sporadically attending staff meetings, and was frequently not in the office during regular working hours.

In February 1994, Vergino asked the Complainant and another employee to account for time because of complaints that both were not working regular hours. In response, the Complainant could only account for 11 hours in a two month work period covering 160 hours.

In April 1994, Vergino hired Linda Dibble as Senior Administrator to handle all personnel issues in the Education Program. According to Dibble, within two weeks Vergino expressed concern that the Complainant seemed unproductive, appeared to be coming in late and leaving early, and was not participating in staff meetings.

The next month, May 1994, the Complainant filed her first Part 708 complaint. The DOE subsequently dismissed the complaint for lack of jurisdiction, because at the time LLNL had not yet contractually agreed to be bound by Part 708.

From May through September 1994, personnel issues regarding the Complainant continued. First, LLNL asked the Complainant to account for absenteeism not reflected on her time cards. Then, the Complainant's supervisor, Glenn Young, indicated that the Complainant had failed to complete an assignment of finding mentors for students participating in NPEPC. In August 1994, Mr. Young provided a marginal performance appraisal for the Complainant. Mr. Young stated in a memorandum that the Complainant should be placed under a highly structured work environment with detailed tasking, reporting requirements, and frequent meetings.

In the meantime, LLNL learned that the lease on the Almond School, the building that housed the Education Program, would be expiring. Accordingly, LLNL needed to find a new location for the program. Building 415, which required some remodeling and repainting, was selected.

In mid-September 1994, the Complainant was assigned to a new full-time position working for Mr. Young in LLNL's Apprentice Program, a program designed as an affirmative action outreach effort to train underprivileged youth, women, and minorities in the trades. Mr. Young provided a detailed job description to the Complainant. Even though the responsibilities assigned to the Complainant appeared to be complementary to her previous experience in recruiting and placing students, and in affirmative action compliance, the Complainant objected to the assignment on the grounds that she was unfamiliar with these areas.

In late September 1994, the Complainant received her performance appraisal for the period 1993-1994. It was "less than satisfactory." The appraisal cited the Complainant's failure to take initiative and the constant follow-up required by those who gave her assignments.

On October 12, 1994, the Complainant filed her second Part 708 Complaint. In her complaint, she indicated that she had been demoted, reassigned and given unsatisfactory performance appraisals in retaliation for challenging the modification of the grant funding the NPEPC.

By December 1994, plans were underway to move the Education Program to Building 415. Linda Dibble advised the staff in early December that carpet was being installed in the building on December 5, 1994, after which time the staff could visit their new offices. The Complainant indicated that she would wait until after the holidays to see her office so that the fumes from the new carpeting could dissipate. In late January 1995, the Complainant purportedly told Ms. Dibble that she had allergic reactions to "new carpet, paint fumes, windows painted close[d], and . . . asbestos." In early February, the Complainant spoke with Mr. Young about her concern regarding the new carpet smell. Thereafter, Linda Dibble requested that LLNL's Hazards Control Department conduct an industrial hygiene "walk through" of Building 415 for guidance on addressing this issue. The Hazards Control Department instructed Dibble to "bake" the building by (1) closing all the windows and turning up the heat for two days and then (2) opening up all the windows to allow the new carpet smell to dissipate into the air. Dibble followed these instructions. Next, Dibble asked LLNL's Health Services Department (HSD) to evaluate the Complainant for purposes of determining whether she could occupy Building 415.

On February 14, 1995, Dr. Scott from LLNL's HSD evaluated the Complainant and determined that she could not work for the short term in Building 415. Scott instructed the Complainant to consult her allergist, Dr. Kaufman, and bring a note from him stating how long it would be before she could enter Building 415. Also, Dr. Scott requested that Dr. Kaufman provide a list of chemicals to which the Complainant is sensitive so LLNL could test for them. Dr. Scott also asked that the Complainant report to HSD on February 21, 1995, prior to going to work.

On February 21, 1995, the Education Program moved to Building 415. The Complainant was slated to occupy a second floor office in Building 415 with her colleagues from the Education Program. On that same day, the Complainant reported to HSD as previously instructed with a note from Dr. Kaufman stating that the Complainant was suffering from acute respiratory problems aggravated by "formaldehyde out-gassing" from the carpeting in her present area. 4/ Ed Ochi of LLNL's Industrial Hazards

---

4/ At the time Dr. Kaufman wrote the note, he was unaware that the Complainant had never entered Building 415 where the new carpeting had been laid, and that no formaldehyde was

(continued...)

Division decided that the Complainant could try to work on the first floor of Building 415 in an area that had not been repainted or carpeted. Dibble set up a temporary office for the Complainant on the first floor of Building 415. Dr. Scott issued a restriction barring the Complainant from working on the second floor only of Building 415 from February 21 to 28, 1995. Dr. Scott noted on the work restriction that he would re-evaluate the Complainant's situation in one week. With the note in hand, she then proceeded to the first floor office in Building 415. After one hour, she felt ill and went home. When the Complainant returned to work on February 24, she was placed in a Trailer 3156 which was located down the street from Building 415.

On February 28, 1995, the Complainant returned to HSD, and Dr. Scott decided that the Complainant should not enter Building 415 for another four weeks.

On March 28, 1995, the Complainant met with Dr. Scott and reported that she was receiving weekly treatment from her allergist, and was experiencing no problems working in Trailer 3156. Dr. Scott extended the Complainant's work restriction in Building 415 for another month, until April 25, 1995.

During this time, the Complainant was working with Glenn Young on the Apprentice Program. On March 31, 1995, Young requested that the Complainant relocate to Building 571 and assume the daily operation of the Apprentice Program. At the Complainant's request, Dr. Scott revised the Work Assignment Restriction to cover both Buildings 415 and 571.

Toward the end of March 1995, Dibble asked LLNL's Hazards Control department to perform an industrial hygiene evaluation of, among other places, Buildings 415 and 571. The evaluation concluded that any airborne contaminants present in the two buildings were at levels acceptable to the published workplace guidelines and standards.

On April 25, 1995, the Complainant visited HSD and expressed concern that if she were to enter Buildings 415 or 571, she would have problems. Dr. Scott agreed to extend her restrictions

---

4/ (...continued)
used in the manufacture of the carpet installed in the offices in Building 415.

for another month until May 25, 1995, based only on the Complainant's articulated fears.

In the meantime, the Complainant's performance issues remained a concern for her supervisors. In April 1995, Mr. Young expressed dismay that the Complainant was having trouble completing her assignments without a step-by-step description of every task. In May 1995, Young told Barry Goldman, the Team Leader of Student Programs in the Education Program, that the working relationship between the Complainant and him was not going well. Young told Goldman that part of the difficulty working with the Complainant was that she worked in an isolated location and he could not determine what she was doing. Because of performance issues, the Complainant was removed from Young's supervision and the Apprentice Program. Goldman decided to assume direct supervision over the Complainant in May 1995.

On May 25, 1995, the Complainant returned to HSD and told Dr. Scott that she was still reluctant to work in Buildings 415 and 571. This time, however, Dr. Scott decided that the Complainant could work in these two buildings "as tolerated" from May 25 to June 23, 1995. Scott stated that he had been in both buildings recently and knew from personal experience that the new carpet odor was gradually disappearing. He agreed to evaluate the Complainant again in one month.

The Complainant's work restrictions expired on June 23, 1995. At this point, Goldman determined that because of programmatic needs, he could no longer accommodate the Complainant's desire to remain in the trailer. Goldman informed the Complainant that she must report to her office in Building 415 on June 26, 1995, unless she provided medical documentation outlining the restrictions LLNL needed to accommodate. On June 26, 1995, the Complainant submitted a hand-written note from her allergist stating that the Complainant tests intolerant to petroleum products, paints, lacquers, varnishes, formaldehyde products, organic dusts, glue products, and fibers of many kinds, especially organic in origin.

At this point, Goldman decided he could no longer use the services of an employee who could not enter the building where all the program work was done. Goldman consulted with Vergino and a decision was made to send the Complainant home. The Complainant was subsequently placed on paid administrative leave pending a review of her medical status and disability eligibility.

On August 3, 1995, the Complainant's allergist sent a medical note to LLNL stating that the Complainant "could function in an ordinary environment, [but] needed to avoid a chamber heavily laden with vapors of formaldehyde coming from large yardage of new and never before aerated carpet." The note further stated that all that the Complainant required was "clear, ambient room air."

The Complainant returned to LLNL on August 9, 1995 after a six week hiatus. She and Dr. Scott went to Building 415, but the Complainant fell ill and went home. As a consequence, Dr. Scott issued another work restriction prohibiting the Complainant from working in Building 415 until September 17, 1995.

Following this incident, Gloria Kwei, the Manager of LLNL's Human Resources Department, wrote the Complainant a letter informing her that she would be on unpaid leave until September 17. In the letter, Kwei stated that the program no longer had assignments that could be performed outside Building 415. Kwei further stated that if the Complainant's work restrictions became permanent, a job search of other parts of LLNL would be performed and if no alternative assignment was found, the Complainant would be separated from her employment.

On September 10, 1995, the Complainant wrote to the Secretary of Energy complaining that on July 22, 1993 she was improperly removed from her position as the Project Director for an education project funded by NSF. The Complainant further stated that LLNL had required that she work in a building containing toxins to which she is allergic.

On September 17, 1995 the Complainant's work restriction expired again and she again entered Building 415 with Dr. Scott. The Complainant complained of not feeling well and she went home. Dr. Scott issued another work restriction for Building 415 until November 6, 1995.

On November 20, 1995, LLNL decided to obtain an outside medical evaluation as to the Complainant's ability to work in Building 415. The Complainant was subsequently evaluated by Dr. Abba Terr, an allergy and immunology specialist. Dr. Terr issued a report on December 27, 1995. Dr. Terr did not find any objective evidence of a medical condition, but concluded that based on the Complainant's subjective beliefs, there was no reason to believe she could enter Building 415 without becoming "subjectively ill."

Sometime in January 1996, Dr. Richard Watts, Dr. Scott's successor, met with the Complainant to discuss her return to work. During this meeting the Complainant agreed that she should be permanently restricted from working in Building 415. Accordingly, Dr. Watts issued a permanent restriction prohibiting the Complainant from working in Building 415 and 571. At this point, LLNL determined that in view of the Complainant's inability to perform the essential assigned functions of her position, she should be separated.

Before separating the Complainant, Gene Dent, LLNL's Rehabilitation Representative, tried to contact the Complainant via certified mail and telephone in order to discuss vocational rehabilitation. Records show that the Complainant received the certified mail letter. However, the Complainant never responded to the letter. At the hearing, the Complainant explained that she never contacted Mr. Dent because she "didn't feel [she] needed to be rehabilitated."

On February 22, 1996, Robert Perko of LLNL's Staff Relations sent the Complainant a notice of separation. In his letter to the Complainant, Perko stated that the Complainant had five calendar days to respond either orally or in writing to LLNL if she believed the action was improper. The Complainant did not respond.

On March 22, 1996, LLNL sent a second certified letter to the Complainant advising her that she was being terminated effective March 22, 1996. The letter informed the Complainant that her separation was due to her inability to perform the essential functions of her job. The letter also advised that she could appeal the separation if she believed LLNL's policies or procedures had been improperly applied. The Complainant did not appeal.

B. IAD's Conclusions of Law

After making the above findings of fact, the IAD proceeded to analyze them and reach conclusions of law. The IAD cited the burdens of proof under the Contractor Employee Protection Regulations. As the IAD noted:

> It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding or refused to participate in an activity as described in

> § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29

Benson, 28 DOE at 89,146.

Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. 10 C.F.R. § 708.29. *Benson, 28 DOE at 89,147.*

As the IAD further noted, Section 708.5(a) provides that a disclosure is protected if an employee in good faith believes that she is disclosing a violation of any law, rule, or regulation; a substantial and specific danger to employees or to public health or safety, or fraud, mismanagement, gross waste of funds or abuse of authority. 10 C.F.R. § 708.5(a). *Benson*, 28 DOE at 89,152.

The IAD found that Benson's oral statements to Dr. Perry between January 1993 and July 1993 regarding NPEPC fraud, waste and abuse by LLNL, and the written statements contained in her February 1993 memorandum to Dr. Perry were protected disclosures under Part 708.

The IAD next considered whether the protected disclosures were a contributing factor to the following four alleged retaliations: (i) Benson's reassignment on September 23, 1994 to LLNL's Apprentice Program; (ii) her "less than satisfactory" performance appraisal on September 27, 1994; (iii) the decision to assign her to work in Building 415; and (iv) LLNL's determination to separate her in March 1996.

The IAD found that Vergino made the decision to assign Benson to the Apprentice Program and was the supervisor who gave Benson the "less than satisfactory" performance appraisal. The IAD also found that Vergino knew that animus existed between Harper and Benson, but had no knowledge that the complainant had filed a Part 708 complaint until July 1995, and had no knowledge about the allegations of fraud made by Benson. Based on these findings, the IAD determined that Vergino had neither constructive nor actual knowledge of the nature of the protected disclosures regarding NPEPC. The IAD concluded that Benson had not shown that the reassignment and the performance appraisal were retaliations for the protected disclosures. The IAD went on to determine that, in any event, the Laboratory had clearly and

convincingly shown that it would have taken these two actions absent Benson's protected disclosures.

The IAD then considered whether the reassignment of Benson to Building 415 or LLNL's termination of Benson was a retaliation for the protected disclosures or for Benson's filing a Part 708 complaint in October 1994 or for her September 1995 letter to the Secretary of Energy. 5/ The IAD found that the LLNL official involved in asking Benson to enter Building 415 in May 1995 was Barry Goldman. He also requested her to move to the building in June 1995. The IAD determined, however, that Goldman did not know that Benson had filed Part 708 Complaint until July 1995. Accordingly, the IAD found that Benson had not established that the protected disclosures were a contributing factor to the purported retaliation of expecting her to work in Building 415. The IAD went on to conclude that in any event, LLNL had clearly and convincingly shown that the move of the entire education program to that building had nothing to do with Benson, and was simply due to the fact that the lease on the Almond School had expired.

With respect to the termination of the complainant in March 1996, the IAD found that Goldman, with the concurrence of Dibble, Vergino and Kwai, made the decision that Benson could no longer perform work outside Building 415. The IAD determined that Dibble, Goldman and Vergino did know of Benson's Part 708 filing. Nevertheless, the IAD determined that there is "no credible evidence of any nexus between the complainant's protected disclosures and her termination." However, the IAD went on to find that there was in any event clear and convincing evidence that LLNL separated Benson because her inability to work in Building 415 prevented her from performing the essential function of her job.

The IAD next considered whether Benson had engaged in a protected activity under Section 708.5(a)(3) by refusing to work in Building 415, and whether LLNL retaliated against her for engaging in this activity. That provision generally protects a contractor employee from retaliation by a contractor employer for

---

5/ In that letter Benson alleged that LLNL demanded that she work in "environments containing chemicals and toxins to which she is allergic." She contended that the separation was a ruse for terminating her for making the protected disclosures and for the 1995 letter to the Secretary.

refusing to participate in an activity which causes the employee to have a reasonable apprehension of serious injury to himself, other employees or the public. The IAD found that Section 708.5(a)(3) was not designed to protect employees with pre-existing disabilities or medical conditions who refuse to perform the job for which they were hired when their disability or medical condition becomes incompatible with a work environment that is considered safe and healthy under workplace guidelines. The IAD noted that intensive testing demonstrated that there was nothing inherently dangerous in Building 415 from an environmental standpoint. Accordingly, the IAD rejected the claim of retaliation for participating in a protected activity.

The IAD next considered whether Benson made disclosures that were protected under Section 708.5(a)(1), when she stated that she had a dangerous and life threatening reaction to working in Building 415. The IAD found statements to this effect were made directly to Dibble in January 1995, and also included in her September 1995 Letter to the Secretary of Energy. The IAD found these statements to be protected. The IAD recognized that the managers who made the decision to terminate Benson had actual knowledge that she had written to the Secretary of Energy at the time they terminated her, but concluded there was no temporal proximity between the letter and the termination. The IAD also found that even if the termination was the culmination of an ongoing series of reprisals, it would be unreasonable to infer a nexus between any of the protected disclosures and any claimed act of reprisal. The IAD therefore concluded that Benson's disclosures in January and September 1995 regarding Building 415 were not a contributing factor in LLNL's decision to terminate her from employment in March 1996. The IAD also found that in any event LLNL had shown by clear and convincing evidence that it would have terminated her absent the protected disclosures.

In sum, the IAD concluded that Benson was not entitled to relief.

III. The Benson Statement of Issues and the LLNL Response

A. Statement of Issues

Benson filed a statement identifying the issues that she wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). 10 C.F.R. § 708.33. The Statement first maintains that under 5 U.S.C. § 554(d) (of the Administrative Procedure Act or APA), the agency official who

presides over a hearing must make the recommended decision, unless he or she is no longer with the agency. The Statement argues that where evidence of credibility or demeanor is significant to a decision, the examiner presiding at the hearing must issue a decision.

The Statement then raises the claim that this case turns upon the credibility of witnesses. The Statement contends that Benson has been prejudiced because Hearing Officer Augustyn reviewed only the written record developed in this case and did not hear the witnesses' testimony. She therefore could not assess their demeanor. In particular, the Statement contends that although she was not present at the hearing, Hearing Officer Augustyn nevertheless made credibility determinations regarding testimony by Dr. Terr. The Statement further maintains that claims that Benson was irrational are not credible and greatly outweighed by the testimony of Benson's own treating physician, which Hearing Officer Augustyn also did not hear. The Statement concludes that Benson was prejudiced by the reassignment of this case to Ms. Augustyn, and asks that the case be returned to Ms. Lazarus, in accordance with the APA.

B. LLNL's Response

In response to the Benson Statement of Issues, the Laboratory contends that the APA does not apply to proceedings under Part 708. LLNL also argues that the Hearing Officer's decision was not dependent on any credibility determinations, and that Benson could therefore not have been prejudiced in any way by the substitution of a new Hearing Officer.

IV. Analysis

A. Applicability of the APA to Part 708 Proceedings

The applicability of the APA to proceedings under Part 708 is an issue that can be disposed of quickly. After reviewing the APA and relevant case law, I can find no basis for concluding that the Statute applies to proceedings under Part 708. The APA states with respect to adjudications that its provisions apply in cases where adjudication is "*required by statute* to be determined on the record after opportunity for an agency hearing. . . ." 5 U.S.C. § 554(a)(emphasis added). Consequently, this provision only applies if another statute requires the adjudication proceeding. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950)(*Wong*). In *Wong*, the Supreme Court stated that "the limitation to

hearings 'required by statute' in Section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom or special dispensation; not those held by compulsion." *Id.* at 50.

There is no statutory authority requiring that hearings be held under Part 708. The rule was issued pursuant to the broad authority granted the agency by the Atomic Energy Act of 1954 and the Department of Energy Organization Act to prescribe such rules and regulations as necessary or appropriate to protect health, life and property. 57 Fed. Reg. 7533 (March 3, 1992). Neither of these Acts requires that the DOE hold hearings regarding the protection of contractor employees from reprisals by their employers for whistleblowing. Since Part 708 hearings are conducted based solely on authority vested by regulation, they fall squarely within the exception noted in *Wong*. Accordingly, there is no APA or other statutory requirement that the Hearing Officer conducting the Part 708 hearing issue the IAD.

B. Overall Prejudice to the Complainant

Even though no statutory requirement exists, I recognize that it is generally desirable that the person hearing the evidence in these Part 708 proceedings issue the determination on the merits of the case. For reasons not relevant here, I used my discretion and made a determination to depart from that general principle in this instance. See 10 C.F.R. § 708.2 (definition of Hearing Officer and OHA Director), and § 708.25(a). I am nonetheless mindful of the possibility that some prejudice might arise as a result of that decision. Accordingly, if either party were able to establish that it was prejudiced by my decision to appoint a new hearing officer, I would certainly take appropriate measures to correct the detriment.

As I stated above, in the instant case, the Statement of Issues contends that Benson was prejudiced by the reassignment because the new hearing officer did not hear the witnesses' testimony and could not make informed credibility assessments. In particular, the statement cites the testimony of Dr. Terr, the allergy and immunology specialist called by LLNL, and that of Benson's own treating physician as examples of instances in which Hearing Officer Augustyn could not make appropriate credibility determinations regarding their views of the seriousness of Benson's illness and the reasonableness of Benson's belief that there was a danger to her if she entered Building 415.

After performing a thorough review of the IAD, I have concluded, as an initial matter, that the determinations reached therein were unrelated to the credibility of these two experts. As discussed above, the Hearing Officer considered Benson's claims that she was retaliated against for reporting waste, fraud and abuse in the NPEPC program under Section 708.5(a)(1)(iii) and for refusing to participate in a dangerous activity under Section 708.5(a)(3). The Hearing Officer determined that Section 708.5(a)(3) was not designed to protect employees with pre-existing disabilities or medical conditions which prevent them from working in an ordinary office environment. I am in complete agreement with this finding, which is a purely legal determination. As such, it does not depend upon the testimony of the experts. Accordingly, I see no prejudice to Benson due to the fact that the Hearing Officer did not hear the testimony of the two medical experts. 6/

I also find that no prejudice has been shown to exist with respect to Benson's claims regarding retaliation for reporting waste, fraud and abuse in the NPEPC program. I see no issues regarding witness credibility that would make any difference here. As I noted above, the Hearing Officer found four possible retaliations that might have arisen from the complainant's disclosures regarding NPEPC: (i) her reassignment on September 23, 1994 to LLNL's Apprentice Program; (ii) her "less than satisfactory" performance appraisal on September 27, 1994; (iii) the decision to assign her to work in Building 415; and (iv) LLNL's determination to separate her in March 1996.

As discussed below, I will reverse for other reasons the determination regarding the "less than satisfactory" performance evaluation. With respect to Benson's reassignment to the Apprenticeship Program, I am in agreement with the determination made by the Hearing Officer based on the written record. However, I do recognize that it is possible that the determination as to whether the reassignment was a retaliation may be related to the credibility of the testimony of Vergino and

---

6/ It is true that the Hearing Officer did proceed to make some additional determinations regarding the reasonableness of Benson's apprehensions about entering Building 415. These determinations did to some extent involve the credibility of the experts. However, these findings are dicta only. They are not a necessary part of the ultimate determination under review.

others who believed that Benson's performance was not satisfactory, and that the reassignment would allow her experience to be better utilized in the program. *Benson*, 28 DOE at 89,154. Benson did provide some testimony as to her views about why she was having difficulty meeting expectations. For example, she explained that she was unable to perform some of the assigned clerical tasks because she did not have the requisite secretarial skills. She also maintained that in spite of several requests, she never received a new job description that gave her a full understanding of the tasks for which she would be responsible. Transcript of Hearing (Tr.) at 102-12.

Nevertheless, after reviewing this issue as a whole, I see no reason to ask the Hearing Officer to hear personally the testimony on this issue. Even at the time of the hearing, there was no meaningful remedy to Benson's objection to her re-assignment. Although she claimed she was demoted, the reassignment did not change her job classification or reduce her salary. Tr. at 156. Therefore, she could not receive any monetary relief for the reassignment. Since, as I find below, she was ultimately properly terminated, I do not see in what way having the Hearing Officer present for testimony about the job reassignment would make any difference at all in this case. I certainly can see no benefit in having the Hearing Officer present for testimony on this point at this time. I therefore find no prejudice to Benson on this issue, and no basis for reopening the hearing.

I turn next to the alleged retaliation regarding assignment of Benson to work in Building 415. I do not believe that there is a credibility concern here. It is preposterous to believe that the entire education program was moved from the Almond School to Building 415 as a retaliatory measure. There is no doubt that the lease on the Almond School expired and was not renewed. There is simply no evidence to indicate that the selection of and move to Building 415 was in any way related to Benson or her protected disclosures. I find the evidence on its face to be overwhelming and unrelated to the credibility of witnesses.

With respect to the termination of Benson, it is uncontested that she refused to work in Building 415. In the termination process LLNL did not challenge Benson's claim that the building made her ill. The decision to terminate her was based on her unwillingness to come to work in Building 415. The Hearing Officer reviewed the extensive factual record showing that for months LLNL attempted to accommodate Benson's medical needs,

including airing out the building and the carpeting, and placing Benson in temporary work sites until this was accomplished. *Benson*, 28 DOE at 89,149, 89,150, 89,155. The Hearing Officer made legal determinations that LLNL was not required by law to make more accommodations than it did and that overall the Laboratory had shown by clear and convincing evidence that it dealt with her inability to work in Building 415 as it would have with any other employee's inability to work at the job site. Ultimately, it is clear that Benson was unable to work in Building 415, and LLNL established that it would have terminated her for this reason, even absent the protected disclosures. I see no credibility issue that forms a part of that determination, and I am in complete agreement with that decision as a matter of law.

In sum, I see no witness in this case whose testimony would lead me to think that the conclusions in the IAD would have been different, if only his demeanor had been observed and considered. I find no reason to reopen the hearing in this case in order to allow a decisionmaker to gauge the demeanor and credibility of a witness.

C. The Contributing Factor Issue

Hearing Officer Augustyn did an outstanding job in making sense of and giving form to a voluminous and heretofore unstructured record developed with little overall planning or forethought by her predecessor. I am extremely impressed with Ms. Augustyn's ability to cull through the record, make findings of fact, identify and focus the relevant legal issues, and craft her conclusions into a well-drafted determination. Her exceptional work has considerably facilitated my review at this phase of the Part 708 proceeding. I did note, however, one finding meriting further discussion and review. The adjustment I am making to the IAD is a minor one, although the conceptual point regarding proper analysis and application of the "contributing factor" standard, as discussed below, is an important one for OHA's Part 708 case law.

As the Hearing Officer stated, a Part 708 complainant must establish by a preponderance of evidence that he made a protected disclosure that was a contributing factor to a retaliation against him by his contractor-employer. 10 C.F.R. § 708.29. As we have acknowledged in a number of previous cases, one of the many possible ways to show that the protected disclosure was a factor in a retaliation is to show that the official taking the

action knew or had constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the retaliation. *E.g. Ronald Sorri*, 23 DOE ¶ 87,503 (1993).

Under Part 708 case law, this "actual or constructive knowledge" does not just mean that the official taking the action personally knew or should have known of the protected disclosure or protected activity. In OHA cases under Part 708, a complainant can also establish the requisite level of "knowledge" by showing that the person taking the alleged retaliatory act was influenced by the negative opinions of those with knowledge of the protected conduct. A complainant can demonstrate this knowledge by showing that the alleged retaliation is based on information that is tainted by the protected disclosure. *Jagdish C. Laul,* 28 DOE ¶87,006 (2000). In this type of situation, we believe it is appropriate to "impute" the knowledge of the protected disclosure or protected activity to the person taking the retaliatory action. *See* 64 Fed. Reg. 12862 at 12865 (March 15, 1999). This is precisely the situation in the instant case. Therefore, as discussed below, I find that the complainant has satisfied the contributing factor element with respect to several aspects of her case.

The relevant facts in this regard are as follows. The complainant made the protected NPEPC disclosures to her supervisor Dr. Perry in early 1993. The complainant also complained about this same matter to her co-PI Dr. Harper. Ms. Vergino testified that she was aware of the animus between the complainant and Dr. Harper. Further, Ms. Vergino, the complainant, Dr. Perry and Dr. Harper had a meeting in July 1993, the same month in which Ms. Vergino was hired as Deputy Manager of the LLNL's education program. At this meeting Ms. Vergino was informed that she would take the complainant's place as co-PI. Ms. Vergino was told that the reason for the replacement was that there was animus between Dr. Harper and the complainant. She testified that she learned that the animus was "not good for the program and not good for the students." Tr. at 630-31. Ms. Vergino also testified that the complainant had shown her a memo that Dr. Perry had written "about some unauthorized procurements associated with the program." Tr. at 632.

Thus, it is clear that Dr. Perry, who was aware of the protected disclosures, told Ms. Vergino of animus between the complainant and Dr. Harper. This animus was in part related to the very subject of the disclosures. In May 1994, the complainant filed

her first Part 708 complaint. In September 1994, Ms. Vergino rated the complainant's performance as unsatisfactory for the year 1993-1994.

I believe that the complainant has adequately established the existence of a work environment tainted by her disclosures and by the filing of her first complaint of retaliation *(i.e.*, participation in a protected proceeding). It is not a requirement that the complainant establish which of several protected actions was the exact cause of the resentment and animus against her. She is highly unlikely to be able to find out what was in the minds of those individuals responsible for the retaliation. *See Jagdish Laul,* 28 DOE at 89,051. As discussed above, it is also not a requirement that the individual taking the retaliatory action have actual knowledge of the protected disclosure or protected activity. *Id.* at 89,052. Therefore, even if she did not have direct and complete knowledge of the protected disclosures or the actual filing of the Part 708 complaint, Ms. Vergino certainly had enough information about the complainant's problems related to her dissatisfaction with the way monies were being proposed to be spent in the NPEPC program to be considered to have imputed knowledge of the protected disclosures and the May 1994 Part 708 complaint for purposes of this proceeding. Accordingly, I find that the complainant has established by a preponderance of evidence that Ms. Vergino had imputed knowledge of the complainant's protected disclosures and protected activity. I will therefore consider the effect of that conclusion on the alleged retaliations.

1. The September 1994 Performance Appraisal

The "less than satisfactory" performance evaluation of September 27, 1994, was provided only four months after the filing of the individual's Part 708 complaint. This short time period certainly would allow a reasonable person to conclude that the filing of the complaint was a factor in the retaliatory performance appraisal. Accordingly, the less than satisfactory performance evaluation, coming as it did about four months after the filing of the Part 708 complaint, fulfills the second prong of the contributing factor aspect of the complainant's burden of proof. 7/

7/ As the IAD noted, this May 1994 Part 708 complaint was dismissed for lack of jurisdiction, because at that time LLNL had not yet agreed to be bound by the DOE's contractor

(continued...)

The IAD finds that LLNL would have provided the same rating to the complainant in the absence of her disclosures. In this regard, the IAD cites that fact that Ms. Vergino and the complainant exchanged seven memoranda regarding the complainant's job description, complainant's poor job performance and time and attendance problems.

I agree with the finding of the IAD that "LLNL appears to have been completely justified in giving the complainant a less-than-satisfactory performance evaluation in September 1994." However, this is not the standard in Part 708 cases. The standard to be applied is whether the contractor has shown by clear and convincing evidence that it would have taken the alleged retaliation in the absence of the protected disclosure.

I do not agree with the IAD that LLNL has established that it would have taken this same action in the absence of the protected activity. In order to make such a showing LLNL could have provided evidence regarding how the Laboratory treated other similarly situated employees. However, there is no evidence establishing how LLNL treated other employees who had performance problems, and how soon after performance problems were identified their performance appraisals were downgraded. Accordingly, I find on the basis of the present record, that LLNL has not clearly and convincing shown that it would have taken this same action in the absence of the complainant's protected disclosures.

The complainant is entitled to relief for this action. Accordingly, LLNL shall remove this performance review from the complainant's file.

7/ (...continued)
employee protection program. However, on September 23, 1994, LLNL did agree to comply with the provisions of Part 708. Accordingly, beginning on that date, any LLNL reprisals for protected activities or disclosures would violate Part 708. Therefore, even though the May 1994 complaint was dismissed for lack of jurisdiction, any retaliation by LLNL for the protected activity of filing a Part 708 complaint would be a violation of the regulations as of September 23, 1994. See 10 C.F.R. § 708.5(b).

2. Reassignment of the Complainant to the Apprentice Program

The Hearing Officer found that since Vergino had no knowledge of the protected disclosures, the complainant had not established that her disclosures regarding the NPEPC were a contributing factor to LLNL's decision to reassign her to the LLNL's Apprentice Program on September 23, 1994. Since, as discussed above, I find that Vergino did have imputed knowledge of the protected disclosures, and the reassignment came only four months after the complainant filed her first Part 708 complaint, I have concluded that the complainant has made a showing that the protected disclosures/activity were a contributing factor to the reassignment. However, I agree with the Hearing Officer's determination that LLNL has convincingly shown that it would have reassigned her to the Apprentice Program in the absence of the protected disclosures.

3. Assignment of the Complainant to Building 415 and Termination

The IAD cites Barry Goldman, Linda Dibble, and Eileen Vergino as among the LLNL personnel involved in the decision to assign the complainant to Building 415 and ultimately terminate her. Nevertheless, the IAD concludes that none of the LLNL personnel involved had any knowledge of those disclosures, and therefore finds no contributing factor has been established by the complainant. However, as discussed above, Ms. Vergino did have imputed knowledge of the protected disclosures/activity. The IAD indicates that Linda Dibble was hired by Ms. Vergino to handle personnel issues in the education program, and that within two weeks of being hired, Vergino asked for Dibble's assistance in dealing with the complainant. Goldman also had meetings with Dibble regarding the complainant. Tr. at 789, 796. These interchanges all occurred within the months before the move to Building 415. Thus, applying the principles enunciated above regarding imputed knowledge of the protected disclosures and time nexus, I find that there is an adequate demonstration that the protected disclosures were a contributing factor to the aforementioned alleged retaliations.

Nevertheless, I am in complete agreement with the IAD that LLNL has clearly and convincingly shown that even in the absence of the protected disclosures, the Education Program would have been moved to Building 415, and the complainant would have been assigned to work in that building. I further agree with the IAD that LLNL has clearly and convincingly shown that ultimately the complainant was terminated because she was unable to work in the building. Accordingly, I see no reason to disturb the IAD on these issues.

V. CONCLUSION

As indicated by the above discussion, with the exception of the less than satisfactory performance appraisal, the instant appeal is denied and the IAD is affirmed. In addition to the removal of the appraisal from her personnel file, Benson is entitled to attorney fees and costs in this case. 10 C.F.R. §708.36(a)(4).

It Is Therefore Ordered That:

(1) The Appeal filed by Janet K. Benson on June 10, 2002 (Case No. VBA-0082), of the Initial Agency Decision issued on May 22, 2002, is hereby granted as set forth below.

(2) Within 30 days of the date that it receives notice of this determination, LLNL shall remove the September 1994 "less than satisfactory" performance appraisal from Benson's personnel file. LLNL shall file a certification with Benson's attorney and the OHA that this action has been taken.

(3) LLNL shall compensate Benson for the costs and expenses incurred in this proceeding. Within 30 days of the date she receives notice of this determination, Benson's attorney shall submit a detailed statement showing her costs and fees and justification therefor. The statement shall be served on the attorney for LLNL.

(4) LLNL shall be permitted to submit comments on the statement of costs and fees. The comments shall be due 10 days after receipt of the statement.

(5) This appeal decision shall become a final agency decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 21, 2002

October 16, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: S.R. Davis

Date of Filing: May 19, 2004

Case Number: VBA-0083

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on April 21, 2004, involving a complaint filed by S.R. Davis (also referred to as the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, the Complainant claims that her former employer, Fluor Fernald, Inc. (the Contractor), retaliated against her for engaging in activity that is protected by Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that the Contractor met its burden of demonstrating, by clear and convincing evidence, that it would have taken the same action in the absence of the protected activity. The Complainant appeals that determination. As set forth in this Decision, I have concluded that the determination is correct.

I. Background

A. The DOE Contractor Employee Protection Program

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

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by the Complainant in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding and General Background

The events leading to the filing of the Complaint are fully set forth in the IAD. *S. R. Davis* (Case No. VBH-0083), 28 DOE ¶ 87,044 (2004) (hereinafter IAD). For the purposes of the instant appeal, the relevant facts are as follows.

The Complainant worked in the Contractor's Information Management (IM) department. In June 2001, the Complainant filed a Complaint under Part 708, alleging that she made protected disclosures and that the Contractor retaliated against her by issuing her two disciplinary actions and transferring her to a different job. In June 2002, the local employee concerns office referred the matter to OHA for an investigation and hearing, and the OHA Director appointed an investigator (the Investigator). However, in July 2003, as the Investigator was preparing his report, the Contractor terminated the Complainant as part of an involuntary separation program.

After completion of an investigation pursuant to 10 C.F.R. § 708.22, the Complainant requested and received a hearing on this matter before an Office of Hearings and Appeals (OHA) Hearing Officer.[1] Before the hearing, the Hearing Officer tentatively determined that the Complainant had alleged four Part 708 retaliations: the two disciplinary actions, the job transfer, and the involuntary separation.[2] The Hearing Officer also tentatively determined that the Complainant had met her burden with respect to all four of the alleged Part 708 retaliations. Therefore, she limited the hearing to the issue of whether the Contractor would have taken the same actions in the absence of the protected activity.

The hearing lasted four days. The Contractor presented a wide range of witnesses which included the Complainant's management chain, human resources (HR) and employee relations officials and staff, and various co-workers. Likewise, the Complainant's counsel presented witnesses, including a co-worker and a worker in another department, to testify about the Complainant's performance and conduct. The Complainant also testified on her own behalf.

After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

In order to more fully understand the issues of this appeal it is important to outline the general background. The general background facts in this case are as follows. Due to the planned closure of its Fernald site, the Contractor implemented a series of voluntary and involuntary separation programs, commonly referred to as VSPs and ISPs. As stated earlier, the Complainant worked in the Contractor's Information Management (IM) department. Prior to a June 2003 ISP, the IM department

---

[1] The Complainant requested that the alleged retaliations to be considered in this case include this July 2003 involuntary separation. The Hearing Officer granted this request.

[2] The Complainant objected to this determination, alleging that over the course of her employment she had made protected disclosures that resulted in the Contractor's failure to promote her and that the Contractor's current refusal to correct this situation was itself a retaliation. Before the hearing, the Hearing Officer ruled that these allegations were untimely and were not part of the complaint.

consisted of five managers: the department head and four division managers. Two of the divisions were "network" divisions and two were "programmer" divisions. As part of the July 2003 ISP, the Contractor separated the IM head and a programmer division manager. The Contractor then promoted one of the programmer managers to be department head, thus leaving two divisions - a network division and a programmer division. The remaining network manager is referred to as the Network Manager; the remaining programmer manager is referred to as the Programmer Manager.

From 1998 to June 2001, the Complainant reported to the Network Manager. During this time, the Complainant held the title of "Supervisor Information Management" and was one of three team leaders. However, in late June 2001, the IM department head reassigned the Complainant to the Programmer Manager. The Complainant reported to the Programmer Manager for the next two years, until she was separated in the July 2003 ISP. While reporting to the Programmer Manager, the IM department eliminated the title of "Supervisor Information Management." The seven employees who held that title, including the Complainant, had their title downgraded to "Information Management Analyst III." Another employee's title was downgraded from "Manager Information Management" to "Senior Information Management Analyst." *See* IAD at 89,317.

During the Complainant's tenure with the Network Manager, the Complainant received two disciplinary actions and was transferred to another job. On March 21, 2001, the Complainant received a Written Reminder from the Network Manager which cited her inconsistent work hours, her failure to follow management direction, and her unprofessional communication style. The second action involved a May 31, 2001 "decision-making leave," which cited the Complainant's failure to establish and maintain backups and unprofessional communication style. [3] On June 25, 2001, the Complainant received notice of a job transfer to the Programmer Manager. This notice cited the Programmer Manager's need for the Complainant's skills.

II. The Initial Agency Decision

The IAD sets forth the burdens of proof in cases brought under Part 708. It is the burden of the Complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation. *See* 10 C.F.R. §§ 708.5 and 29. If the Complainant has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the Complainant's disclosure. 10 C.F.R. § 708.29. The IAD considered the application of these elements to this proceeding.

[3] In a "decision-making leave," the Contractor places an employee on administrative leave for the rest of the day so that the employee can make a decision about whether or not the employee wishes to remain employed.

A. Protected Activity and Contributing Factor

Prior to the hearing, the Hearing Officer identified two alleged protected disclosures. The Contractor did not dispute that the Complainant made these disclosures or that they were protected. The Hearing Officer also found that the circumstances permitted a reasonable inference that the disclosures contributed to the alleged actions. She therefore found that the Complainant satisfied her burden of proof with respect to the two disciplinary actions, the job transfer and the involuntary separation.

B. Whether the Contractor Would Have Taken the Same Actions In the Absence of the Protected Activity

The IAD found that the Contractor presented clear and convincing evidence that it would have taken the same actions involving the Complainant in the absence of the protected disclosures. Over the course of her tenure with the Network Manager, the Complainant "had a number of conflicts with subordinates, co-workers, and managers, in which the Complainant made inflammatory and disrespectful statements to, and about, others." IAD at 89,317. The IAD found that the Contractor provided extensive documentary and testimonial evidence to support its actions and further that the Complainant did not cast doubt on the Contractor's strong showing. In the IAD, the Hearing Officer found that the Complainant's testimony was not reliable, particularly that the Complainant's testimony was contradictory and that her version of events conflicted with her contemporaneous e-mails of those events. Moreover, she found, in general, that the Complainant's version of events did not justify her conduct, i.e., failure to take direction from her managers and communicate in a professional manner.

With respect to the first disciplinary action, the March 27, 2001 Written Reminder, the Complainant was cited for "failing to maintain a regular work schedule, failure to follow management direction, and communicating unprofessionally with [her] management and peers." Contractor Ex. 28. Although the Complainant testified that she sometimes had to work after hours or adjust her hours, she also testified that she always notified her supervisor. IAD at 89,322. The IAD found that the record supported the Complainant's position that IM staff members sometimes had to work after hours and were required to notify their supervisor if they wanted to offset their time against their regularly scheduled hours. However, the IAD found that the Complainant abused her flexibility and that the Complainant's managers had objected to her late arrivals. The IAD pointed to evidence that management disapproved of the Complainant's "inconsistent work schedule," and that the Complainant did not maintain a proper work schedule. *Id.* Although the Complainant attributed her conflicts with her managers to the fact that she made disclosures about personnel and managers in the IM department, the IAD found that the evidence in the record was contrary to her claim. The IAD cited as examples: 1) that the Complainant stated her opinion that her supervisors did not have the authority to reverse her decision limiting a subordinate's computer access; 2) the Complainant's failure to follow management direction to restore the subordinate's access; and 3) the Complainant's failure to comply with her managers' requests that she establish and maintain backups. IAD at 89,322, 89,323. Further, the IAD found that the Complainant's communication style was unprofessional and created a tension-filled atmosphere. The IAD cited the Complainant's own e-

mails as examples of her communication style. Finally, with respect to the March 27, 2001 Written Reminder, the IAD concluded that the Contractor demonstrated that there were non-retaliatory reasons for this action.

With regard to the second disciplinary action, the May 31, 2001 decision-making leave, the Complainant was cited by management for her failure to establish and to maintain backups and an "unacceptable communication style" in e-mails to the Network Manager, who was her supervisor at the time. Although the Complainant asserts that she had backups and that she was in the process of complying with a May 24, 2001 request from the Network Manager to train others, the IAD found that the May 31, 2001 decision- making leave was accurately supported. Again, the IAD cited examples of the Complainant's own e-mails as persuasive evidence in the record.

With respect to the third alleged retaliatory action, the job transfer, management cited the Complainant's "withdrawal of her VSP application, the training of individuals to take her place, and the need for the Employee's skills in the Programmer Manager's area" as reasons for the transfer. Contractor Ex. 57. Although, the Complainant argued that other IM employees who rescinded their VSP application were able to stay in the same jobs, the IAD found that the Contractor "had strong reasons for the transfer" and that the facts cited in the transfer letter were accurate in that "there were individuals trained to take the Employee's place and the Programmer Manager had a need for the Employee's skills." IAD at 89,323. The IAD concluded that the Contractor would have transferred the Complainant to a different position in the absence of her protected disclosures and "that the designated position accommodated both the Employee's refusal to be on call and her desire not to work with the Network Manager." *Id*. at 89,324. Finally, the IAD concluded, and the record strongly supports the Contractor's position, that it had non-retaliatory reasons for transferring the Complainant.

Lastly, with respect to the July 2003 Involuntary Separation, the IAD found that it was clear that the Contractor's decision to conduct this involuntary separation was not related to the Complainant, but was rather one of a series of voluntary and involuntary separation programs associated with the upcoming site closure. In addition, "the Contractor's determination that it had an excess number of employees in the IM department had nothing to do with the Employee," nor did the Contractor's decision "to create two groups for IM staff members." *Id*. at 89,325. In regard to this alleged retaliatory action, the Complainant argued that she should have been evaluated according to the network group criteria and that her rating in the programmer group was too low. The IAD analyzed extensive evidence on this matter, first analyzing whether the Complainant was properly evaluated in the programmer group. During the hearing, the Complainant cited notes of manager discussions which recognized that some employees had skills in both the network and the programmer area. She further maintained that she would not have been evaluated in the programmer group if she had not been transferred as a result of her protected activity. The IAD, however, found that the diversity of the Complainant's skills did not affect whether she was evaluated in the network group or in the programmer group, and that the Contractor's treatment of the Complainant was consistent with its treatment of the other IM employees who had been separated. [4]

---

[4] The network group consisted of the staff members in the two network divisions, and the (continued...)

Also, with respect to the July 2003 Involuntary Separation, the IAD analyzed whether the Complainant merited a higher rating in the programmer group. At the hearing, the Programmer Manager testified as to how she assigned the ratings that she did. She explained in detail and provided examples of how she evaluated the employees against certain rating factors and relative to each other. The Hearing Officer believed the Programmer Manager's testimony was highly credible, finding that many of her "comments and examples were corroborated by documents, including e-mails from the Employee and the testimony of others." *Id.* at 89,326. During the course of the hearing, the Complainant objected to her rating by the Programmer Manager, arguing that it was inconsistent with the Complainant's November 2002 performance appraisal and that the written comments on her evaluation underestimated her skills. After the evaluation of extensive testimony on this issue, the IAD concluded that the Complainant's evidence did not cast doubt on the accuracy of her rating and further that the Programmer Manager evaluated the Complainant against the "relevant specified criteria honestly and fairly, notwithstanding the employee's objections." *Id.* at 89,329.

The IAD therefore found clear and convincing evidence existed to show that the Contractor would have taken the same action in the absence of the protected disclosures. In sum, the IAD concluded that the Complainant was not entitled to relief.

III. Analysis

The Complainant filed a statement identifying the issues that she wished the Director of the OHA to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). The Contractor filed a Response to the Statement. [5] 10 C.F.R. § 708.33.

After fully reviewing the voluminous record in this case, in light of the arguments raised in the Complainant's Statement of Issues, I find that there is no basis for overturning the result in this case.

A. The March 27 Written Reminder

The Complainant first asserts that the Hearing Officer failed to require the Contractor to show by clear and convincing evidence that it would have issued the March 27, 2001 Written Reminder in the absence of the Complainant's protected disclosures. In this regard, the Complainant argues that "Fluor Fernald provided no clear and convincing evidence that Ms. Davis' work schedule was inappropriate . . . of Ms. Davis's failure to follow management direction and of her insubordinate conduct and that Ms. Davis's communications were inappropriate." Statement at 4-12. In her

---

[4](...continued)
programmer group consisted of the staff members in the two programmer divisions. The Complainant, who was in the programmer division, was evaluated by the manager in this group.

[5] There is no need in the instant case to set out the specifics of the contractor's response, some of which are incorporated into my analysis below.

statement, the Complainant asserts, *inter alia*, that the Hearing Officer "reverses the burden of proof, requiring Ms. Davis to establish her notification of [her supervisor] and selectively using emails that present Flour Fernald's version of Ms. Davis's insubordination, her inappropriate comments and her failure to follow management direction." *Id*. at 3. The Complainant further asserts that the Contractor did not submit any documentation that she failed to notify her manager or that she missed any assignment deadline. Id. at 4.

This assertion is incorrect. In fact, the Complainant misstates the burden of proof. She states that the Contractor provided no clear and convincing evidence that the Complainant's work schedule was inappropriate. However, the Contractor's burden is to prove by clear and convincing evidence that it would have issued the Complainant the March 27th Written Reminder without her protected disclosures. The Hearing Officer correctly evaluated the testimony and other evidence before her and correctly concluded that the Contractor had met its burden with respect to this issue.

With regard to the issue of whether the Complainant properly notified her manager about changes in her work schedule, the Complainant testified that she left notes, voice mails or emails when she intended to alter her work schedule. However, the Hearing Officer took note of the fact that she could not find any of these notifications to offer as evidence during the hearing. In addition, the Complainant argues that the Contractor failed to submit evidence of "similar treatment of similarly situated employees." Statement at 5. The issue, however, is not whether other employees were permitted to adjust their schedules, but whether other employees gave appropriate notification to their supervisors. The Contractor's position, which it asserted during the hearing and on this Appeal in its Response, is that no other employees received similar disciplinary action "because no one else in the department failed to provide the required notifications" to their managers. Further, the Complainant asserts that the Contractor provided no clear and convincing evidence of her failure to follow management direction and of her insubordinate conduct. Statement at 6. She claims that the Hearing Officer ignored pertinent testimony and overlooked the refusal of the Contractor "to follow up on Ms. Davis' very serious complaint that Mr. Arnett [supervisor] had used the Performance Review process as a weapon." Statement at 7. I do not agree with her contention. The Hearing Officer noted this issue in her Decision and decided the appropriate weight she would accord to it. She evaluated a voluminous amount of documents provided by both parties as well as the testimony of various witnesses to arrive at her factual conclusion that the Complainant failed to follow management direction and behaved in an insubordinate manner. The record well supports these Hearing Officer factual determinations. Finally, the Complainant asserts that the Contractor provided no clear and convincing evidence that her communications were inappropriate. Statement at 8. However, the record reflects that the Hearing Officer reviewed numerous e-mail messages, memos and testimonial evidence which led her to conclude, correctly in my view, that the Complainant engaged in unprofessional and inappropriate communications with her managers, subordinates and peers. Again, the wealth of evidence in the record well supports the Hearing Officer's factual determination on this issue.

The record reflects that the Hearing Officer analyzed all the testimony relating to the March 27th Written Reminder, and concluded that the Contractor's testimony relating to the disciplinary action was more persuasive and credible. She also determined that much of the Complainant's evidence not only failed to support but was contrary to her claims. In doing so she was fully engaged in the role

of the Hearing Officer: to listen to the testimony of witnesses, observe their demeanor, and make a judgment as to their credibility in light of the evidence. I see no error in the judgment of the Hearing Officer in reaching her conclusion that the Contractor met its burden on this issue.

B. The Decision-Making Leave

The Complainant next asserts that the Hearing Officer failed to require the Contractor to show by clear and convincing evidence that it would have issued the May 31, 2001 Decision-Making Leave in the absence of her protected disclosures. Statement at 12. According to the record, the circumstances leading up to this disciplinary action began on May 3, 2001 when the Complainant signed an application to participate in a Voluntary Separation Program (VSP) that was being offered by the Contractor. The Complainant requested a separation date of June 29, 2001, although she ultimately withdrew her VSP application. After accepting the Complainant's separation date, the Contractor found it necessary to plan for her departure by seeking to identify other employees to assume the duties she had performed. During the hearing, the Complainant did not dispute the necessity of the Contractor to plan for her departure and the necessary training of other employees. She also understood the importance of her personal participation in the training process. In a May 23, 2001 e-mail message, the Complainant's supervisor specifically directed the Complainant to train another employee in a specific type of Internet security software used by the Contractor. Strict deadlines were imposed on the Complainant due to the limited time remaining before her anticipated separation. The decision-making leave also cited the Complainant's failure to establish and maintain personnel backups. IAD at 89,323. In her Statement, the Complainant generally, asserts as she did during the hearing, that she had personnel backups and that she was in the process of complying with the Network Manager's May 24, 2001 direction to train others. However, the record is to the contrary. It indicates that she had a cavalier and insubordinate attitude about the managerial direction she was receiving. She ultimately did not follow these instructions. *Id.* Moreover, the Complainant sent a number of "inappropriate" and "unprofessional" e-mails in response to her manager's request to provide backups although she denies these e-mails had an unacceptable communication style. Based on her evaluation of the evidence in the record, the Hearing Officer correctly determined that the Contractor had non-retaliatory reasons for issuing the Decision-Making Leave in light of its legitimate need to plan for the Complainant's anticipated separation. Again, I see no error in the judgment of the Hearing Officer in reaching her conclusion that the Contractor met its burden in issuing this disciplinary action to the Complainant.

C. Job Transfer/Change of Duties

Next, the Complainant asserts that the Contractor failed to show by clear and convincing evidence that it would have issued the Complainant's Change of Duties in the absence of her protected disclosures. Specifically, the Complainant argues, *inter alia,* that the Contractor "failed to explain why it selected a reassignment option for Ms. Davis that resulted in a demotion when others where available and requested by Ms. Davis." Statement at 17. In addition, the Complainant asserts that the Contractor failed to justify her reassignment based on immediate need. Finally, the Complainant asserts that the Hearing Officer improperly considered her "refusal to continue managerial on-call" as a basis for the decision to reassign her. She refers to the Contractor's decision to transfer her job, which cited the Complainant's withdrawal of her VSP application, the need to train other individuals to take her place

and the need for the Complainant's skills in the Programmer Manager's area. The Hearing Officer found that "the job transfer was largely the result of the Employee's ongoing conflict with the Network Manager, including her repeated statements that she did not want to report to him, and her stated refusal to work after hours." IAD at 89,323. The record amply supports the fact that there was an ongoing conflict between the Complainant and the Network Manager. The record also supports the Programmer Manager's need for the Complainant's skills. It further indicates that neither the Complainant's pay nor her benefits were reduced as a result of the job transfer. Finally, the record indicates that the Complainant's April 2001 refusal to work after hours prompted the employee relations department head to conclude that the Complainant "should be moved to a job that did not require her to be on call." Id. at 89,324. The record strongly supports the Hearing Officer's conclusion on this issue – that the Contractor would have transferred the Complainant to a different position in the absence of her protected disclosures. I see no Hearing Officer error here.

D. Involuntary Separation

Finally and perhaps most significantly, the Complainant challenges the Hearing Officer's conclusion that the Contractor met its burden with respect to the Involuntary Separation. The Complainant asserts numerous arguments in support of this contention. [6] In asserting these arguments, the Complainant attempts to raise various factual matters in seeking to rebut the findings reached by the Hearing Officer after evaluating voluminous evidence including testimony subject to cross examination. The Complainant's contentions on appeal are not new but were addressed by the Hearing Officer in the IAD. It is well settled that the factual findings of the Hearing Officer are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to weigh evidence and to judge the credibility of witnesses. *Eugene J. Dreger*, 27 DOE ¶ 87,564 at 89,351-52 (2000), *citing Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,501, 89,001 (1995); *O' Laughlin v. Boeing Petroleum Services, Inc*., 24 DOE ¶ 87,513, 89,064 (1995). For the reasons below, I have determined that the Complainant has failed to show that the Hearing Officer's findings were erroneous as a matter of fact or law, and the IAD must therefore be sustained.

At the outset of the hearing, the Hearing Officer found that neither the Contractor's decision to conduct the July 2003 ISP nor the Contractor's determination that it had an excess number of employees in the IM department had anything to do with the Complainant. During the course of the hearing, the Complainant never challenged these findings, but rather challenged the fact that she was evaluated according to the Programmer Group criteria instead of the Network Group criteria. The Hearing

[6] Those arguments include the following: (1) the Contractor failed to explain why the Complainant was not evaluated on a Network Individual Skills Rating Form instead of a Programmer Individual Skills Rating Form; (2) the Contractor failed to explain why none of the Complainant's network skills were considered even though she used them within the prior two years; (3) the Contractor failed to explain why it selected a reassignment for the Complainant to the Programmer Group when a continuing need for the Complainant's skills was not ascertained before the reassignment; (4) the Contractor failed to explain why it did not consider other reassignment options that were favored by the Complainant; and (5) the Contractor failed to explain inconsistencies in the testimony of an [IM Supervisor] as to her knowledge of the Complainant's Part 708 complaint when the supervisor was both a crucial member of the FRT [Function Review Team] and SRT [Senior Management Team].

Officer evaluated extensive documentary evidence and testimony, including evidence on whether the Complainant belonged in the Programmer Group and deserved a higher rating, and concluded (1) that the Contractor had a legitimate business reason for its ISP and (2) that it would have selected the Complainant for the ISP in the absence of her protected disclosures. Again, the Complainant presents no new evidence that indicates that the Hearing Officer's conclusions should be overturned.

In her Statement, the Complainant reasserts an argument she made during the hearing that "(1) Ms. Davis was the only IM employee whose primary job assignment was not within the group to which she reported; and (2) Ms. Davis was the only IM employee to cross over from the Network to the Programmer arena (or the reverse) within the last two years. Application of the two year rule only affected Ms. Davis." Statement at 18-19. The Complainant further asserts that the Contractor "never showed, by clear and convincing evidence, why Ms. Davis was evaluated as a Programmer when her primary assignment was as a Network Analyst." *Id.* at 19. As stated earlier, the record supports the Hearing Officer's finding, that the Complainant was properly evaluated as a member of the Programmer Group based on her primary assignment. I see no clear error. This is not the appropriate forum to conduct new fact-finding.

Further, I find no basis for the Complainant's assertion that she was the only employee affected by application of the "two year rule." According to the record, the "two year rule" relates to an employee's "skills transferability" where employees who have been selected for involuntary separation are eligible to transfer to available positions in other sub-groups "if they have demonstrated current skills for that position." Thus, to be eligible to transfer under this rule, an employee must have had actual experience in the other skill area within the last two years. It was determined and the record supports the fact that the Contractor applied this rule to all employees who were being considered for an ISP, not only the Complainant. Although the Hearing Officer did not discuss this "two year rule" in detail, she found, through her evaluation of the evidence in the record, that the "recognition of diverse skills, either in management discussions or on the evaluation form, did not affect whether an employee was evaluated in the network group or the programmer group." IAD at 89,325.

With respect to the Complainant's assertions that the Contractor failed to consider other reassignment options she favored, failed to explain why it selected a reassignment for the Complainant when a continuing need for the Complainant's skills was not ascertained, and finally that there were inconsistencies in the testimony of an IM Supervisor. The Complainant is wrong again. The Complainant has misstated the Contractor's burden of proof. The Contractor is not required to prove why it did not choose a variety of other possible options for the Complainant instead of the particular action it ultimately took. Rather, the Contractor's burden is to prove by clear and convincing evidence that it would have taken the same action absent the Complainant's protected disclosures. I agree with the Hearing Officer that the Contractor has met its burden here by persuasively demonstrating that it evaluated its employees properly, according to their demonstration of "core skills and the essential job-specific skills for their job classification or sub-classification." Further, I am equally persuaded by the strength of the testimony in the record, and I agree with the Hearing Officer, that the Programmer Manager evaluated the Complainant "against the relevant specified criteria honestly and fairly." IAD at 89,329.

E. Refusal to Consider Job Level/Title Change (Demotion) in Part 708 Complaint

Finally, the Complainant argues that the Contractor demoted her sometime in the mid-1990's and that she did not become aware of this "demotion" until August 2003 when she received the Contractor's personnel and employee relations files from the OHA Investigator in connection with her Part 708 complaint. The Complainant contends that this issue of "job level/title" change is part of the Contractor's "pattern of continuing retaliation against her, and should be considered with the other four retaliations." Statement at 22.

On November 12, 2003, the Hearing Officer issued a letter denying the Complainant's request to include the "job level/title" change as an additional issue to be a subject of the hearing. The Hearing Officer stated that the "mid-nineties job level/title change is beyond the scope of the proceeding." She further stated that the complaint "does not identify the mid-nineties job level/title change, and the investigator did not investigate it." Thus, the Hearing Officer concluded that the request should be denied. She declined to exercise her discretion to include "the alleged retaliation . . . , given its nature and age." Therefore, she ruled that the hearing proceeding was limited to the four alleged retaliations addressed in the IAD. The Part 708 regulations provide that a complaint must be filed by the 90th day after the employee knew, or reasonably should have known of the alleged retaliation in order to be timely. *See* 10 C.F.R. § 708.14(a). Although, as mentioned above, the Complainant asserts that she did not become aware of this alleged retaliation until she received documents from her personnel file in August 2003, there is no evidence in the record to support this assertion. Therefore, I find that the Hearing Officer correctly determined that this allegation, which the Complainant alleged occurred approximately eight years earlier, should not be included in the proceeding based on its untimeliness.

IV. Conclusion

As is evident from the above description of the IAD, this case involves factual issues which are strongly disputed. Ultimately, however, it was the role of the Hearing Officer to make findings of fact based on her assessment of the witnesses and their testimony, as well as the documentary evidence presented during the proceeding. The Hearing Officer did so, and after reviewing the entire record, I find no error. Complainant's attempt to reargue these factual matters is unavailing. As previously stated, there is deference given to the trier of fact to weigh evidence and to judge the credibility of witnesses, and unless the factual findings are deemed clearly erroneous they should not be overturned. In the interest of efficiency, it is inappropriate to relitigate the same matters that came before the Hearing Officer. Again, I see nothing in the Complainant's Statement of Issues that would cause me

to overturn the IAD in this case. Accordingly, the instant appeal should be denied and the IAD affirmed.

It Is Therefore Ordered That:

(1) The Appeal filed by S.R. Davis on May 19, 2004, Case No. VBA-0083, of the Initial Agency Decision issued on April 24, 2004 be and hereby is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 16, 2006

March 15, 2004
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Elaine M. Blakely

Date of Filing: July 9, 2003

Case Number: VBA-0086

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on June 25, 2003, involving a Complaint filed by Elaine M. Blakely (Blakely or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Blakely claims that her former employer, DOE contractor Fluor Fernald, Inc. (FFI or the contractor), retaliated against her for engaging in activity that is protected by Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that Blakely engaged in activity that is protected under Part 708, but that FFI showed that it would have taken the same personnel action in the absence of the protected activity. Blakely appeals that determination. As set forth in this decision, I have decided that overall, the determination is correct.

I. Background

A. The DOE Contractor Employee Protection Program

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

by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by Blakely in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Benson's Complaint are fully set forth in the IAD. *Elaine M. Blakely* (Case No. VBH-0086), 28 DOE ¶ 87,039 (2003)(*Blakely*). For purposes of the instant appeal, the relevant facts are as follows.

Blakely worked as a general engineer for FFI at the DOE's Fernald, Ohio site. She was terminated by reduction in force (RIF) on April 4, 2002. On April 9, 2002, Blakely filed a Complaint under 10 C.F.R. Part 708 with the Manager of the DOE Ohio Field Office, claiming that she was terminated in retaliation for filing a prior Complaint of Retaliation in February 2001, which was dismissed in March 2002. 1/

After completion of an investigation pursuant to 10 C.F.R. § 708.22, Blakely requested and received a hearing on this matter before an Office of Hearings and Appeals Hearing Officer. The hearing lasted three days. After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

II. The Initial Agency Decision

The IAD set forth the burdens of proof in cases brought under Part 708. The IAD stated that it is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding or refused to participate in an activity as described in § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29

1/ That dismissal was upheld on appeal in a determination that I issued on April 3, 2002. Case No. VBU-0080.

The IAD further noted that if the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. 10 C.F.R. § 708.29. The IAD then proceeded to consider the application of these elements to the Blakely proceeding.

A. Protected Disclosures or Protected Activity.

The IAD first considered Blakely's contention that she made a protected disclosure in October 1998, when she submitted a note to the Waste Pits Remedial Action (WPRAP) project manager stating that she could not support him in connection with a review of hazard calculations, and that she would not act contrary to her conscience. The Hearing Officer found that there was nothing in the note that one could reasonably believe revealed a substantial violation of a law, rule or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds or abuse of authority. Thus, the Hearing Officer concluded that the note was not a protected disclosure under Part 708, and that prior to October 2000, Blakely had no other conversations that constituted protected disclosures regarding the WPRAP.

The IAD found that Blakely made several protected disclosures beginning in October 2000. These included a memorandum and a follow up E-mail to FFI management, with copy provided to the DOE Inspector General (IG). The subject of these disclosures was safety concerns regarding the WPRAP.

The IAD also found that Blakely participated in an activity protected under Part 708 when she filed the above-mentioned complaint of retaliation in February 2001. 2/

2/ In that Complaint, Blakely alleged that she was reassigned to a different project in March 1999, after making the alleged protected disclosures in 1998. The complaint, filed in February 2001, was dismissed because it was filed more than 90 days after the alleged retaliation. Section 708.14 provides that complaints must be filed by the 90th day after the date the complainant knew or should have known of the alleged retaliation.

B. Contributing Factor

As the IAD stated, a protected disclosure may be a contributing factor in a personnel action where the official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude the disclosure was a factor in the personnel action. The IAD noted that Blakely was terminated as part of an ongoing process of downsizing at the Fernald site. The IAD further found that neither the overall RIF nor the decision of FFI management to reduce the number of engineer positions by five was motivated by a desire to terminate Blakely. The IAD noted that Shelby Blankenship was Blakely's supervisor at the time of the RIF, and was the official who ranked Blakely for purposes of the RIF. The IAD pointed out that Blakely received the lowest rating of all 23 employees who were ranked in the engineer job category.

The IAD next considered whether Blankenship had actual or constructive knowledge of Blakely's protected activity (filing the Part 708 Complaint in February 2001). In response to the question, as to whether he was aware that Blakely filed a Part 708 complaint with the Department of Energy in February 2001, Blankenship replied "I don't know if I was aware of this in that time frame or not." Transcript of December 10, 2002 Hearing (hereinafter Tr.) at 860. Based on this testimony the IAD indicated that Blakely had not met her burden of proof. The Hearing Officer stated that he could not find that Blankenship was aware of the February 2001 complaint. The IAD determined that Blakely's protected activity could therefore not have been a contributing factor to her low rating in the RIF process.

In my view, this determination was not well founded. After reviewing the record, and based on my knowledge of how DOE contractor workplaces function, I believe that Blakely's participation as a complainant in a Part 708 proceeding that lasted for approximately 13 months is in and of itself sufficient to permit a finding that it was a contributing factor in her termination, which took place within a matter of days after that initial Part 708 proceeding was concluded. I believe it is appropriate to impute knowledge of this earlier Part 708 proceeding to Blankenship, given the fact that he did not deny that he knew about it after being given the opportunity. Tr. at 860. Moreover, other FFI management officials were aware of the filing of the

complaint. 3/ See, *Jagdish Laul* (Case No. VBA-0010), 28 DOE ¶ 87,011 (March 9, 2001). However, as indicated below, this error does not affect the overall outcome of this case.

The IAD also found that Blankenship became aware of Blakely's complaints to the DOE/IG in either December 2000 or January 2001, shortly after he became her supervisor. Blankenship filled out Blakely's RIF form approximately 13 months later. The IAD concluded that this period is not sufficiently short to infer a connection between the protected activity (filing a complaint with the IG) and the adverse personnel action. The IAD also found that Blakely presented no other evidence to support a conclusion that her disclosures to the DOE/IG were a contributing factor to her termination.

C. Whether FFI would have terminated Blakely absent the Protected Activities

Even though the IAD found that Blakely had not shown by a preponderance of evidence that her protected disclosure and protected activity were a contributing factor to her termination, the Hearing Officer nevertheless went on to consider whether FFI showed by clear and convincing evidence that it would have "riffed" Blakely absent the protected activity. Overall, the Hearing Officer was convinced by Blankenship's testimony that the low rating he gave to Blakely in the RIF process was based on his judgment that she was relatively unproductive, needed too much supervision and tended to be argumentative. The IAD therefore found clear and convincing evidence that Blakely would have been terminated whether or not she engaged in protected activity under Part 708.

In sum, the IAD concluded that Blakely was not entitled to relief.

III. The Blakely Statement of Issues and the FFI Response

Blakely filed a statement identifying the issues that she wished the Director of the Office of Hearings and Appeals to review in this

---

3/ Dennis Carr and Robert Nichols deny that Blakely's filing of the complaint played a role in the termination, but do not deny knowing about it. Tr. at 404-05, 505. Blankenship testified that prior to Blakely's beginning to work for him, he had heard that she was difficult to work with. Tr. at 909.

appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). FFI filed a Response to the Statement. 10 C.F.R. § 708.33.

A. Statement of Issues

1. The Statement first maintains that other FFI officials besides Blankenship were involved in the decision process that led to Blakely's termination. In particular, the Statement cites Dennis Carr, FFI Executive Vice President and Senior Director of Projects, as one member of a management team that reviewed the employee rankings and decided which employees from the list would be laid off. Tr. at 404. The Statement also points out that Carr knew about Blakely's 2001 Part 708 complaint, because he said he did not take this into account in the termination decision. *Id.*

2. The Statement then claims that the IAD erred in finding that Blankenship had no knowledge of Blakely's 2001 Part 708 complaint. The Statement cites Blankenship's testimony that he did not know of the Complaint in the February 2001 "time frame," and then points out that Blankenship never denied knowing about the complaint at a later time. The Statement argues that it should be deemed admitted that Blankenship knew of the 2001 complaint at the time of the RIF.

3. The Statement contends that the Hearing Officer incorrectly determined that the time between Blankenship's knowledge of Blakely's protected disclosures and the RIF action was too long to establish a causal connection. In this regard, the Statement claims that from time to time, Blakely reminded Blankenship about her DOE/IG and Part 708 complaints. The Statement also points out that since Blankenship learned of the 2001 Part 708 complaint sometime after it was actually filed, less than 13 months elapsed from the time he learned of it to the time that Blakely was terminated.

4. Citing some purported inconsistencies in the RIF ratings process, the Statement maintains that overall Blakely has proven by a preponderance of evidence that her protected activities were a contributing factor in her termination.

5. The Statement argues that the Hearing Officer erred in concluding that FFI had proved by clear and convincing evidence that it would have terminated Blakely in the absence of the protected disclosures. In support of this contention the Statement contends that the Hearing Officer incorrectly placed the burden of proof on Blakely to show that FFI would have terminated her absent the disclosures, whereas, under the regulations this burden lies with

FFI. The Statement cites to portions of the hearing transcript in which the Hearing Officer spoke to Blakely about the necessary showing. For example, the Statement cites the Hearing Officer's statement "the question is whether [Blankenship] would have reached the same conclusions absent the protected activity." Tr. at 934. *See also* Tr. at 934, 935, 936. The Statement concludes from this assertion and other similar assertions by the Hearing Officer that he improperly shifted the burden from FFI to Blakely to establish by clear and convincing evidence that she would have been terminated in the absence of her protected disclosures.

6. The Statement also maintains that there are inconsistencies and unexplained gaps in the RIF and other ratings data provided by FFI. The alleged anomalies include incorrect translation of the employee ratings from the individual employee rating form (IERF) to the overall employee comparison document (the Functional Ranking Report or FRR). The Statement cites as unfair the fact that the FRR does not include the names of any of the engineers to whom Blakely was compared, thus depriving her of the opportunity to cross-examine the decision makers about the ratings of these other employees. The Statement contends that there were "unacceptable" blanks in some of the comment fields in the FRR. Tr. at 506. The Statement also points out employees who were rated as weak in some areas, but who overall received a higher rating that Blakely. The Statement appears to argue that these anomalies and inconsistences establish that FFI has not shown by clear and convincing evidence that Blakely would have been terminated absent the protected disclosures.

B. FFI's Response

1. In response to the Statement's assertion that the Hearing Officer erred in determining that Shelby Blankenship was the official taking the action in connection with the Blakely RIF, FFI admits that other FFI officials had input into the RIF process. However, the FFI Response contends that Blankenship's role was the critical one in the selection of Blakely for termination.

2. The Response contends that Blankenship's testimony indicated that he did not know when he became aware of Blakely's 2001 Part 708 Complaint. The Response argues that since it was Blakely's burden to establish that Blankenship knew of the protected activity when he terminated her, Blakely has not met her burden with respect to the contributing factor showing.

3. The Response agrees with the IAD's conclusion that the 13 month period between the time that Blankenship learned of the DOE/IG

communication and the RIF is too long to establish a causal connection between the protected activity and the adverse personnel action.

4. The Response supports the overall conclusion in the IAD that Blakely failed to show that her protected activities were a contributing factor to her termination.

5. The Response maintains that the IAD correctly found that FFI would have riffed Blakely in the absence of her protected disclosures/activity.

IV. Analysis

As is evident from the above description of the filings in this case, the arguments are numerous, complex and involve some complicated factual contentions. However, after fully reviewing the voluminous record in this case, as well as the arguments raised in the Statement of Issues, I find that there is no basis for overturning the result in this case. As previously discussed, I believe that the complainant has shown that filing the prior Part 708 complaint was a contributing factor to her termination by FFI. However, as indicated below, I find that FFI has established by clear and convincing evidence that it would have terminated Blakely absent the protected activity.

The Statement argues that during the hearing, the Hearing Officer incorrectly placed the burden of proof on Blakely to show that FFI would have terminated her absent the disclosures. The Response cited several portions of the transcript for this proposition. Tr. at 932-37. As an initial matter, the argument that Blakely could or would be expected to make such a showing is illogical in the context of Part 708. It should thus be summarily dismissed as non-sensical. Nevertheless, in order to be completely fair to Blakely, I have reviewed the citations referred to in the Statement, and can find no indication that the Hearing Officer in any way improperly assigned the burden of proof.

The interchange cited by the Statement took place during the examination of Blankenship. As the Statement pointed out, the Hearing Officer made the following statements to Blakely: ". . . it's really to determine what influence your protected activities had on these conclusions,. . . whether [Blankenship] would have reached the same conclusions absent the protected activity." Tr. at 934. The Hearing Officer also stated "I want to know whether

[Blankenship] was improperly influenced by your protected activity in reach that conclusion." Tr. at 936.

In the cited portions the Hearing Officer was simply reviewing in plain language for Blakely's benefit the type of information he thought should be educed during the examination of Blankenship. I see no evidence whatsoever that the Hearing Officer was attempting to place the burden of this showing on Blakely. In fact, the Hearing Officer prefaced this discussion with Blakely with the following statement: "assuming that you can show that your disclosures were somehow a contributing factor to anything Mr. Blankenship did with respect to you, then Fluor Fernald would have to show that he would have done the same thing whether.. . you had made protected disclosures or engaged in protected activity or not." Tr. at 931-32. Thus, it is clear that the Hearing Officer understood the burdens of proof in this case. There is simply no evidence that the Hearing Officer incorrectly apportioned the burden of proof on this issue.

The Statement also maintains that there are inconsistencies and unexplained gaps in the RIF and other ratings data provided by FFI. The Statement argues that when these deficiencies are taken into account, FFI will not have met its burden of proof.

The Statement first points out that Blankenship's ratings of Blakely in her annual performance assessment (PA) dated January 15, 2002, were inconsistent with his rating of her for the RIF (Individual Employee Rating Form or IERF), which took place only one month later, on February 19, 2002. As an example, the Statement indicates that in the PA, Blankenship rated Blakely as "meets expectations" in the "Initiative" category, but in the IERF, he rated her in that same category as "occasionally fails to meet standards and expectations." The Statement claims the same inconsistency for the "Quality of Work," "Technical Knowledge," and "Communication Skills" categories.

After reviewing the hearing testimony on this very point, I find no inconsistency. The PA and the IERF are different. As FFI Program Director of Administration Paul Mohr explained, the performance assessment process looks at an employee's performance over the past 12 months and the rating serves as a point of discussion between the employee and supervisor on areas of improvement and employee strengths. This rating does not compare employees. However, in performing ratings for the involuntary separation process (RIF), the focus is quite different. In the RIF process the rating official will assess the types of work that will need to be performed in the

future, and how a particular employee's skills fit into future skill mix requirements in comparison to other employees. Thus, the two ratings can be different for the same employee for the same period. Tr. at 666-73.

Darlene Gill, who was FFI Human Resources Manager for Workforce Restructuring during 2001, also testified on this point. She stated that the skills assessment for the RIF was designed to evaluate behavior and skills necessary for closure and completing the Fluor Fernald/DOE project. She indicated that workforce restructuring is "looking at behaviors that are needed today, or that will be needed to help meet the goal [of] closure." On other hand, she stated that "performance assessments are looking at behaviors that happened for the past year performance and [on] evaluating goals, behaviors of the work that was done." Tr. at 683.

Based on this testimony, I find there was a clear and convincing reason for the different ratings of Blakely in the PA and IERF.

The Statement argues that there may have been some transcription errors in transferring ratings from the IERF to the Functional Ranking Report (FRR). The Statement argues that Blakely's rating in particular was inaccurately transcribed as 2.15 instead of 2.35. The Statement speculates that other ratings may have also been inaccurately transcribed. The Statement suggests that it is possible that Blakely was not among the lowest ranked employees, and should therefore not have been terminated. 4/

As an initial matter, the Statement does not provide any calculation that would allow me to evaluate that assertion. On the other hand, the FFI Response has laid out a fully documented calculation that indicates that the 2.15 rating was correct. FFI Response at 17.

In any event, the assertion that there may have been errors in the transcription of the scores of other employees is merely speculative, and I will not reopen the record at the point in the proceeding to test that possibility. In this regard, I note that the focus of our efforts here is to insure that an employee was not unfairly treated as a result of protected activity. These claims

---

4/ Even at the 2.35 rating level, Blakely was still the lowest ranked of all employees on the relevant FRR. FFI Exh. J. Thus, in order for Blakely not to be among those terminated, there would have to be errors committed with respect to rankings of other employees.

of unintentional error fall more within the purview of an employer's human resources operation. It is not the purpose of the Part 708 process to investigate and correct mathematical errors, transcription mistakes or other unintentional errors that appear unrelated to a retaliation against an employee for a protected disclosure/activity. Based on the record, there is no reason to believe that even if there were any errors, they were committed intentionally to insure the termination of Blakely.

The Statement then raises the possibility of overall discrepancies and inconsistencies in the Functional Rating Report. The FRR was entered into the record without identifying by name the individual employees who were rated and ranked, except for Blakely. The Statement questions the fairness and accuracy of the rankings of these other unidentified employees. The Statement points out that whether Blakely should have been retained instead of other employees cannot be fairly considered without knowing the identities of each rated employee and his qualifications.

It is true that Blakely's ability to challenge the ratings of FRR is limited by the fact that the names of the other employees are deleted from this material. Usually this information is deleted in order to protect these other employees from an unwarranted invasion of their privacy. However, this information could have been provided to Blakely under a protective order. If Blakely wished to probe the accuracy and fairness of the FFI ratings of other employees, she should have asked for an un-deleted version of this material prior to the hearing. There is no evidence that she ever made a request for this information. At this stage of the proceeding, it is far too late to reopen the record on this point. Accordingly, I will not give her assertions on this issue further consideration.

The Statement also mentions that Blankenship performed a "skills assessment" for Blakely, but did not perform one for another engineer, "John McCoy." 5/ The Statement speculates that the failure to perform this assessment for this employee may have allowed him to be retained instead of Blakely. FFI explains that this employee was not assigned to a group that fell into a declining category and therefore no skills assessment for him was necessary. Statement at 19. In this regard, Blankenship testified that he "only had one person in the engineer category that was shrinking." Tr. at 852. I therefore find this objection to be without merit.

5/ The correct surname of this employee is McCloy.

The Statement also raises a series of anomalies and discrepancies in the FFR. These include, for example, that a "comment area" on the FRR with respect to Blakely was left blank, in spite of the fact that it was allegedly unacceptable to leave blank any comment areas on the FRR. I am not persuaded by this argument. Overall, a RIF tends to be a long and complicated process, during which there may well be some inconsistencies and anomalies. This fact alone, an area left blank, does not mean that the RIF was unfair, or that it was performed in such a way as to target or eliminate a particular employee. In this case I see no reason to believe, nor has the Statement shown, that a minor deviation, such as failing to fill in all the blanks, suggests an error in the Hearing Officer's determination that there is clear and convincing evidence that the contractor would have riffed the complainant in the absence of the protected disclosure/activity.

Finally, the Statement alleges that FFI had a policy of reviewing lay-off candidates to see if there were any company job openings in which these employees could be placed. The Statement argues that FFI did not present evidence regarding whether this failure to place Blakely in another position was part of a retaliation effort. The FFI response included an affidavit from Ms. Gill to the effect that Blakely did not qualify for any of the open positions. I am inclined to accept that assertion. In any event, Blakely should have pursued this issue at the hearing if she believed that the failure to place her in another position was part of the firm's effort to terminate her because of her protected activities. The fact that FFI did not find her another job does not in and of itself mean that the firm has failed to meet its burden of proof. Thus, overall, the Statement has simply not raised any issues that even suggest that the Hearing Officer's determination regarding the contractor's clear and convincing showing was incorrect.

Further, from my review of the record as a whole, I believe that the Hearing Officer's determination regarding FFI's showing was well-founded. With respect to the clear and convincing showing, he based his determination largely on Blankenship's assessment that Blakely was relatively unproductive, needed too much supervision and tended to be argumentative. These were first hand opinions derived from working directly with Blakely, and were the basis for his low rating of her on the IERF. The IAD cited hearing testimony from Blankenship explaining and supporting his judgment that Blakely was argumentative, unproductive and needed excessive supervision. IAD at 17-19. I will not revisit the Hearing Officer's findings of fact on this issue. I believe that they are adequately supported. In fact, I note other testimony in the record suggesting that at least

one other FFI manager found Blakely difficult to work with. Mark Cherry, FFI project manager for the WPRAP, testified that he worked with Blakely beginning in January 2000. Tr. at 170. Cherry testified that he found Blakely "very difficult" to work with. Tr. at 188. He stated that she refused to accept closure of issues. Tr. at 202. He indicated that Blakely was seeking "an admission of guilt on somebody's part and on saying you [i.e. Blakely] were absolutely right." Tr. at 203. There is some testimony in the record from other witnesses who stated that they did not have problems working with Blakely. However, these same witnesses also indicated that they did not have any significant interaction with her. *E.g.*, Tr. at 230, 235, 243. Thus, these witnesses do not lend meaningful support to Blakely's position that Blankenship judged her unfairly. 6/

In sum, I am convinced that there was sufficient evidence in the record in this case to support the hearing officer's conclusion that FFI clearly and convincingly established that it would have terminated Blakely absent her protected activity.

V. CONCLUSION

As discussed above, I see nothing in the Blakely Statement of Issues that would cause me to overturn the IAD in this case. Accordingly, the instant appeal should be denied and the IAD affirmed.

It Is Therefore Ordered That:

(1) The Appeal filed by Elaine Blakely on July 9, 2003 (Case No. VBA-0086), of the Initial Agency Decision issued on June 25, 2003, be and hereby is denied.

6/ Another witness who found her to be competent and was satisfied with her performance, nevertheless thought her manner could be "abrasive" and "irritating." Tr. at 756. Overall, I believe this testimony tends to support Blankenship's assessment.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 15, 2004

Department of Energy
Washington, DC 20585

OCT - 4 2000

Mr. Thomas Dwyer
5007 Clarevalley Drive
Cincinnati, OH 45238

Re: OHA Case No. VBB-0005

Dear Mr. Dwyer:

This letter concerns the complaint of reprisal that you submitted to the Department of Energy under 10 C.F.R. Part 708. You have filed a petition for Secretarial review of the appeal decision issued to you on July 24, 2000.

The Part 708 regulations applicable to the petition provide that the Secretary will reverse or revise an appeal decision by the Director of the Office of Hearings and Appeals only under extraordinary circumstances. 10 C.F.R. § 708.35(d). After fully evaluating all the issues that you raised in your filing dated September 8, 2000, I have determined that you have not shown that extraordinary circumstances warranting Secretarial review exist in this case. No modification to the appeal decision by the OHA Director is therefore warranted. Accordingly, the petition for Secretarial review is hereby dismissed, and the appeal decision I issued to you on July 24, 2000, constitutes the final agency decision on your complaint.

If you have any questions regarding this letter, please call Virginia Lipton at telephone number (202) 426-1436.

Sincerely,

George B. Breznay
Director
Office of Hearings and Appeals

cc: James A. Mills
Denlinger, Rosenthal & Greenberg
2310 Star Bank Center
425 Walnut Street
Cincinnati, OH 45202

Department of Energy
Washington, DC 20585

JUL 19 2001

Mr. David D. Powell, Jr.
Holland and Hart
P.O. Box 8749
Denver, CO 80201-8749

Re: OHA Case No. VBB-0010

Dear Mr. Powell:

This letter concerns the complaint of reprisal submitted by Dr. Jagdish Laul to the Department of Energy under 10 C.F.R. Part 708. You have filed a petition for Secretarial review of the appeal decision issued in that case on March 9, 2001. You submitted a Statement of Issues to be reviewed (Statement) on June 11, 2001. On July 10, 2001, Ms. Alene Anderson submitted a Response to your Statement on behalf of Dr. Laul.

The Part 708 regulations applicable to the petition provide that the Secretary will reverse or revise an appeal decision by the Director of the Office of Hearings and Appeals only under extraordinary circumstances. 10 C.F.R. § 708.35(d). As discussed below, you have not shown that extraordinary circumstances warranting Secretarial review exist in this case.

Dr. Laul filed a Complaint alleging that his employer, Excalibur Associates, Inc. (Excalibur), a subcontractor of Kaiser-Hill Company, the DOE's M&O contractor at its Rocky Flats Field Office, retaliated against him for participating in an activity protected under Part 708. The retaliations took the form of four adverse personnel actions: (i) reducing Dr. Laul's authority, (ii) reducing the work available for Dr. Laul by entering into a subcontract with another firm, (iii) rating Dr. Laul the lowest of all 12 Excalibur employees, and (iv) discharging him. In a September 1, 2000 Initial Agency Decision (IAD), an Office of Hearings and Appeals Hearing Officer determined that Dr. Laul had established that his Part 708 protected activity was a contributing factor to the Excalibur adverse personnel actions, and that Excalibur did not show by clear and convincing evidence that it would have taken these same adverse actions in the absence of the protected activity.

In determining that the protected activity was a contributing factor to the Excalibur retaliations, the IAD found that it was appropriate to impute constructive knowledge of the protected

activity to Excalibur, even though Excalibur management had no direct knowledge of that activity. That determination was based on the following findings. First, the protected activity was directly known to Kaiser-Hill. In this regard, the Hearing Officer determined that a number of Kaiser-Hill management employees were aware of Dr. Laul's protected activity and made adverse comments about the activity and about Dr. Laul, himself. These "directly knowledgeable" employees worked closely with other Kaiser-Hill managers who were members of the Hazardous Assessment Committee (HAC Managers). Further, one HAC manager was a subordinate of a Kaiser-Hill employee who made specific negative comments about Dr. Laul's whistleblower activities. The HAC manager group was responsible for providing Excalibur with the negative ratings that led to the adverse personnel actions and ultimately to Dr. Laul's discharge.

Thus, the IAD found a two-part linkage from Kaiser-Hill knowledgeable employees through Kaiser-Hill HAC managers to Excalibur managers, in determining that Excalibur improperly terminated Dr. Laul. The linkage involved evidence that Kaiser-Hill knowledgeable employees held negative views of Dr. Laul's protected activity, and evidence that these employees had close contact with other Kaiser-Hill employees, who in turn gave negative reviews of Dr. Laul to Excalibur. The IAD found by a preponderance of evidence that Kaiser-Hill knowledgeable employees provided tainted, negative views of Dr. Laul to other Kaiser Hill employees who dealt directly with Excalibur. I affirmed the IAD in the appeal decision issued on March 9, 2001. Jagdish C. Laul, 28 DOE ¶ 87,011 (2001).

In your Statement of Issues you object to the finding of contributing factor and imputed knowledge through this two-part linkage from the directly knowledgeable Kaiser-Hill management employees via the Kaiser-Hill HAC managers to Excalibur management. In this regard, you contend that the Hearing Officer did not have a sufficient basis for concluding that the knowledgeable Kaiser-Hill employees offered negative opinions about Dr. Laul to Kaiser-Hill HAC managers, and that these negative reviews were then communicated to Excalibur employees.

In essence, then, the objections you raise relate to the credibility and weight that the Hearing Officer gave to the witnesses' testimony and to other evidence regarding Kaiser-Hill employees' negative assessments of Dr. Laul. These are matters clearly within the province of the Hearing Officer, who presided at the hearing and heard all the testimony. You have set forth no

reasonable basis for overturning any of those findings. The objections you raise indicate a simple disagreement with the Hearing Officer's conclusions regarding the credibility of witnesses and the weight assigned to their testimony.

In fact, the record clearly establishes that the Hearing Officer had a substantial basis for his findings. The Hearing Officer specifically referred to the remarks and conduct that he found demonstrated that Excalibur managers were ultimately tainted by negative opinions about Dr. Laul, which were initially communicated by Kaiser-Hill knowledgeable employees. E.g., Jagdish C. Laul, 28 DOE ¶ 87,006 at 89,051-53 (2000). In sum, your objection regarding the weight assigned to the evidence in this case suggests no extraordinary circumstances that merit review by the Secretary.

The other objection you raise concerns a purported unfairness in holding Excalibur fully responsible for providing a monetary remedy to Dr. Laul. In this regard, you state that Excalibur was not aware of Dr. Laul's protected activity, and that it is unfair to hold the firm wholly liable under these circumstances. You further note that Kaiser-Hill has never been a party to this proceeding, thereby implying that Kaiser-Hill should be held responsible for the remedy here. These assertions do not rise to the level of extraordinary circumstances warranting review by the Secretary. The Excalibur firm did not accept the offer by the Hearing Officer to join Kaiser-Hill in this proceeding. March 15, 2000 Letter from Thomas L. Wieker, Hearing Officer, to David Zwisler, Attorney for Excalibur. While Excalibur objects to its sole liability for the remedy here, this result came about through its own decision not to join Kaiser-Hill. Insofar as Excalibur was the employer that retaliated against the employee based upon his protected activity, as found by the Hearing Officer, Excalibur is properly held liable. Adopting the position Excalibur advocates would leave the employee without a remedy.

Accordingly, the petition for Secretarial review is hereby dismissed, and the appeal decision issued to you on March 9, 2001, constitutes the final agency decision on your complaint.

If you have any questions regarding this letter, please call Virginia Lipton at telephone number (202) 287-1436.

Sincerely,

George B. Breznay
Director
Office of Hearings and Appeals

cc: Ms. Alene Anderson
Project on Liberty and the Workplace
6814 Greenwood Ave. N.
Seattle, WA 98103

Department of Energy
Washington, DC 20585

OCT 17 2000

Mr. Eugene J. Dreger
P.O. Box 27050
Las Vegas, NV 89126-1050

Re: OHA Case No. VBB-0021

Dear Mr. Dreger:

This letter concerns the complaint of reprisal that you submitted to the Department of Energy under 10 C.F.R. Part 708. You have filed a petition for Secretarial review of the appeal decision issued to you by the Office of Hearings and Appeals (OHA) on June 27, 2000.

The Part 708 regulations applicable to the petition provide that the Secretary will reverse or revise the OHA appeal decision only under extraordinary circumstances. 10 C.F.R. § 708.35(d). After fully evaluating all the issues that you raised in your filings in this case, I have determined that you have not shown that extraordinary circumstances warranting Secretarial review exist in this case. No modification to the OHA appeal decision is therefore warranted. Accordingly, the petition for Secretarial review is hereby dismissed, and the appeal decision issued to you on June 27, 2000, constitutes the final agency decision on your complaint.

If you have any questions regarding this letter, please call Virginia Lipton at telephone number (202) 426-1436.

Sincerely,

Thomas L. Wieker
Deputy Director
Office of Hearings and Appeals

cc: Mr. Frank Sullivan
Deputy Managing Counsel
Bechtel Nevada, Inc.
P.O. Box 98521
Las Vegas, NV 89193-8521.

Department of Energy
Washington, DC 20585

SEP 29 2000

Gregory Kellam Scott, Esq.
Vice President and General Counsel
Kaiser-Hill Company, L.L.C.
Rocky Flats Environmental
Technology Site
10808 Hwy. 93, Unit B
Golden, CO 80403-8200

Re: Case No. VBB-0033

Dear Mr. Scott:

This letter concerns the complaint of reprisal that Ms. Barbara L. Nabb submitted to the Department of Energy under 10 C.F.R. Part 708. You have filed a petition for Secretarial review of the appeal decision issued to you on April 5, 2000.

The Part 708 regulations applicable to the petition provide that the Secretary will reverse or revise an appeal decision by the Director of the Office of Hearings and Appeals only under extraordinary circumstances. 10 C.F.R. § 708.35(d). After fully evaluating all the issues that you raised in your filings dated on July 3, 2000 and August 24, 2000, I have determined that you have not shown that extraordinary circumstances warranting Secretarial review exist in this case. No modification to the appeal decision by the OHA Director is therefore warranted. Accordingly, the petition for Secretarial review is hereby dismissed, and the appeal decision I issued to you on April 5, 2000, constitutes the final agency decision on Ms. Nabb's complaint.

If you have any questions regarding this letter, please call Thomas O. Mann at telephone number (202) 426-1449.

Sincerely,

George B. Breznay
Director
Office of Hearings and Appeals

cc: Ms. Barbara L. Nabb
9231 Travis Street
Thornton, CO 80229

Department of Energy
Washington, DC 20585

AUG 27 2001

Mr. Gary Roybal
23 A Camino Torcido
Santa Fe, NM 87505

Re: OHA Case No. VBB-0037

Dear Mr. Roybal:

This letter concerns the complaint of retaliation that you submitted to the Department of Energy under 10 C.F.R. Part 708. You have filed a petition for Secretarial review of the appeal decision issued to you on June 14, 2001. That decision dismissed your complaint of retaliation on the grounds that your complaint has been substantially resolved, and you have already received a remedy that is at least equivalent to what you could have received under the Part 708 regulations. 10 C.F.R. § 708.17(c)(5) and (6).

The Part 708 regulations applicable to your petition provide that the Secretary will reverse or revise an appeal decision by the Director of the Office of Hearings and Appeals only under extraordinary circumstances. 10 C.F.R. § 708.19(d). After fully evaluating all the issues that you raised in your filing dated July 12, 2001, I have determined that you have not shown that extraordinary circumstances warranting Secretarial review exist in this case. No modification to the appeal decision is therefore warranted. Accordingly, the petition for Secretarial review is hereby dismissed, and the appeal decision I issued to you on June 14, 2001, constitutes the final agency decision on your complaint.

If you have any questions regarding this letter, please call Thomas Wieker at telephone number (202) 287-1543.

Sincerely,

George B. Breznay
Director
Office of Hearings and Appeals

cc: Robert P. Tinnin, Jr.
Hinkle, Hensley, Shanor & Martin, L.L.P.
500 Marquette, N.W. Suite 800
Albuquerque, N.M. 87102

Department of Energy
Washington, DC 20585

AUG 21 2000

Ms. Ann Johndro-Collins
1509 Amon Drive
Richland, WA 99352

Re: OHA Case No. VBB-0038

Dear Ms. Johndro-Collins:

This letter concerns the complaint of reprisal that you submitted to the Department of Energy under 10 C.F.R. Part 708. You have filed a petition for Secretarial review of the appeal decision issued to you on March 28, 2000.

The Part 708 regulations applicable to the petition provide that the Secretary will reverse or revise an appeal decision by the Director of the Office of Hearings and Appeals only under extraordinary circumstances. 10 C.F.R. § 708.35(d). After fully evaluating all the issues that you raised in your filing dated May 16, 2000, I have determined that you have not shown that extraordinary circumstances warranting Secretarial review exist in this case. No modification to the appeal decision by the OHA Director is therefore warranted. Accordingly, the petition for Secretarial review is hereby dismissed, and the appeal decision I issued to you on March 28, 2000, constitutes the final agency decision on your complaint.

If you have any questions regarding this letter, please call Virginia Lipton at telephone number (202) 426-1436.

Sincerely,

George B. Breznay
Director
Office of Hearings and Appeals

cc: Chris W. Jensen
Fluor Daniel Hanford
P.O. Box 1000 MSIN:B3-64
Richland, WA 99352-1000

Department of Energy
Washington, DC 20585

AUG 11 2000

Mr. John L. Gretencord
917 Pine Street
Ottawa, IL 61350

Re: OHA Case No. VBB-0041

Dear Mr. Gretencord:

This letter concerns the complaint of reprisal that you submitted to the Department of Energy under 10 C.F.R. Part 708. You have filed a petition for Secretarial review of the appeal decision issued to you on March 13, 2000.

The Part 708 regulations applicable to the petition provide that the Secretary will reverse or revise an appeal decision by the Director of the Office of Hearings and Appeals only under extraordinary circumstances. 10 C.F.R. § 708.35(d). After fully evaluating all the issues that you raised in your filing dated April 27, 2000, I have determined that you have not shown that extraordinary circumstances warranting Secretarial review exist in this case. No modification to the appeal decision by the OHA Director is therefore warranted. Accordingly, the petition for Secretarial review is hereby dismissed, and the appeal decision I issued to you on March 13, 2000, constitutes the final agency decision on your complaint.

If you have any questions regarding this letter, please call Virginia Lipton at telephone number (202) 426-1436.

Sincerely,

George B. Breznay
Director
Office of Hearings and Appeals

cc: James Grasso, Esq.
Phillips, Lytle, Hitchcock, Blaine & Huber, LLP
3400 One HSBC Center
Buffalo, NY 14203-2287

Department of Energy
Washington, DC 20585

DEC 12 2000

Dennis E. Jontz, Esq.
Eastham Johnson Monnheimer & Jontz
PO Box 1276
Albuquerque, NM 87103-1276

Patricia Matthews, Esq.
460 St. Michael's, Suite 401
PO Box 6724
Sante Fe, NM 87502-6724

Re: Case No. VBB-0047

Dear Mr. Jontz and Ms. Matthews:

This letter concerns Edward Seawalt's Part 708 complaint against Contract Associates, Inc. Pursuant to the parties' request, the complaint was dismissed on December 4, 2000. Accordingly, the related petition for Secretarial review (Case No. VBB-0047) is hereby dismissed.

If you have any questions regarding this letter, please contact Janet N. Freimuth at (202) 287-1439.

Sincerely,

Thomas L. Wieker
Deputy Director
Office of Hearings and Appeals

Department of Energy
Washington, DC 20585

NOV 26 2003

Blake G. Hall, Esq.
Anderson, Nelson, Hall, Smith, P.A.
490 Memorial Drive
Post Office Box 51630
Idaho Falls, ID 83405-1630

Mr. Bernard F. Cowan
4380 East 300 North
Rigby, ID 83442

Re: Case No. VBB-0061

Dear Mr. Hall and Mr. Cowan:

This letter concerns the Complaint of Retaliation filed with the Department of Energy (DOE) by Mr. Cowan (Complainant) under 10 C.F.R. Part 708. Mr. Cowan filed a Petition for Secretarial Review of a February 27, 2003 appeal decision issued by the Director of the Office of Hearings and Appeals (OHA) in connection with this proceeding. Mr. Hall also filed a Petition for Secretarial Review of the February 27 Decision. That Petition was filed on behalf of Argonne National Laboratory-West (ANL). Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the Director of OHA only in extraordinary circumstances. 10 C.F.R. § 708.35(d). As discussed below, neither Petitioner has met the regulatory standard.

The ANL Petition for Review raises four matters. First, it objects to a finding that Complainant's whistleblowing activity was a contributing factor to ANL's three-day suspension of the Complainant ten months later. Second, ANL argues that the Complainant did not make a disclosure that qualifies for protection under Part 708. Third, ANL contests a conclusion by an OHA Hearing Officer that ANL did not present clear and convincing evidence that, in the absence of the Complainant's Part 708 protected activity, ANL would have suspended the Complainant for improper use of ANL E-mail. Finally, ANL contends that my conclusion in the February 27 determination that the Complainant's reinstatement to his former position was not a workable remedy was inconsistent with my finding that the transfer of the Complainant away from his former position was retaliatory.

In his Petition for Review, the Complainant takes issue with my finding that his own actions contributed to the negative attitude of the ANL managers who did not want him back in his former position. The Complainant also objects to my finding that he refused to cooperate with those investigating his allegations of criminal sabotage.

None of these arguments establishes a basis for Secretarial Review. ANL's first two arguments contest the application of legal principles well-established in this and other OHA proceedings and in the federal courts. ANL's other arguments, as well as the issues the Complainant raises, are wholly fact-bound objections that merely seek to reargue determinations with which each party disagrees. The arguments raised present nothing of an extraordinary nature.

The Deputy Secretary of Energy has reviewed the ANL and Cowan Petitions and concurs with the above determinations. He has authorized me to send you this letter dismissing the Petitions for Review for failure to demonstrate extraordinary circumstances.

If you have questions concerning this matter, please call Thomas L. Wieker, Deputy Director, OHA, at (202) 287-1543.

Sincerely,

George B. Breznay
Director
Office of Hearings and Appeals

Department of Energy
Washington, DC 20585

MAR 15 2002

Mr. Ronald E. Timm
President
RETA Security
P.O. Box 369
Lemont, IL 60439

Re: OHA Case No. VBB-0077

Dear Mr. Timm:

This letter concerns the complaint of retaliation that you submitted to the Department of Energy (DOE) under 10 C.F.R. Part 708. Your complaint involves alleged retaliation against your firm by the DOE for your disclosures involving safety concerns. On September 10, 2001, the Employee Concerns Manager at the DOE Albuquerque Operations Office dismissed the complaint for lack of jurisdiction. In an October 25, 2001 appeal decision, the Office of Hearings and Appeals (OHA) sustained that determination. The basis for that determination was that the Part 708 regulations apply to retaliation by DOE contractors, but they do not cover contractor-employee allegations of retaliation only by the DOE.

On November 23, 2001, you filed a Petition for Review by the Secretary of Energy of the October 25 appeal decision. The Part 708 regulations applicable to the petition provide that the Secretary will reverse or revise the OHA appeal decision only under extraordinary circumstances. 10 C.F.R. § 708.19(d). After fully evaluating all the issues raised in the filings in this case, I have determined that no extraordinary circumstances warranting Secretarial review exist in this case. No modification to the OHA appeal decision is therefore warranted. Accordingly, the petition for Secretarial review is hereby dismissed, and the appeal decision issued to you on October 25, 2001, constitutes the final agency decision on your complaint.

If you have any questions regarding this letter, please call Thomas Wieker at telephone number (202) 287-1543.

Sincerely,

George B. Breznay
Director
Office of Hearings and Appeals

Case No. VBD-0059

June 8, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Name of Case: Janet L. Westbrook

Date of Filing: June 5, 2001

Case Number: VBD-0059

This determination will consider a Motion for Discovery filed with the Office of Hearings and Appeals (OHA) by UT—Battelle, LLC, the company that manages the Oak Ridge National Laboratory. The Motion relates to a hearing soon to be held on a complaint that Janet L. Westbrook filed under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). For the reasons stated below, the motion is denied.

Ms. Westbrook worked at the Oak Ridge National Laboratory as a radiological engineer. She claims that she has persistently disclosed various safety-related concerns and as a result experienced hostility and negative treatment that ultimately resulted in her discharge on December 1, 2000. On March 20, 2001, a DOE investigator issued a Report of Investigation on Ms. Westbrook's retaliation complaint. The report found that Ms. Westbrook made protected disclosures in June 2000 and that those disclosures were a contributing factor to her discharge because of the temporal proximity between the disclosures and the decision to discharge Ms. Westbrook, which the investigator found occurred in August 2000, just two months after the disclosures. The investigator also concluded that at the time she had not uncovered sufficient evidence to conclude that UT-Battelle would have discharged Ms. Westbrook even in the absence of the protected disclosures.

In the present Motion, UT-Battelle requests that I order DOE's Oak Ridge Operations Office to disclose documents that it believes deal with concerns that Ms. Westbrook filed with the Operations Office. UT-Battelle states that it is aware that DOE's Oak Ridge Operations has hired an outside firm to investigate and report on the safety concerns underlying Ms. Westbrook's complaint. UT-Battelle states that it has requested from the Oak Ridge Operations Office all documents relating to that investigation, including a "separate report" on her employee concern, and a contract between the Operations Office and a contractor to investigate the employee concern. However, the Operations Office has denied UT- Battelle's request for the documents. UT-Battelle now seeks those documents through discovery in this proceeding and justifies its request by maintaining that the retaliation complaint that Ms. Westbrook filed should be addressed as an employee concern and that "due process considerations mandate the production of these agency documents that directly relate to the instant case."

The Part 708 regulations state that the "Hearing Officer may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint." 10 C.F.R. § 708.28(b)(1). UT-Battelle has made no showing that any of the documents it seeks contains information relevant to a Part 708 proceeding. In deciding whether an employee has made a disclosure protected by Part 708, one need conclude only that the employee disclosed information that he or she **reasonably believed** reveals a

substantial violation of law, a substantial danger to health or safety, or waste, fraud, or abuse. 10 C.F.R. § 708.5. After interviewing a number of supervisory personnel at UT-Battelle, the DOE investigator in this matter concluded that it was reasonable for Ms. Westbrook to have believed that some of the disclosures she made in June 2000 revealed substantial rules violations or danger. Whether the underlying actions **in fact** led to a dangerous situation or violated rules is not at issue here in this case. UT-Battelle has made no argument that all of the concerns that Ms. Westbrook raised in June 2000 were unreasonable and therefore not protected under the Contractor Employee Protection Program. Thus, the requested discovery would not lead to evidence that is relevant to Ms. Westbrook's retaliation complaint under Part 708. Nor is the requested discovery likely to assist UT-Battelle in preparing its defense to the complaint. The Motion for Discovery should accordingly be denied.

It Is Therefore Ordered That:

(1) The Motion for Discovery filed by UT-Battelle, Case No. VBD-0059, is hereby denied.

(2) This is an interlocutory order of the Department of Energy. This order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: June 8, 2001

Case No. VBD-0063

August 14, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Name of Petitioner:Bruce R. Field

Date of Filing: August 2, 2001

Case Number: VBD-0063

This determination will consider a Motion for Discovery filed with the Office of Hearings and Appeals (OHA) by Bruce R. Field (Field). This Motion, dated August 2, 2001, concerns the hearing requested by Field under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). Field requested this hearing on April 24, 2001 (Case No. VBH-0063) in connection with the Part 708 complaint he filed against the management and operating contractor, Midwest Research Institute (MRI) for the National Renewable Energy Laboratory (NREL).(1)

I. Background

Field's complaint arises from his employment at NREL as a Project Manager. During the period 1994 to April 2000, Mr. Field had a strained relationship with his direct supervisor Michael Glaser (Glaser), a Group Manager in Site Operations. In early April 2000, the two differed over a choice of contractor on pending construction contracts. This dispute led to Glaser allegedly sending a derogatory item of electronic mail to one of Field's engineers, Ray Jukkola (Jukkola), and later berating Jukkola in Jukkola's office. Glaser then personally solicited another contractor to perform the contract.

On April 21, 2000, Field and Glaser argued over the choice of a contractor for another project. This dispute resulted in an exchange of electronic mail which culminated in Glaser allegedly questioning Field's professional competence in selecting contractors. Field then sent an electronic mail to Glaser, the NREL Legal Office and the acting Human Resources Director charging that Glaser's remarks concerning Field's integrity and ethics were slanderous. Later in the day, when Field entered the NREL building where Glaser works, Field alleges that Glaser followed and confronted him in a manner Field believed was physically threatening. Field then obtained a Temporary Restraining Order (TRO) against Glaser from a County Court. On April 24, 2000, Field sent a memorandum to the NREL Legal Office detailing the confrontation with Glaser and explaining that Field believed that he had to get the TRO because Field's prior complaints to NREL had been unavailing.

In May 2000, Field sent three items of electronic mail to NREL officials alleging waste, fraud, and abuse on the part of Glaser and his supervisor, John Shaffer. NREL then turned over Field's messages and its files to the DOE Office of the Inspector General (IG) for investigation. IG took no action regarding Field's complaints. NREL also retained an outside investigator to examine the circumstances leading to the conflict between Field and Glaser. The investigator concluded that he found no basis for Field's claim that Glaser presented a physical threat to Field. The investigator also concluded that the working relationship between Field and Glaser was beyond retrieval. Subsequently, in a June 27, 2000 hearing, the County

Court denied Field's request for a Permanent Restraining Order (PRO), concluding that there was no imminent threat of serious injury, harassment, or molestation.

In July 2000, NREL decided to remove Field from his position in Site Operations and to move him to a temporary 60-day position. Afterwards, Field was then moved to another 60-day position. In November 2000, Field was then offered a permanent position in the Science and Technology Directorate at NREL.

Field then filed the Part 708 complaint which underlies this Motion. After conducting an investigation, the Department of Energy's Office of Hearings and Appeals issued a Report of Investigation (Report) on April 24, 2001. The OHA Investigator found that Field did make several protected disclosures and that the disclosures were a contributing factor in Field's transfer out of NREL Site Operations. However, the OHA Investigator concluded, based upon the facts available to him, that NREL would have transferred Field notwithstanding his disclosures.

In preparation for the hearing, Field has propounded to NREL a number of Interrogatories and Request for the Production of Documents. NREL responded. After receiving that response, Field has filed a request with me (which I deemed a Motion for Discovery) asking that I order NREL to provide fuller disclosure of information and documents concerning certain discovery items. These items are detailed below.

II. Analysis

The issuance of discovery orders in proceedings under Part 708 is within the discretion of the Hearing Officer. 10 C.F.R. § 708.28(b)(1). The regulations lay out the types of discovery that can be ordered. See 10 C.F.R. § 708.28(b). The regulations grant the Hearing Officer authority to arrange for the issuance of subpoenas for witnesses to attend the hearing on behalf of either party, or for the production of specific documents or other physical evidence, provided a showing is made that the requested discovery is "designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint." 10 C.F.R. § 708.28(b)(1).

Arrangements for pre-hearing discovery are usually worked out between the parties, without the need of a formal discovery order from the OHA Hearing Officer. However, the OHA is prepared to issue a discovery order if necessary to ensure compliance with any reasonable discovery request. Since there are material disputes regarding Field's discovery request, I will consider those disputes in this Decision. In my discussion below, I will address Field's complaints concerning NREL's responses to various discovery items.

A. Interrogatory No. 1 and Requests for Documents Nos. 2, 3, 4 and 10

Interrogatory No. 1 requests that NREL submit information regarding individuals who have filed complaints against Shaffer and Glaser. Requests for Documents Nos. 2 and 3 request copies of Glaser's and Shaffer's personnel files, respectively. Request for Documents No. 4 asks for copies of all documents relating to disciplinary actions taken against Glaser and Shaffer. Request for Document No. 10 requests copies of all documents relating to any and all complaints asserted by any employees of NREL against Shaffer and Glaser.

In this case, to support his complaint, Field must establish by a preponderance of the evidence that he made a protected disclosure(s) (concerning fraud, gross mismanagement, gross waste of funds or abuse of authority) and that his disclosures were a contributing factor in NREL's alleged retaliation against him. See 10 C.F.R. § 708.5; 10 C.F.R. § 708.29. If Field meets this burden, the NREL must prove by clear and convincing evidence that it would have transferred Field, his April and May 2000 disclosures notwithstanding. 10 C.F.R. § 708.29. According to the Report of Investigation, NREL chose to transfer Field instead of moving the management team of Shaffer and Glaser.

Evidence concerning complaints and disciplinary actions taken against Shaffer and Glaser might be relevant in considering whether it was reasonable for NREL to retain Shaffer and Glaser. It thus would affect the issue of whether NREL would have transferred Field in the absence of his disclosures. These are both relevant inquires. Consequently, I will grant, in part, Field's request with regard to Interrogatory No. 1 and Requests for Documents Nos. 2, 3, 4 and 10. NREL shall provide information or documents related to complaints NREL has received, or disciplinary actions NREL has taken, against Shaffer and Glaser. See 10 C.F.R. § 708.28(b)(1).

B. Interrogatories Nos. 4, 5, 6 and 7

Interrogatories Nos. 4, 5, and 6 request information concerning various complaints Field made against Shaffer or Glaser in 1994, 1996 and 2000. Specifically, Field requests that NREL identify all actions taken in response to those complaints along with the names and other related information concerning all NREL employees acting on its behalf with respect to those complaints. As indicated in the Report of Investigation, Field alleged that he had submitted complaints in 1994 and 1996 concerning incidents where Glaser lost his temper with Field, yelled profanities, and questioned Field's professional competence. Report of Investigation at 3. In January 2000, Shaffer reportedly lost his temper with Field and ordered him out of his office. Id. For the reasons articulated above in Section A, NREL should comply, to the extent it has information, with Interrogatories Nos. 4, 5, and 6.

Interrogatory No. 7 requests that NREL identify all actions it undertook in response to Field's complaint concerning the April 21, 2000 incident, along with information concerning the NREL officials who undertook the actions. In my review of the relevant document, NREL appears to have responded to Interrogatory No. 7.

C. Interrogatory No. 9

Interrogatory No. 9 requests that if NREL contends that any employment decision concerning Mr. Field was in any way related to Field's performance, NREL should identify each such decision along with the perceived problem in Field's performance. This request is overbroad since not all employment decisions regarding Field would be relevant for purposes of his present Part 708 complaint. Only NREL employment decisions concerning Field made after his alleged disclosures would be relevant. In its response the Discovery Motion, NREL has stated that Field's transfer to the two temporary assignments and to his current permanent position (the retaliatory actions Field alleges NREL made against him in response to his April and May 2000 disclosures) were not motivated by performance problems. I deem this response to be adequate with regard to Interrogatory No. 9.

D. Interrogatories Nos. 10 and 11 and Requests for Production Nos. 8 and 9

These discovery items relate to salary and compensation information concerning various specific job positions at NREL. I have decided to bifurcate the hearing in this matter. I will first conduct a hearing on the merits now scheduled for August 29 and 30, 2001. If Field prevails on the merits of his Part 708 complaint, I will allow the parties to conduct discovery and make submission concerning damages to Field. Consequently, I will defer ruling regarding these discovery items.

E. Interrogatory No. 15

Interrogatory No. 15 requests that NREL identify all communications relating to any leave of absence taken by Glaser and "his impending departure from NREL." Field asserts this information is relevant given NREL's claim in the Part 708 investigation that removing Glaser would be potentially disruptive and whether Glaser provided NREL information supporting Field's position that Glaser was volatile and threatening. Nevertheless, I do not find that this Interrogatory would produce relevant evidence. The Report of Investigation states that NREL managers believed that the only alternative to removing Field

was to remove the Site Operation management team of Shaffer and Glaser. The fact that Glaser may have left subsequent to the decision to transfer Field does not provide relevant evidence concerning the NREL decision not to remove Shaffer and Glaser at the time Field made his complaint. Field's assertion that such leave of absence communications might contain admissions from Glaser is too speculative. Consequently, NREL need not respond to Interrogatory No. 15.

F. Request for Production No. 11

Request for Production No. 11 asks for information relating to communications between the parties concerning Field's Part 708 complaint. In its response to Field's Motion for Discovery, NREL stated that Field's Motion for Discovery has clarified the fact that Field seeks copies of communications between the parties pertaining to Field's Part 708 complaint. NREL has agreed to produce these documents for inspection and photocopying. Consequently, I will postpone further consideration of this issue.

G. Request for Production No. 14

Request for Production No. 14 asks for documents relating to any investigation made by NREL or its agents or representatives in response to complaints asserted by Mr. Field and other NREL employees against Glaser or Shaffer. For the reasons stated in Section A, NREL should comply with Request for Production No. 14.

It Is Therefore Ordered That:

(1) The Motion for Discovery filed by Bruce R. Field, Case No. VBD-0063, is hereby granted in part as described in the foregoing decision.

(2) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Richard A. Cronin, Jr.

Hearing Officer

Office of Hearings and Appeals

Date: August 14, 2001

(1)In this Decision, I will refer to MRI as NREL.

Case No. VBH-0002

November 2, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner:Don W. Beckwith

Date of Filing:February 2, 1998

Case Number: VBH-0002

This Initial Agency Decision concerns a whistleblower complaint filed by Don W. Beckwith (the Complainant) against his former employer, Westinghouse Savannah River Company (WSRC), under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. At all times relevant to this proceeding, WSRC was the management and operating contractor at the DOE's Savannah River Site in Aiken, South Carolina. The Complainant alleges that in December 1997, he disclosed to WSRC that a WSRC management official had engaged in improper conduct. According to the Complainant, WSRC terminated him in January 1998 as a consequence of his disclosure. As discussed below, I have determined that the Complainant is entitled to relief because WSRC has not sustained its evidentiary burden in this case.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. (1) The regulations provide, in pertinent part, that

a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a) (1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an OHA investigator, an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

On February 2, 1998, the Complainant filed a Whistleblower Complaint against WSRC pursuant to 10 C.F.R. Part 708. On April 16, 1999, the Office of Inspections of the DOE's Office of Inspector General transferred a number of pending complaints, including the subject complaint, to OHA. On April 26, 1999, the OHA Director appointed an investigator to examine the issues raised in the Complainant's Part 708 Complaint. The investigator promptly conducted an investigation, and issued a Report of Investigation on June 7, 1999. On that same day, the OHA Director appointed me the hearing officer in this case.

On August 24, 1999, I convened a hearing on the Complainant's Part 708 Complaint in Aiken, South Carolina. I received the hearing transcript on September 16, 1999 at which time I closed the record in the case.

II. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

In the case at hand, WSRC stipulated at both the investigatory and hearing stages of this proceeding that (1) the Complainant had made a protected disclosure as defined in 10 C.F.R. § 708.5, and (2) the Complainant's protected disclosure can be considered a contributing factor to WSRC's decision to terminate the Complainant because of the temporal proximity that existed between the protected disclosure and the Complainant's termination. In view of WSRC's stipulations, the Complainant is deemed to have met his regulatory burden in this case, thereby shifting the burden to WSRC.

B. The Contractor's Burden

The regulations require WSRC to prove by "clear and convincing" evidence that the company would have terminated the Complainant even if he had not disclosed information about alleged misconduct by a WSRC management official. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n.3. In evaluating whether WSRC has met its burden, I will consider the strength of WSRC's evidence in support of its decision to terminate the Complainant; the existence and strength of any motive to retaliate on the part of the officials who were involved in the decision to terminate the Complainant's employ from WSRC; and any evidence that WSRC takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

III. Analysis

It is WSRC's position that even had the Complainant not made the protected disclosure at issue in this case, it would have nonetheless terminated him for dishonest acts, including his violation of WSRC's disability policy. WSRC maintains that it made the decision to terminate the Complainant because the Complainant was seen at a construction site working while drawing 100% disability pay from WSRC, a

fact that led WSRC to conclude that the Complainant could have been working at the Savannah River Site. Transcript of Hearing (Tr.) at 19-21.

WSRC also argues that under applicable state law no liability can be found against the company for terminating the Complainant. Id. at 20. WSRC asserts that since the State of South Carolina is an employment-at-will state and the Complainant had no contract with WSRC, WSRC had the right to terminate the Complainant's employment for any reason, as long as it was not a discriminatory reason. Id. According to WSRC, its argument is supported by a recent South Carolina Supreme Court decision, Prescott v. Farmers Telephone Cooperative Inc., 516 S.E.2d 923 (S.C. 1999)

Before addressing WSRC's legal argument and evaluating the evidence it has tendered, I will first set forth the facts in this case, including the substance of the protected disclosure and the events leading up to the Complainant's termination.

A. Factual Overview

WSRC or its predecessor employed the Complainant at the DOE's Savannah River Site from 1988 until 1998. Tr. at 277. During all or a part of his tenure at WSRC, the Complainant also owned and operated a residential contractor business. Ex. 17.

In 1994, the Complainant sustained a job-related back injury while working as a mechanic at WSRC's Separations Maintenance Department. Id. To accommodate the Complainant's back injury and for safety reasons, WSRC assigned the Complainant to WSRC's Training Department. Id.

In the summer of 1995, the Complainant alleges that a WSRC manager offered him a transfer to WSRC's Tritium Maintenance Organization as a shift maintenance mechanic, a position that provided the Complainant with greater earning potential than he had in WSRC's Training Department. Id. The Complainant alleges that the offer also included a subsequent promotion to the position of maintenance planner. Id. In exchange for these job enhancements, the Complainant claims the WSRC manager asked the Complainant to assist with a construction project at the WSRC manager's home. Id. The Complainant reports that he did indeed assist in the construction project by providing free labor, arranging for his subcontractors to install the roof, vinyl, and sheetrock on the project, and allowing the WSRC manager to use his contractor's discounts. Id. The Complainant also alleges that the WSRC manager provided paid leave to his third-line supervisor and other WSRC personnel in exchange for their assistance on the construction project. Id.

According to the Complainant, the WSRC manager arranged for his transfer to a maintenance mechanic's position in WSRC's Tritium Maintenance Organization in August 1996. Id. Due to impending layoffs at WSRC at the time, claims the Complainant, the maintenance planner positions were frozen. Id. The Complainant contends that the WSRC manager continued to ask him for favors, nevertheless, always assuring the Complainant he was working on the maintenance planner position for him. Id.

In the summer of 1997, some maintenance planner positions became available, and the Complainant was selected to interview for one of these positions. Id. According to the Complainant, he was absent from work due to recurring back problems and he missed his scheduled interview. (2) Id. The Complainant contends he discussed the matter with the WSRC manager who allegedly assured him he would be interviewed for the maintenance planner position at a later date. Id. When the Complainant returned to work in August 1997, he discovered that the maintenance planner positions were already filled. Id.

Shortly thereafter, the Complainant approached WSRC's Human Resources Representative (HR Representative) and complained generally about misconduct on the part of a WSRC manager in the Tritium Maintenance Organization. Id. To substantiate his allegations, the Complainant provided the HR Representative with a redacted copy of a hand-written note from the WSRC manager to the Complainant. Id. The Complainant had removed the WSRC manager's signature from the note prior to supplying it to

the HR Representative and did not otherwise reveal the WSRC manager's name at this point. Id.

On August 20, 1997, WSRC placed the Complainant on Short-Term Disability with full pay as he awaited back surgery. Ex. 36; Tr. at 308. The Complainant underwent back surgery in September 1997, and returned to work in early December 1997. Id.; Ex. 2h.

Sometime around December 12, 1997, the Complainant met with his third-line supervisor and a medical doctor from WSRC (WSRC Medical Doctor). According to the Complainant's testimony, the WSRC Medical Doctor told him at the meeting that he would never perform the duties of maintenance mechanic at WSRC again because of medical restrictions affecting his ability to do his job. Tr. at 284. The Complainant testified he was told he could either find another place of employment or apply for Total and Permanent Disability. Id. The Complainant signed the forms initiating the request for Total and Permanent Disability on December 22, 1997. Ex. 2c. (3) The Complainant claims that before he left the WSRC work-site in December 1997, he furnished to the HR Representative the name of the WSRC manager against whom he had made allegations of improper conduct (the protected disclosure) and the complete copy of the note bearing the WSRC manager's signature that purportedly supported those allegations. Id; Tr. at 334-35.

In January 1998, two of the Complainant's supervisors reported that they saw the Complainant doing physical labor at a house located 50 miles from the Savannah River Site. Ex. 1c, 1d, 1e, 34, 38; Tr. at 44-53, 119. As the result of the eyewitness accounts of the two supervisors, WSRC convened a constructive discipline meeting on January 19, 1998, to discuss whether the Complainant had committed disability fraud. Ex. 1a, 24b. After the meeting, the WSRC Disciplinary Committee (4) recommended that the Complainant be terminated. Ex. 24, 24b. A review committee consisting of the Complainant's first-, second-, third- and fourth-line supervisors, and the HR Representative, however, recommended that the Complainant be confronted with the information and allowed to respond to the allegations. Ex. 1a. On January 20, 1998, WSRC summoned the Complainant to a meeting to provide a response to the allegations that he had been seen performing physical contract work related to his private business while on short-term disability. Ex. 1b. The review committee refused to entertain statements from persons who, the Complainant alleges, would have contradicted the accounts of the two supervisors who allegedly saw the Complainant doing physical labor while on disability. The two supervisors who provided the eyewitness accounts also served as review committee members. Id. at 307. Sometime after the January 20, 1998 meeting, the first-, second-, third- and fourth-line supervisors (but not the HR Representative) memorialized their collective recollection of the subject meeting in an unsworn statement in which they relate that the Complainant admitted in the meeting that he had been on the roof of the house in question but had not performed any work. Id. According to the Complainant, however, he never "got on the roof to complete any roofing work or to supervise the subcontractor." Ex.19; Tr. at 301.

On January 22, 1998, another meeting occurred after which WSRC's President terminated the Complainant effective January 23, 1998. Ex. 17, 24; Tr. at 103.

B. WSRC's Testimonial and Documentary Evidence

To support its contention that WSRC would have terminated the Complainant absent his protected disclosure, the company presented the testimony of the following five witnesses at the hearing: the lead investigator for WSRC's Office of General Counsel (WSRC Investigator); the Complainant's first- and second-line supervisors; a recordkeeper from WSRC's Human Resources Department (HR Recordkeeper); and a former Policy Representative from WSRC's Human Resources Department (WSRC Policy Representative). In addition, WSRC submitted numerous color photographs of the house where the Complainant was allegedly seen working in January 1998, the streets immediately adjacent to the house in question and sketches of street grids in the area around the subject house. See Ex. 42, 43a, 43b, 43c, 43d, 43e and 43f.

1. The Complainant's Activities on January 12 and 16, 1998

The Complainant's first-line supervisor testified that he first observed the Complainant on the roof of the house in question on January 12, 1998. Tr. at 50. On that day, according to the first-line supervisor, the Complainant was overseeing a roofing crew. Id. The first-line supervisor also attested that at 1:00 p.m. on January 16, 1998, he saw the Complainant through binoculars at the subject house climbing a ladder, lifting things to a crew that was roofing the outbuilding, and sawing some material. Id. at 53, 86. When asked what the restrictions are in WSRC's short-term disability program as far as what the Complainant could and could not do, the first-line supervisor expressed his view that the Complainant should not have been working while collecting disability. Id. at 72. When pressed further about whether the first-line supervisor knew whether his view was substantiated by WSRC's policy, he reluctantly admitted that he did not know.

The second-line supervisor testified that he saw the Complainant on January 16, 1998, cutting siding with a table saw, transporting the siding to the workmen, jumping and throwing the siding to the workmen on the roof, picking up a wooden straight ladder and climbing on the roof. Id. at 119-120, 176. The second-line supervisor opined that what he saw the Complainant doing on January 16, 1998, was incompatible with his disability status because the Complainant had previously represented that he was unable to lift a five- to six-ounce package. Id.

The homeowner of the house in question (Homeowner) was to have testified as the Complainant's witness at the hearing. On the day of the hearing, the Complainant revealed that the homeowner refused to become involved in the matter. Prior to the hearing, the WSRC Investigator obtained an unsworn statement from the Homeowner which the company submitted at the hearing over the objections of the Complainant's attorney. In the unsworn statement, the homeowner states while he never observed the Complainant doing any work or heavy lifting, he recalls that the Complainant climbed up a ladder to the rooftop during the roofing work. Ex. 44.

In rebuttal, the Complainant presented three witnesses, the roofing subcontractors who were working at the subject house where the Complainant was allegedly seen on January 12 and 16, 1998. Tr. at 245-276. All three testified that they never saw the Complainant on the roof of the subject house on the dates in question, never saw the Complainant cut any plywood, and never saw the Complainant do any other kind of labor on the house. Id. The Roofing Crew Leader on the project was emphatic that the Complainant never did any physical labor on the job. Id. at 248, 257. What the Complainant did do, according to the Roofing Crew Leader, was to go to the hardware store and get whatever supplies the crew needed. Id. The Roofing Crew Leader testified that in addition to the two other members of his crew who testified at the hearing, he had two other laborers on the job whose function it was to tote shingles and plywood. Id. at 249. The Roofing Crew Leader related that it was he who cut the plywood on the job site, another laborer who pushed the plywood up the ladder, and a third crew member who took the plywood from the ladder and threw it in place. Id. at 258. The Roofing Crew Leader also advised that there were no wooden ladders at the house in question, only aluminum ones. Id. at 259.

The Complainant also testified about his activities on the two days in question. He and the roofing crew met the homeowner of the house in question on January 12, 1998, between 8:30 and 8:45 a.m. Id. at 292. He watched the crew work for awhile, left to purchase coffee to counteract drowsiness from medication, returned to the house around 11:15 or 11:30 a.m. and "hung around" until lunchtime. Id. He took the crew to lunch, returned to the house for 15 or 20 minutes and then went home for the day. Id. at 294. The Complainant asserts that he never was on the roof on January 12, 1998. Id.

As for January 16, 1998, the Complainant states he arrived at the house around 12:30 p.m. Id. He then went to the store to buy some continuous ridge band around 1:00 p.m. and returned to the home around 3:30 p.m. with the material. Id. The Complainant states his crew unloaded the continuous ridge band from the truck, installed it, and finished the job around 4:30 p.m. The Complainant asserts that he never went on the roof on the 16th of January, never climbed up and down a ladder that day, never cut any material that day, and never did any physical labor that day. Id. at 297-99. The Complainant did admit that he went up

on the roof of the subject house on Saturday, January 17, 1998, to view an area about which the homeowner had complained.(5)

Evaluation of Evidence and Credibility of Witnesses

The conflicting testimony in the record leads me to conclude that some of the witnesses were not completely candid in their testimony, their recollection of events were faulty, or their eyewitness accounts were inaccurate. After observing the demeanor of the witnesses at the hearing and considering the other evidence submitted, I am unable to determine whose version of events is the accurate one. It was simply not evident to me at the hearing that any of the witnesses were being untruthful. While I have doubts about all the details of the first- and second-line supervisors testimony (i.e. their claim they saw the Complainant cut siding when there is evidence that there was no siding work being done at the home on the dates in question; their testimony that they saw the Complainant move a wooden ladder when there was testimony only aluminum ladders were being used by the roofing crew; their claim they saw the Complainant working at 1:00 p.m. on January 16, 1998 when the Complainant claims he was en route to purchase some continuous ridge band at that time), those doubts are not so significant that I would discredit their testimony in its entirety.

I do have substantial doubts, however, about the objectivity of the first- and second-line supervisors, both of whom participated in the decision to terminate the Complainant and both of whose eyewitness accounts formed the basis for WSRC's termination decision. The Complainant's first- and second-line supervisors both acknowledged they knew that the Complainant's third-line supervisor (i.e. their boss) had assisted in the construction project that was the subject of the Complainant's protected disclosure. Tr. at 65, 139. In addition, the second-line supervisor acknowledged at the hearing that his immediate supervisor, the Complainant's third-line supervisor, typed the personal statement that set forth the details surrounding the second-line supervisor's viewing of the Complainant on the roof. Id. at 186. Curiously, there was no testimony proffered that the second-line supervisor could not type. Moreover, the second-line supervisor admitted he knew that the Complainant had provided documentation to the HR Representative that supported his protected disclosure, that he is still a friend of the WSRC manager about whom the protected disclosure had been made, and that the WSRC manager could influence the second-line supervisor's ability to remain employed at WSRC. Id. at 136.

I also considered that the Complainant provided a source of income to the roofing crew members when he hired them as subcontractors on various projects. Moreover, I noted that the Complainant typed the roofing crew members' written statement describing the events that transpired on January 12 and 16, 1998. Id. at 252.

It is indeed unfortunate that the Homeowner did not testify at the hearing, a person who presumably has no allegiance to either WSRC or the Complainant. Since I believe the Homeowner's testimony was potentially crucial to resolving one of the chief factual disputes in this case, I am unwilling to accord much weight to the Homeowners' unsworn statement that WSRC tendered in this case. As the Complainant's attorney noted, the inability to cross-examine the Homeowner in a situation such as this is highly prejudicial. I will also accord no weight to the WSRC Investigator's notes of a telephone conversation he had with the Homeowner because (1) the information in the notes is at divergence with that in the unsworn statement, and (2) there was no opportunity to cross-examine the Homeowner about the accuracy of those notes. Since the burden in this case rests with WSRC, it was the company's responsibility to produce witnesses, such as the Homeowner, to prove its case.(6)

The evidence in the record is simply not sufficient for me to find that the Complainant was on the roof and/or doing physical labor at the house in question on January 12 and 16, 1998. I find therefore that WSRC has not clearly and convincingly proven that it terminated the Complainant because he was on the roof of the house in question and/or engaged in physical labor at the subject house at the time he was drawing disability pay.

2. The Complainant's Purported Violation of WSRC's Short-Term Disability Policy

The WSRC Policy Representative testified that WSRC management convened the January 19, 1998 Constructive Discipline Meeting "because of a violation of the disability policy." Id. at 213. She related that the WSRC Disciplinary Committee, of which she was a member, recommended that the Complainant be terminated "due to the violation of our disability policy and fraudulent with [sic] working while being paid full salary to be out on disability." Tr. at 217.

According to the WSRC Policy Representative's testimony, from 1994 through 1998 she implemented all WSRC's Human Resource policies, made sure WSRC was consistent site-wide in its recommendations regarding disciplinary actions and termination, and served as a representative in constructive discipline cases. Tr. at 210. At the hearing, the WSRC Policy Representative stated that WSRC's "disability policy requires an employee to be at home, be available at any point in time for management or medical to get in touch with him. Our disability policy does not allow any other type of work." Id. at 221. When queried if Exhibit 23a, the exhibit tendered by WSRC in the record of this case, constituted WSRC's Disability Policy, the WSRC Policy Representative responded negatively. Id. at 232. She explained that Exhibit 23a, a part of WSRC's Employee Benefits Handbook, is merely a two- page summary of the company's 20-page Short-Term Disability Policy. Id. On cross-examination, the WSRC Policy Representative revealed that WSRC does not provide the disability policy to its employees; it is the employee's responsibility to obtain copies of whatever policy they need to have. Id. at 223.

I am unwilling to accord substantial weight to the WSRC Policy Representative's recollection of the terms of WSRC's Short-Term Disability Policy for several reasons. First, she has not had day-to-day responsibility for implementing WSRC's Human Resource policies for more than 18 months. Second, there was no indication in her testimony that she had recently reviewed WSRC's Short- Term Disability Policy in preparation for the hearing. Third, I found it hard to believe her testimony that WSRC's Short-Term Disability Policy required its employees to be at home and available at all times for the company to contact them. Under this scenario, an employee would be prevented from going to the doctor's office, or driving to the pharmacy to obtain medication or the grocery store to purchase food. All these concerns lead me to conclude that WSRC should have tendered its 20-page Short-Term Disability Policy to support its position that the Complainant's actions, whatever they were, violated the terms of that policy.

The only other evidence in the record regarding WSRC's Short-Term Disability Policy and its application to the Complainant's situation is the uncorroborated personal opinions espoused by the first- and second-line supervisors. While I am convinced that both line supervisors earnestly believed that the Complainant was defrauding the disability system, I must decide this issue on evidence before me, not the witnesses' viewpoints or moral convictions.

In the end, I find that it was uniquely within WSRC's power to produce the Short-Term Disability Policy that was in effect during the period in question in this case. Its failure to do so prevents me from finding that the Complainant's activities on the days in question, whatever they were, rise to the level of disability fraud or dishonesty, and constituted a non-retaliatory reason for terminating him.(7) I must therefore find that WSRC has not shown by clear and convincing evidence that it terminated the Complainant for violating the company's disability policy.

3. The Complainant's Alleged Dishonesty

The WSRC Policy Representative also asserted at the hearing that WSRC terminated the Complainant for lying to his managers during the January 20, 1998 meeting. Tr. at 218, 232-33. It is clear from the record, however, that the Complainant's purported lying did not form the sole basis for his termination. In fact, the record reveals the WSRC Disciplinary Committee recommended that the Complainant be terminated on January 19, 1998, a day before the Complainant purportedly lied. I view the January 20, 1998 meeting as a mere formality since two of the managerial participants at that meeting were the two eyewitnesses in this case, and WSRC refused to allow the Complainant to present corroborating evidence to support his side of

the story. In addition, the documentary evidence submitted by WSRC indicates that the Complainant's purported lying was inextricably intertwined with his alleged disability violation, on which I have already concluded that WSRC has failed to prove it justifiably relied in terminating the Complainant. The record of a Disciplinary Meeting held on January 22, 1998, reveals that WSRC terminated the Complainant for Dishonest Acts with the notation "fraud/disability violation." Ex. 24a. Handwritten notes on Exhibit 24a state, in relevant part, as follows: [The Complainant] was dishonest in discussing and making his statements concerning working on another job during work hours while out on disability." Ex. 24a.

As noted earlier in this Decision the two line supervisors upon whose eyewitness testimony WSRC's entire case hinges are not necessarily unbiased observers. The Complainant's second-line supervisor is a friend of the WSRC manager who was the subject of the protected disclosure and reluctantly admitted at the hearing that the WSRC manager could influence his continued employment at WSRC. The first-line supervisor also revealed the WSRC manager had been in his supervisory chain during a portion of his tenure at WSRC. In addition, the Complainant testified that in the summer of 1997, he reported his first-line supervisor for violating some safety procedures at the Savannah River Site, yet another reason to question the purity of the supervisor's motives.(8)

Moreover, WSRC failed to proffer the testimony of other more objective witnesses who might have provided relevant, probative evidence regarding the Complainant's alleged lying. (9) It might have been helpful, for example, if the Complainant's fourth-line supervisor had testified since he is the one who conducted the January 20, 1998 meeting. In addition, the HR Representative, the person to whom the Complainant made the protected disclosure and a participant at both the January 19 and 20 meetings, might have provided valuable information on a number of issues. Specifically, it is unclear why the HR Representative did not sign the document in which the Complainant's four-line managers memorialized their collective recollection of the January 20, 1998 meeting. Ex. 1b. Moreover, the HR Representative might have provided insight into the existence or absence of retaliatory animus on WSRC's part, specifically whether the Complainant's whistleblower complaint was alluded to during any of the meetings during which the Complainant's termination was discussed.(10)

Based on the foregoing considerations, I find that WSRC has not shown by clear and convincing evidence that it terminated the Complainant for lying during the January 20, 1998 meeting.

4. WSRC's Treatment of Similarly Situated Persons

At the hearing, the HR Recordkeeper testified that she tracks all constructive discipline meetings and grievances for WSRC. Tr. at 199. She attested that she reviewed all constructive discipline hearings at WSRC since April 1, 1994 and determined that there were 20 cases involving disciplinary action of some sort under the category, "Dishonest Acts." Of the 20 cases, three involved disability violations, according to the HR Recordkeeper. Id. at 203. Under questioning, the HR Recordkeeper revealed that one of the three cases involved the Complainant. Id. The second of the three cases involved a woman who was playing softball while on disability. Id. WSRC gave the woman a "corrective contact" which, according to the HR Recordkeeper, is the least severe form of disciplinary action on a continuum where the most severe form of punishment is termination. Id. at 203-4. The third of the three cases involved a man "playing horseshoes in a bar. . ." Id. at 204. WSRC terminated that man. Id. The HR Recordkeeper was unable to explain why WSRC accorded different treatment to one of the three individuals who received some sort of disciplinary action based on the unspecified disability violations. Id. at 207. The HR Recordkeeper opined that the WSRC Policy Representative was better suited to respond to this query.

The WSRC Policy Representative, however, was unable to explain why WSRC had handled one of the three disability violation cases differently. Id. at 224-25, 234. She knew few details relating to the other two cases, either, such as whether either of the other two WSRC employees had filed whistleblower complaints. Id. The WSRC Policy Representative further related that either the HR Recordkeeper or the person who took her place as the WSRC Policy Representative could have reviewed the records relating to the other two cases and readily ascertained from those records why WSRC had taken different disciplinary

actions against the two employees involved. Id. at 234-35. The WSRC Policy Representative concluded her testimony by asserting that WSRC makes individual decisions based on individual employees. Id. at 235.

Based on the record before me, WSRC has not proven that it consistently implemented its policy of terminating employees for violating its disability policy. Cf. Charles Barry DeLoach, 26 DOE ¶ 87,509 (1997) (the contractor showed that it consistently implemented its policy of terminating employees where there was conclusive evidence that the employees intended to steal government property).(11) WSRC's failure to explain the specific circumstances surrounding its treatment of two other employees similarly situated to the Complainant prevents me from finding that WSRC terminated the Complainant because its policy is to terminate employees who are found to have violated the terms of WSRC's Short-Term Disability Policy.

5. Summary

The unresolved conflicting testimony in this case makes it impossible to know with any confidence what the Complainant did or did not do on January 12 and 16, 1998. Nevertheless, it is clear from the record that WSRC has not presented clear and convincing evidence that it would have terminated the Complainant absent his protected disclosure. WSRC submits it terminated the Complainant for dishonest acts, including his violation of WSRC's short-term disability policy. Yet, WSRC failed to provide the most probative evidence of the Complainant's purported violation, the Short-Term Disability Policy itself. WSRC alternatively claims it terminated the Complainant for lying in the January 20, 1998 meeting. Yet, the record reveals that the WSRC Disciplinary Committee recommended that the Complainant be terminated on January 19, 1998. WSRC also claims it terminated the Complainant for working while on disability, a fact that lead it to conclude that the Complainant could have been working at the Savannah River Site. Yet, the evidence submitted by WSRC did not clearly and convincingly prove that the Complainant was either on the roof of the house in question or performing physical labor at the subject house. WSRC also has not provided clear and convincing evidence that it consistently terminates employees who violate the terms of its Short-Term Disability Policy. The limited evidence it presented to support this position, i.e., it terminated a man who was playing horseshoes while on disability but did not terminate a woman who was playing softball while on disability, raises more questions than it answers.

What is noticeably absent in this case is testimonial evidence from unbiased witnesses who might have provided relevant, probative information on the issue of the Complainant's activities on the days in question. It is possible, for example, that testimony from the Homeowner might have tipped the scales in WSRC's favor had the company elected to secure the Homeowner's presence at the hearing. In addition, testimony from the Complainant's fourth-line supervisor and the HR Representative might have provided insight into the January 20, 1998 meeting where the Complainant allegedly lied.(12)

C. WSRC's Legal Arguments

As a final matter, I reject WSRC's contention that no liability can be found against the company because the State of South Carolina is an employment-at-will state. WSRC agreed in its contract with the DOE to abide by the Part 708 regulations which are national in scope, further important DOE policy interests, and are intended to apply to all DOE management and operating contractors. Moreover, WSRC has cited no cases that suggest that the law in the State of South Carolina prevents the company from complying with this regulatory mandate.

The case cited by WSRC, Prescott v. Farmers Telephone Cooperative Inc. (Prescott), 516 S.E.2d 923 (S.C. 1999), is not controlling. Prescott involved a wrongful discharge action brought by an employee against his former employer alleging breach of an employment agreement, breach of the implied duty of good faith and fair dealing, defamation, intentional interference with an economic relationship, promissory estoppel, and specific performance. While holding that vague assurances of job security by the employer

in Prescott did not alter the employee's employment-at-will status, the Court recognized that the employment-at-will doctrine can be contractually altered by the employer and employee. In this case, WSRC contractually agreed with the DOE not to discharge or otherwise discriminate against any employee because that employee has made a protected disclosure as defined in 10 C.F.R. Part 708. It stands to reason that WSRC's employees are third-party beneficiaries of the contract between the DOE and WSRC, and that the WSRC employees' employment- at-will status is altered to the extent dictated by the Part 708 regulations. (13)

D. Conclusion

As set forth above, I am compelled to find for the Complainant because WSRC has not sustained its evidentiary burden in this case. Given the paucity of information in the record regarding the appropriate remedy in this case, and in fairness to both parties, I will permit the parties to submit information on this issue before I render a determination on it.

IV. Remedy

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order: reinstatement, transfer preference; back pay; reimbursement of reasonable costs and expenses, including attorney and expert-witness fees; and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36. At the hearing, the Complainant stated that he desired to be reinstated if he prevailed in this proceeding. Tr. at 330. Since neither party presented any information on the issue of remedy, I find it appropriate to allow the parties to submit briefs before determining the appropriate remedy in this case.

I am especially interested in the parties' views with regard to reinstatement since the current record suggests that the Complainant was unable to perform his job of maintenance mechanic at the time WSRC terminated him. I direct the Complainant to submit a detailed statement setting forth the precise remedy he is seeking, including a summary of his expenses and attorney fees within 15 days of his receipt of this Initial Agency Decision. WSRC will then have 15 days from its receipt of the Complainant's statement to respond to the Complainant's remedy request. The parties are also free, of course, to seek mediation regarding the issue of remedy. If they chose this course of action, I will hold the remedial phase of this case in abeyance for 30 days pending mediation on the issue.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Don W. Beckwith under 10 C.F.R. Part 708 is hereby granted as set forth in paragraph (2) below.

(2) Within 15 days of receipt of this Initial Agency Decision, the Complainant shall submit to the Office of Hearings and Appeals and Westinghouse Savannah River Company a detailed statement setting forth the precise remedy he is seeking, including a summary of his expenses and attorney fees. Westinghouse Savannah River Company shall have 15 days from its receipt of the Complainant's submission to file a responsive document. Should the parties elect to seek mediation to resolve the remedial phase of this case, they shall notify me immediately and I will hold this proceeding in abeyance for a period of 30 days.

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

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: November 2, 1999

(1)On March 15, 1999, the DOE published an Interim Final Rule revising the regulations governing the Contractor Employee Protection Program. See 64 Fed. Reg. 12862 (March 15, 1999)(amending 10 C.F.R Part 708, effective April 14, 1999). Section of 708.8 of the revised regulations provides that the new procedures "apply prospectively in any complaint proceeding pending on the effective date of this part." Thus, the Interim Final Rule is applicable to the instant case. In this regard, under the revised Part 708 regulations, the DOE's Office of Hearings and Appeals (OHA) assumed investigatory jurisdiction over all pending and future complaints, including the one under consideration.

(2)The Complainant's medical records reflect that he has a long history of chronic back pain and suffers from degenerative arthritis of the spine. Ex. 2b, 2d, 2f, 2g, and 2h.

(3)The individual continued to receive Short-Term Disability Benefits during the time he was awaiting a decision on his Total and Permanent Disability request.

(4)The members of that committee were the Complainant's first-, second-, third-, and fourth-line managers, the WSRC Medical Doctor, the HR Representative, a WSRC Policy Representative, an EEO representative, and an HR Consultant. Ex. 1a.

(5)At the hearing, the Complainant had difficulty concisely articulating what he had communicated to others about his activities on January 12 and 16, 1998. He testified that after the January 20, 1998 meeting, he told the HR Representative, "I wasn't on the roof . . . If I was up there, I was only talking." Tr. at 308. Under questioning, the Complainant claimed, in essence, that he was only using a hypothetical and did not intend to communicate in any way that he was on the roof at anytime. Id. I found it quite unusual that the Complainant would use hypotheticals in response to direct questions calling for a yes or no response. It is understandable how WSRC might have construed a response such as the "hypothetical" described above as a contradiction of the Complainant's previous denials of being on the roof.

(6)I recognize, of course, that WSRC probably relied on the Complainant's representation during the pre-hearing conference that he would produce the Homeowner as a witness. Nevertheless, WSRC knew that it had the burden of proof in this case. WSRC knew from the Report of Investigation that the OHA investigator had identified the Homeowner as a person whose testimony at the hearing might be useful in resolving disputed issues of fact. In my opinion, WSRC could have, and probably should have, identified the Homeowner as its witness and taken steps to secure the Homeowner's testimony by subpoena.

(7)WSRC had ample opportunity before, during, and after the hearing to submit any evidence it deemed relevant to the issues at hand, including WSRC's 20-page Short-Term Disability Policy. I note that WSRC chose not to supplement the record with post-hearing briefs or evidence when given that opportunity. Tr. at 339.

(8)The Complainant's safety allegation against his first-line supervisor was apparently never presented by the Complainant as a protected disclosure under Part 708.

(9)It is understandable why WSRC did not present the testimony of the Complainant's third-line supervisor as he was accused by the Complainant of working on the home improvement project for the WSRC manager against whom the Complainant made the protected disclosure.

(10)There are differing recollections of whether the Complainant's Part 708 Complainant was discussed at any of the meetings leading up to the Complainant's termination. The WSRC Policy Representative testified that there was no discussion about the Complainant's allegations against the WSRC manager at

the meetings she attended. The first-line supervisor did not recall if there was any discussion about the Complainant's Whistleblower Complaint in the meeting with WSRC's President. Tr. at 103. The second-line supervisor testified that no one mentioned the allegations against the WSRC manager in any of the meetings discussing the Complainant's termination. Id. at 132. Upon further examination, however, the second-line supervisor revealed that while he did not recall the WSRC President discussing the Complainant's Part 708 Complaint, he did recall another high- level WSRC Executive alluding to a complaint filed against the WSRC manager. Id. at 197. The Complainant testified that at one of the meetings, he looked at his third-line supervisor and said, "This has got to do with [the WSRC manager] and that's it. I know it." Id. at 306. According to the Complainant, his first-, second-, and third-line supervisors said nothing in response. Id.

(11)WSRC also provided no evidence showing it routinely terminates its employees for lying.

(12)This assumes that WSRC had introduced into evidence its Short-Term Disability Policy and that the policy prevented the Complainant from being away from his home as recounted by the WSRC Policy Representative.

(13)It is instructive that the Supreme Court of the State of South Carolina held in a case involving a claim brought under the State Whistleblower Act that the trial court correctly refused to charge the jury on the employment-at- will doctrine, finding that the employment-at-will of the whistleblower was irrelevant under the version of the State Whistleblower Act in force at the time of the whistleblower's termination. Baber v. Greenville County, 488 S.E.2d 314 (S.C. 1997)

Case No. VBH-0005

May 2, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Thomas Dwyer

Date of Filing: June 23, 1999

Case Number: VBH-0005

This Decision involves a whistleblower complaint filed by Thomas Dwyer under the Department of Energy's (DOE) Contractor Employee Protection Program. From January 1996 to October 1997, Mr. Dwyer was employed as a pipefitter by Fluor Daniel Fernald (FDF), a DOE contractor responsible for the cleanup of the Fernald Environmental Management Project, a former DOE uranium production facility located about 18 miles northwest of Cincinnati, Ohio. Mr. Dwyer alleges that FDF first suspended him and then terminated him in retaliation for taking certain actions and making health and safety disclosures.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor- operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

B. Procedural History

In December 1997, Mr. Dwyer filed a complaint with the DOE's Office of Inspector General (IG). After making a preliminary determination that the complaint fell within the jurisdiction of Part 708, the IG referred the complaint to the DOE's Ohio Field Office (DOE/OH) for an attempt at informal resolution. After DOE/OH was unable to resolve the complaint, the IG began an investigation of the matter. The investigation was pending when, on April 14, 1999, revisions to Part 708 took effect. See 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised procedures, investigations are conducted by the DOE's Office of Hearings and Appeals (OHA). On June 23, 1999, an OHA investigator issued a report of his investigation of the complaint, and the OHA Director appointed me to be the hearing officer in this matter. 10 C.F.R. § 708.23(a), 708.25(a).

On September 7, 1999, FDF filed a Motion to Dismiss Mr. Dwyer's complaint. FDF referred to the

decision of an arbitrator on a labor grievance filed by Mr. Dwyer's union, arguing that the "arbitrator considered the same issues and facts under a collective bargaining agreement with employee protections virtually identical to those in the [Contractor Employee Protection Program]. The Secretary should defer to the arbitrator's opinion and award." Motion to Dismiss at 1. FDF specifically cited a provision of the revised Part 708 regulations stating that a complaint may not be filed if a complainant has chosen "to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless" the complainant has "exhausted grievance-arbitration procedures . . . and issues related to alleged retaliation for conduct protected under [Part 708] remain." 10 C.F.R. § 708.15(a)(3). I denied the Motion, finding that this provision of the revised regulations should not be retroactively applied to bar a complaint filed by Dwyer before the revised regulations took effect. Fluor Daniel Fernald, 27 DOE ¶ 87,532 (1999).

The hearing was held at Fernald, Ohio on January 18-19, 2000. At the conclusion of the hearing on January 19, the parties elected to forego oral argument, and requested permission to file post-hearing briefs. The OHA received post-hearing brief from both parties and closed the record on March 3, 2000.

II. Analysis

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Mr. Dwyer establishes that a protected disclosure, participation, or refusal was a factor contributing to his termination, FDF must convince me that it would have taken the action even if Mr. Dwyer had not engaged in any activity protected under Part 708. Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 at 89,034-35 (1994).

After considering the record established in the investigation by the Assistant Inspector General and OHA, the parties' submissions, the testimony presented at the hearing, and the post-hearing briefs, for the reasons stated below I have concluded that Mr. Dwyer has met his burden of proving by a preponderance of the evidence that he made a protected disclosure concerning health or safety that contributed to his termination. However, I have concluded that FDF has shown by clear and convincing evidence that it would have terminated Mr. Dwyer absent this disclosure.

A. Whether Mr. Dwyer Engaged in Activities Protected Under 10 C.F.R. § 708.5

The Part 708 regulations prohibit discrimination by a DOE contractor "against any employee because the employee (or any person acting pursuant to a request of the employee) has,"

(1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences--

(i) A violation of any law, rule, or regulation;

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

(iii) Fraud, mismanagement, gross waste of funds, or abuse of authority;

(2) Participated in a Congressional proceeding or in a proceeding conducted pursuant to this part; or

(3) Refused to participate in an activity, policy, or practice when--

(i) Such participation--

(A) Constitutes a violation of a Federal health or safety law; or

(B) Causes the employee to have a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation, and the activity, policy, or practice causing the employee's apprehension of such injury--

(1) Is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety resulting from participation in the activity, policy, or practice; and

(2) The employee is not required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities;

(ii) The employee, before refusing to participate in an activity, policy, or practice has sought from the contractor and has been unable to obtain a correction of the violation or dangerous activity, policy, or practice; and

(iii) The employee, within 30 days following such refusal, discloses to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy, or practice, and explaining why he has refused to participate in the activity.

57 Fed. Reg. at 7542 (1992) (10 C.F.R. § 708.5(a)).(1) There are a number of activities in which Mr. Dwyer alleges he engaged that are potentially protected under Part 708.

1. April 1996 Refusal to Participate

First, Mr. Dwyer states that in or around April 1996, while working with another pipefitter on a job that required cutting pipe, liquid came out of the pipe. Mr. Dwyer immediately left the work area following what he believed was safety protocol, while his co-worker stayed. Even assuming that the complainant could demonstrate the dangerous nature of the activity and that he was not required to participate in this activity because of the nature of his employment, Mr. Dwyer has not alleged that continuing to work on the job would have constituted "a violation of a Federal health or safety law," that he, "before refusing to participate in an activity, policy, or practice ha[d] sought from the contractor and ha[d] been unable to obtain a correction of the violation or dangerous activity, policy, or practice" or that he, "within 30 days following such refusal, disclose[d] to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy, or practice, and explaining why he . . . refused to participate in the activity." 10 C.F.R. § 708.5(a)(3). Thus, I do not find Mr. Dwyer's refusal to continue working on this particular job to be a refusal to participate protected under Part 708.

2. August 1996 "Job Stop"

Second, the complainant states that in late August 1996, he and his co-workers "were doing a walk-through and not wearing respirators and somebody was wearing a respirator and I put a job stop and we evacuated the building . . . ." Tr. at 190, 280-81, 330-31. However, neither of the two witnesses whom Mr. Dwyer questioned at the hearing about this incident could remember it taking place, and I found the demeanor of these two witnesses, compared with that of the complainant, to reflect more credibility. In any event, it is unlikely that this alleged activity by the complainant would be protected under 10 C.F.R. § 708.5(a). First, this activity fails to meet the same criteria for a protected refusal under 10 C.F.R. §

708.5(a)(3) as discussed above with regard to Mr. Dwyer's April 1996 refusal. Moreover, such a "job stop" would not constitute a protected disclosure under 10 C.F.R. § 708.5(a)(1) because the complainant does not allege that he made any disclosure regarding this incident that he believed evidenced a "violation of any law, rule, or regulation," a "substantial and specific danger to employees or public health or safety," or "[f]raud, mismanagement, gross waste of funds, or abuse of authority."

3. Internal Company Grievances

Third, Mr. Dwyer refers to a number of internal company grievances he filed during the course of his employment. These grievances include allegations that management officials and employees of the company's medical department were harassing him, and also complain about the person assigned to hear the grievances and the timeliness of the company's response to them. These grievances could only conceivably be considered to be protected activity under 10 C.F.R. § 708.5(a) to the extent they might evidence what the complainant believed was mismanagement or abuse of authority, since there is no allegation that what Mr. Dwyer objected to was a "violation of any law, rule, or regulation," a "substantial and specific danger to employees or public health or safety," "[f]raud," or "gross waste of funds, . . ." However, I have reviewed copies of the grievances and find that they do not contain disclosures that evidence mismanagement or abuse of authority. At the root of these grievances are disagreements between Mr. Dwyer and his employer as to the application of company policy on medical leave, usually whether particular illnesses or injuries reported by Mr. Dwyer were genuine and whether they merited excused absences from work.

In considering whether such disclosures are protected under Part 708, I note that the Deputy Secretary of Energy has addressed this issue and concluded that

[e]quating a particular type of disagreement to "mismanagement" as contemplated by the "whistleblower" regulation demands a careful balancing lest the term encompass all disagreements between a contractor and its employees. . . . [T]here must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, at the same time granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork.

Narish C. Mehta v. Universities Research Association, 24 DOE ¶ 87,514 at 89,065 (1995)

The regulatory preamble to the version of Part 708 being applied in this case speaks of the DOE's responsibility "for safeguarding public and employee health and safety; ensuring compliance with applicable laws, rules, and regulations; and preventing fraud, mismanagement, waste, and abuse" and the need "to assure workplace conditions at DOE facilities that are harmonious with safety and good management." This language indicates an intent to address problems that are more systemic and serious in nature than relatively minor disputes between an employee and his employer over the employee's qualification for medical leave. Thus, I do not find the grievances filed by the complainant evidence "mismanagement" as that term is used in Part 708. For the same reasons, I do not find that the grievances contain evidence of the type of "abuse of authority" the Part 708 regulations were designed to protect.

4. September 1997 Disclosures

Finally, Mr. Dwyer alleges that he made protected disclosures in September 1997 at Fernald's Plant 6. One of the allegations relates to complaints Mr. Dwyer made to a safety engineer about laundry bags presenting a tripping hazard in the entry way to Plant 6. Tr. at 248. Though the safety engineer does not dispute that there was "excessive trash and clothing coming out of Plant 6" at this time, Tr. at 257, and that arrangements were made after Mr. Dwyer's complaints to increase the frequency of pick-up of the bags in response to Mr. Dwyer's concerns, there was conflicting testimony as to whether the bags presented a safety hazard. The safety engineer testified that there was a three- or four-foot opening

between the bags for workers to walk through, and that therefore the bags were not a safety issue, only a housekeeping issue. Tr. at 248, 249, 259; see also Tr. at 76, 467 (witness testified that "there was a four-foot wide opening or better that you could get around between where you enter into Plant 6 and the desk where you badge in."). The complainant contends that the presence of the bags was a safety hazard and testified that he saw two workers' feet "just hit [a bag] a little, a little trip, that's all." Tr. at 325. Yet Mr. Dwyer also testified that he believed he could walk through the opening between the bags without risking any danger to himself. Tr. at 326, 329. There is no allegation that Mr. Dwyer's disclosure evidenced a "violation of any law, rule, or regulation" and, on balance, I do not find a preponderance of evidence to support a good faith belief that the bags presented a "substantial and specific danger to employees or public health or safety." I found the testimony of the complainant on this issue to be equivocal and, similar to my impressions of the demeanor of the complainant compared to other witnesses noted above, I found the testimony of Mr. Dwyer to be generally less credible than that of the other two witnesses who testified as to any safety hazard caused by the bags.

The other allegations of protected disclosures made in September 1997 relate to a Plant 6 asbestos abatement job in which Mr. Dwyer was assigned to assist. On September 23, 1997, Mr. Dwyer questioned why he was not required to wear the same type of dosimeter that he had worn during a previous assignment in Plant 6, and also complained that there was dust falling from the rafters of the building. A safety engineer was called in to address Mr. Dwyer's concerns, and testified at the hearing that Mr. Dwyer was wearing a regular dosimeter that measures alpha/beta [radiation]. The one he wore before measured gamma [radiation]. What I found out after we talked to him, before -- I did go back and try to find where he had been. He was working in a high radiation [area].

What we tried to explain, like I said, you could go in Plant 6 one day and be dressed one way. You could go in another day and be dressed differently, . . .

Tr. at 238. Asked whether there was a "dust concern" at the time of Mr. Dwyer's complaint, the safety engineer testified,

No. There was -- Plant 6 is dirty and it is dusty, but we do continuous air monitoring in Plant 6 and the guys that would be doing the job were going to be dressed out in PAPRs [powered air purifying respirator] and PPEs [personal protective equipment]. And the area was going to be cordoned off where we were going to be doing our work.

Because Mr. Dwyer was not satisfied with the explanation of the safety engineer, a radiation engineer came to address Mr. Dwyer's concerns, and concurred with the safety engineer. Tr. at 241-42. Mr. Dwyer was still not satisfied, and so was given the telephone number of FDF's director of health and safety. Tr. at 243. Mr. Dwyer apparently did not call the number.

Again, because Mr. Dwyer does not allege that these disclosures about his dosimeter and dust were evidence of a "violation of any law, rule, or regulation," the relevant issue is whether Mr. Dwyer disclosed information that he in good faith believed evidenced a "substantial and specific danger to employees or public health or safety; . . ." 10 C.F.R. § 708.5(a)(1)(ii). Regarding Mr. Dwyer's questions about his dosimeter, I see no basis for finding that, by Mr. Dwyer merely asking these questions, he conveyed any evidence of danger to employees or public health or safety, let alone evidence of a "substantial and specific danger." Therefore, I cannot find that the questions about his dosimeter constitute a protected disclosure.

The concern raised by Mr. Dwyer about dust falling from the rafters of the building presents a more difficult issue. A FDF "safety and health team coach," the manager of the safety engineer to whom Mr. Dwyer reported his concern, testified at the hearing as follows:

HEARING OFFICER GOERING: And you are aware that they were doing [asbestos] abatement that was marked off in certain areas of Plant 6?

THE WITNESS: Mm-hmm.

HEARING OFFICER GOERING: And there were certain areas of Plant 6, outside of the abatement area, that respiratory protection was not required?

THE WITNESS: Right.

HEARING OFFICER GOERING: So somebody in that period of time in Plant 6 in an area outside of the abatement area, they look up, they see dust falling from the rafters . . .

- . . .
- . . either inside or outside the abatement area. Is either one of those grounds for a reasonable person to raise a safety concern?

THE WITNESS: Sure. Anything -- anything anybody is concerned about they should feel free to say, hey, I'm concerned about this, talk to the safety professional, what do you think, no matter what the concern.

HEARING OFFICER GOERING: Okay. Well, all right. It gets a little difficult when I ask this kind of question here because we've had testimony that it's the philosophy of Fernald that, you know, you'll respond to even baseless concerns.

THE WITNESS: That's true.

HEARING OFFICER GOERING: So what I'm trying to get at is whether or not a reasonable person in a situation seeing dust falling down, is it reasonable for that person to have a safety concern?

THE WITNESS: Sure, sure. That's reasonable for them to voice that concern, sure.

HEARING OFFICER GOERING: Okay.

THE WITNESS: I have an unfair advantage because I see all the [dosimetry] results that come out of Plant 6. I know there were never any issues. I see all the internal doses that were received.

HEARING OFFICER GOERING: Right. But somebody in a -- a pipefitter who doesn't have that advantage --

THE WITNESS: Right.

HEARING OFFICER GOERING: -- it's -- you would say it's reasonable for that person?

THE WITNESS: Sure, sure.

Tr. at 506-08. This testimony leads me to conclude that, whether the falling dust in fact posed a danger to health or safety, the presence of falling dust in that environment was evidence sufficient to support a *good faith belief* of a substantial and specific danger to employee safety. See Rosie L. Beckham, Case No. VBA-0044, 27 DOE ¶ (April 10, 2000) ("for purposes of Part 708, it does not matter whether the information a putative whistleblower disclosed is ultimately factually substantiated").

The respondent argues that while the concerns about "dust might have been reasonable in the first instance, . . . his persistence in refusing to accept valid, accurate explanations from responsible employees, considered together with [earlier] stall tactics before the start of the job, more reasonably suggest that delay was his objective as opposed to the articulation of a good faith safety concern." Post-Hearing Brief of Respondent at 22. The respondent cites a prior hearing officer's opinion in a Part 708 case to support the proposition that a "claimant's personal, non-safety-related motive supports [the] conclusion that [an] alleged disclosure is unprotected." Id. (citing Francis M. O'Laughlin, 24 DOE ¶ 87,505 at 89,030 (1994)).

First, I note that the hearing officer's conclusion in O'Laughlin as to the "self-serving nature" of the disclosures was only one of many factors he relied upon, among them his finding that the complainant did not "explicitly disclose any matter of health and safety" or "implicitly communicate[] a cognizable health and safety danger by his stated concerns . . . ." O'Laughlin, 24 DOE at 89,029-30. In any event, a recent decision of the OHA Director, reviewing a hearing officer's opinion, makes clear that the motivations of a complainant are not relevant to the determination of whether a disclosure is protected under Part 708.

The Hearing Officer also appears to have considered that Ms. Beckham may have made her disclosures in response to KENROB's negative comments about her job performance. In evaluating whether a person has made a disclosure in good faith, however, the person's motivations for making the disclosure are irrelevant. See Howard W. Spaletta, 24 DOE ¶ 87,511 at 89,051 (1995) (whether the Complainant was motivated to protect his reputation is irrelevant to the question whether the disclosures come within the ambit of Part 708 protection). Cases decided under the Whistleblower Protection Act also are in accord with this view. See Bump v. Dep't of Interior, 69 M.S.P.R. 354 (1996) (WPA makes no provision for considering whether the employee's personal motivation rendered his belief not genuine), Carter v. Dep't of Army, 62 M.S.P.R. 393, 402 (1994), aff'd, 45 F.3d 444 (Fed. Cir. 1995); see also Frederick v. Dep't of Justice, 65 M.S.P.R. 517, 531 (1994), rev'd on other grounds, 73 F.3d 349 (Fed. Cir. 1996). Hence, to the extent the Hearing Officer considered Ms. Beckham's motivations in communicating her concerns about KENROB's implementation of the FASA in finding that Ms. Beckman did not make a protected disclosure under Part 708, she erred.

Rosie L. Beckham, Case No. VBA-0044, 27 DOE ¶ (April 10, 2000).

Rather than calling for an inquiry into the motives of the complainant, "the good faith clause is intended to relieve complainants of the burden of proving that their allegations are correct or accurate. Under 10 C.F.R. § 708.5(a)(1), complainants must show only that they had a *reasonable belief* that their allegations were accurate." Howard W. Spaletta, 24 DOE ¶ 87,511 at 89,051 (1995). In this case, based primarily upon the testimony of the safety and health "team coach" discussed above, I conclude that Mr. Dwyer's belief as to the danger posed by falling dust in Plant 6 was reasonable, whatever the motive may have been for his disclosure of this information. Accordingly, I find that Mr. Dwyer thereby engaged in activity protected under Part 708.

B. Whether Mr. Dwyer's Protected Activity Was a Factor Contributing to his Termination

In prior decisions of the Office of Hearings and Appeals, we have established that,

A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54 (1997) (quoting Ronald Sorri, 23 DOE ¶ 87,503 at 89,010 (1993)); Ronny J. Escamilla, 26 DOE ¶ 87,508 at 89,046 (1996).

In this case, there is fairly clear temporal proximity between Mr. Dwyer's protected disclosure in Plant 6 on September 23, 1997, and his subsequent suspension on October 6, 1997, and termination on October 16, 1997. It also appears that at least one of the two deciding officials in this case, FDF managers Mel Karnes and Jean West, knew of Mr. Dwyer's September 23 disclosure. Tr. at 15 (FDF opening statement recounting that "West and Karnes suspended him pending investigation."); Tr. at 215 (Mr. Karnes testimony that he was "the one who made the call on" Mr. Dwyer's termination). Mr. Karnes testified that he remembered the September 1997 events at Plant 6, that he "was brought into that one," and specifically that he "remember[ed] the concerns that were raised about dust." Tr. at 199-200. Thus, I find the preponderance of the evidence supports the conclusion that Mr. Dwyer's September 23, 1997 disclosure about dust in Plant 6 was a contributing factor to his suspension and dismissal.

C. Whether FDF Would Have Terminated Mr. Dwyer Absent His Protected Disclosure

For the reasons set forth below, I find based on my review of the record in this case clear and convincing evidence that FDF would have terminated Mr. Dwyer absent the protected disclosure described in section II.A above. My conclusion is based on compelling evidence that FDF's action was motivated by its finding that Mr. Dwyer violated two of the "Category A" rules of conduct governing FDF employees, violations that are considered "extremely serious misconduct." Respondent's Exhibit 24. The company's procedures for employee discipline define a "Category A Rule" as one "that, when not followed, may result in immediate discharge without oral reminder, written reminder, or decision-making leave." Respondent's Exhibit 21.(2) In Mr. Dwyer's case, the two violations at issue were "Willful hampering or interfering with work or production" and "Insubordination, including failure to carry out definite instructions or assignments." Respondent's Exhibit 2.

On October 6, 1997, Mr. Dwyer returned to work from medical leave. He had with him a note from his doctor dated October 3, 1997, stating that he could "return to work Monday 10/6/97, with light duty work. He cannot climb or lift anything over 10 lbs for the next two 2 wks." Respondent's Exhibit 13. Based on this restriction, FDF manager Jean West assigned Mr. Dwyer to work as a "porter," i.e. performing routine cleaning duties. Tr. at 516. According to Ms. West, this job did not require climbing, and that because Mr. Dwyer could control how much he lifted he would not have to lift over 10 pounds. Id. Mr. Dwyer refused to accept this assignment, telling Ms. West "that he was a pipefitter and that he was not a porter," id., and that he "had a walking restriction and . . . could not perform as a porter." Tr. at 21; see also Tr. at 370. At the hearing, Ms. West described her reaction.

I was giving him a direct assignment, which I had the power in [Industrial Relations] to do and did it frequently for other employees. And when he told me that he did not want to be a porter, along with some of the other things that Mel [Karnes] had brought to my attention, I thought at this point it might be best to suspend Mr. Dwyer. And he was very hostile. He was being very hostile, and I just needed to get him out of there at that point.

Tr. at 518-19. Mr. Karnes described his discussion with Ms. West leading to Mr. Dwyer's suspension.

At the time we stepped outside. I told Jean I hadn't had the time to look into a little bit more of Mr. Dwyer's past with other supervisors and told her that there was a definite pattern here to avoiding work. And we both decided at that time to put him under suspension to allow us time or allow me time to finish the investigation.

Tr. at 370-71. Mr. Karnes testified that he "went back and reviewed all the records, training records, time sheets, all the computer printouts that had anything attached with [Mr. Dwyer's] name, tracked down his supervisor[s]" and "went back and interviewed each one of them." He "talked to craft and talked to other rad techs and other safety individuals who had had contact with him." Based on the information he gathered, Mr. Karnes concluded "it was very obvious that [Mr. Dwyer] was avoiding certain types of training that he knew would keep him out of certain jobs in certain areas." Tr. at 371. While Mr. Dwyer's avoidance of training appeared to be Mr. Karnes' primary concern, he also found the following to be significant:

- "His constant visits to the medical department after jobs were assigned in the morning. He would go to the medical department. That was one of the traits; coming up with mysterious injuries, bleeding fingers, things of that nature. That was obvious."
- "The medical restrictions. Depending on who he worked for at the time, he would tell the supervisor he was under medical restriction where he couldn't do the work that they had for him."
- "The time spent in the restroom; a lot of the craft were complaining that they would get a job assignment and he'd go to the restroom, and he just happened to come out after the job and

everything was done in time to walk back to the shop with them."

- "Mr. Dwyer was quite famous, quite notorious for taking long times to dress out so that the crew who went in to do the work would be returning and, well, there was no sense of him going in, so he just returned with them."

Tr. at 372-73.

In addition to the information turned up by Mr. Karnes, Tr. at 23, Ms. West testified about her own observations of Mr. Dwyer on several occasions.

On one occasion -- on a couple of occasions you parked near me in the parking lot. We had to be here at 6:00. You would get here about quarter till or 10 till 6.

On a couple of occasions, you parked near me. I saw you get out of your vehicle, walk from your side of the car over to the passenger side, pick your crutches up, walk to the turnstile without the use of the crutches. And then, at the turnstile, you would put them under your arm and then proceed to limp.

Then, when you were assigned in the laundry, I saw you several times -- even though I was not your supervisor, but I was in that same area, I saw you, along with some of my other employees, walk around in the laundry without the assistance of crutches.

You would put them at the back of the building when you had to go over to the respirator side. You would . . . walk out of the building without the crutches without a limp.

You would go up at lunch time or break time up the hallway. I would stand in the back of the building and watch you walk up the hallway. You didn't limp or use the crutches.

Tr. at 24-25.

It is also clear, for several reasons, that FDF has not trumped up false or flimsy charges of insubordination or avoiding work as a pretext for terminating Mr. Dwyer in retaliation for protected conduct. First, the demeanor of the testimony of both Ms. West and Mr. Karnes convinced me that their motivation for terminating Mr. Dwyer was sincere--that he had been insubordinate and had a history of avoiding work.

Moreover, other hearing testimony and documentary evidence strongly supports the conclusion that Mr. Dwyer was in fact insubordinate and routinely tried to avoid work. As to the allegation of insubordination, Mr. Dwyer does not dispute that he refused to accept the work he was assigned on October 6, 1997. Instead, he claims that medical restrictions did not permit his to perform any job that required him to be on his feet, though the doctor's note he brought to work that day clearly contradicts this claim. In addition, the record is replete with testimony of Mr. Dwyer's co-workers and supervisors supporting the allegation that Mr. Dwyer had a pattern of avoiding work. See, e.g., Tr. at 69, 168, 425, 428-30, 442-43, 452-53, 484. While recounting all the testimony would extend the length of this decision considerably, the following excerpts capture the flavor of the opinions expressed, almost universally, at the hearing.

- "I believe the general consensus was you was a slacker and didn't want to pull your own weight." Tr. at 161 (testimony of co-worker).
- One of Mr. Dwyer's supervisors was reluctant to express his opinion. "It's kind of hard for me, because he's out of my local [union]. I don't really want to say anything bad against him." The supervisor continued,

I never had a good day with him, when I was his supervisor, not one good day with him. Every -- excuse me, folks. I just don't talk this way about people. But never had a good day. That's about all I could say.

. . . .

I had trouble with the folks working with him, because once they go on the job, they couldn't find him. You know, he'd be there with them, go to the job briefing whatever, then, from there, the guys would not see him, you know.

Tr. at 52-53.

· Another of Mr. Dwyer's co-workers summed up his opinion as follows, addressing Mr. Dwyer directly:

Well, I've done everything from flip hamburgers from 16 years old to working at General Motors and coming out here, and in my estimation, I've never seen anybody as sorry as what you were.

- . . .
- . . [Y]ou wanted everybody but yourself to do the work. You sit there and watched us, laughed at us while we worked, and sit there and had that stinking grin on your face. You know, you worked harder to get out of work than you did to do it. You made up excuses why you couldn't do it. It made me sick, to tell you the truth.

Tr. at 110.

Finally, there is both documentary evidence and hearing testimony supporting the opinion expressed by Mr. Karnes and Ms. West that Mr. Dwyer repeatedly attempted to avoid obtaining the training necessary to perform his job. See, e.g., Respondent's Exhibit 25 (training class attendance rosters); Tr. at 181-88 (testimony of training instructor).

I therefore conclude that the primary motivating factor behind the decision of Mr. Karnes and Ms. West to terminate Mr. Dwyer was their opinion that he had been insubordinate and had a history of work avoidance. Moreover, I am convinced that this factor, by itself, would have resulted in Mr. Dwyer's termination, i.e. would have occurred in the absence of Mr. Dwyer's disclosure that I found above to be protected under Part 708. Both Mr. Karnes and Ms. West testified credibly that, not taking into account the safety-related concerns raised by Mr. Dwyer, they would have nonetheless decided to terminate him based on the insubordination and avoidance of work described above. Tr. at 375 (testimony of Mr. Karnes that "10 percent, 20 percent maximum" of Mr. Dwyer's work avoidance due to his safety related concerns); Tr. at 376, 528. Bolstering this testimony is evidence that, in a five year period ending in 1999, sixteen FDF employees, including Mr. Dwyer, were terminated for committing Category A violations, in most cases based on only one violation. Respondent's Exhibit 21. Clearly, the finding of two Category A violations in this case would have led Mr. Karnes and Ms. West to terminate Mr. Dwyer absent the one instance in which Mr. Dwyer engaged in protected activity. In sum, I find that FDF has met its burden to "prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d).

IV. Conclusion

As set forth above, I have found that the complainant has met his burden of proof of establishing by a preponderance of the evidence that he made a disclosure protected under 10 C.F.R. Part 708. I also have determined that the complainant's disclosure was a contributing factor in his termination. However, I found that FDF has proven by clear and convincing evidence that it would have terminated the complainant absent his disclosures. Accordingly, I conclude that the complainant has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted.

It Is Therefore Ordered That:

(1) The request for relief filed by Thomas Dwyer under 10 C.F.R. Part 708 is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after receipt of the decision.

Steven J. Goering

Staff Attorney

Office of Hearings and Appeals

May 2, 2000

(1)This decision applies section 708.5 as it existed prior to the revisions of April 15, 1999. Linda D. Gass, 27 DOE ¶ 87,525 at 89,141 (1999) (“drafters of the revisions to Part 708 did not intend to apply the expansion in scope of 10 C.F.R. § 708.5 to cases pending on April 15, 1999").

(2)Thus, although Mr. Dwyer has repeatedly complained that his violations were never documented or brought to his attention, see, e.g., Post-Hearing Brief of Complainant at 2, the company’s employee discipline procedures clearly do not require such a warning. Moreover, in grievance reports he filed as early as May 1996, Mr. Dwyer notes that he was warned of violations of company rules, pointing to these warnings as evidence of harassment. FEMP Grievance Report Nos. A7450, A7452.

Case No. VBH-0007

September 27, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Salvatore Gionfriddo

Date of Filing: June 23, 1999

Case Number: VBH-0007

On December 28, 1998, Salvatore Gionfriddo (Complainant) filed a Complaint of Reprisal with the Director of the Federal Energy Technology Center of the Department of Energy (DOE) pursuant to 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. The Complainant alleged that he made a protected disclosure under Part 708 and his employer, Energy Research Corporation (ERC) retaliated against him by terminating his employment. (1)

On July 19, 1999, ERC filed a Motion to Dismiss the complaint. The firm claims that its agreement with the DOE is not covered by Part 708 and that it is not obligated to participate in proceedings

under this Part. The Complainant filed a Memorandum in Opposition to the Motion on August 3. Thereafter, I requested that ERC submit a complete copy of its agreement with the DOE, and the firm filed this document on August 5. ERC also provided a copy of the agreement to the Complainant. I then permitted the parties to submit another round of briefs and responses discussing all the matters related to the jurisdictional issue. These filings were made on September 7 and 14. I have reviewed all the submissions on this matter and other relevant material and have concluded that the Motion to Dismiss should be granted. Accordingly, no further action is warranted with respect to the instant Complaint of Reprisal.

The relevant facts in this case are as follows. ERC engages in the research and development of advanced carbonate fuel cells and batteries used to generate and store electric power. Fuel cells convert fuels, such as natural gas, to electricity through an electrochemical reaction. ERC August 2, 1999 Brief at 2. According to the firm, this technology was developed by ERC through funding by many sources, including a series of research and development contracts, grants and cooperative agreements that ERC entered into with federal and state agencies including the DOE, contracts with public utilities, associations and commercial organizations and internally sponsored independent research and development efforts. ERC August 2, 1999 Brief at 1.

The Complainant was employed by ERC in the fuel cell area beginning in March 1982. In September 1998, he was given an assignment to compare a short fuel cell stack with a tall fuel cell stack, and in his report concluded that "unless the trend of cell shrinkage changes drastically, the loss of compressive load for tall stacks is highly probable." June 23, 1999 Report of Investigation at 4. On October 23, 1998, ERC terminated the Complainant's employment. It is the Complainant's position that his report was a protected disclosure because the individual cell shrinkage problem, if not corrected, poses the hazards of fire and explosion, which would qualify as significant safety risks under Section 708.5(a).

In its Motion to Dismiss, ERC states that its relationship with the DOE was in the form of a "Cooperative Agreement." The firm claims that it is not covered by the DOE's Contractor Employee Protection Regulations because it is not a DOE contractor. As discussed below, I find that ERC is correct.

Part 708 provides that for jurisdiction to adhere, the underlying procurement contract must include a specific reference either to Part 708 or to the requirements of DOE. The original version of Part 708 provided that this "part is applicable in complaints of reprisal filed after the effective date of this part that stem from disclosures, . . . involving health and safety matters if the underlying procurement contract described in § 708.4 contains a clause requirement compliance with all applicable safety and health regulations and requirements of DOE (48 C.F.R. 970.5204-2)." 10 C.F.R. §708.2(a)(emphasis added). The preamble to the current Interim Final Rule states that "this provision [10 C.F.R. §708.2(a)] is no longer necessary since DOE contracts now require compliance with Part 708 when specifically applicable." 64 Fed. Reg. 12862 at 12863 (March 15, 1999).

The ERC cooperative agreement does not contain any language requiring the firm to comply with DOE requirements as set forth at 48 C.F.R. 970.5204-2 or Part 708. This fact supports the firm's position that it is not required to participate in the Contractor Employee Protection Program.

However, the Complainant points to the following language in the agreement to support its position that ERC is bound by Part 708:

The Participant shall have in place, within 60 days of execution of the cooperative agreement, a safety and health program for the DOE work being performed consistent and in accordance with applicable Federal, State and local laws, including codes ordinances and regulations.

The Participant shall take all necessary precautions in the performance of the work under this cooperative agreement to protect the safety and health of employees and the public and shall comply with all legally required safety and health regulations and requirements.

Cooperative Agreement, Part II, 8A and B.

The Complainant maintains that these two paragraphs are sufficient to bring ERC within the coverage of Part 708. It points to 10 C.F.R. § 708.2 (prior regulations), which, as cited above, provides that the Contractor Employee Protection Program is applicable to complaints of reprisal where the underlying contract "contains a clause requiring compliance with all applicable safety and health regulations and requirements of DOE," or if the underlying contract "contains a clause requiring compliance with this part." The Complainant contends that the two paragraphs of the cooperative agreement cited above requiring ERC to comply with "all legally required safety and health regulations" require the firm to comply with Part 708.

I do not agree. Section 708.2 plainly provides that the underlying procurement contract must contain a clause requiring compliance with requirements of DOE. The cooperative agreement in the instant case contains no such language. It requires compliance with generally applicable health and safety rules. This language is not sufficient to put ERC on notice that it must comply with any particular or unusual requirements that DOE may have adopted in the area of contractor employee protection. It merely provides that ERC must comply with all applicable health and safety regulations. This general language refers to obligations to provide a safe and healthy working environment, as required by applicable laws and regulations. Any employer would be required to do as much. It does not mean that ERC is bound to provide other unspecified benefits, such as the protections afforded by the DOE Contractor Employee Protection Program.

In this regard, DOE contracts with firms that must comply with Part 708 are quite clear on this point, and thereby significantly different from the ERC/DOE cooperative agreement. For example, under the prior regulations, those in effect in 1994 when the ERC agreement was signed, a contract included language such as the following:

WHISTLEBLOWER PROTECTION FOR CONTRACTOR EMPLOYEES (DEC 1992) (DEAR 952.222-70)

(a) The Contractor shall comply with the requirements of the "DOE Contractor Employee Protection Program" at 10 C.F.R. Part 708, with respect to work performed on-site at a DOE-owned or leased facility, as provided in Part 708. (2)

There could be no doubt on the part of a firm that signed a contract containing this type of provision that it was to comply with Part 708. This language is entirely different from the broad, general language of the ERC agreement, requiring it to obey applicable health and safety laws and regulations.

In sum, the fact that the agreement between the DOE and ERC did not contain the necessary regulatory language requiring compliance with Part 708, while not necessarily conclusive, is in my view a strong indication that the firm is not bound by the requirements of that Part.

There is other evidence supporting this determination. After reviewing the cooperative agreement, I have concluded that the omission of the regulatory language was not inadvertent. As discussed below, the absence of the key language specifically mentioning Part 708 is consistent with the very nature of the instant agreement between ERC and the DOE.

Part 708 is also referred to as the "DOE's Contractor Employee Protection Program." As this title suggests, the regulations generally apply to contractors and their employees. 10 C.F.R. §§ 708.2 and .3. (3) In the present case, the cooperative agreement between the DOE and ERC does not seem to qualify as a contract for purposes of Part 708. There is persuasive evidence to the effect that contracts and cooperative agreements are distinct and different devices, and that these differences are not just technicalities. See 31 U.S.C. §§ 6303, 6305. The Federal Acquisition Regulations specifically state that "Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301 et seq." 48 C.F.R. 2.101 (definition of contract). Those sections of Title 31 are also known as the Federal Grant and Cooperative Agreement Act.

The document memorializing the agreement between ERC and the DOE specifically cites the Federal Grant and Cooperative Agreement Act as the authority for the agreement. The instrument is not entitled or referred to as a "contract" between the DOE and ERC. The heading of the agreement refers to a "Notice of Financial Assistance Award." In the DOE/ERC agreement itself, there are no references to the arrangement between the DOE and ERC as being anything other than a "Cooperative Agreement." The arrangement is not referred to as a contract between DOE and ERC. Moreover, the ERC Cooperative Agreement consistently refers to ERC as "the Participant," or a "recipient," but never as "the Contractor." In contrast, the Part 708 regulations consistently refer to the firm involved as a contractor.

Thus, the characteristics of the DOE/ERC agreement itself indicate that the arrangement is not the type that should fall within the scope of regulations intended to apply to DOE contractors. This is consistent with the fact that, as discussed above, the cooperative agreement contained no requirement that ERC participate in Part 708. It lends support to my determination that the absence of a reference to Part 708 in the agreement was by design, and that ultimately ERC is not bound by that Part.

The Complainant raises several additional arguments in support of its position that ERC does fall within Part 708. They are not persuasive and can be dealt with summarily.

The Complainant maintains that the facts surrounding the relationship between the DOE and ERC show considerable involvement between the two entities. (4) For example, the Complainant points out that under the terms of the agreement, the DOE will monitor all aspects of the project and review technical reports and information required to be delivered by the Participant to the DOE. The agreement also allows the DOE to make visits to the ERC's site, as necessary. It further provides that ERC will present briefings to the DOE at the DOE's site in Morgantown, West Virginia or at other designated locations. Cooperative

Agreement, Part II, 2(a); Part IV, Attachment A, page 10. The Complainant contends that this level of involvement brings ERC within the coverage of Section 708.3, which provides:

This Part applies to a complaint of retaliation filed by an employee of a contractor that performs work on behalf of DOE directly related to activities at a DOE owned or -leased site.

The Complainant contends that the fact that ERC must deliver reports to the DOE at a DOE site establishes that its work is directly related to activities at DOE at a DOE site. The Complainant cites META, Inc., 26 DOE ¶ 87,501 (1996)(META) as support for this position.

The Complainant seeks to draw significance for Part 708 purposes from matters which are unrelated to the jurisdictional issue. I do not believe that the considerations at issue in META are applicable to the instant case, since META was clearly a subcontractor, and thus had a relationship with the DOE that was of the type that normally falls within the scope of Part 708.(5) Once a firm has agreed to be bound by Part 708, it is certainly appropriate to examine whether the work performed is of the type that will otherwise require it to comply with that Part.

In the instant case, there is no need to consider in detail the nature of any work performed by ERC at a DOE site. Since there is no agreement referring to Part 708, the nature of ERC's contacts with the DOE is irrelevant for purposes of that Part. (6)

The Complainant also asserts that ERC has admitted that part of its funding is based on "a series of research and development contracts, grants and cooperative agreements with the Department of Energy as well as other government and commercial contracts." Complainant's September 7, 1999 Submission at 4. The Complainant therefore contends that since part of ERC's "funding is based on contracts, it clearly falls within the definition of contractor in Part 708." Id. At the very least, the Complainant contends that it is entitled to an evidentiary hearing to ascertain whether ERC has entered into any contract with the DOE in which it has agreed to be bound by Part 708.

This argument, too, is unavailing. The Complainant's protected disclosure related solely to fuel cell matters covered by the cooperative agreement. Any arrangements that ERC may have entered into which do not involve fuel cells are irrelevant in this case. I further see no reason to believe that ERC has entered into other agreements to perform work involving fuel cells that do refer to Part 708.

Accordingly, for the reasons set forth above, I find that ERC's Motion to Dismiss should be granted.

It Is Therefore Ordered That:

(1) The Complaint of Reprisal filed by Salvatore Gionfriddo on June 23, 1999, be and hereby is dismissed.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within 15 days of its receipt, a Notice of Appeal is filed with the OHA requesting review of the Initial Agency Decision by the Director of the Office of Hearings and Appeals.

Virginia A. Lipton

Hearing Officer

Office of Hearings and Appeals

Date: September 27, 1999

(1)On March 15, 1999, the DOE published as an Interim Final Rule a revised regulation governing the Contractor Employee Protection Program. 64 Fed. Reg. 12862 (March 15, 1999). It became effective on April 14, 1999. Section 708.8 of the new procedures states that they "apply prospectively in any complaint

proceeding pending on the effective date of this part." The Complainant argues that the Interim Final Rule is applicable in this case. Unless otherwise indicated, in this Initial Agency Decision I will refer to the Interim Final Rule. Part 708 was originally published at 57 Fed. Reg. 7533 (March 3, 1992). This version was in effect in 1994, when ERC entered into the relevant agreement with the DOE. I find considerable merit in ERC's position that it is unfair at this point to apply the new rule in a manner that would work to the detriment of the firm. However, I believe that the Motion to Dismiss is meritorious under either version of the Rule.

(2)See OHA Case No. VWA-0040, Investigatory Report, Exh. 2.

(3)Section 708.3 provides in relevant part:

This part applies to a complaint of retaliation filed by an employee of a contractor that performs work on behalf of DOE, directly related to activities at a DOE-owned or -leased site, if the complaint stems from a disclosure, participation or refusal described in § 708.5.

Section 708.2 defines "Contractor" as "a seller of goods or services who is a party to:

(1) A management and operating contract or other type of contract with DOE to perform work directly related to activities at DOE-owned or -leased facilities ....

(4)In its September 14 Memorandum, the firm argues that there is no evidence concerning what took place during ERC's visits to DOE and implies that evidence should be taken on this point.

(5)META never argued that its contract did not include language requiring it to comply with Part 708.

(6)Further, under the Federal Grant and Cooperative Agreement Act, substantial involvement is contemplated between the Agency and the entity carrying out the activity set forth in the cooperative agreement. 31 U.S.C. § 6305(2). Thus, the ties between the DOE and ERC, as discussed in the text above, are fully consistent with that Section of the Act, and lend support to the position that the arrangement was a cooperative agreement.

Case No. VBH-0010

September 1, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Petitioner: Jagdish C. Laul

Date of Filing: December 3, 1999

Case Number: VBH-0010

This Decision involves a complaint filed by Dr. Jagdish C. Laul (hereinafter the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant contends that his dismissal by his employer, Excalibur Associates, Inc. (Excalibur) was a reprisal for his participation in a prior Part 708 proceeding. Excalibur is a subcontractor of Kaiser Hill Company (Kaiser) who is the managing and operating contractor of DOE's Rocky Flats Field Office (Rocky Flats).

I. The DOE Contractor Employee Protection Program

A. Regulatory Background

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). The program's primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. A DOE contractor may not discharge or otherwise discriminate against any employee because that employee has participated in a Part 708 proceeding or otherwise engaged in protected conduct. 10 C.F.R. § 708.5(b). Employees of DOE contractors who believe they have been discriminated against in violation of Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to (i) an investigation by an Office of Hearings and Appeal (OHA) investigator, (ii) a hearing and independent fact-finding by an OHA hearing officer, and (iii) an opportunity for review of the hearing officer's initial agency decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.30, 708.32.

B. Procedural History

On December 18, 1998, the complainant filed this complaint with the DOE Office of Inspections of the Office of the Inspector General. On April 16, 1999, the Office of Inspections transferred a number of pending complaints, including the subject complaint, to OHA. On April 26, 1999, the OHA Director

appointed an investigator to examine and focus the issues raised in the complaint. The investigator conducted an investigation, and issued a Report of Investigation on December 3, 1999. (1) On that same day, the OHA Director appointed me the hearing officer in this case.

On May 10, and May 11, 2000, I convened a hearing on the complaint in Rocky Flats. The transcript of the Hearing will be referred to in this decision as TR.

II. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). See also Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins).

B. The Contractor's Burden

If the complainant meets his burden, the regulations require Excalibur to prove by "clear and convincing" evidence that it would have terminated the complainant if he had not engaged in protected conduct. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n.3. In evaluating whether a contractor has met its burden, the hearing officer considers the strength of the contractor's evidence in support of its action and any evidence that the contractor takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

III. Background

Excalibur is a small company(2) formed to provide technical services to DOE contractors. Excalibur received its first contract during May 1997. Excalibur's closing brief at 2. The two founders and principals of Excalibur are Charlie Burns, Chief Executive Officer and Wayne Spiegel, Chief Operating Officer. Hereinafter these two individuals will collectively be referred to as Excalibur's senior management. The third member of Excalibur's management with significant involvement in this proceeding is David Richards. He was employed by Excalibur between October 1997 and May 1999. Starting in February 1998 he was the direct supervisor of the complainant.

Excalibur's primary contract with Kaiser required that Excalibur prepare "Emergency Preparedness Hazards Assessments" (EPHA) and "Emergency Assessment Resource Manuals" (EARM) for most of the sites at the Rocky Flats facility. A building or a work area is considered a site. The EPHA described in detail the risks associated with the release of each hazardous material located within a site. TR. at 318. After the EPHA for a given site was prepared by Excalibur and approved by Kaiser, Excalibur prepared the EARM for that site. Because the EARM used the EPHA as its primary source, during the hearing the EARM was often referred to as a derivative document. The EARM provided operational guidance on the appropriate actions to take in the event of the release of each hazardous material located within a site.

Two Kaiser employees, Mark Spears and Wilbert Zurline, had the primary responsible for substantively reviewing the EPHAs and EARMs written by the Excalibur employees. Mr. Spears was the manager of the Hazardous Assessment Committee (HAC); Mr. Zurline was the alternate manager. Mr. Zurline was

responsible for the initial review of the EARMS. Mark Spears was responsible for the final review. Collectively, Mr. Spears and Mr. Zurline will be referred to as the HAC managers.

The complainant started working for Excalibur on November 17, 1997, AR at 405, as a principal scientist.(3) Excalibur assigned the complainant to work primarily on drafting and revising EARMs.(4)

During the hearing there was significant testimony regarding the complainant's performance. The testimony generally indicated that the complainant was a hard worker, motivated and technically competent. The testimony also indicated several areas in which the complainant needed to improve, including the quality of his written work, his ability to follow oral direction and his responsiveness to others' concerns.(5) I will briefly review some of the testimony regarding the complainant's performance.

Mr. Burns, Excalibur's Chief Executive Officer, testified that the complainant was "motivated" and he would volunteer to undertake "a task that I wanted done." TR at 390. "I looked at [motivation to undertake a project] very favorably." TR at 391. Mr. Burns' testimony further indicated that the complainant had difficulties dealing with comments. TR at 392. I found Mr. Burns' testimony particularly thoughtful and candid when he indicated the complainant had difficulties dealing with others and was sometimes unwilling or unable to follow direction he received from management. Mr. Burns also indicated that the complainant's final documents required an additional review by editors because the first set of editorial comments was not always properly implemented. TR at 415. Mr. Burns summarized his testimony by indicating there was good and there was bad in the complainant's work. TR at 391. Mr. Burns' testimony was confirmed by Tony Miles.(6) Mr. Miles worked in a cubicle that was next to the complainant's. He testified:

> On numerous occasions Charlie Burns came over and he gave [the complainant] some assignments that required extra work. And it showed that Charlie Burns had a lot of faith and confidence in [the complainant]. And on other occasions he came by and he complimented [the complainant] on work that he had done.

TR at 333. Mr. Miles also testified that he had a Ph.D. and did peer review of the complainant's work. He testified that he thought that the complainant's work was of high caliber and he was technically knowledgeable. TR at 334.

The testimony of Mr. Spiegel, Excalibur's Chief Operating Officer, indicated that he had little first hand contact with the individual. He testified that he deferred to Mr. Burns in evaluating the technical abilities of the complainant. TR at 266. He further testified that in evaluating the complainant's teamwork and work quality, he deferred to comments from his peers and Mr. Richards. TR 266. The OHA investigator's notes indicate that Mr. Spiegel's evaluation was that the complainant's work was satisfactory and that "he would have no problems rehiring him should the company have a future need of his skills." AR at 275.

Mr. Richards testified that the complainant's work was generally technically accurate. TR at 205. He also testified that "technically in some of his documents he was better and more detail-oriented. Sometimes, he missed things. I can't really say how he compared directly to any of the other analysts." TR. at 216. The testimony of Mr. Richards confirmed that the complainant had some difficulty with written and oral communications.

The complainant was discharged on October 21, 1998. The October 21, 1998, out processing form provided to the complainant indicates the complainant was discharged because there was "insufficient scope of work to justify retaining the service of [the complainant]." AR at 365. Mr. Spiegel's testimony also indicated the complainant was discharged because there was insufficient work for the complainant. TR at 545.

There is no dispute that prior to the complainant's dismissal he participated in "an administrative proceeding conducted under part 708." 10 C.F.R. § 708.29(b). That administrative proceeding was initiated

in June of 1996 when the complainant filed a whistleblower complaint against Kaiser and his direct employer Tenera, a subcontractor of Kaiser. The final agency decision on that complaint was issued on August 19, 1998. The complainant believes the October 21, 1998 dismissal was a retaliatory act for his participation in that Part 708 proceeding.

IV. Analysis

A. Complainant's Showing

As stated above, under Part 708 a complainant has the burden of demonstrating, by a preponderance of the evidence, that the complainant engaged in protected conduct and that the protected conduct was a contributing factor to a reprisal. As explained below, I have concluded that the complainant has met his burden.

1. The protected conduct

As indicated above, it is undisputed that the complainant participated in the administrative proceeding conducted under Part 708 from June 1996 through August 1998. This was protected conduct under Part 708.

2. The adverse personnel actions

Three relevant personnel actions by Excalibur's management preceded the complainant's October 21, 1998 dismissal. Each of these actions contributed to the dismissal.

The first personnel action occurred in February 1998 when Mr. Burns directed "Mr. Richards to take the lead in dealing with [Kaiser]." TR at 385. This meant the complainant would no longer be the team lead for the EARMs, he would not be permitted to sign the documents he prepared, and his interactions with the HAC managers would be reduced.

The second personnel action was Excalibur's decision to enter into a subcontract with Global Business Associates (GBA).(7) This contract was entered into during June 1998. GBA was a subcontractor with one employee, Mr. Ron Beaulieu. Under this contract GBA was given the responsibility for preparing and maintaining certain EPHAs and ERAMs. This contract and the extension of the contract into fiscal 1999 had the effect of reducing the work on EARMs available for employees of Excalibur.

The third personnel action was Excalibur's senior management's written rating of each of its twelve analytical employees. Complainant's exhibit #12. This rating was prepared in June 1998.(8) The complainant was rated the lowest of the twelve Excalibur employees. That written rating of its employees was the most important factor in Excalibur's determination of which employee to dismiss.

As the foregoing indicates, three negative actions - Excalibur's removal of the complainant as the team lead, Excalibur's transfer of work to an outside contractor and Excalibur's low rating of the complainant - contributed to the complainant's dismissal. As explained below, the complainant has met his burden of demonstrating that his protected conduct was a contributing factor to the three negative actions that led to his dismissal.

3. Contributing Factor

It is undisputed that a complainant can show that protected conduct was a contributing factor by showing that the official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the

personnel action. For an example of a case applying this standard, see Barbara Nabb, 27 DOE ¶ 87,519 (1999).

As explained below, the complainant has met this standard: the complainant has shown such constructive knowledge and temporal proximity. I consider the temporal proximity first.

a. Temporal proximity

In this case the three preliminary Excalibur personnel decisions all occurred at the same time as the protected conduct, i.e., during the pendency of the complainant's protected participation in the Part 708 proceeding. Therefore, there is a direct temporal nexus between the complainant's protected conduct and the personnel decisions that led to his dismissal. There is also a close time nexus between the protected conduct, which concluded during August 1998, and his October 21, 1998 dismissal.

b. Actual or constructive knowledge

Although it is clear that Excalibur had no direct knowledge of the protected conduct, the complainant has demonstrated that Excalibur's management had constructive knowledge of such conduct. As explained in section i below, the complainant can demonstrate constructive knowledge by demonstrating that the individuals making the personnel decision were influenced by the opinions of those persons with knowledge of the protected conduct. In this case, there are two communication linkages that demonstrate that negative information was passed from those with knowledge of the protected disclosure to Excalibur's management. The first is between Kaiser employees involved in that protected proceeding and the Kaiser HAC managers. The basis for finding a passage of negative information from those involved in the protected proceeding to the HAC managers will be discussed in section ii below. The second linkage is between the HAC managers and Exclaibur's management. The method used to pass negative information from the HAC managers to Excalibur management will be discussed in section iii below.

i. The legal standard for demonstrating constructive knowledge

Under Part 708 case law, a complainant can establish constructive knowledge by showing that the person taking the alleged retaliatory act was influenced by the negative opinions of those with knowledge of the protected conduct. See Am-Pro Protective Services, Inc., 26 DOE ¶ 87,511 (1996) (Am-Pro); Morris J. Osborne, 27 DOE ¶ 87,542 (1999); Jimmie L. Russell, 28 DOE ¶ 87,502 (2000). For example, in Am-Pro, the complainant's first and second level supervisors recommended to the third level supervisor that he terminate the complainant for insubordination, and the third level supervisor took the recommended action. Am-Pro found that, because the third level supervisor acted on information originating with those with knowledge of the protected conduct, the third level supervisor had constructive knowledge of the protected conduct. Thus, the decision stands for the proposition that if the alleged retaliation is based on information that is tainted by the protected disclosure, the decision maker has constructive knowledge of the protected disclosure. In the other two cases cited, the personnel recommendation of independent committees were directly affected by those with direct knowledge of the protected conduct.

The foregoing decisions take into account the realities of organizational structure and the manner in which we have seen retaliations occur in the workplace. If a complainant makes a protected disclosure to his immediate supervisor, and his immediate supervisor retaliates by recommending the complainant's dismissal, it is unlikely that the immediate supervisor will cite the protected disclosure. Instead, the immediate supervisor will likely cite a pretext such as poor performance or misconduct. As a result, the decision maker is led to believe and reasonably believes that poor performance or misconduct prompted the recommended action, and the decision maker takes the recommended action on that basis. Thus, the decision maker's lack of knowledge of the protected conduct is attributable to reasonable reliance on subordinates.

Excalibur argues, however, that in order for a complainant to demonstrate that the person taking the retaliatory action had constructive knowledge of the protected conduct, the complainant must establish that the person should have known, in the exercise of reasonable care, of the protected conduct. As authority for this proposition, Excalibur cites the definition of "constructive knowledge" in Black's law dictionary.

Excalibur's definition of constructive knowledge is not applicable in this proceeding. As just explained, under Part 708, a complainant can demonstrate constructive knowledge by showing that the alleged retaliation is based on information that is tainted by the protected disclosure. None of the decisions cited above contained a finding that the decision maker should have known, in the exercise of reasonable care, of the protected conduct, and there is nothing in those decisions to indicate that the decision makers' lack of knowledge resulted from a lack of reasonable care. Indeed, those decisions demonstrate how a definition of constructive knowledge that requires proof of lack of reasonable care would ignore the decision making context in which reprisals commonly occur.

Finally, I note that, aside from Excalibur's specific argument about constructive knowledge, a thread running through Excalibur's submissions is that Part 708 protections do not apply where the decision maker has no retaliatory intent. I disagree. By looking at the decision maker, this narrow reading would deny Part 708 protection to any complainant even though the employee's protected conduct contributed to the adverse action. It would thereby frustrate Part 708's purpose of protecting whistleblowers. Moreover, the respondent's argument is inconsistent with case law under the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1). Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993). In Marano, the complainant disclosed mismanagement in his office. The resulting agency investigation confirmed the accuracy of the disclosures, which in turn led to a reorganization of the office, including the transfer of the complainant. The court held that, even though the agency did not have any retaliatory motive in transferring the complainant, the complainant had met his burden of establishing that his disclosures were a contributing factor to the transfer. Thus, the Marano decision makes clear that a complainant can meet his burden without establishing retaliatory motive.

As explained below, the complainant has demonstrated that Excalibur's management had constructive knowledge that he participated in a protected proceeding. Although the linkage between these Kaiser employees and Excalibur's senior management is more attenuated than the linkage in the three cases cited above, the same principle applies. The record indicates that it is more likely than not that the complainant's participation in a prior Part 708 proceeding led various Kaiser employees to make negative comments about the complainant that predisposed the HAC managers to negatively evaluate the complainant to Excalibur.

ii. The HAC managers' constructive knowledge of the protected conduct

As discussed below, the record indicates that the complainant's prior Part 708 proceeding resulted in a general animus toward the complainant, that Kaiser employee Spears was aware of that animus, and that Kaiser HAC manager Spears and his fellow HAC manager Zurline, passed negative comments about the complainant along to Excalibur's management. I conclude that the HAC managers' comments were based on a preconceived negative bias toward the complainant because the HAC managers made those comments in unusual haste, the comments had significant immediate effects on the complainant, and there is no support for the accuracy of their comments.

In this case at least three Kaiser officials were directly aware of the complainant's participation in the protected proceeding. They are R. E. Kell, the deputy manager of the Kaiser Safety Engineering and Technical Service Office (SETS office), Robert Allen, Manager, Kaiser Human Resources, and Dana Dorr, Kaiser Work Force Restructuring Manager (hereinafter referred to collectively as the "directly involved Kaiser employees"). Mr. Kell signed the April 1996 memorandum that directed Tenera, the complainant's employer, to dismiss the complainant. Excalibur Exhibit #17. That dismissal was the adverse personnel action that led to the prior whistleblower proceeding. Mr. Allen and Mr. Dorr worked for Kaiser on investigating and evaluating the prior whistleblower complainant.

The evidence is clear that other Kaiser employees knew of the protected conduct and made negative comments about the complainant. The record indicates that two senior Kaiser/Tenera employees, Mr. Maini, a Tenera employee who headed the Kaiser SETS Office, and Ms. Bateman, made comments that the complainant was a whistleblower and should not be rehired during 1996.(9) In addition the record indicates that Mr. Tony Buhl, Vice President Environment Safety and Health and Assurance, made comments that he would not hire the complainant during 1998.(10)

It is clear that HAC manager Spears worked with various Kaiser employees who had knowledge of the complainant's participation in the protected proceeding. On the organization chart for the SETS Office(11) dated March 1, 1996, Mr. Spears reported directly to Mr. Maini and his deputy Mr. Kell. As mentioned above, Mr. Kell was directly involved in the prior proceeding and Mr. Maini, his supervisor, was found by the Deputy Inspector General to have made negative comments about hiring the complainant. Ms. Bateman is also listed on that organization chart. As also mentioned above, she was also found by the Deputy Inspector General to have made comments aimed at assuring the complainant was not hired. Including Mr. Spears, there are six people named on the March 1996 organization chart of the SETS Office. Three of the other five people on the chart were directly involved in the prior protected proceeding. In such an office set up I believe that while Mr. Spears may not have been aware that the complainant was a whistleblower, Mr. Spears would have been aware of the problems being caused by the complainant and the negative feeling of his peers and supervisors toward the complainant.

Excalibur asked Mr. Spears two questions in an attempt to demonstrate that Mr. Spears did not have knowledge of the negative feeling toward the complainant in the SETS office. Those questions were "Do you know if [the complainant] was a whistleblower?" and "Did you ever have any conversation with Mr. Dick Kell about [the complainant]?" TR at 249-250. Mr. Spears answered no to both of those questions. However, this testimony does not even address the issue whether Mr. Spears was aware of the bad feeling in the office toward the complainant.(12)

The HAC managers' alacrity in negatively evaluating the complainant's work and their weak and evasive testimony regarding the basis for their determination provide further support for the conclusion that the HAC managers had a preconceived negative bias toward the complainant.

HAC managers Spears and Zurline negatively evaluated the complainant's work from the outset, i.e., in January 1998. HAC manager Spears testified that he first met the complainant during January 1998 when the complainant was preparing the first group of EARMs. That month the complainant provided ten draft EARMs to the HAC managers for their review. At that point the complainant had been an employee for less than two months and had just completed the first drafts of ten EARMs; these ten EARMs were the first group of EARMs that had been developed for Rocky Flats. TR at 179 and 202.

The HAC managers testified that during January 1998 they each provided negative comments directly to Excalibur's senior management, regarding the quality of all documents received from Excalibur, but the HAC managers did not testify with any specificity concerning their quality concerns. TR at 207 and 240.

HAC manager Spears testified that he provided feedback to Excalibur's CEO Spiegel, which indicated Mr. Spears "was dissatisfied with the quality of the products he was given to review." TR at 240. He indicated that there were "an excessive number of substantive and technical errors in the document." TR at 240. But he did not provide any examples of such errors at the Hearing.

Similarly, HAC manager Zurliene testified that he had meetings with the complainant and others in which he criticized the complainant's work product. TR at 179. He testified that he told Mr. Spiegel that the complainant's work was not "competently based." TR at 181. When he was asked "What was not technically competent about the [complainant's] work?", his testimony was evasive and did not specifically point to any incompetence. TR at 182. From his demeanor and the lack of specifics in his testimony, I conclude that he did not have a reasonable basis for his conclusion that the complainant's work was not technically competent. TR at 181.(13)

In summary, the initial contact between the HAC managers and the complainant was in January 1998. There was limited contact between the HAC managers and the complainant during that month.(14) The HAC managers' specific concerns regarding the EARMs were quickly resolved. Yet, the HAC managers provided negative comments to Excalibur which, as discussed below, caused Excalibur's management to quickly downgrade the complainant.

I believe the HAC managers did not testify honestly at the Hearing about the nature of their comments. The HAC managers suggested in a portion of their testimony that their comments in January 1998 to Excalibur's senior management related to the quality of all documents received from Excalibur. TR at 500 and 501. In that testimony they were trying to convince me that they did not make comments regarding specific employees' work.(15) My evaluation of this testimony was that it was intentionally vague and was intended to be evasive. When they made these statements, their general demeanor indicated they were not willing to recall the substance of their comments and that they were attempting to minimize the importance of their comments. Their evasiveness led me to believe their comments to Excalibur's management regarding the complainant were specific and strongly negative. The fact that only the complainant was downgraded and only his contact with the HAC managers was reduced supports my evaluation of the HAC manager's testimony.

As the foregoing indicates, I have concluded that the HAC managers had constructive knowledge of the protected conduct. It is not the complainant's burden to demonstrate exactly how the animus was passed to the HAC managers by Kaiser/Tenera employees. Such a burden is typically beyond the ability of any whistleblower. The complainant has shown that his protected conduct caused animus by the Kaiser/Tenera management and that it is more likely than not that this animus influenced the HAC managers to make negative comments to Excalibur.

iii. Excalibur's constructive knowledge of the protected conduct

It is clear that beginning in January 1998 HAC manager Spears and Zurline provided negative evaluations of the documents prepared by the complainant. Mr. Richards clearly remembered that "It was right after [the complainant] had produced the first couple of documents and we had gotten comments on them. Then I was instructed to assume full responsibility for all of them." TR at 200. Mr. Burns testified that he recalled that comments he received from Kaiser either directly or indirectly indicated that "there are problems with [the complainant's] ability and/or willingness to accept and/or deal with comments . . ." TR at 384. He also indicated that "There was a difficulty in the ability for [the complainant] to deal with the comments and come back with an answer that resolved the issue in more than just a superficial way." TR at 384. However, Mr. Spiegel described the information he received from the HAC managers in a slightly different manner. He testified that the comments indicated that the documents lacked quality. TR at 273. He also stated that the HAC managers indicated "our process lacked proper definition and that the documents had not gone through a rigid quality assurance before being forwarded to him." TR at 274.

Therefore, even though I believe that Excalibur employees were not aware of the complainant's participation in the prior protection proceeding, I find that Excalibur's senior manager received and considered the negative opinions of the HAC managers. These findings lead to the conclusion that Excalibur had constructive knowledge of the complainant's participation in the protected proceeding when it made various personnel decisions regarding the individual. Once there is a reasonable inference that the complainant's participation in the protected proceeding had an effect on the individuals making personnel decisions at Excalibur the complainant has met his burden of showing that his participation in the protected proceeding was a contributing factor to the adverse personnel decisions.

B. Excalibur's Showing

In light of my finding that the complainant's protected activity was a contributing factor to his dismissal, the burden is on Excalibur to show by clear and convincing evidence that the complainant would have

been dismissed absent the participation in the prior Part 708 proceeding. Excalibur must demonstrate by clear and convincing evidence that it would have taken the personnel actions even if it had not received the HAC managers' evaluation that the complainant's work was not technically accurate. As an initial matter there has been no analysis to support the HAC managers' comments that the complainant's work was not technically competent. Excalibur did not submit any documents prepared by the complainant. Nor did it provide any analysis to support the position that the complainant's work was technically unsatisfactory.

Instead Excalibur has attempted to show that its decision to dismiss the complainant was a reasonable business decision. Excalibur has provided testimony from its senior management which indicates its reasons for reducing the complainant's contact with the HAC managers, contracting GBA, and rating the complainant as its poorest performing employee. The testimony tends to indicate that given Excalibur's receipt of the negative evaluations from the HAC managers, there was a reasonable basis for each of the three preliminary personnel decisions. The testimony also indicates that after those preliminary decisions were made it was reasonable to dismiss the complainant.(16) I am convinced that the senior management officials of Excalibur made each of the initial decisions without malice toward the complaint. Nevertheless, the burden is on Excalibur to show that it would have dismissed the complainant absent the effects of the complainant's participation in the protected proceeding.

In this case Excalibur's senior management's opinions of the complainant were clearly affected in a number of ways by the evaluation of the HAC managers.(17) Over time, the HAC managers provided information which indicated that the complainant's work was technically incompetent. Therefore, in order to prevail Excalibur is required to demonstrate that, in the absence of knowledge of the HAC managers' opinions, it would have reached the decision to hire a subcontractor, rate the complainant poorly and then dismiss him. I do not believe the testimony provided by Excalibur comes close to making these showings under the clear and convincing standard.

For instance, the decision to hire a subcontractor (GBA) was critical to the company's ability to perform its work without the services of the complainant. The testimony of Mr. Burns attempts to convince me that performing the work through GBA was more cost effective than performing the work in house. Mr. Burns suggested two reasons why he believed GBA was more cost effective. Mr. Beaulieu (the sole employee of GBA) agreed to a fixed price contract to complete 16 EPHAs and 16 EARMs in fiscal 1999. TR at 409. Mr. Burns indicated that such production levels would significantly exceed the production level of Excalibur employees in 1998. Mr. Burns further indicated that under the guidance of GBA and using GBA's methodology, an Excalibur employee, Mr. Blumstein produced significantly more EPHAs and ERAMs than he had in fiscal 1998. TR at 423. Mr. Burns ascribed the increase in production of Mr. Blumstein to the efficiency of GBA's methodology and supervision. I found this portion of his testimony to be deceptive. In fact, the development work on all of the EPHAs was completed in fiscal 1998. Mr. Burns' initial testimony indicated that you could measure the increase in production by comparing the number of documents prepared in each year. However, cross examination confirmed the prior testimony at the hearing that the work to be done in fiscal 1999 constituted revising and updating the documents prepared in 1998 and that revising and updating a document took less time than the initial preparation of a document. When asked about the difference between the 1998 development and the 1999 maintenance, Mr. Burns recognized that his stated reason for believing that 1999 production was higher than 1998 was illogical. Initially he seemed confused and was unable to articulate a reason why he believed production levels per employee were higher in 1999. Finally, after some confusion he testified without support that "It well could have taken twice to three times as many hours as what it took in fiscal 1999 as it did take." TR at 439. His initial statements provided a misleading comparison and his final statement was unconvincing and provided no reason other than his extemporaneous opinion to believe that production was higher in 1999. Therefore, Excalibur has provided no support for its position that GBA was more productive than Excalibur employees. Excalibur has failed to present a convincing rationale for hiring GBA in the absence of the negative comments of the HAC managers.

Another stated basis for Excalibur's decision to dismiss the complainant was Mr. Spiegel's often-repeated

assertion that in making his decision to lay off the complainant he considered only Excalibur employees. He was clear that he did not consider laying off subcontractors. TR at 279. The decision to consider Excalibur employees only made it much more likely the complainant would be dismissed. There is no support for the proposition that Mr. Spiegel would have only considered Excalibur employees in the absence of the complainant's participation in the protected proceeding. If the HAC managers' evaluations of the complainant had been more positive, Excalibur certainly would have at least considered other options for reducing costs. Therefore, I find there was no clear and convincing evidence presented to support the position that Excalibur would have subcontracted with GBA and would have considered dismissing only Excalibur employees in the absence of the comments of the HAC managers.

After considering the documentary information, the briefs of the parties, the testimony given at the hearing, and the parties' post- hearing submissions, I find Excalibur has not shown by clear and convincing evidence that it would have discharged the complainant absent the poor evaluations of his work provided by the HAC managers.

V. Conclusion

Based on the analysis presented above, I find that the complainant has participated in an administrative proceeding conducted under Part 708, and that Excalibur's dismissal of the complainant was an adverse personnel action that constituted a retaliatory act under Part 708. Therefore, the complainant is entitled to remedial action from Excalibur. The individual has requested back pay and litigation expenses. The back pay shall be calculated from October 21, 1998 until the day the complainant accepted a position at Los Alamos National Laboratory, October 12, 1999. The hourly rate shall be the rate the complainant was paid as a consultant, $39.60.

It Is Therefore Ordered That:

(1) The Request for Relief filed by the complainant under 10 C.F.R. Part 708 is hereby granted as set forth below.

(2) Within thirty days of the date of this order the complainant shall provide Excalibur with a detailed report that provides a detailed calculation of attorneys' fees and litigation expenses.

(3) Within thirty days of the date of this order the complainant shall provide Excalibur with a report which calculates back wages for forty hours each week from October 21, 1998, through October 12, 1999. The hourly rate shall be $39.60. There shall be no offsets for unemployment benefits or wages earned by the complainant. Interest shall accrue on the back-wages at the rate of 1% per month starting on November 1, 1999. Interest shall compound monthly.

(4) Within sixty days of the date of this order Excalibur shall pay the attorney's fees and litigation expenses as reported pursuant to Paragraph (2) above and shall pay back wages as reported pursuant to Paragraph (3) above.

(5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the complainant relief unless, within 15 days of the date of this Order, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Thomas L. Wieker

Hearing Officer

Office of Hearings and Appeals

Date: September 1, 2000

(1)The Investigator's Report is a ten page written determination. It will be referred to as the "IR". The Administrative Record of the OHA investigative proceeding consists of 489 pages and will be referred to as the "AR".

(2)During the 1998 fiscal year (October 1, 1997 through September 30, 1998) Excalibur had between ten and twenty employees.

(3)Mr. Burns testified that prior to hiring the complainant he did not check the complainant's references nor did he call anyone at Rocky Flats regarding the complainant. TR at 376.

(4)Mr. Burns testified that the analyst that created an EARM signed it as the subject matter expert and therefore in January 1998 the complainant was signing the EARMs that he authored. TR 379.

(5)In addition to the testimony at the hearing, the record contains three relevant memoranda from Excalibur's management. The first is an April 29, 1998, memorandum from Mr. Spiegel to the file indicating concerns that he had discussed with the complainant. AR at 399. This memorandum indicates Mr. Spiegel discussed the complainant's inability to communicate with co-workers and his failure to listen to instruction. The memorandum also indicated that Mr. Spiegel indicated to the complainant that he had many talents that were valuable to the company. The second is an August 11, 1998, memorandum from Mr. Richards to Mr. Spiegel indicating problems with the complainant's work. AR at 403. That memorandum indicated Mr. Richards' opinion that the complainant had difficulty following guidance on the structure of reports and that the complainant's written language skills were weak. The third is an August 31, 1998, memorandum from Mr. Spiegel to the file indicating he had discussed Mr. Richards' concerns with the complainant. AR at 402.

(6)Mr. Miles worked for Excalibur as an employee of G.D. Barri. G.D. Barri was subcontractor of Excalibur.

(7)Mr. Spiegel testified that the decision to subcontract some of Excalibur's work to GBA was a business decision made by Mr. Burns. TR at 536. He also testified that he knew the decision to hire GBA had the potential of causing the layoff of current employees. TR at 539.

(8) Mr. Spiegel testified that the written evaluation was prepared during the May/June time frame. TR at 558.

(9)Complainant's exhibit #4 is the June 22, 1998, Supplemental Report of Inquiry and Recommendation. That report was prepared by the Acting Deputy Inspector General for Inspections. The report indicates Mr. Maini and Ms. Bateman attempted to dissuade Tenera management from rehiring the complainant. Complainant Exhibit #14 at 13. The organization charts contained in complainant's exhibit #9 indicate that Mr. Maini was the head of the Kaiser SETS Office and was a Tenera employee.

(10)Tony Miles testified at the hearing. He indicated that during 1998 he was considering submitting a bid to become a subcontractor. Mr. Miles testified that he discussed the proposal with Mr. Buhl. Mr. Miles indicates that Mr. Buhl was favorably inclined to the project. However, Mr. Miles testified that when he mentioned the complainant's name Mr. Buhl indicated that the complainant had "been engaged in a whistleblowing incident, and, he said that he would probably have some reluctance to bring a person like that into his company." TR at 243.

(11)There were four Kaiser organization charts included in complainant's Exhibit #10. The first is an overall organization chart for Kaiser. The second and third indicate the organization of two offices listed on the overall organization chart and mentioned in the text. The fourth is a lower level office which is not referred to in this decision. Two of the office organization charts are dated March 1, 1996. The other two organizational charts are undated but they appear to reflect the organization on March 1, 1996.

(12)It is difficult to elicit testimony that the HAC managers were aware of the negative feeling of other Kaiser employees toward the complainant because the HAC managers themselves would not recall a general comment that indicated euphemistically that the complainant was not a team player. Nevertheless, such a euphemism or code word would have led the HAC managers to form the opinion that the complainant should be placed under a higher level of scrutiny. Euphemisms/code words that have been seen in other cases include “insubordinate”, “dangerous” and “does not act in the best interest of the company”. People usually pick euphemisms/code words that are somewhat reasonable. Therefore, my impression is that the euphemisms/code words used in this case probably were more likely to have been along the lines of “he is a pain in the neck”, “he never listened to what I tell him”, “he is hard to get along with” and “he makes my life difficult”.

(13)In addition there was no testimony or documents indicating a basis for finding the complainant’s work was, in fact, technically unsatisfactory. In the last week of January nine of the EARMs were accepted after the requested changes were made. See the “approved by” date on the first ten pages of complainant exhibit #5. There was no basis presented to indicate specific technical errors in the complainant’s work nor was any testimony provided which indicated that the complainant’s work was less satisfactory than other Excalibur employees.

(14)Mr. Spears met with the complainant only two times before the complainant was removed from his lead position. Excalibur’s post hearing brief at 16.

(15)Mr. Burns testified that he received comments from the HAC managers regarding specific Excalibur engineers. TR at 500. Additionally, in its post hearing brief Excalibur indicates that Mr. Spears provided specific comments about the quality of work presented by Mr. Beaulieu. Post Hearing brief at 17.

(16)Mr. Spiegel testified that prior to the complainant’s dismissal, Excalibur moved Mr. Blumstein and Mr. Richards to other activities. TR at 563.

(17)The complainant need only establish that the HAC managers’ negative comments contributed to Excalibur’s decisions. In Osborne a supervisor convinced a disciplinary committee that the complainant was engaged in time card fraud. The committee had no retaliatory motive. However, the committee was manipulated into recommending dismissal by the false information provided by the supervisor. In that case the committee relied on the statements of the supervisor that the individual had committed time card fraud. In this case Excalibur’s senior management relied on the evaluations of the HAC managers. At the hearing in the Osborne case the committee members were convinced they had made an independent judgment. However, they were unable to explain why they believed the action of the complainant constituted time card fraud.

Case No. VBH-0011

December 22, 1999

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner:Diane E. Meier

Date of Filing: April 16, 1999

Case Number: VBH-0011

This Decision involves a complaint filed by Diane E. Meier (Meier or “the complainant”) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Meier is the former employee of a DOE contractor, Lawrence Livermore National Laboratory (LLNL or “the contractor”), and alleges in her complaint that certain reprisals were taken against her, including being the subject of unjustified anger and threats from her supervisor, and ultimately being removed by the contractor from her position on a favored work project, as a result of her participating in an act protected under Part 708. More specifically, Meier alleges that these adverse personnel actions were taken against her in retaliation for disclosing to the contractor her disapproval of the supervisor’s improper conduct in assuming supervision of his wife working on the project, in violation of the contractor’s personnel rules concerning the supervision of “near relatives.” In compensation for these alleged retaliations, the complainant seeks reinstatement, back pay, other unspecified damages, and reasonable attorney’s fees. On the basis of the hearing that was conducted and the record before me, I have concluded that Meier is not entitled to relief under 10 C.F.R. Part 708.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533

(March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure, or participating in a related proceeding, will be directed by the DOE to provide relief to the complainant.

As initially formulated, the program regulations, codified at 10 C.F.R. Part 708, generally prescribed independent fact-finding by the DOE Office of Inspector General (IG), followed by the issuance of a Report of Inquiry setting forth the IG’s findings and recommendations on the merits of the complaint. Thereafter, the complainant could request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer rendered an Initial Agency

Decision. However, on March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised regulations, OHA conducts the investigation of the complaint, if one is requested by the complainant. 10 C.F.R. § 708.22. Similar to the prior regulations, the Director of OHA then appoints a Hearing Officer who conducts a hearing on the record and issues an Initial Agency Decision. 10 C.F.R. §§ 708.28, 708.30. Parties may seek review of an Initial Agency Decision by the filing of an appeal with the Director of OHA, in accordance with section 708.32.

B. The Present Proceeding

(1) Procedural History

On April 22, 1998, Meier filed her complaint under Part 708 with the IG, which accepted jurisdiction in a letter dated June 2, 1998. On April 16, 1999, the complaint was transferred to OHA which immediately assigned an investigator to the case, 10 C.F.R. § 708.22. OHA Case No. VBI-0011. In conducting the investigation of the complaint, the investigator interviewed the complainant and other key individuals, and received pleadings and supporting documents filed on behalf of the individual and contractor. Based upon this information, the investigator issued a Report of Investigation on June 14, 1999.

In the Report of Investigation, the investigator sets forth her findings that the complainant arguably made disclosures protected under Part 708, and assuming a protected disclosure is found, that there is sufficient temporal proximity to the retaliations alleged by the complainant to permit an inference that the disclosure was a contributing factor. The investigator further found that while the contractor claimed that its actions with respect to the complainant were not in retaliation for any protected disclosure, the complainant challenges the contractor's support for this claim.

Concurrent with the issuance of Report of Investigation, I was appointed as Hearing Officer in this case. 10 C.F.R. § 708.25. After a number of contacts with the parties in the form of written correspondence and conference calls, I conducted a hearing in this proceeding on September 9-10, 1999. The official transcript of that hearing will be cited in this determination as "Tr.". Meier and LLNL filed respective post-hearing closing arguments on October 29, and November 2, 1999.

(2) Factual Background

The following summary is based upon the hearing testimony, the investigation file and submissions of the parties. Except as indicated, the facts set forth below are uncontroverted.

The complainant, Meier, was first employed by LLNL in September 1992, as a supplemental labor employee at the Washington Operations Office (WASHOP) located in Germantown, Maryland, a satellite office under LLNL's Fission Energy Systems and Safety Program (FESSP). However, in March 1994, Meier accepted a position as a career LLNL employee working under Thomas Crites (Crites), who in early 1995 became Associate Program Leader (APL) for Environmental Safety and Health (ES&H). In the fall of 1995, the complainant assumed the position of Deputy APL under Crites.

Beginning in 1993, Crites' wife, Linda Rahm-Crites (Rahm-Crites), also worked at WASHOP. Rahm-Crites was actually employed by an LLNL subcontractor, but worked at WASHOP as a supplemental labor employee performing technical editing and writing on various projects on an hourly rate. Although Rahm-Crites was assigned work as needed by project managers, she ultimately reported to Nancy Swertz, another APL who had overall WASHOP management responsibility. In early 1996, however, Ms. Swertz returned to LLNL's home office in Livermore, California (Livermore), and under a reorganization, Crites assumed the position as APL in charge of general office management.

FESSP management personnel at Livermore oversee WASHOP, and ultimately determine hiring and firing of all WASHOP personnel as well as organizational structure. Thus, FESSP management was well aware of the potential conflict of interest associated with Rahm-Crites working under her husband, Crites, and was concerned that this arrangement under the reorganization might constitute a violation of LLNL's "near relative" policy. This policy, as described in LLNL's Personnel Policies and Procedures Manual, prohibits employees from working under the supervision of near relatives. During 1996, Shirley Loquist (Loquist), a FESSP administrator responsible for WASHOP staffing matters, examined this matter and determined that there was no violation since Rahm-Crites was not supervised by Crites, and he was not responsible for her assignments, salary or appraisal. Loquist also visited WASHOP and interviewed employees, including the complainant, to ascertain whether there were problems associated with Crites and Rahm-Crites working in the office. At that time, Meier raised no objection to the arrangement, stating only that it was sometimes "awkward." The complainant and Crites had a friendly, supportive relationship in the workplace, and Meier often interacted socially with Crites and Rahm-Crites outside of the workplace.

However, the friendly relationship between Meier and Crites began to deteriorate in August 1997, when both the complainant and Crites took on new work assignments as a result of impending budget restrictions imposed by DOE and consequential changes in WASHOP's project priorities. WASHOP managers anticipated that in fiscal year 1998 (beginning October 1997), DOE would significantly cut defense program projects, previously a leading source of WASHOP funding. It appeared, however, that there would be ample funding for an emerging project administered by WASHOP, the Highly Enriched Uranium (HEU) Transparency Program (HEU Project). Under the HEU Project, DOE provides assistance to Russia in accounting for and disposing of highly enriched uranium. As part of the program, the United States sends monitors to Russia to ensure that highly enriched uranium from nuclear weapons is properly down- blended. Part of WASHOP's mission for DOE under the HEU Project is to design and conduct the training of these monitors. From January 1996 until September 1997, the WASHOP project manager for the HEU Project was Joe Glazer (Glazer).

In August 1997, Meier completed a project assignment that had previously accounted for a major portion of her time, and Glazer agreed to have the complainant assume the position of Training Coordinator for monitor training under the HEU Project. Although Crites, as APL, agreed to the assignment of Meier as Training Coordinator, he expressed reservations since the complainant had no previous training experience. Crites also had reservations about the handling of the HEU Project in general, since during this time frame he had received complaints from the DOE sponsors about Glazer's performance in administering the program. On August 25, 1997, a meeting was held to discuss a proposed HEU Project training plan prepared by a member of Glazer's staff (not Meier). During this meeting, attended by Crites, Meier, Glazer and Rahm-Crites, Crites was caustically critical of the training plan and suggested that his wife, Rahm-Crites, should perhaps rewrite it. Both Meier and Glazer considered it inappropriate for Crites to have suggested using his wife, Rahm-Crites, to perform work on the project. Meier states that following the meeting, she telephoned Loquist to complain about Crites' behavior at the meeting as well as his attempt to insert his wife in the HEU Project. The complainant states that she also expressed these concerns to Crites. Notwithstanding, the complainant herself gave Rahm-Crites work assignments reviewing training modules on the HEU Project during September 1997, and the complainant was instrumental in having Rahm-Crites appointed as editor of the HEU quarterly newsletter.

Continuing to be concerned with Glazer's performance, however, Crites decided in late September 1997 that he would assume the position as Program Manager of the HEU Project in place of Glazer, and relinquish his position as APL in charge of WASHOP. Crites informed the DOE sponsors of this determination and new HEU Project staff assignments in a letter dated September 26, 1997. Most significantly, the letter states that "Linda Rahm-Crites will assume editorship of the quarterly report." Following issuance of the letter, Meier stated her concerns to Crites in a voice mail message that having Rahm-Crites working directly for him created an improper appearance to DOE sponsors and might cause problems for WASHOP. Almost immediately after making the appointment, however, Crites recognized that due to LLNL policy, he could not have his wife working under him and therefore, during the first week of October 1997, he rescinded the appointment and removed Rahm-Crites from the HEU Project.(1)

Beginning in October 1997, Pete Prassinos (Prassinos) assumed the position of Acting APL, replacing Crites as manager and director of WASHOP. Following the removal of Rahm-Crites from the HEU Project, Prassinos became increasingly concerned that there was insufficient work to justify retaining Rahm-Crites as a subcontracted supplemental employee in view of the diminishing work and available budget resources remaining on other WASHOP projects. Prassinos discussed this matter with the complainant, who continued to serve as Deputy APL besides holding the position of HEU Project training coordinator. Prassinos also discussed the matter with WASHOP project managers, the WASHOP office administrator, and ultimately with FESSP management personnel at Livermore, including Loquist, Mark Strauch (Strauch, FESSP Program Leader), and C.K. Chou (Chou, LLNL Associate Director in charge of FESSP). Based upon these discussions, Prassinos determined that Rahm-Crites should be released. Strauch made the decision to release Rahm-Crites on the basis of Prassinos' recommendation, and Chou approved the decision. Prassinos informed Rahm-Crites in mid-October 1997 that she would be laid off effective November 26, 1997.(2) Upon being informed of this determination, Crites attempted to intervene on his wife's behalf, since he believed that sufficient work remained in the office to justify retaining her services, and he did not believe that Prassinos had the authority to remove her. Crites acquiesced in the termination of Rahm-Crites when it became apparent that Prassinos' action was in fact authorized by FESSP management.

Meier maintains that once Crites became aware of the determination to terminate his wife, he became distant and withdrawn in his relations with the complainant and began take retaliatory actions against her. First, the complainant states that in October 1997, Crites informed the complainant that her billable working hours on HEU Project training were being cut to half time. The complainant states that when she complained about this training cutback, Crites reminded her that he had intended to recommend the complainant for the APL position (of ES&H) which he vacated. Meier states that she took this comment as a threat that Crites no longer intended to do so. In November 1997, the complainant states that Crites became enraged over a minor disagreement concerning the graphics to be used on the cover of the HEU Annual Report. In this instance, the complainant claims that Crites yelled at her with his hands raised in clenched fists and stormed out of the office. According to the complainant, these actions by Crites were taken in retaliation against her because Crites held the complainant responsible for the termination of his wife. Meier maintains that on separate occasions in late 1997, she complained about Crites' behavior toward her to Loquist and to Chou.

The complainant states that during January 1998, Crites continued to exert subtle pressure to undermine her position as HEU Project Training Coordinator. According to the complainant, the most egregious example of this occurred on January 30, 1998, when Crites improperly issued an HEU training solicitation letter. At the time the letter was issued, Meier was away in Oak Ridge, Tennessee (Oak Ridge), conducted HEU monitor training with Janie Benton (Benton), the DOE employee responsible for oversight of HEU Project training. The January 30, 1998, letter issued by Crites concerned proposed training on the use of specialized uranium testing equipment, referred to as NDA. Upon seeing the letter after returning from Oak Ridge, the complainant felt strongly that Crites had transgressed proper procedures by not getting approval from Benton to proceed with the NDA training, and the complainant was also disturbed that he had not discussed the matter with her. According to the complainant, Crites refused to discuss the NDA training letter with her in private and she therefore confronted Crites with the matter on February 13, 1998, at the monthly HEU Project staff meeting held to discuss action items. Meier states that Crites again attempted to avoid discussing the NDA training letter, stating that it was not an appropriate agenda item for the staff meeting. The complainant states that when she refused to drop the matter, Crites became enraged and told Meier with a hostile expression on his face that he had not involved her in NDA training since she was not competent to conduct training in this technical area, whereupon the complainant left the meeting.

On February 17, 1998, Meier telephoned Strauch and emotionally voiced her concerns that Crites was out of control and destroying the HEU Project, citing the NDA training letter and their confrontation at the February 13, 1998, meeting as examples. The complainant further claimed that Crites was physically

threatening to her and was retaliating against the complainant for her involvement in having Rahm-Crites terminated. The complainant insisted that Crites be removed from the HEU Project and warned Strauch that if Crites were not removed, she would go to the DOE Inspector General (IG) about the former improper working relationship between Crites and his wife. In response to this phone call, Strauch dispatched a crisis management team from Livermore, including an LLNL psychologist and a personnel specialist, to ascertain the causes of the turmoil in WASHOP and the legitimacy of Meier's charge that Crites had physically threatened her. The next day, on February 18, 1998, Meier had a private meeting with DOE sponsors overseeing the HEU Project, including Edward Mastel (Mastel), HEU Project Director. Mastel states that during that meeting, the complainant expressed her discontent with how the HEU Project was being run by Crites, and stated the operational and staffing changes that she would make if she were placed in charge of the project. At the time, Mastel had no difficulties about the manner in which Crites was running the HEU Project.

The next day, on February 19, 1998, the complainant had a conference call with FESSP management personnel including Chou, Strauch and Loquist, in which she vociferously restated her charges against Crites, claiming that she feared for her personal safety. The complainant again threatened that she would go to the IG if Crites were not removed from the HEU Project. According to Strauch, the complainant also threatened to take the HEU Project to another national laboratory. Strauch indicated that he would get back to the complainant with his decision within a few days.

In the interim, on February 24, 1998, the crisis management team that Strauch had sent to WASHOP issued its report of its findings with regard to the allegations made by Meier, based upon its interviews with staff personnel including those present at the February 13, 1998 meeting. The crisis management team found no basis for the complainant's allegation of "physical threats" by Crites, stating in the report that "[n]one of the individuals interviewed have observed behaviors by [Crites] that they interpreted as threatening toward [Meier]." To the contrary, the report states that "[s]everal individuals have expressed concern for [Meier's] behavior in dealing with these issues." While staff members noted a change in Crites' behavior toward Meier, perhaps attributable to the termination of his wife, "[o]f greater concern to several interviewed is recent behavior by [Meier]" and "[s]everal indicated that they feel she is overreacting to events and on the edge of losing control." At the same time, the report finds that Crites was not sensitive to "people issues."

On February 27, 1998, Strauch telephoned Meier and informed her of his determination that due to "irreconcilable differences" between her and Crites, Strauch had determined to remove Meier from the HEU Project. In a letter to the complainant issued the same day, Strauch explains that the DOE sponsors were generally satisfied with Crites' performance and "there is no significant basis for the removal of [Crites] from this leadership position as you have requested." The letter further notes what Strauch deemed "inappropriate interaction" between Meier and the DOE sponsors, and that the complainant had taken an "unprofessional approach" in conveying her demands to FESSP management. In this regard, the letter states that while any employee is free to go to the IG, "to frame a request for management action in your favor by threatening to go to the IG if not implemented is not a professional way to resolve differences with management." The letter concludes by itemizing a list of expectations regarding the complainant's future conduct, *e.g.* maintaining "civil, courteous and professional interaction" with all staff members. Strauch sent a corresponding letter to Crites informing him of his determination to transfer the complainant from the HEU Project that concludes with a similar list of behavioral expectations.

After receiving Strauch's telephone call, the complainant flew into a rage, based upon the observations of those present. The complainant first went to the personnel office and began copying portions of Rahm-Crites' time cards. Glazer stated that in the process of doing this, Meier upset the personnel secretary to the point of tears and also threatened to "steamroll" him if he got in her way. Meier later apologized to the secretary before packing some of her things and leaving the work site. The complainant never returned to work at WASHOP, but went on medical disability leave, apparently on the basis those prior occurrences had exacerbated a mental condition that prevents her from working. After a year's time, LLNL requested medical documentation of the work restriction from the complainant, which she refused to provide.

Therefore, in a letter to the complainant dated June 18, 1999, LLNL separated Meier from employment based upon her inability to perform the essential functions of her position.

II. Legal Standards Governing This Case

The regulations of the Contractor Employee Protection Program, 10 C.F.R. Part 708, provide in pertinent part that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because the employee "[d]isclosed to . . . the contractor . . . information that the employee in good faith believes evidences-- . . . (iii) Fraud, management, gross waste of funds, or abuse of authority; . . . ." 10 C.F.R. § 708.5(a)(1). In the present case, Meier claims in her complaint that adverse personnel actions were taken against her, including threats and physical intimidation by her supervisor, Crites, and being removed from a favored work project by the contractor, as a result of making protected disclosures to Crites and FESSP management personnel. According to the complainant, her protected disclosures concerned, first, Crites improperly assigning his wife to a position on the HEU Project and, second, threatening behavior by Crites in retaliation for the complainant's involvement in having his wife terminated.

A. The Complainant's Burden

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

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

10 C.F.R. § 708.9(d); *see* *Ronald Sorri*, 23 DOE ¶ 87,503 (1993). "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the burden of persuasion is allocated roughly equally between both parties. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). As a result, Meier has the burden of proving by evidence sufficient to "tilt the scales" in her favor that she made a protected disclosure under Part 708. 10 C.F.R. § 708.5(a). If the complainant does not meet this threshold burden, she has failed to make a *prima facie* case and her claim must therefore be denied. If the complainant meets his burden, she must then prove that the disclosure was a "contributing factor" in the personnel actions taken against her. 10 C.F.R. § 708.9(d); *see* *Helen Gaidine Oglesbe*e, 24 DOE ¶ 87,507 (1994); *Universities Research Association, Inc.*, 23 DOE ¶ 87,506 (1993). This standard of proof is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221(e)(1), and the 1992 amendment to § 210 (now § 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In explaining the "contributing factor" test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation's chief House sponsors, stated: "The words ?a contributing factor' . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." 135 Cong. Rec. H747 (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20). *See Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying "contributing factor" test).

B. The Contractor's Burden

If the complainant meets her burden, the burden shifts to the contractor. The contractor must prove by "clear and convincing" evidence that it would have taken the same personnel action(s) against the

complainant absent the protected disclosure(s). "Clear and convincing" evidence is a much more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F. Supp. at 1204 n.3. Thus, if Meier has established that it is more likely than not that a protected disclosure was a contributing factor in alleged retaliations, LLNL must convince me that it would have taken these actions despite the complainant's disclosure.

III. Analysis

I have carefully reviewed the record in this proceeding, including the testimony of the witnesses at the hearing and supporting documents submitted by the parties. For the reasons set forth below, I have determined that the complainant is not entitled to relief under the provisions of the 10 C.F.R. Part 708. While I find that Meier made protected disclosures, and that the complainant has by inference carried her burden to show that her protected disclosures were a contributing factor in the retaliations which she alleges, the contractor has met its burden to show by clear and convincing evidence that it would have taken the same actions in absence of such protected disclosures.

A. Protected Disclosures

The complainant made disclosures arguably protected under Part 708 first in August and September 1997, when the complainant expressed her disapproval of Crites assigning his wife to perform work on the HEU Project. Tr. at 49-51, 233-34, 476-77. The complainant also made arguably protected disclosures in February 1998, when she voiced a number of concerns to FESSP management in support of her effort to have Crites removed from the HEU Project. As discussed below, I find that while the complainant made protected disclosures in the first instance, in the latter she did not.

I am persuaded that the complainant's objections to Crites attempting to have his wife work on the HEU Project, and later selecting of his wife to the HEU Project then under his supervisory authority, fall within the purview of section 708.5(a)(1). Meier states she telephoned Loquist in August 1997 to complain about Crites, then APL, attempting to have his wife work on the HEU Project training report, and then complained to Crites directly in late September 1997, when Crites became HEU Project Manager and designated his wife as newsletter editor. LLNL concedes that the latter action, when Crites placed his wife under his supervisory authority, constituted a clear violation of their "near relative" policy. Tr. at 334. It is apparent that Meier was not specifically aware of LLNL's "near relative" policy at that time, and therefore did not couch her objection to Crites' actions in those terms. Nonetheless, the record shows that in both instances, Meier expressed her belief reasonably and in good faith that Crites' actions created an appearance of serious impropriety, particularly at a time of impending budget cutbacks on other projects. I am therefore persuaded that Meier's objections amounted to a protected disclosure of "abuse of authority" by Crites, deserving of protection under Part 708.

However, I am not persuaded that Meier made a protected disclosure in February 1998, when she demanded that FESSP management remove Crites from the HEU Project. The complainant's demand was lodged in two telephone discussions with FESSP managers, ensuing an acrimonious exchange between Meier and Crites during an HEU Project staff meeting held on February 13, 1999. During this meeting, Meier confronted Crites about his action in issuing an NDA training letter while she was away conducting HEU monitor training, an action which she perceived to be both a breach of proper protocol with respect to DOE and a transgression of her position as Training Coordinator. Tr. at 155-62.(3) The record persuades me that the NDA training matter and the complainant's claim that Crites had become a physical threat in the workplace were at the heart of the matters raised by Meier to FESSP management, in support of her position that Crites had lost judgment and should be removed from the HEU Project. Tr. at 101. Strauch confirmed that the complainant also charged Crites with nepotism for attempting to assign his wife to the HEU Project in violation of LLNL's "near relative" policy, and further claimed that Crites was retaliating against her for involvement in having his wife laid off. Tr. at 411. It is apparent, however, these latter assertions were designed to lay basis for Meier's ultimatum that if FESSP did not remove Crites, she

would go to the IG. According to the complainant: "I told them I would go [to the IG] unless something was done about [Crites], I had no recourse . . . I was afraid for my safety." Tr. at 102. Having examined the complainant's February 1998 statements in context, I do not find that the complainant at that time was making a disclosure protected under Part 708. While Meier referred to Crites' past misconduct, I find nothing to indicate that Meier was attempting to reveal, reasonably and in good faith, an "abuse of authority" by Crites in February 1998.(4)

Thus I find that the complainant made protected disclosures in August and September 1997, relating to Crites' improper behavior in attempting to assign his wife a position on the HEU Project. I now turn to whether the complainant has carried her burden to show that these disclosures were a contributing factor in any of the retaliations which she alleges.

B. Contributing Factor

A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald Sorri*, 23 DOE at 89,010, *citing McDaid v. Dept. of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F. 2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that there is temporal proximity between Meier's protected disclosures in August and September 1997, and the subsequent alleged retaliations beginning in October by Crites, and ending in February 1998, when the complainant was removed from the HEU Project.

I therefore find Meier has established a *prima facie* case that her protected disclosures were a contributing factor in the retaliations which she alleges. The burden now shifts to LLNL to prove by clear and convincing evidence that it would have taken the same actions absent her protected disclosures. 10 C.F.R. § 708.9(d).

C. Clear and Convincing Evidence

The predominant portion of the retaliations alleged by Meier involve actions taken against her by Crites. Only the final alleged retaliation, the removal of Meier from the HEU Project, was an adverse personnel action taken against the complainant by the contractor itself. My consideration of the alleged retaliations is bifurcated in this manner below.

(1) Alleged Retaliations by Crites

The complainant asserts that Crites took a number of retaliations against her, including reducing her work as Training Coordinator on the HEU Project to half time, and then threatening and directing anger toward her. I emphasize, however, that the complainant does not contend that any of these alleged retaliations were specifically in response to her protected disclosure, *viz.* her stated disapproval of Crites' decision to place Rahm-Crites on the HEU Project, particularly after he had become HEU Project Manager.(5) Instead, Meier claims that the alleged reprisals began weeks later when Crites learned that Prassinos had given notice to Rahm-Crites that she would be terminated due to lack of funding. According to Meier, Crites retaliated against her because he blamed her for the decision to terminate his wife. Tr. at 62, 592. However, in moving to the complainant's highly subjective belief that Crites blamed her, in particular, I observe that there is no direct connection between the substance of the complainant's protected disclosure and the alleged basis for the purported retaliations by Crites.(6)

Although the complainant apparently believes that Crites blamed her in particular for his wife's dismissal from WASHOP, it is not clear to me that this was truly the case. Crites admits that he resented the dismissal of his wife because he believed that there were ample work and funding remaining on projects apart from the HEU Project to justify her retention. Tr. at 472, 483. When Crites questioned Prassinos, then Acting APL, on the decision to release Rahm-Crites, Prassinos told him that he had discussed the matter with a number of individuals besides the complainant, including the WASHOP office administrator, WASHOP project managers, and FESSP management personnel at Livermore, who ultimately made the decision. Tr. at 482-83, 587-88 (Prassinos). Thus, I find Crites believable when he asserted during his testimony that he did not blame Meier for his wife being laid off, because the complainant had no authority to make that determination. Tr. at 530-31.(7) The complainant asserts that the reason she believes that Crites blamed her is a statement he made during a meeting in late October 1997, when Crites informed Meier that her training hours were to be cut to half time (discussed below). Meier states that when she challenged this decision, Crites responded by stating among other things that "no one was protecting [Rahm-Crites]." Tr. at 62. While Crites confirmed that he may have made the statement, Tr. at 496, I find no basis to assume that he was referring specifically to the complainant. Instead, under the circumstances presented, it is obvious that by use of the phrase "no one" Crites was referring to all of the individuals who had input regarding the determination to release his wife.

In any event, I find insufficient factual support in the record for Meier's claims of retaliation by Crites. The first matter she raises is that Crites informed her in late October 1997 that her billable hours for HEU Project training were being cut to half time. Tr. at 61-62. Crites explained, however, that the determination to cut training to half time was based upon fiscal year 1998 budget restrictions and specific instructions received from the DOE sponsor, specifically Mastel, HEU Project Director. Tr. 533-34. Mastel corroborated that for fiscal year 1998, HEU Project training was allocated only a half time budget, testifying that DOE envisioned that over the year, training should comprise "no more than six months." Tr. at 206. The complainant claims that another retaliation came at the very same meeting, when Crites made a statement to the effect that he "had been" intending to recommend her to Chou (FESSP Director) for an APL position. Meier states that "I took that to mean that now he wouldn't." Tr. at 63.(8) While it is difficult to assess whether Crites intended this statement to be a threat not to recommend the complainant, Chou verified in his testimony that at the ensuing management meeting in October 1997, Crites did in fact recommend Meier for the APL position. Tr. at 577-78.

Next, Meier claims that Crites retaliated against her in November 1997, when Crites became enraged over a minor disagreement concerning the graphics to be used on the cover of the HEU Annual Report. In this instance, the complainant claims that Crites yelled at her with his hands raised in clenched fists and stormed out of the room. Tr. at 65-66. Crites testified that he recalls the graphics matter as only a minor incident, and maintains that he never got angry. Tr. at 499-500. Since there were apparently no witnesses to the incident, I have no means to gauge the veracity of these conflicting accounts. Notwithstanding, the record provides little support for the complainant's logical leap that Crites' behavior could only have been because he blamed her for his wife's dismissal. Other WASHOP workers testified that during this time period, Crites was under strain in his position as HEU Project Manager, apparently driven to achieve project deliverables, and was many times abrupt and insensitive to his employees. Tr. at 289-90, 602, 621.(9) However, there was no perception that Crites was more harsh to the complainant. Tr. at 281, 621.

Finally, Meier's claims that the most severe retaliation by Crites came at the February 13, 1998, meeting when according to the complainant, Crites physically threatened her after she confronted him about the NDA training matter.(10) I consider this matter below in addressing the alleged retaliation by the contractor, since it is intertwined with LLNL's determination to remove Meier from the HEU Project.

(2) Alleged Retaliation by LLNL

The complainant finally alleges that, as a result of her disclosures regarding Crites' nepotism, LLNL retaliated against her by removing her from the HEU Project in February 1998.(11) I find, however, that the contractor has clearly and convincingly shown that this personnel action was completely justifiable,

and in no way related to the complainant's protected disclosures.

As indicated in the factual summary, Meier had telephone conversations with FESSP management on two occasions in February 1998, in which she demanding that Crites be removed as HEU Project Manager since Crites had physically threatened her, and threatened that she would go to the IG if Crites were not removed. Tr. at 95-96, 102.(12) Strauch dispatched a crisis management team to investigate Meier's claim that she had been physically threatened by Crites when she confronted him during the February 13, 1998, meeting. Based upon interviews with staff members including those present at the meeting, the crisis team determined in its report that there was no foundation for the complainant's claim of physical threats by Crites, but it was instead the complainant's behavior that caused the difficulty and was of greater concern to staff members. At the hearing, Dave Thomas (Thomas), a senior engineer who was present at the meeting, confirmed the findings of the crisis team. Thomas testified that Meier refused to allow Crites to conduct the meeting on the HEU Project agenda items, but continued to press him for an explanation of the NDA training letter while ignoring the urging from others present that she drop the subject. Tr. at 639-42. Thomas stated that while the complainant was clearly angry, Crites did not appear to be angry but gave her "very matter of fact, low key answers." Tr. at 643.(13) When Crites finally responded by telling the complainant that she was technically incompetent in the matter of NDA training, Thomas stated that Meier got up and left while Crites continued the meeting. Tr. at 642-43. Glazer and Ken Young similarly testified they had never observed any behavior by Crites that they considered physically threatening. Tr. at 283, 626.

Thus, while there was no basis for Meier's claim of a physical threat, it was clear on the basis of the complainant's demand for Crites' dismissal under threat of going to the IG, that she and Crites should no longer work together on the same project. Since FESSP and the DOE sponsor were satisfied with Crites' management of the HEU Project, I deem the removal of Meier from the project an appropriate response. I find absolutely nothing in the record which would lead me to conclude that LLNL's decision to remove Meier from the HEU Project was in any way related to Meier's disclosure in September 1997 about Crites' wife, a matter that FESSP deemed rectified months earlier when Rahm-Crites was removed from the HEU Project and subsequently released from WASHOP due to budget restraints. Instead, I find legitimacy for LLNL's charge in Strauch's February 27, 1998, letter of "inappropriate interaction" by the complainant with the DOE project sponsors(14), lending additional support for LLNL's determination.

IV. Conclusion

As set forth above, I have determined that the complainant has failed to establish the existence of a violation on the part of LLNL for which she may be accorded relief under DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. I find that the complainant made protected disclosures under Part 708, and that such disclosures were a contributing factor in the alleged retaliations taken against her. Notwithstanding, I find that to the extent that any of the actions raised by the complainant might be deemed to be truly retaliatory in nature, the contractor has shown by clear and convincing evidence that it would have taken the same actions even in the absence of the protected disclosures. Accordingly, I will deny Meier's request for relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The complaint filed by Diane E. Meier on April 22, 1998, under 10 C.F.R. Part 708 is hereby denied.

(2) This Initial Agency Decision will become the Final Decision of the Department of Energy denying the complaint unless within fifteen days of its receipt, a party files a Notice of Appeal requesting review by the Director of the Office of Hearings and Appeals, in accordance 10 C.F.R. § 708.32.

Fred L. Brown

Hearing Officer

Office of Hearings and Appeals

Date: December 22, 1999

(1)By this time, FESSP management at Livermore had received a copy of the September 26, 1997, letter and determined that Rahm-Crites could not be allowed to remain on the HEU Project since it was a clear violation of LLNL's "near relative" policy. Mark Strauch, FESSP Program Leader, states that he instructed Loquist that the assignment could not be allowed. However, Loquist apparently issued no formal directive to Crites since Crites had already rescinded the appointment of his wife on his own initiative.

(2)Rahm-Crites was allowed to stay temporarily in order to work on certain assigned projects that were yet uncompleted on her scheduled separation date, and thus Rahm-Crites did not actually leave WASHOP until early December 1997.

(3)At the hearing, the complainant testified that her primary concern was that Crites should have cleared the NDA training letter with Janie Benton, DOE training coordinator, and she did not consider the training letter as a personal affront to her. Tr. at 155. However, Dave Thomas, an engineer who was present at the February 13, 1998, meeting testified that it was the complainant's unrelenting insistence on an explanation of why Crites had not involved her in NDA training that led to the verbal exchange. Tr. at 642. The account given by Thomas is consistent with testimony of Crites and the complainant that the confrontation finally ended, and Meier abruptly left the meeting, after Crites told her that the reason he had not involved her in NDA training was that she is not technically competent in that area. Tr. at 93, 509.

(4)Clearly, Crites' decision to issue the NDA training letter did not constitute an "abuse of authority." Crites explained during his testimony that he had been directed by the DOE, specifically, Edward Mastel (Mastel), HEU Project Director, to initiate NDA training. Tr. at 504. Mastel corroborated this testimony and stated the he was remiss in not having first run the matter of NDA training by Janie Benton, DOE training coordinator on his staff. Tr. at 196, 199. Nor do I find that the complainant made statements that might possibly constitute a protected disclosure of "mismanagement." 10 C.F.R. § 708.5(a)(1)(iii). The complainant disagreed with Crites' handling of the HEU Project, believing that Crites "had lost all judgment and sense of proportion." Tr. at 101. However, this general disagreement with management decisions does not rise to a protected disclosure of "mismanagement." *See, e.g.*, *Roger H. Hardwick*, Case No. VWA-0032 (July 6, 1999, *affirmed*, Case No. VBA- 0032 (November 26, 1999). Moreover, I note that FESSP management and the DOE sponsors were pleased with Crites' handing of the HEU Project. Mastel, DOE HEU Project Director, testified with regard to his performance: "I enjoyed it. He was taking responsibilities for actions. In terms of milestones being met and reported against, we saw marked improvement since [Crites] came on board and was doing the work." Tr. at 211.

(5)Meier states that she first talked with Crites about his wife in September 1997, asking Crites about his plans concerning his wife in view of the budget cuts expected beginning October 1997 (fiscal year 1998). Tr. at 51-52. Meier states in her complaint, however, that during this time, she herself had Rahm-Crites appointed as editor of the HEU newsletter, prior to the time that Crites took over as HEU Project Manager. Declaration of Diane E. Meier, ¶ 23. Meier later criticized Crites' appointment of Rahm-Crites in the September 26, 1997 letter. However, Crites apparently realized the error of this appointment, which he himself had disclosed by issuance of the letter, and rescinded the appointment on his own initiative without intervention by FESSP management. Tr. at 476.

(6)It might be argued that the termination of Rahm-Crites was inevitable once she was removed from the HEU Project. Nonetheless, I draw a distinction between the determination to remove Rahm-Crites from the HEU Project, made by Crites, and the decision to terminate her, made by FESSP management upon the recommendation of Prassinos. Both Prassinos and Strauch testified that the decision to terminate Rahm-Crites was a budgetary matter, and not related to the past "near relative" policy violation which in their estimation had been rectified by removal of Rahm-Crites from the HEU Project. Tr. at 338, 607. Rahm-Crites had been employed at WASHOP since 1993, working on various projects. However, the 1998 fiscal

year budget was barely adequate to cover full time LLNL career employees at WASHOP, and a subcontracted supplemental labor employee such as Rahm-Crites was expendable.

(7)Crites maintains that the conflicts he had with Meier had purely to do with her handling of HEU Project training matters, such as budget overruns. Tr. at 490, 530, 542-43. Ken Young, a WASHOP project manager, also testified that in his perception based upon his conversations with the complainant, the conflicts between Crites and Meier stemmed from training matters. Tr. at 622.

(8)Interestingly, Meier stated that she didn't really want the position, Tr. at 63, and told others that she never expected to get the position because of sexism. Tr. at 137, 578. Notwithstanding, the complainant considered it a retaliation when she thought that Crites would not recommend her and, according to Glazer, she was upset when she did not in fact get the position when announced in December 1997. Tr. at 288-89.

(9)Strauch, FESSP Program Leader, testified that although Crites was successful as HEU Project Manager, he characterized Crites as "a hard-nosed manager that wants to deliver results for the customer, and the human side of him is not as warm and fuzzy as someone might like for a manager." Tr. at 360.

(10)I also find no appearance of retaliation in the issuance of the NDA training solicitation by Crites prior to reviewing the matter with the complainant. As noted above, Crites was directed to initiate NDA training by the DOE sponsor while the complainant was away conducting monitor training in Oak Ridge. *See* note 4, *supra*.

(11)I note that the removal of Meier from the HEU Project did not constitute termination or demotion, but was an adverse personnel action only to the extent that it reflected unfavorably upon the complainant, and she would no longer be able to work on this favored project.

(12)In Meier's view, Crites' past nepotism was just cause for his removal, under threat to initiate an IG investigation if necessary, despite the fact the matter had been resolved months earlier. According to the complainant, "It doesn't matter. He still did it." Tr. at 165. The complainant chose to ignore cautions from co-workers that her gambit to force the removal of Crites by ultimatum might not work out in her favor. Tr. at 293-94 (Glazer), 625-26 (Young).

(13)The complainant concedes that Crites did not raise his voice, but claims that there was "rage in his face." Tr. at 93, 162-63.

(14)On February 18, 1998, the day after the complainant's initial phone call to FESSP demanding the removal of Crites, the complainant admits that she met with the DOE sponsors and informed them that Crites would likely not be continuing as HEU Project Manager. Tr. at 99. The complainant maintained that she never mentioned herself as possible replacement manager or as APL in charge WASHOP, but only suggested that Glazer resume the position as HEU Project Manager. Tr. at 100. However, Mastel, the DOE HEU Project Director, recounted that during the meeting, the complainant stated how she would administer the HEU Project and change the staffing structure "if she were placed in charge or she was able to take over as the project leader." Tr. at 203. According to Mastel, "[the complainant] was trying to get our support to put her into a position as the project manager for the WASHOPS group." Tr. at 210. Consistent with Mastel's testimony, Glazer testified that Meier told him in mid-February 1998 that "she was going to take over, you know, the position that [Crites] held, head of the office . . . [and] she was going to put me back down as program manager." Tr. at 292.

Case No. VBH-0014

December 29, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner:Roy Leonard Moxley

Date of Filing:November 7, 1996

Case Number: VBH-0014

This Initial Agency Decision concerns a whistleblower complaint filed by Roy Leonard Moxley against his employer, Westinghouse Savannah River Company (WSRC), under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. At all times relevant to this proceeding, WSRC was the management and operating contractor at the DOE's Savannah River Site in Aiken, South Carolina. Mr. Moxley alleges that during a period of at least two years, he made several disclosures to WSRC that its personnel practices were in violation of the Fair Labor Standards Act (FLSA). According to Mr. Moxley, WSRC demoted him in October 1996 as a consequence of his disclosure. As discussed below, I have determined that Mr. Moxley is entitled to relief because WSRC has not proven by clear and convincing evidence that it would have taken the same action against him had he not made those disclosures.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. (1) The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee in good faith believes reveals a violation of a law, rule, or regulation; or fraud, mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a)(1)(i), (iii), as published at 57 Fed. Reg. 7533, 7542. Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an OHA investigator, an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

On November 7, 1996, Mr. Moxley filed a Whistleblower Complaint against WSRC pursuant to 10 C.F.R. Part 708. On April 16, 1999, the Office of Inspections of the DOE's Office of Inspector General transferred a number of pending complaints, including this one, to OHA. On April 26, 1999, the OHA Director appointed an investigator to examine the issues raised in Mr. Moxley's Part 708 Complaint. The investigator promptly conducted an investigation, and issued a Report of Investigation on June 10, 1999. On that same day, the OHA Director appointed me the hearing officer in this case.

On September 29, 1999, I convened a hearing on Mr. Moxley's Part 708 complaint in Aiken, South Carolina. I received the hearing transcript on October 18, 1999 at which time I closed the record in the case.

II. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

In the case at hand, WSRC stipulated at both the investigatory and hearing stages of this proceeding that (1) Mr. Moxley had made protected disclosures as defined in 10 C.F.R. § 708.5, and (2) he had established a prima facie case of retaliation, because his protected disclosures could, by inference, be considered a contributing factor in WSRC's decision to reclassify Mr. Moxley to a lower salary grade level due to the temporal proximity between the protected disclosures and his reclassification. In view of WSRC's stipulations, Mr. Moxley is deemed to have met his regulatory burden in this case, thereby shifting the burden to WSRC.

B. The Contractor's Burden

The regulations require WSRC to prove by "clear and convincing" evidence that the company would have reclassified Mr. Moxley to a lower salary grade level even if he had not disclosed his allegations of violations of the FLSA. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n.3.

III. Analysis

A. Factual Overview

WSRC has employed Mr. Moxley at the DOE's Savannah River Site since 1988. Starting no later than August 1994 and continuing through at least the last months of 1996, Mr. Moxley made a series of disclosures to Westinghouse personnel, including his supervisors and the president of the company, concerning what he perceived to be violations of the FLSA. The gist of these allegations is that lower-paid employees, who were subject to various provisions of the FLSA, such as the right to overtime for

hours worked in excess of the standard work week, were performing the same tasks and had the same duties and responsibilities as higher-paid employees, who were in some cases also exempt from the protections of the FLSA. In his initial Complaint, Mr. Moxley listed a number of actions that he alleged WSRC had taken in retaliation for his disclosures, including his October 1996 demotion from Salary Grade Level (SGL) 31 to SGL 30. Later, at Mr. Moxley's request, the parties agreed to narrow the scope of the proceeding to this single incident of alleged retaliation. See Memorandum of Telephone Conversation between Mr. Moxley, Michael Wamsted (Attorney for WSRC), and the Hearing Officer, August 9, 1999.

WSRC considers the personnel action by which Mr. Moxley's salary grade level was changed from SGL 31 to SGL 30 a reclassification rather than a demotion. This action occurred after WSRC had completed its Professional Job Review, a lengthy personnel procedure during which approximately 5,000 professional employees' positions were reviewed and in many cases replaced with new job descriptions and salary ranges. Transcript of Hearing (Tr.) at 29-31. One result of the Professional Job Review was the modification of the "job ladder" within which Mr. Moxley was employed, that is, the group of positions through which he could be promoted. Before the Professional Job Review, SGL 31 was one of the possible salary levels at which an employee on Mr. Moxley's job ladder might have been paid. After the Professional Job Review, his job ladder was renamed "Process Computing" and the rungs on that ladder were assigned SGLs of 28, 30, 32, and 34, each of which bore a distinct job title. Exh. 72. Consequently, Mr. Moxley could no longer remain at SGL 31; he needed to be reassigned to one of the available SGLs for his job ladder. On October 1, 1996, he was reassigned to SGL 30. This reassignment, whether termed a demotion or a reclassification, is the sole incident of alleged retaliation that we considered at the hearing. Four months later, on February 1, 1997, Mr. Moxley was promoted to SGL 32.

B. Motion to Dismiss

At the start of the hearing, WSRC's attorney moved to dismiss the proceeding. He argued that a recent OHA Hearing Officer's decision dictated that I grant his motion. I denied his motion at that time, and when he renewed the motion after he had completed the presentation of WSRC's witnessed, and again at the end of the hearing. I explained to the parties that I would consider this motion when I weighed the case in its entirety.

It is well settled that a motion to dismiss in a Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. Lockheed Martin Energy Systems, Inc., 27 DOE ¶ 87,510 (1999) (Lockheed); EG&G Rocky Flats, 26 DOE ¶ 82,502 (1997). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely used it. Boeing Petroleum Services, 24 DOE ¶ 87,501 at 89,005 (1994). WSRC has not met the Lockheed standard. Moreover, the circumstances under which I may dismiss a complaint are specifically set forth at 10 C.F.R. § 708.17(c). I have reviewed each of the six enumerated bases for dismissal and it is clear that none of them applies to the present case.

WSRC argued that dismissal was appropriate because Mr. Moxley suffered no negative action as a result of his conceded disclosures. WSRC based this assertion on the fact that Mr. Moxley's compensation was never reduced, and relied on the OHA Hearing Officer's decision in Theresa G. Joyner, 27 DOE ¶ 87,526 (1999). In that decision, the Hearing Officer found that an employee's removal from a special team did not meet the regulatory definition of "retaliation" under Part 708, because it was not "an employment-related ?negative action' with respect to the employee's ?compensation, terms, conditions, or privileges of employment.' [Citation omitted.] The employee's removal from the team did not affect her pay and benefits, and there is no evidence that the employee viewed the removal as a negative action." Id. at 89,142.

I will again deny WSRC's motion to dismiss this proceeding. Unlike the circumstances in the Joyner case, the form of retaliation about which Mr. Moxley has complained is a reclassification of his position to a lower SGL. Because his salary before the reclassification fell within the range of salaries permitted at his

new level, his salary was not affected by the reclassification. However, regardless of whether it is appropriate to consider the reclassification a demotion or not, the result of the reclassification was that Mr. Moxley was in a lower position in the salary grade scale after the reclassification (SGL 30) than before it (SGL 31). Therefore, the reclassification's effect on Mr. Moxley was a negative action with respect to a term of employment. In addition, and contrary to the facts in Joyner, the employee in the present case clearly viewed the reclassification as a negative action. Consequently, the ruling in Joyner is inapplicable in this proceeding. Therefore, I deny WSRC's motion to dismiss and will now consider the substance of Mr. Moxley's Part 708 complaint.

C. Testimonial and Documentary Evidence

The evidence presented related to the business environment at the time Mr. Moxley's salary grade level was reduced from SGL 31 to SGL 30 and the processing of his Part 708 complaint. The witnesses for WSRC were Jennifer Howell, a Principal Human Resources Representative in WSRC's Compensation Department, Stephen Kilpatrick, a manager in the organization in which Mr. Moxley worked at the time of the grade reduction, and Jeannette Brooks, an investigator in WSRC's Employee Concerns Program. Mr. Moxley presented the testimony of Julie Quattlebaum, a co- worker.

Ms. Howell's testimony focused on the Professional Job Review Program, a review of the roughly 5,000 professional positions at the Savannah River Site. The Compensation Department's task was to examine those positions for grade inequities between organizations. Tr. at 29, 46. As Ms. Howell explained, there was a concern that "people might have been doing the same work but being called different things and being in different titles and grades across organizations. And it was a business decision made to take a look at all . . . the professional positions, to make decisions about meeting legal requirements such as Fair Labor Standards Act, as well as making sure that our internal equity issues were being addressed." Tr. at 29-30. The Compensation Department had conducted similar reviews of WSRC's non-professional positions and management positions in previous years. Tr. at 28. As a result of the Professional Job Review, the grade levels of 329 employees were decreased throughout the site. Tr. at 31-32. Of the 98 jobs reviewed in the organization headed by Mr. Kilpatrick, in which Mr. Moxley worked at the time of the Professional Job Review, 22 had a grade reduction; the remainder either had grade increases or no change. Tr. at 34. As of October 1, 1996, the day on which the Professional Job Review results were made effective, the salary grade levels on the Process Computing job ladder, which contained Mr. Moxley's position, were 28, 30, 32, and 34. Prior to that date, Mr. Moxley and others had been "on an odd grade progression rather than an even grade progression. . . . [H]is grade at the time was a 31. So a decision had to be made by his management as to where to place him as far as the work that he was doing, what the business decision was to place him in . . . one of the four grades on that ladder." Tr. at 41-42. See also Tr. at 47-48 (although Compensation developed the job position descriptions, it is management that decides who is placed in which position). Because of the change in grade progressions, Mr. Moxley could not remain in SGL 31. Tr. at 63, 64. The personnel documents indicate that Mr. Kilpatrick was the manager who decided to place Mr. Moxley in an position assigned an SGL of 30. Tr. at 51.

Mr. Kilpatrick's testimony about the Professional Job Review Program confirmed that of Ms. Howell. His role in the process was to assign employees in his organization to the newly created job positions, and inform each employee of his new title, position and SGL. Tr. at 134. The process of describing existing jobs to the Compensation Department and then assigning employees to the new positions that Compensation developed took place during the spring and summer of 1996. Tr. at 158, 185. The numbers of positions for each title were established before those assignments were made, based on the type and amount of work for which each work group was responsible. Tr. at 136. Mr. Kilpatrick acknowledged full responsibility for assigning specific employees to specific job titles, but made the decisions with the input of other managers and team leaders. Tr. at 134-135. At the time he assigned Mr. Moxley to a job position with SGL 30, Mr. Kilpatrick was aware that Mr. Moxley has expressed concerns about possible violations of the Fair Labor Standards Act. Tr. at 141, 165.

Every year, according to the testimony, WSRC managers must forecast the number and type of job

positions in the last quarter of one year on the basis of their perceptions of business needs in the following year. Tr. at 167-168. Such projections include the number of employees who must be promoted to higher job titles in order to meet the organization's anticipated work responsibilities. Tr. at 160. Mr. Kilpatrick had forecast Mr. Moxley's promotion to SGL 32, in November or December 1996. Tr. at 144, 157. Regarding the factors that Mr. Kilpatrick weighed in proposing Mr. Moxley's promotion, he stated, "Your management recommendation was 1. Job availability in the organization was 2. Those were the principal things that would have influenced a person to recommend somebody for promotion on a salary forecast, but particularly recommendations from your direct manager, Mr. [James B.] Johnson." Tr. at 167-168. That promotion was scheduled to take effect in April 1997. Tr. at 156-157. However, the promotion was moved forward to February 1997 during an effort to resolve Mr. Moxley's Part 708 complaint, as discussed in the paragraph below. Tr. 159-160.

Ms. Brooks testified about her role in the investigation of the Part 708 complaint that Mr. Moxley filed with the DOE. According to her records, the DOE first asked for assistance from WSRC's Employee Concerns Program on January 14, 1997. Tr. at 128. After conducting an investigation into the complaint, she concluded that WSRC had not retaliated against Mr. Moxley. Tr. at 102. WSRC did, however, attempt to resolve Mr. Moxley's complaint through mediation. Tr. at 106. One term of the proposed settlement agreement drafted by WSRC's counsel included a promotion. Tr. at 109. Ms. Brooks was aware, however, that in a salary forecast for the next year, Mr. Moxley had already been reclassified to an SGL 32 position. Id. Mr. Moxley did not sign the settlement agreement. Exh. 71.

Finally, Ms. Quattlebaum testified that she and Moxley had substantially the same job during the relevant period, Tr. at 191, and that she had filed a complaint with WSRC's Employee Concerns Program regarding her reclassification as a result of the Professional Job Review. Tr. at 196. She reported that Employee Concerns personnel had investigated her being downgraded from SGL 31 to SGL 30, and found some "inconsistencies" in the handling of her reclassification. Tr. at 197. The Employee Concerns investigator told her that she would be getting a promotion to an SGL 32 position, id., which became effective in February 1997. Tr. at 195.

D. Evaluation of Evidence

Because WSRC has conceded that Mr. Moxley made disclosures protected under Part 708 and made a prima facie showing of retaliation, the sole issue before me is whether WSRC has shown, by clear and convincing evidence, that it would have taken the same action against Mr. Moxley-- his reclassification from SGL 31 to SGL 30-- if he had not made those protected disclosures. After considering all the evidence presented in this proceeding, I conclude that WSRC has not met that burden.

It is clear that WSRC conducted a Professional Job Review, which resulted in the reclassification of Mr. Moxley's position from SGL 31 to SGL 30. The decision to place Mr. Moxley in an SGL 30 position rather than, for example, an SGL 32 position rested with Mr. Kilpatrick. At the time of his decision, Mr. Kilpatrick had knowledge of Mr. Moxley's protected disclosures, which Mr. Moxley had made on a fairly continual basis. These facts are not in dispute. However, in order to prevail, WSRC must produce evidence that convinces me that Mr. Kilpatrick's decision would have been the same if Mr. Moxley had not made his disclosures. In discussing the testimony WSRC presented at the hearing, I will address in particular the evidence that I view as essential to the company's position.

Through Ms. Howell's and Mr. Kilpatrick's testimony, WSRC established that Mr. Moxley's reclassification occurred as the result of two related business functions: the Professional Job Review, by which Mr. Moxley's position and salary level was eliminated, and new positions were developed; and his manager's judgment call regarding into which new position to place Mr. Moxley. The Professional Job Review affected the job descriptions and salary scales of some 5,000 employees. In many cases, the employees had to be reassigned to new SGLs because their current SGLs were no longer available to them within their job ladders. Throughout the Savannah River Site, 329 employees, including Mr. Moxley, suffered a lowering of their SGLs as a result. The evidence convinces me that this site-wide personnel

action was undertaken for reasons entirely unrelated to Mr. Moxley's protected disclosures.

The evidence regarding the second, related personnel action-- the decision to assign him to an SGL 30 position-- is less complete, however. Mr. Kilpatrick testified about the numerous factors, including past performance, that he would generally consider in assigning an employee to a particular job position. Tr. at 147, 150. There is evidence in the record regarding Mr. Moxley's performance evaluations and those of his co-workers, which Mr. Kilpatrick stated was one factor he considered in general. See IG Ex. 5 (Krieger Statement) (listing performance ratings for 19 SGL 31 Computer Analysts for four years). My review of those performance ratings does not convince me that an employee with Mr. Moxley's ratings would fall clearly into either the group of employees that were reclassified to SGL 30 positions or the group reclassified to SGL 32 positions. Moreover, in a related context, Mr. Kilpatrick stated that management recommendations and job availability in the organization were primary factors to consider. Tr. at 167-168 (factors considered in promoting employees). Although WSRC has presented evidence regarding the factors Mr. Kilpatrick should have considered when he reclassified Mr. Moxley to an SGL 31 position, such as recommendations and job availability, it presented no evidence of the factors that Mr. Kilpatrick did in fact consider. The only evidence presented concerning this topic was Mr. Kilpatrick's testimony, which was admittedly general in nature, and demonstrated virtually no recollection of Mr. Moxley's particular situation. Tr. at 172, 176-178. Faced with the absence of testimony or documentary evidence about what affected Mr. Kilpatrick's decision to assign Mr. Moxley to an SGL 30 position rather than an SGL 32 position effective October 1, 1996, I am not convinced that Mr. Kilpatrick would have made the same decision if Mr. Moxley had not made his protected disclosures.

Most important, the testimony of Ms. Howell and Mr. Kilpatrick as well as documentary evidence demonstrate that some similarly situated employees who were not whistleblowers were reclassified to positions with lower SGLs in the same manner as Mr. Moxley, within his own work group and throughout the Savannah River Site. However, the evidence also demonstrates that similarly situated employees were also reclassified to positions with higher SGLs as well. If the evidence had established that all employees similarly situated to Mr. Moxley had been downgraded as he was, then I could have concluded that his downgrading would have occurred even if Mr. Kilpatrick had not been aware of the protected disclosures. However, that is not the evidence here. WSRC has presented no evidence to explain why Mr. Moxley in particular was part of the group that was downgraded rather than part of the group that was promoted. This lack of evidence arises, in my opinion, from Mr. Kilpatrick's inability either to recall specifics about Mr. Moxley's reclassification or to produce documentation that supports his decision. I am not surprised at Mr. Kilpatrick's failure to recollect, particularly given the relatively ministerial nature of the decision and the great number of similar decisions he was compelled to make within a fairly short period during 1996. Nevertheless, the burden rests upon WSRC to demonstrate that Mr. Kilpatrick would have taken the same action even if he had no knowledge of Mr. Moxley's disclosures. The lack of evidence on this point must be held against the party that bears this burden, in this case, WSRC. Without documentation or at least very strong oral testimony concerning the factors that drove Mr. Kilpatrick's decision, I am not convinced that he would have made the same decision absent Mr. Moxley's protected disclosures.

After considering all the evidence presented in this proceeding, and all the arguments raised by both parties, I cannot find that WSRC has established by clear and convincing evidence that Mr. Kilpatrick, and therefore WSRC, would have reached the same decision concerning Mr. Moxley's reclassification even if he had made no disclosures protected under Part 708. Accordingly, I will grant Mr. Moxley's request for relief under 10 C.F.R. Part 708.

IV. Remedy

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order reinstatement, transfer preference, back pay, reimbursement of reasonable costs and expenses, and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36. I recognize that a number of these forms of relief may not apply in this case.

For example, Mr. Moxley continues to work for WSRC, so reinstatement is not relevant. However, I will permit the parties to submit briefs on the issue of remedy before I determine the appropriate remedy in this case. I direct Mr. Moxley to submit a detailed statement setting forth the precise remedy he is seeking, including explanations of any mathematical calculations, within 15 days of his receipt of this Initial Agency Decision. WSRC will then have 15 days from its receipt of Mr. Moxley's statement to respond to his remedy request. The parties are free, of course, to seek mediation regarding the issue of remedy. If they choose this course of action, I will hold the remedial phase of this case in abeyance for 30 days pending mediation on the issue.

It Is Therefore Ordered That:

(1) The request for relief submitted by Roy Leonard Moxley under 10 C.F.R. Part 708, OHA Case No. VBH-0014, is hereby granted as set for in paragraph (2) below.

(2) Within 15 days of receipt of this Initial Agency Decision, Mr. Moxley shall submit to the Office of Hearings and Appeals and to Westinghouse Savannah River Company a detailed statement setting forth the precise remedy he is seeking. Westinghouse Savannah River Company shall, within 15 days from its receipt of Mr. Moxley's statement, submit a responsive document to the Office of Hearings and Appeals and to Mr. Moxley. Should the parties elect to seek mediation to resolve the remedial phase of this case, they shall notify me immediately and I will hold this proceeding in abeyance for a period of 30 days.

(3) This is an Initial Agency Decision, which becomes the final decision of the Department of Energy unless, within 15 days of the issuance of a Supplemental Order with regard to remedy in this case, a party files a notice of appeal with the Director of the Office of Hearings and Appeals, requesting review of the Initial Agency Decision.

William M. Schwartz

Hearing Officer

Office of Hearings and Appeals

Date: December 29, 1999

(1)On March 15, 1999, the DOE published an Interim Final Rule revising the regulations governing the Contractor Employee Protection Program. See 64 Fed. Reg. 12862 (March 15, 1999) (amending 10 C.F.R. Part 708, effective April 14, 1999). Section 708.8 of the revised regulations provides that the new procedures "apply prospectively in any complaint proceeding pending on the effective date of this part." Therefore, under the revised Part 708 regulations, the DOE's Office of Hearings and Appeals (OHA) assumed investigatory jurisdiction over all pending and future complaints, including the one under consideration. Because there is a presumption against retroactivity where new rules affect substantive rights of parties, the version of 10 C.F.R. § 708.5 in effect at the time Mr. Moxley filed his complaint is applicable in this case. That version is described below.

Case No. VBH-0015

December 1, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Petitioner: Morris J. Osborne

Date of Filing: June 28, 1999

Case Number: VBH-0015

This Decision involves a complaint filed by Mr. Morris J. Osborne (hereinafter the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant contends that reprisals were taken against him after he made disclosures concerning the lack of electrical inspections at the Idaho National Engineering and Environmental Lab (INEEL). These alleged reprisals were taken by Lockheed Martin Idaho Technologies Company (Lockheed). Lockheed was the managing and operating contractor of INEEL through September 30, 1999. Bechtel assumed Lockheed's management responsibilities at INEEL on October 1, 1999.

I. The DOE Contractor Employee Protection Program

A. Regulatory Background

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). The program's primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed information that the employee reasonably and in good faith believes reveals a

substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a) (1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an OHA investigator, a hearing and independent fact-finding by an OHA hearing officer, and an opportunity for review of the hearing officer's initial agency decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.30, 708.32.

B. Procedural History

On June 22, 1998, the complainant filed a complaint with the DOE-ID Office of Employee Concerns

against Lockheed pursuant to 10 C.F.R. Part 708. On April 16, 1999, the Office of Inspections of the DOE's Office of Inspector General transferred a number of pending complaints, including the subject complaint, to OHA. On April 26, 1999, the OHA Director appointed an investigator to examine the issues raised in the complainant. The investigator promptly conducted an investigation, and issued a Report of Investigation on June 28, 1999. (1) On that same day, the OHA Director appointed me the hearing officer in this case.

On September 14 and September 15, 1999, I convened a hearing on the complaint in Idaho Falls. The transcript of September 14 will be referred to in this decision as TR. I and the transcript of September 15 will be referred to as TR. II.

II. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.29. See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th ed. 1992).

B. The Contractor's Burden

In the event that the complainant satisfies his evidentiary burden, the regulations require Lockheed to prove by "clear and convincing" evidence that the company would have terminated the complainant if he had not made a protected disclosure. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n.3. In evaluating whether Lockheed has met its burden, I will consider the strength of Lockheed's evidence in support of its decision to terminate the complainant and any evidence that Lockheed takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

III. Background

A. The Protected Disclosure

The complainant was a quality assurance (QA) inspector for 14 years at the INEEL facility. He was assigned to work primarily within the Idaho Nuclear Technology and Engineering Center, INTEC.(2) The INTEC facility is one of approximately seven sites within INEEL. Six of those sites are gated work areas.

The complainant made several disclosures concerning the lack of safety inspections at the INEEL facility. The disclosure that is relevant to the complainant's discharge was made in February 1998 to the complainant's supervisor. The complainant repeated the disclosure during a March 2, 1998, telephone conversation with the President of Lockheed. That telephone conversation led to a March 5, 1998, meeting with several Lockheed officials. During that meeting the complainant repeated his disclosure that there was a dangerous lack of safety inspections at the INEEL facility. Lockheed has stipulated that the individual's disclosures are protected by Part 708.

B. The Retaliation

During May 1998, two months after his protected disclosure, the department manager requested that Doug Bensen, hereinafter "the internal auditor," review the time card reports of the complainant and the complainant's co-worker. After reviewing the time cards the internal auditor reached the conclusion that the complainant and the complainant's co-worker were reporting the same charge codes during the same periods. TR. I at 26.

The finding that the complainant and the co-worker were charging the same charge codes suggested to the department manager that the complainant and the complainant's co-worker may have been engaging in non work related activities and therefore, may have been improperly charging their time. After discussing the matter with the internal auditor, the department manager directed the internal auditor to arrange for the INEEL security office to investigate the time card charging practices of the complainant and the complainant's co-worker.(3)

The security office investigation was conducted by a "security investigator" and covered the activities of the complainant and the complainant's co-worker for 12 weeks beginning on the date of the protected disclosure, March 2, 1998 through May 18, 1998. AR at 413. (4) The notes of the security investigator indicate that on June 4, 1998, the security investigator briefed the department manager on the information obtained during his interview with the complainant. Those notes indicate that the complainant's supervisor was not briefed on the interview. AR at 416, 419.

The security investigator issued an investigative report on June 10, 1998. AR at 413.(5) The security investigator concluded that the complainant and the complainant's co-worker acknowledge "leaving INTEC for approximately 17 hours,(6) or more each, during the above period [March 2, 1998 through May 18, 1998] to ?goof off' when they had no work to do." AR at 413.

I was convinced by the testimony at the hearing that the complainant did spend time outside the gate engaged in non work related activities. However, I believe the 17 hour estimate is excessive. The testimony at the hearing indicates that the 17 hours estimate in the security investigator's report was based on an assumption that all time outside the INTEC gate with the exception of time spent at the infirmary was not productive work time. However, testimony at the hearing indicates that some of the time outside the INTEC gate was work related.(7) Nevertheless, Lockheed has established that the complainant was outside the gate for 10 hours, during which he was not involved in activities that were related to a specific project and he was not engaged in training activities.

After the security investigator issued his report, the Employee Review Board met on June 11, 1998. Following that meeting, Lockheed's senior ethics officer asked the security investigator to conduct a second investigation to determine if "there actually had been a basis to begin the investigation in the first place." Lockheed's post hearing brief at 5. On June 18, 1998, the security investigator issued his second report of investigation. AR at 478-81.

The Employee Review Board met a second time on June 17, 1998. Complainant's Exhibit 4. During the second meeting the Employee Review Board members agreed that the complainant's activities constituted "time card fraud" and that the complainant should be discharged. Soon after that meeting the complainant was discharged.

IV. Analysis

A. Complainant's Showing

Under Part 708 a complainant must demonstrate by a preponderance of the evidence that he made a protected disclosure. In this case, as stated above, Lockheed concedes that the complainant made protected

disclosures. TR. II at 47. The complainant must also demonstrate that the protected disclosure was a contributing factor in the retaliation by the contractor. 10 C.F.R. § 708.29. In the past, we have presumed that the standard is met when the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. Barbara Nabb, 27 DOE ¶ 87,519 (1999). In the present case I find this standard is satisfied because the protected disclosure, the investigation and discharge all occurred within four months. Indeed, Lockheed does not challenge that the disclosure and retaliation took place within a short period. However, Lockheed raises two arguments in an attempt to overcome the presumption indicating that the disclosure was a contributing factor to the complainant's discharge.

Lockheed's first argument is that the complainant made prior protected disclosures which did not result in retaliation from the department manager. Lockheed believes this indicates that the department manager "was not bent on retaliation." Lockheed's post hearing brief at 11 and 12. Lockheed has not presented any testimony or evidence which would indicate that the department manager did not retaliate or attempt to retaliate against the individual after prior disclosures. Therefore, I find there is no support for Lockheed's argument regarding the lack of prior retaliations. Furthermore, the absence of prior retaliations does not necessarily mean that the department manager did not retaliate after the current disclosure.

Lockheed's second argument is that the department manager was the only one in the disciplinary process to have a reason for retaliating against the complainant, but that the department manager was not a "principal actor in the process leading to the complainant's dismissal." Lockheed's post hearing brief at 12. I generally agree that it is likely that the department manager was the only person in the process who was motivated to retaliate against the complainant. However, I reject Lockheed's claim that the department manager was a mere passive figure in the three investigations (i.e., the internal auditor's investigation and the two investigations by the security investigator) and Employee Review Board deliberations.

During the investigations, the department manager attended all the meetings with the internal auditor and the security investigator.(8) The testimony at the hearing and the documents in the record indicate the department manager was active in characterizing the time card reporting practices and work assignments of the complainant during the investigations. He was also involved in all decisions to seek additional investigations. For instance, the internal auditor testified that he brought the fact that the complainant and the complainant's co-worker were charging the same charge number to the department manager's "attention, and then we had a discussion with Ethics, and we went from there." TR. I at 26. Similarly, the department manager testified that "he asked the investigator to check the card reader at INTEC for two specific people." Tr. I at 245. In a letter dated August 14, 1998, Lockheed's senior ethics officer confirms that the complainant's supervisor bought the matter to the attention of the department manger who "consulted with internal controls." It is clear that the department manager was actively involved in the three investigations.

The department manager was also actively involved in the two Employee Review Board meetings, and his testimony at the hearing indicates that he was an advocate for dismissal of the complainant. For example, at the hearing the department manager testified regarding the relationship of the complainant's time card reports and the time spent outside the gate on March 28, 1998. He stated:

The problem is that the time sheet shows three charge numbers, four hours of NEC/NDT, four hours on the cave . . . and two hours on the coal-fire unit. And that work should have taken place in the facility at INTEC.

TR. I at 250.

It is clear that the coal fire plant is outside of the INTEC gate so that it is not true that all of the work should have taken place inside the gate. The record indicates that this type of characterization was made to the Employee Review Board and clearly affected opinions regarding the propriety of the complainant's time charging practice. For instance, Lockheed's senior ethics officer stated in his letter of August 14,

1998, that it was determined that "there was no reason to have left INTEC." AR at 21. I believe that the only person in the Employee Review Board meeting that could have made such a statement and thereby misled Lockheed's senior ethics officer about the locations of inspections was the department manager. The fact that the department manager misled Lockheed's senior ethics officer and attempted to mislead me during the hearing indicates that he was an advocate for discharging the complainant.

Since the complainant's supervisor was not invited to attend the Employee Review Board meetings, the department manager was the only person in attendance who could comment on the time card reporting practices of QA inspectors.(9) The security investigator's report found time card irregularities while the Employee Review Board found time card fraud, a much more serious matter. In order to reach this conclusion someone at the Employee Review Board meeting must have suggested that the complainant's activities and time reporting were significantly different from other QA inspectors.(10) The only person in attendance at the Employee Review Board meetings with the information and expertise to have suggested that the complainant's time card practices were significantly different from other QA inspectors was the department manager. That fact indicates the department manager had a significant opportunity to characterize the complainant's activities and time card practices and thereby influence the understanding of the other members of the Employee Review Board. Accordingly, I find that Lockheed's argument that the department manager was not influential in the Employee Review Board meetings to be unpersuasive.

I therefore believe that Lockheed has not rebutted my initial finding that the complainant has carried his burden of showing that the time nexus between his protected disclosure and the retaliatory action demonstrates that the disclosure was a contributing factor to the complainant's dismissal.

B. Lockheed's Showing

In light of my finding that the complainant's protected disclosure was a contributing factor to his dismissal, the burden is on Lockheed to show by clear and convincing evidence that the complainant would have been dismissed for his time card reporting practices in the absence of the protected disclosure. It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both the complainant and Lockheed.

In order for Lockheed to prevail, it must submit clear and convincing evidence that it had an independent basis for terminating the complainant. This means that it needs to show that the complainant's time card reporting practices were so unusual or so different from other quality inspectors that they warranted disciplinary action. After considering the documentary information, the briefs of the parties, the testimony given at the hearing, and the parties' post-hearing submissions, I find no reason to believe the complainant's time card reporting was not similar to other QA inspectors and in accordance with the direction he received. There has been no showing that his activities during standby time were not similar to the practices followed by other QA inspectors. Therefore, Lockheed has failed to demonstrate that absent the protected disclosure the complainant would have been discharged.

Three of Lockheed's arguments can be dealt with summarily. Lockheed first contends that the investigation of the complainant was proper. The complainant has not disputed that there was a reasonable basis for Lockheed's determination to investigate him and I believe Lockheed has presented a clear and convincing showing that it would have undertaken that investigation in the absence of the protected disclosure. I also believe that Lockheed has established that it followed its normal disciplinary procedures in terminating the complainant.(11) Finally, I agree with Lockheed that most of the members of the Employee Review Board, based on the information provided to them by the department manager believed that the complainant engaged in improper time reporting, and that they believed Lockheed discharged the complainant for that behavior. However, these conclusions are not dispositive of Lockheed's ultimate burden, which is to show that it would have terminated the complainant even absent the disclosure.

The contention that the complainant was properly discharged for charging time not worked, requires some detailed examination. It is first necessary to understand the function and time card reporting practices of

QA inspectors. The testimony indicates that a QA inspector's function was to respond promptly to requests for inspections from various projects at the INEEL facility. This meant that at some times inspectors had sufficient inspection work to occupy a full workday, and sometimes they did not. Inspectors believed that their productive function was to review work to determine whether it met applicable quality standards. TR. II at 63. The testimony in this case indicates that the complainant was at all times on the grounds of the INEEL facility (either inside or outside of the gated INTEC facility), with his beeper active, and was ready and able to conduct any inspection that he was requested to perform. There was no suggestion that he ever failed to conduct an inspection or was ever unavailable to conduct an inspection. TR. II at 107, 110. The time card reporting practices that led to the dismissal dealt with the periods when the complainant did not have a pending request for an inspection.(12)

The department manager provided written guidance to approximately 15 QA inspectors as to the appropriate time card reporting codes. Complainant's Exhibit #2. In addition to inspection work, which was reported using a code for the project being inspected, the inspectors were given training codes to use to report their time during their normal duty hours when there were no inspections to perform. These instructions meant that when QA inspectors did not have inspections to perform they were to report their time using a training code. The exact definition of training was never provided. However, it clearly includes reading manuals and keeping professional certifications up to date. It also included cross training through consultation and collaboration with other inspectors. Although it is likely that there were periods during an inspector's work day when he was not actively training yet fully available to be called for duty, there was no explicit "standby" code to account for such time. Notwithstanding the lack of a training program or an effort to assist inspectors in identifying training opportunities, the group manager and Lockheed's senior ethics officer testified that Lockheed management expected that QA inspectors would be involved in training activities whenever they had no inspections to perform. Because of the lack of training guidance and oversight, and the unrealistic expectation that 100% of inspector's time would be attributable to inspection and/or training, I do not believe that their testimony regarding their expectation about training was credible.

The issue presented is whether, during those standby periods when there were no inspections to perform, taking breaks and performing nontraining tasks and reporting that time under the training code, constitute the type of time card misreporting that would normally have led to an employee's discharge.

Lockheed has failed to provide any affirmative evidence to support its position that the complainant's time reporting was unusual. For example, Lockheed could have called other QA inspectors to testify they trained continuously during all periods when they did not have inspections to perform. Under Part 708 this was clearly the firm's burden. 10 C.F.R. § 708.29. Lockheed did not call any QA inspectors to provide testimony regarding time card reporting and training practices. Nor did Lockheed present any testimony on the activities of other inspectors during their standby time. Therefore, there is no support for Lockheed's contention that the complainant's activities during the times he had no inspections to perform and his time card reports for those times were different from the activities and reports of other QA inspectors.

In an attempt to compensate for its failure to show that the complainant's time reporting was unusual, Lockheed argues that the complainant's reporting must necessarily be improper. Lockheed reasons that its failure to have a reporting category for standby time - i.e., time in which the inspectors did not engage in productive work or training - compels the conclusion that either the inspectors never had standby time or, if they did, they did not report it. This argument is flawed. The lack of a descriptive reporting category for a particular activity does not mean that the activity does not exist or that it is not reported under another category. In fact, there could be various reasons for the lack of a descriptive category for an otherwise recognized activity. In this case, Lockheed clearly had the authority to establish a code for standby time, since Lockheed controlled the time cards. Lockheed's failure to establish a standby code could have been attributable to a variety of reasons,(13) and therefore, the absence of a standby code does not mean that inspectors did not report such time under existing codes.

No matter how strongly Lockheed asserts that since there was no generally recognized standby category the training category meant an inspector was actually training, Lockheed must provide clear and convincing evidence regarding the normal practice of QA inspectors if departure from that practice is the basis for a personnel action against a whistleblower. Lockheed has failed to do so.

On the other hand, the complainant himself brought forward testimony and evidence regarding the time reporting practices of QA inspectors. The complainant's log and his testimony indicate that QA inspectors thought if they had no inspection to perform they were in a standby mode. TR. II at 52. See also letter from the complainant's co-worker dated September 11, 1998, AR at 111. The complainant's testimony indicated that inspectors thought of being on standby status as a normal activity and they believed that management had directed them to report standby time using a training code. TR. II at 28. In addition to his own testimony the complainant called his supervisor to testify. When asked to describe the activities that would be expected during standby time he indicated "the most desired activity would be to do some sort of retraining . . . [but] there's a limit to how much you can read and reread and reread." TR. II at 94. In view of the candor of his testimony and the fact that the complainant's supervisor has been promoted to supervise a larger group, I viewed this testimony to be unbiased and strong support for the proposition that Lockheed's asserted requirement that standby time could not be reported using a training code was not reasonable and was not being generally followed by QA inspectors. The testimony of the complainant's supervisor also confirmed the testimony of the complainant that there was no formal training program. TR. II at 95. His testimony also supported the complainant's position that standby time was a

generally recognized concept. TR. II at 130. The complainant's supervisor also testified that the policy of charging to training codes only during periods when a QA inspector is involved in training is generally not enforced. TR. II at 134.

In its post-hearing brief Lockheed challenges the credibility of the complainant's supervisor by indicating that his statements at the hearing and his statement to the security investigator that QA inspectors had to "charge only time worked" are inconsistent. Lockheed's post hearing brief at 23. I find these discrepancies to be caused by Lockheed's refusal to acknowledge that the complainant's supervisor recognized that standby time was time worked and a normal work-related activity. Therefore, the discrepancy perceived by Lockheed does not diminish my belief that the testimony of the complainant's supervisor was candid, and consistent with the documentary evidence.

In summary, Lockheed's maintains that the complainant's behavior was improper because he reported he was in training during ten hours of a twelve week period when he was in a standby mode and not actually doing training. However, Lockheed has not shown that any other QA inspector was ever even disciplined for such an act, much less discharged. Lockheed did not bring forth a single inspector to testify that during periods of standby it was consistent practice to constantly review manuals and train. Lockheed did not provide testimony from other inspectors that they did not behave in the same manner as the complainant. Without such evidence,Lockheed has not met its burden of showing by clear and convincing evidence that ten hours of not performing training activities during a twelve week period would normally lead to the complainant's dismissal.(14)

V. Conclusion

Based on the analysis presented above, I find that complainant has made disclosures protected under Part 708, and that Lockheed's dismissal of the complainant was an adverse personnel action that constituted a retaliatory act under Part 708. Therefore, the complainant is entitled to remedial action from Lockheed and Bechtel.

It Is Therefore Ordered That:

(1) The Request for Relief filed by the complainant under 10 C.F.R. Part 708 is hereby granted as set forth below.

(2) Bechtel shall immediately reinstate the complainant to the position of QA inspector at the salary rate calculated in Appendix A.

(3) The complainant shall produce a report that provides information on attorney's fees, litigation expenses and incremental medical costs. The complainant's report shall be calculated in accordance with Appendix A.

(4) Lockheed shall produce a report that calculates the back wages plus interest payable to the individual. Lockheed's report shall be calculated in accordance with Appendix A.

(5) Lockheed shall pay the complainant back wages plus interest, attorney's fees, litigation expenses and incremental medical costs. The amounts of each of these items shall be calculated in the two reports specified in paragraphs (3) and (4) above.

(6) Lockheed shall make retirement fund contributions in the amount calculated in the report specified in Appendix A.

(7) Lockheed shall facilitate the complainant making retirement fund contributions as calculated in its report specified in Appendix A.

(8) Lockheed shall remove all information regarding this proceeding from the complainant's personnel file. The complainant shall have the right to review his personnel file.

(9) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the complainant relief unless, within 15 days of the date of this Order, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Thomas L. Wieker

Hearing Officer

Office of Hearings and Appeals

Date: December 1, 1999

APPENDIX A

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order: reinstatement; transfer preference; back pay; and reasonable costs and expenses, including attorney and expert-witness fees; and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36.

A. Findings

In the complainant's post hearing brief he requests the following relief:

1. Reinstatement to his previous job as a QA inspector.

2. Elimination of information regarding the case from his file.

3. Back wages plus interest from June 22, 1998, until reinstatement (hereinafter the unemploy- ment period).

4. Restoration of sick and annual leave that would have been earned during the unemployment period.

5. Restoration of his retirement account.

6. Payment of litigation expenses.

7. Attorney's fees and expenses.

8. The posting of finding regarding this case at INEEL.

9. Incremental medical expenses.

It is clear that the complainant is entitled to reinstatement, item 1, back wages plus interest from June 22, 1998 until reinstatement, item 3, and attorney's fees and expenses, item 7. He is also entitled to receive actual out of pocket litigation expenses, item 6, and incremental medical costs, item 9. I also believe that elimination of negative information regarding this proceeding from his personnel file is appropriate, item 2.

The complainant is not entitled to restoration of sick and annual leave that would have been accrued since June 22, 1998, item 4. It is likely that the complainant would have used that leave. Therefore, it would amount to double counting to compensate him for all the hours during the unemployment period while permitting him to accrue leave for future use. Of course when reinstated he should be credited with all leave he had accrued and not used prior to his dismissal unless he has been previously compensated for that leave.

I believe it is highly speculative to determine the earnings and the investment pattern of funds that would have been contributed by Lockheed. Therefore, I will direct Lockheed to now contribute any amounts it would have contributed during the unemployment period. In addition Lockheed shall facilitate the complainant's contribution of any amounts he would have contributed had he been employee during the unemployment period.

There is no reason to believe that posting of findings of this case, item 8, at the facility is necessary to abate the violation or provide the complainant with relief. I will therefore not order that form of relief.

B. Lockheed's Calculations

In order to calculate back wages plus interest, retirement fund contributions and leave accrued, Lockheed and/or Bechtel shall make the following calculations and provide them to the complainant within 30 days of the date of this order. (1) In the event that the exact date of reinstatement is unknown Lockheed shall make the calculations through the first pay period ending on or after March 31, 2000.

1. Calculate the number of hours of overtime the average QA inspector earned during each pay period ending during the period January 1, 1999 through June 30, 1999. In the alternative to making such a calculation, Lockheed may use four hours of overtime each week.

2. Provide for each pay period the basic pay rate per hour the complainant would have received per hour. For the period after dismissal until the date that annual pay increases are granted Lockheed shall use the hourly rate the complainant was receiving on June 22, 1998. For periods after the date of annual hourly rate change they shall increase the rate by the average increase that QA inspectors received. In the alternative to making a calculation of the average increase of QA inspectors Lockheed may use 5%.

3. Using the principles described in item 2, provide for each pay period the overtime rate the complainant would have received.

4. Determine the gross wages the individual would have earned by multiplying the basic salary rate (item

2) by forty and the overtime hourly salary rate (item 3) by the number of overtime hours (item 1).

5. Calculate the amount of interest that would have been earned on the gross wages. The interest shall be 10% annually, accrued and compounded semiannually. The calculation shall be made by accruing 5% interest on the balance of the salary accrued (item 3) and the prior interest accrued on December 31 and June 30 of each year.

6. Provide a calculation of the amount Lockheed would have contributed to any retirement account during the unemployment period.

7. Provide information on each retirement or leave benefit that is based on the length of an employee's service. For each such plan, indicate how the firm will adjust the complainant's credited service to compensate for the unemployment period.

8. Calculate the amount the complainant was eligible to contribute to retirement programs during the unemployment period. Indicate how Lockheed and Bechtel will facilitate the complainant's ability to make those contributions.

9. Calculate the amount of accrued leave the complainant will have on the date of his reinstatement.

C. Complainant's Calculation

Within 30 days of this order the complainant shall provide Lockheed the following information,

1. A calculation of the out of pocket litigation expenses and attorney's fees. In calculating attorney's fees, the complainant's counsel should estimate her hours and expenses for this calculational portion of the proceeding. In lieu of estimating her hours and costs for the calculational phase of the proceeding she may use five hours of her time and no expenses. The complainant's attorney shall provide Lockheed with sufficient information to understand how her hours and costs were determined. The complainant shall also provide reasonable information regarding his out of pocket litigation expenses.

2. Records describing the medical expenses the complainant believes would have been paid by insurance if the complainant had not been discharged. Also, the complainant should indicate any change in the complainant's medical insurance cost as a result of his discharge. The change in medical insurance cost will be an offset to the incremental medical bills or an additional recoverable expense.

D. Negotiation Period

The parties will have until sixty days from the date of this order to discuss and negotiate any disputes regarding the calculations. During that period I expect that both parties will provide reasonable information to facilitate the other party's understanding of calculations.

E. Final Report

Seventy days from the date of this order the complainant shall provide a report to Lockheed and the Office of Hearings and Appeals with a summary calculation. The complainant shall describe in detail any matters that remain in dispute. Lockheed will have 15 days from the date of that report to provide a response to that report.

F. Appeal

In the event of an appeal both parties shall follow the above negotiating and reporting steps unless those requirements are specifically stayed by an appropriate official.

(1)The Administrative Record of the OHA investigative proceeding consists of 545 pages and will be referred to as the "AR".

(2)The complainant's direct supervisor during the period was Renie Montoya, hereinafter the "complainant's supervisor." The complainant's supervisor supervised three other QA inspectors as well as several other employees. TR. II at 93. One of the other three QA inspectors is also a key figure in this proceeding. She will be referred to as the complainant's co-worker. The other individual who is a central figure in this proceeding is the supervisor of the complainant's supervisor. He will be referred to as the "department manager." His department consisted of between 28 and 35 employees. TR. I at 232.

(3)There was an intervening meeting with the department manager, the security investigator and Dennis Patterson, hereinafter "Lockheed's senior ethics officer."

(4)In order to enter or leave INTEC each person must put his security card through and electronic card reader. TR1. at ____. The electronic card reader records data which indicates the exact time that each person entered or left the INTEC area.

(5)In order to enter or leave INTEC each person must put his security card through and electronic card reader. TR1. at ____. The electronic card reader records data which indicates the exact time that each person entered or left the INTEC area.

(6)The full text of the security investigator's report is included in the AR at pages 413-82. The investigative report includes: the investigator's conclusions, six pages of investigator's notes, badge activity reports obtained from the electronic card readers, time and attendance reports for the complainant and the complainant's co-worker, a four page summary of the electronic card reader data prepared by the investigator, and weekly diaries of the complainant and the complainant's co-worker.

(7)The 17 hours seems to have been calculated by the investigator by subtracting 14 hours of time spent at the infirmary from the 31 hours spent outside the gate. However, the inspector was unable to indicate which specific hours constituted the 17 hours. After reviewing the record I am also unable to identify exactly which hours the security investigator included in the 17 hours.

(8)Testimony at the hearing indicated that some of the time outside the gate was spent going to the central facility to pick up mill test reports, TR. I at 276, and doing inspections at the coal fire plant and other facilities, TR. II at 31 (coal fire plant) & TR. II at 78 (weld shop). For instance, on March 18, 1998, the complainant and the complainant's co- worker were outside the INTEC gate for 2 hours and 26 minutes. AR at 460. On that day the complainant reports two hours on his time cards under a code for performing an inspection at the coal fire plant. That plant is outside the gate. That period outside the gate was clearly productive work time. The department manager testified at the hearing that the complainant should not have done that inspection because it was outside the INTEC gate. TR. I at 292-94, 309-12. I found that testimony of the department manger to be an attempt to justify his statements to the security investigator and the employee review board. When questioned at the hearing he could not provide any basis for his position that the complainant should not have done that inspection. This self serving and defensive testimony is an example of the department manager's pattern of evasiveness which leads me to believe the department manager did not testify honestly at the hearing.

(9)I am aware the department manager testified that he was not involved in the investigation by the internal auditor. TR. I at 246. However, I believe the internal auditor's testimony on this issue to the contrary. TR. I at 23, 24 and 26. The internal auditor was clearly more credible than the department manager whose recollections were often in error and reflected his self interest.

(10)It is clear from Lockheed's senior ethics officer's testimony that he had no familiarity with the reason a QA inspector might leave the INTEC facility. TR. I at 341.

(11)The testimony of the security investigator and his report are quite clear that he did not find time card

fraud. He clearly indicated that he only found time card inconsistencies. TR. I at 122. He also testified he was not in a position to evaluate whether those time card inconsistencies were improper. TR. I at 148, 150, 156.

(12)The internal auditor did testify that the duty of his office, Internal Controls Office, was to do floor checks, which are audits of the time reporting process. TR. I at 16, 22. This is the type of audit that normally was used to determine whether there was time card fraud. No such audit was performed. I believe that the audit was not conducted because the group manager recognized that the QA inspectors were very mobile and therefore such a audit would not provide useful information.

(13)I believe that the Employee Review Board did not understand the function and the inspection duties and normal time card reporting practices of QA inspectors. Therefore, without adequate guidance from line management, the Employee Review Board would not have been able to evaluate the time card practices of the QA inspectors.

(14)It is my sense here that by providing such a code Lockheed might have been obligated to reveal to the DOE that there were many hours when QA inspectors had no inspections and no productive training to do.

(15)One of the examples of time card impropriety presented by Lockheed was an individual that failed to show up for an entire week and came in Saturday night and filled out his time cards as if he had been present for the entire week. TR. I at 93-96. Another example dealt with an employee who showed up in the morning, left after a short period and submitted a time card indicating she was present for the entire day. TR. I at 323. These examples seem quite different from this situation in which a QA inspector took occasional walks with his beeper active so that he could return if called. In fact, Lockheed's senior ethics officer's testimony makes a distinction between fraud and occasional breaks. He testified that "things such as long breaks, an employee coming in late, those kind of issues . . . wouldn't necessarily result in a formal investigation of time card fraud or mischarging." TR.I at 318.

(1)Lockheed shall also provide the complainant's counsel with sufficient detail for her to determine how the weekly hours of overtime and wage rate increase calculations were made.

Case No. VBH-0017

July 18, 2000

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Jimmie L. Russell

Date of Filing: October 12, 1999

Case Number: VBH-0017

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Jimmie L. Russell under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Mr. Russell contends that reprisals were taken against him after he made certain disclosures concerning mismanagement, breaches in security procedures and safety violations at the DOE's Los Alamos National Laboratory (LANL). LANL is managed and operated by the University of California (the UC). At the time that he made the alleged disclosures, Mr. Russell worked at LANL for managers who were UC employees. However, Mr. Russell was an employee of Comforce Technical Services, Inc. (Comforce), a sub- contractor of UC. Mr. Russell alleges that certain UC employees retaliated against him for making protected disclosures at LANL, and that these retaliations resulted in the termination of his work at LANL.

I. Summary of Determination

Based on my analysis of the record in this proceeding, I find that Mr. Russell made protected disclosures that were proximate in time to the adverse personnel actions taken against him by the UC and, at the UC's direction, by Comforce. Under these circumstances, the DOE's strong commitment to whistleblowers imposes the significant requirement that the UC and Comforce show by clear and convincing evidence that, in the absence of these protected disclosures, they would have taken the same negative personnel actions against Mr. Russell.

As indicated below, the evidence in the record indicates that Mr. Russell was occasionally short-tempered and argumentative in the workplace. However, I find that the UC based its decision to terminate his assignment on alleged instances of threatening behavior by Mr. Russell which lacked any substantial factual basis or, in other instances, were grossly exaggerated.

Moreover, I find that Mr. Russell's supervisor, his group leader, and his division director appear to have played a crucial role in collecting and transmitting unfounded allegations of Mr. Russell's threatening behavior. The evident willingness of these UC managers to see Mr. Russell's actions as intentionally menacing and not to reasonably evaluate these incidents raises the strong possibility that they acted with retaliatory intent. Further, I find the consensus for the immediate termination of Mr. Russell that was reached by an emergency advisory panel at LANL was substantially tainted by the selective and misleading information that it received from these UC managers.

I also conclude that the UC's decision not to hire Mr. Russell to an in-house position when it reorganized

his job function may have reflected the retaliatory intent of his UC managers. Accordingly, I find that the UC and Comforce committed reprisals against Mr. Russell, and that the UC should be required to take restitutionary action on his behalf.

II. Background

A. The DOE Contractor Employee Protection Program

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

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations.(1)

The regulations provide, in pertinent part, that "a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a)(l), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations are entitled to receive an extensive series of protections. They may file a whistleblower complaint with the DOE. As part of the proceeding, they are entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they may request independent fact-finding and an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History: Mr. Russell's Complaint and the ROI Findings

Mr. Russell filed his Part 708 complaint with the DOE's Office of Inspector General (IG) on March 30, 1999. The investigation was pending when, on April 14, 1999, revisions to Part 708 took effect. See 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised procedures, investigations are conducted by the DOE's Office of Hearings and Appeals (OHA), and the revised procedures "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. §§ 708.8, 708.22. On April 26, 1999, OHA Director George B. Breznay appointed an OHA investigator to complete the investigation of Mr. Russell's complaint. On October 12, 1999, the OHA investigator issued his Report of Investigation (the ROI). The ROI made the following factual findings concerning Mr. Russell and his employment history at LANL which are not disputed by the parties:

(1) Russell is a certified security auditor with extensive military, academic and law enforcement experience. Russell began his employment at LANL in 1985, and worked for several LANL contractors. In April 1996, Russell was hired as a Self-Assessment Team Leader by Comforce, a sub-contractor providing staffing services to the LANL Security Division's Plans and Assessment Office (PAO). At some point in 1997, Michael Irving, a UC employee, became Russell's immediate supervisor.

(2) Russell received excellent performance evaluations with no negative comments for his

> three final years at LANL. Sometime around the beginning of 1999, the UC began the process of converting the position that Russell held as a sub-contractor employee to two positions to be staffed by employees of UC (the UC positions). As late as February 25, 1999, Russell was one of the two highest rated candidates for the UC positions.

ROI at 4. The ROI finds that Russell made many disclosures that fall within the definition of "protected disclosures" under 10 C.F.R. § 708.5. Specifically, it finds that

> Russell has been employed as a Self Assessment Team Leader in LANL's Security Division [hereafter the "S- Division"] since 1996. Russell was responsible for conducting audits and assessments of Safeguards and Security programs and preparing written reports of his findings. These reports routinely communicated the assessors' findings of security, safety and management deficiencies to the UC's management and to DOE. Accordingly, Russell made protected disclosures on a regular basis. In addition, the UC may have blamed Russell for reporting the locked door to LANL safety inspectors.

ROI at 4. With regard to Mr. Russell's allegations of retaliation, the ROI finds that Mr. Russell's complaint and supporting documentation contain numerous allegations of retaliation involving events that occurred in a time period spanning from the mid 1980's to the present. However, the ROI finds that Part 708 requires a complainant to file a complaint within 90 days of the date that he "knew or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a). It therefore finds that only the following alleged retaliations are covered by the current complaint: (1) Russell's March 5, 1999 termination for cause; (2) Russell's failure to be awarded one of the two UC positions that he interviewed for on February 26, 1999; (3) an alleged UC ban on hiring Russell for any work with or at LANL; and, (4) the UC's submission of allegedly derogatory information concerning Russell to DOE-AL Personnel Security. ROI at 4.

With respect to these alleged disclosures and retaliations, the ROI concludes that Mr. Russell made protected disclosures on a regular basis to his employers, and that many of these protected disclosures occurred in sufficient temporal proximity to the alleged retaliations to meet Mr. Russell's burden under 10 C.F.R. § 708.29 of showing that these protected disclosures were a contributing factor to the four acts of alleged retaliation listed above. ROI at 5.

Section 708.29 of the Part 708 regulations states that once a complainant has met the burden of demonstrating that conduct protected under section 708.5 was a contributing factor to the contractor's acts of retaliation, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." 10 C.F.R. § 708.29. According to the ROI, the UC believes it has met the burden with respect to the four retaliations listed above. The UC contends that it terminated Mr. Russell's work assignment at S-Division due to his threatening behavior toward fellow employees. Specifically, the UC alleges that on February 26, 1999, Mr. Russell was involved in two incidents in which he threatened and intimidated the same UC employee, and that he made additional threats in the following days. As a result, on March 3, 1999, the Director of the S-Division convened a Rapid Action Team (the RAT) to deal with Mr. Russell's alleged behavior. The RAT is a LANL group designed to convene on short notice to provide advice to managers on handling difficult human resource issues such as potential violence in the workplace. The RAT met on March 4, 1999, and, according to UC officials who were present, reached a strong and unanimous consensus that Mr. Russell should be removed from the workplace. Mr. Russell was informed on March 5, 1999, his services would no longer be needed at LANL and was not permitted to return to his office. Soon after Russell's termination, the S-Division notified DOE-AL Personnel Security officials of the RAT determination to terminate Russell's work at LANL on the grounds that he had intimidated fellow employees. See ROI at 2-3.

In its analysis of these allegations, the ROI does not find convincing evidence that Mr. Russell threatened

his fellow employees or engaged in other behavior meriting the termination of his work assignment at the S-Division. Accordingly, the ROI finds that there is not clear and convincing evidence that the UC would have taken the alleged retaliatory actions (1), (3) and (4) listed above in the absence of Mr. Russell's protected disclosures. With respect to action (2), the ROI does not make a direct finding on whether the UC has shown, by clear and convincing evidence, that it would have awarded the two UC positions to other candidates. ROI at 5-11.

C. The Addition of Comforce as a Party and Its "Settlement" with Russell

While Mr. Russell acknowledged in his complaint that he was an employee of Comforce and that Comforce had terminated his employment, he contended that Comforce took this action at the instigation of the Security Division at LANL, which is managed by UC. March 8, 1999 Complaint of Jimmie Russell at 13. The ROI makes no findings concerning Comforce's role in this matter, and does not identify Comforce as a party to Mr. Russell's Part 708 Complaint. In my initial letter to the parties, I found that both the UC and Comforce are proper parties to this proceeding. In doing so, I rejected the contention, made by the UC in its response to Mr. Russell's March 8, 1999 Complaint, that the UC is not subject to a complaint from Mr. Russell under Part 708 because Mr. Russell was never directly employed by the UC. June 18, 1999 UC Response at 9-11. As I stated in that letter:

> Part 708 applies to employees of DOE contractors, and the term "contractor" is specifically defined to include "a subcontract under a contract . . . with respect to work related to activities at DOE-owned or -leased facilities." 10 C.F.R. §§708.1-2. Mr. Russell was employed by a UC subcontractor at LANL and the UC, as the management and operating contractor at LANL, took actions which directly and negatively impacted the "terms", "conditions" and "privileges" of Mr. Russell's employment at LANL. The UC therefore bears potential liability, under Part 708, to remedy these negative actions if they ultimately are found to be "retaliations" under 10 C.F.R. §708.2.

October 20, 1999 letter to the parties at 3. I further noted that although Mr. Russell's allegations of retaliation involve determinations and actions taken by the UC, it may be necessary to require Comforce, in its capacity as Mr. Russell's direct employer, to make payments or take other actions necessary to provide Mr. Russell with appropriate relief. Accordingly, I determined that both the UC and Comforce are parties in this proceeding. Id.

In a submission dated January 13, 2000, Counsel for Mr. Russell and Counsel for Comforce requested that I execute an order dismissing Comforce from the proceeding. The submission stated that the request for dismissal was made "pursuant to a settlement of disputed claims documented in a Settlement Agreement and Mutual Release ("Agreement"), which was entered into by the parties on January 13, 2000, and which will survive the dismissal of this action." The "Order Granting Dismissal" submitted by the parties provided as follows:

> It is hereby ordered that Comforce Technical Services, Inc. is dismissed with prejudice, the parties to bear their own respective attorney's fees and costs and that Comforce agrees to employ Russell in the future for a position at LANL based upon LANL's determination to reinstate or hire Russell, and subject to his acceptance of all current terms and conditions of employment with Comforce.

In a letter to the parties dated January 21, 2000, I indicated that the Agreement between Comforce and Mr. Russell and the related request for the dismissal of Comforce as a party to this proceeding raised a significant issue concerning my authority to order relief for Mr. Russell in the event that he prevails on the merits of his complaint. I stated that if the Agreement eliminated Comforce, the subcontractor who was the actual employer of Mr. Russell, from my jurisdiction, I did not believe I would be authorized to take any

remedial action against the general contractor (UC), whose liability under Part 708 appears to be based on the "subcontract under a contract," i.e., UC's agreement with Comforce. I therefore invited Mr. Russell and Comforce to present additional information concerning their settlement agreement and its impact on my ability to order relief in this proceeding.

After receiving additional comments by these parties, I stated in a January 31, 2000 letter to the parties that I found it appropriate to proceed with a hearing. The comments indicated that the "settlement" between Mr. Russell and Comforce anticipated that this Part 708 proceeding would continue and that Comforce would remain subject to certain remedial actions that I might order. In particular, Comforce agreed to implement at least some of the Part 708 remedies sought by Mr. Russell in the event that I found that the requested remedies are warranted and appropriate.See January 27, 2000 letter from Comforce to me. Under these circumstances, I found that the settlement agreement between Comforce and Mr. Russell did not have the effect of eliminating Comforce as a party to this proceeding either for the purpose of establishing Part 708 jurisdiction or for the purpose of implementing an effective remedy. January 31, 2000 letter at 2.

Based on these findings, I denied the request of Mr. Russell and Comforce that I execute an order dismissing Comforce from this proceeding. I stated that it was inappropriate to dismiss Comforce as a party to this Part 708 proceeding when I may find it necessary to require Comforce to rehire Mr. Russell or make payments to him as part of the remedy. Id. Finally, I noted that I was not bound by any findings of fact or limitations of liability that may be contained in the "Settlement Agreement and Mutual Release" entered into between Comforce and Mr. Russell. I stated that I would make my findings of fact and of liability for any remedial actions based solely on the factual record of this proceeding and the standards for liability set forth in the Part 708 regulations. I indicated that in the event that I order Comforce to take remedial action that Comforce believes is not permitted by the terms of its settlement agreement with Mr. Russell, Comforce will have the burden of invoking the settlement agreement as a defense against compliance with my remedial directives. Id.

After a number of contacts with the parties and a conference call, I convened a hearing on Mr. Russell's Part 708 compliant in Los Alamos, New Mexico on February 15, 2000. In a submission received by me in Los Alamos on February 14, 2000, Comforce again sought dismissal as a party to this proceeding. As the basis for this request, Comforce asserted that no findings in the ROI indicated that Comforce had knowledge that Russell made protected disclosures or that Comforce knew of the reasons for his termination. Comforce stated that it "merely acted out LANL's directive to terminate Russell." Submission at 3. Comforce cited two DOE whistleblower determinations, David Ramirez, (Case No. LWA-0002), 23 DOE ¶ 87,505 (1993), aff'd., (Case No. LWA-0002), 24 DOE ¶ 87,510(1994) (Ramirez), and Daniel L. Holsinger, (Case No. VWA-0005), 25 DOE ¶ 87,503 (1995)(Holsinger), as supporting its position that the DOE could order relief against a general contractor or a successor subcontractor without the subcontractor employer of the whistleblower being a party to the proceeding. At the outset of the hearing in this matter, I denied Comforce's request for dismissal. I stated that it was not clear that I had the authority to direct relief through a party who had been dismissed. I noted that the Ramirez determination did not specifically address Part 708 jurisdictional issues. The Holsinger determination dealt with the limited issue of whether a successor subcontractor employer could be required to reinstate the whistleblower. Accordingly, the implementation of the remedy in that matter required no jurisdiction over the prior subcontractor employer. Transcript of Hearing (hereafter "Tr.") at 6.

The testimony at the hearing focused on UC's effort to show that it would have taken adverse actions (1), (3) and (4) listed above in the absence of any protected disclosures by Mr. Russell, and on Mr. Russell's efforts to show that these adverse actions and his failure to be hired to a UC position (adverse action (2)) were retaliatory acts taken in reprisal for his protected disclosures. Comforce sought to show through its witness' testimony that it played no role in the decisions leading to the adverse actions taken against Mr. Russell. At the hearing, Mr. Russell testified and called nine witnesses on his behalf. The UC called eleven witnesses, and Comforce called two witnesses. Each side was allotted ample time to question each witness. Mr. Russell submitted forty-nine numbered exhibits at the hearing. The UC introduced twenty-three lettered exhibits, and Comforce submitted one exhibit. Each of the parties submitted a post-hearing brief,

and Mr. Russell was permitted to submit an additional evidentiary exhibit. Upon receiving this additional exhibit, I closed the record of the proceeding on May 23, 2000.

III. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish

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

10 C.F.R. § 708.29.(2)

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both Mr. Russell and the contractors. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the risk of error is allocated roughly equally between both parties. Grogan v. Garner, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake).

B. The Contractor's Burden

If I find that Mr. Russell has met his threshold burden, the burden of proof shifts to the contractors. The contractors must prove by "clear and convincing" evidence that they would have taken the same personnel action against the complainant absent the protected disclosure. "Clear and convincing" evidence is a much more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". See Hopkins, 737 F. Supp. at 1204 n.3. Thus if Mr. Russell has established that it is more likely than not that he made a protected disclosure that was a contributing factor to an adverse personnel action taken by the contractors, the contractors must convince me that they clearly would have taken this adverse action had Mr. Russell never made any communications concerning violation of security rules or regulations at LANL.

In evaluating whether the UC and Comforce have met this burden, I will consider all the evidence in the record of this proceeding. In particular, I will closely examine the strength of evidence in support of the UC's decision to terminate his work assignment at the S-Division. In a similar manner, I will consider the UC's decision not to hire Mr. Russell to one of two UC positions to which he had applied, the UC's submission of derogatory information concerning Mr. Russell to DOE Security, and Comforce's decision to terminate Mr. Russell from its employment.

IV. Analysis

A. Mr. Russell Made Protected Disclosures.

I find that the record in this proceeding supports Mr. Russell's assertion that he made protected disclosures

to the UC management and to the DOE. As discussed above, Mr. Russell was employed as a Self Assessment Team Leader in LANL's Security Division from 1996 until his termination in early 1999. In that position, he was responsible for conducting audits and assessments of security programs and preparing written reports of his findings. These reports routinely communicated the assessors' findings of security, safety and management deficiencies to Mr. Russell's UC management and to the DOE. Based on these facts, the ROI finds that Russell made protected disclosures on a regular basis. ROI at 4.

The UC argues that Mr. Russell is not entitled, "automatically", to a presumption that he engaged in protected activity as a result of his role in preparing assessments of security matters.

> Any disclosures that he made were part of a Laboratory process and were made at the request of Laboratory management which directly solicited these disclosures by assigning him the task of performing assessments. This removes the disclosures from the realm of those which are protected.

UC Post-Hearing Brief at 3. I reject this contention. The original Part 708 regulations clearly indicate that an employee who has disclosed the violation of a security rule or regulation has made a protected disclosure for purposes of Part 708, and there is no indication of any intent to exclude such a disclosure if it was made pursuant to a management assignment. The Preamble to those regulations specifically states that disclosures made pursuant to such assignments are to be considered protected disclosures.

> The DOE has determined to afford protection to employees who have made disclosures to contractors. Disclosures to contractors will include quality assurance reports and other similar reports made in the course of an employee's job responsibilities.

57 Fed. Reg. 7535 (March 3, 1992).

Mr. Russell must also prove, however, that one or more of these protected disclosures was a *contributing factor* in a personnel action taken against him. 10 C.F.R. § 708.29; see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994). A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." Ronald A Sorri, 23 DOE ¶ 87,503 at 89,010 (1993) citing McDaid v. Dep't of Hous. and Urban Dev., 90 FMSR ¶ 5551 (1990). See also Russell P. Marler, Sr., 27 DOE ¶ 87,506 at 89,056 (1998).

The record indicates that Mr. Russell's managers at LANL's S- Division were aware of the findings of security infractions contained in his security assessments and that two of these managers, S-Division Director Stanley Busboom and Group Leader Kevin Leifheit, served on the Rapid Action Team (the RAT) whose recommendation resulted in Mr. Russell's immediate termination from his position at LANL on March 5, 1999. In addition, Mr. Busboom reported the RAT's findings to the DOE's Personnel Security Program as allegedly derogatory information after Mr. Russell's termination. S-Division management was also responsible for designating Mr. Russell's termination as "for cause" and thereby preventing his reemployment at LANL for a five year period. Another manager, Michael Irving, served on the committee that rejected Mr. Russell application to be hired as a UC employee. UC Hearing Exhibit S.

The record also indicates that Mr. Russell made protected disclosures proximate in time to these alleged retaliations. In December 1998, Mr. Russell made findings in connection with an assessment of Classified Matter Protection and Control (the CMPC assessment). In connection with this assessment, the UC acknowledges that there was a dispute between Mr. Russell and his immediate supervisor, Mr. Irving, as to whether certain data should be identified as security "infractions" or security "incidents". UC Post-Hearing Brief at 17, citing Tr. at 135 (Testimony of Mr. Irving). For purposes of Part 708, however, data indicating either an infraction or an incident is sufficient to constitute the disclosure of the violation of a security rule or regulation, and is therefore protected.(3) The record indicates that Mr. Russell continued to

submit draft security assessments, presumably containing data concerning security violations, right up until his termination in early March 1999. Complaint of Mr. Russell at 11, Tr. at 137 (testimony of Mr. Irving). Accordingly, I find that Mr. Russell made protected disclosures which were proximate in time to the four alleged reprisals.

In its Post Hearing Brief, the UC argues that Mr. Russell's testimony at the hearing indicated that he believed that the alleged retaliations taken against him were based on causes other than his protected disclosures. Even if statements by Mr. Russell were to be viewed as admissions that some of his supervisors were inclined to discriminate against him for reasons unrelated to his protected disclosures, it does not follow that his protected disclosures therefore did not "contribute" to the decision of these supervisors to take the alleged adverse personnel actions that he has identified in his Part 708 complaint. Barbara Nabb, 27 DOE ¶ 87,519 at 89,118 (1999). In this regard, I note that, under questioning by his own counsel, Mr. Russell testified that with respect to his supervisor, Mr. Irving, "the root cause of our rocky relationship was directly related to the arguments we had over self-assessments." Tr. at 1164-65. Accordingly, I reject the argument that the admitted existence of other potential sources for retaliation precludes me from inferring that protected disclosures made by Mr. Russell, in close temporal proximity to adverse personnel actions taken against him, were contributing factors to the decisions to take those actions.

I therefore conclude that Mr. Russell has met his burden of showing that his disclosures of security violations at LANL constituted a contributing factor in the negative personnel actions identified as alleged reprisals in the ROI. The burden is therefore with the contractors, the UC and Comforce, to prove by clear and convincing evidence that they would have taken the same actions without Mr. Russell's disclosures.

B. The Decision to Terminate Mr. Russell's Work Assignment at S- Division Was a Reprisal.

With respect to the UC's decision to terminate Mr. Russell's work assignment at S-Division, the ROI finds that on Friday, February 26, 1999, Mr. Russell was allegedly involved in two incidents. First, Mr. Russell allegedly threatened and intimidated Mr. John Waterbury, a co-worker who was a member of the committee that was screening candidates for the UC positions. Later on that same day, Mr. Waterbury allegedly found Mr. Russell yelling, cursing and forcefully shoving a locked door in the basement of the building in which they both worked. The ROI notes that Mr. Russell asserted that he was merely yelling for help in opening the door. ROI at 2. The ROI reports that on Tuesday, March 2, 1999, Mr. Kevin Leifheit (Mr. Russell's group leader) and Mr. Irving informed the division office that Mr. Russell had threatened and intimidated other employees. Id. In particular, they reported that Mr. Russell had written a threatening statement on a whiteboard in the group office. ROI at 9.

On Wednesday, March 3, 1999, the situation was brought to the attention of Mr. Stanley Busboom, the Director of LANL's Security Division and the decision was made to convene a Rapid Action Team (the RAT). The RAT is a LANL group designed to convene on short notice to provide advice to managers on handling difficult human resource issues such as potential violence in the workplace. The RAT included Mr. Busboom, Mr. Leifheit, a member of the special projects office, a legal representative, a clinical psychologist and an employee relations specialist. On March 4, 1999, the RAT met to consider the concerns raised about Mr. Russell, and reached a strong and unanimous consensus that Russell should be removed from the workplace. ROI at 2-3.

At the Hearing, the UC presented the testimony of several of the individuals involved in these events in the effort to show that its stated reasons for terminating Mr. Russell's assignment were correct. In its Post-Hearing Brief, the UC maintained that

> the Laboratory clearly has met its burden of showing by clear and convincing evidence that Russell would have had his assignment terminated notwithstanding any alleged protected

> disclosures. . . . Further, it is clear that Waterbury, Irving, Leifheit and Busboom were convinced in good faith that Russell presented a threat.

UC Post-Hearing Brief at 35.

I do not agree. The burden of the UC in this case is to show by clear and convincing evidence that in the absence of Mr. Russell's protected disclosures, the behavior of Mr. Russell would have led to the termination of his work assignment. As discussed below, my review of the record indicates that, rather than such a clear and convincing showing supporting the UC's actions, there is convincing evidence indicating that alleged instances of threatening behavior by Mr. Russell lacked any substantial factual basis and, in other instances, were grossly exaggerated. Moreover, Mr. Russell's supervisors, Mr. Irving and Mr. Leifheit, appear to have played a crucial role in transmitting these unfounded allegations of threatening behavior to their division manager, Mr. Busboom. Mr. Leifheit and Mr. Busboom later presented these allegations to the other members of the RAT.(4) These RAT members may have been acting in good faith when they relied on the information collected by Messrs. Irving, Leifheit and Busboom, but by that point the process was already tainted by the selective and misleading information that they received. Moreover, there was no mechanism in the RAT process, a process usually reserved for instances of overt violent or threatening behavior, for the verification of the allegations being made against Mr. Russell.

In a memorandum dated March 12, 1999 [hereinafter the "Busboom Memorandum"], Mr. Busboom informed the Director of the DOE Albuquerque Operations Office's Division of Security and Safeguards that the S-Division had requested Comforce "to terminate [Mr. Russell's] services with LANL for cause." Mr. Busboom attached two summaries to his memorandum "explaining the background of the situation." The second attachment to this memorandum discussed the RAT's investigation and findings concerning Mr. Russell.(5) UC Hearing Exhibit L. The heading "Facts" appears at the top of this summary. The document states that

The panel considered the following information in making their recommendation of dismissal:

* Mr. Russell was observed by his co-workers to be under pressure from the IEO investigation. . .

* He was also under pressure as his contract position was being converted to a UC FTE position, which he had to compete for as an external candidate.

* He had a behavior history of being involved in violent confrontations. (A physical altercation some 8-10 years ago when Mr. Russell worked for the Mason & Hanger protective force was confirmed. A verbal altercation 4 years ago, resulting in Mr. Russell being let go from a contract with [LANL's Nonproliferation and International Security Division (NIS)], was also confirmed.)

* Various incidents of poorly controlled temper and strained interpersonal relationships were confirmed from Mr. Russell's tenure as a contractor with OS/FSS/S Divisions.

* It was confirmed that Mr. Russell intimidated a member of the screening committee for the job he was applying for, just hours before [his] own interview with that committee.

* It was confirmed that Mr. Russell had written a statement on a "white board" in the group office that warned employees: "you should not be concerned with the bullet with your name on it, be concerned with the one that does not have your name on it."

* The group leader recounted that his job interview with Mr. Russell for the open position had disintegrated into a complaint session about how group business was currently conducted.

* Other instances of erratic behavior were noted, and co- workers of Mr. Russell were noted

> as fearing for their personal safety, citing concerns for his unpredictable conduct, his reputation for violent outbursts, and his affinity for firearms.

Busboom Memorandum, Attachment 2, UC Hearing Exhibit L. As the following analysis indicates, the "facts" presented at the RAT by Mr. Leifheit and Mr. Busboom were relied upon by the advisory RAT members as supporting a substantial concern that Mr. Russell might commit acts of violence against his co-workers. As discussed below, I find that these "facts" contain substantial exaggerations, unfounded allegations, and other distortions that negate the validity of the RAT conclusion. Moreover, clarifying and exonerating information was readily available and yet was not sought out or presented, leading me to conclude that the actions taken against Mr. Russell were tainted by the retaliatory motives of his UC managers, and would not have been pursued in the absence of his protected disclosures.

1. Mr. Russell Does Not Have a History of Threatening and Violent Behavior.

Through its witness testimony and argument in this proceeding, the UC has broadly characterized Mr. Russell as "a worker who clearly had trouble functioning in the workplace." UC Post-hearing Brief at 12. I do not believe that Mr. Russell's overall employment record supports such a conclusion. I concur with the ROI's finding that Mr. Russell, a certified security auditor, and "has an extensive and impressive military, academic and law enforcement background." ROI at 2. Mr. Russell is now in his early sixties. From 1956 until 1980 Mr. Russell served with distinction in the United States Marine Corps. ROI Administrative Record (hereinafter "ROI AR") at 00020. From 1982 until 1985, Mr. Russell was employed at the Harris County Sheriff's Department in Houston, Texas. From 1985 until 1992, he was employed in several positions by the Mason and Hanger Protective Force at LANL (Mason and Hanger), including the positions of Training Manager, Quality Assurance Manager, and Environment, Safety and Health Manager. In 1988, he received a recommendation from the Vice President/Contract Manager of Mason and Hanger which praised his professional abilities and added that

> Jimmie is an exceptionally honest individual who is very committed to his work, family and church. He has a very friendly and outgoing personality and is frequently asked to speak to groups of all sorts.

Russell Hearing Exhibit 2. From 1993 to 1995 he was employed directly by LANL as a security consultant. Finally, from 1996 to 1999 he served as a contract employee at LANL, first through Grumman Technical Services and then through Comforce, in the capacity of Assessment Team Leader. ROI AR at 00019. The ROI notes that Mr. Russell received excellent performance evaluations with no negative comments for his three final years at LANL. ROI at 2. Accordingly, I find unpersuasive the UC's efforts to depict Mr. Russell as a marginal and troubled employee.

Nor am I convinced that Mr. Russell's "affinity for firearms" posed a legitimate source of concern for his co-workers. Busboom Memorandum, Attachment 2. The record certainly establishes that Mr. Russell, who spent a considerable part of his career in the military and in law enforcement, maintains an active and knowledgeable interest in firearms. He is a licensed gun dealer and kept a stack of gun catalogs in an accessible spot next to his office and invited co-workers to order weapons through him. There is no indication that his interest in firearms was in any way extreme for someone with his career background, and the testimony of a co-worker who shared this interest with Mr. Russell supports this conclusion. See Testimony of Thomas A. Baca, Tr. at 613. Nor is there any evidence that Mr. Russell ever used firearms in a threatening and irresponsible manner.(6) Under these circumstances, off-hand references to weapons by Mr. Russell, in and of themselves, cannot be viewed as threatening in nature, and it is unreasonable for his managers or co-workers to make such a claim.

In his memorandum to the Director of DOE Security at LANL, Mr. Busboom stated that the RAT had found that Mr. Russell "had a behavior history of being involved in violent confrontations." Two instances of behavior are cited as support for this alleged "behavior history," only one of which involved physical

violence. That event was described as a "physical altercation some 8-10 years ago when Mr. Russell worked for the Mason & Hanger protective force." In spite of this being the only known instance of physical violence in the workplace involving Mr. Russell, no one involved with the RAT proceeding attempted to ascertain the circumstances surrounding this "physical altercation." Mr. Leifheit testified that Mr. Russell had "told a lot of folks" about the incident, so it was treated by management as a "self-admission." Tr. at 100. The ROI finds that Mr. Russell was involved in a fistfight with an employee at LANL around nine years ago, and that "there is no evidence that LANL took any disciplinary action against Russell for the incident." ROI at 17. In his testimony at the Hearing, Mr. Russell related that this incident occurred at an early morning meeting where he was threatened by another Mason & Hanger employee.

> Mr. Jennings . . . unloaded on me with venomous remarks and profanity and vulgarity and really bad things. And it was so out of line that I thought at first he was kidding and it just got worse and worse and worse. And I told him that I thought he ought to shut up. . . . At a point, we were standing -- he was sitting and I was standing very close to him. And at a point there, he says to me "I'm going to kick your so and so such and such." And I said to him -- "Well, if you feel froggy, jump." And he stood up and made a movement toward me and then I hit him in the mouth.

Tr. at 863-64. Mr. Russell further testified that he was not disciplined over this action in any way by Mason & Hanger, while he was told by the General Manager of the Mason & Hanger contract that Mr. Jennings had been disciplined for his behavior by having his salary increase suspended for a period of time. Tr. at 864. Mr. Russell further testified that, other than this incident, he has never had a physical altercation in the work force, and, throughout his career at Los Alamos, he has never threatened, pushed or shoved anyone. Tr. at 865-66. I found Mr. Russell's testimony concerning these matters to be convincing, and counsel for UC and Comforce have not produced evidence of any other physical confrontations involving Mr. Russell or evidence of physical threats made by Mr. Russell during his fifteen years of employment in the LANL workforce.(7) I certainly do not see this isolated incident occurring approximately nine years ago as supporting the view that Mr. Russell had a "behavior history" of being involved in "violent confrontations."

A second incident was cited in the Busboom Memorandum as evidencing Mr. Russell's violent behavior history. Mr. Busboom reported that the RAT had "confirmed" that Mr. Russell was involved in a "verbal altercation" four years earlier, "resulting in Mr. Russell being let go from his contract with NIS." Busboom Memorandum, Attachment 2. At the Hearing, Mr. Busboom testified that he collected this information about Mr. Russell himself, during a telephone conversation with Terry Hawkins, the Director of NIS. Tr. at 535-36. As discussed below, Mr. Busboom's account of this incident contains omissions and inaccuracies highly detrimental to Mr. Russell, leading me to conclude that his collecting and transmitting of this information was tainted by retaliatory intent. Steven Fine, the ROI Investigator, conducted a telephone interview with Mr. Hawkins on September 15, 1999 concerning Mr. Russell employment at NIS. In a memorandum, Mr. Fine reported the following information from that interview:

> Mr. Hawkins recalled that Mr. Russell was a Special Security Officer (SSO) with the Mesa-Quill Program at the T-33 facility. Mesa-Quill was an Air Force funded program. When the funding for Mesa-Quill dried up, its employees, including Mr. Russell, lost their jobs. . . .Mr. Hawkins recalled that Mr. Russell had a run-in with Handel and Perrizo at NIS. But it wasn't Russell's fault. After the incident was investigated, Handel and Perrizo were found to be at fault and disciplined.

Memorandum of Telephone Interview, ROI AR at 00399. At the Hearing, Mr. Hawkins testified that Mr. Russell lost his full-time position at NIS because the project itself was canceled. Tr. at 414. He was not questioned concerning his previous comments concerning the altercation with Handel and Perrizo. I

conclude that there is substantial evidence contradicting the "confirmed" allegation reported by Mr. Busboom that Mr. Russell lost his employment at NIS due to a "verbal altercation." In fact, Mr. Hawkins is reported to have remembered Mr. Russell as a good employee who did not cause problems in his interactions with other employees.

> Mr. Hawkins remembered that Mr. Russell did a very good job at TA-33 and was a good employee with excellent technical skills. He could get a bit hot under the collar, but there were no problems with him at NIS.

Memorandum of Telephone Interview, ROI AR at 00399. Accordingly, Mr. Busboom substantially misrepresented Mr. Russell's employment history at the NIS when reported these matters to the RAT and, later, to DOE Security.

2. Mr. Russell Did Have a Bad Temper, But It Was Known and Tolerated by His Managers and Coworkers.

The RAT correctly found that Mr. Russell had a "poorly controlled temper" [Busboom Memorandum, Attachment 2], but it addressed this issue in a one-sided and inappropriate way. The ROI investigating attorney, after conducting numerous interviews with Mr. Russell's managers, co-workers and self assessment "customers", reached the following conclusions about Mr. Russell's poorly controlled temper and his management's reaction to it.

> Many of the individuals interviewed during my investigation commented that Russell appeared to have a low frustration threshold and poor anger management skills. Moreover, it is well documented that Russell verbally abused Irving on at least three occasions. . . . [T]he UC's management appears to have tolerated Russell's occasional verbal outbursts, perhaps because of Russell's positive aspects or perhaps because of the rough and tumble nature of the security environment.

ROI at 7-8. Testimony at the Hearing confirmed that Mr. Russell occasionally vented his frustrations and anger at co-workers and managers. It also confirmed that Mr. Russell received little if any feedback from management that was critical of this behavior.

At the Hearing, Mr. Russell's immediate supervisor, Mr. Irving testified that Mr. Russell lost his temper frequently when they had discussions about assessments, but that there were three occasions when he lost his temper "I would say extremely badly." Tr. at 141. These three incidents were recounted in detail by Mr. Irving during direct examination at the Hearing. Although his testimony indicated a perspective that is biased against Mr. Russell, it was nevertheless enlightening on Mr. Russell's bad tempered behavior. That testimony provides further indication that Mr. Russell's outbursts of temper, even at their most extreme, were just that - outbursts - and were not accompanied by overt threats of violence. His testimony also indicates that Mr. Russell's management tolerated these outbursts and that Mr. Russell was not disciplined for them.

Mr. Irving first recounted a 1997 incident that occurred in a vehicle outside of Building 470, where Mr. Russell "became enraged" while discussing the problems arising from an ongoing assessment. Mr. Irving related that Mr. Russell "got out of the vehicle, right in front of Building 470, screaming and cussing at me, and yelling at me. And calling me names and so forth." Tr. at 142. Mr. Irving acknowledged that following that incident, Mr. Russell approached him later and "apologized for his behavior. We shook hands." Id. In a second incident, possibly in 1998, Mr. Irving related that following a group discussion of the problems that S- Division was having with the Organizational Safeguards Security Officer program, he and Mr. Russell had a private conversation where he admonished Mr. Russell for being critical of management's approach to the problems, during which Mr. Russell

> became enraged, he doubled up his fist. He started to come out from . . . where his desk is. And he had his fist doubled up. He was kind of frothing at the mouth, red faced. And he said, "do you want to fucking take me on?" And he got close to me. Didn't get this close, but he was about this close. He says -- "you don't want to fucking take me on."
>
> And I realized, and I think somebody was down the hall. And I realized that was inappropriate. This discussion was getting out of hand. Let's go into Debbie Ewing's office and talk this thing out. And he went on and on in Debbie Ewing's office, extremely angry that I'm trying to censor him. And then my saying under no circumstances am I trying to censor you. But once a decision is made by management, we are morally bound to support the decision as long as it is a legal, moral or ethical decision.

Tr. at 143-47. Although Mr. Russell's alleged gestures and language were inappropriate, I note that Mr. Irving's response was to invite Mr. Russell into an empty, private office to continue the discussion. This is not the typical response of someone who feels physically threatened by the behavior of someone with whom he is having an argument.

The third incident recounted by Mr. Irving involved Mr. Russell's reaction to the annual performance evaluation that he received in October 1998. The evaluation was completed by Mr. Irving and signed by Mr. Tucker. At the time he completed the evaluation, Mr. Irving reported that the felt that Mr. Russell's problems with his temper

> seemed to have improved somewhat since the OSLO incident. Therefore, I rated him a 3 plus [on a scale of 1 to 5], I think, in a couple of areas ["Working with Others" and "Adaptability"]. And a 4 for attitude.

Tr. at 149.(8) Mr. Irving rated Mr. Russell outstanding (5 or 5+) in the other nine categories on the evaluation form, and made no comments under the heading "Indicate areas that need improvement." See ROI AR at 00045. Mr. Irving testified that during his discussion of the evaluation, Mr. Russell challenged the 3 plus ratings and eventually became enraged. Tr. at 151. Mr. Irving then testified that Mr. Russell scheduled an appointment with Mr. Tucker to discuss the evaluation, and invited Mr. Irving to attend. At this meeting, Mr. Irving stated that Mr. Russell again lost his temper.

> He became very irate, angry. That this was an unjust assessment of his performance. We [Mr. Tucker and Mr. Irving] were saying we felt this was a just assessment. . . . He [Mr. Russell] was attempting to impugn my integrity. Mr. Tucker is trying to tell him this was unacceptable, it is inappropriate. You can't do that without empirical evidence, etc. Then we were way up here in this heated discussion. . . . And then finally it comes down, and we're now back to . . . just a normal conversation.

Tr. at 153. Mr. Tucker agreed to review the evaluation of Mr. Russell in light of the their discussion. At that point Mr. Irving made a comment which once again enraged Mr. Russell, who, according to Mr. Irving, told him

> You're not going to talk down to me like that, your Highness. Something like that. And Mr. Tucker then stopped him right there, and said, -- you are completely out of line again. I don't know how many times he said this. And I said, Jimmie, you have concluded that my comment was condescending, which it was not. And then he said, -- well, perhaps I overacted. That was the third major incident.

Id. In a memorandum dated October 13, 1998, Mr. Tucker thanked Mr. Russell "for the opportunity to receive your verbal comments," and advised him that he had concluded that the evaluation "is appropriate for the period in question."

> Mr. Irving has advised both you and me that he observed marked improvement in your attitude and your ability to work with others. I encourage you to take Mr. Irving's constructive comments to heart and aspire to further improve your performance in these areas, as well as sustain your acknowledged superior performance in other areas.

October 13 Memorandum from John E. (Gene) Tucker to Jimmie Russell, ROI AR at 00046. This memorandum is quite revealing. Although Mr. Tucker had witnessed Mr. Russell lose his temper with Mr. Irving and himself, he evidently did not consider it of sufficient importance to warrant criticism or comment in his memorandum to Mr. Russell. Instead, Mr. Russell was informed that his ability to work with others had shown "marked improvement." Accordingly, Mr. Russell received no indication at that time, or at any time prior to his March 5, 1999 termination, that his managers considered his outbursts of temper to be a serious behavior problem.(9)

According to the Busboom Memorandum, the RAT found that "co-workers of Mr. Russell were noted as fearing for their personal safety, citing concerns for his unpredictable conduct, his reputation for violent outbursts, and his affinity for firearms." UC Hearing Exhibit L, Attachment 2. The ROI finds that the three LANL employees who expressed such concerns to the RAT were Ms. Debra Huling, Mr. Waterbury, and Mr. Irving. With respect to these individuals, the ROI Investigating Attorney concluded that "each of these individuals harbors a great deal of personal animosity against Russell. It is highly possible that one or more of the three individuals have expressed fear of Russell in order to obtain revenge against him." ROI at 10. As indicated above, I find that Mr. Irving was not physically threatened or intimidated by Mr. Russell. I will discuss Mr. Waterbury's allegations in the next section.

Ms. Huling is a LANL employee whose office was located in close proximity to Mr. Russell's until he moved to another building in the Fall of 1998. The ROI Investigator found that "upon interviewing Huling, I was left with a very strong impression that she has an intense and highly personal dislike of Russell." Id. Ms. Huling did not testify at the hearing, but her January 25, 2000 deposition in this matter confirms the ROI's findings. At the deposition (Russell Hearing Exhibit 7), she affirmed that she has an intense and highly personal dislike for Mr. Russell. Deposition at 46. She stated that she was frequently disturbed by the loud arguments and vulgar language emanating from the office area that Mr. Russell shared with a co-worker. However, she stated that "at times Mr. Russell was coaxed or encouraged" to engage in loud arguments by this co-worker and by Mr. Irving, who also raised his voice. Id. at 17-18. She also stated that "most of the comments that held the offensive language originated with [this co-worker]." Id. at 43. Although Mr. Russell's arguments with others made her very uncomfortable, she stated that at no time did she feel physically threatened by him. Id. at 33. She states that she had complained about the vulgar language to Mr. Tucker, and had mentioned feeling uncomfortable about Mr. Russell to John Waterbury and another co-worker, and to her manager, Ms. Gloria Garcia, but did not ask that any action be taken concerning the situation. Id. at 14-17.(10) She reports that during Mr. Russell's final week at LANL, she had no contact with him and did not discuss his behavior with any of her supervisors or co-workers. Id. at 24-26. Based on my review, I concur with the ROI's findings that Ms. Huling's complaints do not provide significant support for the determination to terminate Mr. Russell.

3. Mr. Russell's Behavior from February 26 through March 5, 1999 Did Not Support the Stated Reasons for His Dismissal by the UC.

As noted above, in late 1998 and early 1999, LANL's IEO investigated allegations that Mr. Russell was conducting his private gun selling business during office hours using LANL equipment. Mr. Busboom's summary of the RAT findings indicates that "Mr. Russell was observed to be under pressure from the IEO

investigation." Busboom Memorandum, Attachment 2. The basis for this finding appears to be that, after he became aware of the investigation, Mr. Russell spoke to three managers and some of his co-workers about it. Tr. at 1122. However, Mr. Russell testified that after speaking to these people and to the IEO auditor his concern was "significantly reduced."

> The impression that I got after talking to these people was that what I had done, while not right, was not a capital offense and that I might receive some type of punishment for it but it probably wouldn't be severe.

Tr. at 1122. He stated that by late February and early March, 1999, he "had almost forgotten about [it]. I think in the back of my mind, there was, you know, it was still there." Tr. at 1123. Mr. Russell's conclusion that he probably would not receive a severe punishment or termination for these violations is compatible with the recommendations of the IEO Report that was issued concerning this matter. ROI at 6. I believe Mr. Russell when he testified that his anxiety concerning this investigation had eased substantially by early March 1999. I therefore conclude that the RAT was incorrect in attributing a significant potential for threatening behavior to Mr. Russell's concern over this matter.

According to the Busboom Memorandum, the RAT also found that Mr. Russell was "under pressure as his contract position was being converted to a UC FTE position, which he had to compete for as an external candidate." UC Hearing Exhibit L, Attachment 2. There is factual support for this finding. In his testimony at the Hearing, Mr. Russell testified that, on the morning of his formal interview for the UC FTE position (February 26, 1999), he expressed anger and frustration about Mr. Irving's decision to have a formal interview process to Mr. Waterbury, who he knew was a member of the selection committee. Tr. at 990.

In a February 26 memorandum to Mr. Irving (the February 26 Memorandum), Mr. Waterbury recounted his morning conversation with Mr. Russell and a subsequent incident involving a locked door, and stated his fear that Mr. Russell could become physically violent. Because this memorandum triggered a management response that culminated in the RAT determinations, I will analyze its contents in detail. As the discussion below indicates, I do not find that the actual facts warranted Mr. Waterbury's conclusion that Mr. Russell constituted a physical threat to Mr. Irving and himself.

In the February 26 Memorandum, Mr. Waterbury recorded the insulting comments that Mr. Russell allegedly made concerning Mr. Irving's judgment in requiring him to make a formal presentation in applying for one of the UC FTE positions. He also provided the following description of his encounter with Mr. Russell at a recently locked door in their office area, after he allegedly explained to Mr. Russell that the door had been locked to establish a security perimeter.

> My attempt to clarify appeared to increase his agitation and he loudly stated, "I don't want to have to use a fucking key to get out of here. You got all the doors padlocked and you expect me to get out." . . . As I was trying to explain, he forcefully shoved the door wide open, ignored my communication, and walked off leaving the door unsecured. He acted like I personally locked the doors to complicate his life.

February 26, 1999 Memorandum from Mr. Waterbury to Mr. Irving, ROI AR at 00225. With respect to the encounter, Mr. Waterbury reported that "I felt as if he was about to strike me at any moment." Id. Mr. Waterbury concluded his memorandum to Mr. Irving with the following comments.

> Based on his comments and hostile behavior today, and personally witnessing countless past episodes where he was out of control, I have genuine fear that you personally (over any other S&S employee) are in harm's way and (God forbid) possibly your family as well. His many firearms, combat training, and under his current frame of mind his "perceived injustice" towards him, I hate to think what we might be facing at the hands of Jimmie.

Id. (emphasis in original). Based on Mr. Waterbury's account of his interactions with Mr. Russell on that date, the RAT found that Mr. Russell "intimidated a member of the screening committee for the job he was applying for." UC Hearing Exhibit L, Attachment 2. The ROI, however, is critical of the RAT's reliance on this account.

> The RAT accepted and relied upon Waterbury's account of February 26, 1999 without hearing Russell's side of the story. Moreover, Waterbury's conclusions about Russell's behavior on that day were accepted and relied upon by the RAT without any substantive analysis. While the alleged behavior attributed to Russell was unprofessional, impolitic and suggests poor self-control on Russell's part, it certainly did not suggest a propensity for violence as the RAT team concluded.

ROI at 9.

I find that the testimony at the Hearing supports the position that Mr. Russell's interactions with Mr. Waterbury on February 26 were not physically threatening to Mr. Waterbury or to Mr. Irving, and did not constitute intimidation of Mr. Waterbury.

In his testimony, Mr. Russell stated that immediately prior to his February 26 conversation with Mr. Waterbury, he had been talking to a co-worker, Pat Trujillo, who was critical of Mr. Irving's formal interview procedures for selecting the UC FTE positions. "He thought it was ridiculous and overkill and he had never seen it done that way before." Tr. at 988. Mr. Russell testified that he expressed agreement with these views and, when Mr. Waterbury visited Mr. Russell's office a few minutes later, he "started pontificating about my opinion of the process." Tr. at 990. Mr. Russell admits that he expressed anger, disgust and frustration in his comments to Mr. Waterbury, Id.., but he also testified that Mr. Waterbury's memorandum exaggerated the level of personal criticism and profanity that Mr. Russell used concerning Mr. Irving in this conversation. Tr. at 1135.(11) Mr. Russell also denies that his comments were intended to intimidate Mr. Waterbury, or to influence his decision as a member of the selection committee. Tr. at 994.

At the Hearing, Mr. Waterbury testified that at the time he had this conversation with Mr. Russell, he believed that Mr. Russell was simply venting his frustration about the interview process.

> [Waterbury] So, I went into this office at the time and said Jimmie are you all right? And without a moment's hesitation he turned around and just let loose with the fact that we knew what he could and couldn't do; didn't Mike Irving have to get permission to do an interview, the purpose of the interview. Mike Irving doesn't know what he's doing, etc. And I then thought to myself I [should] be anywhere but there. And I said okay Jimmie I just wanted to make sure that you were all right. And I walked away.
>
> Q How did you interpret that at the time?
>
> A Jimmie being Jimmie. Being -- I just let it go.

Tr. at 295. Mr. Waterbury testified that it was only in the late afternoon, following the door incident at 11:00 am and Mr. Russell's interview for the UC position at 1:30 pm, that he realized that he had been intimidated.

> As I said earlier, the morning incident in my mind was just Jimmie just being Jimmie. But sitting there working, it struck me that John Browne [the Director of LANL] has a zero

> tolerance policy to a hostile work environment. I began putting two and two together, how inappropriate that was. Well I didn't have to take that kind of abuse. And that -- what he did in the morning was inappropriate as well -- trying to have me influence Mike Irving to relieve him of giving a presentation requirement.

Tr. at 303. This change of impression by Mr. Waterbury weakens his allegation that the morning incident was an instance of intimidation by Mr. Russell. Whether one is being intimidated or not is something that one should know at the time. It is not a rational or reflective process. It also is possible that Mr. Waterbury may have been influenced by Mr. Irving, with whom he was in contact throughout the day, to alter his impression of this incident.

In his testimony concerning the February 26 door incident, Mr. Waterbury acknowledged that S-Division employee Mr. Byron McCloud was with Mr. Russell at the locked door, a fact that he had not included in his memorandum to Mr. Irving. He testified as he approached the door he could "hear animated voices on the other side. I couldn't hear what they were saying, but banging and kicking on the door." Tr. at 301. Mr. Waterbury testified that he opened the door and explained to Mr. Russell that the door has to be kept locked.

> and that's when I first thought he was -- he was going to take a swing at me. Still cussing, red faced -- I had to take a step back because -- he started to walk in. If I hadn't moved, he would have bowled me right over. So, I opened the door and it just was not very good. . . .I have no doubt in my own mind that if I hadn't moved, I would have been pushed aside, knocked over.

Tr. at 301-2. Mr. Waterbury describes this as "the first time I had concerns for my own physical safety" around Mr. Russell.

Mr. McCloud's account of this incident does not confirm or deny that Mr. Russell forced Mr. Waterbury to get out of his way as they passed through the door. However, it points out inaccuracies and exaggerations in Mr. Waterbury's account. Mr. McCloud recalls that it was he and not Mr. Russell who rattled a door handle and pushed and pulled on a locked door to try to get it to open. Tr. at 814. He recalls eventually exiting with Mr. Russell through a nearby door. Tr. at 815. He does not believe that Mr. Russell hollered through a doorway to anyone about a door being locked. Tr. at 815. He cannot recall whether Mr. Waterbury was present at the doorway. Tr. at 816.

Mr. Waterbury's allegation that Mr. Russell would have "bowled me right over" if he had not stepped out of the doorway, is the only direct allegation of actual physical intimidation made against Mr. Russell by anyone in the S-Division. Were this confirmed, or if I believed Mr. Waterbury's account, it might well be pivotal. However, the testimony of Mr. McCloud indicates that for him, there was nothing memorable about this encounter between Mr. Russell and Mr. Waterbury. Tr. at 815. Mr. Waterbury acknowledges that he stepped aside and that Mr. Russell did not verbally threaten, touch or shove him. Tr. at 301. I conclude that Mr. Russell acted rudely toward Mr. Waterbury in this encounter, but that there is no reason to believe that he intended to physically intimidate or assault Mr. Waterbury. I conclude that this incident does not provide substantial support for a finding that Mr. Russell presented a threat of violence in the workplace.

After fully reviewing the record in this matter, I find that the expressions of concern for the physical safety of Mr. Irving and others contained in Mr. Waterbury's February 26 memorandum lack any significant factual basis, and may have been motivated by Mr. Waterbury's desire to assist Mr. Irving and Mr. Leifheit in discrediting Mr. Russell. Mr. Waterbury testified that he composed this memorandum after discussing the morning incident with his supervisor, Mr. Irving (Tr. at 319) and Mr. Irving's supervisor, Mr. Leifheit (Tr. at 60). While Mr. Waterbury and Mr. Irving deny that Mr. Waterbury was asked to write the memorandum, the testimony of Mr. Leifheit is more circumspect.

> Q: Mr. Waterbury wrote a memo on the date of the 26. Did you tell Irving to have him do that?
>
> Mr. Leifheit: I did not tell him to do that.
>
> Q: Did you suggest to Irving that this series of events be documented?
>
> Mr. Leifheit: No, I didn't. We had a conversation. And in that conversation, it is not unlikely that we talked about what we needed if we needed to do something about this. At that point, it was not an issue of anything other than [Mr. Russell's] selection process. And so his actions relative to his interview and his selection with a focus that there was damage.

Tr. at 89. Mr. Waterbury admitted in his testimony that he gave Mr. Irving a draft of the memorandum to review before Mr. Waterbury put it in final form. Tr. at 304. These acknowledged discussions and interactions between Messrs. Leifheit, Irving and Waterbury raise the distinct possibility that Mr. Waterbury was influenced, either directly or indirectly, to exaggerate his concerns in order to please his managers and assist them in finding a means to retaliate against Mr. Russell.(12)

Mr. Leifheit testified that on Friday, February 26, 1999, both Mr. Waterbury and Mr. Irving approached him and discussed their concern that Mr. Russell might react violently if he was not selected for one of the UC-FTE positions. Tr. at 60-61. On Monday, March 1, Mr. Leifheit testified that he became "very concerned" about Mr. Russell's behavior after Mr. Irving reported that Mr. Russell had written a military axiom on the white board in a common office area. Mr. Busboom indicated that it was reported to the RAT that it was confirmed that Mr. Russell wrote a message on the white board "warning employees" that "you should not be concerned with the bullet with your name on it, be concerned with the one that does not have your name on it." Busboom Memorandum, Attachment 2. The ROI makes the following findings concerning this matter:

> This incident was taken out of context by the RAT. Tom Baca [a UC employee and coworker of Mr. Russell] recalled that Russell wrote this statement on the whiteboard while Russell and Baca were discussing their military experiences and training. During this conversation, their discussion turned to slogans and cadences. According to Baca, Russell wrote the statement on the whiteboard and asked Baca what he thought of it.

ROI at 9-10. The ROI concludes that it is clear that Russell did not write this slogan to warn or threaten fellow employees, and if the RAT had investigated the allegation further, it would not have "rashly" interpreted the statement as a threat. ROI at 10. The testimony at the hearing confirmed the ROI's explanation of this event. Mr. Baca testified that he was formerly employed as a firearms instructor, including sniper rifles, at the DOE's Training Academy in Albuquerque. Tr. at 612-613. He said that he and Mr. Russell would occasionally talk about guns, which was a mutual interest of theirs, and that on this occasion they were talking about sniper rifles and the differences between the military style rifles and the sniper rifles used by the DOE. Id. He then said that the conversation turned to different firearm maxims.

> The Air Force has certain terms that we use compared to the Marine Corps and the one that I told Jimmie that I used to use quite a bit as an instructor in Firearms proficiency is "Speed was fine, but accuracy is final." And it started like -- well, what about this phrase here? It just -- there was an exchange of phrases is what it was.

Tr. at 625. He testified that both he and Mr. Russell were writing phrases on the white board and erasing them, and that the maxim in question happened to be the last one written on the board during that conversation. Tr. at 626.

I find it extraordinary that this explanation was not made a RAT finding and was omitted from the Busboom Memorandum. This is especially troubling in light of Mr. Baca's testimony that he was approached by Mr. Leifheit and asked to write a memorandum confirming what Mr. Russell had written on the white board that day. See Russell Hearing Exhibit 12. Mr. Baca states positively that Mr. Leifheit never inquired into the circumstances which resulted in Mr. Russell writing the maxim.

> Mr. Baca: I was sitting in his office, and [Mr. Leifheit] goes -- Tom, did you ever see Jimmie write that memo. At the time that it was written down, I figured it was erased off the board. And I said yes, and he goes can you write me a statement saying that you saw Jimmie writing it. I said well sure. So, that's why I wrote the statement.
>
> Q: Did you tell Mr. Leifheit why it was written and how it came about to be written by Mr. Russell?
>
> Mr. Baca: He would never ask me why and I never questioned it why. I just said -- okay, if you want me to write it, I'll write it.
>
> Q: Did anyone ever -- did Mr. Irving or did Mr. Leifheit on March 4th ever ask you why that got written or what the circumstances were?
>
> Mr. Baca: No, he did not.

Tr. at 617. In his testimony at the Hearing, Mr. Leifheit states that he saw the maxim that Mr. Russell wrote on the white board and that he confirmed with Mr. Baca that Mr. Russell wrote it. He further states that he did not confirm with Mr. Baca the context and why it was written. Tr. at 102-03. However, although Mr. Baca's memo is addressed to him, Mr. Leifheit does not recall asking Mr. Baca to write it.

> I did not [ask Mr. Baca to write it]. I don't know why this was written. My guess is, and this is a guess, I don't recall having a conversation with Tommy about this. My guess is, speculation on my part, that Mr. Irving or Mr. Waterbury might have asked him to do this. Or he might have done this on his own.

Tr. at 102. Mr. Leifheit also testified that it was "one of my folks, I still think it was either John [Waterbury] or Mike [Irving], but it could have been Pat Trujillo as well, talked about a conversation that had taken place between Jimmie [Russell] and Tommy Baca about Mr. Russell buying a sniper rifle." Tr. at 115.(13) Mr. Leifheit testified that this rumor was given serious consideration at the RAT, but that no one spoke to Mr. Baca about it.

> Q: The concept of buying [a sniper rifle] was pretty important to you?
>
> Mr. Leifheit: It was a contributing factor. It was a concern, yes.
>
> Q: It's a pretty loaded phrase to be throwing around a RAT team, isn't it?
>
> Mr. Leifheit: Well, you don't buy a sniper rifle for duck hunting, so yes, I would agree.
>
> Q: Sure. Did anyone talk to Mr. Baca about the conversation that was relayed to you by someone, which you passed on to the RAT team?
>
> Mr. Leifheit: No, I did not.

Tr. at 115. He testified that, although a rumor, "I think it was equally important to all the other incidents" in convincing him that LANL needed to take action against Mr. Russell. Tr. at 116.(14)

Based on this testimony, I believe that the findings of the ROI Investigator on the "white board" issue are correct. Moreover, the decision of the UC manager, Mr. Leifheit, not to look for explanations that would have exonerated Mr. Russell from allegations that he was threatening his co-workers and contemplating violence clearly raises the strong possibility that Mr. Leifheit acted with retaliatory intent against Mr. Russell. The presentation to Mr. Busboom of these incorrect or misleading allegations, along with the exaggerated concerns for personal safety expressed by Mr. Irving and Mr. Waterbury, constituted Mr. Busboom's acknowledged basis for his determination to convene the RAT. (15)

4. The RAT Relied Solely on Mr. Busboom and Mr. Leifheit in its Evaluation of Mr. Russell.

The RAT was convened on March 4, and Mr. Busboom stated that it consisted of himself, Mr. Leifheit, a legal representative, a medical representative, an employee relations specialist, and a member of the special projects office. Id. According to Mr. Busboom, the RAT "reviewed facts presented by the group leader [Mr. Leifheit]," and made its recommendation to terminate Mr. Russell. Id. Thus in reaching their consensus that Mr. Russell should be removed from the LANL workforce, the members of the RAT were entirely dependent on the factual information and concerns presented to them by Mr. Leifheit and Mr. Busboom. Mr. J. Patrick Trujillo, who participated in the RAT as a leader of the Employee Relations Group, testified that the meeting lasted about an hour, that Mr. Russell was not present, and that all of the information provided to team members concerning Mr. Russell came from Mr. Leifheit and Mr. Busboom. Tr. at 360, 363. According to Mr. Trujillo, these managers shared concerns "that Mr. Russell possibly had a weapon on site" and that there was "some sort of altercation with a co-worker." Tr. at 360. After he received the recommendation of the RAT, Mr. Busboom immediately took steps to permanently remove Mr. Russell from the LANL workforce. On March 5, 1999, Mr. Russell was instructed to depart the laboratory after turning over his keys and security badge.

Based on the analysis set forth above, I conclude that the allegations brought forward against Mr. Russell by UC managers Irving, Leifheit, and Busboom were relied upon by the RAT in reaching its consensus for termination and cited by Mr. Busboom as grounds for removing Mr. Russell from the LANL workforce and identifying his dismissal as "for cause." In addition, I find that these allegations included incorrect facts, speculation, and exaggeration to such an extent that there is a clear possibility that they reflected the retaliatory intent of these UC managers. I believe that this retaliatory intent arose in large part from the protected disclosures made by Mr. Russell and his disputes with his UC managers concerning those disclosures, some of which occurred proximate in time to his dismissal. Under these circumstances, the UC has not shown, by clear and convincing evidence, that these managers would have taken these actions against Mr. Russell in the absence of his protected disclosures, and that the UC would have terminated Mr. Russell's work assignment at LANL as a result. Mr. Russell therefore is entitled to relief under Part 708 for this termination and for the resulting termination of his employment by Comforce. See Reeves v. Sanderson Plumbing Products, Inc., No. 99- 536, 2000 WL 743663 (U.S. June 12, 2000) (a plaintiff may win an employment discrimination case by presenting a prima facie case of discrimination and discrediting the employer's explanation for its actions).

C. S-Division's Communication to DOE Security of Unsubstantiated or Exaggerated Derogatory Information Concerning Mr. Russell Was a Reprisal.

As discussed above, I have found that many of the "Facts" listed in Attachment 2 to the Busboom Memorandum as support for the concern that Mr. Russell was a potentially violent individual are inaccurate, speculative or highly exaggerated. In the cover memorandum itself, Mr. Busboom asked DOE Security that the information in the attachments be kept confidential because "we are extremely concerned that [Mr. Russell] would use any knowledge gained in this manner to target our employees for further acts of intimidation, or potentially -- violence." Busboom Memorandum. At the Hearing, Mr. Busboom

testified that when he reported these concerns to DOE Security, he was acting pursuant to the requirements of DOE Order 472(1)(b), which directs the UC, as a DOE contractor, to report derogatory information concerning an employee to the DOE. Tr. at 507-9.

While Mr. Busboom is correct in identifying his duty to report certain derogatory information concerning an employee to the DOE, I find that the concerns that he reported to the DOE concerning Mr. Russell were inaccurate and of such a nature as to interfere with Mr. Russell's ability to obtain access authorization (a security clearance) in the future. Moreover, as discussed above, I find that the UC has failed to show that these inaccuracies would have been present absent Mr. Russell's protected disclosures. I therefore conclude that the UC should be required to take such remedial action as may be necessary to provide the DOE Safeguards and Security Division with full and accurate information concerning the derogatory allegations about Mr. Russell that were contained in the Busboom Memorandum.

D. The UC Effectively Barred Mr. Russell from further Employment at LANL.

The ROI finds that Part 708 provides the DOE with jurisdiction over Mr. Russell's allegation that, subsequent to his March 5, 1999 dismissal from the LANL workforce, the UC retaliated against him by banning him from being hired for any work with or at LANL. ROI at 4. With regard to this allegation, the ROI finds that

> The UC terminated Russell for cause. Security Division management informed at least one other division director at LANL (Terry Hawkins, Division Director of the NIS) that Russell had been terminated for cause.

ROI at 5. The ROI also refers to the Busboom Memorandum, which bears the subject heading "Derogatory Information - Dismissal for Cause." Id. The effect of a dismissal for cause is a lengthy ban on a former employee's reemployment at LANL. In its Post- Hearing Brief, the UC acknowledges that the contract between the UC and Comforce provides that Comforce

> shall not refer candidates to the University who have:
>
> 1. Been discharged for cause by the University or by any subcontractor at the Los Alamos National Laboratory within the last seven (7) years.

UC Hearing Exhibit A, Other Document Section, Appendix I, p. 26. At the Hearing, Ms. Rose Ann Casale, the Regional Manager of Comforce, testified that immediately after Mr. Russell's March 5, 1999 termination, Comforce took steps to place Mr. Russell in a new position. Tr. at 666, 679, 701. Mr. Keith Whitworth, Comforce's Senior Recruiter, testified that he would have submitted Mr. Russell's resume for subsequent LANL openings, but was told by Mr. Fred Shelly, the UC's Staffing Specialist for Contract Workers, that "he didn't want to see [Mr. Russell's] resume coming across his desk." Tr. at 743. Later, Comforce received a LANL database sheet for Mr. Russell indicating that it was prepared by Mr. Shelley and dated May 14, 1999. This database sheet indicates that effective March 5, 1999, Mr. Russell's assignment ended. Under "reason" the words "per instruction of client - for cause" are written. Comforce Hearing Exhibit 1. Mr. Whitworth testified that his understanding was that "when someone is terminated for cause, we can't get them hired back up at the Lab for a period of seven years." Tr. at 743. In his testimony, Mr. Shelly confirm that Mr. Russell's official record at LANL indicates that his assignment with S-Division was terminated "for cause" and that this information would be made available to any prospective employers of Mr. Russell at LANL. Tr. at 434-35.

I conclude that the UC placed what in effect was a ban on the rehiring of Mr. Russell at LANL following the termination of his assignment with S-Division. Mr. Shelly's statement that he didn't want to see Mr.

Russell's resume carried the strong message that Mr. Russell was unwelcome as a job applicant at LANL. The UC's designation of Mr. Russell's termination as "for cause" led officials at Comforce to believe that the UC was invoking a contract provision that placed a seven year ban on Mr. Russell's employment at LANL. In its Post-Hearing Brief, the UC makes the ingenious argument that this contract provision is inapplicable in this instance because it only refers to a "for cause" termination of "employment" and the UC was never Mr. Russell's "employer." UC Post-Hearing Brief at 31. I reject this reasoning. The phrase "for cause" in the context of employment actions carries a specific meaning that is commonly understood by Comforce and UC officials as limiting the employee's future employment rights with LANL. The UC understood how Comforce would view this designation when it was applied to the termination of Mr. Russell's work assignment at S- Division, and the UC has offered no other explanation for using the words "for cause" in Mr. Russell's official employment record. Accordingly, I conclude that the UC effectively banned Mr. Russell's reemployment at LANL.

E. Comforce Is Liable for the Termination of Mr. Russell's Employment under Part 708, But Equity Favors Placing the Remedial Actions with the UC.

In its post-hearing brief, Comforce contends that it bears no liability for any of Mr. Russell's claims because it "was unaware that Jimmie Russell made any disclosures under 10 C.F.R. § 708.9 or that Comforce terminated his employment for such disclosures." Comforce Post-Hearing Brief at 1. At the hearing, Ms. Casale testified that when the UC terminates an employee's assignment at LANL, Comforce is forced to end the employee's employment. Accordingly, Comforce ended Mr. Russell's employment on March 5, 1999. She indicated that but for the UC termination of his assignment, Comforce would still employ Mr. Russell in his position as a Self-Assessment Team Leader at LANL. Tr. at 677-78. See Comforce Post-Hearing Brief at 2-4.

Although I find that Comforce had no role in the UC's decision to terminate Mr. Russell's work assignment at LANL, Comforce admits that it terminated its employment contract with Mr. Russell because the UC ended his work assignment with LANL. As discussed above, the UC's decision to end his work assignment constituted a retaliation against Mr. Russell for activity that is protected under Part 708. Comforce therefore terminated Mr. Russell's employment as a result of Mr. Russell's protected activity, and is jointly and severally liable with the UC for the damages arising from this termination.

As noted above, Part 708 applies to employees of DOE contractors and the term "contractor" is specifically defined to include "a subcontract under a contract . . . with respect to work related to activities at DOE-owned or -leased facilities." 10 C.F.R. §§708.1- 2. Mr. Russell was employed by a UC subcontractor, Comforce, to perform a work assignment at LANL. Both the UC and Comforce took actions which directly and negatively impacted the "terms", "conditions" and "privileges" of Mr. Russell's employment at LANL. Accordingly, both the UC and Comforce bear liability to remedy these "retaliations" under 10 C.F.R. §708.2. Although Comforce has shown that it acted against Mr. Russell solely as a result of actions taken by the UC, that showing does not relieve Comforce from liability in this matter. Part 708 contains no provision exempting a subcontractor from liability under such circumstances. To create such an exemption would vitiate the protections for whistleblowers that Part 708 was intended to provide. Accordingly, I find that Comforce is jointly and severally liable, along with the UC, for the damages arising from Comforce's termination of Mr. Russell's employment on March 5, 1999.

In the present case, both the UC and Comforce have sufficient resources to compensate Mr. Russell for back pay, lost benefits, litigation costs and other expenses necessary to provide relief for his termination from the LANL workforce by the UC and the resulting termination of his employment by Comforce. Under these circumstances, it is appropriate to consider the equities of requiring the UC and Comforce to share the burden of providing these remedies, or alternatively, of assigning these remedies to one or the other party. In Daniel Holsinger (Case No. VWA-0005), 26 DOE ¶ 87,506 (1996), the Deputy Secretary encouraged the weighing of equities in a situation where the imposition of an equitable remedy (in that instance reinstatement) placed a burden on an innocent party.

> With any equitable remedy, however, an adjudicator "must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" Teamsters v. United States, 431 U.S. 324, 375 (1977) [quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944)]. "Especially when * * * an equitable remedy threatens to impinge upon the expectations of innocent parties, the [adjudicator] must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable.'" Ibid. [quoting Lemon v. Kurtzman, 411 U.S. 192, 200-201 (1973) (plurality opinion of Burger, C.J.)].

Id. at 89,018. In the present case, Comforce has shown that it acted against Mr. Russell solely as a result of actions taken by the UC, and that it had no role in the deliberations leading to the UC's actions. Moreover, the UC's effective ban on Mr. Russell's employment at LANL after March 5, 1999 prevented Comforce from mitigating Mr. Russell's damages by seeking his employment in another contractor position at LANL. As discussed below, I find that the UC has not shown that it would not have hired Mr. Russell to an in-house position in March 1999 in the absence of his protected disclosures. Therefore, the most appropriate equitable remedy for Mr. Russell is for the UC to bring Mr. Russell back into the LANL workforce as its own employee and to provide him the wages and benefits that he would have received if he had been hired by the UC on March 6, 1999, the day after his dismissal from Comforce.(16) In light of these findings, I believe it is appropriate to hold the UC solely responsible for the repayment of Mr. Russell's lost wages and benefits, and for his litigation expenses. I will direct Comforce, as well as the UC, to delete from its employment records any reference to a "for cause" termination of Mr. Russell from the LANL workforce in March 1999.

F. The Decision by UC not to Hire Mr. Russell to a UC FTE Position Was a Reprisal.

As a contract employee in the LANL workforce, Mr. Russell is protected by Part 708 from retaliations for his protected disclosures, both by his employer, Comforce, and by his contract employer, the UC. As noted above, Mr. Russell's protected disclosures to his UC managers occurred proximate in time to his March 5, 1999 removal from the LANL workforce and dismissal from Comforce. These disclosures also occurred proximate in time to the March 1999 determination by UC management not to hire Mr. Russell for one of the two UC positions that it was creating to replace the contractor position of Self Assessment Team Leader then held by Mr. Russell. This administrative reorganization shifted Mr. Russell's job duties from a contract position with Comforce to a UC position.

Mr. Russell, as a contract employee of the UC who has made protected disclosures proximate in time to this reorganization, clearly is protected from retaliatory acts occurring during its implementation. I therefore find that the UC has not shown, by clear and convincing evidence, that it would have rejected Mr. Russell for both of the reorganized UC positions in the absence of his protected disclosures and the retaliatory intent that these disclosures engendered in his UC managers.

1. Mr. Russell was well-qualified for the UC positions.

It is not contested that Russell had the necessary training and experience required for the UC positions. At the Hearing, Mr. Waterbury testified that prior to conducting the interviews, each member of the screening committee (himself, Mr. Irving and Ms. Marcene Roybal) ranked the applicant resumes according to a matrix of qualifying characteristics and that Mr. Russell's resume ranked "within the top five." Tr. at 297. In fact, the resume ranking contained in Mr. Irving's March 8, 1999 Report (March 8 Report) to Mr. Leifheit (UC Hearing Exhibit V) indicates that Mr. Russell was tied for second place on the basis of his overall resume ranking among the 54 job applications that had been submitted. However, the top ranking candidate, Mr. David Cornely, declined an invitation to be interviewed for the S Division positions

because "he had accepted employment elsewhere." Mr. Paul Mathis, who tied with Mr. Russell for the second highest score, also accepted employment elsewhere. March 8 Report at 2-3. Accordingly, Mr. Russell was the top ranked candidate available for selection by the UC on the basis of his resume qualifications. Moreover, as noted above, Mr. Russell had consistently received overall evaluations of "Outstanding" in his annual performance evaluations from S Division managers, and these evaluations contained no negative comments. Although Mr. Irving testified extensively at the Hearing concerning his encounters and arguments with Mr. Russell in 1998 and concerning complaints that he received regarding Mr. Russell's alleged abrasiveness, Mr. Irving did not express these criticisms of Mr. Russell when he ranked Mr. Russell's resume on February 5, 1999. He awarded Mr. Russell nine out of ten points in the following categories: (i) Demonstrated competence dealing with senior management & DOE Staff; (ii) Excellent interpersonal oral and written communication skills; and (iii) Demonstrated ability to work in a team environment. UC Hearing Exhibit U. Accordingly, I concur with the ROI's finding that "Russell was among the top candidates for these positions." ROI at 8, ft. 4.

2. Russell's Conduct of his Job Interviews Does Not Furnish Clear and Convincing Evidence for his Rejection by UC.

The ROI finds that Mr. Russell's conduct of his job interview on February 26, 1999 provided a sound basis for the UC's decision not to award either of the UC positions to Russell. Specifically, the ROI finds that each of the three members of the screening committee recalled that Mr. Russell expressed some discontent with the S- Division during his presentation to the committee. ROI at 10. It also cites Mr. Russell's conversation with Mr. Waterbury on the morning of the interview and concludes that "Russell's disparaging remarks about his supervisor and open ambivalence about accepting one of the UC positions clearly justify the UC's decision to award these positions to other more enthusiastic candidates." ROI at 12.

Mr. Russell contests this finding, and argues that the facts established at the Hearing show that Mr. Russell's disclosures were a contributing factor to the UC's decision not to hire him, and weigh heavily against a finding that the UC's failure to hire Mr. Russell was by clear and convincing evidence not an act of retaliation. Russell Post-Hearing Brief at 37. I have examined the record, and conclude that UC has not made this showing. As set forth below, there is a strong indication that it was UC management's hostility towards Mr. Russell, and not his actual behavior, that resulted in its decision not to offer him a UC position.

With respect to Mr. Russell's conversation with Mr. Waterbury on the morning of February 26, I have already found that Mr. Waterbury's initial reaction to Mr. Russell's outburst was "Jimmie being Jimmie" (Tr. at 295) and that Mr. Russell was simply venting his frustration at having to make a presentation and be formally interviewed. I also found that Mr. Russell's alleged derogatory remarks about Mr. Irving contained in Mr. Waterbury's memorandum, particularly the phrase "God Damn Idiot," appear to be exaggerated, and that Mr. Waterbury's memorandum itself, written after his conversations with Mr. Irving and Mr. Leifheit, may have been intended to assist his managers in building a case against Mr. Russell. In light of these findings, the UC has not established that the complaints voiced by Mr. Russell on the morning of February 26 would not simply have been ignored if they had made by some other co-worker being required to submit to an interview under similar circumstances.

In his March 8 Report, Mr. Irving provided the following explanation for the rejection of Mr. Russell's application:

> Mr. Jimmie Russell could not demonstrate an ability to work in a team environment. Based on the results of the interview and internal issues that have been resolved, Mr. Russell is not considered a viable candidate for the position.

March 8 Report at 2. However, the UC has not established that Mr. Russell's actual conduct at his job

interviews establishes a clear and convincing basis for its refusal to hire him. In Mr. Irving's March 8 report, he indicates that the four candidates interviewed to date had been given a numerical rating (on a scale of 0 to 4) by each committee member for each of the twelve questions that they were asked. The combined ranking of the committee members for each of the four candidates is contained in Mr. Irving's report and indicates that Mr. Russell scored the lowest of the four, with a total of 57 points. The other three candidates had point totals of 75.5, 61 and 86.5. Given my previous findings that Mr. Irving and Mr. Waterbury exaggerated Mr. Russell's inappropriate conduct and reported rumors in an effort to get Mr. Russell terminated, their low ratings of Mr. Russell's responses cannot be accepted as an impartial assessment of Mr. Russell's performance. It is also possible that Ms. Roybal's rating of Mr. Russell may have been influenced by hostile opinions and attitudes expressed by Mr. Irving and Mr. Waterbury concerning Mr. Russell. The UC has not shown, by clear and convincing evidence, that their low ratings of Mr. Russell's responses were unbiased or would have occurred in the absence of Mr. Russell's protected disclosures.

In particular, I am not convinced that Mr. Russell received fair treatment when all three screening committee members rated as zero Mr. Russell's response to the question: "please describe how you work in a team environment." This is the only instance where any candidate received a zero ranking from all three screening committee members in response to a question, and this rating rendered Mr. Russell ineligible for the position. At the Hearing, Mr. Russell testified that he responded to the question using a football team analogy because he knew that Mr. Irving had been a football player. He discussed the importance of each team member attending to his assigned task while being on the lookout to help others with the objective of accomplishing the team mission. Tr. at 1004-05.

Mr. Irving's interview notes for that question indicate that wrote down the phrases "put out most and best work one can," "if someone needs help, he will help them find it," and "football team" while listening to Mr. Russell's answer. UC Hearing Exhibit S, question no. 8. (17)

At the hearing, Mr. Irving, Mr. Waterbury and Ms. Roybal each testified that Mr. Russell's response to the question was so poor that he or she was forced to rate his response a zero. However, in light of Mr. Russell's testimony and the contemporaneous notes of Mr. Irving, I find that these responses are not credible. I therefore conclude that the UC has not shown by clear and convincing evidence that Mr. Russell would have received a disqualifying mark on this question in the absence of retaliatory intent on the part of UC management.

Finally, I am not convinced that Mr. Russell's questions about the job position and the direction of S-Division provide a clear and convincing reason for the UC's decision not to hire him. Mr. Irving, Mr. Waterbury and Ms. Roybal testified that they were shocked when, at the end of the interview, he expressed reservations about "where this program is going." Tr. at 254. Ms. Roybal, for example, testified that she found it "disconcerting" when Mr. Russell stated that he wanted to know more about the job because it may not be something that he wanted to do. She said that it was not a positive remark "and to me, in an interview, you want to be positive." Tr. at 249. On March 1, 1999, Mr. Russell attended a scheduled employment interview with Mr. Leifheit. Mr. Leifheit testified that at this meeting Mr. Russell had "basically taken the same approach . . . as he had at the screen team interview. He didn't particularly know if he wanted the job. Didn't particularly like the division." Tr. at 64.(18)

Based on the reservations and lack of enthusiasm that Mr. Russell expressed to his interviewers concerning S-Division management practices and the conduct of assessments there, the ROI concluded that UC's decision to award these positions to "other more enthusiastic candidates" was clearly justified. ROI at 12. However, while the UC may have provided a clear justification for its decision not to hire Mr. Russell, that is not in itself sufficient to meet its burden of persuasion under Part 708. The provisions of Part 708 clearly indicate that in this situation, the burden is on the UC not just to show that it had a good business reason for its action, but to show, by clear and convincing evidence, "that it would have *taken that same action* without the employee's disclosure." 10 C.F.R. § 708.29 [emphasis added].

There may well have been legitimate business reasons for the UC to prefer candidates who expressed more enthusiasm for S-Division's management of the assessment program than did Mr. Russell. However, I cannot conclude that it is clear and convincing that this management decision would have been the same absent Mr. Russell's protected disclosures. Under Part 708, these protected disclosures are presumed to have influenced UC management to implement hiring criteria that would not operate to Mr. Russell's benefit. The UC has the burden of showing that its decision was not influenced by Mr. Russell's protected activities. The reservations that Mr. Russell expressed concerning S-Division's management of its assessment program and his request for reassurances concerning his role in the program are the type of questions that an incumbent candidate would normally ask and do not disqualify him for employment with that division. In light of his acknowledged qualifications for the position and his past record of achievement as an assessment team leader, the UC has not made a clear and convincing showing that, in the absence of his protected disclosures, Mr. Russell's expressions of reluctance and concern about the direction of the program at his job interviews would have precluded his being made a job offer.(19)

V. Conclusion

Based on the analysis presented above, I find that Mr. Russell has made disclosures protected under Part 708, and that these protected disclosures were a contributing factor to adverse personnel actions taken by the UC and Comforce against Mr. Russell. Furthermore, I find that the UC and Comforce have not shown by clear and convincing evidence that they would have taken these same actions in the absence of Mr. Russell's disclosures. Therefore, Mr. Russell is entitled to remedial action from the UC and Comforce. I find that this remedial action shall include his placement by the UC in a comparable task position to the Security Specialist 03, SSM-02 position for which his application for employment was rejected by the UC in March 1999. The UC shall also provide Mr. Russell with back pay and benefits for the Security Specialist 03, SSM-02 position going back to the day following the March 5, 1999 termination of his work assignment and employment by the UC and Comforce.(20) The remedial action shall also include the payment of attorney fees and litigation expenses by the UC, the removal and or correction of information concerning Mr. Russell in UC and Comforce personnel files, and the correction by the UC of information that it provided to DOE Security concerning Mr. Russell.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Mr. Jimmie Russell under 10 C.F.R. Part 708 is hereby granted as set forth below.

(2) The University of California (UC) shall immediately place Mr. Russell in the position of a full-time regular UC employee in a comparable task position to the Security Specialist 03, SSM-02 position for which his application for employment was rejected by the UC in March 1999 at the salary rate calculated in the Appendix to this decision.

(3) Mr. Russell shall produce a report that provides information on attorney's fees and litigation expenses. Mr. Russell's report shall be calculated in accordance with the Appendix.

(4) The UC shall produce a report that calculates the back wages plus interest payable to Mr. Russell. The UC's report shall be calculated in accordance with the Appendix.

(5) The UC shall pay Mr. Russell attorney's fees and litigation expenses. The amount of these payments shall be in accordance with the report specified in paragraph (3) above.

(6) The UC shall pay Mr. Russell back wages plus interest. The amount of this payment shall be in accordance with the report specified in paragraph (4) above.

(7) The UC shall make retirement fund contributions in the amount calculated in the report specified in the Appendix.

(8) The UC shall make information available and otherwise facilitate Mr. Russell making retirement fund contributions as calculated in its report specified in the Appendix.

(9) The UC and Comforce shall remove all information regarding his proceeding from Mr. Russell's personnel files, and shall eliminate any and all "for cause" designations made with regard to the March 5, 1999 termination of his work assignment at LANL and/or his employment with Comforce.

(10) The UC shall notify the Director, Safeguards and Security Division, DOE Albuquerque Operations Office, that Attachment 2 to the March 12, 1999 memorandum from Stanley L. Busboom, Director of Security to his Office entitled "Derogatory Information - Dismissal for Cause (Jimmie L. Russell)" contained information under the heading "facts" that is incorrect or exaggerated and that may have been assembled with the purpose of retaliating against Mr. Russell in violation of 10 C.F.R. Part 708. The UC shall enclose a copy of Mr. Busboom's memorandum and its attachments and a copy of this decision with its notification.

(11) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting Mr. Russell relief unless, within 15 days of the date of this Order, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Kent S. Woods

Hearing Officer

Office of Hearings and Appeals

Date: July 18, 2000

APPENDIX

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order: reinstatement; transfer preference; back pay; and reasonable attorney and expert-witness fees; and such other remedies as are necessary toabate the violation and provide the employee with relief. 10 C.F.R. § 708.36.

As discussed in my initial agency decision in this matter, Mr. Russell is entitled to remedial action from the UC and Comforce. This remedial action shall include his placement by the UC in a comparable task position to the Security Specialist 03, SSM-02 position for which his application for employment was rejected by the UC in March 1999, along with back pay and benefits for that position going back to the day following the March 5, 1999 termination of his work assignment and employment by the UC and Comforce. The remedial action shall also include the payment of attorney fees and litigation expenses, the removal and or correction of information concerning Mr. Russell in UC and Comforce personnel files, and the correction of information provided to DOE Security by the UC concerning Mr. Russell. Accordingly, in order to implement these remedies, I have here provided clarifications concerning the nature and extent of certain benefits that Mr. Russell is entitled to received. I have also directed the UC and Mr. Russell to make certain calculations and provide them to the other parties within 30 days of the date of this order. Finally, I have provided for a negotiation period between the parties and a final report on remedial calculations. In the event of an appeal, both the UC and Mr. Russell shall follow the negotiating and reporting steps set forth below unless those requirements are specifically stayed by an appropriate official.

A. Clarification Concerning Mr. Russell's Benefits

Mr. Russell is not entitled to restoration of sick and annual leave that would have been accrued since March 6, 1999. It is likely that Mr. Russell would have used that leave. Therefore, it would amount to double counting to compensate him for all the hours during the unemployment period while permitting him

to accrue leave for future use. Of course when reinstated he should be credited with all leave he had accrued and not used prior to his dismissal unless he has been previously compensated for that leave.

I believe it is highly speculative to determine the earnings and the investment pattern of funds that would have been contributed by the UC to the retirement account that it would have maintained for Mr. Russell. Therefore, I will direct the UC to now contribute any amounts it would have contributed during the unemployment period. In addition, the UC shall facilitate Mr. Russell's contribution of any retirement fund amounts he would have contributed had he been employee during the unemployment period.

B. The UC's Calculations

In order to calculate back wages plus interest, retirement fund contributions and leave accrued, The UC shall make the following calculations and provide them to Mr. Russell within 30 days of the date of this order. (21) In the event that the exact date of reinstatement to the LANL workforce is unknown, the UC shall make the calculations through the first pay period ending on or after October 31, 2000.

1. Calculate the number of hours of overtime the average Security Specialist earned during each pay period ending during the period March 1, 1999 through February 29, 2000. In the alternative to making such a calculation, the UC may use four hours of overtime each week.

2. Provide for each pay period the basic pay rate per hour Mr. Russell would have received per hour. For the period from March 6, 1999 until the date that annual pay increases are granted, the UC shall use the hourly rate Mr. Russell would have received if he had been hired to the Security Specialist 03, SSM-02 position for which his application for employment was rejected by the UC in March 1999. For periods after the date of annual hourly rate change, the UC shall increase the rate by the average increase that Security Specialists received. In the alternative to making a calculation of the average increase of Security Specialists, the UC may use 5%.

3. Using the principles described in item 2, provide for each pay period the overtime rate Mr. Russell would have received.

4. Determine the gross wages the individual would have earned by multiplying the basic salary rate (item 2) by forty and the overtime hourly salary rate (item 3) by the number of overtime hours (item 1).

5. Calculate the amount of interest that would have been earned on the gross wages. The interest shall be 10% annually, accrued and compounded semiannually. The calculation shall be made by accruing 5% interest on the balance of the salary accrued (item 3) and the prior interest accrued on December 31 and June 30 of each year.

6. Provide a calculation of the amount the UC would have contributed to any retirement account during the unemployment period.

7. Provide information on each retirement or leave benefit that is based on the length of an employee's service. For each such plan, indicate how the firm will adjust Mr. Russell's credited service to compensate for the unemployment period.

8. Calculate the amount Mr. Russell was eligible to contribute to retirement programs during the unemployment period. Indicate how the UC will facilitate Mr. Russell's ability to make those contributions.

9. Calculate the amount of accrued leave Mr. Russell will have on the date of his

reinstatement.

C. Mr. Russell's Calculations

Within 30 days of this order Mr. Russell shall provide the UC the following information,

1. A calculation of the out of pocket litigation expenses and attorney's fees. In calculating attorney's fees, Mr. Russell's counsel should estimate his hours and expenses for this calculational portion of the proceeding. Mr. Russell's attorney shall provide the UC with sufficient information to understand how his hours and costs were determined. Mr. Russell shall also provide reasonable information regarding his out of pocket litigation expenses.

2. Records describing the medical expenses Mr. Russell believes would have been paid by insurance if Mr. Russell had not been discharged. Also, Mr. Russell should indicate any change in Mr. Russell's medical insurance cost as a result of his discharge. The change in medical insurance cost will be an offset to the incremental medical bills or an additional recoverable expense.

D. Negotiation Period

The parties will have ample time up to sixty days from the date of this order to discuss and negotiate any disputes regarding the calculations. During that period I expect that both parties will provide reasonable information to facilitate the other party's understanding of calculations.

E. Final Report

Seventy days from the date of this order Mr. Russell shall provide a report to the UC and the Office of Hearings and Appeals with a summary calculation. Mr. Russell shall describe in detail any matters that remain in dispute. The UC will have 15 days from the date of that report to provide a response.

Footnotes

(1)On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12,862 (March 15, 1999).

(2)As Mr. Russell's complaint was pending on April 14, 1999 when the revised Part 708 regulations took effect, I will apply the language of the original version of the Part 708 regulations wherever application of the revised Part 708 would subject a party to a more stringent showing or other regulatory requirement to which it was not previously subject. To apply the revised Part 708 language in such an instance would clearly prejudice that party, contrary to the clear intent of the revisions to the regulations. See Salvatore Gionfriddo, 27 DOE ¶ 87,544 at 89,224 (1999).

(3)In its Post-Hearing Brief, the UC argues that Mr. Russell's dispute with UC management concerning his CMPC assessment cannot involve a protected disclosure in this instance because the dispute concerning this assessment apparently centered on Mr. Russell wanting to give the assessed program office a higher overall rating ("satisfactory") than did his managers ("marginal"). UC Post-Hearing Brief at 16, citing Tr. at 977. I do not agree. The dispute relates to the proper evaluation of a program area based directly on the reporting of regulatory violations that are protected disclosures under Part 708. Whether the dispute involved a more favorable or less favorable rating category is irrelevant to the fact that the data that constituted the protected disclosures were an essential element in the dispute.

(4)The evident willingness of Messrs. Irving, Leifheit and Busboom to see Mr. Russell's actions as intentionally menacing and not to look for any alternative explanation raises the strong possibility of retaliatory intent on their part.

(5)The first attachment involved information surrounding an investigation by LANL's Audits and Assessments Division Internal Evaluations Office (IEO) of a complaint that Mr. Russell was using his office and computer for personal business. The UC Post Hearing Brief asserts that "the termination [of Mr. Russell] was solely and completely linked to the reasonable perception that Russell presented a threat of violence in the workplace." UC Post Hearing Brief at 4. Accordingly, I will not consider whether the findings of the IEO audit justified the termination for cause of Mr. Russell.

(6)In fact, on February 24, 1997, while an employee of Comforce at S-Division, Mr. Russell taught a fire-arms safety course with the support of the Los Alamos Sportsmen's Club (LASC), a LANL-sponsored club under the Club 1663 program. See February 20, 2000 memo from Mr. Maxwell T. Sanford II, LASC membership chair, to Mr. Russell, attached to May 23, 2000 submission of counsel for Mr. Russell entitled "Motion to Supplement Evidentiary Record."

(7)The UC did present the testimony of Mr. Waterbury, who claimed that he felt threatened by being in Mr. Russell's path as he allegedly stormed through a door in the S-Division offices. I will discuss that incident below, but for now it is sufficient to find with respect to this incident that there is no indication either that Mr. Russell intended to make physical contact with Mr. Waterbury as he passed through the doorway, or that he actually did so.

(8)According to Mr. Irving's Memorandum of Record, dated October 13, 1998, a 3 plus rating equates to slightly above "meets the basic standards for the position held." UC Hearing Exhibit J.

(9)Mr. Irving composed a memo for his own file, dated October 13, 1998, in which he criticized Russell's behavior in this episode, and reported that "I told Tucker that I would request that Mr. Russell's services be terminated if he acted in the same manner with me again." UC Exhibit J. At the Hearing, Mr. Tucker confirmed that Mr. Irving told him this, but testified that he did not mention this comment to Mr. Russell. Tr. at 244. Mr. Irving's memo was not placed in Mr. Russell's official employment file and Mr. Russell was unaware of its existence prior to the termination of his position at S- Division. Tr. at 848-852. While Mr. Irving's memorandum describes Mr. Russell's attitude as "hostile" and "belligerent" when they were discussing his evaluation, Mr. Irving never indicates that Mr. Russell physically threatened him during these discussions.

(10)In his testimony at the Hearing, Mr. Busboom stated that in November 1998, Ms. Huling had visited his office to express a concern about "her general fear of firearms and her specific fear of firearms in the hands of Mr. Russell." Tr. at 477. Ms. Huling, however, did not report this meeting in her deposition. Instead, she stated there that she expressed her fears about Mr. Russell and his firearms to Mr. Busboom "sometime after March 5" when she expressed thanks to Mr. Busboom for letting her know on March 5, 1999 that Mr. Russell had been terminated. Huling Deposition at 29. It appears that Mr. Busboom may be mistaken in his recollection.

(11)Mr. Russell freely admitted in his testimony that he had a very low opinion of Mr. Irving's performance as a manager, considering him to be too controlling and too eager to please his superiors. He testified that when Mr. Irving had asked him "point blank" if Mr. Russell thought he was a "yes man," Mr. Russell had explained his reasons for holding that opinion. Tr. at 997-1001.

(12)Mr. Waterbury testimony at the Hearing indicates that his efforts to please his supervisors extended beyond performing the duties of his position with LANL. He acknowledged performing roof and auto repairs for Mr. Irving and helping to pour a driveway for Mr. Leifheit. Tr. at 316.

(13)In his testimony, Mr. Baca stated that at no time during their discussion of sniper rifles, did Mr. Russell express any interest in buying one. Tr. at 617-18.

(14) In addition to the incidents already discussed, Mr. Leifheit referred to a February 24, 1999 incident where Mr. Russell allegedly exhibited anger and attempted to push open a locked door in order to exit his work area (Tr. at 57-58), and to a March 1 conversation where Mr. Russell allegedly complained to a co-worker about Mr. Irving's unfair conduct of the selection process and stated that "I can play hardball, too." Tr. at 63. These incidents were discussed at the RAT as evidence of Mr. Russell's poorly controlled temper and strained interpersonal relationships. However, they do not provide significant support for the RAT's conclusion that Mr. Russell presented a physical threat to Mr. Irving or to his co-workers.

(15)On March 12, 1999, Mr. Busboom reported to DOE Security that on March 2, Mr. Irving and Mr. Leifheit met with him and discussed their concerns "that Mr. Russell may have threatened and/or intimidated other employees." Busboom Memorandum, Attachment 2. On March 3, he again met with Mr. Leifheit "and the decision was made to convene a rapid action team." Id.

(16)In the absence of any retaliatory acts by the UC and Comforce, Mr. Russell would have continued working at LANL as a contract employee for a short period after March 5, 1999, before converting over to a UC position. However, as a matter of administrative efficiency and equity, I believe it is proper to use March 6, 1999 as his first day in a UC position for purposes of calculating Part 708 relief.

(17)This page also indicates that when writing his notes concerning Mr. Russell's response to this question, Mr. Irving deliberately avoided putting any comments on the portion of the page reserved for positive remarks and headed "strengths." At the Hearing, Mr. Irving explained that he placed the comments quoted above in a neutral spot at the bottom of the page because he felt that they did not rise to the level of a "strength." Tr. at 234. However, this is the only instance in recording his interview notes where Mr. Irving did not record all of his comments in the two boxes labeled "Strengths" and "Weaknesses." It therefore indicates to me the strong possibility that Mr. Irving had decided to rate Mr. Russell a zero on this question regardless of how he answered it, and was determined to leave the "Strengths" box empty.

(18)In his testimony, Mr. Russell explained that he asked the screening committee about the direction of the program because "there were differences between the job that I had been doing and the way this one was written up in the job ad, and I was curious as to what those differences meant." Tr. at 1054. Mr. Russell also testified that at the conclusion of a very brief interview with Mr. Leifheit, he spent ten or fifteen minutes in conversation with him concerning the direction the assessment program was heading, assessment philosophy, Mr. Russell's relationship with Mr. Irving, and how assessors were treated in the field. He testified that he did most of the talking in response to Mr. Leifheit's questions and comments. Tr. at 1077-78. I do not find such questions and comments to be outside the bounds of acceptable behavior for an in-house candidate interviewing for a position.

(19)Similarly, I find that Mr. Russell's behavior toward his coworkers and managers, as discussed in the previous sections of this opinion, does not furnish a clear and convincing basis for the UC not to have hired him. Nor does the IEO report concerning his use of certain office resources for his private business.

(20)In providing this back pay and benefits, the UC is not entitled to offsets for wages and benefits earned by Mr. Russell from other sources during this period. The express terms of the regulation do not provide for any adjustments to "back pay." See Am-Pro Protective Services, Inc. (Case No. VWA-0015), 26 DOE ¶ 87,511 at 89,071 (1997).

(21)The UC shall also provide Mr. Russell's counsel with sufficient detail for him to determine how the weekly hours of overtime and wage rate increase calculations were made.

Case No. VBH-0021

February 7, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Case: Eugene J. Dreger

Date of Filing: July 14, 1999

Case Number: VBH-0021

This Initial Agency Decision addresses a whistleblower complaint filed by Eugene J. Dreger (the complainant) against his former employer, Reynolds Electrical & Engineering Co., Inc. (REECO) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. At the time of the incidents described below, Dreger worked at the DOE's Nevada Test Site as a safety inspector. REECO was a primary contractor at the Test Site until December 31, 1995. Beginning January 1, 1996, Bechtel Nevada assumed this responsibility, and it has also assumed responsibility for litigation relating to the prior period, including defending this action. For four years before his employment was terminated in September 1994, Dreger had worked for REECO. He was terminated for "Failure to perform assigned job tasks successfully." Termination Notice dated September 19, 1994. The complainant alleges that REECO retaliated against him for raising safety concerns in the course of his routine job duties. As remedies, Dreger seeks to be rehired, to have his performance appraisals corrected and to be awarded back pay, Social Security credits, and compensation for emotional stress.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect such "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations.

The regulations provide, in pertinent part, that "a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority." See 10 C.F.R. §708.5(a) (1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations are entitled to receive an extensive series of protections. They may file a whistleblower complaint with the DOE. As part of the proceeding, they are

entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they may request independent fact-finding and an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

On February 28, 1995, approximately five months after he was discharged by REECO, Dreger filed a written complaint under Part 708 with the former DOE Office of Contractor Employee Protection (OCEP). OCEP exercised its discretion to waive the 60 day filing requirement contained in the regulations. In 1996, OCEP was absorbed into the DOE's Office of Inspector General (IG). The IG began an investigation of the allegations in the complaint, but had only sporadic contacts with Dreger over the next few years.

The investigation was pending when, on April 14, 1999, revisions to Part 708 took effect. See 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised procedures, investigations on contractor employee whistleblower matters are now conducted by the DOE's OHA, and the revised procedures "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. §§ 708.8, 708.22. The Dreger complaint was such a pending matter. On April 26, 1999, I appointed Thomas O. Mann, a Deputy Director of the Office of Hearings and Appeals, to investigate Dreger's complaint. He promptly conducted an investigation and issued a Report of Investigation on July 14, 1999. In the Report he concluded that in the course of his ordinary duties, Dreger made protected disclosures regarding safety-related matters to his employer. He also inferred that these disclosures were regularly communicated to REECO managers, and that the "cumulative effect of these disclosures was a factor contributing to the decision to terminate him". Report of Investigation, slip opinion at p. 6, Administrative Record of OHA Case No. VBI-0021 ("AR") at 00824.

The Investigator then examined whether REECO would have terminated the complainant in the absence of the protected disclosures. See 10 C.F.R. § 708.29. The Investigator cited in his Report the relatively high burden of proof the contractor has in this regard.

He concluded that REECO fired Dreger for the following reasons: (1) job performance problems, including never having mastered the computer skills that he needed to complete his reports and to use the relatively new deficiency tracking system; (2) a lack of consistency in writing up his reports and in interpreting and applying Occupational and Safety Health Administration (OSHA) standards; and (3) human relations problems, including poor communication and relations with employees at the work sites he inspected.

The Investigator found that REECO had followed its standard procedures in terminating Dreger. The Investigator also found that there was no evidence that Dreger was targeted for termination. On July 14, 1999, I appointed Bryan MacPherson, an Assistant Director of the Office of Hearings and Appeals, to be the Hearing Officer in this matter. However, Mr. MacPherson retired from federal service at the end of September, 1999. Accordingly, on October 1, 1999, as the OHA Director I elected to replace Mr. MacPherson and to act as the Hearing Officer in this matter.

After a number of contacts with the parties and conference calls, I convened a hearing on the complainant's Part 708 complaint in Las Vegas, Nevada on November 15, 1999. At the hearing, Mr. Dreger called nine witnesses to testify, and the contractor called three witnesses. Each side was allotted ample time to question each witness. Ten exhibits were introduced. I received the hearing transcript on December 8, 1999, at which time I closed the record in this case. The official transcript of the hearing will be cited in this determination as "Tr.". Exhibits introduced at the hearing are cited as "Ex.".

II. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See *Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing 2 McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

In his whistleblower complaint, Dreger sets forth a variety of allegations. A number are age-based.(1) Taken as a whole, the complaint suggests that Dreger believed he was being treated unfairly by REECO. Most importantly, he complains that the low performance evaluations he received, being placed on a Performance Improvement Plan, and his termination were reprisals for his safety-related disclosures. In the case at hand, REECO never really challenged during either the investigatory or the hearing stages of this proceeding that (1) the Complainant had made protected disclosures as defined in 10 C.F.R. § 708.5, and (2) these disclosures can be considered a factor contributing to REECO's decision to terminate the Complainant. As stated by REECO's counsel at the hearing, "his job was identifying environmental safety and health issues". Tr. at 292.

These disclosures were proximate in time to the "marginally successful" performance appraisals the complainant received in 1992 and 1993 and to his eventual termination in 1994. *Don W. Beckwith*, 27 DOE Par. 87,534 (1999). The three key REECO officials who testified at the hearing were aware of the complainant's disclosures in the period leading up to his dismissal. Accordingly, the Complainant is deemed to have met his regulatory burden in this case, thereby shifting the burden of proof to REECO.

B. The Contractor's Burden

Given the complainant's showing, the regulations require REECO to prove by "clear and convincing" evidence that the company would have terminated the complainant even if he had not disclosed safety-related information to the contractor's management officials. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See *Hopkins*, 737 F. Supp. at 1204 n.3. In evaluating whether REECO has met its burden, I will consider all the evidence in the record of this proceeding. In particular, I will closely examine the strength of evidence in support of its decision to terminate the complainant; the existence and strength of any motive to retaliate on the part of the officials who were involved in the termination decision, and any evidence that REECO has taken similar or different actions against employees who are similarly situated.

III. Analysis

It is REECO's position that the complainant was terminated "for failure to successfully perform his job". Tr. at 295. The complainant was hired by REECO on September 25, 1990, as a safety inspector at the Nevada Test Site (Test Site). REECO was the primary contractor at the site during the time when the complainant worked there. Some time prior to hiring the complainant, REECO decided to improve its safety inspections. According to Frank Spenia, the complainant's supervisor, Spenia started the compliance section in response to former Secretary of Energy Admiral James Watkins' desire that DOE facilities follow OSHA safety standards. REECO hired four individuals for this purpose, including Dreger. All of them had OSHA experience. For example, Dreger had experience at the Department of Labor and at OSHA as a safety inspector.

REECO claims that an examination of the complainant's work record shows a history of performance

problems that were documented in performance appraisals issued during the years 1992 through 1994. After this marginally successful performance, REECO implemented a performance improvement plan for Dreger in June of 1994. The plan targeted three areas of Dreger's performance in need of improvement: (1) computer skills; (2) description of deficiencies noted during investigations; and (3) communication with line personnel during investigations. REECO maintains the plan was intended to help the employee succeed. The plan imposed obligations on management as well as on the employee, mandated regular monitoring and evaluation, required interviews with contacts selected by the employee, and specified that regular meetings with the employee be held.

In essence, it extended a full opportunity to the complainant to improve his performance. It advised him "You must understand that if there is no significant improvement by August 1, 1994, disciplinary action, which could include termination, will be taken." Performance Improvement Plan dated June 1, 1994, Ex. 8 at 1.

REECO issued a final report on the plan's implementation on September 12, 1994, and a copy of that report is in the record. This report concludes that the complainant had shown little or no improvement. REECO contends that it reluctantly terminated the complainant on September 19, 1994.

The complainant's position has not changed during the entire course of this proceeding. He believes that he was an outstanding employee who regularly brought significant matters to the attention of management and work site employees. He maintains he received inadequate credit for his targeting of health and safety deficiencies. He contends that the computer-related issues about his job performance were exaggerated, and that other employees who knew his work believed him to be outstanding.

Before I delve into the testimony and other evidence relating to the complainant's work performance, I note some of the complainant's strengths. He is direct and plain speaking. He served in the Navy and has a long record of being a capable safety professional, including working at OSHA for many years.

REECO found problems with Dreger's work during virtually the entire time that the complainant worked at the Test Site. These problems have not changed over time. The first problem area is a failure to master computer skills, which he needed to write up investigations, to complete safety deficiency reports accurately and to enter material into the REECO "Automatic Deficiency Tracking System" (ADTS) system. These matters were a key part of each annual performance appraisal the complainant received. The complainant says REECO is wrong and that his computer skills were at a level comparable to those of the other safety inspectors.

None of the witnesses the complainant called to testify at the hearing had any direct knowledge of his computer skills. Certainly none of them testified that Dreger's computer skills were adequate. Nor did he submit an independent assessment of his skills, which would have been helpful to me. Nevertheless, I believe I have formed an accurate opinion in that respect. Two of the REECO witnesses testified at length at the hearing about his deficiencies in this area, and Dreger did not contradict any of the specifics of their testimony. The complainant's skill at written communication was clearly poor. Notwithstanding, he did not use skill enhancements available on computer programs - e.g. "spell check"or a grammar check program. It was clear that he did not proofread his work, which would have allowed him to make ready use of the computer to make needed corrections. A REECO official testified at the hearing that Dreger would turn off the computer in order to save a document, utilizing the back up copy, because he couldn't master the regular "save" command. Tr. at 215.

Moreover, it was also clear to me from the testimony and the record in this case that the complainant did not ever really care very much about refining or improving his computer skills. The complainant saw his primary function as a safety inspector to be making unannounced visits to work sites, performing OSHA-type investigations and finding safety- and health-related problems. It did not interest him to spend time writing up proper reports.

He never believed they were important or essential, notwithstanding the fact that they alerted those at the

work site to the problems, promoted correction by them of deficiencies, and allowed for proper monitoring and follow through by those at the work site and by management.

Dreger wanted to swoop in and "put the hammer down", and he never changed this view of his job. See the Witness Statement of Frank Spenia transcribed by the OHA Investigator dated July 8, 1999 (Spenia Witness Statement) at 2 (AR at 00803). Compare *Russell P. Marler, Sr.*, 27 DOE Par. 87,506 (1998)(*Marler*).

I have reviewed the many deficiency reports, weekly activity reports and status reports written by the complainant that are part of the record in this case. I found them commonly to have typographical errors (see e.g. the Inspection Report dated 3/23/94, AR at 00070) and to be hard to follow (in the Long Form Deficiency (LFD) Report dated 6/9/94, the following appears: ". . . The supervisor has stated; the ergonomic problems are solved, by dating and signing the LFD, that it corrected." AR at 00095). Often the reports look like a first draft, with clumsy grammar. Individual Deficiency Report dated June 4. 1993: " . . .The ladder hand rails atop both fuel tanks are not permanently afixed [sic] since they pose erratic movements." AR at 00082. The reader sometimes cannot determine the exact nature of the deficiency Dreger cites. Even the general nature of a deficiency can be elusive in these reports, and the reader must read on into the details for better understanding. *Marler* at 89,057-59.

The second area of the complainant's work deficiencies involves his interpretation of applicable safety and health rules and whether he was consistent in his reports. Management pointed to numerous problems in this regard. Performance Appraisal dated 10/13/92, Ex. 3 at 2 ("Hazards were not properly identified, improper standard used and reports not timely."), and at 3 ("on occasion SDR's and/or . . . forms had to be rewritten or rejected for improper standard cited or details in describing violation/hazard."); Performance Appraisal dated 11/10/93, Ex. 4 at 2 ("Standard interpretation in cases has been opinionated and some times overstated. Personal preferences are sometimes reflected in citations rather than accurate interpretations.") and at 4 ("In many cases calls have been received from personnel in employee's areas of responsibilities with questions on interpretations. Interpretations are not always clear and sometimes confusing."); Performance Improvement Plan Final Report dated 9/12/94 ("Final Report"), Ex. 9 at 2, 5 ("Deficiency reports are at times hard to understand. One deficiency report showed two different responsible managers. Also, found one report that was signed by the employee in the wrong place preventing us from advancing status."). Witness Spenia noted in a telephone interview that "Dreger would identify a deficiency, agree on a method of correcting it, and then he would go back and reinspect the job and tell them they should have used an entirely different approach. We also got complaints about differences in interpretation of the OSHA standards." Spenia Witness Statement at 1 (AR at 00802).

The testimony at the hearing on this issue was not at all favorable to the complainant. The witnesses he called did on occasion give favorable comments of a general nature regarding his safety inspections. See the testimony of Terrance S. Holmes ("Mr. Dreger operated the same as all the safety officers out there. I believe in a very professional manner." Tr. at 21); see also the testimony of Donald McDermott, a maintenance and well crew worker at Area 6 and Area 12 of the Test Site, who when asked by the complainant about his opinion of Dreger's inspections, said generally "You were held in high regard. You were competent, you [knew] exactly what you were doing." Tr. at 83.

However, two of the witnesses called by the complainant had very negative and detailed comments about the way he interpreted rules applicable to the workplace. Dudley Russell, an ES&H coordinator for REECO, criticized Dreger for performing misguided inspections. He testified "when issues would be brought forward we were of the opinion that those things, especially minor details could have been taken care of on the spot.

Rather than being tracked on a deficiency system and treated as something that would may have a fine attached to it." Tr. at 67. By way of example, Russell said that if they had five jars containing the same thing, like mayonnaise, and four jars had proper labels while the fifth jar, with the same contents, had no label, Dreger would "write up" the jar not labeled properly instead of just putting on a new label

indicating the contents. Russell said ". . . you just correct it with a black sharpie and go on. In many instances . . . that wasn't good enough. [Dreger] wanted a label on there that went into excruciating detail and, you know, I just didn't feel that was necessary. It didn't add any value to the project." Id.

Another witness called by the complainant, Michael Rollins, was a safety specialist for REECO who had duties similar to the complainant's. Rollins clearly believed that the way the complainant approached his job was not valuable for REECO or its employees. He testified that "our roles were different", Tr. at 52, and that Dreger "was primarily there, for lack of any other term, to play ?gotcha'" at the work site, Tr. at 53. In contrast, Rollins says he worked on building a team which was intent on making safety a daily routine. "We had an incredibly successful safety program at the test site. . . We had safety committees where we worked with the craft people to get them on board. And get them to work with us in the safety program. . . It was sort of probably a hallmark program across the nation as companies started into this thinking. . ." Tr. at 57-8.

The third problem area for REECO management officials with respect to the complainant's work performance involved his communication skills. Repeatedly, he was cited in the performance appraisals by REECO management officials as needing improvement in this area. See e.g. his very first performance appraisal for a full year (Ex. 2) dated January 29, 1992, which stated as follows in the "areas requiring development" section: "Some development in communications skills". Id. at 4. The performance appraisal dated October 13, 1992, for the period ending on September 30 of that year, states "employee . . . at times interprets in a manner that confusses [sic] the issues. Details of hazard description are not always clear which leaves responsible individuals unclear on proper corrective action." Ex. 3 at 6. See also Tr. at 128. Dreger never put in any evidence to contradict these negative reports in the performance appraisals about his interpersonal skills. His former colleague G. A. Rodriguez, also a REECO safety inspector, told the Investigator "I worked with Dreger for two years. He and I had a run-in. . . Because of the run -in . . . I tried to avoid him as much as possible. . . I heard that Dreger had problems, and that they were putting him on probation . . . Dreger brought it on himself, because of his attitude. He tried to be a know-it-all." Witness Statement of G.A. Rodriguez dated July 12, 1999 at 1, AR at 00804.

In addition, a number of employees who testified at the hearing after being called by Dreger discussed in detail what they called his communication problems. For example, Dan Gouker, general foreman of the Area 6 generator shop at the Test Site, testified about his interactions with the complainant. First, he carefully distinguished himself from management ("I'm a craft and that's what I did." Tr. at 42). His testimony was adverse to Dreger in two important respects, both on the type of inspections he made and in contrasting him with other inspectors.

The Witness: [Dreger] would sit in front of a man's toolbox and go through drawer by drawer looking for tools. I know that my crew took personal offense to it because of the fact that he questioned everything in it and why is this like this and what's this and why is that. And my men

at the time did keep one drawer in their toolbox for personal effects, wallets, et cetera, that drawer was not allowed to be looked into but obviously opened to make sure there's nothing in there to be modified; no bad tools, broken tools, et cetera. . . . I know that my men were offended by the type of inspection.

Hearing Officer [Breznay]: Is that just normal reaction to a safety inspector coming in?

The Witness: Absolutely not, absolutely not. It was the fact that he was going through their personal toolbox. We had inspections all the time. . . . So we were under constant scrutiny to make sure that we come up to both DOE requirements, REECO requirements, OSHA requirements and more importantly the National Electrical requirements. So were never offended by any inspection that came through. . . .

Hearing Officer: Can you compare what happened with Mr. Dreger and the men on site to other safety inspectors who came by? Were there similar problems or were they different?

The Witness: There weren't problems with other inspectors, they would come in and say I'm here to do

this, they would proceed on and they would do that. . . . Mr. Dreger would contact me, as a general foreman, and say I'm coming by your shop to do an inspection. . . Then my guys would have to come over and say who's that and what is he doing going through my toolbox? So, it wasn't similar at all. . . .It wasn't a matter of whether they liked it or not, it was the manner in which it was done. Without conversation with the employee whose tools are being looked at. . . . toolbox[es] had personal things in it, like wallets, like badges, in the shop the guys were allowed to work without their badge because of the fact they were bending over rotating equipment. . . . It was never a question of looking at tools, we always wanted that. In fact, I took it upon myself for my tool crib man to remove any damaged tool . . . we were never opposed to any type of an inspection to make sure that the tools were safe. It's the manner that these particular inspections were done in going through parts of the toolbox that had no tools in them. That was the problem." Tr. at 36-40.

Frank Spenia, the complainant's Section Chief, testified extensively at the hearing about Dreger's work performance. Spenia was an experienced manager for REECO, and he is currently employed by Bechtel Nevada at the Test Site. He is a certified safety professional. Spenia discussed his "performance notes" which underlie the REECO performance appraisals introduced at the hearing. The performance note dated 12/29/92 records that Dreger had improperly cited a particular work site "for failure to have MSPS for hand cream." Ex. 5 at 3. An "MSPS" is a material safety data sheet, which is typically required for chemicals on the worksite. It states the composition or formula for the particular compound. Under questioning by the complainant, witness Spenia said "I myself wouldn't require somebody to have an MSPS for hand cream. Technically speaking, you're probably correct. . . . [But] I don't think that out on the job site, . . . we would require or cite somebody for not having an MSPS for hand cream." Tr. at 221.

When I asked Dreger for clarification of his position on the matter, I said "So, you thought it was part of your concern to flag this because of the safety hazard to individuals who might be using their hand cream." Dreger responded "Yes, sir. In this specific reason it could be a health hazard." Tr. at 222; see also AR at 00021. I find that the evidence strongly supports REECO's position that Dreger's communication skills, overall judgment and behavior towards employees at the worksite fell short of normal expectations.

These performance shortcomings and other events combined in 1994 to precipitate a crisis at the workplace for the complainant. His last two performance appraisals had been "marginally successful". In addition, on December 6, 1993 Dreger was cited for failing to answer a page, an extremely serious matter.

According to a "performance note" recorded by Witness Spenia, "After looking into circumstances it was determined that Dreger was on duty and had not responded to a 900 page for approximately 2 hrs. This does not meet requirement in [occupational safety and fire protection] internal procedures - reprimand issued." Ex. 6 at 1. The complainant was the assigned duty officer for the particular weekend, and agrees that he did not respond to the page. Tr. at 154. His only comment was that he was either at a movie at Nellis Air Force Base or in a bus somewhere on the Test Site. Tr. at 225. He was properly reprimanded for dereliction of duty. He was also cited on December 12, 1993 for becoming "short" with another employee. Ex. 6 at 1. See Tr. at 156. Spenia testified that at that point, REECO management officials concluded " . . . something needed to be done. We needed to look into this." Tr. at 162.

REECO concluded that the best approach was to implement a "Performance Improvement Plan" (PIP), a vehicle that REECO had used in the past with problem employees. The PIP drafted for use in complainant's case is in the record (Ex. 8). The evaluation period was June 1 through August 1, 1994. REECO officials testified that they worked carefully on drafting the PIP, that it was implemented following regularized procedures, and that it was discussed with the complainant in detail before implementation. The testimony at the hearing was consistent on this point. I conclude that REECO utilized the PIP in a sincere effort to focus the complainant's attention on his problems and to build consensus towards improvement. See Tr. at 163 et seq. At the meeting to discuss it prior to implementation were the complainant, Spenia and Spenia's supervisor, Steve Jones, the department manager for safety and fire protection (who supervised about 60 employees). Jones testified convincingly that "the goal was to work

with employees, to identify areas that they needed to improve at so that we can get them up to a acceptable level of performance". Tr. at 261. Jones, who had 18 years of experience as an OSHA employee in the field and in Washington DC, said "It - it give[s] me no pleasure to point out to employees how they're failing to perform, if it were not for the goal of trying to improve that performance." Tr. at 264. In the PIP, the three areas of special concern were the same ones cited above. At the end of the evaluation period, the PIP states a report would be prepared, the complainant would be notified and a meeting would be held to discuss the results. The PIP warned Dreger that failure to improve would trigger disciplinary action, including a possible termination.

Dreger never fully appreciated the significance of the PIP. For example, at the meeting during which the PIP was discussed and introduced, Dreger informed Jones and Spenia that he wanted to take his summer vacation during the evaluation period and also wanted to attend an "American Society of Safety Engineers performance development conference." Tr. at 181-2. The REECO officials stressed with the complainant the importance of the PIP, and advised the complainant against taking time off as requested, but Dreger refused.

Moreover, Dreger's work performance during the evaluation period fell well short of reasonable expectations. In fact, at the end of week 1 of the evaluation period, the Final Report notes with respect to the PIP that Dreger said he "had not yet had time to read it". Ex. 9 at 2. See Tr. at 184-85. The continuing deficiencies in the complainant's work during the evaluation period are noted and discussed in detail in the Final Report. See Final Report, Ex 9 at 2-5. It was evident to me, based on testimony at the hearing, that the reporting and monitoring function required by the PIP was done carefully and seriously by management.

For example, at week 6 the Final Report notes that "Minor improvement was noticed on report test fields", and it concedes in the "conclusion" section that "Marginal improvement has been made in documenting of deficiencies and investigations." Id. at 4, 6. However, in summing up the complainant's performance during the evaluation period, the Final Report finds that "There was no noticeable improvement in computer skills. This employee has received as much training as anyone on the two programs that he uses most. The employee relies on unorganized notes to recall functions of a different programs rather than reference manuals, books, or asking others in the section for guidance. . . . Rather than retaining to memory and practicing the skills, the employee will scribble down the sequence and when the function is to be used the notes are either lost or not understandable. " Id. at 6.

The complainant's reaction at the time to management's comments and urges to improve performance was typically a denial. Or he queried "such as?". Letter (74 pages) to Hearing Officer dated November 5, 1999 ("November 5 Letter") at 50. When I directed him on several occasions prior to the hearing in this case to be prepared to address the PIP in detail, he continued typically to deny its relevance. See November 5 Letter at 43. He called the PIP "ridiculous" (id. at 44), "baloney" (at 43), "fabricated", "unbelievable", and "I don't understand" (at 48-50). He responds to the statement in the PIP that "Everything appears to him as black or white" (Final Report at 2) by saying "[Yes], if you know what you are doing, which I do". November 5 Letter at 44. As for the comment in the Final Report that he makes too many errors in his deficiency reports, his response at one point is "Who are the others who made errors?" (id. at 45). He also quibbles about semantic issues. Pointing out that the concluding section of the Final Report says he "is a very nice person", he seems to feel that it contradicts itself later when it states he "lacks diplomacy, tact and concern for others", since the definition of "nice" includes "showing tact or care". November 5 Letter at 52-3. With respect to the criticism that he viewed his function too narrowly as being there on site to "? put the hammer down' and make them do things his way," Spenia Witness Statement at 2, AR at 00803, the complainant in essence agrees. He says "Well I do have the knowledge and experience to back it up with, don't I!" November 5 Letter at 61. In the end, Dreger was convinced he was right and all others were wrong. He says "my expertize [sic] offends others because they are not as knowledgeable as I". Letter (23 pages) to Hearing Officer dated November 5, 1999 at 13.

Dreger never thought the PIP was worth more than a moment of his time. He never mentioned it in his

original whistleblower complaint, and he hardly addressed it at all in his questioning and arguments at the hearing I conducted. In fact, he never presented a serious discussion of it. At one point he called the 62 day evaluation period a "sham", "since they are out to terminate me." November 5 Letter at 42. He continues "they could not assist me since my experiences are beyond theirs." Id.

Significantly, he chose to focus at the hearing not on the poor ratings he received but on the failure to receive higher ratings in some areas. He asked both Spenia and Jones why he did not receive a rating of 3, on a scale from 1 to 3, "in some of the areas I'm very strong in . . .?" Tr. at 272. Jones replied that "if you were very strong in an area, you would have received a grade of 3. If you received a grade of 2, that means you meet the performance level specified in that criteria." Id. The complainant also complained that he got no credit for arriving at work on time, Tr. at 206, and for not using much sick leave, Tr. at 199. To the extent he addressed work-related problems directly, such as shortcomings in his computer skills, he would simply offer his disagreement, e.g., "I can't accept that." Tr. at 202.

Dreger's allegation that the whole rating process was a sham was an important matter. I devoted considerable time trying to ascertain whether there was any support for his claim. Since his "marginally successful" ratings began with the second full year performance assessment he received, in 1992, I would have to find that the REECO deception and unfairness began then, years before he was terminated. Moreover, unfairness itself would not be enough for me to find in Dreger's favor in this proceeding. The unfairness would have to be directed against him in retaliation for a protected disclosure. I am convinced this did not occur. REECO has shown that it was the complainant's work- related deficiencies that caused the REECO adverse actions.(2)

Returning to the issue of whether he was rated unfairly, I pressed Spenia, the complainant's supervisor, for more information on this issue: "Mr. Dreger's allegation is that they weren't done fairly. That you didn't give him credit for safety successes that he brought to the fore, the crimping machine . . the Hanta virus episode, where he brought up rodent contamination, that kind of thing. How do you respond to his claim that . . . the deck was stacked against him from the beginning, that this process of rating him was unfair?" Tr. at 195. In response, Spenia readily conceded that Dreger had work-related successes: "Those things that Mr. Dreger, did, as far as identifying a press needed on a crimping machine . . . that's what he was supposed to be doing. It's nothing exceptional about that.

Those things were identified in the standards . . . you're supposed to implement . . . and that's what he did." Tr. at 195-6. See also id. at 240, where Spenia says the complainant's discovery of "poor electrical grounding" at a bulk petroleum facility at the Test Site was a "good call" (AR at 00259), a phrase he also used candidly when asked about the Hanta virus episode (Tr. at 239-40). When I asked Spenia about the rating of the three other safety inspectors (Terrell, Rodriguez and Boucher), his response was "His performance was obviously less than adequate because we didn't let any of the other people go. . . Mr. Dreger was having more difficulties with our computer systems. He seemed to have problem cooperating, getting his point across to those people that were responsible for corrective actions. I wasn't experiencing that with the other employees that were in that section at that time." Id. at 196-7.

Next, I present testimony about REECO's attitude towards safety. I have accumulated a surprising amount of circumstantial evidence in this proceeding to the effect that REECO was very unlikely to have retaliated against the complainant. According to all of the witnesses called by the complainant who addressed the issue, REECO was an exceptionally safety-conscious firm. Mr. Gouker, the generator shop foreman, said "In my fifteen years working for [REECO], there was never retaliation for safety related things. . . [REECO Division Manger] Flangus, who was in charge [at Mercury] at the time made a firm commitment to us . . . that there would not be retaliation for safety infractions, or safety complaints . . . And I can assure you in my length of time out there, that never happened. . . it was the same philosophy for REECO at the Tonopah test range, that there were not complaints or retaliations for bring[ing] up safety. That's probably one of the most safety consc[ious] companies I've ever worked for." Tr. at 43; see also id. at 45.

Michael Rollins, the REECO safety specialist called to testify by Dreger, praised REECO for setting up an

employee-driven safety program on the Test Site, which was copied nationally.. Upon being asked by counsel for REECO whether he knew of any retaliation against employees for raising safety concerns, Rollins said "No, in fact, that was probably the thing that was, that was clearly put forth time and time again that made the safety committee concept work as well as it did. Because the employees were truly empowered. They were actually able to pick a representative . . . way of governing safety. . . . It became an honor to sit on these committees . . . If it was a legitimate safety concern they were given all the resources possible. I was flabbergasted frankly, that the company spent as much time and effort as they did. These men were given vehicles, they were given time, their bosses were clearly instructed to give them the resources they needed to go solve these problems. . . I haven't seen anything of its type since." Tr. at 60-61.

Dudley Russell, the ES&H coordinator for REECO called to testify by Dreger, denied that reprisals for safety-related issues ever occurred. I queried him on this: "My job is to inquire whether his disclosures resulted in a [reprisal] from management. . . like, lowered performance appraisals or ultimately termination, because he raised safety issues. Does it strike you as something that could have happened [?].

The Witness: No. I would say no, that's not what we were all about. You know, when somebody brings something of a safety issue, you know, I mean that's the safest place I ever worked. And I've been out there, I'm still there, I've been there 16 years. And I spent 10 years in the craft and when I first went out there it didn't take me long to see that's the safest place I ever worked. And we - - they were - - safety issues were brought forward, they were corrected and we went on."

Hearing Officer: "And that was in your view the high point on the safety curve, if I understand your testimony. Is that right?

The Witness: Absolutely. We did the best we could and I think we did a damn good job in the realm of safety. And I don't think anybody -- I don't think anybody -- to my knowledge there hasn't been anybody run off for bring[ing] forth safety violations. . . . And I don't deem this of being one of them." Tr. at 69-71.

As Dreger's colleague Milton Terrell said, who was also a REECO safety inspector, "Dreger had quite a few problems at REECO, and most of them were people problems, personality difficulties. He also had a big problem with interpreting the OSHA standards. Gene was very bullheaded, once he made his mind up about something. . . . No one ever retaliated against Gene for any reason. Nobody dared retaliate against any of us - we had a charter to do a safety program." Witness Statement of Milton Terrell dated July 13, 1999 at 1, AR at 00806.

On the basis of the foregoing testimony and other evidence in this proceeding, I conclude that the contractor has met its burden to show by clear and convincing evidence that it would have taken the same actions with respect to the complainant in the absence of the protected disclosures. *Diane E. Meier*, 27 DOE Par. 87,545 (1999).

IV. Conclusion

As set forth above, I have determined that the complainant has failed to establish the existence of a violation on the part of REECO for which he may be accorded relief under DOE's Contractor Employee Protection Program, 10 CFR Part 708. I find that the complainant made protected disclosures under Part 708, and that such disclosures were sufficiently close in time to his termination and to other personnel actions adverse to him to be considered potentially contributing factors to those actions. Nevertheless, I find that the evidence clearly and convincingly establishes that REECO would have taken those actions, including rating him "marginally successful" in 1992 and 1993 and terminating him in 1994, in the absence of those protected disclosures. The strength of the evidence supporting the reasonableness of the contractor's decision to terminate him is overwhelming.

I am convinced that Dreger had serious work performance deficiencies, including a lack of adequate computer skills, poor communication and other interpersonal relations problems, and deficiencies in interpreting and applying applicable safety and health rules. Two of the three other REECO safety inspectors dismissed the idea that REECO may have retaliated against him, and suggested that Dreger was himself responsible for any problems he was having at work. No evidence at all exists in the record to link his termination with his safety disclosures. Based on my observation of the witnesses' demeanor and my assessment of their credibility, I discerned no motive or intention to retaliate by REECO. Nor did I find any evidence which would indicate that REECO's treatment of Dreger was at all inconsistent with its treatment of similarly situated employees. Accordingly, I must deny his request for relief under 10 CFR Part 708.

It Is Therefore Ordered That:

(1) The complaint against Reynolds Electrical and Engineering Co., Inc., filed by Eugene J. Dreger on February 28, 1995, under 10 C.F.R. Part 708 is hereby denied.

(2) This Initial Agency Decision will become the Final Decision of the Department of Energy denying the complaint unless within fifteen days of its receipt, a party files a Notice of Appeal requesting review by the Director of the Office of Hearings and Appeals, in which case the review will be done by his designee, all in accordance with 10 C.F.R. § 708.32.

George B. Breznay

Hearing Officer

Office of Hearings and Appeals

Date: February 7, 2000

(1)The complainant had previously filed an age discrimination complaint with the State of Nevada, but it was dismissed for lack of evidence. AR at 00039. These allegations are not the proper subject of a Part 708 Complaint. Part 708 specifically excludes allegations based on issues of this type. 10 C.F.R. § 708.4(a).

(2)Dreger has never pointed to a particular disclosure which allegedly triggered REECO's retaliation. His claim is that it was all of his safety-related findings which caused REECO to retaliate against him. Based on the testimony and the other evidence in this case, I do not agree. Given the extensive testimony at the hearing about REECO's attitude toward safety, portions of which I quote infra, and testimony about Dreger himself and his work performance, I do not believe he was targeted because of his protected activities.

Case No. VBH-0023

March 31, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Stephanie A. Ashburn

Date of Filing:July 6, 1999

Case Number: VBH-0023

This Initial Agency Decision concerns a whistleblower complaint filed by Stephanie A. Ashburn, a former fellow of the Oak Ridge Institute for Science and Education (ORISE). As explained below, Ashburn's complaint is denied.

This case arises under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708, the "whistleblower" regulations. The whistleblower regulations prohibit a contractor from retaliating against a contractor employee who engages in protected conduct. Protected conduct includes disclosing information that the employee believes reveals 1) a substantial violation of a law, rule, or regulation; 2) a substantial and specific danger to employees or to public health or safety; or 3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.

If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish by a preponderance of the evidence that 1) the employee made a protected disclosure; and 2) the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, the burden shifts to the contractor to prove, by clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure. If the employee prevails, the Office of Hearings and Appeals (OHA) may order employment-related relief such as reinstatement and back pay.

Background

ORISE, Ashburn's employer, performed work at the Department of Energy's site in Oak Ridge, Tennessee. As an ORISE fellow, Ashburn was assigned to a team working on the Environmental Compliance and Management Program (ECAMP). Although the people who worked on the ECAMP were based at a DOE site, the ECAMP was funded by the Department of the Air Force. LMER received a contract with the Air Force for the ECAMP, and performed work at Oak Ridge under the DOE's "Work for Others" program. LMER also entered into subcontracts with several entities, including ORISE, to supply personnel for the ECAMP.

Ashburn, an attorney, was granted a one-year fellowship by ORISE in October 1994. The terms of the fellowship are set out in a letter to Ashburn dated September 29, 1994, which states that the fellowship "will be under the direction of [the Supervisor] in the Environmental Sciences Division.... The appointment may be extended ... subject to satisfactory performance and the continued availability of funds."

Ashburn's appointment was extended several times. The last extension was announced in a letter dated November 26, 1996, which stated that her "appointment ... has been extended for up to one year beginning October 1, 1996."

Ashburn's whistleblower case concerns certain activities of her supervisor on the ECAMP team, who was an employee of LMER. In her complaint, Ashburn states that the supervisor often expressed frustration with what she perceived as LMER's "inability to support her and the Air Force sponsor's work." In August 1996, Ashburn attended a meeting with the supervisor and a representative of the Air Force. During the meeting, Ashburn was asked whether she was willing to support the supervisor's attempt to take the ECAMP contract to either a different contractor or a new firm to be formed by the supervisor.

Also in August, the supervisor began negotiating with consulting firm "A" for positions for her and others on the ECAMP team. She told Ashburn that she had arranged a salary for Ashburn with the management of "A." In September, the Air Force placed an announcement in the *Commerce Business Daily*, soliciting bids for the ECAMP contract. The announcement stated that consulting firm "A" "is the only known source with the expertise and is capable of providing services for this specialized effort." The announcement was soon withdrawn, for reasons not stated in the record, and the supervisor began negotiating with other consulting firms to hire the ECAMP staff and obtain the ECAMP contract.

In November 1996, Ashburn disclosed to LMER management that her supervisor was attempting to manipulate LMER's subcontracts involving some of the ECAMP staff. For the purposes of this Decision, I will assume, without making a finding, that Ashburn's disclosures involved abuse of authority by the supervisor, and meet the regulatory definition of a protected disclosure. *See* 10 C.F.R. § 708.5(a). Two other subcontractor employees who worked on the ECAMP, Matthew J. Rooks and Alizabeth Aramowicz Smith, filed whistleblower complaints based on facts similar to those alleged in Ashburn's complaint. *See Matthew J. Rooks*, Case No. VBH-0024, 27 DOE ¶ _____ (March 1, 2000).

Meanwhile, LMER received a letter from the Air Force, dated August 26, 1997, stating that funding for the ECAMP contract would end on September 30, 1997. This was the same day that Ashburn's fellowship was due to terminate. Ashburn received a letter in October 1997, notifying her that her fellowship had been officially terminated as of September 30, 1997. According to the letter, the termination was based on notification ORISE had received that the ECAMP project would not continue past that date.

The new contract for the ECAMP project was awarded to consulting firm "B." The supervisor, meanwhile, had resigned from LMER and accepted a position with consulting firm "B," where she worked on the ECAMP.

On November 5, 1997, Ashburn filed the present complaint against LMER. In a supplement to the complaint, dated October 4, 1999, Ashburn listed retaliatory acts which she alleges were committed by LMER.

Analysis

The Part 708 regulations provide that the employee who files a complaint has the burden of establishing by a preponderance of the evidence that her whistleblowing was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. Retaliation is defined as "an action ... taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of [the whistleblowing]."

Ashburn's central claim is that the loss of her fellowship was retaliation for her whistleblowing. There is no dispute that the termination of her fellowship was a negative action with respect to her employment, and could be found to be retaliation if it was the result of a protected disclosure. 10 C.F.R. § 708.2

(definition of "retaliation"). Ashburn must show, however, not only that the termination occurred, but that her disclosure was a contributing factor to the termination.

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Luis P. Silva*, 27 DOE ¶ _____ (Case No. VWA-0039, February 25, 2000), citing *135 Cong. Rec. H747* (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20); *see also Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying the "contributing factor" test in a case under the Whistleblower Protection Act, 5 U.S.C. § 1201).

The record is clear that the termination of Ashburn's fellowship was caused by LMER's loss of the ECAMP contract. Linda McCamant, ORISE's group manager for research participation programs, was responsible for administering Ashburn's fellowship. McCamant filed an affidavit in this proceeding, stating the termination of Ashburn's fellowship was based on ORISE's loss of funding from the ECAMP. McCamant states that "ORISE has no policy whereby Ms. Ashburn's appointment could have been extended - or she be paid for - the equivalent time period that she had been on leave without pay. When her appointment ended, the basis for ORISE's ability to pay her also ended."

The record also suggests that the decisive factor in the placement of the ECAMP contract was the supervisor herself. Thus, when the supervisor was apparently about to accept a position with consulting firm "A," the Air Force announced its intent in the *Commerce Business Daily* to award the ECAMP contract to the same firm. When the supervisor accepted a position with consulting firm "B," the Air Force awarded the ECAMP to that firm.

Moreover, the record indicates that the supervisor's decision to leave LMER for a new contractor was motivated by a long-standing dissatisfaction with LMER management that predated any disclosure by Ashburn. Ashburn notes in her complaint that when the supervisor first interviewed her in 1994, she expressed frustration with LMER's lack of support for the ECAMP. In March 1996, according to Ashburn, the supervisor met with Air Force personnel to express her dissatisfaction with her management and to discuss moving the ECAMP contract to another firm. In September 1996, the supervisor began negotiating for a position with consulting firm "A." It was only in November 1996, after the supervisor had taken steps to ensure that the ECAMP contract would be placed with another firm, that Ashburn made her first disclosure.

The timing of the supervisor's departure from LMER also appears to be unrelated to Ashburn's disclosure. Ashburn states in her complaint that in September 1996, the supervisor asked her to find out when she, the supervisor, would be eligible for retirement benefits from LMER. Ashburn called the LMER benefits office and found that the supervisor would be eligible on October 8, 1997. According to Ashburn, the supervisor set up her voice mail and e- mail accounts with consulting firm "B" in mid-September 1997, but did not officially resign from LMER until October 9, 1997, one day after she qualified for retirement benefits.

In summary, there is ample evidence in the record to conclude that the termination of Ashburn's employment was due to LMER's loss of the ECAMP contract, that the supervisor herself was the key factor in awarding the ECAMP contract, that LMER lost the ECAMP contract because the supervisor would be working for another firm, and that the supervisor had determined to leave LMER before Ashburn made a protected disclosure. Consequently, I find that Ashburn has failed to establish that her disclosure was a contributing factor to her termination.

Ashburn alleges a number of other retaliations. Most of them involve what she calls "threats." In these allegations, she appears to rely on the definition of retaliation at 10 C.F.R. § 708.2, to include "an action (including intimidation, threats ... or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment)...." Ashburn has not convincingly shown that the statements she cites are actual threats of a negative personnel action, and include such trivialities

as being directed to attend a meeting where she, a woman in her twenties, was among older men who were managers. Ashburn also alleges that LMER's decision to move Rooks and Smith to off-site offices in January 1997 "served to isolate and punish me ... and interfered with my ability to adequately perform my job, as I was unable to readily work with my colleagues." However, since Ashburn went on leave without pay in January 1997 and did not return until mid-August 1997, about a month before her fellowship was terminated, it is clear that the absence of Rooks and Smith could have had no more than a minimal impact on Ashburn's job performance. I find that these allegations fail to meet the regulatory definition of retaliation, and they will accordingly be given no further consideration.

Ashburn also alleges that an LMER manager threatened her "not to accept any positions with contractors," and claims he told her that if she accepted a position with a contractor "he would not approve the required paperwork, thereby rendering the position moot." Ashburn's own statement to the investigator, however, shows that this allegation is without merit.

The manager in question is the person to whom Ashburn disclosed the supervisor's attempts to move the ECAMP contract. In her statement to the investigator, Ashburn describes how the manager was angry at the supervisor, and told Ashburn and Smith that he would protect their current positions by not approving any paperwork authorizing new LMER subcontractors for the ECAMP. While it is clear that the manager refused to meddle with LMER's existing subcontracts, Ashburn has provided no evidence that the manager made any attempt to interfere with an attempt to seek or accept a job with another employer. Thus, there is no basis on which to find that the manager threatened Ashburn or that the manager's statement constitutes retaliation within the meaning of the regulations.

Conclusion

Ashburn has failed to show that the protected disclosure she made was a contributing factor to an retaliatory action. Given the supervisor's determination to take the ECAMP contract elsewhere, the loss of Ashburn's fellowship appears to have been an inevitability before she made a disclosure. Consequently Ashburn has failed to establish by a preponderance of the evidence that her disclosure was a contributing factor to an alleged retaliation. Accordingly, her complaint will be denied. *Richard W. Gallegos*, 26 DOE ¶ 87,502 (1996).

It Is Therefore Ordered That:

(1) The complaint filed under 10 C.F.R. Part 708 by Stephanie A. Ashburn, OHA Case No. VBH-0023, is hereby denied.

(2) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision.

Warren M. Gray

Hearing Officer

Office of Hearings and Appeals

Date: March 31, 2000

Case No. VBH-0024

March 1, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Matthew J. Rooks

Date of Filing: July 6, 1999

Case Number: VBH-0024

This Initial Agency Decision considers a complaint filed by Matthew J. Rooks under the whistleblower protection program of the Department of Energy, 10 C.F.R. Part 708. As explained below, Rooks' complaint is denied.

Background

Rooks filed this complaint under the Part 708 regulations on November 17, 1998, and the Department's Office of the Inspector General began an investigation. While the investigation was pending, responsibility for conducting investigations of Part 708 complaints was transferred to the Office of Hearings and Appeals (OHA). 64 Fed. Reg. 12826 (March 15, 1999).

The OHA issued a Report of Investigation on July 6, 1999. The Report, which I will discuss further below, essentially found that Rooks had failed to provide enough evidence to establish that a retaliatory act occurred. In accordance with 10 C.F.R. § 708.21(a), a hearing on Rooks' complaint was scheduled. Rooks and the contractor subsequently requested that the Initial Agency Decision be issued on the basis of the existing record, without a hearing. 10 C.F.R. § 708.31.

The incidents relevant to Rooks' complaint took place at the Department's Oak Ridge National Laboratory (ORNL). The management and operating contractor at ORNL was Lockheed Martin Energy Research (LMER). LMER contracted with several firms to provide technical personnel for programs at ORNL. One such firm was Jaycor Environmental (Jaycor).

Rooks had been hired by Jaycor in 1992 as an environmental scientist and assigned to ORNL. At times relevant to this complaint, he was a member of a team working on the Environmental Compliance and Management Program (ECAMP). The ECAMP was a project of the Department of the Air Force's Air Combat Command (ACC), which contracted with LMER to carry out its duties under the ECAMP. LMER tasked one of its divisions, the Environmental Sciences Division (ESD), with responsibility for the ECAMP. The supervisor for the ECAMP team was XXXXX (the Supervisor), an employee of LMER. Besides Rooks, ECAMP team members included Alizabeth Aramowicz Smith, who was also an employee of Jaycor, and Stephanie Ashburn, an employee of ORISE. Rooks, Smith, and Ashburn have all filed similar whistleblower complaints, and I will refer to them collectively as "the complainants."

The following account of the Supervisor's actions is taken from the complainants' submissions, unless otherwise noted.

In March 1996, the Supervisor met with the complainants to discuss her frustration with LMER and ESD management. She told them she wanted to move the ECAMP contract from LMER to another firm. The record shows that the Supervisor had often expressed the same frustrations during the five years that Rooks worked with her.

In fall of 1996, the supervisor began pressuring the complainants to choose a new consulting firm for which they wanted to work. Smith and Ashburn went to Dave Shriner, a manager in the ESD, to complain about the Supervisor's pressure tactics. Shriner referred them to Jim Loar, the Supervisor' immediate supervisor. They told Shriner and Loar that the Supervisor was trying to force them to work for another subcontractor. Loar told Smith and Ashburn not to change employers, and said he would speak with the Supervisor about her behavior. Smith or Ashburn relayed this information to Rooks.

The Supervisor was upset when the complainants refused all job offers that she had helped arrange. On November 15, she told the complainants that one of them would be fired if they could not agree on a single firm from which each would accept a job offer. Ashburn immediately telephoned Loar to report the Supervisor's threat. Loar told the Supervisor immediately to stop trying to force the complainants into working for another firm, and to apologize to them for having done so. She verbally apologized and wrote a letter to Loar justifying her attempt to place the complainants with another employer.(1)

On November 25, 1996, an anonymous call was made to the Lockheed Martin Ethics Help Line. According to the Help Line Report, the caller alleged that the Supervisor "was manipulating contracts in order to create a situation where she could retire from LMER and go to work with a subcontractor working on the same job. There were other allegations also dealing with [the Supervisor's] interactions with subcontractors regarding setting salaries."

The Help Line Report relates that Steve Stow, an LMER ethics official, responded to the complaint by setting up a meeting attended by himself, the Supervisor, and the Supervisor's first and second level managers, Loar and Steve Hildebrand. When the Supervisor was questioned about the allegations, she denied manipulating subcontracts, claiming that she had no authority to move subcontracts. Based on the interview with the Supervisor, the Help Line Report concludes that "investigation did not substantiate the allegations. It is felt that they were brought by a disgruntled subcontractor, probably one whose salary requests could not be met." The Report further notes that "because of the non- specificity of the original anonymous allegation and based upon the interview with [the Supervisor] ... the conscious decision was made not to interview subcontractors individually, but to hold [a] group meeting."

In accordance with the Help Line Report, a meeting was arranged for January 14, 1997. The participants in the meeting were Ashburn, Smith, the Supervisor, Hildebrand, Stow, and Loar. Rooks was away on an ECAMP assignment when the meeting was held. However, Rooks learned of the matters discussed at the meeting and claims that as a result, he became convinced that he would soon lose his job. He began to look for new employment. In March 1997, he resigned from his job with Jaycor and accepted a position with another firm.

In April 1997, Rooks returned to the LMER site and, with the other complainants, met with Charlene Edwards. As an LMER ethics officer, Edwards initiated a new investigation. On August 21, 1997, the investigation was closed. Edwards met with the complainants and informed them that her office had reached the following findings:

1. An employee of ... LMER [*i.e.*, the Supervisor] acted in a manner that was unfair to Jaycor, some of its employees, and another individual [*i.e.*, Ashburn, an employee of ORISE]. These actions, which were not authorized or condoned by LMER management, constituted a clear violation of LMER ethical principles and policies.
2. A personal conflict of interest was identified.
3. The allegation that an LMER employee [*i.e.*, the Supervisor] was working with various subcontracting firms to establish salaries for those team members, who might go to work for them,

was not substantiated.

4. Although there is some support for the allegation that team members would lose their jobs if they did not reach a consensus and select an employer other than Jaycor, the evidence was not sufficient to substantiate the allegation.
5. The following corrective actions are being taken:

a. Letters of reference will be prepared for the non-LMER team members.

b. Efforts will be made to prevent even the perception of retaliation. A record of decision will be prepared and approved by the Environmental Sciences division manager for major decisions involving the ... ECAMP that may affect the non- LMER members of the ECAMP team.

c. Division management will prepare a written plan of action to prevent recurrence of this issue.

d. Originally the Ethics Office recommended that management review the suitability of the ECAMP work per the guidelines of the Economy Act. This is in reality a ... sponsor's decision. On September 3, 1997, notification was received from the sponsor that current funding of the ECAMP project at the Oak Ridge National laboratory would expire on September 30, 1997, and that the option to extend work in FY 1998 would not be exercised.

e. Appropriate disciplinary action will be taken.

On November 7, 1997, Rooks filed this complaint against LMER.

Analysis

1. The Part 708 Regulations

The goal of the Part 708 regulations "is simply to restore employees to the position they would have occupied but for the retaliation" committed against them for whistleblowing. 64 Fed. Reg. 12867 (March 15, 1999). To accomplish this goal, the regulations authorize a set of restitutionary remedies at 10 C.F.R. § 708.36. *Id.*

The retaliation for which employees can seek restitution is defined at 10 C.F.R. § 708.2 to mean "an action ... taken by a contractor against an employee with respect to employment (*e.g*., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment)" as a result of the employee's whistleblowing activities, which are defined at 10 C.F.R. § 708.5.

The complainant in a Part 708 proceeding has the burden of showing, by a preponderance of the evidence, that his protected disclosure was a contributing factor to a retaliatory act. 10 C.F.R. § 708.29. According to the Report of Investigation, the complainants disclosed that the Supervisor had abused her authority. Such an allegation constitutes a protected disclosure. 10 C.F.R. § 708.5(a)(3).

Rooks, however, did not make an actual disclosure about the Supervisor until the April 1997 meeting with Charlene Edwards, after he had left Jaycor. Nevertheless, the Report of Investigation concludes that "Rooks made an *indirect disclosure* to Loar [before he left Jaycor], by virtue of his close association with Ashburn and Smith, who identified Rooks as an employee adversely affected by [the Supervisor's] actions" (emphasis added).

As noted above, a complainant in this proceeding must show, by a preponderance of the evidence, that he made a protected disclosure and that the protected disclosure was a contributing factor to a retaliatory act. The issue of "indirect disclosures" is murky, and I make no finding on it in this Decision. I find, however, that Rooks has failed to show that he was subject to retaliation, as defined in the regulations, and has

therefore failed to meet his evidentiary burden.

In some whistleblower cases, the whistleblower is discharged or demoted, and there is no need to establish that there was retaliation against the whistleblower. In Rooks' case, however, he has claimed that certain acts by the LMER management forced him to resign. It is part of Rooks' burden, therefore, to show that the actions he claims as retaliation meet the regulatory definition of retaliation.

As an initial matter, it is not clear what Rooks is claiming as a retaliatory act. The Part 708 regulations require a complainant specifically to describe the alleged retaliation taken against him. 10 C.F.R. § 708.12(a)(1) (emphasis added).(2) Rooks did not specify the acts for which he sought restitution, either in his complaint or in subsequent written submission to this Office.

Nevertheless, the Report of Investigation infers from Rooks' submissions that "the adverse personnel actions affecting Rooks were Lockheed's decision to enter into a task-based contract with Jaycor beginning in early 1997, and certain statements concerning subcontractor employees made by [Hildebrand] in a meeting held on January 14, 1997, and subsequently conveyed to Rooks." On August 12, 1999, I sent Rooks a letter requesting, among other things, that he specify the negative actions with respect to employment for which he sought restitution. Rooks did not respond to this request.

Rooks' claim is essentially that these events made his job conditions so unbearable that he was forced to resign. I will therefore consider whether these two events could have reasonably caused Rooks to leave his job with Jaycor.

2. Hildebrand's Comments at the January 14 Meeting

The January 14, 1996 meeting between the complainants and a group of LMER managers occupies a central role in Rooks' complaint. First, Rooks finds it significant that the meeting was held while he was traveling on an ECAMP assignment. Although Rooks claims his absence shows that the purpose of the meeting was intimidation and harassment, I find no support for his belief. If the managers wanted to intimidate Rooks, they would have wanted him to be at the meeting with the other complainants.

There is no explanation in the record of why the meeting was held without Rooks. As noted above, at the time of the meeting Smith and Ashburn had personally come forward with complaints about the Supervisor's conduct, while Rooks had not.

Besides claiming that his exclusion from the meeting indicates retaliatory intent, Rooks asserts that the content of the meeting led him to leave his job with Jaycor. Although he missed the meeting, Rooks says that Smith, Ashburn, and Wojtowicz told him what had been said. Rooks summarizes the meeting as follows:

Alizabeth [Smith] and Stephanie [Ashburn] were told that an anonymous call had been placed with the Lockheed Martin ethics hotline. They were informed that the allegations made in that call were baseless and that this meeting was their opportunity to say anything or nothing at all about the *conclusions* of the investigation. They also listened to the division director discuss budget cutbacks and personnel layoffs in the division, and how he hoped we could continue to have a working relationship. The message was clear, and Alizabeth and Stephanie kept mum. Instead, we called Lockheed Martin's ethics hotline senior official ... to express our disgust at being railroaded by the LMER management and ethics officer, threatened with layoffs, and labeled "disgruntled subcontractors seeking revenge" without being given the opportunity to tell our side of the story during the "investigation."

S.G. Hildebrand's comments during the meeting I missed in January, as relayed to me by ... Wojtowicz, made it clear to me that it was just a matter of time, a few months or even less, before Lockheed Martin would terminate my employment. I began to look for another job. Although I would lose my benefits, I would at least guarantee income for my family. In addition, I knew that [the Supervisor] had acted unethically and perhaps illegally. I further knew that the Lockheed Martin employees who were above [the

Supervisor] in the chain of command told us that she had done nothing wrong. They were embracing her unethical, perhaps illegal behavior. I feared that under their guidance, I would be mired in even more unethical, even illegal behavior.

Rooks also gave a statement during the investigation, in which he claimed that comments made in this meeting led him to look for a new job.

I recall that I was told that Mr. Hildebrand made comments that our jobs at LMER were not long term....

Because of the situation, I knew that I would not be employed by Jaycor much longer, and I knew that I would have no future opportunities to work in a unique environmental data base development area. Although I was never expressly told by Jaycor that my funding would end at a certain time, I began to look for work elsewhere, as well as to seek alternative funding that would allow Ms. Smith and I to continue working for Jaycor. In March 1997, I received an employment offer and gave Jaycor two and one-half weeks notice. I had no real desire to leave Jaycor, but I could not take the financial risk of being unemployed.

Thus, as summarized in the Report of Investigation, "Rooks ... perceived Hildebrand's statements as a threat and they formed the basis for his decision ultimately to resign and accept a position with another firm in March 1997." The investigator concludes, however, that "I do not find that Rooks has shown by a preponderance of the evidence that Hildebrand's statements, which appear to have been merely advisory on their face, constituted a threat within the reasonable perception of those receiving the statements." I concur with the Report of Investigation in finding that the evidence does not support the conclusion that Hildebrand's comments can be reasonably construed as the type of intimidation that would reasonably cause Rooks to resign.

There is some dispute about the exact phrasing of Hildebrand's comments. Smith, Ashburn, and Wojtowicz recall Hildebrand saying that subcontracts and fellowships were not permanent careers, and that no long term expectations of employment should be held. Loar did not recall the comment. Hildebrand said his comment about not expecting permanent careers concerned only fellowships, and was a response to a question from Ashburn about whether her fellowship could be extended beyond the expiration date. Hildebrand also acknowledged telling Rooks and Smith that they may face difficulties because the downsizing of the ESD staff could affect Jaycor's work load and staffing levels.

Thus, while there is disagreement about Hildebrand's precise wording, the general nature of his comments seems clear. The question is how to interpret the comments. When considered outside any context, the words themselves are ambiguous. They may indicate nothing more than Hildebrand's expression that ESD would undergo staffing reductions in the future. Rooks, however, interprets Hildebrand's words as a threat of retaliation for blowing the whistle on the Supervisor. He claims that Hildebrand's comments made it clear to him "that it was just a matter of time, a few months or even less, before [LMER] would terminate [his] employment." I do not find that Rooks' interpretation is supported by the evidence.

The circumstances of the meeting suggest that Rooks' interpretation in inaccurate. LMER had just extended its contract with Jaycor to October 1, 1997. Immediately after the meeting described above, a "kick off" meeting was held to announce the terms of the contract extension. Thus, Rooks could not have reasonable concerns that the Jaycor's contract with LMER would end within "a few months or even less." Moreover, Rooks has not advanced a claim that LMER actually took steps to have him discharged from his job with Jaycor, and there is no indication in the record of such steps. On the contrary, Wojtowicz, the Jaycor manager in Oak Ridge, told an investigator that he had never been asked to take any adverse actions against Rooks or Smith.

Rooks asserts that it is "clear" that Hildebrand's statements meant it was "only a matter of time" before he was unemployed. On the other hand, he acknowledges that Hildebrand expressed a desire to continue working with Jaycor.

I find that Rooks' interpretation of Hildebrand's comments is unreasonable given the context in which those comments were made. As a result, I find that Rooks has failed to meet his burden of showing by a preponderance of the evidence that Hildebrand's comments were a threat for the purposes of the Part 708 regulations.

In addition to his claims about Hildebrand's statements, Rooks apparently alleges that the failure of the investigation by the LMER ethics office to substantiate charges against the Supervisor was retaliatory. I find that it is unreasonable for Rooks to contend that the charges were covered up in an attempt to intimidate the complainants. As noted above, the complainants made two complaints against the Supervisor, in November 1996 and in April 1997, that were similar to the anonymous complaint. Neither charge was made anonymously. Both charges resulted in findings against the Supervisor, which tends to show that there was no cover up. Moreover, Rooks has not brought forth any evidence to suggest that the results of the investigation into the anonymous complaint had any adverse effect on him. I therefore find that the investigation into the anonymous complaint does not constitute retaliation under the Part 708 regulations.

3. The Decision to Move Smith and Rooks Off-Site.

Rooks' second allegation involves the implementation of a management plan adopted by LMER. The plan, known as "PRO-7," was described in the Report of Investigation.

A Lockheed policy, embodied in a document known as "PRO- 7," at least ten years old, and revised and renamed as recently as December 1995, calls for subcontracting to obtain services not generally available from within Lockheed. This policy states that such subcontracting must be task-specific, that is, for a specific short-term purpose, not to obtain long-term support staff. Work performed under task-based contracts should be performed off-site to the extent possible.

The implementation of the PRO-7 plan with respect to the complainants was announced at the January 14 meeting. Rooks describes the event in his statement to the investigator.

Mr. Wojtowicz advised that both Ms. Smith and I would be required to remove our materials from the ESD office areas and work from the Jaycor facility that was off site. We were also told to put our computer accounts at ORNL in "vacation" status. Only Ms. Smith and I were instructed to make this move. At least one other Jaycor employee remained on site....

It appeared to us that LMER was retaliating against us because they believed we had filed an anonymous ethics complaint in November 1996....

Because of the situation, I firmly believed that I would not be employed by Jaycor much longer, and I knew that I would have no future opportunities to work in a unique environmental data base development area.

There are two important points about Rooks' statement. First, he does not make any claim that the move to his Jaycor office space had a negative impact on the terms or conditions of his employment. On the contrary, Ashburn and Smith indicate in their complaints that Rooks had voluntarily moved to his Jaycor office space before the January 1997 meeting so he could take advantage of better computing equipment there.

Second, Rooks' assertion that the off-site move led him to believe he would "not be employed by Jaycor much longer" is not credible. The record indicates that many subcontractors had been moved off- site under the PRO-7 plan without losing their jobs.

The extent to which the PRO-7 plan was carried out is shown by an affidavit submitted in this proceeding by Loar. It recounts that, in August 1995, Loar received a memorandum from Hildebrand that contained a list of 37 subcontractor employees in ESD. Two of the 37 were ORISE employees, and thus exempt from

PRO-7. Of the remaining thirty-five employees, only six were still working on- site after three months, four were still on-site after one year, and two were still on-site after two years.(3) In other words, of 35 subcontractor employees in ESD who were subject to PRO-7 in August 1995, 33 had been moved off-site within two years.

Loar's affidavit thus shows that PRO-7 had been broadly implemented in ESD before Rooks was included in it. Thus, Rooks was almost certainly aware of PRO-7 before the January 14 meeting. This conjecture is supported by Ashburn's and Smith's complaints, which state that the possibility that PRO-7 would be applied to Jaycor employees was discussed in October 1996, before the complainants made a protected disclosure.

Thus, I believe that Rooks knew before the January 14 meeting that the PRO-7 program might be applied to him, and that it did not mean he would lose his job. Consequently, it is not reasonable for Rooks to have believed that the move off-site meant that his job was in jeopardy. I therefore find that the implementation of the PRO-7 plan cannot be considered a retaliation under the Part 708 regulations.

Conclusion

As stated above, the complainant in a Part 708 proceeding has the burden of showing, by a preponderance of the evidence, that his protected disclosure was a contributing factor to a retaliatory act. 10 C.F.R. § 708.29. Rooks has failed to meet that burden. I will therefore deny Rooks' complaint.

It Is Therefore Ordered That:

(1) The Complaint filed by Matthew J. Rooks under 10 C.F.R. Part 708, Case No. VBH-0024, is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within 15 days of its receipt, a Notice of Appeal is filed with the Director of the Office of Hearings and Appeals requesting review of the Initial Agency Decision.

Warren M. Gray

Hearing Officer

Office of Hearings and Appeals

Date: March 1, 2000

(1) In his complaint, Rooks discusses at length a letter the Supervisor wrote to Loar in November 1996. He characterizes it as "a scathing letter to her immediate manager in which she proposed that he let our contracts expire (dismiss us) with the explanation that ?downsizing results in reductions in internships and subcontracts' because we had breached her trust (by reporting her unethical business conduct)." However, Rooks did not find out about the letter until April 1997, after he had resigned from Jaycor. The letter thus could have played no part in his resignation, and I will not consider it in this decision.

(2) See also 10 C.F.R. §708.6(c) in the previous version of the regulations.

(3) In addition, the impact of PRO-7 on three employees is unknown, because they held positions that were not on the ESD organization chart.

Case No. VBH-0025

June 22, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Alizabeth Aramowicz Smith

Date of Filing:July 6, 1999

Case Number: VBH-0025

This Initial Agency Decision concerns a whistleblower complaint filed by Alizabeth Aramowicz Smith, a former contractor employee at the Oak Ridge National Laboratory. As explained below, Smith's complaint should be denied.

This case arises under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708, the "whistleblower" regulations. The whistleblower regulations prohibit a contractor from retaliating against a contractor employee who engages in protected conduct. Protected conduct includes disclosing information that the employee believes reveals 1) a substantial violation of a law, rule, or regulation; 2) a substantial and specific danger to employees or to public health or safety; or 3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.

If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish by a preponderance of the evidence that 1) the employee made a protected disclosure; and 2) the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, the burden shifts to the contractor to prove, by clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure. If the employee prevails, the Office of Hearings and Appeals (OHA) may order employment-related relief such as reinstatement and back pay.

Background

The following background information is taken primarily from Smith's submissions.

From March 1993 through September 1997, Smith was a full-time employee of Jaycor Environmental. She worked at the Department's Oak Ridge National Laboratory (ORNL), where Jaycor was a subcontractor to Lockheed Martin Environmental Research (LMER), the management and operating contractor for the facility. Smith was assigned to a team working on the Environmental Compliance and Management Program (ECAMP), a project of the Air Force that was being performed at ORNL under the Department's "Work for Others" program. As a member of the ECAMP team, Smith specialized in issues involving pesticide, wastewater, and drinking water management, and environmental compliance.

Smith's whistleblower complaint concerns certain actions of her supervisor on the ECAMP team. The supervisor, who was an employee of LMER, holds a doctoral degree in science and was the principal investigator for the ECAMP. Two other members of the ECAMP team filed essentially identical

whistleblower complaints concerning the supervisor. *See Matthew J. Rooks*, Case No. VBH-0024, 27 DOE ¶ _____ (March 1, 2000), and *Stephanie A. Ashburn*, Case No. VBH- 0023, 27 DOE (March 31, 2000).

In brief, the supervisor was dissatisfied with the way LMER managed the ECAMP, and actively searched for another firm that would take on the contract with the Air Force and hire herself and the other members of the ECAMP team. As early as 1994, Smith notes that the supervisor "was expressing frustration with (as she perceived it) [LMER's] inability to support her and the ... sponsor's work. [The supervisor] routinely became angry with [LMER] management and threatened to leave constantly...." Complaint at 4.

In March 1996, Smith was present on a field assessment when the supervisor learned that LMER had laid off an ECAMP team member without consulting her. The supervisor became irate, and spoke with two officials from the Air Force sponsor that she planned to remove the ECAMP contract to another consulting firm, where she would have complete control of financial and staff resources. In August 1996, Smith was present at another meeting, arranged by the supervisor and a representative from the Air Force, during which Smith and another team member were asked if they would support the supervisor's move to a new contractor.

During the next few weeks, the supervisor approached various consulting firms about taking over the ECAMP contract. I will refer to two of the consulting firms that the supervisor dealt with as consulting firms "A" and "B." The supervisor discussed with Smith and other team members the preparation of a budget for transferring the ECAMP to consulting firm "A." In September 1996, Smith learned that the Air Force had placed a notice in the *Commerce Business Daily*, which stated that consulting firm "A" "is the only known source with the expertise and is capable of providing services for this specialized effort."

Later that month, Smith met with the supervisor and Ashburn. Smith states that the supervisor was distressed because the Air Force received more than twenty bids for the ECAMP contract. The supervisor told Smith that the Air Force would either have to award the contract to the low bidder, or "find another means of moving the money to [the supervisor]." Soon after the meeting, the Air Force withdrew the solicitation for bids, and ultimately renewed its contract with LMER for another year.

At this point, it will be helpful to summarize the situation. The supervisor has been dissatisfied with LMER for several years. She has openly discussed with officials of the contracting agency her dissatisfaction with LMER's management and her intention to have the contract placed with a different firm. She entered into negotiations with at least six consulting firms to employ her and take over the ECAMP contract. In October 1996, Smith and other ECAMP team members attended employment interviews, arranged by the supervisor, with two consulting firms. The supervisor pressured the ECAMP team members to chose one firm they would all work for. In addition, the supervisor found out, through research done at her request by Ashburn, that she would be eligible for a pension from LMER on October 8, 1997. She solicited offers from a number of contractors, rejecting some because she did not want to lose her retirement benefits by leaving LMER prematurely. All of this happened before Smith made her first protected disclosure.

In November 1996, after several months of the supervisor's attempts to find a new contractor, Smith and Ashburn complained to Jim Loar, the supervisor's manager. Loar angrily ordered the supervisor to stop interfering with LMER's subcontracts, and to apologize to Smith and Ashburn. Although the supervisor apologized, her relationship with Smith became unpleasant.

In January 1997, under the provisions of the "PRO-7" plan, Smith was assigned to work in the Jaycor office space, where she did not have day-to-day contact with the supervisor. See *Rooks* for further information on the PRO-7 plan. Smith became increasingly concerned that the supervisor was giving Jaycor's work to other subcontractors, was not communicating with her and was "speaking ill" of her to other employees. Along with Ashburn and Rooks, Smith met with Charlene Edwards, an LMER ethics officer, and filed a complaint against the supervisor. Edwards conducted an investigation and issued a report in August 1997, finding that the supervisor had acted unfairly toward Ashburn, Rooks, and Smith,

and that her actions constituted a conflict of interest.

Edwards' report coincided with two other events. The Air Force notified LMER that the ECAMP contract, which expired on September 30, 1997, would not be renewed. The new contract for the ECAMP project was awarded to consulting firm "B." The supervisor, meanwhile, resigned from LMER the day after her retirement benefits vested and accepted a position with consulting firm "B," where she worked on the ECAMP.

Jaycor was not a subcontractor of consulting firm "B," and therefore had no further work to perform on the ECAMP. Smith was given part-time work. In January 1998, Smith found full-time employment outside of Jaycor, although she continued to do part- time work for Jaycor until August 1999.

On November 5, 1997, Smith filed the present complaint against LMER. The OHA issued a Report of Investigation on July 6, 1999. In accordance with 10 C.F.R. § 708.21(a), a hearing on Smith's complaint was scheduled. Smith and LMER subsequently requested that the Initial Agency Decision be issued on the basis of the existing record, without a hearing. 10 C.F.R. § 708.31.

Analysis

The Part 708 regulations provide that the employee who files a complaint has the burden of establishing by a preponderance of the evidence that her whistleblowing was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. Retaliation is defined as "an action ... taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of [the whistleblowing]."

Smith's central claim is her transfer to part-time work was retaliation for her whistleblowing. There is no dispute that the reduction in her working time was a negative action with respect to her employment, and could be found to be retaliation if it was the result of a protected disclosure. 10 C.F.R. § 708.2 (definition of "retaliation"). The question remains, however, as to whether Smith's disclosures were a contributing factor in the reduction of her working time.

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Luis P. Silva*, 27 DOE ¶ _____ (Case No. VWA-0039, February 25, 2000), citing *135 Cong. Rec. H747* (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20); *see also Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying the "contributing factor" test in a case under the Whistleblower Protection Act, 5 U.S.C. § 1201).

The process by which LMER lost the ECAMP contract and Smith was transferred to part-time work cannot be attributed to a retaliatory motive by the supervisor. The decisive factor in the placement of the ECAMP contract was the supervisor's attitude about LMER, which had been formed before Smith made any disclosures. For example, in August 1996, more than a year before Smith's first disclosure, the supervisor told her contacts at the Air Force about her desire to find a new firm for the ECAMP contract. When the supervisor was apparently about to accept a position with consulting firm "A," the Air Force announced its intent in the *Commerce Business Daily* to award the ECAMP contract to the same firm. Though this plan was unsuccessful, the supervisor continued to arrange for the ultimate placement of the ECAMP contract outside LMER. For much of the time that the supervisor was attempting to have the contract placed with a different firm, she was actively arranging a position for Smith with the new firm, which shows that the supervisor's plan for moving the ECAMP contract was not retaliatory against Smith.

In addition, the record indicates that the supervisor's decision to leave LMER for a new contractor was motivated by a long-standing dissatisfaction with LMER management that predated any disclosure by Smith. Smith notes in her complaint that when the supervisor first interviewed her in 1994, she expressed frustration with LMER's lack of support for the ECAMP. In March 1996, according to Smith, the

supervisor met with Air Force personnel to express her dissatisfaction with her management and to discuss moving the ECAMP contract to another firm. In September 1996, the supervisor began negotiating for a position with consulting firm "A." It was only in November 1996, after the supervisor had taken steps to ensure that the ECAMP contract would be placed with another firm, that Smith made her first disclosure.

LMER's eventual loss of the ECAMP contract followed, but was unrelated to, Smith's disclosures. Two factors, unconnected to Smith's disclosures, were responsible for the timing of the Air Force's award of the ECAMP contract to consulting firm "B." First, the contract was up for renegotiation at the end of September 1997. Second, the supervisor had ascertained, through Ashburn, that she was eligible to leave LMER with retirement benefits as of October 8, 1997. However, the supervisor had established e-mail and voice mail accounts with consulting firm "B" by September 1997, strengthening the bid of consulting firm "B" for the ECAMP contract and assuring that this attempt to move the contract would be successful. Smith's disclosures, however, had no effect on the process to place the ECAMP contract outside LMER.

In summary, there is ample evidence in the record to make the following four findings:

1) That the supervisor had determined to leave LMER before Smith made a protected disclosure;

2) That the supervisor herself was a key factor in determining the recipient of the ECAMP contract;

3) That LMER lost the ECAMP contract because the supervisor went to work for another firm: and

4} That the termination of Smith's employment was due to LMER's loss of the ECAMP contract.

Considering these four findings together, it is clear that Smith's disclosures did not affect in any way her transfer to part-time work. The supervisor would have left LMER, and Jaycor would have lost its subcontract for ECAMP work, regardless of whether Smith had made any protected disclosures. Consequently, I find that Smith's disclosures were not a contributing factor to her transfer to part-time work.

Smith alleges a number of other lesser retaliations in addition to her transfer to part-time work. For example, she claims that after January 1997, her work assignment was greatly changed so that she "went from a protocol team leader for three environmental protocols to basically clerical support." As Smith relates, preparing for, performing, and reporting on the assessments was the bulk of her work. The assessments typically involved traveling to an Air Force site. In 1994, Smith states, the ECAMP team's work load increased from ten to eighteen assessments per year. In 1997, however, there were only two ECAMP assessments, one in April and one in August. Smith was replaced on the April assessment by another team member, and took part in the August assessment. Since LMER has shown that the amount of assessment work was greatly reduced, there is clear and convincing evidence that, absent the protected disclosures, such work would not have been available to be assigned to Smith.

Smith also claims as retaliation the fact that "those [ECAMP team] employees ... who did not speak out regarding [the supervisor's] actions ... continued on with the ECAMP work through [consulting firm "B"]. Smith is apparently claiming that the supervisor committed an act of retaliation by not hiring her to work at consulting firm "B." There is no indication, however, that Smith applied for a job with consulting firm "B," nor is there any reason to believe that LMER should be held responsible for the hiring practices of consulting firm "B." Consequently, I find no evidence of retaliation in this assertion.

Conclusion

The evidence clearly establishes that Smith's disclosures were not a contributing factor in her transfer to part-time work. Given the supervisor's determination to take the ECAMP contract elsewhere, the loss of Smith's position as a subcontractor of LMER was inevitable. Accordingly, her complaint will be denied.

It Is Therefore Ordered That:

(1) The complaint filed under 10 C.F.R. Part 708 by Alizabeth Aramowicz Smith, OHA Case No. VBH-0025, is hereby denied.

(2) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision.

Warren M. Gray

Hearing Officer

Office of Hearings and Appeals

Date: June 22, 2000

Case No. VBH-0028

April 7, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Dr. Jiunn S. Yu

Date of Filing: July 2, 1999

Case Number: VBH-0028

This decision considers a Complaint filed by Dr. Jiunn S. Yu (Dr. Yu) against the Sandia Corporation (Sandia) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708.

I. Background

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (amended regulations) (definition of retaliation).

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that “apply prospectively in any complaint proceeding pending on the effective date of this part.” 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12,862 (March 15, 1999).

Dr. Yu was employed by Sandia in various capacities from 1979 to March 30, 1995, when he was terminated by Sandia. On April 7, 1995, Dr. Yu filed a complaint under 10 C.F.R. Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In this complaint, Dr. Yu alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement.

The IG began an investigation of Dr. Yu's allegations. However, during the pendency of this investigation, DOE transferred most pending whistleblower investigations to this office. On May 12, 1999, OHA Director Breznay appointed an OHA investigator to complete the investigation of Dr. Yu’s complaint. On July 2, 1999, the OHA investigator issued his Report of Investigation (the Report). The Report found that:

[T]he record strongly indicates that the Complainant disclosed to his Sandia Supervisor, Mr. Finnegan, and to other Sandia Officials on a number of occasions that there was a failure to fulfill a Quality Assurance

obligation to conduct on-site inspections of [Tiger Team Completed Actions]. . . . [H]is disclosure constituted a protected disclosure for the purposes of Part 708.

Report at 9. The Report further found that "the Complainant has met his burden of showing that his protected disclosures . . . were a contributing factor under the provisions of Part 708 to his March 30, 1995 termination from Sandia." *Id.* at 10. Accordingly, the Report concluded that the Complainant had met his burden under 10 C.F.R. § 708.29. However, the Report did not reach a conclusion as to whether Sandia had met its burden of proving, by clear and convincing evidence, that it would have terminated Dr. Yu absent his protected disclosures.

On July 2, 1999, OHA received Dr. Yu's request for a hearing and I was appointed as the Hearing Officer. A hearing was held on December 7, 8, and 9, 1999, in Albuquerque, New Mexico, in which the testimony of 10 witnesses was taken under oath. On January 18, 2000, I closed the record of the present proceeding upon receipt of both parties' written closing arguments.

The present case arises in the context of DOE's increased efforts to address environmental, health and safety concerns. Admiral James Watkins, who served as the Secretary of Energy from 1991 through 1995, ordered "Tiger Teams" to conduct thorough and sweeping inspections of DOE facilities in order to find any environmental, health and safety problems. In 1991, a Tiger Team assessed Sandia National Laboratory (SNL) and found 561 deficiencies. Tr. at 59. Sandia consulted with DOE and agreed to a series of Corrective Action Plans (CAPs). Sandia agreed to implement these CAPs and then submit documentation to DOE to show that each CAP had been satisfactorily implemented. Sandia placed the responsibility for implementing and verifying each CAP with particular line organizations (Owners). Once an Owner completed a CAP, it was supposed to summit a proposed closure package to Sandia's Appraisal Management Office (AMO). Originally, the AMO was responsible for tracking CAPs and verifying that they were sufficiently documented before they were submitted to DOE for verification and closure. The purpose of the closure package was to document that the Owner had implemented the CAP.

During his final 30 months as a Sandia employee, Dr. Yu was employed as Quality Assurance Verifier in the AMO. Dr. Yu's role was to examine proposed closure packages to see if they sufficiently verified the completion of the CAP. If Dr. Yu was satisfied that the proposed package sufficiently documented the completion of a CAP, the CAP was finalized and sent to the DOE for final approval and closure.

II. Analysis

Under the DOE's Contractor Employee Protection Regulations, "the employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . as described under §708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employer by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure . . . ." 10 C.F.R. § 708.29.

Sandia has contended that Dr. Yu did not make any protected disclosures and therefore did not meet his burden of proof. However, the record clearly shows that Dr. Yu had made numerous protected disclosures during his final 10 months as a Sandia employee, including the protected disclosure discussed at length in the Report. For example, the record shows that:

- On June 21, 1994, Dr. Yu sent L. Jay Clise a five page summary of a 96 page package that Dr. Yu had previously submitted to Wendall Jones. This summary clearly expresses Dr. Yu's concern that his supervisor, Daniel Finnegan, had encouraged other Sandia employees to ignore the QA/QI [quality assurance/quality implementation] process.
- Dr. Yu's April 29, 1994 memorandum alleges that Sandia's Management Integration and Implementation Plan (the MIIP) was "mismanaged, confused abuses and manipulated and failed to delineate responsibility and accountability of QA management."

- Daniel G. Pellegrino stated that during Dr. Yu's last year at Sandia, Dr. Yu would call him and express concerns that he did not feel he could close out Tiger Team Action items. Memorandum of September 23, 1996 interview of Daniel G. Pellegrino.
- A June 2, 1994 Memorandum of Record authored by L.J. Clise of Sandia's Audit Center indicates that Clise was aware of Dr. Yu's concerns that (1) he was not being provided with sufficient information to conduct his verifications, and (2) additional quality control measures were needed.
- In a memorandum dated April 29, 1994, entitled "Request for Help" Dr. Yu wrote Jim Martin, Finnegan's supervisor, informing him that problems with the QA/QI processes were "recurring in a wasteful/harmful pattern. . . ."
- On February 3, 1995, Dr. Yu wrote J. Tagnelia, one of Sandia's vice-presidents, claiming that: "[1] a more cost-effective compliance with requirements of 10 C.F.R. 830.120 and 830.310 would come only with an improved understanding that the 2 codes have mutually ensuring goals; and [2] A more time efficient conformance to guidelines of DOE 5700.6C and 5480.19 would come only with an improved understanding that the 2 orders have mutually enhancing objectives."
- A March 22, 1995 memo from John P. Dickey, Sandia's Ethics Director, to Dr. Yu indicates that Sandia's Audit Center had conducted a Special Management Review (SMR) to examine Sandia's authority to close corrective actions to Tiger Team findings at Dr. Yu's request.

Based on the foregoing, I find that Dr. Yu made numerous protected disclosures during the final 10 months of his employment at Sandia.

In most whistleblower cases, it is difficult or impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Therefore, Congress and the courts, recognizing this difficulty, have found that a protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993), *citing McDaid v. Department of Hous. and Urban Dev*., 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, the courts have found that "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F.2d at 148 (8th Cir. 1989).

Since Dr. Yu had made numerous protective disclosures during his final 10 months with Sandia, there was a temporal proximity between his protected disclosures and his termination. Moreover, it is clear that the Sandia managers who decided to terminate him had actual knowledge of this protected activity. I therefore find that he has shown by a preponderance of the evidence that his protected disclosures were a contributing factor to his March 30, 1995 termination by Sandia.

Accordingly, I find that Dr. Yu has met his burden under § 708.29, thereby shifting the burden to Sandia to prove by clear and convincing evidence that it would have taken the same actions without Dr. Yu's protected disclosures. However, I have also found that Sandia has clearly and convincingly proven that its termination of Dr. Yu was motivated by legitimate managerial considerations instead of a desire to retaliate against his protected disclosures. I am therefore denying Dr. Yu's compliant under 10 C.F.R. § 708.30(e).

Dr. Yu was obviously a highly motivated, principled, conscientious, and well intentioned employee. Dr. Yu was sincerely concerned about what he viewed as a weakening of Sandia's and the DOE's commitment to the Tiger Team process and to Total Quality Management principles. (1) The AMO hired Dr. Yu to improve the quality of the AMO's services and by the account of his first supervisor at the AMO, Richard Trager, and of the DOE Official who was then responsible for reviewing the quality of the CAPs submitted to DOE, was highly successful at this endeavor. Tr. at 304, 305. Apparently, prior to Dr Yu's assignment to the AMO, the DOE was unhappy with the quality of the CAPs it was receiving from Sandia. Tr. at 294, 296. In fact the DOE had returned the majority of CAPs Sandia submitted to it finding that they had not been sufficiently documented. The record shows that Dr. Yu had succeeded in

significantly improving DOE's confidence in Sandia's ability to implement CAPs. Tr. at 296, 297.

However, in 1993, the contract with AT&T for the Management and Operation of Sandia National Laboratory terminated. AT&T was then replaced by a subsidiary of Lockheed Martin. Lockheed Martin brought in its own management team and Trager was replaced by Daniel P. Finnegan in early June 1993. Tr. at 538. Apparently there was friction between Dr. Yu and Finnegan from the very start of their relationship. After Finnegan succeeded Trager, he began implementing changes at the AMO. (2)

Dr. Yu was extremely concerned about these changes. As a verifier, Dr. Yu was in a difficult position. He was charged with verifying the accuracy of the CAP's documentation. If he had a concern about a CAP, he needed to be able to frankly communicate that concern to each Owner. Human nature suggests that, at least on some occasions, even the most tactfully and carefully worded negative feedback is less than welcome. As Trager testified:

I think every [corrective] action team owner was objected to the action because they had to work. [sic] So it was a pain in the tail. It was an extra stop. And some of them, they considered it irrelevant. . . . And so I don't know of an action - - of an owner that was happy. They were all unhappy.

Tr. at 294.

It is clear that Finnegan had less confidence in Dr. Yu's ability to manage this difficult role than Trager had. Moreover, the two men had fundamentally conflicting viewpoints concerning Dr. Yu's responsibilities and the functions of the AMO . Dr. Yu wished to continue functioning in the same manner that he had while under Trager's supervision. On the other hand, Finnegan maintained a different vision for the AMO.

For example, Finnegan's conception of Dr. Yu's role in the process differed significantly from that of Dr. Yu. Dr. Yu believed that in order to properly verify a proposed completion package, he often needed access to additional information, including information documenting other CAPs, the completion of which were necessary for the proper implementation of the CAP at issue.

Apparently, Finnegan began receiving complaints from owners who thought that Dr. Yu needed only to consider the information contained in the proposed CAP to determine whether it was adequate. Tr. at 545. Finnegan testified that he ordered Dr. Yu to confine his verification analysis to information contained in the proposed CAP. *Id.* Dr. Yu viewed this as an attempt to prevent him from finding deficiencies in the CAP packages, and an infringement upon the independence he needed to conduct his quality assurance process.

Finnegan also sought to have Dr. Yu give the line organizations written feedback reports on their proposed CAPs. In the past, Dr. Yu had usually supplied his feedback to the line organizations verbally. Tr. at 539. Dr. Yu, contending that preparing written feedback reports was wasteful, initially resisted this new requirement, but began preparing written feedback reports as requested by Finnegan. Dr. Yu claims that Finnegan's motivation for requiring written feedback reports was to retaliate against him for protected disclosures, by setting him up for failure. Tr. at 452.

Sandia contends that Finnegan began receiving complaints about Dr. Yu's written feedback to the line organizations. Sandia accurately claims that Dr. Yu's written feedback memos were often poorly written, poorly organized, and plagued by numerous misspellings. It is clear from the content of those feedback reports that appear in the record that Dr. Yu's written communication skills were poor. Moreover, on some occasions the content of these feedback reports could reasonably be interpreted by their recipients as abusive and personally offensive. It is not clear that this was Dr. Yu's intention.

Moreover, Finnegan testified that he was concerned that Dr. Yu, in conducting his verification process, was reviewing whether the CAPs were likely to mitigate the finding of deficiencies. Tr. at 541-43. Finnegan thought that Dr. Yu should confine his analysis to sufficiency of the owners' documentation that

the CAPs previously agreed upon by Sandia and DOE had been implemented. *Id.* Dr. Yu felt he should be free to express his concerns about the effectiveness of particular CAPs. Tr. at 543. These differences in opinion soon began to escalate and led to the events that cumulated in Dr. Yu's termination by Sandia on March 30, 1995.

On June 18, 1993, just weeks after Finnegan came to the AMO, Finnegan wrote Dr. Yu, stating in pertinent part:

Your review does not include a check of how adequately the corrective action addresses the milestone or finding, or how technically sound the corrective action appears to be. The corrected actions contained in the corrective action plan have previously been accepted by the auditing agency (e.g., DOE) as technically sound and adequate to properly address the corresponding milestone/finding. As 'owner' of the finding, the line organization has the responsibility to insure that the corrective action is technically correct and appropriate. If you have concerns about the technical quality of the corrective action or how well the corrective action addresses the corresponding milestone/finding, please note your comments to the owning line organization on a separate sheet of paper (distinct from your comments to the owning line organization) and forward to me for review and follow-up.

June 18, 1993, Memo from Finnegan to Dr. Yu. Dr. Yu testified that he did not obey this guidance because he felt it violated the independence of the quality assurance process mandated by DOE Order 5700.6C. Tr. at 357-64. On August 13, 1993, Finnegan sent another quite similar memo to Dr. Yu. Tr. at 544. Finnegan testified that Dr. Yu continued to comment to line organizations on the efficacy of the corrective actions. Tr. at 545.

Finnegan testified that in April of 1994, he reviewed a feedback report that Dr. Yu had prepared to send to Wayne Cox. Tr. at 553. Finnegan was concerned that the feedback report was too convoluted and that Cox would not understand it. *Id.* He instructed Dr. Yu not to send it to Cox, but Dr. Yu sent it to Cox anyway. Tr. at 554.

On April 29, 1994, Dr. Yu wrote Jim D. Martin, Sandia's Director of Site Operations, requesting his assistance in clarifying Dr. Yu's role in the quality assurance process. Tr. at 354, 356. On May 5, 1994, Dr. Yu, Finnegan and Martin met to discuss a list of ten concerns prepared by Dr.Yu. Tr. at 180. Among these ten concerns was Dr. Yu's assertion that he needed to be allowed access to all objective evidence associated with the corrective actions he was responsible for verifying. Tr. at 185. According to Dr. Yu, Martin's response to his concerns was to inform him that Finnegan was his supervisor and that he was required to follow Finnegan's directions. Tr. at 183. Dr. Yu felt that Martin was hostile to him at this meeting and attributed this hostility to Dr. Yu's assertion, at the meeting, that Finnegan and Martin did not understand his concerns because they had not been trained in quality assurance. Tr. at 185.

According to Dr. Yu, the April 29, 1994 request and the May 5th meeting between Dr. Yu, Finnegan and Martin provoked an angry response from Finnegan. Tr. at 180. Dr. Yu contends that the day after the meeting, May 6, 1994, Finnegan came into Dr. Yu's cubicle, "stared at me with extreme anger and said, 'You asked for it! You are cutting your own throat'" and then handed him a memo. May 9, 1994 Memorandum from Dr. Yu to Martin, Tr. at 180, 366. The record shows that on May 6, 1994, Finnegan wrote Dr. Yu a memo instructing him not to send out correspondence without having it first approved by Finnegan. Finnegan testified that the May 6th memorandum was motivated by Dr. Yu's transmission of the feedback report to Cox against Finnegan's orders. Tr. at 554. Dr. Yu felt, and still strongly feels, that Finnegan was trying to suppress his freedom of speech and had no right to review his correspondence. Tr. at 367. Dr. Yu further testified that he refused to abide by those instructions given in the May 6, 1994 memorandum which he felt violated DOE's quality assurance order. Tr. at 369.

On May 24, 1994 Finnegan wrote Dr. Yu a memo instructing him to make specific changes to several feedback reports. For example, Finnegan instructed Dr. Yu to:

- "Confine both your review and your comments on the Feedback report to an objective review of the

evidence as it supports or fails to support the corrective action called for in the corresponding milestone." (Emphasis in the original).

- "Avoid any reference to the appropriateness of ownership or lack thereof."
- "Avoid any reference to your not being permitted to review entire package or evidence previously submitted and accepted. Likewise, avoid any reference to individuals . . . not providing you with additional evidence you feel you need. As we have discussed several times, your responsibility is to conduct a review of new documentation submitted, not to review evidence previously reviewed and accepted."
- "Avoid any reference to cost or budget as this is beyond the scope of your review."
- "Avoid any reference to the SCARB (Sandia Corrective Action Review Board) as their activities are also beyond the scope of your review. If you have concerns with how the SCARB conducts its activities, I will be happy to discuss these with you. If the SCARB is acting inappropriately, I will certainly bring this to the attention of Jim Martin, the SCARB chair."
- "Avoid using terms such as 'Owner's Overseeing Executive' or 'Owner's Supervising Executive."

Dr. Yu interpreted this memorandum as an attempt to discredit and destroy his quality assurance process. Tr. at 372. Dr. Yu chose to ignore those portions of this memo directing him to act in a manner he considered to be contrary to the spirit of DOE quality assurance orders. Tr. at 376-79, 563. Dr. Yu raised concerns to Sandia management about: (1) these limitations on his conduct, (2) the fact that that Sandia's verification process did not implement each of the ten quality assurance (QA) criteria set forth in DOE Order 5700.6C, and (3) the DOE's delegation to Sandia of the inspection authority for all but the highest priority CAPs. As a result, Martin requested that Sandia's Audit Services Department (Audit Services) conduct a Special Management Review (SMR) of the Tiger Team Corrective Action Verification Process. That review was promptly conducted and on June 1, 1994, Audit Services issued a report of the SMR's findings. Audit Services did not find that the delegation of inspection authority to Sandia violated any laws, rules or regulations. Audit Services also found that "DOE Order 5700.6C does not mandate the use of the ten QA criteria in every process." SMR Report at 5. However, Audit Services found that:

The verifier [Dr. Yu] should be allowed access to all objective evidence associated with the corrective action. Milestones might be independent from each other, but they are not independent from the entire corrective action. As such, it may be necessary for the verifier to review evidence from prior milestones to determine the context of the corrective action and evaluate the action accordingly.

Id.

In August of 1994, Finnegan and Dr. Yu met to discuss the results of Dr. Yu's FY94 performance review. During this review, Dr. Yu was accused of repeatedly failing to follow directions provided by Sandia Management and was told to comply with these instructions in the future. Dr. Yu was also reminded that many of his feedback reports contained comments that were not pertinent and germane to his review process and was instructed to avoid such comments in the future.

On August 19, 1994, Finnegan again wrote to Dr. Yu, ordering him to restrict his comments in feedback reports to relevant and germane issues. Tr. at 583.

On October 6, 1994, Martin wrote to Finnegan complaining about the accusatory and judgmental tone of some of Dr. Yu's comments in a feedback report that Dr. Yu had written to Martin. Tr. at 589-90.

By early 1995, the relationship between Dr. Yu and his managers had deteriorated to an intolerable level. Dr. Yu obviously distrusted his managers. Nor did he harbor an abiding respect for his managers. Instead, he felt that their actions were illegal or immoral and refused to cooperate with them. Moreover, it appears that Dr. Yu developed an unprofessional attitude towards his managers and coworkers.

In January of 1995, Finnegan and Dr. Yu met to discuss the results of Dr. Yu's FY 1995 mid-year performance review. During this review, Dr. Yu was again accused of repeatedly failing to follow

directions provided by Sandia Management and was again told to comply with these instructions in the future. Dr. Yu was reminded again that many of his feedback reports contained comments that were not pertinent and germane to his review process and was again instructed to avoid such comments in the future.

On January 24, 1995, Dr. Yu sent an owner of a corrective action, Dick Fate, a feedback report which had been reviewed and approved by Finnegan. Tr. at 605. In February 1995, Finnegan received both a written complaint and a telephone call from Fate about this report. Tr. at 606. Fate contended that the feedback report was very derogatory and inflammatory, and contained unsubstantiated accusations. Tr. at 607. Finnegan discussed Fate's concerns with Dr. Yu, indicated that he would handle the matter, and instructed Dr. Yu to refrain from further contact with Fate. Tr. at 607. Soon thereafter, Dr. Yu telephoned Fate, in direct contravention of Finnegan's instructions. Tr. at 152, 153, 607. A lengthy and heated conversation between Dr. Yu and Fate ensued. Tr. at 146, 149. At the hearing, Fate testified that Dr. Yu treated him in a highly unprofessional manner. Tr. at 151.

On February 17, 1995, Dr. Yu prepared a follow-up feedback report to Fate. This two page memo contained a substantial amount of unprofessional invective. For example, this memo states:

I had by then concluded that you were as corrupt (i.e. absence of integrity, disregarding quality processes, contemptuous of laws, regulations, commitments, —, arrogant of your SNL authority, failure as a manger [sic] or leader, no respect for the individuals you think are "below you," and so on) as Mr. Blejwas , as I had painfully experienced last year.

February 17, 1995 Memorandum from Dr. Yu to Dick Fate at 2.

Apparently this communication was intercepted by Finnegan, who prevented its delivery to Fate. Tr. at 537, 608. On February 24, 1995, Finnegan wrote to Dr. Yu about this memo, stating in pertinent part:

Much of your Feedback memo is of concern to me, but the last two paragraphs are particularly disturbing. These two paragraphs in your feedback memo to Mr. Fate are not supportable, violate the guidelines for corrective action feedback, and are clearly contrary to acceptable standards for dealing with fellow employees. I will not tolerate the further publication or transmittal of such statements from this organization and I will not allow your Feedback memo to be forwarded to Mr. Fate.

February 24, 1995 Memorandum from Finnegan to Dr. Yu.

On February 25, 1995, Martin wrote Dr. Yu, stating in pertinent part:

[I]t appears that you have used on several recent occasions verbiage which I consider accusatory, rude and insulting in your Feedback to various corrective action owners. . . . I interpret some of your comments as accusations of deliberate malfeasance or misfeasance and thus tantamount to an accusation of criminal conduct. If you believe that any such managerial actions are deliberate malfeasance or misfeasance, then I insist that you take this information to the DOE Office of Inspector General. . . .

On March 3, 1995, Dr. Yu wrote Martin, informing him that "about 07:30 today, I told Mr. Finnegan that I would be sending [the February 17, 1995 Feedback Memo] to Mr. Fate unless he shows me the basis of his self-indulged SMA [Sandia Management Authority] to suppress Sandians' human rights to communicate." Later that day, Martin wrote Dr. Yu a memo in response reminding him that the Sandia Code of Conduct prohibits the use of insulting, abusive, or offensive language.

On March 7, 1995, Dr. Yu was instructed to use a specific automated form to track and conduct follow-up on pending corrective actions. Tr. at 614. Dr. Yu expressed resentment at having to use the automated form, which he considered unnecessary and redundant, and did not use it as instructed. Tr. at 423, 614-15. At the hearing, Dr. Yu testified that he thought that the adoption of the form "was a provocation to induce me into insubordination" since the information Dr. Yu was expected to put in the form was already

available though the SIMS. Tr. at 423.

On March 10, 1995, Dr. Yu was instructed to meet with Finnegan and Martin in order to discuss the results of his performance review. Dr. Yu attended the meeting but refused to stay and listen while Martin explained the contents of a Performance Action Plan (PAP) that had been developed for Dr. Yu by Sandia management. Tr. at 213-14. Dr. Yu compared this meeting to a "lynching." Tr. at 214, 218.

On March 13, 1995, Dr. Yu was again instructed by Martin to review his PAP with Finnegan. Dr. Yu attended this meeting, but again refused to listen while Finnegan explained the PAP.

On March 15, 1995, Finnegan became aware that Dr. Yu had been regularly submitting feedback reports directly to line organizations against Finnegan's orders and the provisions of his PAP. Dr. Yu informed his management that he refused to follow Finnegan's directive requiring him to submit feedback reports to Finnegan for approval before distributing them to line organizations.

On March 21, 1995, Finnegan and Dr. Yu met to discuss Dr. Yu's PAP. At this meeting, Dr. Yu refused to accept the terms and conditions of the PAP and stated that he intended to continue sending feedback reports directly to the line organization, and to continue using his own follow-up procedures instead of the automated system implemented by Finnegan.

On March 30, 1995, Dr. Yu was terminated by Sandia for insubordination.

Dr. Yu was extremely and unambiguously insubordinate. For example, Dr. Yu flagrantly disobeyed his supervisor's orders to route his feedback reports though him. In April of 1994, Finnegan specifically prohibited Dr. Yu from sending a feedback report that Dr. Yu had prepared for Wayne Cox. Tr. at 553. Dr. Yu sent the feedback report anyway. Tr. at 554. Apparently this was not an isolated occurrence. The record shows that Dr. Yu sent a feed back report out on January 1, 1995, without routing it through Finnegan. Tr. at 603-04. On March 15, 1995, Finnegan became aware that Dr. Yu had been flagrantly disobeying his instructions to route feedback reports through him on a regular basis. Tr. at 621. As noted above, valid management reasons led Finnegan to require Dr. Yu to route his feedback reports through him. Finnegan had been receiving complaints about the feedback reports from owners, and the feedback reports contained in the record show that Dr. Yu had poor written communication skills and often did not exhibit sufficient tactfulness. Given these concerns, Finnegan was obviously justified in requiring Dr. Yu to submit feedback reports for his review.

On another occasion, in February of 1995, Finnegan specifically instructed Dr. Yu to refrain from contacting Dick Fate. Tr. at 605, 607. Clearly, Finnegan, as Dr. Yu's manager, had a right to intercede in a personality conflict between his employee and one of his organization's customers. Yet, Dr. Yu flagrantly violated Finnegan's instructions by telephoning Fate soon thereafter. Tr. at 149, 607.

In March of 1995, Dr. Yu was ordered to use a specific automated form to track and conduct follow- up on pending corrective actions. Tr. at 614. It was clearly within the purview of Sandia management's discretion to automate this tracking and control process. Yet Dr. Yu refused to comply with this order. Tr. at 423, 614-15.

Perhaps the most disturbing aspect of Dr. Yu's insubordinate conduct involved the Personnel Action Plan (PAP) that Sandia Management had prepared for Dr. Yu. A PAP is an important device used in corporate personnel relations. PAPs are typically reserved for serious personnel problems. *See* *Eugene Dreger*, OHA Case No. VBH-0021 (February 7, 2000). The PAP prepared by Sandia management was lengthy and comprehensive, but was also very reasonable in its terms. Yet, Dr. Yu refused to acknowledge or comply with the terms of his PAP. Tr. at 622-23.

Dr. Yu's repeated failure to abide by the reasonable and legitimate instructions of his managers clearly constitute insubordination. It is well settled that "an employee's insubordination towards supervisors and coworkers, even when engaged in a protected activity, is justification for termination." *Kahn v. United*

States Secretary of Labor, 64 F.3d 271, 278 (7th Cir. 1995). Given Dr. Yu's continuing insubordination, Sandia was left with no other reasonable option but to terminate his employment.

Dr. Yu contends, however, that since Sandia was acting outside of its authority, he did not have to comply with Finnegan's and Martin's orders. Tr. at 360-67. This assertion is without merit. The DOE Contractor Employee Protections Program Regulation in effect at the time of Dr. Yu's termination did not provide Dr. Yu with the right to refuse to submit his feedback reports for his supervisor's review. Nor do they excuse his failure to acknowledge and comply with the terms of his PAP. The former 10 C.F.R. § 708.5(a)(3)(i) protects those employees who "refuse to participate in an activity, policy, or practice when, (i) such participation (A) constitutes a violation of a Federal health and safety law, or (B) causes the employee to have a reasonable apprehension of serious injury . . . ." Clearly, routing his feedback reports through his supervisor and acknowledging and complying with the terms of his PAP would not have violated Federal law. Nor would it have placed him in harm's way. Instead, routing his feedback reports through his supervisor was a reasonable request on the part of Sandia management. After all, as Dr. Yu's supervisor, Finnegan was responsible for maintaining the quality of the AMO's output while preserving a good working relationship with the owners.

Dr. Yu also attempts to evade responsibility for his misconduct by attributing it to an unspecified mental condition which he claims was caused by Sandia's harassment. However, Dr. Yu failed to offer any evidence other than his own testimony in support of this assertion. In the absence of expert medical testimony in support of this theory of causation, I am disinclined to grant it any weight.

Dr. Yu also claims that Sandia management deliberately provoked his insubordination. Tr. at 124. However, he has failed to explain or support this theory and I find it is not supported by any evidence in the record. Moreover, while Part 708 protects employees from retaliation for protected activity, it does not excuse intolerable conduct on the part of an employee.

Even if an employer retaliates against an employee for making a protected disclosure, an employee should conduct himself in a professional manner. It is well settled that whistleblower laws are not meant to protect employees from their own misconduct. *Carr v. Social Security Administration*, 185 F.3d 1318, 1325 (Fed. Cir. 1999); *see also*, *Watson v. Department of Justice*, 64 F.3d 1524, 1527 n.3 (Fed. Cir. 1995) (citing cases for the proposition that whistleblowing does not shield employees who engage in wrongful conduct); *Marano v. Department of Justice*, 2 F.3d 1137, 1142 n. 5(Fed. Cir. 1993) (whistleblower protection laws are not intended to protect employees from the consequences of their own misconduct). Therefore, even if Sandia had "provoked" Dr. Yu, he should still be held accountable for his subsequent actions. Accordingly, I find that Sandia has clearly and convincingly shown that it would have terminated the employment of Dr. Yu even if he had not made protective disclosures.

III. Conclusion

Dr. Yu's decision to ignore his managers' reasonable instructions provided Sandia with good cause to terminate him. Accordingly, I find that the Sandia Corporation has proven by clear and convincing evidence that it would have terminated Dr. Jiunn S. Yu without his protected disclosures.

It Is Therefore Ordered That:

(1) The Complaint filed by Jiunn S. Yu against the Sandia Corporation, on July 2, 1999, Case No. VBH-0028, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: April 7, 2000

(1)It is clear that Dr. Yu's disappointment in Sandia's response to his concerns led him to lose respect for some of his managers. Dr. Yu obviously believed that his managers lacked the moral authority to give him binding directions. It is also clear that Dr. Yu sincerely believed that there were improper motives behind some of Sandia management's decisions that affected him. Dr. Yu appropriately elevated these concerns up his line of command, to Sandia's legal department, to Sandia's ombudsman, and to Sandia's Human Resource Department. Dr. Yu was obviously disappointed in these organizations' responses to his concerns. (In the case of the caustic response provided by Sandia's legal department, quite justifiably so).

(2)Apparently, as a result of a number of factors, the emphasis on the Tiger Team Corrective Actions was somewhat reduced around this time as well.

Case No. VBH-0034

September 29, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Jennifer S. Gentry

Date of Filing: August 24, 1999

Case Number: VBH-0034

This Initial Agency Decision concerns a whistleblower complaint filed by Jennifer S. Gentry, a former employee (hereinafter the employee) of Golder Federal Services Incorporated, formerly Golder Associates, Inc. (Golder). Golder was a subcontractor for EG&G, then the managing and operating contractor at DOE's Rocky Flats site (hereinafter the term "contractors" refers to both Golder and EG&G). The employee alleges that she made protected disclosures concerning health and safety matters, and as a result, the contractors took retaliatory actions against her. For the reasons explained below, I have determined that the employee's request for relief should be denied.

I. Background

The Department of Energy (DOE) Contractor Employee Protection Program governs this matter. The DOE recently revised the regulations governing this program. See 64 Fed. Reg. 12862 (March 15, 1999) (amending 10 C.F.R. Part 708, effective April 14, 1999) (the whistleblower regulations). Under the regulations, the DOE's Office of Hearings and Appeals (OHA) conducts investigations, issues initial agency decisions, and hears appeals.

The whistleblower regulations prohibit a contractor from retaliating against a contractor employee who engages in certain protected conduct. Protected conduct includes disclosing information that the employee believes reveals a substantial violation of a law, rule, or regulation. If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish, by a preponderance of the evidence, that (1) the employee made a protected disclosure and (2) the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, the burden shifts to the contractor to prove, by clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure. If the employee prevails, the OHA may order employment-related relief such as reinstatement and back pay.

The events involved in the complaint took place during the period August 1993 through December 1993. On August 10, 1993, the employee began working for Golder in a temporary job as a "Health and Safety Specialist" at the Main Decontamination Facility at Rocky Flats. The EG&G project for which she was hired was scheduled to last through June 30, 1995. However, on November 23, 1993, the employee received a poor performance evaluation, and on December 10, 1993, her employment with Golder was terminated.

On February 3, 1994, the employee filed a Part 708 complaint with the DOE Rocky Flats Manager,

seeking relief against Golder and EG&G for alleged retaliatory acts including her termination,"poor employee evaluations, chastisement and reprimands...." The complaint does not allege any specific protected disclosures, other than "reporting to and providing information to EG&G Radiological Engineering regarding Health and Safety issues and violations." The employee's complaint sought formal written apologies from Golder and EG&G, reinstatement to her former position as an HSS at the same rate of pay, and back pay from the date of her termination to the date of reinstatement. At some point in 1994, the complaint was referred to DOE's Office of Inspector General (OIG) for investigation under Part 708. The OIG did a detailed investigation of the allegations in the complaint and the contractors' affirmative defenses. The investigative record includes 14 interviews of persons who had personal knowledge of the events involved, and nearly 40 documents.

On April 6, 1999, the DOE Assistant Inspector General for Inspections (Assistant IG) issued a "Report of Inquiry and Recommendations," based on the record compiled during the investigation of the complaint. The report concluded that the complaint was without merit. The report found that the employee did communicate concerns to contractor management officials including safety issues that were protected disclosures under Part 708. While the report did not specifically discuss whether the employee met her burden before considering the contractors' affirmative defenses, there was a "temporal proximity" between the alleged protected disclosures and the alleged acts of retaliation, and this was sufficient to shift the burden to the contractors to show that they would have taken the same actions in the absence of any protected disclosures. Based on the evidence developed during the investigation, the Assistant IG was clearly convinced that the contractors did prove that they would have taken the same actions against the employee in the absence of any protected disclosure. The report determined that the employee made significant, job-related errors that resulted in the circulation of misinformation and unnecessary confusion, and that the employee created additional problems by failing to follow established procedures. According to the report, the employee's low performance evaluation and subsequent termination were justified by the facts in evidence, and were not based on retaliation. The report advised the employee and the contractors of their rights to a hearing. None of the parties requested a hearing. Accordingly, the OHA Director appointed me to review the investigative report and issue an initial agency decision.

II. Analysis

The employee has not requested a hearing, nor submitted any evidence and arguments that would contravene the determination in the investigative report to recommend against relief under Part 708. I have carefully reviewed the report and the lengthy investigative record on which it is based. I find that the findings and conclusions in the report have a rational basis in fact, are supported by substantial evidence, and I agree that the complaint for relief under Part 708 is without merit. Therefore, based on my independent consideration of the record in this matter, I find that the disposition recommended in the report should be adopted as the initial agency decision in this matter.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by Jennifer S. Gentry, OHA Case No. VBH-0034, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party’s receipt of the initial agency decision.

Thomas O. Mann

Hearing Officer

Office of Hearings and Appeals

Date: September 29, 1999

Case No. VBH-0035

September 22, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Theresa G. Joyner

Date of Filing: August 24, 1999

Case Number: VBH-0035

This Initial Agency Decision concerns a whistleblower complaint filed by Theresa G. Joyner, a former employee (hereinafter the employee) of NCI Information Systems, Inc. (NCI) (hereinafter the contractor). As explained below, the employee's request for relief is denied.

I. Background

The Department of Energy (DOE) Contractor Employee Protection Program governs this matter. The DOE recently revised the regulations governing this program. See 64 Fed. Reg. 12862 (March 15, 1999) (amending 10 C.F.R. pt. 708) (the whistleblower regulations). Under the regulations, the DOE's Office of Hearings and Appeals (OHA) conducts investigations, issues initial agency decisions, and hears appeals.

The whistleblower regulations prohibit a contractor from retaliating against a contractor employee who engages in certain protected conduct. Protected conduct includes disclosing information that the employee believes reveals a substantial violation of a law, rule, or regulation. If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish, by a preponderance of the evidence, that 1) the employee made a protected disclosure and 2) the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, the burden shifts to the contractor to prove, by

clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure. If the employee prevails, the OHA may order employment-related relief such as reinstatement and backpay.

In this case, the contractor performed work for the DOE on site. The DOE funded the contract incrementally. Over the period 1995 to 1997, the DOE reduced the incremental funding, resulting in NCI layoffs in 1995, 1996, and 1997.

During the period 1995 to 1997, the employee worked in the contractor's abstracting and indexing (A&I) group, which abstracted and indexed various technical reports. In addition to the A&I work, the employee sometimes worked on other projects. As of May 1997, the employee was one of the three remaining employees in the A&I group.

In April 1997, the DOE decided not to provide any further funding under the contract for the A&I work, and the DOE notified the contractor. On May 1, 1997, the contractor sent a layoff notice, effective May

23, 1997, to the three employees. The notice cited the DOE's decision not to fund any further A&I work.

On May 12, 1997, the employee filed a Part 708 complaint, seeking relief against the DOE for its elimination of the A&I work. Specifically, the employee challenges the DOE's decision to perform A&I work in-house and through another contractor. The employee's complaint also seeks relief against the contractor for the layoff and for various matters that occurred prior to her layoff.

A DOE office investigated the complaint and issued a report. The report concluded that the complaint was not meritorious. The report addressed the two alleged retaliations for which the complaint was timely, (i) the cessation of the A&I work and the resultant layoff, and (ii) the employee's removal, two months earlier, from a committee preparing an energy quality award application. The report found that, even assuming that the employee had made a protected disclosure, the employee had not demonstrated that the protected disclosure was a contributing factor to the complained of actions. The report advised the employee and the contractor of their right to a hearing. Neither party requested a hearing. Accordingly, the OHA Director appointed me to review the investigatory report and issue an initial agency decision.

II. Analysis

The employee's principal complaint, i.e., that the DOE should have continued to fund the contractor's A&I work, is not the proper subject of a Part 708 complaint. Part 708 applies to contractor employee complaints about contractor retaliations; part 708 does not apply to contractor employee complaints about DOE decisions. See George E. Parris, IG Complaint No. HG97-0006 (October 15, 1998) (decision by Deputy Secretary affirming dismissal of complaint).

Moreover, to the extent that the employee's complaint is directed at the contractor's layoff decision, the employee is not entitled to relief. The employee herself maintains that the layoffs resulted from the DOE's elimination of the A&I work. Indeed, the term of the contract ended two months later. The employee has not argued that, in the absence of the protected disclosure, the contractor would have retained the employee despite the elimination of the A&I work. Accordingly, the contractor has met its burden of demonstrating that the layoff would have occurred in the absence of the protected disclosure.

Finally, the employee is not entitled to relief with respect to her removal from a team preparing an energy quality award application. The employee has failed to establish that her removal was a "retaliation" under part 708. Under part 708, a retaliation is an employment-related "negative action" with respect to the employee's "compensation, terms, conditions, or privileges of employment." 64 Fed. Reg. 12862, 12871 (1999) (to be codified at 10 C.F.R. § 708.2 (definition of "retaliation")); see also 10 C.F.R. § 708.4 (1999) (former definition of "discrimination"). The employee's removal from the team did not affect her pay and benefits, and there is no evidence that the employee viewed the removal as a negative action. In fact, one of the employee's complaints was that the contractor assigned her non A&I work. See Investigatory Report, Ex. A-1 at 1 & 2; Ex. A-2 at 1,3. Accordingly, the employee has not met her burden of demonstrating that her removal from the team was a retaliation under part 708.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by Theresa G. Joyner, OHA Case No. VBH-0035, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Janet N. Freimuth

Hearing Officer

Office of Hearings and Appeals

Date: September 22, 1999

Case No. VBH-0036

September 23, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Complainant: XXXXXXX

Date of Filing: August 24, 1999

Case Number: VBH-0036

XXXXXXX (the complainant) filed a complaint against his employer, Fluor Daniel, Inc. (FDI), and two other DOE contractors, Duke Engineering & Services (DE&S) and TRW Environmental Safety Systems (TRW), pursuant to the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. In that complaint, the complainant alleges that he suffered reprisals because he had made a disclosure that is protected by Part 708.

I. Background

The Contractor Employee Protection Program was established to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those “whistleblowers” from consequential reprisals by their employers. DOE may order remedial action if a DOE contractor takes adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee made a protected disclosure. The complainant under Part 708 has the burden of establishing by a preponderance of the evidence that he or she made a protected disclosure, and that such act was a contributing factor to one or more acts of retaliation. If the complainant makes such a showing, the contractor can avoid liability by proving by clear and convincing evidence that it would have taken the same action without the employee's disclosure. 10 C.F. R. § 708.29.

The complainant moved from FDI's XXXXXXX office to XXXXXXX in August 1992 to become FDI's XXXXXXX of the Multi-Purpose Canister System (MPC) project. The XXXXXXX office was closed on October 1, 1994. Some personnel were transferred to TRW's facility in XXXXXXX. However, the complainant was not selected for the XXXXXXX office and returned to XXXXXXX in July 1995. The complainant alleges that he made a number of protected disclosures while employed on the MPC project and that it was because of these disclosures that he was not selected for transfer to XXXXXXX. As a result, he had the expense of maintaining two households and lost a 5% locality pay differential upon moving to XXXXXXX. He also complains that he was not reimbursed for certain moving expenses and that his company credit card was canceled.

The Office of Inspector General investigated the complaint and issued a Report of Inquiry and Recommendations (Report). The Report assumed for the purpose of its analysis that the

complainant had made protected disclosures and that they contributed to the alleged adverse action that was taken against him. Even with these assumptions, the Report concluded that the contractors would have taken the same action even in the absence of the assumed protected disclosures. Accordingly, the Report

found that the complaint was not meritorious.

The OHA Director appointed me the hearing officer in this case. As neither party requested a hearing, I have conducted an independent analysis and issue this initial agency decision based upon the Report and other materials in the investigative file. I shall not repeat the detailed analysis contained in the Report which is hereby incorporated by reference.

II. Analysis

The Report did not make any finding on whether the complainant had made disclosures that were protected by Part 708. I have reviewed the matter, and I find that certain disclosures do fall within the scope of Part 708. These disclosures include allegations that DE&S charged the MPC project for moving expenses and salaries for work that was not attributable to that project and that it allegedly double billed for some work. Other disclosures, however, do not appear to come within the scope of Part 708. These include allegations that certain "value engineering" should have been conducted to control costs and that the review by a supervisor of an employee's work on a procurement package constituted a conflict of interest. These are primarily management issues that are committed to management discretion. They do not the type of mismanagement necessary to bring them within the scope of Part 708.

The Report also did not make any finding on whether the protected disclosures contributed to the adverse action that was allegedly taken against the complainant. I find nothing in the record to suggest that the disclosures played any role in the matter. Moreover, as set forth in detail in the Report, and as summarized below, FDI had good reasons for the action that it took. Consequently, the complainant has not shown by a preponderance of the evidence that the disclosures contributed to the allegedly adverse actions.

Finally, the Report found that even assuming that the disclosures contributed to the adverse actions, the contractors had convincingly shown that they would have taken the same action in the absence of the disclosures. With respect to not being selected for transfer to the XXXXXXX office, the record indicates there was intense competition for the few slots available in the XXXXXXX office, and that only one FDI employee was among the nine employees to be transferred. There is substantial evidence in the record that the complainant's skills and experience did not fit the skills needed for the XXXXXXX project as well as those of other employees. I agree with the Report's conclusions in this regard. Consequently, the contractors have demonstrated that they would not have transferred the complainant to XXXXXXX even without the disclosures. Since there is no merit to the complainant's claim that he was retaliated against in not being selected for the XXXXXXX office, there is also no merit to his claim for the cost he voluntarily incurred in maintaining two households or for the loss of the pay differential.

The Report also found no merit to the complainant's claim that cancellation of his corporate credit card and non-payment of certain moving expenses ($395) constituted retaliation. The record shows that the credit card was canceled by American Express because he was delinquent in his payments. The disallowed moving expenses were beyond the $1,500 allowance under company policy for miscellaneous expenses. I agree with the Report's conclusion that FDI has shown by clear and convincing evidence that it would have taken these actions even if the complainant had not made the disclosures.

In sum, the complainant has not shown that the protected disclosures that he made contributed to any of the adverse actions that he claims were taken against him. The contractors have shown by clear and convincing evidence that they would have taken the same actions even if there had been no disclosures. Accordingly, Mr. XXXXXXX's the request for relief under Part 708 should be denied.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by XXXXXXX, OHA Case No. VBH-0036, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Bryan F. MacPherson

Assistant Director

Office of Hearings and Appeals

Date: September 23, 1999

Case No. VBH-0042

March 1, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Hearing Officer Decision

Name of Petitioner: Richard R. Sena

Date of Filing: February 24, 2000

Case Number: VBH-0042

This Decision involves a complaint filed by Richard R. Sena (Sena) against Sandia Corporation under the Department of Energy's Contractor Employee Protection Program. That program is codified at Part 708 of Title 10 of the Code of Federal Regulations. 10 C.F.R. Part 708. In his complaint, Sena maintains that he was retaliated against and ultimately constructively discharged for disclosing that laboratory personnel were using the Internet improperly at Sandia National Laboratories.

I. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect such "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Part 708 of Title 10 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. §§ 708.5(a)(l), (a)(3). An employee of a DOE contractor who believes he has been discriminated against in violation of the Part 708 regulations is entitled to receive an extensive series of protections. He may file a whistleblower complaint with the DOE. As part of the proceeding, he is entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). 10 C.F.R. §§ 708.21-.23. After the investigator's report on the complaint is issued, an OHA Hearing Officer will generally conduct an independent fact-finding and evidentiary hearing. 10 C.F.R. §§ 708.24-.25. The Hearing Officer issues a formal, written opinion on the complaint. 10 C.F.R. § 708.31. Finally, a party may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. § 708.32.

II. Factual Findings

Sena is a former employee of Sandia Corporation at the Sandia National Laboratories. He worked there for

more than 25 years. In 1995, he noticed that a number of employees who worked in close proximity to him were using the Internet connection in their offices to view sexually explicit materials in violation of Sandia policy. Sena reported this information to the Sandia ethics office. Sandia conducted an investigation and discovered that six people -- one Sandia employee and five contractor (subcontractor to DOE) employees -- were using the Internet connection to view sexually explicit materials on the office computers. At the time, such an offense was grounds for dismissal. A senior manager, Neil Hartwigsen, confronted each of the five contractor employees with information that Sandia computer security personnel had compiled about their access to sexually explicit web sites from Sandia offices. Each agreed with the information provided by the computer security personnel. Hartwigsen took each of their badges and told each that he was fired and that he would not be coming back to work at Sandia. Tr. at 432. At the time of discharge, Hartwigsen told them that they would not be allowed to work in the same area at Sandia again. Tr. at 442, 443. The one Sandia employee was on vacation and unreachable. When he returned, he was not fired because the policy at Sandia had changed in the interim to allow penalties less severe than termination.

At the time of this incident, Sena was told by Hartwigsen that the employees who were fired would never return to work at Sandia, so that he would have no interactions with them while at work. At the time, Hartwigsen believed that they would not return to that work environment, Tr. at 458, and that Sena would never have a working relationship or contact with these employees again. Tr. at 459-60. On the evening of the day the employees were fired, someone blew up Sena's mailbox in front of his home. This was particularly traumatic to Sena because (1) his daughter witnessed it and was extremely upset, and (2) he reasonably felt it was a threat to the safety of his family. At the time, Sena testified that a security officer suggested that he obtain a gun for protection. In addition, a number of threatening telephone calls were made to Sena at his residence.

In July 1998, two of the contractor employees discharged for viewing sexually explicit Internet sites returned to the Sandia site as employees for other contractors (hereinafter referred to as the offending employees). They were permitted access to the same general area in which Sena worked. Sena objected to this and immediately told Hartwigsen that he feared for his safety. Hartwigsen understood from their conversation that Sena feared that some or all of the dismissed employees were out for vengeance. Tr. at 438. Hartwigsen knew about the mailbox incident and some threatening phone calls because Sena had reported these incidents. *Id.* Despite this knowledge, Hartwigsen believed that many of the employees suffered in their lives and jobs because of the dismissals. Tr. at 442. Hartwigsen did not want to deprive them of a livelihood. Tr. at 456. He therefore sponsored the reinstatement of security clearances for a number of these employees so they could resume work at Sandia. Tr. at 467. Hartwigsen allowed them to continue to work at Sandia and to come back into the office space that he controlled. However, he did not allow them to have offices and computers. *Id*. Hartwigsen testified that at the time he thought that he could not prevent these people from returning as new contractor employees, but could deny them office space. Tr. at 454. He now knows that he was mistaken and that he could have prevented the offending employees from having physical access to the Lab site. Tr. at 455. However, Hartwigsen also testified that he did not seek any advice from the procurement or the legal departments at Sandia because he believed he already knew the answer to the question about whether he could remove the offending employees. Tr. at 479-80.

Sena could not accept the stress that the presence of these individuals was causing and, with the approval of Dr. Clevenger, the Sandia Medical Director, went on temporary sick leave in the middle of August 1998. During the course of this leave his condition was monitored by the Sandia Medical department. Nevertheless, Clevenger and Sena both believed that finding a suitable job and returning to Sandia was appropriate. Tr. at 382-87. Clevenger thought that Sena's symptoms had improved somewhat and that Sena wanted to continue working at Sandia. Tr. at 339. Clevenger and Sena set up what they thought was a reasonable return-to-work trial in late August 1998. Tr. at 339. However, that trial lasted just two days, after which Sena returned to sickness absence. Tr. at 340.

At that time, Dr. Clevenger spoke with Hartwigsen and told him that Sena could not work in the same environment as the five employees who were terminated. Tr. at 470. Hartwigsen looked to move Sena to another position where he would not interact with them, Tr. at 567, because at the time, Hartwigsen

believed that he could not ban the offending employees from coming to Sandia. Tr. at 568. The solution that Hartwigsen offered was to transfer Sena, first to one job and then, when Sena rejected that placement, to another, so that some distance (100 yards) was placed between Sena and the offending employees. This would also place Sena in a building where the offending employees would not have a business reason to visit. Sena rejected those two job placements, and Sandia management agreed not to move Sena.

In September 1998, Sena started to see a psychologist, Dr. Clara Farah. Dr. Clevenger had suggested to Sena that his personal physician, Dr. Best, should be consulted to see if he thought Sena should seek some psychological help. Dr. Farah first saw Sena on Sept. 2, 1998. Tr. at 107. Her first tentative diagnosis was anxiety disorder. Tr. at 108. However, shortly thereafter she believed that Post Traumatic Stress Disorder (PTSD) might be the appropriate diagnosis. Tr. at 112. Dr. Farah changed her diagnosis to PTSD by September 15, 1998. Tr. at 141. On Nov. 2, 1998 Dr. Farah wrote to Dr. Best, Sena's personal physician, stating that she believed that Sena suffers from PTSD. Tr. at 141. Dr. Clevenger concurred in that diagnosis. Tr. at 353-54.

By November 1998, all of the medical personnel involved concluded that Sena would be unable to return to work at Sandia. Dr. Clevenger believes that it is a medical probability that had the offending employees not returned to Sandia in 1998, Sena would not be suffering from PTSD. Tr. at 368. However, Hartwigsen maintains that during this period he did not know the degree of impact the presence of the offending employees had on Sena. Tr. at 445, 471, 499. While Dr. Clevenger believes that he told Hartwigsen about the severe discomfort and trauma caused Sena by the presence of the offending employees, Tr. at 365, Hartwigsen believes that conversations between them were limited to discussing whether Hartwigsen could expect Sena to return to work because work was piling up in his absence. Tr. at 588. Hartwigsen testified that: "all of the conversations that I had with Dr. Clevenger were in the vein of: We expect that at some point we'll have this situation under control and he'll be able to come back to work." Tr. at 579. Hartwigsen claims that Dr. Clevenger never told him the extent to which the presence of the two employees was hurting Sena. Tr. at 581.

On April 8, 1999, while he was still on medical absence, Sena requested that he be allowed to retire on disability. Exhibit 26. Dr. Clevenger recommended that Sena be allowed to retire on full disability in a memorandum he sent to the Employee Benefits Committee on May 4, 1999. Exhibit 28. The Employee Benefits Committee, which consisted of three Sandia managers, one of whom was Hartwigsen, approved full disability retirement for Sena. This was communicated to Sena in a letter dated June 3, 1999, from the secretary of the Committee. Exhibit 16. That retirement was effective November 2, 1999. In September 1999, Sena filed a complaint under the DOE Contractor Employee Protection Program in which he claimed that he was forced to retire from Sandia because management failed to protect him after he reported the improper use of the Internet at the laboratories.

III. Legal Standards Governing This Case

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[ ] fraud, mismanagement, waste, and abuse" at DOE's government-owned, contractor-operated (GOCO) facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers.

Proceedings under 10 C.F.R. Part 708 offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by providing for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the OHA Director and, when appropriate, the Secretary of Energy or his designee. *See David Ramirez*, 23 DOE ¶ 87,505, Case No. LWA-0002, *affirmed*, 24 DOE ¶ 87,510 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any action, such as discharge, demotion, or any other negative action, against any employee because that employee

has disclosed to an the contractor information that the employee in good faith believes evidences a violation of any law, rule, or regulation, or a substantial and specific danger to employees or public health or safety. 10 C.F.R. § 708.5(a)(1); *see also* *Francis M. O'Laughlin*, 24 DOE ¶ 87,505, Case No. LWA-0005 (1994), *affirmed*, 24 DOE ¶ 87,513 (1995).

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. *See* *Ronald Sorri*, 23 DOE ¶ 87,503, Case No. LWA-0001 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)).

In this case, Sena claims that the actions taken by Sandia lead to his "constructive discharge." Courts considering claims of constructive discharge have required employees to prove that their working conditions were so difficult or unpleasant that a reasonable employee in their shoes would have felt compelled to resign. *Sanchez v. Denver Public Schools*, 16 F.3d 576 (10th Cir. 1998); *Arcy v. American Sheep Indus. Assn*, 981 F.2d 1569 (10th Cir. 1992). The maintenance of an environment so hostile that it leads an employee to conclude that the only reasonable alternative is for the employee to resign may be considered an adverse personnel action for Part 708 purposes. *See* *Kensley v. Diamond Back Services, Inc*., 27 DOE ¶ 88,025, Case. No. AL—95—0009 (1999) (presumption that a resignation is voluntary may be rebutted in Part 708 proceeding by evidence which shows that it was the result of duress or coercion, i.e., a constructive discharge). This is so because "*Retaliation* means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (*e.g*., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) . . . ." 10 C.F.R. § 708.2. The maintenance by an employer of a hostile work environment after a protected disclosure is made is certainly a negative action with respect to the terms and conditions of employment. In fact, a Hearing Officer has held that a Sandia subcontractor's management failure to resolve inter-employee conflicts may be an act of reprisal under DOE regulations. *Luis P. Silva*, 27 DOE ¶ 87,550, Case No. VWA-0039 (2000).

B. The Contractor's Burden

If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d). *See* *Ronald Sorri*, 23 DOE ¶ 87,503, Case No. LWA-0001 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Sena establishes that he made a protected disclosure that was a contributing factor to an adverse personnel action, Sandia must convince me that it would have taken the same actions even if Sena had not raised any concerns. *Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 at 89,034-35, Case No. LWA-0006 (1994).

IV. Whether Sena Has Made A Prima Facie Case of Retaliation

Section 708.5 of the Contractor Employee Protection Program provides that a disclosure is protected if an employee discloses a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5. Such a disclosure must be made to "a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor." *Id*. In this case, there is no dispute that Sena disclosed to his employer that contractors were using the Internet connection that Sandia provided to view sexually explicit materials while at Sandia. At the time this was extremely serious, for Sandia policy

dictated that anyone doing such action should be fired. Thus this disclosure was a disclosure of a substantial violation of Sandia rules and clearly falls under § 708.5 as a protected disclosure. Sandia concedes this to be true. Post-hearing Brief of Sandia Corp. at 15.

It is also clear that the disclosure was a contributing factor to an act of retaliation. At the time Sandia management allowed the offending employees to return to the Sandia site, management clearly had in mind the disclosure of the incidents that occurred in 1995, because but for the disclosure, management would not have had to sponsor new security clearances for these individuals and would not have had to consider whether they should be allowed to return to the site.

I find that Sandia management's failure to remove the offending employees and alleviate the hostile work environment for Sena indicates an intent to harm Sena despite testimony that management had no such intent. *See Azzaro v. County of Allegheny*, 110 F.3d 968 (3rd Cir. 1997). Hartwigsen testified that when he allowed the offending employees to return to work at Sandia, he had no intent to harm Sena. I agree. There was no indication at that time that their return would cause Sena such trauma. Hartwigsen also testified that had he known that any harm would have occurred, that he "would have pursued other means to keep those people from coming on site." Tr. at 577. Dr. Clevenger, a senior management official at Sandia and its medical director, also did not know the extent of Sena's trauma in August 1998. But as September turned into October, and October turned into November, all the medical personnel involved knew how traumatic this situation was for Sena. Dr. Clevenger believes he told Hartwigsen about the extent of the trauma, but Hartwigsen denies this. However, even if there were miscommunication between senior managers at Sandia, that does not mean that Sandia should escape responsibility for not alleviating the hostile environment that it created. By early November 1998 at the latest, it should have realized the hostile work environment prevented Sena from returning to work. This is especially true because the remedy was simple and straightforward: remove the offending employees. There was nothing to "work on" or "get control of," and Sandia management, if not Hartwigsen, knew how to do this when it wanted to. *See* *Luis P. Silva*, 27 DOE ¶ 87,550, Case No. VWA-0039 (2000). Under these circumstances, I find that Sena has met his burden under the DOE's Contractor Employee Protection Program.

V. Whether Sandia Has Rebutted That Prima Facie Case

I now turn to the evidence regarding the contractor's burden. In its post-hearing brief, Sandia argues that it should not be held liable in this case because there is clear and convincing evidence that it would have taken the same measures absent the protected disclosures. However, I do not agree with its claim. After reviewing the record in this matter, I find that actions taken by Sandia management not only allowed the work environment to become hostile for Sena, but their actions, and lack of actions, allowed that hostile environment to continue until he could not longer work at Sandia.

Testimony at the hearing showed that Sandia management through their actions created a hostile work environment, although at the time they did not know how hostile the work environment would be. Hartwigsen testified that he sponsored the offending employees for security clearances so that they could return to Sandia to work. He did this deliberately because he believed they had suffered enough from their previous banishment from Sandia. Without such security clearances, the employees could not have returned to work at Sandia. But at the time, Hartwigsen did not fully realize the extent of trauma that would be inflicted on Sena upon the return of these employees.

The environment for Sena continued to be hostile despite the knowledge of Sandia management that it was affecting Sena in an extremely bad way. When Sena noticed the offending employees, he immediately contacted Hartwigsen and told him that he feared for his safety. Sena also questioned Hartwigsen as to why the offending employees were allowed to return to Sandia. Despite the voiced concerns by Sena, Hartwigsen allowed the offending employees to continue to remain on site and interact with Sena. At this particular time--late August 1998—there was no particular evidence to suggest that the presence of the offending employees would lead to an environment in which Sena ultimately could not function. I find

that Hartwigsen did not know the extent of the trauma inflicted on Sena by the presence of these employees at this time. Nor did Dr. Clevenger, the other senior Sandia management official dealing with this matter. However, for the reasons explained below, it seems clear to me that at some point in the fall of 1998 both Hartwigsen and Dr. Clevenger realized the severity of this situation.

By October or November 1998, Hartwigsen should have realized that something was terribly wrong with this situation. Sena noticed the presence of the offending employees on August 24, 1998. He immediately complained about the situation. Hartwigsen, who was Sena's supervisor's supervisor, claims that he did not grasp the severity of the situation at that time. I believe Hartwigsen when he testified to that effect. Dr. Clevenger also testified that he did not appreciate the severity of the problem in the August 1998 timeframe. However, when a long-term employee is on extended leave under the supervision of the Sandia medical department, at some point management must realize that the condition that led to the leave is severe. If a valued employee were on sick leave for more than several weeks, wouldn't most people believe that the underlying medical condition is out of the ordinary? I noted this at the hearing, where I asked Hartwigsen:

> Hearing Officer: What I'm concerned about is the time period in the fall of 1998. Clearly when someone goes on extended medical leave, you know something is hurting them.
>
> And yet, I hear from the testimony here that nothing was done in September and October to get rid of these two people, to make the workplace a little safer for Mr. Sena. And that concerns me. Is that accurate?
>
> Mr. Hartwigsen: Well, I understand your concern, especially retrospectively, you can see this. But I think at the time, that the prevailing thought was that he was having physical problems.
>
> As I said earlier, I had never heard of the term post-traumatic stress disorder until this week. So whether the doctors knew it or not, I don't know.

Tr. at 580. Hartwigsen also testified that he did not ask Dr. Clevenger about the details of Sena's medical condition because he knew from previous dealings that the Sandia medical department would not reveal that information to him due to privacy concerns.

Dr. Clevenger clearly appreciated the severity of the problem in this time period. The testimony at the hearing shows that all three health professionals, Drs. Clevenger, Best, and Farah, agreed by November 1998 that Sena would not be returning to Sandia. This was communicated to Hartwigsen. At that time, clearly Hartwigsen knew how difficult this situation was for Sena. However, for the next several months nothing was done to remove the offending employees from Sandia.

Hartwigsen testified that he thought in 1998 that he did not have the authority to ban the offending employees from the Lab site. He testified that Sandia had recently adopted a performance-based contract model and that he had been told shortly before August 1998 that he could not influence the choice of which employees a company would use to perform under such a contract. From this knowledge, Hartwigsen inferred that he could not remove an employee once he showed up at Sandia. For this reason, he did not seek advice from either the procurement or legal departments at Sandia as to whether he could remove the offending employees from the Lab site. However, Hartwigsen now realizes that he was wrong and that he had the authority to ban those employees.

In another case also arising from Sandia, a management official had no problem banning an employee from the premises. *Luis P. Silva*, 27 DOE ¶ 87,550, Case No. VWA-0039 (2000). In *Silva*, a Sandia manager became aware of a conflict between contractor employees where one employee had to take a two-week leave because of stress. While asking management of the contractor to solve the conflict, the Sandia manager testified that she realized that "it was my right under the contract to take some steps to resolve the issue of a hostile work environment." (citation omitted). That Sandia manager then consulted with both the procurement and legal departments at Sandia and directed the contractor to remove the

offending employee who she believed was causing the hostile environment. These actions in the *Silva* case occurred in August 1997, a full year before the offending employees showed up to create a hostile work environment for Sena.

Hartwigsen also realizes that he, as a senior Sandia manager, would have to resolve a hostile work environment. Hartwigsen testified: "If we have somebody who is in a hostile work environment, I believe it's our responsibility to resolve that hostile work environment. Now, if that means removing somebody, then I think they have to be removed." Tr. at 487-88. Although Hartwigsen testified that he thought the Sena matter would ultimately be worked out, this is not convincing. Hartwigsen testified that "all of the conversations that I had with Dr. Clevenger were in the vein of: We expect that at some point we'll have this situation under control and he'll be able to come back to work." Tr. at 579. Dr. Clevenger testified, however, that he believes he told Hartwigsen about the trauma facing Sena. Tr. at 365. Nevertheless, by November 1998 two senior Sandia managers knew that the trauma would prevent Sena from returning to work at Sandia. Still nothing was done, even though there was clear, simple, straightforward ways to get the situation "under control:" remove the offending employees. Hartwigsen chose not to do this.

In summary, Sandia management created the beginning of a hostile work environment when Hartwigsen sponsored the reinstatement of security clearances for the offending employees. This was done deliberately to allow them to return to work at Sandia. Upon seeing them, Sena told Sandia management that their presence was extremely hurtful. After a few days the Sandia medical director became involved. Sandia management should have realized that the environment was hostile. Exactly when this should have occurred is unclear, but certainly it is true after Sena had been on supervised medical leave for an extended period of time. Its failure to act at that time deepened and prolonged the trauma to Sena. Sandia officials knew that Sena was suffering from PTSD by late October or early November 1998. Yet even then no one at Sandia did anything to make Sandia a safe place for Sena to try to return to work. At all times during these incidents, it appears that Sandia had the right to ban the offending employees from the Sandia site, and in fact had exercised that right previously.

In *Silva*, the Hearing Officer found that the company, a Sandia subcontractor, "sacrificed" an employee to retaliate against Silva, ignoring complaints she made and thus failing to resolve her perceptions of a hostile work environment. In this case, Sandia similarly sacrificed Sena in order to provide employment at Sandia to the offending employees. The Sandia manager in *Silva* realized that it was her duty to resolve the hostile workplace there. And Hartwigsen testified in this case, as I've summarized above, that he realized that he would have to resolve a hostile work environment if it existed. Three medical professionals, including the Sandia medical director (who was also a senior Sandia manager), concluded that the environment was so hostile to Sena that he could not return to work. Yet Sandia management did little to alleviate the situation. Sandia has presented no evidence to show that it treated Sena in the same manner as other Sandia employees who found themselves in a hostile environment. Under these circumstances, I find that Sandia has failed to present clear and convincing evidence that meets its burden under the DOE Contractor Employee Protection Program. Accordingly, I conclude that Sena's complaint should be granted.

VI. Relief

The DOE Contractor Employee Protection Program provides as follows:

> If the initial or final agency decision determines that an act of retaliation has occurred, it may order:
>
> (1) Reinstatement;
>
> (2) Transfer preference;
>
> (3) Back pay;

(4) Reimbursement of your reasonable costs and expenses, including attorney and expert-witness fees reasonably incurred to prepare for and participate in proceedings leading to the initial or final agency decision; or

(5) Such other remedies as are deemed necessary to abate the violation and provide you with relief.

10 C.F.R. § 708.36(a). In the present case, Sena and Sandia have submitted calculations showing what each believes to be the relief necessary to put Sena in the same position had he worked until retirement age. Sandia claims that the amount needed to pay Sena is $342,324.77. According to Sandia, this figure consists of the present value of the difference between Sena's salary and his current disability pension for the period November 1999 through April 11, 2014 ($277,005.09), the present value of matching funds for Sena's saving plan ($21,819.68), and the forgone pension benefits ($43,500.00). Sena claims that he should receive $1,291,288.03. This figure includes what is described as the difference between the future value of Sena's retirement account and the value of the account when he retired ($971,425.63), plus lost wages ($319,862.70).

The calculations that Sandia submitted clearly utilized the correct methodology for calculating the amount of relief necessary to place Sena in the same position had the constructive discharge not occurred. Sandia has calculated the present value of the difference between Sena's retirement income and the income he would have received had he remained working at Sandia, the present value of Sandia's contribution to Sena's retirement account, and the forgone pension benefits. None of Sena's calculations attempt to take a stream of earnings over the next 15 years and calculate a present value of those streams. This is a fundamental flaw in his submission.

Two issues remain, however. First, Sena is entitled to reasonable attorneys fees and costs. *See* *C. Lawrence Cornett*, 26 DOE ¶ 87,510, Case No. VWX-0010 (1995); *David Ramirez*, 24 DOE ¶ 87,512, Case No. VWX-0001 (1995). Second, Sena believes that he should be compensated for the money he has removed from his retirement plan for living expenses from the date he retired until the present. Since I need to consider the former, and to receive evidence on that issue, I will also allow the parties to submit information about the latter. I will then issue a supplemental order establishing the total amount for which Sandia is liable. I also encourage the parties to consider settlement negotiations and thereby attempt to resolve all issues related to remedies and any other issues remaining in this case.

This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by each affected NNSA element, official, or employee, and by each affected contractor.

It is Therefore Ordered That:

(1) The complaint for relief under 10 C.F.R. Part 708 submitted by Richard R. Sena, OHA Case No. VBH-0042, is hereby granted as set forth in paragraphs (2), (3) and (4) below.

(2) Richard R. Sena shall submit a detailed report as described in the remedy section of this decision, showing the amount of attorney fees and costs claimed, including the basis and justification for those legal and other expenses. The report shall be due 30 days after receipt of this decision, and shall be served on the attorney for Sandia Corporation.

(3) Sandia Corporation shall be permitted to submit its comments, if any, on the report described in paragraph (2) above. The comments shall be due 10 days after receipt of the report.

(4) This is an initial agency decision, which shall become the final decision of the Department of Energy granting the complaint in part unless, within 15 days of the issuance of a Supplemental Order with regard

to remedy in this case, a notice of appeal is filed with the Office of Hearings and Appeals Director, requesting review of the initial agency decision.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: March 1, 2001

Case No. VBH-0056

March 6, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner:Jean G. Rouse

Date of Filing:November 7, 2000

Case Number: VBH-0056

This Initial Agency Decision concerns a whistleblower complaint filed by Jean G. Rouse (the Complainant) against her current employer, Westinghouse Savannah River Company (WSRC), under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. WSRC is the management and operating contractor at the DOE's Savannah River Site in Aiken, South Carolina. The Complainant alleges that in June 2000, WSRC changed her job classification in retaliation for her having filed a whistleblower complaint against the company in 1998. As discussed below, I have determined that the Complainant is not entitled to relief because she has not met her evidentiary burden in this case.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a)(1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

In March 1998, the Complainant filed a complaint with WSRC's Office of Employee Concerns alleging that WSRC management had retaliated against her by giving her a poor performance evaluation and denying her a salary increase because she had refused to violate WSRC procedures without written orders from her supervisor. WSRC's Employee Concerns Office investigated the Complainant's allegations in April 1998, found them to be meritorious, and suggested a remedy. WSRC had not implemented its investigator's recommended remedy in May 1998 when the Complainant filed a complaint under 10 C.F.R. Part 708 with the DOE's Office of Employee Concerns at the Savannah River site (1998 Complaint). The 1998 Complaint set forth the same allegations previously advanced by the Complainant in her March 1998 complaint filed with WSRC's Office of Employee Concerns. WSRC settled the 1998 Complaint by implementing the remedy the WSRC's Employee Concerns Office had recommended after its own investigation into the Complainant's allegations. The remedy included (1) giving the Complainant a pay increase retroactive to the date of her 1998 Complaint; (2) upgrading the Complainant's performance evaluation at issue; (3) reassigning the Complainant to a different management team; and (4) purging the Complainant's personnel file of all derogatory and inappropriate information dating back to March 18, 1998. See Electronic Mail Message from Jean Rouse dated June 23, 1998 at 9:08 a.m. to Marcia Delmore, DOE Employee Concerns Manager.

On July 24, 2000, the Complainant filed another Complaint against WSRC with the DOE under 10 C.F.R. Part 708 (2000 Complaint). In her 2000 Complaint, the Complainant alleges that WSRC reclassified her Senior Administrative Assistant position from "exempt" to "Selected Overtime Position (SOP)" in retaliation for her having filed the 1998 Complaint against WSRC. On September 20, 2000, the Complainant requested that the issues raised in her Complaint be investigated by the DOE and that she be afforded a hearing on the matter.

On October 10, 2000, the Director of the Office of Hearings and Appeals (OHA) appointed an investigator to examine the issues raised in the subject Complaint. The investigator promptly conducted an investigation and issued a Report of Investigation on November 7, 2000. In her Report of Investigation, the OHA investigator concluded, inter alia, that the Complainant did not meet her burden of showing that her protected conduct was a contributing factor to a retaliation. On the same day that the OHA investigator issued her Report of Investigation, I was appointed the Hearing Officer in this case.

Shortly after my appointment as Hearing Officer, the parties exchanged discovery. Soon thereafter, the Complainant decided that she did not want to proceed to a hearing and asked that I issue an Initial Agency Decision based on all the information already submitted into the record of the case. (1) See Letter from Jean G. Rouse to Ann S. Augustyn, Hearing Officer (January 4, 2001)(January 4, 2001 Letter). WSRC agreed to forego a hearing on the complaint but requested permission to respond to comments made by the Complainant in her January 4, 2001 Letter. See Record of Telephone Conversation between Michael Wamsted, Counsel for WSRC, and Ann S. Augustyn, Hearing Officer (January 4, 2001); Letter from Michael Wamsted, Counsel for WSRC, to Ann S. Augustyn, Hearing Officer (January 12, 2001). The Complainant declined the opportunity to file a reply to WSRC's response to her January 4, 2001 Letter. See Record of Telephone Conversation between Jean G. Rouse and Ann S. Augustyn, Hearing Officer (January 16, 2001). Accordingly, on January 17, 2001, I canceled the hearing that had been scheduled in the case and advised the parties that I would issue an Initial Agency Decision within 60 days in accordance with 10 C.F.R. §§ 708.24(b) and 708.31.

II. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the Complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate as described in § 708.5, and that such act was a contributing factor to one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on

Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); McCormick on Evidence § 339 at 439 (4th Ed. 1992).

In the case at hand, WSRC stipulated at the investigatory stage of this proceeding that the Complainant made a protected disclosure as defined in 10 C.F.R. § 708.5, but denied that the protected disclosure was a contributing factor to the company's decision to reclassify the Complainant's job position.

B. The Contractor's Burden

If the Complainant meets her burden as set forth above, the burden then shifts to WSRC to prove by "clear and convincing" evidence that the company would have reclassified the Complainant's job position even if she had not made a protected disclosure in 1998. 10 C.F.R. § 708.29. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n.3.

III. Findings of Fact

The factual findings set forth below are based on the limited information contained in the record of this case. In a typical Part 708 case, the record is developed extensively during the hearing phase of the proceeding. Specifically, the parties can question witnesses about facts material to the case, and the Hearing Officer can assess the credibility of the witnesses by, among other things, observing their demeanor. In addition, useful insights into the working environment at the DOE facility in question and the relationship between managers and employees can often be gleaned from the testimony of witnesses. In this case, the parties elected to forego a hearing. As a consequence, this record is devoid of potentially relevant testimonial evidence, and it is difficult for me to decide what weight to accord to some of the documentary evidence without being able to probe further into statements contained in those documents. Notwithstanding these challenges, I make the following findings of fact based on the limited record before me.

The Complainant began her career at WSRC in a "non-exempt" clerical position of an unknown grade. According to the Complainant, she was promoted to an "exempt" Senior Administrative Assistant position in 1989. See Record of Telephone Conversation between Jean Rouse and Helen Mancke, OHA Investigator (October 19, 2000). It is not known what salary grade the Complainant held in 1989 and whether she received any grade promotions after that date. The record reflects, however, that in 1996 the Complainant was a Grade 30 Senior Administrative Assistant in an "exempt" pay category. See Memorandum from R. L. McQuinn, Operations Manager, Nuclear Materials Stabilization Program to Jean G. Rouse (September 16, 1996). As part of the Complainant's duties as a Grade 30 Senior Administrative Assistant in 1997, she prepared reports that tracked "safety surveillances" for certain pieces of equipment. See Record of Telephone Conversation between Helen Mancke, OHA Investigator, and Jean Rouse (October 19, 2000). In December 1997, the Complainant's management allegedly instructed her verbally to stop preparing the safety surveillance reports. The Complainant refused to comply with the directive absent written guidance because she believed that the DOE had mandated the preparation of these reports during an "Operations Readiness Review" of WSRC. Id.

On March 18, 1998, the Complainant received a low performance evaluation and was denied a salary increase. Id. The Complainant filed a Complaint against WSRC with the company's Employee Concerns Office, alleging that her supervisors rated her as low/poor performer, based not upon her actual job performance, but as "direct punishment" for her having requested written guidance before complying with instructions to violate company procedures. See Memorandum from the Complainant to Mr. Sokolo, WSRC Employee Concern Program (March 20, 1998). A subsequent investigation by WSRC confirmed the Complainant's allegations that her management had retaliated against her after she had refused to

violate established company procedures without written instructions. See Investigative Report prepared by Dennis B. Hurshman (April 8, 1998).

In May 1998, the Complainant filed a Part 708 Complaint with the DOE's Office of Employee Concerns, reiterating the allegations she had raised to WSRC's Employee Concerns Office. See Complaint dated May 20, 1998; Affirmation executed by the Complainant on May 30, 1998. Shortly thereafter (June 1998), WSRC and the Complainant settled the matter to the Complainant's satisfaction. As part of the settlement, the Complainant was assigned to work for a different management team. The Complainant's job title (Senior Administrative Assistant), grade (30), and pay category (exempt) remained unchanged, however.

In the interim, WSRC released the results of an internal audit on February 10, 1998 that concluded, among other things, that there is a risk that some WSRC employees may have been incorrectly classified as "exempt" employees under the Fair Labor Standards Act (FLSA). See Inter-Office Memorandum dated February 10, 1998 from Daniel A. Santucci to Larry L. Myers attaching "Position Classification Audit, 97137206." The internal audit recommended that WSRC perform a complete evaluation for compliance with the FLSA of all positions that had been reclassified at the site since October 1, 1996, and all future employee position reclassifications.

Accordingly, in the fall of 1999 and winter of 2000 WSRC conducted an extensive study of all the duties performed by, among others, employees in the Senior Administrative Assistant positions to determine WSRC's compliance with the FLSA. See Affidavit of Sara S. Jones, Manager, Compensation Design and Implementation, WSRC Human Resource Division at 1 (August 8, 2000) (Jones Affidavit). After the study, WSRC's Director of Human Resources reviewed the results and decided that all Senior Administrative Assistants in the Salary Grade 30, not only those who had been reclassified at the site since October 1, 1996, should be classified as non-exempt for purposes of the FLSA. Id.

The Complainant's position was among those affected by WSRC's decision to reclassify all Senior Administrative Assistants from exempt to SOP. See Inter-Office Memorandum from G.L Watters, Manager, WSRC Compensation Department, to Jean G. Rouse (May 8, 2000). Accordingly, on May 8, 2000, WSRC informed the Complainant in writing that a "review of information from all Senior Administrative Assistants showed that a majority of the work being performed was more similar to that of the Selected Overtime Position (SOP) classification," and that her job position would be reclassified from exempt to SOP. WSRC reclassified the Complainant's Grade 30 Senior Administrative Assistant position and that of 26 other Senior Administrative Assistants in the same grade from exempt to SOP effective June 1, 2000.(2) In addition, WSRC reclassified one Grade 30 Senior Administrative Assistant from exempt to SOP effective August 1, 2000.

IV. Analysis

A. Protected Conduct

As previously noted, WSRC stipulated that the Complainant engaged in protected conduct when she filed her 1998 Complaint against WSRC. As a result, the Complainant does not need to present any evidence on this point.

B. Whether the Protected Conduct Was a Contributing Factor to a Retaliation

The Complainant may prove that her protected conduct was a contributing factor to an alleged act of retaliation, i.e., her reclassification from "exempt" to SOP, by showing that "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in a personnel action." Ronald Sorri, 23 DOE 87,503 at 89,010 (1993), citing McDaid v. Dept. Of Hous. and Urban Dev., 90 FMSR ¶ 5551 (1990); see also County v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) (County). Temporal proximity between a

protected disclosure and an alleged retaliation is sufficient as a matter of law to establish the final required element in a prima facie case for retaliation. See e.g. County, 886 F.2d 147, 148 (8th Cir. 1989).

After reviewing the limited evidence tendered by the Complainant, I have concluded that she has not met her burden of proof in this case for several reasons. First, it is not clear from the record that WSRC's reclassification of the Complainant's job position from exempt to SOP constituted an act of "retaliation" under Part 708. "Retaliation" under Part 708 is defined in relevant part as "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment)." 10 C.F.R. § 708.2.

According to the record in this case, the reclassification of the Complainant's job did not result in a change in her compensation, salary grade level, benefits, work hours, job title, job description, job duties, work space, quantity and quality of assignments, supervisory chain, or advancement potential. The only discernible consequence of the Complainant's job classification is a potential monetary benefit, not a "negative action," since SOP employees are entitled to overtime pay under the FLSA while exempt employees are not. (3)

Notwithstanding the documentary evidence suggesting that no negative action flowed from WSRC's reclassification of all Senior Administrative Assistants from exempt to SOP, the Complainant contends that there is a social perception within the workplace hierarchy at DOE's Savannah River site that SOP employees are non-professionals. According to the Complainant, SOP positions are viewed as less prestigious than exempt positions at the site. WSRC has acknowledged that this perception is held by some employees at the Savannah River worksite. See Record of Telephone Conversation between Michael Wamsted, WSRC Senior Counsel, and Helen Mancke, OHA Investigator (October 23, 2000).

Whether "loss of prestige" can constitute retaliation involves a fact-bound determination. The evidence in this case is simply not developed enough for me to conclude that any "loss of prestige" the Complainant may possibly have suffered as the result of her reclassification constitutes retaliation for purposes of 10 C.F.R. Part 708. As the record stands, there appears to have been no tangible negative consequence associated with WSRC's reclassification of the Complainant's job from exempt to SOP.

The Complainant also argues that the reclassification of her job should be viewed as a demotion for purposes of Part 708. To support her position, the Complainant points to a May 8, 2000 Memorandum from G.L. Watters notifying her of her reclassification in which the following language appears:

> In 1997, the Internal Oversight Division conducted a study of employees who had been promoted from Selected Overtime Positions (SOP) to exempt positions since the latter part of 1996.

While I can understand how the Complainant can infer from the language set forth above that a change from exempt to SOP might be deemed a promotion, it is not clear from the memorandum whether the promotions referred to therein were career ladder promotions or lateral transfers. Since the Complainant did not provide any documentary or testimonial evidence to support her inference that lateral moves from SOP positions in one grade to an exempt position in the same grade constituted a promotion at WSRC, I cannot find that the converse situation is a demotion.

Finally, the Complainant speculates that WSRC's reclassification of her position from exempt to SOP is the first step toward a demotion or discharge. Since the Complainant has not submitted any documentary or testimonial evidence to support her speculation on this matter, I simply cannot conclude based on the evidence that WSRC's reclassification of the Complainant's job constituted a Part 708 retaliation.

Even assuming for the sake of argument that the Complainant's job reclassification could be considered "retaliation" for purposes of 10 C.F.R. Part 708, I find that the Complainant has provided no evidence to establish that her protected conduct was a contributing factor to her job reclassification. There is no

temporal proximity between the filing and settlement of the Complainant's 1998 Complaint and the reclassification of the Complainant's job position in 2000. Moreover, the facts reveal that the internal audit regarding WSRC's compliance with the FLSA predated even the filing of the Complainant's 1998 Complaint. The reclassifications directed by WSRC were wholesale in nature, affecting many similarly situated employees. These facts suggest to me that there was no connection between the Complainant's protected activities and her subsequent job reclassification. Furthermore, on the basis of the record before me, I cannot infer that the official at WSRC who made the reclassification decision affecting all Senior Administrative Assistants made that decision to retaliate against the Complainant for her having engaged in protected activity.(4)

Finally, even if I were to have found that the Complainant had met her burden of proving by a preponderance of evidence that her protected conduct in 1998 was a contributing factor to her 2000 reclassification, I would find that WSRC has met its burden of showing through clear and convincing evidence that it would have reclassified the Complainant's job position irrespective of her protected conduct. First, WSRC submitted documentary evidence showing that it began studying the classification structure of its workforce for purposes of the FLSA even before the Complainant had filed her 1998 Complaint. Second, WSRC has provided documentary evidence that it reclassified 26 other Senior Administrative Assistants from exempt to SOP on the same day it reclassified the Complainant. While the Complainant believes that WSRC reclassified the 26 other Senior Administrative Assistants to mask its retaliatory motive towards the Complaint, I find that the unrebutted evidence in the record does not support the Complainant's belief in this regard. (5)

V. Conclusion

As set forth above, I have determined that the Complainant has failed to meet her regulatory burden of showing by a preponderance of evidence that her 1998 protected disclosure was a contributing factor to any act of retaliation against her by WSRC. Accordingly, I conclude that the Complainant is not entitled to any relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Jean G. Rouse under 10 C.F.R. Part 708, OHA Case No. VBH-0056, be and hereby is denied.

(2) This is an Initial Agency Decision that shall become the Final Decision of the Department of Energy denying the complaint, unless a party files a notice of appeal within fifteen days after receipt of this Initial Agency Decision.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: March 6, 2001

(1)The Complainant stated that she decided to waive a hearing in this matter because WSRC would not provide her with the information she requested in discovery. WSRC responded that it has made a diligent effort to supply the Complainant with all the information she requested during discovery. WSRC's counsel also represented several times during the hearing phase of the case that he and WSRC's Human Resources' personnel were amenable to sitting down with the Complainant and going over any documents about which the Complainant had questions. The Complainant elected not to accept WSRC's overtures in this regard.

(2)Of the 26 Senior Administrative Assistants reclassified from a Grade 30 exempt position to a Grade 30 SOP position on June 1, 2000, four were WSRC subcontractor employees, not WSRC employees. The remaining 22 Grade 30 Senior Administrative Assistants, including the Complainant, worked for WSRC. In addition to the 26 contractor and subcontractor Senior Administrative Assistants reclassified on June 1, 2000, one other WSRC employee was reclassified from exempt to SOP on June 1, 2000 when she was demoted from a Grade 32 position to Grade 30 Senior Administrative Assistant position. Finally, WSRC provided evidence during discovery that one Grade 30 Senior Administrative Assistant was not reclassified to SOP because she received a promotion to an exempt Grade 32 position, the Executive Assistant to the President.

(3)It is conceivable that evidence showing that SOP employees are more vulnerable to reductions-in-force than exempt employees might be sufficient in some circumstances to support a claim of retaliation. However, no such evidence was presented in this case.

(4)Had a hearing occurred, the Complainant could have questioned WSRC's Director of Human Resources, for example, about whether he knew about the Complainant's previous Part 708 filing and whether it affected his decision to reclassify all Senior Administrative Assistants at WSRC. While WSRC filed an Affidavit of Sara S. Jones, a Human Resources Manager at WSRC, who attested that she had no knowledge that the Complainant had ever filed a Part 708 Complaint, the record reflects that it was the Director of Human Resources and not the Human Resources Manager who made the pivotal decision regarding reclassification.

(5)The Complainant contends that she has shown WSRC retaliated against her because WSRC reclassified one Senior Administrative Assistant on August 1, 2000. This argument ignores that 25 other Senior Administrative Assistants were reclassified on the same date as the Complainant.

Case No. VBH-0059

December 21, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Hearing Officer Decision

Name of Petitioner: Janet L. Westbrook

Date of Filing: March 20, 2001

Case Number: VBH-0059

This Decision involves a complaint that Janet L. Westbrook (Westbrook) filed under the Department of Energy's Contractor Employee Protection Program against UT-Batelle, LLC, the contractor that manages the Oak Ridge National Laboratory (the Laboratory). That program is codified at Part 708 of Title 10 of the Code of Federal Regulations. 10 C.F.R. Part 708. In her complaint, Westbrook maintains that she was retaliated against and ultimately discharged for making a series of disclosures about radiation safety at the Laboratory.

I. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect such "whistleblowers" from any consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Part 708 of Title 10 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a). An employee of a DOE contractor who believes she has been discriminated against in violation of the Part 708 regulations is entitled to receive an extensive series of protections. She may file a whistleblower complaint with the DOE. In response to such a complaint, she is entitled to an investigation by an investigator appointed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. §§ 708.21-.23. After the investigator's report on the complaint is issued, an OHA Hearing Officer will generally conduct an independent fact-finding and evidentiary hearing. 10 C.F.R. §§ 708.24-.25. The Hearing Officer will issue a formal, written opinion on the complaint. 10 C.F.R. § 708.31. Finally, a party may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. § 708.32.

II. Factual Background

Westbrook is a former employee at the Laboratory. She received Master of Science degrees from Purdue University in physics and nuclear engineering. Transcript of Hearing (hereinafter referred to as Tr.) at 24. After her full-time education, Westbrook worked for an engineering firm that helped design nuclear power plants. Westbrook then started working for the Laboratory in 1989 as a radiation safety engineer. She worked there for approximately 12 years until she was released as part of a widespread reduction in force on December 1, 2000.

During the 12 years she was employed at the Laboratory, Westbrook was responsible for radiation safety reviews under a principle called ALARA. “The guiding principle behind radiation protection is that radiation exposures should be kept ?As Low As Reasonably Achievable (ALARA),’ economic and social factors being taken into account. This common-sense approach means that radiation doses for both workers and the public are typically kept lower than their regulatory limits.” http://www.hps.org/publicinformation/radfactsheets/ radfact1.html.

From 1996 through 2000, Westbrook:

> disclosed on several occasions to the management of [the] Laboratory . . ., representatives of the U.S. Department of Energy, and other government agencies, her belief that ALARA radiation safety reviews were not performed in cases where [Laboratory] procedures required them, or reviews were performed, but not in accordance with the requirements of [Laboratory] procedures. During this period, Ms. Westbrook further believed and disclosed to [Laboratory] management and others that these alleged procedural violations caused a potential for unnecessary radiation exposure to workers at [the Laboratory].

Joint Stipulation at 1 (August 14, 2001).

Duringt his time period, Westbrook’s supervisor was Dr. Gloria Mei, the head of the ALARA engineering group. Dr. Mei reported to Dr. Ron Mlekodaj, and Dr. Mlekodaj in turn reported to Dr. Steve Sims, who was the Director of the Office of Radiation Protection. Dr. Sims was in that position until October 2000, when there was a general reorganization within the Environment, Safety, Health and Quality Directorate. After October 2000, Dr. Sims became the Deputy Director of the Occupational Safety Services Division of the Directorate. Ms. Carol Scott is the Director of that Division.

On June 8 and 12, 2000, Westbrook met with Ms. Scott to discuss concerns that she had about radiation safety at the lab.(1) Shortly thereafter, in August 2000, Ms. Scott and Dr. Sims decided to reduce the number of ALARA engineers from three to one. As a part of that reduction, they chose to dismiss Westbrook. On September 29, 2000, Ms. Scott provided a written response to Westbrook about the concerns she had raised in their June 2000 meetings. Westbrook’s dismissal was effective December 1, 2000.

III. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish “by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor.” 10 C.F.R. § 708.29. *See* *Ronald Sorri*, 23 DOE ¶ 87,503 (1993).

B. The Contractor's Burden

If the complainant meets her burden of proof by a preponderance of the evidence that her protected activity was a "contributing factor" to the alleged adverse actions taken against her, "the burden shifts to

the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure . . . ." 10 C.F.R. § 708.29. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case, if Westbrook establishes that she made a protected disclosure that was a contributing factor to an adverse personnel action, the Laboratory must convince me that it would have taken the same actions even if Westbrook had not raised any concerns. *Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 at 89,034-35 (1994).

IV. Whether Westbrook Has Made A Prima Facie Case of Retaliation

Section 708.5 provides that a disclosure is protected if an employee reasonably believes that she is disclosing a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). Such a disclosure must be made to "a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor." *Id*. In this case, Westbrook claims that Laboratory management chose her for dismissal during the reduction in force because of her long series of protected disclosures, especially the disclosures she made during her June 2000 meetings with Ms. Scott.

There is no dispute that Westbrook disclosed to her employer what she believed to be violations of Laboratory rules governing procedures to be followed when the potential exists for radiation exposure. However, the Laboratory takes the position that no reasonable person, especially a radiation engineer like Westbrook, could have reasonably believed that the problems that Westbrook noted revealed a **substantial** violation of a law, rule or regulation, or a **substantial** and specific danger to employees or the public health and safety. 10 C.F.R. § 708.5(a). The DOE investigator found that Westbrook articulated at least six concerns during her June 2000 meetings with Ms. Scott. Report of Investigation at 3. To make a prima facie case of retaliation, Westbrook must show only one disclosure that is protected under the DOE Contractor Employee Protection Program.

As an initial matter, I note that the preamble to the rule implementing the Contractor Employee Protection Program discussed the requirement that a disclosure be of a substantial nature as follows:

> The imposition of this requirement in § 708.5(a)(1) would not result in the adoption of a subjective test that a whistleblower would have to pass to qualify for protection. As noted in the preamble to the interim final rule, ??substantial violation of law'' is the same standard that is used in the Section 6006 of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103–355, codified in 41 U.S.C. 265, and implemented by the regulation found at 48 CFR part 3, Subpart 3.9, ??Whistleblower Protection for Contractor Employees.'' The interim final rule emulated the standard in the FASA because it represents a balanced approach designed to ensure that minor, insubstantial issues do not waste limited resources, so whistleblower protection is available to those workers who legitimately need it.

While DOE rules are designed to husband resources by not providing protection to persons who raise issues of a minor nature, they are not supposed to put an employee at risk that the concern raised would be deemed to be insubstantial when it relates to core DOE business. Issues of radiation safety and following procedures for conducting radiation safety reviews are at the core of DOE's business. Part 708 provides an equitable remedy for restitution to protect members of the DOE contractor workforce from reprisals. As much as Part 708 is about protecting contractor employees, it is also about protecting a culture where information flow is encouraged. Indeed, considering the statutory basis for the rule, the culture of openness is arguably the primary purpose, because it promotes health and safety, and helps check waste, fraud, and abuse.

I will now review a number of the concerns that Westbrook raised in her June 2000 meetings with Ms. Scott. First, the Laboratory cites as insubstantial Westbrook's concern that the Laboratory raised the dosage level to 5 rem(2) per hour before an ALARA review was required to be done, a level that Westbrook noted is significantly higher than one rem per hour used at other DOE facilities. The Laboratory's logic seems to be that since radiation exposure at the laboratory in the past ten years has been substantially lower than permitted, concerns about the health effects of changing individual exposure limits are insubstantial. I reject this logic. This is like saying that we do not have to be so concerned about safety because we have not had an accident in the past ten years. Testimony at the hearing supports a finding that substantial issues were involved. Ms. Scott testified that Dr. Mei (Westbrook's supervisor) raised some concerns about the effect of raising the trigger for conducting a radiation review could have on certain areas of the Laboratory. Tr. at 345. And Ms. Scott believes that it was reasonable to raise these questions and be concerned about raising the limit. *Id*.

Dr. Mlekodaj's testimony (he was Dr. Mei's supervisor) corroborates a finding that raising this concern was reasonable and disclosed a substantial health or safety issue:

> Q: Five seems to me like a lot more than 1.
>
> A: Yes, it is.
>
> Q: Okay. Just wanted to make - -
>
> A: We fought it. That's one where [Westbrook] and I were on the same page. And her boss, [Dr. Mei] and I, we fought it down to the bitter end. But out –
>
> Q: Who wanted it?
>
> A: Some of the operating groups and it appeared like some of - people in another section of Office of Radiation Protection.
>
> Q: Why?
>
> A: In my opinion just to reduce the number of reviews they had to do and the –
>
> Q: Why didn't they want to do reviews?
>
> A: Well, because they didn't – in their words now, not mine, they didn't want to deal with our people. They said that they didn't have the right experience. They slowed them down. They added no value. I don't agree with those statements, but that's –
>
> Q: No, I hear you.
>
> A: -- the things they said.
>
> Q: Were those things the sorts of concerns lobbed at [Westbrook] personally?
>
> A: Oh, I'm sure they were, yes.
>
> Q: Would it be reasonable for a person – well, you agree with her and you all had the same experience. You all think you're being reasonable in thinking that jacking it up to 5 is unreasonable?
>
> A: Yes. We fought it to the bitter end.
>
> Q: Were you worried about worker safety?

A: Sure.

Tr. at 212-13. But after reviewing information, management disagreed with staff and believes that the limit could be raised to 5 rem per hour before a radiation safety review needs to be performed. While experience certainly dictates the need for occasional changes in procedures, limits or actions, it is hard for me to understand why the Laboratory during this proceeding has deemed a professional discussion about the effects a change of that nature may have on the safety of its workers to raise insubstantial issues. Where a radiation safety engineer complains about matters that could lead to higher radiation exposures for workers at the Laboratory, and fellow engineers share her belief, substantial issues are raised. I find this issue to be based on reasonable beliefs and to raise substantial concerns about dangers to employees for purposes of the Contractor Employee Protection Program.(3)

The Laboratory also cites as insubstantial Westbrook's concern that Dr. Sims approved a waiver of Laboratory rules to implement the change from using engineers to technicians in clear violation of written Laboratory procedures. Westbrook testified about a number of separate issues surrounding this matter. First is Westbrook's concern that Dr. Sims did not follow written procedures when he granted the waiver. Second is Westbrook's concern that Dr. Sims was pressured into granting a waiver of standard Laboratory rules to a line organization and therefore circumvented normal Laboratory procedures for the approval of such waivers. And third is her concern that a change from using engineers to lower-trained technicians for certain radiation safety reviews could degrade safety.

Ms. Scott testified that it was reasonable for Westbrook to come to her, as Dr. Sims' supervisor, with her concern that he had violated Laboratory procedures when he approved the waiver. Tr. at 341. She also testified that she believes that Westbrook "truly" believed that Dr. Sims had been pressured by a line program to grant the waiver outside of normal Laboratory procedures. *Id*. The Laboratory has stipulated "Ms. Westbrook reasonably believed that the actions taken by Dr. Sims in granting the waiver violated ORNL procedures 110 and 310." Tr. at 196. However, the Laboratory downplays this action by claiming that the waiver that Dr. Sims approved – allowing safety reviews to be done by radiation technicians working for line management instead of engineers working for the safety organization – was insubstantial and thus could not affect employee health or safety in a negative way.

The Laboratory takes the position that there are no substantial issues raised by allowing radiation technicians who report to the management of line organizations to perform safety reviews instead of engineers working for a central safety organization. However, the testimony on this issue is mixed. While Ms. Scott pointed out that the radiation technicians were Certified Health Physicists who in her opinion are fully capable of doing ALARA reviews, she also noted the following:

Q: Ms. Scott, don't you think that it would be reasonable to assume that if you have a medical problem, a Doctor might be better for you than a Medical Technician?

A: It depends on the extent of your medical problem.

Tr. at 343. That answer shows that Ms. Scott knows that a fully trained doctor, as opposed to a lower trained Medical Technician, may best do the diagnosis of certain medical problems. The same seems both true and reasonable for Westbrook to believe about ALARA reviews. While technicians could reasonably be expected to be fully capable of doing a number of ALARA reviews, engineers might better do others.(4) But it seems clear that it is reasonable to believe that the switch from using engineers to technicians to perform these reviews could significantly affect employee health and safety in the appropriate case. That is not to say that management cannot review the situation and decide that it was willing to accept the risks associated with technicians doing all radiation safety reviews, and I voice no opinion as to whether this change was appropriate. Nevertheless, for purposes of the Contractor Employee Protection Program, I find this concern raises substantial health and safety concerns.

As a part of her case in chief, Westbrook must also show that any one of her disclosures was a contributing factor to her discharge or any other adverse personnel action. In this regard, an OHA Hearing

Officer has concluded:

> A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993) *citing McDaid v. Dep't of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F. 2d 147, 148 (8th Cir. 1989).

Russell P. Marler, Sr., Case No. VWA-0024 (footnote omitted). It is clear in this case that there was temporal proximity between the June 2000 disclosures and the alleged act of reprisal. The evidence shows that Ms. Scott made the decision as to whom to terminate in her division during the planning phase for the December 2000 reduction in force. That decision was made in August 2000, two months after the eventful meetings between Westbrook and Scott. That two-month period is clearly a period of time within which any reasonable person could conclude that the disclosures made in June could have influenced the personnel action that Ms. Scott took in August of the same year. Thus, Westbrook has met her burden of showing that she made a protected disclosure that, because of temporal proximity, was a factor in her discharge. This showing is sufficient to establish a prima facie case of retaliatory discharge.

V. Whether the Laboratory Has Rebutted That Prima Facie Case

I now turn to the evidence regarding the contractor's burden. In its post-hearing brief, the Laboratory argues that it should not be held liable in this case because there is clear and convincing evidence that it would have discharged Westbrook even absent the protected disclosures.

Testimony at the hearing shows that Westbrook was professional and diligent in the manner in which she performed her job. Nevertheless, Dr. Sims testified that a number of individuals at the Lab called him over the course of many years to complain about Westbrook. Sims testified "[a] recurring theme seemed to be that [Westbrook] would take issues that seemed to be insignificant and continue on with them in a very tenacious manner, and just not let go of these things." Tr. at 362. Sims also received multiple complaints that individuals at the Laboratory would no longer work with her. Tr. at 365-66.

Testimony at the hearing also showed that Westbrook would have been terminated during the December 2000 reduction in force even if she has made no protected disclosures. A human resources generalist, Ronald Honeycutt, testified for the Laboratory about the practices and procedures followed at the Laboratory during a reduction in force. He testified that there were nine reductions in force during the period 1996 through 2000 and that he advised the Occupational Safety Services Division, headed by Carol Scott, about the procedures to follow for the December 2000 reduction in force. Tr. at 70. Honeycutt testified that during the previous eight reductions in force during the period 1996 through 1999, many employees in the Office of Radiation Protection, the predecessor to the Occupational Safety Services Division, were discharged and that the head of the Office, Dr. Steven Sims, would have decided whom to terminate. Tr. at 67. Dr. Sims chose no individual in the ALARA group for termination in the eight reductions in force. Tr. at 68-69. Honeycutt also testified about charts that were made purporting to show ranking factors for the ALARA engineers. Those charts purported to list the factors underlying management's decision as to which employee to let go in the December 2000 reduction in force.

> The thing that I do is to look at, once they've established a structure, looking at the peer groups of the people that would be impacted. In other words, if you have five people performing a function, and you only have funding for two people, and all these people are in a common peer group as defined by the process, work with [management] to gather the data and look at the forms they need to complete, the information they need to, you know, put on the

> forms and once they have completed that and they've filled out the forms, then my role is to become somewhat of a - - instead of assistance with them, and look at organizational development, but a devil's advocate of the data. Reviewing the data that they've recorded on individuals to see if, you know, when I read this, it means that to me, you know. Explain that to me, how do you justify the differences in that. We go through that dialogue and then take the paperwork to the review committee. This is not like we did in the morning, afternoon and the evening. It's over a time frame, and then the review committee's established. We bring outside individuals, people who have not participated at that point to review the same documentation.

Tr. at 71. The forms that were completed show that, for the three ALARA engineers in the peer group that included Westbrook, six criteria were to be considered in the retention decision: 1) Possession of Critical Skills, 2) Performance Reviews, 3) Skills for Current Position, 4) Transferability of Skills, 5) Length of Service, and 6) Time in Current Position. Admin. Record at 226. Two of the engineers were given a "low retention" rating, while one was given a "medium retention" rating. Westbrook was one of the two who was given a low retention rating. There is no apparent weight factor that was assigned to each criterion.

The two managers who were primarily responsible for the reduction in force in this area were Carol Scott and Steven Sims, and they were candid in describing how individuals were picked for retention. Both testified that Kelly Beierschmitt, Director of the Environment, Safety, Health & Quality Directorate, told them when UT-Batelle assumed responsibility for the Laboratory in April 2000 that ALARA reviews would have to move to being a service that was charged to the programs that used them. Sims testified that:

> Dr. Beierschmitt made that decision [that the Alara Engineering Group was to be a Charge-out function and not get any money from overhead].
>
> The first time that I ever saw him – again, when preparing for this, I looked at my notes, and the first time I ever met him was on February the 10th of the year 2000.
>
> He came to my office and we discussed a wide variety of things, and one of the things that he told me that day was that this would be the last year that the Alara Engineering Group would be paid from out of overhead.

Tr. at 372. Sims also noted that Laboratory management had discussed moving the ALARA Engineering Group from an overhead-based function to a charge-out function "during the ESH&Q Re-Engineering effort in 1996 and, I think, actually went on in to 1997." *Id*. Sims also testified that despite the fact that there were eight previous reductions in force between 1996 and 2000, no one in the ALARA Engineering Group was laid off. Tr. at 368. He testified that he resisted efforts in 1996 to change the ALARA Engineering Group funding from overhead to a charge-out basis because "the people would not support that at that particular time" and as a result, the employees in the ALARA Engineering Group would lose their jobs. Tr. at 372-73. He also noted that the reason there was a reduction in force in December 2000 was:

We had a new Organization that came in, and the specific thing that changed in the past year that made that different was that they were really going to cut the budget by a tremendous amount.

> The thing that really did it for the RAD [Radiation Protection] Organization was the fact that I was told by the new administration that came in very early on – actually, before they took over – that the year that we were currently in at that time would be the last year that the Alara Group was funded out of overhead.
>
> They said that they were going to be a Charge-out function.

Tr. at 369.

Beierschmitt confirmed that he had told his subordinates that he wanted to move services in the Directorate from an administrative function for budget purposes to a charge-out function. Tr. at 259. As a charge-out function, the office doing a particular project would pay for any services provided by the ALARA Engineering Group. However, Beierschmitt denied making the decision to require that ALARA engineering services be charged-out. Tr. at 259-60. Nevertheless, given the fact that Sims made contemporaneous notes of his February 2000 meeting with Beierschmitt and believed from that conversation that the ALARA Engineering Group must be funded on a charge-out basis, Tr. at 385, it seems clear that the decision to fund the ALARA Engineering Group on a charge-out basis occurred before Westbrook made her protected disclosures in the June 2000 meetings with Ms. Scott.

The Sims testimony and the Scott testimony are clear on this point. After considering historical information about the amount of time ALARA engineers had been able to charge to programs, and reflecting on their own knowledge of the engineers' work, both Scott and Sims thought that they would be able to charge to other programs the work of only two ALARA engineers, the engineer who had supervisory experience and one of the three others. In deciding which of the three ALARA engineers to keep, Scott and Sims appear to have had only one consideration in mind: who among the three would be able to charge out his cost. Westbrook was not in that category. One engineer had charged out one-third of his time that year, and the office using his services had already indicated that it would agree to pay for one-half of his time in the coming year. No office had expressed a similar willingness to pay for Westbrook's time. In fact, Sims testified that over several years line officials who had difficulties with dealing with Westbrook had contacted him with negative comments. Tr. at 361-66. *Compare* *Eugene J. Dreger*, Case No. VBH-0021 (February 7, 2000) *affirmed*, Case No. VBA-0021 (June 27, 2000). Several asked for her removal from projects. Tr. at 366. Given that history, Scott and Sims did not believe that project offices would be willing, in effect, to hire Westbrook to perform ALARA safety reviews. Thus, it was easy for Scott and Sims to focus on the one engineer for whom they already had a commitment from a project office to pay for one-half of his time. In the end, Scott and Sims decided that they would retain that engineer and dismiss the other two. Their testimony in this respect was clear and convincing. That, in a nutshell, is the reason why Westbrook was discharged. (5)

VI. Conclusion

The record convinces me that Westbrook's discharge would have happened even if she had made no protected disclosures. Her discharge occurred because (i) senior management required the cost associated with positions in her group to be charged to parts of the Laboratory that utilized their services, (ii) management believed that it might be able to charge out time associated with two ALARA engineer positions, and (iii) frictions between potential customers and Westbrook meant her time was the least likely to be able to be charged out to customers. Thus her discharge would have occurred even in the absence of any protected disclosure.

The record clearly indicates that Westbrook may at times have been a difficult person to deal with. Nevertheless, the record also shows that she sincerely believed the issues she raised could affect the safety and health of workers at the Laboratory. When she had concerns, she brought them to her line management for resolution. When that was not forthcoming, or when the response did not assuage her concerns, she brought them to the company's employee concerns program. When she was not successful there, she finally went to the DOE's employee concerns program. She allowed line management the opportunity to correct issues within their purview, and went to the company's concerns program before seeking help from DOE. That is the type of behavior that DOE policy has attempted to encourage, and it should be commended. Contractor employees should not be concerned that the company will retaliate against them for this. They are protected against this type of reprisal. In the present case, I am convinced, by the clear and convincing evidence presented during this proceeding, that Westbrook would have been terminated during the reduction in force that occurred in December 2000 even if she had made no protected disclosures.

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

It is Therefore Ordered That:

(1) The complaint for relief under 10 C.F.R. Part 708 submitted by Janet L. Westbrook, OHA Case No. VBH-0059, is hereby denied.

(2) This is an initial agency decision, which shall become the final decision of the Department of Energy unless, within 15 days of issuance, a notice of appeal is filed with the Office of Hearings and Appeals, in which a party requests review of this initial agency decision.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: December 21, 2001

(1) These disclosures are described in the section of this opinion that discusses whether Westbrook has made a prima facie case of retaliatory discharge.

(2) A rem is "the dosage of an ionizing radiation that will cause the same biological effect as one roentgen of X-ray or gamma-ray exposure." http://www.m-w.com/cgi-bin/dictionary.

(3) I voice no opinion as to whether it was appropriate to raise this value to 5 rem per hour.

(4) It is also interesting to note that not all engineers could perform all reviews at the same level of competence. There was testimony that Westbrook was the only ALARA engineer who could run certain elaborate computer codes that were necessary for some of the reviews. Admin. Record at 226.

(5) Whether this comports with the rules governing reductions in force is not in issue in this proceeding, since it is not an appeal of the dismissal action.

Case No. VBH-0060

November 1, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner:Robert Burd

Date of Filing:March 27, 2001

Case Number: VBH-0060

This Decision addresses the complaint filed by Robert Burd (Complainant) against his former employer, Mason and Hangar Corporation (the employer), pursuant to the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Complainant alleges that the employer wrongfully terminated him for raising safety concerns. For the reasons set forth below, the complaint will be granted.

I. Procedural History

Complainant filed his Part 708 complaint on October 13, 2000 with the DOE Albuquerque Operations Office (DOE/AOO). At all times relevant to the complaint, the employer was the primary management and operating contractor for the DOE's Pantex facility (Pantex) in Amarillo, Texas, where Complainant worked. On January 22, 2001, the DOE/AOO forwarded the complaint to the Office of Hearings and Appeals (OHA) for an investigation followed by a hearing.

On February 1, 2001, BWXT replaced the employer as the management and operating contractor at Pantex. BWXT agreed to assume the employer's defense to the allegations contained in the complaint. Unless otherwise noted herein, assertions raised by BWXT on behalf of the employer will be attributed to the employer.

On March 27, 2001, the OHA investigator issued her report of investigation. On July 26, 2001, the hearing convened. At the hearing, Complainant testified, presented 3 witnesses and submitted 24 exhibits (denoted by numbers). The employer presented 3 witnesses and submitted 11 exhibits (denoted by letters).(1)

II. Findings of Fact

From January 1998 until his termination in September 2000, Complainant worked for the employer as a radiation safety technician (rad tech) in the Non-MAA Section of the Radiation Safety Division at Pantex. The Non-MAA Section engages in activities involving nuclear weapons parts. At all times relevant to the complaint, Complainant's Operations Manager and immediate supervisor was Henry Ornelas.

Complainant and Ornelas' relationship was less than amicable. Both employees had strong personalities and were candid with their opinions. They argued with each other several times over the years. One argument, which led to the termination of both employees, forms the basis of this proceeding.

The incident occurred on Friday, September 8, 2000. At approximately 8 a.m., Complainant and two other rad techs, Kendra Bridges and Phil Franks, were seated in preparation for a meeting in the rad technicians' area. They began discussing the whereabouts of Complainant's partner, Russell West. Bridges revealed to Complainant and Franks that at that time, West was working an overtime shift and had been working for approximately 24 consecutive hours, save for a pre-dawn, 2 hour break. While they were talking, Ornelas approached. He immediately became agitated and made a statement to the effect that overtime issues were "none of their business." Complainant responded that it was unsafe to work for such a long period of time and that the handling of overtime in West's situation was "stupid." Ornelas replied, "Are you calling me stupid?" From there, the conversation quickly became heated, and Complainant's and Ornelas' voices grew louder and louder until Complainant finally told Ornelas to "shut up." Ornelas then ordered Complainant to accompany him to the office of their Department Manager, Wayburn Scott Wilson. At first, Complainant hesitated, repeatedly asking "why." After Ornelas twice reiterated the order, Complainant agreed, and they proceeded toward Wilson's office, with Ornelas following closely on Complainant's heels.

Wilson was not there, however, so Ornelas grabbed Complainant's arm to lead him to the office of their Operations Coordinator, Richard Jones. As the employees approached and entered Jones' office, they were both yelling. The cramped space in Jones' small office forced Complainant and Ornelas to stand close to each other, virtually face to face. They remained standing and continued to yell, despite Jones' request that they calm down and explain the situation. The parties dispute what happened next, but the evidence shows that Complainant stepped toward Ornelas. This action prompted Ornelas to use his chest to bump Complainant away, and in response, Complainant yelled "Don't bump me, Hank." Jones then inserted himself between the employees and again admonished them to calm down. Ornelas finally stepped aside and attempted to telephone Security, while Complainant asked him if he wanted to go to the Human Resources Office. Jones then ordered Complainant to return to the rad technicians' area. Complainant complied, and the altercation ended.

Jones later reported the altercation to Wilson. On the following Monday, September 11, 2000, Wilson and Michael Knight, Manager of the Radiation Safety Department, reported the altercation to Peter Selde, the Division Manager. As discussed below, after various consultations, the decision to terminate Complainant "rested with Mr. Selde.(2) With Selde's approval, Knight and Chris Passmore, another member of radiation management, launched an investigation into the altercation, as well as the overtime issue.

On or around September 18, 2000, Knight and Passmore presented an investigation memo to Selde (the September 18 memo). Attached to the September 18 memo were written statements from Complainant, Ornelas and Jones, summaries of oral interviews with them, and summaries of oral interviews with other rad techs who witnessed the portion of the argument that occurred in their meeting area. In their written statements, Ornelas and Jones agreed that Complainant had moved toward Ornelas before Ornelas bumped him away. However, in his written statement, Complainant made no mention of moving toward Ornelas; instead, he stated that he and Ornelas were "gripping [sic] at each other in close quarters." Exhibit (Exh.) F.

As set forth in the September 18 memo, Knight and Passmore found that (1) Complainant told Ornelas to "shut up"; (2) Complainant "approached Ornelas and got ?face to face' with him"; and (3) "Ornelas pushed Complainant off of him." Exh. F. They further concluded that Complainant and Ornelas' conduct on September 8, 2000 constituted "clear violations" of the Pantex Employee Manual ("the Manual") and Pantex Bulletin 869 (Bulletin 869). Exh. F. The Manual prohibits "general," "safety," and "security" misconduct and lists examples of each. Bulletin 869 sets forth a "zero tolerance policy" regarding physical and non-physical confrontations. The first section of Bulletin 869 provides for automatic discharge of employees who engage in physical confrontations (Bulletin 869(1)). The second section provides for discipline up to and including discharge of employees who engage in non-physical confrontations (Bulletin 869(2)).(3) The September 18 memo did not specify the type of confrontation in which Complainant or Ornelas engaged.

In the following days, Selde consulted several people regarding the appropriate course of action. First, on September 22, 2000, Selde, Knight and Passmore met with Michael Soper, a Labor Relations representative. Pantex procedures require that managers consult Labor Relations when contemplating formal discipline for an employee. During that meeting, Selde requested that Knight further investigate the duration and circumstances leading to the escalation of the confrontation between Complainant and Ornelas.

On September 25, 2000, Knight presented Selde with a second investigation memo (the September 25 memo). In the September 25 memo, which is based upon a follow-up interview with Jones, Knight concluded that (1) the confrontation in Jones' office lasted 6-8 minutes, with Complainant and Ornelas "face to face" for about 1-2 minutes; and (2) Complainant "advanced on Ornelas and got in his face," before Ornelas bumped him away. Exh. G.

Later on September 25, 2000, Selde, Jones, Wilson, Knight, and Soper met with Robert Rowe, the Human Resources Director. During that meeting, Knight, Wilson, and Jones advised Selde that Bulletin 869 did not require termination for either employee; Soper and Rowe advised that Bulletin 869 required termination for both.

Selde next consulted the general manager of Pantex at the time, Dr. Benjamin Pellegrini. Selde sought Pellegrini's position regarding Bulletin 869, since it had been issued and signed by Pellegrini's predecessor. Pellegrini advised Selde that he supported strict enforcement of the policy.

Finally, on September 27, 2000, Selde met with the Personnel Evaluation Board (PEB). Pantex procedures require the PEB to review termination decisions. The PEB consisted of 10 members, including Soper, Rowe, and representatives from the employer's Employees Concerns Office and legal department. Also present as witnesses were members of radiation management, including Jones, Wilson, Knight and Chris Cantwell. Neither Complainant, nor Ornelas attended the meeting, and besides Jones, no other witnesses to the altercation attended. PEB members had been given for review a copy of the September 18 and 25 memos and all attachments, including Complainant and Ornelas' written statements.

The PEB first discussed Ornelas. After short deliberation, Selde recommended that Ornelas be terminated, and the PEB unanimously concurred. Finding that Ornelas engaged in a physical confrontation, by chest-bumping Complainant, and insubordination, by disregarding Jones' order to settle down, the PEB agreed that Bulletin 869(1) called for Ornelas' termination. Ornelas' personnel file contained evidence of two prior disciplinary actions, including a verbal counseling and a documented warning.(4)

The PEB next discussed Complainant. After extended deliberation, Selde recommended that Complainant be terminated, and again, the PEB unanimously concurred. Finding that Complainant engaged in a non-physical confrontation with Ornelas and two acts of insubordination, once by telling Ornelas to "shut up," and again by ignoring Jones' initial order to settle down, the PEB agreed with Selde that Complainant's conduct fell within the purview of Bulletin 869(2). Although Bulletin 869(2) provides for, but does not mandate, termination, the PEB and Selde agreed that Complainant's discharge was warranted, because he was the initial aggressor in the altercation with Ornelas and repeatedly insubordinate. Complainant had no prior disciplinary actions in his personnel file. Except Selde, every radiation safety manager present at the meeting had recommended a lesser form of discipline for both employees.

The following day, September 28, 2000, Selde presented Complainant and Ornelas with draft termination statements, which restated the employer's investigatory findings regarding the September 8 incident. Given the choice between accepting the termination statements or resigning, both employees resigned.

On October 13, 2000, Complainant filed a Part 708 complaint, alleging that the employer effectively terminated him for raising safety concerns regarding overtime practices. The employer does not dispute that it effectively terminated Complainant, but posits that it would have terminated Complainant for violating Bulletin 869, regardless of whether Complainant made a protected disclosure. Complainant seeks reinstatement, back pay, reimbursement of reasonable costs and expenses and interim relief in the form of

reinstatement, pending the outcome of an appeal.

III. Applicable Legal Principles

The DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708, provides an avenue of relief for contractor employees who experience retaliations as a result of making protected disclosures. The program provides for reinstatement, back-pay, transfer preference and such other relief as may be appropriate.

Section 708.29 requires an employee to show by a preponderance of the evidence that (1) he made a protected disclosure or participated in a protected proceeding, and (2) the protected disclosure or conduct was a contributing factor to an alleged retaliation. Preponderance of the evidence is proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990).

If an employee makes the required showing under Section 708.29, then the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. The clear and convincing standard requires a degree of persuasion higher than a preponderance of the evidence, but less than beyond a reasonable doubt. *Hopkins*, 737 F. Supp. at 1204 n.3.

IV. Analysis

A. The Complainant's Burden

1. Whether Complainant Made a Protected Disclosure

The first issue is whether Complainant made a protected disclosure for purposes of Part 708. I find that he did.

Under Section 708.5, a protected disclosure includes information conveyed by an employee to a DOE official or his employer, which the employee reasonably and in good faith believes reveals a substantial violation of a law, rule or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority.

Complainant made a protected disclosure on September 8, 2000 (the protected disclosure).(5) That morning, Complainant revealed information to his employer that he reasonably and in good faith believed revealed a substantial and specific danger to employees or public health or safety. More specifically, Complainant raised a concern to Ornelas that working excessive overtime was unsafe.

Although the employer maintains that Complainant was not attempting to articulate a safety concern, but rather was complaining about overtime in general, the record indicates that sincere safety concerns motivated Complainant to speak. Indeed, in recalling the September 8 incident, Ornelas twice recounted that Complainant specifically described excessive overtime practices as "unsafe.(6)

In addition, there is ample evidence that Complainant reasonably believed excessive overtime presented a substantial and specific danger. Bridges testified that the risks of contamination involved in handling nuclear weapons parts can only be exacerbated when a rad tech works while fatigued.(7) Stating his belief that Complainant raised a valid safety concern, Selde testified that employees who work more than 16 consecutive hours "are not alert, they represent an increased risk of injury to themselves or the weapons system.(8) Soper testified that he believes Complainant raised a valid safety concern.(9)

The employer contends that even if Complainant articulated a safety concern, any protected disclosure is

"preempted by his contemporaneous conduct.(10) This argument muddles the distinction between Complainant's prima facie case and the employer's affirmative defense. Complainant's conduct would not "preempt" a protected disclosure; instead, it bears upon the issue of whether the employer would have terminated Complainant absent the protected disclosure, as discussed below.

Based upon the foregoing, I find that Complainant made a protected disclosure on September 8, 2000.

2. Whether the Protected Disclosure Contributed to a Retaliation

I next examine whether Complainant has shown that the protected disclosure contributed to a retaliation. Complainant maintains that the protected disclosure contributed to his termination. As discussed below, I agree.

Section 708.12 defines "retaliation" as "an action . . . taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions, or privileges of employment) as a result of the employee's disclosure . . . ." As stated above, the employer admits that Complainant was effectively discharged, and a discharge clearly constitutes an adverse employment action.

In order for an adverse action to constitute a "retaliation," however, a complainant must show that he made a protected disclosure that contributed to that adverse action. A protected disclosure may be considered a contributing factor to an adverse action where the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure factored into such action. *Charles Barry DeLoach*, 26 DOE ¶ 87,509 (1997); *Ronald Sorri*, 23 DOE ¶ 87,503 (1993). Moreover, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

In this case, every person involved in the decision to terminate Complainant knew or had constructive knowledge of the protected disclosure. It is undisputed that Selde, who after consultation with other personnel, made the decision to discharge Complainant, (11) was aware of the protected disclosure.(12) In addition, every member of the PEB that decided to discharge Complainant had been given for review a copy of the September 18 memo, attached to which was Ornelas' written statement that Complainant had "mentioned that it was not safe to work all night long and then have to work the next day." I therefore find that the PEB members had constructive knowledge of the protected disclosure.

In addition, there is a close time nexus between the protected disclosure and Complainant's discharge. The employer terminated Complainant on September 28, 2000, only 20 days after the September 8 incident. The actual or constructive knowledge of the individuals involved in the decision to terminate Complainant, coupled with the temporal proximity between the protected disclosure and his discharge, is sufficient to permit a reasonable person to conclude that the protected disclosure was a contributing factor to his discharge. Therefore, Complainant has established a prima facie case of retaliation.

B. The Employer's Burden

The burden therefore shifts to the employer to show by clear and convincing evidence that it would have terminated Complainant in the absence of the protected disclosure. The employer asserts the following: (1) strict enforcement of Bulletin 869's zero tolerance policy is necessary to ensure the security of Pantex; (2) Complainant had fair notice of the policies set forth in Bulletin 869; (3) the employer conducted a fair investigation into the events of September 8, 2000; (4) the investigation revealed that Complainant engaged in two acts of insubordination and a non-physical confrontation, as prohibited under Bulletin 869; (5) given the severity of Complainant's conduct, Bulletin 869 required Complainant's termination; and (6) the employer applied Bulletin 869 fairly and without improper motives to Complainant. In response, Complainant (1) challenges the integrity of the investigation; and (2) maintains that his termination was a

form of discipline substantially disproportionate to the discipline imposed on other employees for similar conduct. As discussed below, although the employer set forth some evidence that it would have terminated Complainant absent a protected disclosure, it has not satisfied the clear and convincing standard required by Part 708.

As Complainant and the employer recognize, the determination as to whether the employer would have terminated Complainant in the absence of the protected disclosure requires an historical examination of how the employer has disciplined "similarly situated" employees, i.e., employees who have engaged in confrontations and insubordination. (13) In making that determination, I first address whether the employer fairly investigated Complainant's conduct and characterized it as confrontational and insubordinate. As discussed above, the employer relied upon Knight and Passmore's investigation in finding that Complainant engaged in a non-physical confrontation and repeated acts of insubordination. In its draft termination statement to Complainant, the employer explained:

> [T]elling your Operations Manager to "shut up" and your repeated disregard of your Operation Coordinator's direction to lower your voice and calm down, each constitute gross insubordination. Moreover, your advancement, nose-to-nose, with your Operations Manager was both blatantly disrespectful, and in clear violation of Plant work rules, including [Bulletin 869(2)].(14)

Although Complainant does not dispute that he told Ornelas to "shut up" and initially disregarded Jones' order to calm down, Complainant contends that he did not "advance nose-to-nose" toward Ornelas while in Jones' office. Complainant maintains that the confined space of Jones' office, not aggression or a motive to intimidate, forced him to stand within inches of Ornelas. Complainant believes that Jones, who was close friends with Ornelas, reported a version of the September 8 incident that was inaccurate and slanted against Complainant. He further opines that, as evidenced by their heavy reliance upon Jones' statements in their investigation, members of radiation management teamed against him to drive Selde and the PEB toward a discharge decision.(15)

I find that the employer conducted a thorough investigation and fairly characterized Complainant's behavior as confrontational and insubordinate. Knight and Passmore interviewed or obtained written statements from every essential witness to the September 8 incident before presenting their findings to Selde, and, in turn, the PEB. Their heavy reliance upon Jones' description was reasonable, because Jones was the only third party present during the height of the altercation, which occurred in his office. Complainant's argument that Jones made statements designed to protect Ornelas is unconvincing. Jones reported a version of the incident that would later result in the discharge of both employees. Moreover, the September 18 investigation memo presented to Selde and the PEB acknowledges that the "exact details of what transpired differs from person to person," and attaches Complainant's written version of the September 8 incident, as well as the written statements of Jones and Ornelas. Furthermore, regardless of whether Complainant intended to "advance" toward Ornelas in a threatening manner, several rad techs testified that both Complainant and Ornelas employed aggressive mannerisms. In short, I am convinced that the employer conducted an impartial investigation and fairly concluded that Complainant's behavior, although non-physical, was confrontational and insubordinate.

I next examine how the employer has disciplined employees for engaging in confrontations and insubordination. As discussed below, even accepting the employer's description of Complainant's behavior, the employer failed to show with clear and convincing evidence that it consistently discharged employees for similar misconduct.

Because the employer relied upon Bulletin 869 in deciding to discharge Complainant, I focus upon the employer's treatment of similarly situated employees between August 23, 1999, the effective date of Bulletin 869, and September 28, 2000, the date of Complainant's discharge. The employer produced a list entitled "All Disciplines for Misconduct" (the disciplinary list) which shows that between August 23, 1999 and September 28, 2000, the employer disciplined employees for hostile, disruptive behavior

approximately 18 times. Exh. 30.(16) As reflected on the disciplinary list, the employer utilized two forms of discipline short of discharge, which for purposes of simplicity shall be referred to, in ascending order of severity, as Level 1 and Level 2.(17)

Three of the above-described 18 employees, including Complainant, Ornelas and a third employee found to have engaged in a non-physical confrontation (the third terminated employee), were discharged. The remaining employees received either a Level 1 or Level 2.(18) Following are excerpts from written statements the employer issued to the disciplined employees.

(1) Level 1: You and a coworker were discussing pens being sold . . . . A second coworker commented, recommending the pens. You responded . . . in a repeatedly loud, profane, and abusive manner. Exh. 30 at 9.

(2) Level 2: You poked your finger in [a coworker's] chest [in an attempt to engage him in discussion]. This encounter, which you thought was a joke, was not received that way by the employee. Exh. 30 at 10.

(3) Level 2: You became verbally abusive toward [coworkers]. This included raising your voice at employees and using an obscene remark in reference to one of the individuals. Exh. 30 at 10.

(4) Level 2: You addressed [a coworker] in a loud, confrontational manner, verbally ejecting her from your office. Exh. 30 at 11.

(5) Level 2: You initiated a verbal confrontation with a coworker . . . stood over him and chastised him for approximately seven (7) minutes, during which time you shook your finger in his face and voiced profanities concerning this individual, and in comparing him to management. . . . you exacerbated this situation by challenging [the coworker after he suggested a physical action] to try to make good on it. Exh. 30 at 14.

(6) Level 2: You entered [a coworker's] office, verbally objecting to [a management decision] . . . returning repeatedly to reemphasize your protest . . . you told him to advise [another supervisor] that you would "get even," that [he] would regret his action, and you threatened his . . . removal . . . . Your actions . . . were both threatening and disrespectful to those in authority, and constitute serious misconduct. Exh. 30 at 14.

(7) Level 2: You profanely advised [another coworker] that if you were in management you would choke him. On a recent occasion, you threatened another coworker with bodily harm . . . . Exh. 30 at 14.

(8) Level 1: You verbally confronted [coworkers] with your opinions of their shortcomings. [You were instructed to meet with a supervisor later] but to drop it until then. You subsequently went to one of the coworkers' offices and pursued your issue where your tone of voice was overheard by [another individual]. The manner in which you expressed yourself was inappropriate and confrontational and your willful disregard of [a] direction to you is unacceptable. Exh. 30 at 21.

(9) Level 2: You questioned your supervisor . . . in a belligerent manner, i.e., "What's all this [expletive] about us having to do this stuff to help the guys testing the rams alarms?" . . . You continually interrupted him, exclaiming, ". . . yeah, yeah, yeah, that's [expletive]." [You again interrupted repeating the expletive two more times, and] then asserted that management just "lies." Exh. 30 at 27.

Following is an excerpt from the disciplinary statement issued to the third terminated employee:

[After your supervisor saw you take your second morning break and reminded you that the rule is one morning break, you] confronted [him] in his office. You demanded, in a loud agitated voice and pointing your finger at him, to stop "harassing" you. You [then] approached [two other coworkers] in a similar tone and manner. You [then] proceeded back to [your supervisor's] office and, still agitated, persisted in questioning him as to why he challenged your break. Exh. 30 at 21.

The employer maintains that when employees have engaged in insubordinate and confrontational conduct rising to the level of that engaged in by Complainant, they have been terminated. The employer primarily relies upon Bulletin 869(2) in justifying Complainant's termination and maintains that it applied the zero tolerance policy fairly and without discrimination to Complainant. Besides pointing to Ornelas and the third terminated employee, the employer presented evidence showing that in 1998, it terminated two security force personnel pursuant to a zero tolerance policy in effect for only the guard force at the time. Exh. C and D. That policy provided the model for Bulletin 869. The evidence shows that those employees engaged in separate, serious confrontations, one involving repeated racial epithets and the other involving a physical push and challenge to fight. The employer distinguishes Complainant from the above employees who received a Level 1 or Level 2, by maintaining that his non-physical conduct was particularly egregious. Selde testified that "because [he] felt [Complainant] was the aggressor in the case [by advancing toward Ornelas] and that he had failed to comply with Mr. Jones's direction to stop the argument that termination [was appropriate].(19) The Labor Relations representative, who was a member of the PEB, testified that Complainant's behavior differed from that of lesser disciplined employees, because he escalated the conflict with Ornelas and was repeatedly insubordinate. (20)

Complainant contends that his behavior was not unusual for the generally truculent Pantex environment. Indeed, he maintains that he did nothing wrong, was the victim of aggression not the aggressor, and should not have been terminated in any manner. To the extent his behavior was confrontational and insubordinate, he argues that the disciplinary list shows that similarly situated employees have escaped termination. He distinguishes himself from Ornelas and the third employee, both of whom had received a Level 2 prior to termination, because he had never received a formal discipline of any kind.

Complainant further argues that the disciplinary list is not exhaustive, and that numerous confrontations and acts of insubordination were handled "in-house," without even reaching Level 1. Complainant, Bridges and Franks testified that they had heard of several non-physical, verbal confrontations that, to their knowledge, went unpunished. Michael Ford, a member of the radiation safety department, testified that he personally had been involved in a verbal confrontation but received only a verbal counseling.(21) Knight, who was Ford's supervisor at the time, recognized in testimony that Ford was not formally disciplined, but stated that in his opinion, Complainant's behavior was more severe than Ford's. The Labor Relations representative testified that management should consult Labor Relations when it is contemplating formal discipline for an employee, but he further recognized that management may decide not to notify Labor Relations of certain incidents and instead handle them "in-house.(22)

Based upon the foregoing, I find that the employer has not shown by clear and convincing evidence that it would have terminated Complainant absent the protected disclosure. As an initial matter, the employer failed to show with clear and convincing evidence that it consistently invoked Bulletin 869. The employer's own descriptions of several of the above-listed offenses as "confrontational" and "disrespectful to management," indicates that those offenses should have triggered Bulletin 869, yet Selde and Soper testified that they first invoked the zero tolerance policy against Complainant and Ornelas.(23) Moreover, the record indicates that employer conflicts were a near daily occurrence at Pantex, yet several incidents escaped formal review.

The employer also failed to show that it applied Bulletin 869 in a consistent manner. The disciplinary list shows that the termination of Complainant was substantially disproportionate to discipline imposed for similar misconduct in the past. In the nearly two years following Bulletin 869's implementation, numerous employees engaged in non-physical confrontations and insubordination, but besides Complainant, only one other employee had been terminated. All others received only a Level 1 or Level 2.

The employer's attempt to distinguish Complainant from lesser disciplined employees is unconvincing. Although it may be true that Complainant's conduct differed from that of other employees, because he took a step toward Ornelas and was repeatedly insubordinate,(24) one would be hard-pressed to find any two altercations that are factually identical. There is no clear and convincing evidence showing that the general nature of Complainant's conduct is significantly distinguishable from that of other employees who

had "willfully disregarded" instructions and engaged in "verbal confrontations" but were spared termination. The record shows nothing particularly egregious about Complainant's conduct that would warrant singling him out from other employees who disobeyed, repeatedly cursed and yelled at, and threatened violence toward their supervisors or coworkers, but received lesser penalties. See *Dreis & Krump Manufacturing Co., Inc. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976) ("communications occurring during the course of otherwise protected activity remain likewise protected unless . . . so violent or of such serious character as to render the employee unfit for further service.").

In addition, I am unpersuaded by the employer's argument that its termination of Complainant is supported by the terminations of Ornelas, the third terminated employee, and the two security force personnel. The employer's assertion that Ornelas was most similarly situated to Complainant is controverted by its own characterization of Ornelas' behavior as a "physical confrontation" and conclusion that therefore he was subject to automatic termination under Bulletin 869(1). By the employer's own reasoning, Ornelas was in an entirely different category from Complainant, who engaged in a non-physical confrontation subject to Bulletin 869(2).(25) With regard to the third terminated employee, evidence that out of numerous employees who had engaged in similar misconduct, only the third terminated employee and Complainant were discharged falls short of establishing with convincing clarity that the employer applied Bulletin 869(2) in a consistent manner. Furthermore, evidence that two security force personnel were terminated offers the employer little support for its position, since the employees were terminated under a different policy and one of the terminated employees had engaged in a physical confrontation.

Although the employer has set forth some evidence showing that it would have terminated Complainant absent the protected disclosure, the clear and convincing standard requires more. I therefore find that the employer has failed to meet its burden in this case and Complainant is entitled to relief as set forth below.

IV. Relief

Section 708.36 sets forth the types of relief that may be granted in initial agency decisions. The relief includes: (1) reinstatement; (2) transfer preference; (3) back pay; (4) reimbursement of reasonable costs and expenses, including attorneys fees reasonably incurred to prepare for and participate in proceedings leading to the initial decision; and (5) such other remedies as are deemed necessary to abate the violation [including reinstatement as] interim relief, pending the outcome of any request for review of the decision by the OHA Director. Complainant requests all of the above.(26) I have reviewed the parties' post-hearing briefs regarding damages and grant relief as follows.

a. Reinstatement and Transfer Preference

BWXT shall offer Complainant a position that is equivalent to the one he occupied when he resigned.

b. Back pay

Within 30 days of the date of this order, Complainant shall provide BWXT with a report which calculates the weekly pay he received for a 40 hour shift. The report shall calculate the back pay as the sum of that weekly pay for every week until BWXT offers him an employment position at the rate equal to the rate he would be earning if he had not been discharged. Interest shall accrue on the back pay at the rate of ½ percent per month starting December 1, 2001. Interest shall compound monthly.

c. Reasonable Costs and Expenses Associated with Prosecuting the Complaint

Complainant seeks over $7,000 for hotel and housing costs, $3,800 in moving and travel costs, and $756.81 in utility costs, all related to his job relocation. These costs are not "reasonably incurred" in bringing his Part 708 complaint, are beyond the scope of relief Part 708 was intended to grant and therefore will be denied. See *Ramirez v. Brookhaven National Laboratory*, Case No. LWA 002, 23 DOE ¶

87,505 (1994). Complainant also seeks to recover $1,883.44 in "time off." However, all of that time is subsumed in the back pay calculation. Complainant also seeks $11,020.21 in attorneys fees and expenses through July 27, 2001. BWXT stipulates that Complainant has submitted pre- billing worksheets with sufficient itemization of attorney time and expenses.

d. Interim Relief

I have determined that the circumstances do not warrant granting Complainant interim relief in the form of reinstatement. Complainant may seek back pay and other fees and expenses incurred between the date of this order and the outcome of an appeal.

V. Conclusion

As set forth above, I find that Complainant met his burden of establishing by a preponderance of the evidence that he made a protected disclosure that contributed to his termination. I further find that the employer has failed to show by clear and convincing evidence that it would have terminated Complainant absent a protected disclosure. Accordingly, under Part 708, Complainant is entitled to relief.

It Is Therefore Ordered That:

(1) The request for relief filed by Robert Burd under 10 C.F.R. Part 708, OHA Case No. VBH- 0060, is hereby granted as set forth in Paragraphs 2 through 4 below.

(2) BWXT shall reinstate Complainant, provide him with back pay, and reimburse him for the reasonable costs and expenses.

(3) Within 30 days of the date of this order, Complainant shall file a report providing a calculation for back pay. In the event there is no immediate reinstatement offer, the report shall be updated every 90 days.

(4) Within 60 days of the date of this order, BWXT shall pay Complainant attorney fees and expenses, as requested in Complainant's post-hearing brief regarding damages.

(5) This is an initial agency decision which shall become a final decision of the Department of Energy unless, within 15 days of the date of this decision, a party files a Notice of Appeal with the Director of the Office of Hearings and Appeals.

(6) This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by each affected NNSA element, official or employee and by each affected contractor.

Helen E. Mancke

Hearing Officer

Office of Hearings and Appeals

Date: November 1, 2001

(1) In addition to live witnesses, Complainant submitted the deposition transcript of Phil Franks, and the employer submitted the deposition transcripts of Henry Ornelas and Peter Selde.

(2) Employer's post-hearing brief at 9.

(3) Bulletin 869, which was issued to all Mason & Hanger employees by W.A. Weinreich, then General Manager, on August 23, 1999, specifically states in relevant part:

> Effective immediately, I am instituting a ?zero tolerance' policy regarding confrontations on the Plant site. This means: (1) Any employee proven to have engaged in a physical confrontation with another person will be discharged; (2) Non-physical confrontations will result in appropriate disciplinary action, up to and including discharge .

Exh. 1.

(4) The verbal warning was for failure to control "horseplay" during a work-related class he attended. The documented warning was for leaving work early without permission and submitting an inaccurate time card.

(5) Complainant also maintains that he raised safety concerns to Ornelas in November 1999 and August 2000. I need not address those disclosures here, however, because I find that he made a protected disclosure on September 8, 2000 that contributed to a retaliation. The protected disclosure occurred just prior to the incident that resulted in the dismissal of Complainant.

(6) See Transcript of Ornelas deposition, Exh. K at 15 ("[Complainant said,] 'He shouldn't have been here all night. It's unsafe.'"); Ornelas' written statement to Knight, Exh. F ("[Complainant] mentioned that it was not safe to work all night long and then have to work the next day.").

(7) Hearing transcript at 146-47.

(8) Selde deposition transcript at 56, 60.

(9) Hearing transcript at 40.

(10) Employer's post-hearing brief at 6.

(11) Employer's post-hearing brief at 7.

(12) In testimony, Selde admitted that he knew Complainant had raised "safety concerns" regarding overtime. Selde deposition transcript at 56.

(13) Contrary to the employer's assertion, the relevant group of similarly situated employees is not the other rad techs who raised safety concerns.

(14) Draft termination statement from Selde to Burd, Sept. 28, 2000.

(15) Hearing transcript at 219-20.

(16) The disciplinary list is a compilation of 146 written statements issued to employees for various types of "misconduct" occurring between June 1, 1999 and June 13, 2001 (the disciplinary list). The disciplinary list details a broad range of misconduct, from sleeping on duty, to misuse of email, to violent, physical confrontations. Of the 146 incidents of misconduct, 84 occurred between August 23, 1999 and September 28, 2000, and of those 84, 18 resulted from conduct that reasonably may be characterized as confrontational in nature.

(17) The employer utilized two disciplinary tracks, one for employees considered exempt under the Fair Labor Standards Act and one for members of the Metal Trades Council (MTC) and non-bargaining, non-exempt employees. Exempt employees were subject to, in ascending order of severity, (1) a documented warning, (2) a letter of reprimand, or (3) termination. MTC members and non-bargaining, non-exempt employees, such as Complainant and Ornelas, were subject to, in ascending order of severity, (1) a written

reminder, (2) a decision-making leave, which is tantamount to a suspension (DML), and (3) termination. Because the distinction between the two tracks is irrelevant for purposes of this case, Level 1 includes documented warnings and written reminders, and Level 2 includes letters of reprimands and DMLs.

(18) The employer produced evidence showing that it discharged an employee in November 2000. However, the employer's own characterization of that incident as a physical confrontation indicates that the discharged employee engaged in conduct more severe than that engaged in by Complainant. In addition, I find the circumstances of terminations that occurred after Complainant filed his complaint more relevant than terminations that occurred before.

(19) Selde deposition transcript at 38.

(20) Hearing transcript at 21-37.

(21) Hearing transcript at 200-01.

(22) Hearing transcript at 241.

(23) Selde deposition transcript at 39.

(24) Notably, the repeated acts of insubordination at issue here occurred during a single, heated event and thus this case is distinguishable from other cases finding that repeated insubordination justified an employee's discharge, where the employees was insubordinate numerous times over several months. See *Jiunn S. Yu*, VBH-0028 (July 1999).

(25)Complainant also distinguishes himself from Ornelas and the third terminated employee, because unlike them, Complainant had a clean personnel record prior to termination. However, I find the distinction of no import. Soper, the Labor Relations representative who was a member of the PEB, credibly testified that while the existence of prior disciplinary actions in an employee's file may influence what type of action the employer will impose upon him next, the absence of a prior disciplinary action has no effect. Hearing transcript at 107. Soper's testimony is supported by the fact that most of the Level 2 disciplines cited above were issued to employees who had never received a Level 1.

(26)Complainant requested reinstatement in his prehearing brief and reiterated the remainder of his requests in a post-hearing brief regarding damages.

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

June 27, 2002

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Bernard F. Cowan

Date of Filing: November 27, 2001

Case Number: VBH-0061

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Bernard F. Cowan under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Mr. Cowan contends that reprisals were taken against him after he made certain disclosures concerning mismanagement and safety violations to DOE officials and to his employer, Argonne National Laboratory-West (ANL-W), a contractor for the DOE's Chicago Operations Office (DOE/CH). Mr. Cowan contends that ANL-W retaliated against him by (i) referring to him in an Occurrence Report, (ii) failing to select him for a training specialist position, (iii) including undue criticism of him on a performance evaluation, (iv) transferring him to a job that deprived him of compensation, and (v) suspending him for three days without pay.

I. Summary of Determination

Based on my analysis of the record in this proceeding, I find that Mr. Cowan made at least one protected disclosure that was proximate in time to adverse personnel actions taken against him by ANL-W. Other adverse personnel actions were taken after Mr. Cowan initiated his Part 708 complaint. Under these circumstances, the DOE's strong commitment to defending whistleblowers imposes the significant requirement that ANL-W show by clear and convincing evidence that, in the absence of these protected disclosures, it would have taken the same negative personnel actions against Mr. Cowan.

As indicated below, I find that ANL-W management's findings concerning Mr. Cowan in a June 2000 Occurrence Report did not constitute an action with respect to employment under the definition of retaliation contained in Section 708.3. I find that Mr. Cowan's failure to be selected for a training specialist position, criticism of Mr. Cowan contained in a 2000 interim performance appraisal, the June 2000 transfer of Mr. Cowan from one laboratory facility to another, and Mr. Cowan's January 2002 suspension for three days without pay were each an adverse personnel action.

After concluding that there were four adverse personnel actions that were close in time to a protected disclosure or occurred during the pendency of a Part 708 Complaint, I analyze whether ANL- W has demonstrated by clear and convincing evidence that it would have taken those personnel actions absent the protected disclosure or protected activity. I find that, with the exception of its selection for the training specialist position, ANL-W has failed to establish by clear and convincing evidence that it would have taken these negative personnel actions absent Mr. Cowan's protected disclosures.

Accordingly, I find that the ANL-W committed reprisals against Mr. Cowan, and that it should be required to take restitutionary action.

II. Background

A. The DOE Contractor Employee Protection Program

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

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise take any adverse personnel action against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a)(l), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations are entitled to receive protections. They may file a whistleblower complaint with the DOE. As part of the proceeding, they are entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they are entitled to an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. History: Mr. Cowan's Complaint and Relevant Events Concerning his Employment at ANL-W

Mr. Cowan filed his Part 708 complaint with the Manager of Employee Concerns of the DOE's Chicago Operations Office (DOE/CH) on March August 25, 2000. On February 13, 2001, OHA Director George B. Breznay appointed an OHA Investigator to conduct an investigation of Mr. Cowan's complaint. On November 27, 2001, the OHA Investigator issued her Report of Investigation (the ROI). Mr. Cowan's employment history at ANL-W may be summarized in the following manner. In 1974, Mr. Cowan was hired as an Engineering Technician Sr. in the Operations Division (OD) at ANL-W. In 1989, he was promoted to a Training and Procedures Specialist in the Training Group of ANL-W. He later voluntarily transferred from the Training Group to the Fuel Conditioning Facility (FCF) as an Engineering Technician Sr.

The events relevant to Mr. Cowan's Part 708 complaint began on March 13, 2000, when Mr. Cowan wrote a letter to the Manager, FCF, expressing a number of workplace concerns. He had meetings with the Operations Division Director and other ANL-W managers on March 28, 2000 and April 7, 2000 to further discuss his concerns. In April 2000, Mr. Cowan and other ANL-W employees at the FCF were transferred to ANL-W's Sodium Processing Facility (SPF). Mr. Cowan immediately protested this transfer and was permitted by ANL-W management to return to the FCF.

In May of 2000, a Training Specialist position which was vacated by retirement was posted. The record reflects that Mr. Cowan, along with six others, applied for the position. He was not hired for the position.

On May 18, 2000, ANL-W management directed Mr. Cowan to "lock out, tag out" (LO/TO) certain FCF cell lighting circuit breakers.(1) During a routine inspection on June 6, 2000, some of these circuit breakers

were discovered to be locked improperly in the “on” position, although the tags indicated that they were “off”. An ANL-W occurrence report concluded that the breakers were incorrectly positioned and tagged at the time that the LO/TO was installed by Mr. Cowan. In meetings and communications with ANL-W managers, Mr. Cowan insisted that he had correctly performed the LO/TO of these circuit breakers and that he believed someone had deliberately reset them in the “on” position. He requested an investigation of the matter. On December 21, 2000, the DOE’s Argonne Area Office - West (AAO-W) requested ANL-W to investigate the alleged criminal act of someone purposefully reconfiguring the system lineup under the LO/TO performed by Mr. Cowan. In a report issued on January 31, 2001, the ANL-W concluded that, while it was possible for the alleged act to have taken place, the allegation could not be substantiated. On April 6, 2001, the AAO-W issued its investigation report concerning the LO/TO incident and reached the same conclusions.

On June 28, 2000, ANL-W management again transferred Mr. Cowan, under protest, to the SPF, where he remained until March 5, 2001 when management transferred Mr. Cowan to ANL-W’s radiological facility (FASB).

On November 21, 2000, as part of his annual performance appraisal, Mr. Cowan received an interim evaluation employee performance for the period 4/1/00 through 6/23/00. This interim evaluation gave Mr. Cowan a low rating compared to those he generally received and criticized Mr. Cowan for becoming “preoccupied with administrative problems.”

Finally, on January 7 and January 9, 2002, Mr. Cowan sent messages addressed “To: Distribution to Argonne National Laboratory employees.” ANL-W management concluded that portions of these e- mails violated laboratory policies. ANL-W management disciplined Mr. Cowan with a three day suspension, without pay, on January 10, 13, and 14, 2002.

C. The ROI’s Findings

The ROI issued on November 27, 2001 finds that in March and April, 2000, Mr. Cowan brought safety and management concerns to the attention of ANL-W management and to the DOE/CH Employee Concerns Manager. The ROI finds that it is undisputed by ANL-W management that Mr. Cowan made these disclosures and that he reasonably believed that his concerns were of the type described in Section 708.5. The ROI also finds that there was a proximity in time between the protected disclosures and the following alleged adverse personnel actions:

(1) Poor performance evaluations and minimal merit increases in performance appraisals;

(2) Denial of promotions to Mr. Cowan, and failure to select him for a Training Specialist position;

(3) Mr. Cowan’s transfer under verbal protest from the FCF to the SPF in June 2000; and

(4) ANL-W’s assignment of responsibility to Mr. Cowan in an occurrence report for failing to correctly “lock out, tag out” the FCF’s cell lighting circuit breakers on May 18, 2000.

The ROI finds that Mr. Cowan appears to have met his burden of showing that his protected disclosures were a contributing factor to these alleged acts of retaliation as required under 10 C.F.R. §§ 708.5 and 708.29. Section 708.29 of the Part 708 regulations states that once a complainant has met the burden of demonstrating that conduct protected under section 708.5 was a contributing factor to the contractor's acts of retaliation, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." 10 C.F.R. § 708.29. The ROI finds that the available evidence indicated that ANL-W had met its burden of showing by clear and convincing evidence that it would have taken the same adverse personnel actions in the absence of the protected disclosures. ROI at 11. Specifically, the ROI finds that the available evidence establishes

that the criticism of Mr. Cowan's job performance contained on one of his evaluations was reasonable and accurate; that ANL-W acted reasonably in selecting another applicant for the position of Training Specialist; that Mr. Cowan's transfer to the SPF was a reasonable exercise of managerial discretion by ANL-W; and that ANL-W's assignment of the "lock-out tag-out" error to Mr. Cowan appeared to be factually accurate and did not result in any financial loss or loss of promotion opportunity to Mr. Cowan.

Mr. Cowan and Counsel for ANL-W exchanged and submitted responses to the findings of the ROI on December 19, 2001 and January 2, 2002, respectively. In these briefs, both parties objected to findings made in the ROI. ANL-W disputes the ROI's finding that Mr. Cowan made disclosures that are protected under Part 708. Mr. Cowan's brief indicates his belief that many of the findings and conclusions in the ROI are inaccurate.(2) In a January 8, 2002 letter to the parties, I identified certain relevant areas that I believed would help to focus the issues in dispute in this proceeding. With respect to whether Mr. Cowan had made a protected disclosure, I referred to page 7 of Mr. Cowan's March 2000 memorandum to ANL-W management. I stated that Mr. Cowan's reports concerning an operator who is a HAZ-MAT responder who resists wearing a respirator appeared to be protected disclosures concerning health and safety issues. In addition, I stated that the ROI indicates that Mr. Cowan told management officials following the May 18, 2000, Lock Out/Tag Out incident, that another operator should have verified the correctness of the tags, but that no verification was done. I stated that this reporting of a violation of a safety protocol to ANL-W management and to the DOE appeared to constitute a protected disclosure under Section 708.5.

The parties also exchanged and submitted extensive documentary evidence, reply briefs, and witness lists. On March 5 and March 6, 2002, I convened an evidentiary hearing (the Hearing) at which a total of eleven witnesses presented testimony. The testimony at the hearing focused on efforts by Mr. Cowan and counsel for ANL-W to show whether the disclosures of Mr. Cowan referred to in my January 8 letter should be viewed as protected disclosures for purposes of Part 708. Mr. Cowan and counsel for ANL-W also presented testimony concerning whether ANL-W's alleged adverse personnel actions listed above, as well as its 2001 transfer of Mr. Cowan to the FASB and its three day suspension of Mr. Cowan in January 2002, were or were not adverse personnel actions and whether Mr. Cowan's alleged protected disclosures were contributing factors to these actions.

Following the receipt of post-hearing submissions by the parties, I permitted counsel for ANL-W to comment on the appropriateness of evidentiary material submitted by Mr. Cowan along with his post-hearing brief. Upon receipt of these comments on April 29, 2002, I closed the record of the proceeding.(3)

III. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish

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

10 C.F.R. § 708.29.

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both Mr. Cowan and ANL-W. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the

evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the risk of error is allocated roughly equally between both parties. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake).

B. The Contractor's Burden

If I find that Mr. Cowan has met his threshold burden, the burden of proof shifts to the ANL-W. ANL-W must prove by "clear and convincing" evidence that it would have taken the same personnel actions regarding Mr. Cowan absent the protected disclosure. "Clear and convincing" evidence is a more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". *See Hopkins*, 737 F. Supp. at 1204 n.3. Thus if Mr. Cowan has established that it is more likely than not that he made a protected disclosure that was a contributing factor to an adverse personnel action taken by ANL-W, ANL-W must convince me that it clearly would have taken this adverse action had Mr. Cowan never made any communications concerning violations of unsafe or insecure practices and procedures at the FCF.

IV. Analysis

A. Mr. Cowan Made Protected Disclosures

In its filings and through witness testimony at the hearing, counsel for ANL-W argued vigorously that Mr. Cowan has made no disclosures that should be considered protected for purposes of Part 708. I have reviewed this carefully, and find that these arguments must be rejected. As discussed below, I find that the record in this proceeding supports Mr. Cowan's assertion that he made protected disclosures to the ANL-W management and/or the DOE in March and June 2000.

1. Mr. Cowan's March 2000 statements about a Fellow Employee Raised Significant Safety Concerns.

In a memorandum dated March 28, 2000 entitled "Whistleblower Declaration - concerns", Mr. Cowan provided the following information in a section entitled "Emergency Response Team":

> While assigned to the facility system operations, date is uncertain, management informed the crew that one of the operators had a problem with wearing a respirator, and management is working with him to overcome the problem. This operator is a HAZ-MAT responder and part of the re- entry team.
>
> During a FCF evacuation this operator refused to be part of the re-entry team back up. The FAS assigned me his duty as team member.
>
> This incident is not well standing for management to place this operator in an assignment that might jeopardize his safety, team member safety, or the safe operation of a re-entry.
>
> This operator still operates in the capacity of HAZ-Mat responder and re-entry member, with responsibility of responding on back shift when assigned.

March 28, 2000 memorandum from Mr. Cowan to Mr. G. L. Lentz, Operations Division Director, ANL-W, at p. 7.

On April 12, 2000, ANL-W management organized an investigation team of ANL-W employees to investigate and evaluate the issues raised by Mr. Cowan, including this HAZ-MAT responder issue. In its Investigation Report issued on May 18, 2000, the team made the finding that the operator in question, Mr. XXXXXX, has been medically certified/qualified for HAZ-MAT and Respirator for several years (most recently in November 1999) and has no medical restrictions in this regard. The team also found that being a member of a re-entry team is voluntary for all employees on-site.

See May 18, 2000 Investigation Report at 16-17 (attached to ANL-W's February 15, 2002 submission in this proceeding). The team's other findings and recommendations are discussed below.

In its December 19, 2001 response to the ROI, ANL-W contended that Mr. Cowan never made any protected disclosure for purposes of Part 708. In a January 22, 2002 reply brief, ANL-W argued that Mr. Cowan's contentions regarding the HAZ-MAT responder were not protected disclosures because his contentions were not accurate.

> . . . Mr. Cowan's statements concerning [the HAZ-MAT responder] are not true. The individual does not and has not since the Laboratory learned of the problem, been assigned as a HAZ MAT responder, nor is he a re-entry team member. He does not have nor has he had the responsibility of responding on the back shift. Therefore there is not and never has been a substantial and specific danger to employees or to the public health and safety in order to fall under the requirements of 10 C.F.R. 708.5.

ANL-W Reply Brief at 3. In its Post-Hearing Brief, ANL-W explained why it believed that the testimony at the hearing supported its position.

> Mr. Cowan's allegation . . . involved an ANL-W employee, [Mr. XXXXXX], who was qualified as a Hazardous Material Responder, but who was claustrophobic and had trouble wearing a full face respirator for long periods of time. The Laboratory first became aware of Mr. XXXXXX's problem in September 1997 -- a fact which Mr. Cowan does not dispute. [Hearing Transcript (TR) at] page 109, lines 20- 23. Mr. Cowan testified that he waited 2.5 years to report his concerns regarding Mr. XXXXXX to Laboratory management. [TR] page 114, lines 19-23. Mr. Evans,[ANL- W's Associate Division Director for Operations for the Facility Division, with oversight responsibility for the FCF], testified that the Laboratory was already aware of Mr. XXXXXX's problem when Mr. Cowan brought it to the attention of management. [TR] page 291, lines 21-24. Mr. Evans also testified that an individual's participation on a re-entry team was completely voluntary; that the Laboratory had taken steps to ensure that Mr. XXXXXX was not required to participate on re- entries, and that in the event of a hazardous spill requiring a re-entry, it would be the INEEL Fire Department who would perform those duties. [TR] page 290, lines 16-22, page 291, lines 6-9; page 292, lines 2-7; page 293, lines 11-14. Mr. Evans also testified that Mr. XXXXXX was evaluated by the medical staff and passed respirator training. [TR] page 279, line 25; page 280, line 1. Mr. Evans testified that there are things a HAZ MAT Technician could do that did not require wearing a respirator, such as "... draining, dragging, bringing Haz Mat spill containment materials ... So you can be a HAZ MAT Technician and, and not really, and, and function as a HAZ MAT Technician and not really be required to wear a respirator..." [TR] page 228, lines 20-25, page 289, lines 1-8. Mr. [Robert] Belcher, [Operations Supervisor at FCF], also testified that participation on a re-entry team was purely voluntary. [TR] page 216, lines 20-23.

ANL-W's Post-Hearing Brief at 4-5. ANL-W concludes that disclosure of the HAZ MAT incident by Mr. Cowan was not a protected disclosure because some levels of ANL-W management knew of the situation regarding Mr. XXXXXX 2.5 years before Mr. Cowan raised his concerns, and because it believes that the evidence shows that ANL- W had dealt effectively with the issue, and there was no substantial and specific safety issue as required under 10 C.F.R. § 708.5. *Id.*, at 5.

I am not convinced by ANL-W's contentions. Section 708.5(a)(2) states that an employee is protected from retaliation when he has provided to his employer information that he reasonably believes reveals "a substantial and specific danger to employees or to public health and safety." These conditions appear to have been met with Mr. Cowan's March 2000 disclosure concerning the HAZ MAT operator. As an initial matter, I reject ANL-W's assertion that this was not a covered disclosure because ANL-W management was already aware of Mr. XXXXXX's medical condition. Mr. Cowan made his disclosure to Mr. Lentz, ANL-W's Operations Division Director. At the Hearing, Mr. Lentz testified that he first became aware of the potential problem concerning Mr. XXXXXX when Mr. Cowan included that information in his March 28, 2000 memorandum to him. TR at 473. Mr. Cowan's disclosure therefore brought Mr. XXXXXX's medical condition and its potential impact on his HAZ-MAT activities to the attention of a higher level of management than had previously been aware of this situation.

I also find that the record supports a finding that it was reasonable for Mr. Cowan to believe that Mr. XXXXXX's medical condition made his participation in HAZ-MAT reentries a substantial and specific danger to employee health and safety. In his March 28, 2000 memorandum, Mr. Cowan states that Mr. XXXXXX's problem with wearing a respirator "might jeopardize his safety, team member safety, or the safe operation of a re-entry." Memorandum at p. 7. Under questioning by ANL-W counsel at the Hearing, Mr. Cowan answered that a substantial health and safety violation existed if Mr. XXXXXX volunteered to participate in a HAZ-MAT reentry and then became claustrophobic in his respirator.

> A. Okay, the violation comes in when, when you actually call him in to, to perform a duty and he will maybe accept it, and me, as a response team member, understands that this guy's got claustrophobia. Even though he can wear a respirator, we go in and all of a sudden he loses it. He's in trouble. I'm in trouble. And this is a safety concern, and it should be addressed and brought to the point. That date [in 1997] that he [refused to participate in a re-entry] brought it to [attention] that this is a concern and it should be addressed.
>
> Q. Okay, but -- And on that date Management didn't require him to go in, did they?
>
> A. No, they didn't.
>
> Q. So --
>
> A. They were upset.
>
> Q. So they were, when they were made aware of, of, of his concern about wearing this respirator, they took appropriate safety measures by not requiring him to go in?
>
> A. I'm not going to say it was appropriate methods. He shouldn't have been there in the first place, and so inappropriate would be that they had a person qualified to an area that posed safety problems, safety to him and safety to everybody that's going in, and everything around him. That's a, that's a compromise of safety, the way I look at it.

TR at 120-121. I do not believe there can be any dispute that if someone is working as part of a team in a chemically or radioactively contaminated area, and is suddenly compelled to remove his respirator, he would pose a substantial safety risk to himself. Moreover, such an action would be dangerous to other team members who are relying on his participation and support. That it was reasonable to believe that this situation was dangerous is supported by the findings of the investigative team appointed by Director Lentz. Their May 18, 2000 Investigation Report indicates that, once Mr. XXXXXX's situation came under the scrutiny of an investigation, management determined that Mr. XXXXXX's HAZ-MAT activities should be restricted until his medical condition improved. They also removed the requirement that shift operators like Mr. XXXXXX be qualified as HAZ-MAT technicians.

> 3. On May 15 [2000], this committee was advised that the operator [Mr. XXXXXX] has been temporarily restricted from the use of a full face respirator in the event of an emergency

> response. The operator will continue full face respirator use during normal work assignments as required. When the operator advises management that this medical condition has been improved, this restriction will be re-evaluated. The operator will continue to maintain Rad Worker II qualifications which include fit testing for respirator use. HAZ-MAT technician qualifications which include fit testing for respirator use. HAZ-MAT technician qualifications are being dropped and are not required in order to function as a shift operator.

May 18, 2000 Investigation Report at 16-17 (attached to ANL-W's February 15, 2002 submission in this proceeding). These actions taken by management indicate that Mr. XXXXXX's participation as a HAZ-MAT responder was viewed as a sufficiently serious safety concern by ANL-W management at that time to warrant restricting his HAZ-MAT activities and changing the HAZ-MAT qualifications for his work as a shift operator. They therefore support a finding that in March 2000 it was reasonable for Mr. Cowan to believe that Mr. XXXXXX's continued participation in the HAZ-MAT responder program constituted a substantial safety and health concern.

While testimony at the Hearing indicates that further study of the situation, and action by management, may have substantially alleviated the safety concern in this area, this factor is not relevant to my inquiry under Part 708, which is to analyze the reasonability of Mr. Cowan's concerns when he reported them in March 2000.

Finally, I reject ANL-W's argument that there was no real danger posed by Mr. XXXXXX's condition because HAZ-MAT reentries were volunteer activities, and Mr. XXXXXX was always free to refuse to participate. Prior to Mr. XXXXXX's March 2000 disclosure, it is not clear to what extent employees were aware of the voluntary nature of this program. In its Report, the investigation team specifically recommends that

> 1. All [Nuclear Facilities Operators] should be reminded that being qualified as a HAZ-MAT responder is not a job requirement and is purely voluntary on their part.

Id. at 17. The team also felt that it was important to encourage employees to come forward and report any problems they might have in participating as a HAZ-MAT responder.

> 2. Additionally, the NFO's (or anyone else) who feels he/she may have a possible problem or concern with wearing any protective equipment should immediately advise their supervisor, and management should take whatever action (e.g., temporary removal from that area of their responsibility, referral to medical, etc.) is determined to be business-prudent to resolve the matter in a mutually satisfactory manner.

Id. These recommendations appear to address a concern that, at the time Mr. Cowan made his disclosure, some ANL-W employees felt pressured to ignore health problems and participate as HAZ-MAT responders. Moreover, it is clear from the May 18, 2000 Investigation Report that until May 2000, being a qualified HAZ-MAT technician was required in order to function as a shift operator (and receive the higher wages paid to shift operators). Report at 17. This also would have been likely to induce an employee to participate in HAZ-MAT reentries, whether or not he felt comfortable doing so. Management's May 2000 decision to remove HAZ-MAT technician qualifications for shift operators appears to acknowledge and address this problem.

Accordingly, for these reasons I find that it was reasonable for Mr. Cowan to believe, in March 2000, that Mr. XXXXXX's continued participation in the HAZ-MAT responder program constituted a substantial and specific danger to employee health and safety.

2. Mr. Cowan's Statements Concerning the Lock-out Tag- out Incident

With respect to the Lock Out/Tag Out incident, the ROI finds that on May 18, 2000, Mr. Cowan, as part of

his assigned duties, placed lockout/tagout (LO/TO) tags on the FCF's cell lighting circuit breakers. On June 6, 2000, some of these circuit breakers were later found to be locked in the "on" position and incorrectly tagged. In my January 8, 2002 letter to the parties, I stated that the ROI indicates that Mr. Cowan told management officials following the discovery of the incorrect tags, that another operator should have verified the correctness of the tags, but that no verification was done. I stated that this reporting of a violation of a safety protocol to ANL-W management and to the DOE appeared to constitute a protected disclosure under Section 708.5 and invited further discussion of this issue in the pre-hearing submissions and at the hearing. *Id.*

In his response to the ROI, Mr. Cowan asserted that at a June 6, 2000 meeting with ANL-W managers concerning the incorrect LO/TO, he

> stated and submitted signed testimony . . . that he requested verification from an operator in the control room. Both operators in the control room informed Mr. Cowan that a verifier was not required. Mr. Cowan upon receiving the information proceeded with caution in performing the process of de-energizing and/or verifying [that] the appropriate circuit breakers were in the requested position per the Lockout Tagout Authorization (LTA) form, installing locking devices, and attaching appropriate tags.

Cowan Response to ROI at item number 70. In its Reply Brief, ANL-W asserts that Mr. Cowan did not report any violations in this matter.

> After the breakers had been set, another operator, not Mr. Cowan, made the discovery that the breakers were improperly set, reported it to management, and management discovered during the following investigation that there had been no verification of the setting. Mr. Cowan cannot therefore, claim protection under 10 C.F.R. Part 708.

ANL-W Reply Brief at 3. At the Hearing, under questioning by the Hearing Officer, Mr. Cowan testified that he had not disclosed to management that there had been no verification of the LO/TO because they had already discovered that fact.

> THE HEARING OFFICER: . . . [Y]ou were aware at the time that the verification was not done. Did you report that at some point during the investigation of the incident to anyone?
>
> MR. COWAN: During the critique, or the investigation?
>
> THE HEARING OFFICER: Well, the critique or -- When was the first time you spoke about the verification?
>
> MR. COWAN: Well, the first -- This is real kind of difficult because the verification itself was identified by Management themselves.
>
> THE HEARING OFFICER: Uh-huh.
>
> MR. COWAN: Because they instructed that I, I could, and then it was found in another investigation that there were several FASs that didn't understand the red-tag verification part of it. But that was mentioned at that critique that, you know, this was a problem. I didn't do it, but they did, okay?
>
> THE HEARING OFFICER: Okay.

TR at 99. Accordingly, I conclude that Mr. Cowan made no disclosure concerning the lack of verification of the LO/TO.

However, in the context of this LO/TO incident, Mr. Cowan made other statements that could be

considered to constitute protected disclosures within the meaning of Part 708. Section 708.5(a)(1) protects employees who disclose information that they reasonably believe reveals a substantial violation of law, rule or regulation. Section 708.5(a)(2) protects disclosures regarding fraud, gross mismanagement or abuse of authority. At the June 6, 2000 meeting with management, and in later conversations with ANL-W managers and fellow employees, Mr. Cowan contended that he had performed the LO/TO correctly and that some other ANL-W supervisor or employee had deliberately reset the breakers in order to discredit him. He later contended that his abrupt transfer from FCF to SPF in June 2000 was to prevent his disclosure of evidence concerning "several employees and line managers that possibly could be involved." Cowan Response to ROI at item number 65. While ANL-W acknowledges that Mr. Cowan made these accusations beginning on June 6, 2000, it vigorously contends that there is no substantial evidence that anyone tampered with the position of the circuit breakers between the time they were locked by Mr. Cowan on May 18, 2000 and the time that they were discovered to be locked in the incorrect position on June 6, 2000.

> Mr. Cowan's allegations of sabotage or possible criminal acts have not been substantiated. The allegations are based solely upon assertions by Mr. Cowan. Therefore, the Laboratory believes that a reasonable person could not believe the allegations made by Mr. Cowan are true and they are not protected disclosures under 10 C.F.R. 708.5.

ANL-W Closing Brief at 7.

I am not convinced that Mr. Cowan's inability to substantiate his allegation that his work was sabotaged absolutely precludes me from finding that he made a protected disclosure. Rather, in making my determination on that issue, I believe that I would have to evaluate the reasonableness of Mr. Cowan's allegation in light of several factors. These would include my evaluation of Mr. Cowan's honesty and sincerity in making these assertions, Mr. Cowan's experience with circuit breakers and the configuration of the electrical panels, the likelihood that evidence would be available to Mr. Cowan had sabotage occurred, evidence of hostility toward Mr. Cowan from his managers and co-workers during the May 18 through June 6, 2000 period, and the opportunity that these managers and co-workers had to open the locks and change the position of the circuit breakers. There is abundant evidence in the record of this proceeding concerning all of these factors. However, as I have already made the finding that Mr. Cowan made a protected disclosure on March 28, 2000, it would not be administratively efficient or productive to the resolution of this complaint for me to conduct such an extensive analysis. In the event that my finding concerning Mr. Cowan's disclosure regarding the HAZ-MAT operator is reversed on appeal, this determination can be made on remand.

B. Mr. Cowan's Protected Disclosure Was a Contributing Factor to the Alleged Acts of Retaliation

Under 10 C.F.R. § 708.29, Mr. Cowan must also prove that his protected disclosure concerning the HAZ-MAT operator was a *contributing factor* with respect to any adverse personnel action taken against him. *See Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994). A protected disclosure may be a contributing factor to an adverse personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) *citing McDaid v. Dep't of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990). *See also Russell P. Marler, Sr.*, 27 DOE ¶ 87,506 at 89,056 (1998).

As noted above, the ROI finds that there is close proximity in time between the protected disclosure and the four alleged instances of retaliation discussed in the ROI. ROI at 4. I agree with three of these findings. The record indicates that Mr. Cowan's managers at FCF were aware that in March 2000, Mr. Cowan had declared himself a whistleblower and submitted a memorandum detailing his concerns to Director Lentz. Three alleged retaliations - (1) his failure to be selected for a Training Specialist position; and (2) the

issuance of an occurrence report that assigned partial responsibility for LO/TO errors to Mr. Cowan; and (3) Mr. Cowan's transfer to the SPF - all occurred within three months of the date of his memorandum to Mr. Lentz. The performance evaluation at issue in this proceeding, concerning Mr. Cowan's performance at the FCF from April 1, 2000 through June 23, 2000, appears to have been completed in November 2000. This is significantly more distant in time from the protected disclosure, although it could be included as part of a pattern of alleged retaliatory activity that began in May and June 2000 and thereby found to be proximate in time to Mr. Cowan's March 2000 disclosure. However, Mr. Cowan initiated his Part 708 whistleblower complaint on August 25, 2000. This is protected conduct under Part 708. Adverse personnel actions that occur after the filing of a Part 708 complaint and during the pendency of that complaint are clearly proximate in time to that protected conduct. *See Jagdish C. Laul*, 28 DOE ¶ 87,996 at 89,049 (2000). Accordingly, Mr. Cowan has shown that his protected conduct was a contributing factor with respect to this alleged retaliation (the performance evaluation). Similarly, Mr. Cowan has made this showing with respect to other alleged retaliations that occurred during the pendency of this Part 708 complaint. These include Mr. Cowan's transfer from the SPF to the FASB on or about June 1, 2001, and Mr. Cowan's three day suspension without pay from the FASB in January 2002.

I therefore conclude that Mr. Cowan has met his burden of showing that his disclosure and/or his protected activity under Part 708 constituted contributing factors in the above-identified negative personnel actions taken by ANL-W. The burden therefore shifts to ANL-W to prove by clear and convincing evidence that it would have taken the same actions without Mr. Cowan's disclosures or protected activity.

C. ANL-W's Decision Not to Select Mr. Cowan for a Training Specialist position was not a Retaliation

The first adverse personnel action following Mr. Cowan's protected disclosure occurred in May 2000. The ROI finds that at that time, a Training Specialist position which was vacated by retirement was posted. The ROI finds that Mr. Cowan, along with six others, applied for the position, and that he was not hired for the position. The ROI made the following findings concerning ANL-W's selection process.

> The DOE/CH found that the reasons for selecting the successful applicant in this case were justifiable and well articulated. There is no other evidence in the record including interviews of management officials and other documentation submitted by Cowan that disputes DOE/CH's findings with respect to this position. I agree with the DOE/CH on this issue. Based on the foregoing, the evidence clearly and convincingly shows that the contractor would have taken the same action regarding Cowan's advancement opportunities in the absence of his protected disclosures.

ROI at 7, *citing* DOE Argonne Group's Employee Concern #ANL-W-OO-1, Final Report (December 21, 2000) at 19. Mr. Cowan disputes this part of the ROI. However, a document provided by ANL-W at the Hearing, along with the testimony of Director Lentz, confirms the findings made by the DOE Argonne Group in its Final Report. The May 18, 2000 Investigation Report of ANL-W regarding Mr. Cowan's concerns notes that in January 1999, the employee who was assigned to the position of "HFEF Training Specialist" retired and the training duties were reassigned to a Chief Technician in HFEF. At the Hearing, Director Lentz testified that this position of Training Specialist subsequently was posted, and a hiring process was conducted. He stated that there were five or six applications for the position, including one submitted by Mr. Cowan. Director Lentz testified that although no ANL-W regulations required it, the HFEF Manager developed a rating system to rank the applicants according to their qualifications. He further testified that Mr. Cowan was ranked second or third among the candidates, and that the position was awarded to the individual who had been filling it on a temporary basis. TR at 467-68. There was little other discussion of this matter at the Hearing, and neither party discussed the issue in their post-hearing brief.

I find that the evidence presented by ANL-W at the hearing demonstrates that the hiring process for the

HFEF Training Specialist position was fairly conducted by the HFEF Manager. Director Lentz testified that the HFEF Manager devised criteria that he believed were important for the position, and ranked the applicants according to their qualifications. The position was awarded to the individual who had been temporarily assigned to those job tasks for the previous year, a fact that is not surprising, since that individual's knowledge of HFEF training procedures would clearly be a great point in his favor. Mr. Cowan has made no specific allegations of unfairness concerning this hiring process or any specific charge that the winning applicant was less qualified than himself. Under these circumstances, I find that ANL-W has met its burden of showing by clear and convincing evidence that it would have selected the same applicant in the absence of Mr. Cowan's protected disclosure.

D. Portions of an Occurrence Report that Made Findings Concerning Mr. Cowan Did Not Constitute an Adverse Personnel Action

I find that Mr. Cowan has not established, by a preponderance of the evidence, that the findings made in a June 2000 occurrence report constituted an adverse personnel action against him. As noted above, on May 18, 2000, Mr. Cowan, as part of his assigned duties, placed lockout/tagout (LO/TO) tags on some of the FCF's cell lighting circuit breakers. On June 6, 2000, some of these circuit breakers were found to be locked in the "on" position and incorrectly tagged. Later on June 6, ANL-W management convened a critique, attended by Mr. Cowan, concerning the incorrectly tagged circuit breakers. Following the critique, on June 7, 2000, ANL-W issued Occurrence Report CH-AA-ANLW-FCF-2000-0006 (the Occurrence Report) concerning the incident. The following portions of this Occurrence Report discuss Mr. Cowan's involvement in this incident:

> 23. Description of Cause:
>
> . . . The direct cause of this event was improper resource allocation. The operator who positioned the breakers [Mr. Cowan] and applied the tags had declared himself a "whistleblower" and was working under additional stress caused by this declaration. Management should have evaluated assigned work responsibilities more closely.
>
> 24. Evaluation (by Facility Manager/Designee):
>
> . . . Malicious noncompliance was not found. The operator who incorrectly positioned the breakers and placed the tags felt he had correctly positioned the breakers and hung the tags. Management investigated the potential for someone repositioning the breakers. Discussions with the FAS's and investigation of how the breakers were locked and tagged showed it would be extremely difficult to reposition a breaker by one individual. The Data Acquisition Storage System (DASS) was reviewed to see if there was any indication of repositioning of the breakers (i.e., a sudden increase of current on the bus duct) and no conclusive evidence was found. All investigations led to the conclusion that the breakers were incorrectly positioned and tagged [by Mr. Cowan]. No punitive action is required.

Occurrence Report at 3-4, attached to January 29, 2001 ANL-W Investigation Report.

Mr. Cowan contends that the Occurrence Report wrongly concludes that he negligently mispositioned the circuit breakers at the time that he performed the LO/TO, and rejects the possibility that the circuit breakers were later repositioned in an effort to discredit him. Cowan Response to ROI at item 65. The ROI Investigator conducted interviews with FCF personnel concerning this issue and reviewed subsequent studies of these allegations by both ANL-W and the DOE. She concluded that there was "no solid evidence" that the circuit breakers were repositioned in an effort to discredit Mr. Cowan, rather, the evidence suggested that he merely made a mistake. She also found that he suffered no adverse consequences as a result of the conclusions reached in the Occurrence Report "because the facility area

supervisor responsible at the time incorrectly decided not to have a second operator verify the correctness of the LO/TO." ROI at 10.

I do not believe that the Occurrence Report's assignment of responsibility for a LO/TO error to Mr. Cowan constitutes an adverse personnel action against him by ANL-W. Mr. Cowan has not shown that he was harmed by the findings of the Occurrence Report. There is no indication that the Occurrence Report became part of his personnel file at ANL-W. Moreover, the Occurrence Report specifically finds that the direct cause of the error was a "management problem," not the conduct of the operator. It also states that "no punitive action is required" concerning the operator's conduct." Occurrence Report at 3-4. There is therefore no ground for me to consider relief for Mr. Cowan concerning the findings made in this Occurrence Report.

While the findings made concerning Mr. Cowan in the Occurrence Report do not constitute an adverse personnel action against him, the use of these findings by ANL-W to penalize or discriminate against Mr. Cowan certainly would. There is one instance in which the LO/TO incident was cited in a negative manner in a personnel document concerning Mr. Cowan. *See* ANL-W Performance Appraisal of Mr. Cowan for Review Cycle 4/1/00 to 6/23/00 completed by Mr. Keith Powers [hereinafter the "Final FCF Appraisal"]. However, as discussed in greater detail below, I find that ANL-W has shown that Mr. Powers' criticism of Mr. Cowan's performance during that period was not significantly affected by whether Mr. Cowan had correctly positioned the circuit breakers at the LO/TO. At the Hearing, Mr. Powers testified that he referred to the LO/TO incident "partly to show why [Mr. Cowan] was inordinately preoccupied with administrative problems." He also testified that Mr. Cowan's involvement in the LO/TO incident did not affect his overall rating on the evaluation in any way whatsoever. TR at 518. Under these circumstances, I find that the passing reference to the LO/TO incident contained in the Final FCF Appraisal does not constitute an adverse personnel action warranting further analysis under Part 708.

E. The Findings of the Final FCF Appraisal Constituted a Retaliation Against Mr. Cowan

In his Part 708 Complaint, Mr. Cowan contended that he was improperly rated on his performance evaluations, but did not cite specific years in which such allegedly improper ratings were made. The ROI considered the evaluations written subsequent to Mr. Cowan's protected disclosures. Those evaluations included three separate appraisals covering review cycles for Mr. Cowan within fiscal year 2000 (October 1, 1999 through September 30, 2000). The ROI found that it was undisputed that Mr. Cowan is a very competent Nuclear Facility Operator. On a rating scale of one to five, with five being the highest rating, Mr. Cowan received a 3+, 3-, and a 4- on the evaluations in these review cycles. ROI at 5. It should be noted that Mr. Cowan's overall evaluation for fiscal 2000 was a 3+, which is contained in an appraisal dated November 19, 2000, completed by Mr. Cowan's supervisor at the SPF, Mr. J. L. Brink.

The only performance evaluation during this period to which Mr. Cowan has made a specific objection is the Final FCF Appraisal. As noted above, this was an interim evaluation for the period April 1, 2000 through June 23, 2000, completed by Mr. Cowan's supervisor at the FCF, Mr. Powers. For this period, Mr. Cowan received a numerical rating of 3-. Under the heading "Accomplishments" on the evaluation form, Mr. Powers made comments generally critical of Mr. Cowan's performance.

> Mr. Cowan was preoccupied with administrative problems. His work was affected. He would not spend time in the Operations Office on day shift. Work assignments given to him (procedure walkdowns) were not completed on time. Adjustments to Operating Systems (air cell exhaust control set points) were turned over to others to perform. Mr. Cowan was involved in a lockout/tagout incident.
>
> Mr. Cowan maintained all required qualifications.

> Mr. Cowan did not complete assigned procedure reviews.

Under the heading "Appraiser Comments" on the evaluation form, Mr. Powers also was critical of Mr. Cowan's job performance during this period:

> Mr. Cowan allowed problems that involved administrative management to interfere with his work. His attention to detail on watch suffered. He spent more time researching Human Resources documents than he did to watch standing. His direct supervision always had to find him if he wasn't actually on the console watch. Mr. Cowan's professional ability suffered during this time period.

Final FCF Appraisal at 1, 5. Under "Employee Comments", Mr. Cowan stated that he disagreed with this evaluation, and that he had supportive documents to justify his claim. He also characterized the evaluation as "a Retaliation effort to discredit my performance." *Id.* at 5.

The ROI found that the Final FCF Appraisal score of 3- was not inconsistent with scores that Mr. Cowan had received in previous years.

> For the majority of his past ratings, the complainant has received a 4 rating. However his ratings have ranged from a 3- to a 4+ over the years, with 3 defined as acceptable performance and 4 considered above average. Given the well-documented record of the contractor's own internal evaluations of the complainant's performance records as well as the consistent accounts of management officials which I found convincing and persuasive, it is clear to me that Cowan's performance evaluations were consistent with his prior evaluations and unrelated to any protected disclosures.

ROI at 5-6. The ROI specifically finds that the rating contained in the Final FCF Appraisal was valid and that the criticism contained in that evaluation was consistent with ANL-W's usual practice.

> Even the interim appraisal in which Cowan received an overall rating of a 3-, although occurring in close proximity to his protected disclosures, appears to me to have been a consequence of his lack of proper attention to his job duties because of his whistleblower concerns. In addition, there is no evidence in the investigatory file that suggests that Cowan's performance appraisals at issue negatively affected any merit increases or promotion potential for him. Rather, his evaluations were, as is often the case, used as a developmental tool to praise Cowan for his strengths, but also to suggest areas that could be improved upon. The relevant inquiry in this case is whether, in the absence of protected disclosures, the contractor would have taken the same action that followed the protected disclosures. I believe ANL-W has provided clear and convincing evidence that it would have taken the same actions with regard to the complainant's performance appraisals.

ROI at 6. In his response to the ROI, Mr. Cowan did not specifically challenge any of these findings. At the Hearing, Counsel for ANL-W presented witness testimony to support the ROI's findings regarding the Final FCF Appraisal. Mr. Powers testified that following the LO/TO critique and the Occurrence Report, Mr. Cowan

> spent an inordinate amount of time delving into Argonne National Lab Policy and Procedure Manuals trying to show where he was right and we were wrong and/or illegal in what we had done.

TR at 517. He testified that an example of his work assignments not being completed on time occurred when he was assigned to "walk down" some new procedures "step by step, [to] make sure they work." TR at 518. He stated that Mr. Cowan was assigned to perform this task over a weekend, when he was working 12-hour days, and that he did not complete the task. *Id.* Under questioning from Mr. Cowan, he further stated that he could not identify the exact procedures that were involved in this "walk down" because he

had received this information in writing from Mr. Robert Belcher, Mr. Cowan's immediate supervisor. Mr. Powers stated that he generally relied on immediate supervisors and their input in writing his performance evaluations, and that in this case Mr. Belcher gave him "almost 100 percent input." TR at 536-37. Mr. Powers testified that he had noticed on several occasions during this period that Mr. Cowan was absent from the FCF Control Room. TR at 534. Mr. Powers explained that this was Mr. Cowan's assigned workplace.

> His assigned work space or work location is the Control Room for the facility operators, which also has the console in it. When they're not actively on the console they're required to be in that area so they can be found for any other tasks that are needed in the facility.
>
> . . . If [Mr. Cowan] wasn't [operating] the console, he didn't spend much time in there. . . . one of the places we would find him would have been in the Ops Base using the computer that's in there, or searching other documents. If we needed him, we had to page him to find him.

TR at 519-520. Under questioning from ANL-W counsel, Mr. Powers stated that he believed the performance evaluation was a fair estimate of Mr. Cowan's performance for the period, and that it was not retaliation. TR at 520.

I cannot concur with the ROI's conclusion that ANL-W has met Part 708's clear and convincing evidentiary standard with regard to its Final FCF Appraisal. My judgment on this question has been informed by additional evidence that was not before the Investigator. As an initial matter, the Final FCF Appraisal is strikingly different in tone from the other two appraisals received by Mr. Cowan for fiscal 2000. While the other two appraisals contain only complimentary comments concerning Mr. Cowan's performance, the comments in the Final FCF Appraisal are almost entirely critical in nature. Through its witness testimony, I find that ANL-W has provided anecdotal evidence that appears to indicate that Mr. Cowan's overall work performance declined slightly during this period due to his preoccupation with other matters. However, under the standard set forth at Section 708.29, ANL-W must show by clear and convincing evidence that it would have *taken the same action* without the employee's disclosure, *i.e.*, that when similar performance problems had previously occurred, Mr. Cowan and his co- workers received such criticism. As I stated in my December 3, 2001 letter to the parties:

> In determining whether ANL-W has shown that it would have evaluated and transferred Mr. Cowan in the same manner in the absence of his protected activities, it will be necessary for me to consider whether ANL-W's treatment of Mr. Cowan was consistent with its treatment of other, similarly situated employees. Such consideration of ANL- W's general employment practices is fully consistent with OHA precedent in this area. See Thomas Dwyer, 27 DOE ¶ 87,560 at 89,337 (2000); Roy Leonard Moxley, 27 DOE ¶ 87,546 at 89,241 (1999); and Morris J. Osborne, 27 DOE ¶ 87,542 at 89,209 (1999). As indicated in those determinations, the standard in the clear and convincing area is not whether it was *reasonable* for ANL-W to have taken its adverse personnel actions regarding Mr. Cowan. The standard is whether the ANL-W *actually would have taken* these actions absent his protected disclosures.

December 3, 2001 Letter at 4. This is a very difficult standard to meet when dealing with a highly subjective process such as an employee evaluation. For example, while ANL-W has identified an instance where Mr. Cowan did not complete an assigned procedure review on time during the relevant rating period, it has not provided convincing testimony that Mr. Powers would have been likely to have placed such emphasis on this event in a Final Performance Appraisal of Mr. Cowan in the absence of Mr. Cowan's protected disclosure.

In addition to a lack of convincing evidence in support of ANL-W's position, I find that testimony at the Hearing indicates that a significant level of hostility existed toward Mr. Cowan from his managers and co-workers as a result of his protected activity, and that this hostility was likely to have influenced the Final

FCF Appraisal. At the Hearing, I asked Mr. Powers if Mr. Cowan's immediate supervisor, Mr. Belcher, was upset concerning Mr. Cowan's allegations of safety concerns about the HAZ-MAT responder, Mr. XXXXXX. He replied that Mr. Belcher was not pleased that the issue had been raised. He said that "none of us [at FCF] believed it was an issue. . . . To have brought it up later to say it was an issue, yeah, we were a little tight about it." TR at 552-53.

Although in the Final FCF Appraisal and in his initial testimony, Mr. Powers was critical of Mr. Cowan's frequent absences from the FCF Control Room, subsequent testimony indicates that his co- workers and supervisor were happy about his absence. He testified that when he would ask the console operators where Mr. Cowan was, several times the answer was "We hope anywhere but here." He also noted that Mr. Belcher tolerated his absence.

> I asked Bob Belcher, "Why, why are you allowing [Mr. Cowan] to stay out of the Control Room? He is on there? For better and worse, and I lived with this decision out there. He said it was less disruptive to the Control Room if Ben would stay out doing these things. You've got to remember, not only was it the lockout/tagout incident that he was busy researching documentation for. This also had to do with his transfer to and from SPF.

TR at 552.(4) The Hearing also revealed that there existed a personal friendship between Mr. Belcher and Mr. XXXXXX, the HAZ-MAT responder, that naturally would make Mr. Belcher antagonistic to Mr. Cowan for making an accusation concerning Mr. XXXXXX's suitability as a HAZ-MAT responder. In his testimony, Mr. Belcher testified that he and Mr. XXXXXX were close personal friends, and that they car-pooled together almost every day. TR at 221.

As discussed above, the record indicates that the Final FCF Appraisal was written by Mr. Powers based largely on input from Mr. Belcher. Under these circumstances, I find that ANL-W has not shown by clear and convincing evidence that this critical appraisal of Mr. Cowan would have been issued in substantially identical form in the absence of his protected disclosure. Accordingly, I will direct ANL-W to remove this appraisal from Mr. Cowan's personnel file.

There is also an issue of whether the Final FCF Appraisal affected the raises and bonus pay that Mr. Cowan received for his work in fiscal 2000. It does not appear that the Final FCF Appraisal's interim rating of 3- lowered Mr. Cowan's overall rating in fiscal 2000. The interim rating made for the period 10/1/99 through 3/31/00 was 3+. The ratings given to Mr. Cowan by Appraiser J. L. Brink for specific work responsibilities at the SPF from 6/24/00 through 9/30/00 were two 4- ratings and two 3+ ratings. This would result in an overall rating for fiscal 2000 of 3+, which is what Mr. Cowan received. At the Hearing, ANL-W introduced a listing of pay raises received by facility operators for fiscal 2000. This listing indicates that Mr. Cowan's pay raise for fiscal 2000 was completely consistent with other facility operators who received a 3+ rating. *See* testimony of Michael F. Janeczko, ANL-W Manager of Human Resources, TR at 571-576. Nor did the Final FCF Rating affect Mr. Cowan's bonus pay in fiscal 2000. At the Hearing, Mr. Powers testified that a minimum annual rating of 4- is necessary to qualify for a bonus, if bonuses are available in a particular year. TR at 542. Even in the complete absence of the Final FCF Appraisal, Mr. Cowan's rating of 3+ would not qualify him for a bonus. Accordingly, I find no evidence of any recent adverse personnel actions against Mr. Cowan with respect to raises and bonuses.

Finally, a comment appears on Mr. Cowan's interim performance evaluation for his work at FASB during the period 3/5/00 through 9/30/01 (the FASB Appraisal) that Mr. Cowan alleges is retaliatory in nature. The following statement appears under Appraiser Comments:

> Ben's familiarity with the various ANL-W safety rules and policies would prove beneficial to FASB operations if Ben remembered his responsibility to promptly notify his supervisor of his findings instead of compiling his concerns and complaints in the form of a letter that is given wide distribution.

FASB Appraisal at 5. The FASB Appraisal is otherwise complimentary of Mr. Cowan's performance, and

there is no indication that this particular comment affected any of the ratings given for specific responsibilities, or affected the appraisal's overall rating of 3. Under these circumstances, I view this comment as a reminder and a suggestion to Mr. Cowan, rather than a criticism, and find that it does not constitute an adverse personnel action for purposes of Part 708.

F. Mr. Cowan's Involuntary Transfer to the SPF in June 2000 was a Retaliatory Act

As noted above, Mr. Cowan has been transferred three times since he made his protected disclosure in March 2000. On April 10, 2000, Mr. Cowan and other employees at the FCF were transferred to ANL-W's Sodium Processing Facility (SPF). Mr. Cowan immediately protested this transfer and was permitted by ANL-W management to return to the FCF after only half a day at SPF. Testimony of Gary Tarbet, Manager of FCF, TR at 508. On June 28, 2000, ANL-W management again transferred Mr. Cowan, under protest, to the SPF, where he remained for about one year until management transferred Mr. Cowan to ANL-W's radiological facility (FASB).

Although Mr. Cowan contends that his selection for the April 2000 transfer constituted a retaliation by ANL-W management, I find that he has not established that any substantial harm resulted from this brief transfer. If ANL-W's action was retaliatory, it remedied the situation when it acceded to his protest and immediately returned him to the FCF. There is no indication that Mr. Cowan suffered any significant loss of pay as a result of this very brief transfer. Accordingly, I do not believe that it would be appropriate under Part 708 to conduct an extensive analysis to determine whether, under the standard of clear and convincing evidence, that ANL-W has shown that it would have initiated this transfer of Mr. Cowan in the absence of his protected disclosure. I therefore will make no finding concerning this transfer.

With respect to Mr. Cowan's June 2000 transfer to the SPF, the ROI finds the following:

> this transfer was initiated in an effort to ease the tension in the complainant's division, perhaps brought on by his focus on his whistleblower activities. Aside from the complainant's contention, I do not find evidence in the record that would suggest that complainant's transfers were initiated in retaliation for making protected disclosures. Rather, these transfers appear to be part of the laboratory's routine personnel actions. Based on the record, it is clear that laboratory employees had to move where the work was located and where their skills were most needed. I find that ANL-W has provided clear and convincing evidence that it would have taken the same actions in the absence of the complainant's protected disclosures.

ROI at 8.

I cannot concur with the ROI's conclusion that ANL-W has met Part 708's clear and convincing evidentiary standard with regard to its June 2000 transfer of Mr. Cowan. I agree with the ROI's finding that this transfer was made to relieve tension at the FCF between Mr. Cowan and his managers and co-workers. However, in its submissions and witness testimony, ANL-W has provided only anecdotal evidence indicating that Mr. Cowan's activities in the FCF in June 2000 aggravated others at the FCF. Under the standard set forth at Section 708.29, ANL-W must show by clear and convincing evidence that it would have *taken the same action* without the employee's disclosure, *i.e.*, that ANL-W management decision to transfer Mr. Cowan was consistent with the treatment of other, similarly situated employees, not just that it was *reasonable* for ANL-W to have taken this adverse personnel action regarding Mr. Cowan. As discussed below, there is no indication that ANL-W routinely transferred employees from one facility to another to resolve employee conflicts or ease workplace tension. Moreover, the ANL-W manager who ordered Mr. Cowan's transfer relied on recommendations made by individuals who, as discussed in the previous section, were likely to have been prejudiced against Mr. Cowan as a result of his protected disclosure. ANL-W has not shown that similar activity by another individual at FCF would have resulted in the same recommendation that he be transferred to another facility.

In its submissions and at the Hearing, ANL-W presented no information concerning whether it had ever transferred an employee other than Mr. Cowan from one facility to another as a result of tension in the workplace or a dispute with a supervisor. Moreover, under questioning by the Hearing Officer, Mr. Belcher testified that his request to have Mr. Cowan transferred for creating a hostile atmosphere at FCF was highly unusual.

> Q. Can you remember other examples of people being transferred because of an atmosphere that was created, or hostility between one or more people?
>
> A. No I can't. Again, when I was an Operator there was a Technician, but he was fired. He was coming in inebriated; on drugs. He was coming in late. And he had been given time off without pay, warned, and he was finally dismissed.
>
> Q. So in your experience at Argonne this is an unusual situation.
>
> A. Yes, very unusual.

TR at 260-261. The record indicates that Mr. Belcher has been a supervisor at FCF since 1992 (TR at 257), and yet he could recall no instance in which a personality conflict resulted in a person being transferred out of the facility. Accordingly, the available evidence indicates that at least with respect to employees at the FCF, Mr. Cowan's transfer was a highly unusual personnel action.

The individual who made the final decision to transfer Mr. Cowan to the SPF in June 2000 was Dr. John Sackett, the Deputy Associate Laboratory Director for ANL-W. At the Hearing, Dr. Sackett explained his reasons for directing the Mr. Cowan be transferred.

> The issue of the lockout/tagout, and Ben's concern that he had been wrongly accused of missetting the breakers, and his carrying that concern forward, resulted in a situation where people felt either directly or indirectly accused of having set Ben up in that manner.
>
> You can imagine that this caused a great deal of [inaudible][(5)], I will say, among the people in the facility. And I became aware of that more strongly in discussions with the Director of the Operations Division [Mr. Lentz] at the time.
>
> I was made aware of two different letters, items of correspondence from individual technicians on the point, and so I became very concerned in my role as the person responsible for nuclear safety and radiological safety at the site, that I could not allow that kind of dissension to continue in a radiological facility.

TR at 612-613. Dr. Sackett stated that he then met with Mr. Cowan, and when Mr. Cowan refused to voluntarily transfer to the SPF, he told him "Well, in that case, I must direct that transfer." TR at 613. Dr. Sackett clearly relied on information supplied to him by Mr. Lentz in forming his opinion that a high degree of dissension had been created at the FPF as a result of Mr. Cowan's activities. In his testimony, Mr. Lentz stated that between April and early June, the FCF Manager [Mr. Gary Tarbet] and several supervisors voiced concerns to him about their increasing inability to work with and supervise Mr. Cowan.

> They were to the point where they were afraid every time they did something Ben would say, "You're retaliating against me," or that they were going to be written up. They felt they had insufficient supervisory control of Ben doing the jobs.

TR at 450. He testified that in June 2000, he received several letters and an anonymous complaint, all leading him to the conclusion that there was a deterioration in the environment of the FCF and that it would not be wise to leave Mr. Cowan in the facility because "it put both Ben and everybody else under strain that I didn't think was necessary." He therefore recommended to Dr. Sackett that Mr. Cowan be

removed from the FCF. TR at 451.

In his testimony at the Hearing, Mr. Belcher stated that he initiated the effort to have Mr. Cowan transferred from the FCF. He testified that he decided to go to Mr. Tarbet's office and urge that Mr. Cowan be transferred out of the FCF following a conversation that he had with Mr. Cowan. He stated that in that conversation, Mr. Cowan

> approached me and told me to get whoever had set [Mr. Cowan] up [on the lockout/tagout] to come and talk to [Mr. Cowan] in private and [Mr. Cowan] would drop the issue. That was the straw that broke the back, when I went up and I requested that [Mr. Cowan] be taken out of the facility.

TR at 225.

I find that this testimony does not meet ANL-W's burden of proof on this issue. As discussed above, the standard in the clear and convincing area is not whether it was *reasonable* for ANL-W to have transferred Mr. Cowan to SPF in order to alleviate a tense atmosphere at FCF. *See Janet L. Westbrook*, 28 DOE ¶ 87,021 (2002) (mere plausibility and reasonability not adequate to meet the contractor's clear and convincing standard of proof). The standard is whether the ANL-W has shown by clear and convincing evidence that it *actually would have* transferred Mr. Cowan in the absence of his protected disclosures. There is no dispute in the record that Mr. Cowan was actively pursuing his investigation of the lockout/tagout incident and making inappropriate, speculative and possibly accusatory statements to his managers and co-workers concerning the incident. However, I do not believe that ANL-W has established by clear and convincing evidence that, in the absence of his disclosure, Mr. Cowan's activities and statements would have resulted in the decision to transfer him out of the FCF. There is no indication that ANL-W management employed such transfers as a disciplinary or corrective option in responding to instances of inappropriate or accusatory behavior by employees. Nor is there evidence indicating that Mr. Cowan posed any direct safety risk to other employees. While Dr. Sackett referred to the safety risks that could arise from dissension in a radiological facility, ANL-W has made no showing that transferring Mr. Cowan out of FCF was a necessary means to address that problem. Accordingly, I find that ANL-W has not met its evidentiary burden concerning this issue.

As I noted above, there is evidence that Mr. Belcher was upset about Mr. Cowan's protected disclosure concerning Mr. XXXXXX. With respect to the transfer, Mr. Belcher acknowledges that he initiated the action to have Mr. Cowan transferred from the FPF. One of the letters critical of Mr. Cowan that Mr. Belcher conveyed to Mr. Tarbet and Mr. Lentz was written by Mr. XXXXXX. *See* undated note from J. L. XXXXXX submitted as an ANL-W Hearing Exhibit. Under these circumstances, ANL-W clearly has not shown that Mr. Belcher would have reacted to Mr. Cowan's behavior by initiating action to have him transferred out of FCF in the absence of Mr. Cowan's protected disclosure. Accordingly, I find that ANL-W has not shown by clear and convincing evidence that it would have transferred Mr. Cowan to the SPF in June 2000 in the absence of his protected disclosure.(6)

I therefore will direct ANL-W to return Mr. Cowan to the shift position that he occupied at the time of his removal from the FCF and to compensate him for any lost overtime and premium pay that resulted from this transfer out of the FCF. In this regard, the record indicates that Mr. Cowan was working as a shift technician at the FCF at the time of his June 2000 transfer to the SPF. At the Hearing, Director Lentz testified that beginning in April 2000, when Mr. Cowan's initial transfer to the SPF was canceled at his request, ANL-W management placed him in a rotating shift schedule, which permitted him to earn more money through additional overtime and premium pay. TR at 438, 440. Director Lentz also testified that at the SPF, where Mr. Cowan was transferred in June 2000, the ultimate goal was to put everyone on a 24 hour day shift rotation, that would have provided Mr. Cowan the same opportunity to earn overtime and premium pay as he had at the FCF. TR at 440, 459. However, it is not clear that this goal of placing all SPF workers in a shift rotation was realized for the entire period that Mr. Cowan worked at the SPF. Moreover, on March 5, 2001, Mr. Cowan was transferred from the SPF to the FASB, and there is no

evidence in the record that shift rotation work was or is available at that facility. In his December 27, 2001 submission entitled "Requested Relief," Mr. Cowan also claims that all overtime above the normal scheduled shift overtime accrued by Mr. Cowan's replacement on the FCF shift was "a real and actual loss of income to Mr. Cowan." Mr. Cowan is correct. Under these circumstances, I will require ANL-W to calculate the gross salary, including overtime and premium pay, that it would have paid to Mr. Cowan if he had remained in his shift position at the FCF, including additional overtime worked by his replacement on that shift. If this amount is in excess of Mr. Cowan's gross salary since his June 2000 transfer to the FCF, I will direct ANL-W to pay him the difference.

G. Mr. Cowan's Three Day Suspension Without Pay in January 2001 Was a Retaliation

On January 7, 2002, Mr. Cowan sent an e-mail message addressed "To: Distribution to Argonne National Laboratory employees." In this e- mail message, Mr. Cowan expressed great frustration concerning his efforts to have the DOE investigate his allegations of mismanagement and safety violations at ANL-W. In particular, he was critical of the "DOE Employee Concerns Organization" and the employee concerns officer who was his contact in that organization. On January 9, 2002, Mr. Cowan sent another e-mail to all ANL-W employees in which he purportedly quoted an unnamed ANL-W supervisor who sent Mr. Cowan a harsh response to his January 7 e- mail. In a January 9, 2002 memorandum, Dr. Sackett informed Mr. Cowan that his e-mails were in violation of laboratory policies and suspended him without pay until further notice. In this memorandum, Dr. Sackett described ANL-W's concerns with Mr. Cowan's e-mails:

> Your e-mail transmissions of January 7 and 9, 2002 to ANL-W employees violate Laboratory policies. These transmittals also do not reflect the views of the Laboratory and could subject the Laboratory to possible legal action. Additionally, your transmittals are in direct disregard of the instructions given to you by the Laboratory Director, Dr. Grunder, in a letter dated September 10, 2001, which stated, in part: ". . . We strongly believe in the process that we are engaged and that it is the proper forum for these issues to be resolved. Any action outside this forum should be held in abeyance until such process is completed. . . ."

January 9, 2002 memorandum from Dr. Sackett to Mr. Cowan, included in ANL-W hearing exhibits. ANL-W management ultimately disciplined Mr. Cowan with a three day suspension, without pay, on January 10, 13, and 14, 2002.

In its Post-Hearing brief, ANL-W contends that it has established that ANL-W did not retaliate against Mr. Cowan by suspending him for three days without pay. It cites the finding in Dr. Sackett's memorandum that Mr. Cowan violated laboratory policy, and testimony at the Hearing which affirmed this finding and which indicated that other ANL-W employees have been suspended for violating Laboratory policies. ANL-W Post Hearing Brief at 10.

I find that ANL-W has failed to meet its burden under Part 708 to show that it would have taken the step of suspending Mr. Cowan without pay in the absence of his Part 708 protected activity. I agree with ANL-W that Mr. Cowan's use of ANL-W e-mail to express his opinions and experiences concerning the whistleblower process to all ANL-W employees violates the company's policy concerning the use of its networking resources. Moreover, I find that Mr. Cowan was sufficiently informed concerning this policy and ANL-W's views regarding the dissemination of his Part 708 concerns, that he should have been aware that ANL-W would not sanction these e-mails. In March 2000, Mr. Cowan acknowledged and signed an ANL-W policy document entitled "Use of Information Resources at Argonne National Laboratory." This document states in part that it is Laboratory Policy "to prevent the use of Laboratory-owned computing and networking resources for unauthorized purposes." It further states that

> It is your responsibility to comply with this policy. Whenever you utilize any of the Laboratory's Information Resources you are expected to conduct your activities within

> reasonable standards of professionalism and in accordance with the Argonne Code of Ethics. . . .
>
> Argonne's information resources are provided solely for the purpose of carrying out Laboratory work (including authorized work for its customers). Laboratory work primarily consists of assigned technical and management activities, but may also include professional development, training, and other Laboratory approved activities undertaken with the knowledge and approval of management. . . .

Document entitled "Use of Information Resources at Argonne National Laboratory", signed by Mr. Cowan on March 26, 2000, included in ANL-W's Hearing exhibits.(7) This document clearly indicates that the "knowledge and approval of management" is required for any use of ANL-W networking resources by employees for any uses other than "assigned technical and management activities." *Id.* Further guidance was given to Mr. Cowan in the September 10, 2001 letter from Dr. Grunder to Mr. Cowan that Dr. Sackett specifically cited in his January 9, 2002 memorandum. In his September 10 letter, Dr. Grunder stated that it was "inappropriate" for Mr. Cowan to distribute to certain ANL-W employees a report concerning some of the concerns raised in his Part 708 complaint. Mr. Cowan was advised by Dr. Grunder that "any action outside [the Part 708 proceeding before OHA] should be held in abeyance before such process is completed." September 10, 2001 letter from Director Grunder to Mr. Cowan, included in ANL-W Hearing exhibits. I conclude that, on the basis of the policy statement and Grunder letter, Mr. Cowan should have been aware that he was violating ANL- W policy when he sent the e-mails. At the Hearing, Mr. Cowan asserted that he specifically asked counsel for ANL-W for advice on a number of issues in the summer of 2001, including use of ANL-W e- mail, and when he received no response, he assumed that he had approval. TR at 632-635. I find no basis for his supposition that ANL-W tacitly approved his use of laboratory e-mail to disseminate his Part 708 complaint concerns. Dr. Grunder's letter clearly refutes such a conclusion. I therefore reject Mr. Cowan's assertion about advice of counsel.

However, with respect to its three day suspension of Mr. Cowan without pay, I find that ANL-W has not met its Section 708.29 burden of proof. As discussed above, the standard in the clear and convincing area is not whether it was *reasonable* for ANL-W to have taken this adverse disciplinary action against Mr. Cowan. The standard is whether the ANL-W has shown by clear and convincing evidence that, in the absence of his Part 708 protected activity, ANL-W *actually would have* suspended Mr. Cowan in this manner for improper use of the Laboratory's e-mail. I do not believe that ANL-W has clearly and convincingly shown this. The available evidence does not indicate that a three day suspension without pay was commonly used to discipline employees for improper e-mail use or any other violations of ANL-W policy. Mr. Janeczko, ANL-W's Human Resources Manager from 1983 until November 2001, testified that over the years ANL-W had taken disciplinary action for cases involving sexual harassment, theft, violation of safety rules, and attendance and punctuality. TR at 567. However, he did not testify whether ANL-W had any criteria or standards for determining the appropriate disciplinary action in a particular instance. He cited only one specific instance of a three day suspension being imposed by ANL-W as a disciplinary action.

> Q. Have you ever taken disciplinary action with regard to any other individual for improper use of the information system?
>
> A. Well, now that you mention it, we have. We did suspend someone three days for downloading some pornographic material off the Internet about two years ago.

TR at 567. This single instance of a three day suspension does not indicate that ANL-W's normal practice was to impose three day suspensions on employees who improperly used the Laboratory's information system. In fact, Mr. Janeczko testified that in arriving at an "appropriate" disciplinary action in Mr. Cowan's case, ANL-W considered a wide range of possibilities.

> Well, we talked about anything from doing nothing to termination of employment. The end

result of those discussions was it was decided that suspension was the way to go.

TR at 570. In light of its admission that it considered a wide range of possible responses, ANL-W has not convincingly demonstrated that it would have rejected the option of merely issuing a warning to Mr. Cowan, or taken some lesser disciplinary action, had Mr. Cowan not been a participatant in a Part 708 proceeding. Accordingly, I find that ANL-W has not met its evidentiary burden concerning this issue. I will direct ANL-W to compensate Mr. Cowan for his three day suspension, and to alter his personnel record to replace references to this suspension with a warning not to repeat his improper use of Laboratory e-mail.

V. Conclusion

Based on the analysis presented above, I find that Mr. Cowan made a disclosure protected under Part 708, and that this protected disclosure was a contributing factor to adverse personnel actions taken by ANL-W against him. Furthermore, I find that ANL-W has not shown by clear and convincing evidence that it would have criticized Mr. Cowan's work performance on his Final FCF Appraisal, transferred Mr. Cowan to the SPF in June 2000, and suspended Mr. Cowan for three days without pay in January 2002 in the absence of his disclosure and/or his participation in this proceeding. Therefore, Mr. Cowan is entitled to remedial action from ANL-W. I find that this remedial action shall include the removal of the Final FCF Appraisal from his personnel file, his reinstatement as a shift operator at the FCF, the payment of any lost wages or other compensation that resulted from his transfer out of the FCF, the payment of compensation lost as a result of this three day suspension in January 2002, and the removal of any reference to that disciplinary action from his personnel file.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Mr. Bernard F. Cowan under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) The Argonne National Laboratory - West (ANL-W) shall immediately return Mr. Cowan to the position at its Fuel Conditioning Facility (FCF) from which he was transferred in June 2000. Mr. Cowan shall be afforded the same opportunity to work as a shift technician at the FCF, and thereby receive overtime and premium pay, as is normally and customarily afforded to other qualified technicians at the FCF. Mr. Cowan also shall be afforded the same opportunities to earn extra overtime pay as other technicians at the FCF.

(3) Mr. Cowan shall produce a report that provides information on his litigation expenses. Mr. Cowan's report shall be calculated in accordance with the Appendix.

(4) The ANL-W shall produce a report that calculates any lost wages wages plus interest payable to Mr. Cowan. The ANL-W's report shall be calculated in accordance with the Appendix.

(5) The ANL-W shall pay Mr. Cowan's litigation expenses. The amount of this payment shall be in accordance with the report specified in paragraph (3) above.

(6) The ANL-W shall pay Mr. Cowan any lost wages plus interest. The amount of this payment shall be in accordance with the report specified in paragraph (4) above.

(7) The ANL-W shall remove from Mr. Cowan's personnel file the ANL- W Performance Appraisal for Mr. Cowan completed by Mr. K. E. Powers for the Review Cycle 4/1/00 to 6/23/00. The ANL-W also shall remove from Mr. Cowan's personnel files any and all references to his being suspended without pay on January 10, 13, and 14, 2002. The ANL-W may replace such references with a warning that Mr. Cowan's January 7 and January 9, 2002 e-mails to all ANL-W employees were in violation of ANL-W's

policy concerning the use of Laboratory information resources.

(8) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting Mr. Cowan relief unless, within 15 days of receiving this decision, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: June 27, 2002

(1) LO/TO is a system governing the operation of control devices such as electrical circuit breakers, and is intended to guard against injury to personnel or damage to plant equipment. ROI at 9. In this LO/TO, Mr. Cowan was required to go to several electrical panels located at the FCF and and switch particular circuit breakers in those panels to the "off" position. He was then required to insert a lock securing the individual circuit breaker in the "off" position and affix a tag to the lock certifying that the circuit breaker was "locked out."

(2) In addition to the issues discussed later in this decision, Mr. Cowan disagreed with the ROI Investigator's decision to exclude, as irrelevant, certain incidents of alleged retaliation that occurred before March 2000, some of which date back to 1993. *See* ROI at p. 4, ftnt. 2 and p. 10-11. In light of the findings made in this decision, I believe that the Investigator acted correctly in this regard. Section 708.14(a) clearly provides that a contractor employee "must file [his] complaint by the 90th day after the date [he] knew, or reasonably should have known, of the alleged retaliation." There is no indication that Mr. Cowan lacked any knowledge concerning these earlier incidents. Accordingly, any alleged retaliations occurring before April 2000 cannot be remedied in this proceeding. In some Part 708 proceedings, information concerning earlier alleged retaliations could be relevant for evidentiary purposes in determining whether a contractor has met its burden of proof pursuant to Section 708.29. As discussed in this decision, I find that without regard to any actions taken by ANL-W concerning Mr. Cowan prior to March 2000, ANL-W has failed to make its required evidentiary showing under Section 708.29.

(3) In a letter to the parties dated April 30, 2002, I declined to include in the record of this proceeding the documents e- mailed to me along with Mr. Cowan's post hearing brief.

(4) The "transfer to and from SPF" occurred in April 2000, when Mr. Cowan and several other FCF workers were transferred by ANL-W management to the SPF. Mr. Cowan protested the transfer and ANL-W management immediately permitted him to return to FCF, transferring another FCF worker in his place. As discussed below, Mr. Cowan contends that his initial inclusion by ANL-W in the group being transferred to the SPF was a retaliation for his whistleblower disclosures.

(5) The word in the transcript is "autonomy", which does not convey a reasonable meaning in the context of Dr. Sackett's remarks.

(6) At the Hearing, Mr. Cowan also contended that his March 2001 transfer from the SPF to FASB was retaliatory in nature. TR at 630-631. As I have already determined that he should be reinstated at the FCF, and will calculate his lost benefits for the entire period since his June 2000 transfer from the FCF, I do not believe it is necessary to me to address the circumstances of his transfer to FASB and make a Part 708 determination concerning that transfer.

(7) This document also directs the signatory to "retain a copy of this form for your future reference."

August 23, 2002
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Sue Rice Gossett

Date of Filing: May 25, 2001

Case Number: VBH-0062

This Initial Agency Decision concerns a whistleblower complaint filed by Sue Rice Gossett (Gossett) against her former employer, the Safety and Ecology Corporation (SEC), under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. SEC is a sub-contractor of Bechtel Jacobs Corporation (BJC), the DOE's Managing Contractor at the Portsmouth Site in Piketon, Ohio (Portsmouth). In an Interlocutory Decision dated May 8, 2002, I determined that SEC had retaliated against Gossett for engaging in protected activity and that therefore Gossett is entitled to relief. Accordingly, the Interlocutory Decision states:

> Within 30 days of receipt of this Interlocutory Decision, Sue Rice Gossett shall submit to the Office of Hearings and to the Safety and Ecology Corporation, a detailed statement setting forth the precise remedies she is seeking as well as supporting documentation. The Safety and Ecology Corporation shall, within 30 days from its receipt of Sue Rice Gossett's statement, submit a responsive document to the Office of Hearings and Appeals and to Sue Rice Gossett.

Interlocutory Decision at 16.

On June 7, 2002, Gossett submitted a detailed statement (Gossett's June 7, 2002 Statement) setting forth the precise remedies she is seeking as well as supporting documentation. In her statement, Gossett seeks the following remedies: reinstatement, back pay, reimbursement of litigation costs and expenses including attorney's fees, and expungement of information from her personnel file. On July 8, 2002, SEC submitted its response to Gossett's June 7, 2002 statement (SEC's July 8, 2002, Response). On July 17, 2002, Gossett submitted a rebuttal to SEC's July 8, 2002, Response (Gossett's Rebuttal).

The remedies for retaliation available under the DOE Whistleblower Protection Regulations are set forth at 10 C.F.R. § 708.36, which provides:

> (a) *General remedies*. If the initial or final agency decision determines that an act of retaliation has occurred, it may order:
> (1) Reinstatement;
> (2) Transfer preference;
> (3) Back pay;
> (4) Reimbursement of [the complainant's] reasonable costs and expenses, including attorney and expert-witness fees reasonably incurred to prepare for and participate in proceedings leading to the initial or final agency decision; or
> (5) Such other remedies as are deemed necessary to abate the violation and provide [the complainant] with relief.
>
> (b) *Interim relief*. If an initial agency decision contains a determination that an act of retaliation occurred, the decision may order the contractor to provide [the complainant] with appropriate interim relief (including reinstatement) pending the outcome of any request for review of the decision by the OHA Director. Such interim relief will not include payment of any money.

REINSTATEMENT

Since I have found that Gossett's termination was a retaliatory act on the part of SEC, it is clear that reinstatement is an appropriate remedy. SEC recognizes this fact. However, SEC contends that Gossett must be fully re-trained and re-qualified before she can be reinstated. Obviously, it is reasonable to expect that Gossett must have all of the safety, hazardous materials and radiological training required of a radiation control technician (RCT) at the Portsmouth site. Accordingly, I find that Gossett should receive such training and qualification at SEC's expense and while included on SEC's payroll as a senior RCT.

Moreover, it is reasonable to expect that Gossett be required to successfully complete such training and receive passing scores on a re-qualification examination. Accordingly, I find SEC may administer a re-qualification examination to Gossett after Gossett has been reinstated for at least 180 days. If Gossett does not receive a passing score on this exam, she should be administered another re-qualification examination after 30 days and continue her employment as a Senior RCT as well as her training, until this second re-qualification examination is administered to her and the results made available. If Gossett does not receive a passing score on this second re-qualification examination, SEC may place Gossett on leave without pay until she is able to receive a passing score on a re-qualification examination.

Once Gossett has re-qualified, she shall be afforded the same opportunity to work as a senior RCT, and thereby receive overtime and premium pay, as is normally and customarily afforded to other qualified senior RCTs at the Portsmouth Site.

BACK PAY

Gossett has requested $85,930.35 of compensation for lost back pay including interest. Gossett's June 7, 2002 Statement at 4. SEC notes that its concerns about Gossett's calculation of her total back pay are ". . . not significant enough to merit disagreement." SEC's July 8, 2002 Response at 2. 10 C.F.R. § 708.36(a)(3) clearly indicates that compensation for lost back pay is an appropriate remedy for retaliation. Accordingly, I have determined that Gossett's request for $85,930.35 in back pay compensation and interest shall be granted.

REIMBURSEMENT OF COSTS AND EXPENSES

Gossett has requested a total of $127,283.04 of compensation for costs and expenses incurred in pursuing her remedies under 10 C.F.R. § 708. Gossett's June 7, 2002 Statement at 5. The $127,283.04 figure includes $123,082.50 of requested attorney's fees, $125 for out-of-pocket expenses, and $4,075.54 of "standard" expenses (travel, telephone, postage, overnight delivery and photocopying). *Id.* SEC, in turn, contends that Gossett's request for attorney's fees is excessive, her request for expenses inadequately documented, and that her request includes non-reimbursable items.

Attorney's Fees

10 C.F.R. § 708.36(4) specifically provides for the award of attorney's fees for a prevailing complainant. Attorney's fees in Part 708 cases have generally been calculated by the use of the "lodestar" approach described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (*Blanchard*). *See, e.g., Ronald A. Sorri*, 23 DOE & 87,503 (1993), *affirmed as modified*, 24 DOE ¶ 87,509 (1994). Under the "lodestar" methodology, the "starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1939 (1983); *Burlington v. Dague*, 112 S. Ct. 2638, 2640 (1992) (*Dague*); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088, 3098 (1986) (*Delaware Valley I*). The amount to be awarded depends on the unique facts of each case. *Hensley*, 103 S. Ct. at 1937. The party seeking an award of fees bears the burden of submitting evidence supporting the hours worked and the rates claimed. *Webb v. Board of Education of Dyer County, Tennessee*, 105 S. Ct. 1923, 1928 (1985). There is a strong presumption that the lodestar calculation results in a reasonable fee. *Dague*, 112 S. Ct. at 2641; *Delaware Valley I*, 106 S. Ct. at 3098.

Gossett requests a total of $123,082.50 of attorney's fees. Gossett asserts that this figure was determined by using the standard "lodestar" calculation. SEC does not dispute Gossett's reliance upon the lodestar calculation, but rather claims that Gossett's calculation of attorney's fees is excessively high because it uses an unreasonably high rate and an excessive number of hours. SEC's July 8, 2002, Response at 2-3.

The fee applicant has the burden of producing satisfactory evidence that his requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Blum v. Stenson*, 104 S. Ct. 1541(1984). Therefore,

"a reasonable hourly rate" must be "calculated on the basis of rates and practices prevailing in the relevant market." *Missouri v. Jenkins*, 109 S. Ct. 2463, 2470 (1989); *Blanchard, supra*; *Riverside v. Rivera*, 106 S. Ct. 2686 (1986).

In support of her contention that $300 is a reasonable hourly rate for the services of her attorney, Charles J. Fitzpatrick, Gossett has submitted the declaration of Ann Lugbill, an attorney with considerable litigation experience in the Southern District of Ohio as well as substantial experience in the fee application process. 1/ Lugbill's declaration asserts:

> In my opinion, in a case of this type, an hourly rate of $250 to $300 per hour for Mr. Fitzpatrick, an experienced lawyer in a very specialized field, is exceedingly reasonable, if not below the rates normally charged by most attorneys of comparable experience who regularly and successfully practice in this area of hotly-contested whistleblower litigation involving DOE nuclear sites.

Lugbill Declaration at 8. SEC claims that the Lugbill Declaration fails to satisfy Gossett's burden of showing that $300 is a reasonable rate. SEC's July 8, 2002, Response at 2. SEC has articulated a number of arguments in support of this claim.

First, SEC contends that no other complainant in a whistleblower protection proceeding before the Office of Hearings and Appeals (OHA) has received more than $175 an hour in attorney's fees. *Id.* at 6. This contention is without merit. In *C. Lawrence Cornett*, Case No. VWX-0010 (1997) (*Cornett*), an OHA Hearing Officer specifically approved the use of a rate of $265 per hour in calculating a whistleblower complainant's compensation for attorney's fees using the lodestar methodology. *Cornett*, at 2. Moreover, only a handful of OHA decisions have considered the awarding of attorney's fees in proceedings under Part 708, and none of these cases has sought to establish a nationwide ceiling on attorney's fees. Instead, the cases have clearly established that reasonable rates for attorney's fees are to determined on a case-by-case basis after due consideration of whether the rates requested are comparable to those currently prevailing in the local community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

Second, SEC contends that "Counsel for SEC has been unable to locate any decision of the Southern District of Ohio published on Lexis which has awarded $300 per hour in any *contested* fee decision." SEC's July 8, 2002 Response at 6-7 (emphasis supplied). This self-serving assertion by SEC's counsel, who has not claimed to be an expert in the area of attorney's fees, has no evidentiary weight and therefore fails to rebut the Lugbill Declaration.

Third, SEC claims that Lugbill's attorney's fee expertise is limited to *Qui Tam* actions and that therefore her opinion should not be relied upon in a whistleblower forum because she lacks sufficient experience in such proceedings. SEC's July 8, 2002 Response at 7. There is no evidence in the

---

1/ In addition, Lugbill has co-authored and updated chapters on attorney's fee law in a West Group publication entitled *Litigating Wrongful Discharge Claims*. She is also the co-author of *Representing the Terminated Employee in Ohio*.

record supporting this assertion. I note that Lugbill's declaration specifically indicates that her practice has focused upon whistleblower litigation and employment law. Lugbill Declaration at 2. Moreover, Lugbill's experience in the subject matter is further supported by her publication history.

Fourth, SEC cites, as evidence that $150 an hour would constitute a reasonable lodestar rate, a recent case in which the Federal District Court for Southern District of Ohio rejected a prevailing party's request for a lodestar rate of $250 an hour and instead calculated the lodestar using a rate of $150 an hour. *Tinch v. Dayton*, 199 F. Supp. 758 (S.D. Ohio 2002). That determination was based upon prevailing rates in civil rights cases in the local community. The determination of a reasonable lodestar rate is made on a case-by-case basis and must take into account the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Blum v. Stenson*, 104 S. Ct. 1541(1984). In the present case, there is ample evidence that an attorney of comparable skill, experience, reputation and willingness to take the case was not available in the local community. Affidavit of Sue Rice Gossett at 2-4; Lugbill Declaration at 6-8; Affidavit of Charles J. Fitzpatrick at 2-3. In such circumstances, it is clear that a complainant must pay a substantial premium in order to obtain competent counsel. Accordingly, I find that the *Tinch* decision neither reflects the local market for the services of DOE whistleblower proceeding counsel nor requires that we use only the local market to determine a reasonable rate for attorney's fees.

Finally, SEC contends that the rate should be adjusted downward to reflect the relative ease in which whistleblower complainants can, SEC alleges, prevail in actions under 10 C.F.R. Part 708. 2/ This contention is based upon a flawed assumption, i.e. that success in the DOE's whistleblower protection program does not require skilled, determined and experienced counsel. Our experience has shown that the contrary is true.

Departmental policy favors the protection of the rights of alleged whistleblower under Part 708, and reasonable fees should be awarded to encourage attorneys to take these cases. *See Ronald Sorri* (Case No. LWA-0001), 23 DOE ¶ 87,503 at 89,018 (1993), and cases cited therein. Downward adjustment of the hourly rate on the basis of the SEC's contentions would clearly be inconsistent with this Departmental policy.

Gossett has requested that her lodestar be calculated using a total of 407.5 hours for Charles J. Fitzpatrick, Esq. and 6.9 hours for Lori Borski, Esq. SEC contends that Gossett's request for hours is excessive. Specifically, SEC contends that: (1) Gossett improperly requests attorney fees for 16.3 hours of travel by her attorney, (2) Gossett's hours should be capped at 12 per day during the period beginning on October 21, 2002, and continuing through October 25, 2002, 3/ and (3) 6.9 hours of attorney fees claimed for Lori Borski should be disallowed because it is insufficiently documented.

2/ Experience has shown that the majority of whistleblower complainants are unable to prevail in actions under 10 C.F.R. Part 708.

3/ The hearing took place on October 22, 23 and 24 of 2002.

Gossett claims a total of 14.3 hours for Fitzpatrick's services on October 21, 2002, the day that Fitzpatrick traveled from San Antonio, Texas, to the Piketon, Ohio area where the hearing took place. Fitzpatrick's invoice indicates that 9.5 hours of that time was spent traveling to Columbus and Chillicothe and working on Gossett's case. Egan and Associates Invoice at 4. SEC claims that it is inappropriate to bill for travel time. However, both the billing invoice itself and a July 17, 2002 letter from Fitzpatrick indicate that Fitzpatrick was working on Gossett's case while he was traveling. Successful whistleblower complainants are entitled to be compensated for fees charged for legal work performed while their attorneys are in transit. *Ronald A. Sorri* (Case No. LWX-0014) (1994). Therefore, I find SEC's objections concerning attorney travel time to be without merit.

SEC correctly notes that Fitzpatrick's invoice claims that 84.4 hours can be attributed to one five day period, October 21, 2001 through October 21, 2001. While it is true that Fitzpatrick's invoice claims an average of 17 hours a day for this five day period, it must also be borne in mind that this five day period began one day before and concluded one day after a 3 day hearing. Competent counsel are always well prepared for trial-type proceedings, and the high degree of preparedness exhibited by Mr. Fitzpatrick at the hearing, as well as his exceptional success in the proceeding, constitute more than sufficient evidence of his long hours of preparation.

Gossett has also requested to be reimbursed for the services of an attorney, Lori Borski, for 6.9 hours at the rate of $110 an hour. SEC has objected to this request claiming it is insufficiently documented. SEC's July 8, 2002 Response at 8 n.4. I agree. Gossett has not submitted any evidence that the rate of $110 requested for Borski's services is reasonable, and I will not approve those fees.

Based upon my review of Gossett's Statement and the supporting Affidavit and attachments, I have decided to approve the majority of her request for attorney's fees. As indicated above, she has sufficiently documented 407.5 hours of work performed on her case and has affirmed that $300 is a reasonable hourly billing rate. Accordingly, I have concluded that Gossett should be awarded attorney's fees of $122,250, useing the "lodestar" approach.

Other Costs and Expenses

Gossett has requested reimbursement for $125 of out-of-pocket expenses she incurred in pursuing her whistleblower remedy. Apparently, SEC does not object to this request. *See* SEC's July 8, 2002, Response at 10. I therefore will direct SEC to reimburse Gossett for these $125 worth of out-of-pocket expenses she incurred.

Gossett has also requested reimbursement totaling $4,075.54 for travel, telephone, postage, overnight delivery, and copying expenses incurred by Fitzpatrick in representing Gossett. SEC has objected to several aspects of Gossett's request for these expenses. Specifically, SEC contends that Gossett (1) failed to indicate the dates on which many of the claimed expenses occurred, (2) failed to itemize claimed travel expenses, (3) exceeded DOE guidelines for photocopying charges, (4) requested reimbursement for fax transmission and long distance phone calls which are actually "overhead" charges, and (5) charged a reproduction fee of $740.17 in connection with the preparation of a reply brief.

SEC's July 8, 2002 Response correctly notes that Gossett has failed to sufficiently document many of the expenses incurred on her behalf by her attorney. Since the burden of proof is on Gossett to show that she incurred such expenses, I must reject Gossett's request for reimbursement for most of those expenses incurred on her behalf by her attorney. Accordingly, I am rejecting all but $302.02 of Gossett's request for reimbursement of those expenses incurred on her behalf by her attorney. I am granting Gossett's request for reimbursement of those services listed in the June 2, 2002 invoice that are dated and sufficiently described.

Therefore, I will approve a total of $427.02 of Gossett's request for reimbursement of "other costs" and expenses.

OTHER REMEDIES

Gossett's June 7, 2002 Statement requests "that SEC be required to remove from her personnel file all information pertaining to her repeated reassignments within the SEC workforce during the time of her employment prior to her termination on January 19, 2001." Gossett's June 7, 2002 Statement at 5. However, SEC asserts that Gossett's personnel file "never contained any document concerning her transfers." SEC's July 8, 2002 Response at 3. Since SEC has affirmed that Gossett's personnel file does not contain any documents relating to her reassignments, there is no need for me to grant this request. Gossett's June 7, 2002 Statement also requests that a memo from her former supervisor, Joseph Shuman, to her be removed from her personnel file. SEC's July 8, 2002 Response affirms that the Shuman memo is not included in her personnel file. SEC's July 8, 2002 Response at 3.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Sue Rice Gossett under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) Safety and Ecology Corporation shall immediately return Sue Rice Gossett to her position as a Senior Radiation Control Technician from which she was terminated in January 2001, in accordance with the instructions set forth above.

(3) Safety and Ecology Corporation shall pay Sue Rice Gossett $86,055.35 in compensation for her in violation of 10 C.F.R. Part 708.

(4) Safety and Ecology Corporation shall pay Charles J. Fitzpatrick, Esq. $122,677.02 as attorney's fees incurred while representing Sue Rice Gossett in this Part 708 proceeding.

(5) Safety and Ecology Corporation shall pay the above amounts to Sue Rice Gossett and Charles J. Fitzpatrick and reinstate Sue Rice Gossett as a senior radiation technician within 20 days of the date of this Order.

(6) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after receipt of the decision.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: August 23, 2002

July 15, 2002
DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Hearing Officer Decision

Name of Petitioner: Ronald D. White

Date of Filing: October 27, 2000

Case Number: VBH-0068

This Decision involves a complaint filed by Ronald D. White (White or "Complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, codified at 10 C.F.R. Part 708. Complainant is a former employee of a DOE contractor, Midwest Research Institute (the contractor or MRI), the management and operating contractor of DOE's National Renewable Energy Laboratory (NREL), located in Golden, Colorado. According to White, the contractor made him the subject of reprisals because he made protected disclosures to DOE and the contractor in January 1999 and May 2000. In his complaint, White alleges that the contractor then took negative personnel actions against him, culminating in his dismissal in August 2000. On the basis of the hearing that was conducted and the record before me, I have concluded that White is not entitled to relief under 10 C.F.R. Part 708.

I. Background

A. The Contractor Employee Protection Program

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

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. The regulations provide, in pertinent part, that a DOE contractor may not retaliate against any employee because that employee has disclosed to a DOE official or to a DOE contractor, information that the employee reasonably believes to evidence, among other things, a substantial violation of a law, rule, or regulation. *See* 10 C.F.R. §§ 708.5 (a)(1). Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE. In response to such a complaint, the employee is entitled to an investigation by an investigator appointed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. §§ 708.21-.23. After the investigator's report on the complaint is issued, an OHA Hearing Officer will generally conduct an independent fact-finding and evidentiary hearing. 10 C.F.R. §§ 708.24-.25. The Hearing Officer will issue a formal, written opinion on the complaint. 10 C.F.R. § 708.31. Finally, a party may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. § 708.32.

B. The Present Proceeding

1. Procedural History

On October 27, 2000, White filed a complaint with the Office of Hearings and Appeals, requesting an investigation and hearing. The OHA Director appointed an investigator and on May 21, 2001, the investigator issued a report setting forth the results of her investigation of the complaint. *See Report of Investigation*, VBI-0068 (May 21, 2001). The investigator found that White made a protected disclosure, and that proximity in time between the disclosure and the initiation of the alleged negative personnel action raised a Part 708 inference that the protected disclosure was a contributing factor to the alleged retaliation. However, according to the investigation, the contractor also demonstrated a reasonable basis for dismissing the complainant and demonstrated that it followed its normal procedures for terminating an employee. Nonetheless, the investigator was unable to conclude that the contractor met its burden of proving by clear and convincing evidence that it would have dismissed White despite his protected disclosures.

On May 21, 2001, I was appointed hearing officer in this case. The parties participated in discovery, and the hearing was held from February 25 through February 28, 2002 in Denver, Colorado. I received the transcript of the hearing on March 21, 2002, thereby closing the record in this case. Sixteen witnesses testified at the hearing, one via videotaped deposition. The individual presented 80 exhibits, and the contractor presented 225 exhibits. The official transcript of that hearing shall be cited as "Tr." and pertinent documents, received into evidence as hearing exhibits, cited as "Ex."

2. Factual Overview

Ronald Dee White received a bachelor's degree from Texas Christian University (TCU) in 1969 and a Masters Degree from TCU in 1970. Tr. at 46. From 1976 to 1980, he was an energy economist at the Federal Energy Administration (predecessor of DOE), and then spent one year as an energy economist at the US Agency for International Development (US AID). Exhibit K; Tr. at 46-47. White then became Assistant Commissioner of Agriculture for Regulatory

Programs in Texas from 1982 to 1984. After leaving that position, he formed a consulting group specializing in rural energy in developing countries. In December 1990 he joined the Solar Energy Research Institute (SERI), predecessor to NREL, as an international market analyst, a position he held until his termination in August 2000. Tr. at 47.

a. Early NREL Career (1990-1997)

White was first employed by SERI in 1990 as an international market analyst, tasked to perform basic economic analysis of the market conditions for renewable energy technologies. Tr. at 50. White's performance appraisals were satisfactory through 1992 and did not note any significant problems. Ex. A-C. However, in late 1992, White delivered a draft report four months late and then repeatedly missed commitments to deliver the final report (the APEC Compendium). Ex. 3. White promised a final draft by January 1993 so that the APEC Compendium could be issued in February; however he had not submitted his input as of February 3, 1993. *Id.* NREL staffers and DOE employees in Washington, DC then requested that White be removed from his position as editor of the APEC Compendium. Ex. C, Tr. at 244-246. In 1993, White began to report to Walter Short, a branch manager. White's appraisal for calendar year 1993, signed by Short, stated that White needed "immediate improvement" in completing projects and that White needed to improve relationships with the NREL Washington, DC office because those relationships had "gradually deteriorated." Ex. C. Notwithstanding this appraisal, White received a satisfactory rating and a raise. In May 1994, White asked for a promotion but Short refused, instead advising White that he should "start delivering a solid performance at [White's] current grade level." Ex. 6. In June 1994, White and Short agreed to have more formal and frequent performance reviews. Ex. 9. In August 1994, White missed a deadline to review country profiles. Ex. 10-12. Nonetheless, White's calendar year 1994 appraisal stated that White had a successful year. Ex. D. In that appraisal, White agreed to a developmental objective to produce a "significant, quality NREL technical report" in 1995. *Id.*

During 1995, White and a few other employees created NREL's international program in order to allow NREL to maximize international opportunities. In July 1995, White was detailed to the World Bank (Bank), i.e. NREL continued to pay his salary while he worked at the Bank. Tr. at 51. Short testified that he believed the assignment to be a good fit for White because it involved skills like imparting knowledge of renewable energy to World Bank officials, something White was very good at, but did not require a written product. Tr. at 1167. White continued to report to Short officially, but reported on an informal basis to a senior colleague in Washington, Sam Baldwin. Tr. at 51. White traveled with World Bank teams to develop renewable energy projects for World Bank funding. Tr. at 52. At the Bank, White was nominated for a staff "Excellence Award" for his work on photovoltaic energy. Tr. at 377, 665, 842.

On January 8, 1996, Bob Westby, a contractor manager, sent Short an email recognizing White's invaluable assistance at the Bank and explaining how White's activities helped NREL and its subcontractors. Ex. P. In February 1996, Bob Westby became White's manager as the result of a reorganization at MRI. However, Westby soon found White to be unresponsive to his requests for information about White's assignment. Westby testified that in 1996 he repeatedly requested

that White submit performance objectives, but never received them. Tr. at 531. White testified that he submitted the performance objectives through a senior colleague, Sam Baldwin. Tr. at 376. Neither Westby or Short ever received a major report from White regarding his Bank detail. [1] Tr. at 400, 1172.

b. NREL Career After World Bank Assignment (1997-1999)

In August 1997, the World Bank assignment concluded and White returned to NREL where he was placed on overhead until a funded project could be located for him. Tr. at 257. He began reporting to Barbara Goodman, MRI Director, in October 1997, and his team leader at that time was Roger Taylor. Tr. at 659, 1200. Taylor was White's first level supervisor and managed White's daily activities. White began to work on some proposals for energy projects in the Philippines. Tr. at 53.

In September 1998, US AID authorized a project, developed by White and his colleagues, to be funded at $1.4 million from December 1998 to December 2000. Ex. 29, Tr. at 56. The project, Philippines Renewable Energy Project (PREP), was designed for US AID in Manila to assist the country's rural electrification program. Tr. at 56, Ex. 29. This occurred at the same time that White again began to report to Bob Westby, Center Director, who had responsibility for the international program then and was his manager throughout the remainder of his tenure at NREL. Tr. at 55. PREP consisted of approximately 10 tasks, and White was responsible for the market assessment task. White testified that PREP was NREL's first attempt to develop a comprehensive program for a country for rural electrification. Tr. at 57. Roger Taylor was the PREP project manager and very well versed in White's work. Tr. at 60. Westby, on the other hand, testified that he did not understand White's work and Taylor testified that Westby was not very interested in PREP. Tr. at 402.

While working on the PREP project, White made the first of his alleged disclosures. In December, 1998, White received an email that he believed described the misuse of funds on the Technology Cooperation Agreement Pilot Program (TCAPP) and PREP projects. Ex. V. White suspected that staff members were using money from TCAPP to begin PREP activities before the PREP funding was allocated.[2] On January 6, 1999, White called the DOE Office of Inspector General (IG) hotline and complained of the possible misuse of funds. Tr. at 68-69.

On January 13, 1999, Barbara Goodman held an offsite meeting regarding the performance of the employees in her group. The managers that reported to her, including Walter Short, Roger Taylor and Bob Westby, attended this meeting. Tr. at 1200. During the meeting, Goodman asked each manager to describe the strengths and weaknesses of their subordinates, and then all

[1] White testified that he published a professional paper while at the Bank. Tr. at 370.

[2] TCAPP was initiated in August 1997 as a mechanism to implement Article 4.5 of the Framework Convention on Climate Change. DOE, AID, and the Environmental Protection Agency support TCAPP. TCAPP focuses attention and effort on achieving technology transfer from the US to developing countries. Tr. at 67, Ex. 31. NREL implements TCAPP for DOE.

of the managers present ranked that employee according to the work that the employee actually produced, without regard for the employee's current job title. Tr. at 1203, Ex. 35. If the managers ranked an employee in a lower position than that employee's current job, that employee was identified by the group as possibly needing a performance plan. Tr. at 1205. As described below, the managers identified White as having performance problems. At the meeting, White was rated a "3" (fully satisfactory) as a Senior Project Leader Program Manager 1; however, his actual job title was Senior International Market Analyst, a higher-level position. Tr. at 1218, Ex. X. The managers commented that White needed to focus on tangible results and "send the message without sending the irritation," a reference to his sometimes rocky relationships with colleagues. Ex. 35, Tr. at 1204. The minutes of the meeting identified White as possibly needing a performance plan. Ex. 35. Taylor reviewed White's 1998 appraisal with White in early 1999, and advised White to "focus on tangible results due to perceived deficiencies in submitting deliverables." Ex. X, Tr. at 732.

White turned in a PREP work plan on February 1, 1999, earlier than the other PREP staff. Tr. at 495. White's task was Task One, and it was approved in March 1999 on his first trip to Manila, in the amount of $250,000, the highest level of funding for all of the PREP tasks.

On March 2, 1999, the IG informed DOE's Golden Field Office of the complaint about the possible misuse of funds in the PREP and TCAPP programs and asked Golden to take appropriate action. Tr. at 343, Ex. 37. On March 12, 1999, Westby convened a meeting of the PREP and TCAPP staff in order to discuss project funding. Ex. 39. Taylor suspected that White made the complaint, and testified that at some point he told Westby of his suspicions. Tr. at 693. On March 15, 1999, Westby met with Chris Leavitt, Acting Director of Human Resources, and discussed White's performance problems. Tr. at 969-971, Ex. Z.

c. Initiation of the Informal Corrective Action Plan (CAP) (April 1999-May 2000)

On April 27, 1999, White met with Westby and Taylor at Westby's request. Ex. 44. Westby asked White to meet with him every other week for four months and present a one-page summary of specific performance objectives with deliverables and timelines. This document would become part of White's performance self-assessment. Westby considered this an "informal corrective action plan," but never specifically labeled the meetings as such in any conversation or correspondence with White or Taylor. [3] Tr. at 699. Taylor testified that he thought the meetings were established to enable a new manager (Westby) to learn about the work of a subordinate. Tr. at 699. Taylor also said that Westby never directly announced in the meetings that White's performance was an issue. Tr. at 724. Three of White's deliverables and his work plan were submitted ahead of schedule in 1999. Tr. at 12.

[3] The informal CAP is the negative personnel action described in White's whistleblower complaint.

White performed well in the PREP project in 1999. During 1999, White traveled to the Philippines for PREP three to four times for approximately three to four weeks at a time. Tr. at 674. White often helped out when customers visited NREL in Colorado by arranging ad hoc tours and meetings at DOE's request. Tr. at 676, Ex. KKK. During all of the time that White worked on PREP, his customer (the government of the Philippines) never complained about his work. Tr. at 456. In fact, the customer provided favorable feedback on White's work on PREP. Ex. 88. There is no evidence that White missed any major deliverables from December 1998 through most of 1999. In fact, on December 1, 1999, Westby was prepared to reduce the frequency of the regular meetings from bi-monthly to monthly. Ex. NN.

However, problems with timeliness arose later that month. On December 21, 1999, Kelli Anderson asked White and several of his colleagues to provide input to her in early January for her use in compiling an AID Quarterly Report. Ex. 58. Anderson was the administrative assistant to Ron Benioff, the manager responsible for coordinating the report, a quarterly report of progress on AID projects. Deposition of Ron Benioff at 57, Tr. at 456. Each employee was to submit a paragraph or two summarizing their progress on AID projects for the past quarter. *Id.* at 60. NREL was delinquent in producing these required reports for AID, and had been requested to begin submitting the reports on a regular basis. Deposition of Ron Benioff at 58. White did not submit his input in January.

White also began to demonstrate defiance of his manager's requests. On February 3, 2000, Westby asked White to provide a progress report on all of his scheduled deliverables by the end of the following day. Ex. 61. On February 4, White sent Westby and Human Resources an e-mail stating that his computer had crashed and that he had no access to his files. That evening, the computer was repaired and White promised to work on the report the following day, a Saturday, prior to a trip to the Philippines. Ex. 62. White failed to submit the report prior to leaving for, and even after his arrival in Manila. Westby had not received the document by February 14, and sent White a fax in the Philippines asking for its submission. Ex. 63.

White continued to exhibit the procrastination that marked his early NREL career. Anderson asked White again for his input to the AID Quarterly Report on February 14th. On February 17th, Westby asked White to send his material to Anderson. Ex. 63. On February 20th, White told Westby that Ron Benioff had not contacted White about the report, even though White knew that Anderson reported to Benioff. *Id*. On March 17, 2000, White sent an email to Anderson asking her for a schedule of 2000 due dates for input to the Quarterly Report and a description of the format for that input. Ex. 85. On April 19, 2000, Anderson repeated her request for White's input for the Report by May 5, 2002. White asked Anderson again on April 24 for a schedule and she responded the same day. *Id.*

In White's performance appraisal for calendar year 1999, Westby noted that White failed to meet two deliverable deadlines in December 1999 and that White needed improvement in working relationships. Ex. XXX. Westby rated White as a "2" (needs improvement). White then wrote to Westby's manager and complained that Westby was retaliating against him. White also requested that NREL retain a mediator to investigate and mediate the dispute. Ex. TT.

d. Progression to a Formal Corrective Action Plan and Termination (May-August 2000)

Not only did White miss the May 5 deadline for the Quarterly Report input, he also did not respond to Anderson's request until after May 15. By way of explanation, White wrote in an email to Westby that he had requested a schedule of report input dates from Anderson in March 2000 in order to plan his work, but never received such a schedule. Ex. 85. White stated that this "was a problem waiting to happen." *Id.*

Chris Leavitt, then Acting Director of Human Resources, began sitting in on the meetings with Westby in May 2000 after Roger Taylor, White's team leader, declined to attend further, and she testified that White often challenged Westby's directions to White. Tr. at 975-977, 1006, 1046. Taylor had attended the meetings from April 1999 to May 2000. Tr. at 696. However, Taylor testified that the meetings became unproductive and he stopped attending in May 2000 when it became clear to him that the meetings were not being used to communicate the substance of White's work but rather seemed punitive in nature. Tr. at 701, 743. Taylor informed Westby that he no longer desired to be a team leader if that position required Taylor to participate in meetings that Taylor viewed as unproductive and subjected White to a higher level of scrutiny than other employees. Ex. BBB. The meetings became increasingly tense and White advised Human Resources that he disapproved of Westby's management style and that Westby was trying to intimidate White. Ex. 75. Westby also expressed displeasure with White in the meetings, at one point leaving a meeting abruptly. Ex. LLL.

On May 17, 2000, Westby's manager, Jon Pietruszkiewicz, denied White's request for mediation, stating that it was not NREL's policy to provide outside mediation for disputes that could be resolved "with existing resources, policies and procedures." Ex. 92. He informed White that he would be placed under a formal corrective action plan, which White received on May 22. Ex. AAA. At the end of 60 days, NREL management planned to assess his performance and determine what further action would be required. Ex. AAA. Judy Marshall, new Director of Human Resources, refused to meet with White to discuss his formal corrective action plan or allegations of retaliation. Tr. at 1138.

White again procrastinated in meeting deadlines for submitting a written report. On May 22, he committed to submit the AID Quarterly Report information to Anderson on May 23 by close of business. However, by May 24th, Anderson had not received the requested input from White. Ex. 97.

White made allegations of retaliation during a meeting with the Golden Field Office on June 1, 2000. Ex. 109. Westby sent White a Written Reprimand for missing a meeting that was scheduled for that day. Ex. DDD. During a subsequent performance meeting, White committed to producing a deliverable for Westby on Wednesday, July 5, 2000. Ex. 114. He did not meet that deadline. Instead, in a July 5th email, White explained to Westby that White missed the deadline because White's personal computer failed on Thursday, June 29. *Id.* White stated that after visiting Westby's office on June 29 and finding that Westby was absent, White did not

know how to get in touch with Westby. Ex. 114. White sent the deliverable to Westby on July 10. *Id.*

On August 8, 2000, White was terminated. Ex. 64 . He filed a complaint with OHA on October 27, 2000, and requested an investigation followed by a hearing. Ex. MMM. OHA investigated the case and issued a report on May 21, 2001. The report of investigation (ROI) concluded that White made a protected disclosure, that the protected disclosure was a contributing factor to his dismissal, and that the contractor had a reasonable basis for dismissing White. Ex. NNN. The investigator was not, however, able to find clear and convincing evidence that NREL would have dismissed White in spite of his protected disclosures. *Id.*

II. Legal Standards Governing This Case

A. The Complainant's Burden

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

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

10 C.F.R. § 708.9 (d); *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (*Sorri*). "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F.Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th ed. 1992). As a result, White has the burden of proving by evidence sufficient to "tilt the scales" in his favor that he disclosed information which he believed evidenced a substantial violation of a law, rule, or regulation. 10 C.F.R. § 708.5(a)(1). If the complainant does not meet this threshold burden, he has failed to make a prima facie case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a *contributing factor* in the personnel actions taken against him, in this case the imposition of an informal corrective action plan that culminated in his termination in August 2000. 10 C.F.R. § 708.29; s*ee Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying "contributing factor" test). Temporal proximity is sufficient to establish the final required element in a prima facie case of retaliation. *See Sorri*, 23 DOE ¶ 87,503 (1993); *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). *See also* ROI at 3-4.

B. The Contractor's Burden

If White makes a prima facie case, the regulations require NREL to prove by "clear and

convincing" evidence that the company would have terminated White even if he had not made protected disclosures. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F.Supp. at 1204 n. 3. In evaluating whether NREL has met its burden, I will consider: (1) the strength of the contractor's evidence in support of its decision to terminate White; and (2) any evidence that the contractor takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *See Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (quoting *Geyer v. Dep't of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff'd*, 116 F.3d 1497 (Fed. Cir. 1997)) (*Carr*).

III. Analysis

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

A. The Alleged Protected Disclosures

In his complaint, White alleges that he made four protected disclosures to DOE. The first disclosure was White's telephone call to the IG Hotline on January 6, 1999, reporting possible misuse of funds in the PREP and TCAPP projects. The three additional disclosures are: (2) a complaint to NREL that an NREL employee had intentionally undermined Complainant's efforts to obtain funding from the United Nations Development Program for a project in the Philippines; (3) a May 3, 1999 complaint to NREL that a colleague tried to subvert White's efforts to hire a summer intern; and (4) a March 22, 2000, response to a performance appraisal that White alleged was a form of retaliation against him for making the May 1999 disclosures. Ex. 88, Ex. EE. Counsel for NREL did not dispute the fact that Disclosure 1 (the IG complaint) is protected under Part 708. Prehearing Statement of NREL at 2 (February 20, 2002). To make a prima facie case of retaliation, White need only show one disclosure that was protected under Part 708. *See Janet L. Westbrook*, 28 DOE ¶ 87,018 (2001). I therefore find that White has met his threshold showing under Part 708 that he engaged in an activity protected under Part 708. [4]

B. White's Disclosures Were a Contributing Factor in His Termination

A finding of "temporal proximity," i.e., a finding that "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action," is sufficient to show that a protected disclosure was a contributing factor in a personnel action. *See Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993) *citing McDaid v. Department of Hous. and Urban Dev.*, 90

[4] NREL argued that the other three alleged disclosures are not protected activities under Part 708 and I agree. There is no evidence that they allege or demonstrate what White believed to be a substantial violation of a law, rule or regulation. 10 C.F.R. Section 708.5(a)(1).

FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

White made the complaint to the DOE IG on January 6, 1999. The IG sent NREL a letter advising NREL of the complaint on March 2, 1999. NREL asked Westby to investigate, since he was the manager in charge of TCAPP and PREP. Tr. at 419. On March 10, 1999, Westby informed his staff that he would hold a meeting about the complaint on March 12, 1999. Taylor testified that he sent White an email from his personal email account stating that management was very upset about the IG complaint. Tr. at 695

Westby, the manager responsible for putting White on the informal corrective action plan, denies actual or constructive knowledge of the disclosure to the IG prior to placing White on the informal corrective action plan on April 27, 1999. In fact, Westby stated during his deposition that he discovered White was the source of the complaint only after White's termination in August 2000. Tr. at 438. However, there is evidence in the record to dispute this statement and Westby's testimony that he was unaware of any IG involvement. Tr. at 445. Westby's testimony on when he learned that White was the source of disclosures conflicts with the testimony of other witnesses. At the hearing Westby was not clear about the time when he actually found out that White was responsible for the complaint. Tr. at 438-445. There was also evidence in the record that other employees had discussed White as the possible source of the complaint. Taylor quickly suspected that White was the source of the IG complaint, and testified that he informed Westby of his suspicion "at some point." Tr. at 694. White's former manager Walter Short testified that he learned of the complaint around 1999 from Westby, prior to the time that Westby claims he learned that White was the source of the disclosure. Tr. at 1175-1177, 1196. Westby's manager testified at his deposition that he told Westby that White was the source in May 2000, well before White was terminated. Deposition of Jon Pietruszkiewicz at 17-19, 66-68. Finally, Judy Marshall, MRI Director of Human Resources, testified that she discussed the complaint and allegations of retaliation with Westby prior to White's termination. Tr. at 1130.

I find temporal proximity between White's disclosure in January 1999 about the alleged misuse of funds in the TCAPP and PREP projects and the initiation of the informal CAP in April 1999. The disclosures occurred within six months of the date when Westby began the informal CAP. *See, e.g., Frank E. Isbill*, 27 DOE ¶ 87,513 (1999) (six months between disclosure and alleged retaliatory action); *Barbara Nabb*, 27 DOE ¶ 87,519 (1999) (eight months); *Russell Marler*, 27 DOE ¶ 87,506 (1998) (three months to four years). This temporal proximity gives rise to a Part 708 inference that the January 1999 disclosure was a contributing factor in the negative personnel action that NREL took against White in April 1999, i.e., placing him on an informal corrective action plan.

Based on the above, I find that White has established a prima facie case that his protected disclosure was a contributing factor to the alleged retaliatory action. The burden now shifts to NREL to prove by clear and convincing evidence that it would have terminated White despite his protected disclosures.

C. Evidence That NREL Would Have Taken The Same Action Against White Absent His Protected Disclosure

NREL argues that it would have terminated White despite his disclosures to DOE employees based on: (1) his history of performance problems; and (2) his poor working relationships with co-workers. After reviewing the record, I find that the contractor has shown by clear and convincing evidence that it would have terminated White notwithstanding his protected disclosures.

(1) Evidence in Support of Complainant's Termination

NREL argues that White was terminated because of (1) a history of performance problems and (2) poor working relationships with colleagues. I agree with the DOE investigator that NREL has presented credible evidence to support its argument that White was terminated because of a history of performance problems. Ex. NNN (ROI) at 4. However, NREL's argument that the termination was justified by White's poor working relationships is not persuasive, and is countered by credible evidence that White was generally well regarded by his peers and by some managers. Because the first argument is substantiated, as explained below, I need not reach the arguments NREL puts forth regarding White's relationships with his co-workers.[5]

a. Timeliness and Production of Deliverables

Based on a review of the record and my observations during four days of testimony, it is clear that White was an experienced, capable economist with a creative approach to his work and a flair for working with his counterparts in developing countries. White ably promoted his projects and NREL's mission in the developing world. White's PREP customer, the government of the Philippines, never complained about his work, and he was able to broker some important projects in the Philippines while working for NREL. Even Westby acknowledged the creativity of White's work and his value to NREL. Tr. at 539. However, it is also clear that as much as White loved certain aspects of his job (i.e., making deals, creating projects, visiting counterparts in foreign countries, meeting people), White disliked and avoided other aspects, especially writing about his job and producing the deliverables requested by his manager. In December 1998 he found himself reporting to a manager who, based on past experience as White's supervisor, demanded that White produce tangible results of his work in the field on a regular basis.

White's problem with timeliness first became evident in the record in late 1992 when he missed an important due date that was reported to his then manager, Walter Short. White delivered a draft late, and repeatedly missed a deadline on the paper that was to be presented at a conference. This was reflected in a comment on the complainant's 1993 performance appraisal

[5] I note that the Notice of Termination never determined that White failed to comply with Requirement 6, the requirement to follow NREL's policies and procedures in resolving workplace concerns. Ex. III.

that he needed "immediate improvement" in his deliverables. Short testified that White never finished a major written project for a client during the time that White worked for Short, from late 1992 through 1995. Tr. at 1162. In a staffing analysis, White's second level manager Tom Bath wrote that from 1992 to 1994, White was not assigned to "any projects with long-term milestones because of a history of inability to deal with project planning and the completion of deliverables." Ex. 27. Bath continued that White had not completed any major reports or publications from 1990 to 1994. *Id*. Short testified that he identified these performance problems and tried to work them out informally with White and Bath. Tr. at 1179. Short also testified that White made an effort to improve, and Short gave White a performance objective in 1995 to complete a major technical paper. Ex. D. However, White was assigned to the World Bank in August 1995. Short testified that White did not resolve the performance problem--the World Bank assignment did not require the delivery of a tangible product. Tr. at 1180-1183. White never produced a major project paper, thus not meeting his 1995 performance objectives. Ex. D.

While still at the Bank, White began to report to Westby in February 1996. Westby testified that he asked White repeatedly for updated performance objectives and White never delivered them, thus putting Westby on alert for potential performance problems. [6] There is evidence in the record, however, that White did send performance objectives to Westby. [7] First, there is a brief memo from White describing his performance goals that was sent to Sam Baldwin (White's informal supervisor while working at the Bank) in 1997 for his review, and Baldwin testified that the memo was probably sent to Westby also. Ex. Q, R. Second, the record contains a memo in June 1996 entitled "Brief Overview of Past Activities and Proposed Plan for 1997." I also note that in the memo White states "Bob [Westby] has asked for my performance goals *again*," and notes that he (White) is at fault for not engaging his management in discussions about his performance goals. *Id*. Thus, White acknowledges that Westby asked for the information more than once, and that White should have actively pursued the topic with Westby.

After White returned from the World Bank assignment in August 1997, his reviews were satisfactory. His 1998 appraisal noted, however, that he "needs to focus on tangible results (reports, workshops, subcontracts)." Ex. X. Problems with timeliness were noted in the manager's meeting on January 13, 1999, but these problems do not appear in the record again until later in 1999. In fact, in February 1999, White was the first of his colleagues to submit his PREP Work Plan. Further, Westby himself testified that White had not missed any deliverable deadlines from the time Westby began supervising White in December 1998, to March 15, 1999, the date of Westby's meeting with Chris Leavitt, Acting Director of Human Resources, to

[6] Westby admitted that he did not properly manage White during his World Bank assignment because he did not correct this problem when he encountered it in 1996. Tr. at 53. Instead of confronting White and attempting to resolve this problem informally, Westby took a formal, inflexible approach and used White's unresponsiveness in 1996 (along with the consensus at the 1999 manager's meeting that White may have needed a performance plan) as the basis for the informal CAP--without White even knowing that his performance was at issue.

[7] Performance objectives are professional goals for the next performance appraisal period.

discuss White's performance problems. Tr. at 434-437. Westby admitted during the hearing that he placed White on an informal corrective action plan based solely on White's history of performance problems, not based on anything Westby had observed since becoming White's manager again in December 1998. Tr. at 435.

Despite regular performance meetings with Westby, White missed key deadlines for deliverables in 2000. In early February, White missed a deadline for submitting a progress report to Westby, explaining that his computer had crashed on the due date of the report. White did not reply to repeated requests from Anderson in early 2000 to submit input for the AID Report, even after Westby intervened. *See* Section I.B.2.c., *supra*. In fact, on February 20th White wrote Westby that he was surprised to hear from Westby because Ron Benioff (Anderson's manager) had never contacted White about the report. White wrote "If I knew what was wanted and what the reporting schedule is, this would not happen." Ex. 58.

Notwithstanding the previous statement, White was late again with input for the next AID Quarterly report. Ex. 85. On April 19, 2000, Anderson asked White and his colleagues for input by the close of business on May 5, 2000. Ex. 85. Despite several reminders, White had not submitted his input by May 24. *Id.* White's actions demonstrate his cavalier attitude toward a reasonable workplace request. Even after Anderson gave White the information he had asked for, he thumbed his nose at her request by refusing to respond to her until ten days after the deadline, and then failed to send the data by May 23 as he had promised. Ex. 85. NREL could not remain a viable entity if all of its employees adopted White's contempt for deadlines. His uncooperative behavior justified Westby's next step in the progressive discipline, which was to place White on a formal CAP on May 22, 2000. That document stated, in pertinent part:

> You are to inform me, prior to its deadline, when you will need to miss a deliverable. In addition, you are to include with such communication an acceptable justification and a date certain for the completion of the deliverable. This recognizes that the nature of your work may reasonably require adjustments in deliverables and deadlines.

Ex. AAA. Rather than attempt to comply with this condition, which does not appear unreasonable, White challenged its language and used this as an excuse for missing deadlines during the 60-day period that the CAP was in force. Even though this passage is unambiguous, he testified at the hearing that the words "acceptable justification," and "date certain" are "vague" and "likely to cause problems in complying with [the CAP], in terms of dealing with Bob Westby over deliverables…." Tr. at 208. This displays an uncooperative nature and supports NREL's contention that White did not accept Westby's direction.

Even in the face of formal notification that his performance was deficient, White ignored the requirements of the formal CAP. He continued to ignore deadlines and set forth weak excuses for not doing his job. For example, on May 24th, Ron Benioff left a voice mail message for Westby stating that he and Anderson continued to have difficulty in getting the AID data from White, and that requests for input turned into "heated dialog." In response to Westby's inquiry

about the delays, White replied that for two months he had been trying to get an answer to his request for a schedule and format. He characterized Benioff's phone call as "rude" and stated:

> I have no problem with your asking me to have something to Ron/Kelli by the time I leave work tonight. I am sorry that you had to do it, however. . . . If Ron had responded to my March 21 email in anything like a timely fashion, he could have avoided being rude to a colleague, he could have avoided the misuse of your time on this matter, and he could have had the proper information for his deliverable to AID on time. But he did not. . . . As you can see I did my dead level best to avoid this result.

Ex. 85.

White's performance continued to deteriorate in 2000 and he became more brazen in ignoring the CAP requirements. He missed another important deadline the following month – a deliverable that he promised to Westby on June 30. White testified that his hard drive failed on June 29. On Wednesday, July 5, Westby again asked White to send him the deliverable and to leave a voice mail on its completion, and said he would follow up with White on his return to the office on Monday, July 10. However, White showed his disdain for Westby's direction when he replied via email on July 5 that "any fair person who was here in the last few days would have concluded that I was focused on the task and doing all that was humanly possible to meet the delivery deadline." *Id*. He emailed Westby on July 10 that he would submit the document that day. Ex. FFF. At the hearing, White explained his failure to follow Westby's direction as follows:

> Q. Why didn't you leave the voice mail on July 5?
>
> A. Well, because I knew that he wouldn't be back until Monday, and there wasn't any point in leaving three or four emails with pieces of messages of pieces of information. That by Sunday I knew that we'd have a report for him, and tell him the bad news, but tell him the whole story. . ..

Tr. at 162. This exchange reveals White's attitude toward taking Westby's direction and his attitude toward the CAP. White simply refused to do what Westby asked him to do. He clearly did not take the terms of the CAP seriously because he continued to miss deadlines without notifying Westby in advance. Rather than follow Westby's instructions and notify Westby before July 5 that a date would slip, White waited until the deadline to even communicate with Westby. Despite this, White insisted that he was doing everything possible to make his deadline. That is not credible--he did not attempt to recreate the report from memory or existing documents, he did not attempt to renegotiate the deadline, and he never left a voicemail relating the status of his project.

The record supports the NREL argument that White was terminated because of performance problems. White seems to have made minimal effort to meet his manager's demands after being placed on a formal CAP in May 2000. Even assuming, *arguendo*, that White did not know that he was on an informal CAP in April 1999, he should have realized that Westby had a more than passing interest in the reports that Westby requested at the biweekly meetings. Most employees in White's situation would have completed the assignments in order to comply with the CAP and avoid any negative repercussions. Even Taylor, who was very supportive of White, stated that White could have produced the reports, but did not want to. Ex. NNN (ROI) at 9. Rather, White argued with Westby during the performance meetings about the meaning of Westby's memos and whether or not he was required to produce these reports. Tr. at 977-978.

At the hearing, White rationalized his non-performance by blaming his manager, other employees, and his personal computer for his late submissions. When White missed AID deadlines, he blamed Anderson and Benioff for not providing him with a schedule, even though Anderson had done so in April. When he did not meet his February 4, 2000 or July 5, 2000 due dates, he blamed a hard drive failure. I do not doubt that White's hard drive failed on February 4 and June 29. However, an employee on the 35th day of a 60-day formal CAP should have gone to great lengths to turn in the report on time. *See Eugene J. Dreger*, 27 DOE ¶ 87,549 (2000) (upholding the credibility of a performance plan despite whistleblower's refusal to comply with its terms). Since his computer had crashed in February, by June he should have learned the importance of having backup data. In addition, White had almost a week to complete the July report after he found out that his computer had crashed--further evidence of the level of procrastination in his work. Finally, it is ludicrous to attribute his failure to submit a progress report to his lack of a schedule or format. He could have asked another colleague who contributed to the AID Report what format they used, and then submit something similar. When questioned about placing the blame for missing two deadlines on a computer failure, White testified:

A. It's true that I had a Toshiba computer, and that there's a class-action suit against Toshiba for the machines' failure. And I did have, in fact, documented failures of that machine.

Q. So do you believe that somehow, your inability to comply with item 2 of the formal corrective action plan was caused by the fact that you had a crummy Toshiba computer?

A. That was an issue from time to time. It certainly was.

Q. Well, the fact that you didn't like your Toshiba computer didn't prevent you from contacting Mr. Westby by telephone, though, did it?

A. You are correct that I could have contacted him by telephone. My commonsense

judgment led me to believe I should notify him before he came back.

Tr. at 214. White's behavior in this incident does not display "commonsense judgment," and the record shows that he did not comply with the formal CAP. In an email message, White complained of Westby's "hostile and prejudiced reaction to the AID Quarterly report and hard drive failure." Ex. 129. Westby was justified in having a negative reaction to this parade of weak excuses and failure to take his direction. Therefore, I find that the evidence supports NREL's argument that White did not produce deliverables in a timely manner.

b. Conclusion

NREL management identified problems with White's timeliness and production of work as early as 1993. The record also contains evidence, set forth above, that White's relationship with his manager verged on insubordination. These problems improved for a while, but then worsened in 2000, even after formal notification that his performance was under scrutiny. Based on this record, which shows White's repeated failure to meet key deadlines, produce timely deliverables, and take direction from his manager, I find that NREL was justified in terminating White.

(2) Evidence That NREL Followed Its Normal Termination Procedures

In order to ascertain whether NREL has presented clear and convincing evidence that White was terminated despite his protected disclosure, I have examined whether there is evidence that NREL followed its customary termination procedures. I find substantial evidence in the record to support NREL's argument that it followed standard procedure in terminating White.

White's termination was preceded by many discussions that included the director of the laboratory, human resources personnel, and legal personnel. Tr. at 984. NREL's termination procedure, which was extensively described in the ROI, is as follows: the employee is placed on an informal CAP, followed by a formal CAP, culminating in a termination if the conditions of the formal CAP are not met. Ex. NNN (ROI) at 10. The contractor submitted for the record 13 formal CAPs issued between 1997 and 2002, and I reviewed each document.[8] Nine are 60-day plans, two are 90-day plans and two are less than 45 days. Ex. 143. In each example, the employee's manager, the employee, a human resources (HR) representative, and team leader signed the formal CAPs. Five dealt with the issue of timeliness and four dealt with interactions with co-workers. Each formal CAP required regular meetings and a review at the end of a specified time period with HR, the employee and his or her manager.[9]

White's termination followed the steps set forth above. He was given 60 days to improve, and nine of the 13 CAPs also had 60-day terms. In addition, based on my review, NREL regularly

[8] NREL's Director of Human Resources (HR) testified that each year three to five employees are on formal CAPs. Tr. at 975.

[9] The terms of White's formal CAP appeared to be reasonable. Ex. AAA.

dealt with problems of employee timeliness by placing those employees on a CAP. Five of the 13 CAPs dealt with the issue of timeliness, thus supporting NREL's contention that placing White on a CAP was a normal personnel procedure when faced with a performance problem. I do, however, find an abnormality in White's case as regards the informal CAP. Both White and Taylor testified that they were not aware that White's performance was an issue when Westby started the regular meetings in April 1999. Although this does not taint the entire termination process, it is not an effective way to manage an employee with a performance problem. Westby should have been forthright and informed White from the start that his performance was not up to par. Notwithstanding this omission, the terms of the informal CAP were clear and White knew that his performance was an issue months prior to the implementation of the formal CAP.

NREL also presented evidence on the terminations of other employees.[10] The Director of HR testified that there was at least one termination per year at NREL. Tr. at 983. Three termination notices, with formal 60-day CAPs attached, are in evidence. Ex. 142. Each of these notices is similar to the termination notice, with attachments, that White received. However, two aspects of White's termination are troubling: (1) the refusal of the contractor's personnel managers to meet with White regarding his allegation of retaliation, and (2) NREL's initial denial of White's request for mediation.

Judy Marshall, the new HR Director in June 2000, refused to meet with White regarding his CAP because she felt that her role was merely to monitor the discipline and termination process, not to question the decision to place White on a CAP. Tr. at 1110. [11] Marshall and other HR officials testified that they had no knowledge of White's retaliation claim until the summer of 2000. Tr. at 1116. At that time, the Human Resources Department did not investigate the allegation of retaliation, or examine how Westby disciplined other employees in his group. Tr. at 996. The HR officials stated that because they considered White's performance problems to be substantiated, they did not investigate the retaliation claim further. Tr. at 1038-1040.

White requested mediation in his dispute with Westby in March 2000. Westby's manager denied the request in May 2000. [12] White then made a complaint of retaliation to DOE's Golden Field Office under the DOE Employee Concerns Program (ECP) on June 1, 2000. Ex. 109. The Golden Field Office referred the concern to NREL to ensure that NREL utilized informal dispute resolution prior to engaging in the ECP process. *Id.* DOE was aware of NREL's refusal to mediate, and reminded NREL that DOE favors informal means of resolving workplace disputes. *Id.* In July 2000, NREL replied that there was an ongoing investigation into White's concern at

---

[10] According to the testimony of Chris Leavitt, Director of HR, terminations were rare because most employees on a formal CAP either improved their performance or resigned from NREL. Tr. at 1039.

[11] Marshall joined NREL in June 2000, and was only employed there for ten weeks. Tr. at 1107-1108.

[12] NREL declined to mediate for two reasons: (1) company policy that mediation is not appropriate for performance problems, and (2) an internal decision that NREL had expended sufficient resources on the White case. Deposition of Jon Pietruszkiewicz at 23, Ex. OOO.

the time of his complaint and that the investigation was still active. Ex. 116. NREL further stated that its management determined the need for mediation on a case-by-case basis, and asked for time to pursue its internal process. Ex. 116. Nonetheless, NREL did make a last minute attempt at pursuing mediation. On August 4, 2000 (four days prior to White's termination), the contractor initiated a teleconference between NREL legal, NREL human resources, a representative from the DOE Golden Field Office, and the DOE Headquarters Office of Dispute Resolution in order to determine whether any aspects of White's termination could be reviewed by an outside mediator. Ex. JJJ at 2. The participants ended the conversation "with a general recognition that Mr. White's termination would be performance based and that there were no aspects of the termination appropriate for intervention by an external mediator." *Id.*

I find that NREL followed its standard procedures regarding White's termination. The record contains documentation on the contractor's disciplinary procedures and sample CAPs and termination notices. After following the normal process and denying White's initial request for mediation, NREL contacted DOE immediately prior to termination in order to determine whether any part of the termination process could be mediated. DOE personnel appear to have concurred with the decision that no aspects of the termination process were appropriate for mediation. Ex. JJJ. This information, coupled with testimony at the hearing and other evidence already in the record, supports the contractor's action in terminating White.

(3) NREL's Treatment of Similarly Situated Employees

In addition to proving that NREL followed its standard procedures in terminating White, the contractor must also show that it did not discriminate against White for making a protected disclosure to the IG in January 1999. After reviewing the record, I find that NREL has presented credible evidence that White was not singled out for discipline and termination due to his whistleblowing. White, on the other hand, did not offer any substantiated evidence that NREL treated him differently than similarly situated employees. The definition of a "similarly situated employee" is key to my finding in this case.

It is clear from the record that many of White's colleagues submitted at least one, and often more than one, late deliverable. Ex. MM, QQ. However, only White was disciplined, only White was terminated, and most important, only White was a whistleblower. In fact, White is the only employee that Westby has every put on a performance plan or terminated while he was a manager at NREL. Tr. at.568-569. These facts require me to closely scrutinize the contractor's historic treatment of similarly situated employees who were not whistleblowers. *See Robert Burd*, 28 DOE ¶ 87,017 (2001).

NREL argues that it would have terminated White in spite of his protected disclosures. White, however, contends that other employees also submitted their deliverables late and that those employees were not disciplined or terminated. He has presented evidence that other PREP staff members (namely Peter Lilienthal, Roger Taylor, Laura Vimmerstedt, Ralph Overend, Paul Denne and Gary Nakarado) submitted late deliverables and were not disciplined, let alone

terminated.[13] Ex. 73. Moreover, there is evidence in the record that management had recognized that employees other than White had a problem with timeliness. For instance, Westby and his manager complained that Nakarado was not responsive or timely while on a special assignment. The notes of the 1999 manager's meeting stated that Devon Heckman, Blair Sweezy and Gary Nakarado also had problems with timeliness. Ex. 35, Tr. at 632. Taylor testified that he often did not submit his reports on time, and that his work would not hold up to the scrutiny Westby applied to White. White argues that he was treated differently and placed on the informal CAP as retaliation for making a protective disclosure.

There are, however, marked differences in the overall performance of these employees when compared with White. Sweezy and Lilienthal, for instance, were ranked as top performers who were also identified at the managers meeting as ready for promotion. Taylor was a team leader. Sweezy submitted some reports late, but he was the leading developer of products (analyses) and completed a significant number of quality documents that have been placed on NREL's website. Tr. at 1172. White, on the other hand, did not produce any major reports in his first seven years at NREL, and completed few, if any, during his final three years there. The other PREP employees were not singled out at the managers meeting as performance problems.

To be considered similarly situated, it must be shown that the conduct and circumstances surrounding the conduct of the comparison employees are similar to those of the disciplined individual. *See Carr*, 185 F.3d at 1324. *See also Robert Burd*, 28 DOE Para. 87,017 (2001). In the instant case, I find that White's conduct is dissimilar to the conduct of the comparison employees. There is no evidence in the record that other employees had such pronounced problems with timeliness. *See Yunus v. Department of Veterans Affairs*, 242 F.2d 1367, 1372 (Fed. Cir. 2001) (holding that employees are not similarly situated if there is not evidence of a similar level of culpability on the part of both individuals); *Padron v. BellSouth Communications*, 196 F.Supp.2d 1250 (S.D. Fl. 2002) (holding that under Florida Whistleblower Act the quantity and quality of the comparator's misconduct must be nearly identical to prevent courts from second-guessing employers reasonable decisions). The record shows that White repeatedly missed deadlines even after being formally notified that management was monitoring his performance. *See* Section III.C.1.a., *supra*. This indicates to me a lack of professionalism on White's part that is reckless and verges on insubordination. White's problems with timeliness were first identified in 1993, and are well documented over the next seven years. The record contains numerous examples of his flagrant disregard for reasonable requests. White's testimony at the hearing regarding his performance vis-à-vis that of his colleagues is enlightening:

> Q. Sir, as you sit here today, do you believe that any deficiencies in your own

[13] The opinion in the *Carr* case states that employees with different supervisors or in a different chain of command are not similarly situated. *See Carr*, 185 F.3d at 1326. However, even though Westby testified that he was not responsible for the evaluations of all members of PREP, I have included them all in this analysis because Westby was responsible for the project. Tr. at 501-502.

performance played any role whatsoever in the decision to terminate you?

A. In the sense that they provided a pretext for this, yes, they did. In the sense that the things that they found as deficient in my performance could have been found in the performance of everybody else in the building – you see my point.

Q. So it's your point that each of the items that we've talked about, about deficient performance, were pretext to cover up the true scheme to retaliate against you.

A. Yes. In general, I think that's true. I'm not trying to say that there were no problems with me not meeting deliverables or something like that. What I'm saying is that if you look at the performance of my peers, you would find similar – had they been placed under this sort of an ever-tightening noose around my neck, that their performance frankly would have been a lot like mine, if they lasted that long.

Tr. at 360-361. I do not agree with White. As set forth above, I have examined the performance of his peers, and there are obvious differences. Nowhere in the record did I observe any other employee who exhibited a similar level of tardiness, nonchalance in the face of progressive discipline, or outright refusal to take direction from a manager. One of the key factors that influenced my decision that White was not similarly situated to any of his colleagues was the minutes of the January 13, 1999 performance review meeting. Ex. 35. Out of over 100 employees under the supervision of Barbara Goodman, only two were identified at the meeting as possibly needing a performance plan – and White was one of the two so identified. [14] Tr. at 1211. This supports NREL's argument that White's termination was not related to his protected disclosure. NREL managers had identified his performance problems and placed him in a different category than his colleagues, based on that performance, well before NREL was notified of the complaint in March 1999. Those problems had become so severe by August 2000 that his dismissal was inevitable. In conclusion, I find that NREL has presented clear and convincing evidence that it would have terminated White despite his protected disclosure.

IV. Conclusion

After reviewing the record, I find that the respondent contractor has met its burden of proving by clear and convincing evidence that it would have taken negative personnel actions against White, culminating in his termination, despite White's whistleblowing activity. It is true that White was

[14] The other employee later resigned from NREL.

a whistleblower, and to his credit was outspoken when he perceived an alleged unethical, wasteful, or irregular activity being performed with the taxpayer's money. It also is clear that Westby placed a high priority on receiving reports that White simply considered irrelevant to his work. However, Westby was not unreasonable in requesting these deliverables, and in many documented instances White refused to take Westby's direction. Even though White made a protected disclosure to DOE officials, his termination was a reasonable business decision based on White's non-compliance with a formal corrective action plan. White did not prove that he was treated differently because of his whistleblowing activity. Rather, White did not meet the terms of the formal corrective action plan, and NREL's decision to terminate him after notice and an opportunity to improve his performance was in my view clearly warranted. Accordingly, I will deny White's request for relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Ronald D. White under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within 15 days of its receipt, a Notice of Appeal is filed requesting review of the Initial Agency Decision by the Director of the Office of Hearings and Appeals with the Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0107, telephone number (202) 287-1566, fax number (202) 287-1415.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: July 15, 2002

April 22, 2002

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Names of Petitioners: Raymond Gallegos; Andrew Sanchez

Date of Filing: July 3, 2001

Case Numbers: VBH-0070; VBH-0071

This Initial Agency Decision concerns a whistleblower complaint filed by Raymond Gallegos and Andrew Sanchez (the Complainants) against their previous employer, Business Environments (BE), under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. BE is a subcontractor that provides office furniture to the DOE's Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico. The complainants worked as furniture installers for BE until they were both terminated on December 11, 2000. The complainants allege that BE terminated them in retaliation for their refusing to work without proper paperwork.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government- owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an independent fact-finding by an investigator from the Office of Hearings and Appeals (OHA), a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Factual Background

Prior to their termination, the Complainants worked for BE in Los Alamos. Their direct supervisor, James Daniel, worked at BE's office in Albuquerque, New Mexico. They communicated by cellular telephone and facsimile machines. Hearing Transcript (Tr.) at 161-62. The Complainants version of the events

leading to their termination differs from that of BE, offered through Mr. Daniel. On December 1, 2000, Mr. Daniel asserts that he received a telephone call from LANL, asking that furniture be moved immediately. *Id.* at 165. BE had previously installed the furniture. Mr. Daniel called the Complainants to inform them of the request. *Id*. The Complainants told Mr. Daniel that they did not have the correct paperwork to perform the job onsite. Since the office machines, including its facsimile machine, had recently been removed, Mr. Daniel could not FAX the correct paperwork to the Complainants. Therefore, he told them to use the paperwork they had used that morning at a prior job at LANL. *Id.* at 166. He directed them to copy the old form and "white-out" the data on those forms. The correct information could then be written into what would then be a blank form. Mr. Daniel told the Complainants to take the completed forms and have them signed by the appropriate authorities. *Id.* at 46, 132, 165. The Complainants resisted. For the most part, the Complainants agreed with Mr. Daniel's version of the facts of December 1, 2000. They disagree with whether his request would violate the health or safety regulations of LANL – a matter I will discuss later.

Mr. Gallegos claims that in his telephone conversation with Mr. Daniel, he explained that he believed it would be fraudulent to use the old paperwork. Mr. Sanchez testified that they were expecting a delivery at the BE Los Alamos warehouse and could not leave to move the furniture at LANL. Tr. at 21. He further stated that Mr. Daniel suggested that one of them go move the furniture and the other wait for the delivery. *Id.* However, Mr. Gallegos could not drive the truck and Mr. Sanchez who could drive the truck was not site- specific trained(1) for the area at LANL where the move was to occur. *Id.* Both Complainants stated affirmatively that Mr. Daniel told them to have the "whited-out" paperwork signed by the proper LANL employee. The furniture was not moved on December 1, 2000.

Mr. Daniel received a call on December 7, 2000, complaining that the furniture had not yet been moved. Tr. at 168. On December 8, 2000, he called the Complainants and asked why the job had not been completed. Once again, the Complainants claim they told Mr. Daniel they did not have the proper paperwork and refused to "white-out" old paperwork. After terminating the telephone call, Mr. Daniel decided to drive to Los Alamos and deal with the problem.

Mr. Daniel's recollection of the events of December 8, 2000, differs from the Complainants' recollections. Mr. Daniel testified that he arrived at the warehouse around 12:30 p.m. Neither of the Complainants were present, and the company truck was missing. Tr. at 169. Mr. Daniel stated that he left the warehouse to get some lunch, and then he started calling Mr. Sanchez' cellular telephone, Mr. Gallegos' pager, and Mr. Gallegos' father. *Id.* He called the Albuquerque office to determine if there were any messages for him there. There were not. He called Mr. Baird Brandow, who had escorted the Complainants at their morning job, and asked if he knew where they were. Mr. Brandow indicated he did not know where they were. *Id.*

The Complainants disagree with Mr. Daniel's recollection of the facts. Mr. Sanchez stated in testimony at the hearing in this case that he became ill around lunchtime and left. Tr. at 23. When he arrived home, he says he passed out for five to six hours and had a fever of 102 degrees. *Id.* Mr. Sanchez stated that he tried to call Mr. Daniel to tell him he was leaving because he was ill, but Mr. Daniel did not answer his cellular telephone and his voice mail was not activated. *Id.* at 24. Mr. Sanchez stated that he was too sick to call the Albuquerque office of BE. *Id.* at 36. As for Mr. Gallegos, he indicated that, after returning to the warehouse, he stayed until 2 p.m. and then left the warehouse. He tried to call Mr. Daniel and got no response. *Id.* at 106. Mr. Gallegos indicated that he took the company vehicle, although he did not have a driver's license, because he car pooled to work and his car pool had already left. Both the Complainants stated that it was understood that when they finished their assigned work for the day, they could leave – even if it was not yet quitting time.

On the evening of December 8, 2000, BE decided to terminate the Complainants for leaving their jobs early on that day without proper authorization and for taking the company truck. This was officially communicated to the Complainants on December 11, 2000, during a meeting between the Complainants and Mr. Daniel at the Los Alamos warehouse. At that time, Mr. Daniel determined that Mr. Gallegos had taken the truck, not Mr. Sanchez. When notified of his termination by BE, Mr. Sanchez attempted to give

Mr. Daniel a doctor's note.

C. Procedural History

After being terminated on December 11, 2000, the Complainants filed this action with the Albuquerque Operations Office of DOE under Part 708. Pursuant to the Part 708 Regulations, the matter was referred to the Office of Hearings and Appeals for an investigation on March 8, 2001. The Report of Investigation was issued on July 3, 2001, at which time I was appointed the Hearing Officer in this matter. A Hearing was held on December 10, 2001. At the Hearing, the Complainants were given the opportunity to introduce evidence that their refusal to perform the work requested of them led to their termination by BE. Conversely, BE had the opportunity to defend itself and show by clear and convincing evidence that it would have terminated the Complainants absent their refusal to perform the requested work.

II. Legal Standards Governing This Case

A. The Complainant's Burden

In the present case, it is the burden of the Complainants under Part 708 to establish by a preponderance of the evidence that they refused to participate in an activity that they believed would have constituted a violation of federal health or safety laws or caused them to have a reasonably fear of serious injury to themselves or others, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. (2) 10 C.F.R. § 708.29. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993).

Although the regulations do not specifically state that a complainant must have a "reasonable" belief that an activity would violated federal health or safety laws, amendments to this section were made in 1999 that were intended to exclude trivial disclosures. *See* 64 Fed. Reg. at 12866 (March 15, 1999). Thus, it is consistent with these changes to deem that the Complainants must have had a "reasonable" belief that using "whited-out" paperwork would have violated a health or safety regulation.

B. The Contractor's Burden

If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against her, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure." 10 C.F.R. § 708.29. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case, if Messrs. Gallegos and Sanchez establish that they refused to participate in an action covered by section 708.5 and that refusal was a contributing factor to an adverse personnel action, BE must convince me that it would have taken the same actions even if the Complainants had not refused to participate in an action. *Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 at 89,034-35 (1994).

III. Whether the Complainants Have Made A Prima Facie Case of Retaliation

The Complainants have not alleged that they feared serious injury by following Mr. Daniel's instructions. Therefore, the initial question before me is whether they reasonably believed following the instructions to use "whited-out" paperwork would violate a federal health or safety law. 10 C.F.R. § 708.5(c)(1). After

reviewing the record, I find the Complainants did not have a reasonable belief that presenting"whited-out" paperwork to LANL officials in order to enter the site would violate a health or safety regulation at LANL.

There is no dispute that if the Complainants had performed the work without the proper paperwork, it would have violated health or safety regulation at LANL. The paperwork that was necessary to enter the area where the furniture was to be moved included an Environmental, Safety, and Health form. This form lists the hazards to which those entering the particular work area might be exposed. Such exposure could lead to later health or safety issues. The paperwork is required under the health and safety regulations at LANL. Thus, the dispute hinges on whether the Complainants could have reasonably believed use of "whited-out" paperwork would violate the safety and health regulations at LANL.

The record developed before me indicates that the Complainants had not gone forward with the work because of several reasons, none of them related to a concern about violating the health or safety regulations of LANL. I find that their belief that the action requested of them would violate the health or safety regulations of LANL originated only after they were terminated, in an attempt to be covered by the Part 708 regulations.

The Complainants testified as follows about the paperwork at issue. They both stated at the hearing that it was not their job to prepare paperwork. Tr. at 47, 48, 50, 130. During a hearing before the State of New Mexico Department of Labor regarding Mr. Gallegos' unemployment compensation, Mr. Gallegos stated under oath that once the Los Alamos office was closed, he felt all the work was piling up on him. Also during that hearing, it was alleged that Mr. Daniel called late on December 1, 2000, to assign the work to them and the Complainants would be required to work overtime. BE Ex. No. 16 at 33. Apparently, neither of them wished to do that, so they stated that they refused to "white-out" the paperwork. Both Complainants also claimed they did not have the correct paperwork in the warehouse to copy. Mr. Sanchez also stated that he was not site-specific trained in the area where the furniture was to be moved and Mr. Gallegos could not drive the truck, so they could not separate to do two jobs.(3) As is evident, the Complainants have given conflicting reasons for not completing the paperwork.

Another argument the Complainants have advanced is that Mr. Daniel told them to violate the regulations. At times during the hearing, both Complainants claimed they could not remember if Mr. Daniel had asked them to enter without first getting permission; yet at other times, they affirmed that he told them to have the "white-out" paperwork signed. Given the evidence before me, I do not believe that the Complaints were asked to perform the work without getting the "whited-out" paperwork signed by proper LANL officials or to try to enter the LANL facility without getting permission from LANL authorities. I conclude that Mr. Daniel did not ask the Complainants to mislead LANL officials about whether the form was new or "whited-out.(4)

After reviewing the record in this case, I cannot find that the Complainants had a reasonable belief based on the preponderance of the evidence presented that entering the site with "whited-out" paperwork would violate a health and safety regulation at LANL. First, there is evidence that Mr. Gallegos had entered the site based on "whited-out" paperwork previously. Further, I do not think that there is any reasonable basis for thinking a "whited-out" form would be any different from a blank form. Also, any difficulties that might arise would be resolved when the paperwork was taken for the LANL authority's signature. Finally, I believe from the evidence presented to me at both the Hearing and in exhibits that the Complainants attempted to rely on Part 708 after they were terminated as a means to recover damages or their employment. I do not believe the record shows that they believed, at the time they were asked to complete the work, that the use of the "whited-out" paperwork would violate a health or safety regulation of LANL. The Complainants made many conflicting statements about what occurred on December 8, 2000, both at the hearing, before the investigator, in their complaint letters, and in other accounts.(5) Because these conflicts remain unresolved, I cannot credit their story of why they did not complete the work Mr. Daniel requested. Consequently, I find that the failure of the Complainants to do what Mr. Daniel asked of them on December 1, 2000, and again on December 8, 2000, is not a "refusal to participate" protected under Part

708.

IV. Whether BE Would Have Terminated the Complainants in Absence of their Conduct

If I had found that the Complainants' refusal was a protected activity, BE would need to show that it would have terminated the Complainants even if they had not refused to perform the job on December 1, and 8, 2000.(6) As a result of my review of the record, I also find that BE has made that showing. I believe that BE would have terminated both Mr. Gallegos and Mr. Sanchez, absent their refusal. I will discuss them separately.

During the hearing held in this case, Mr. Gallegos admitted in his testimony that BE had cause to terminate him for taking the company truck on December 8, 2000, without proper authority. Mr. Gallegos was not permitted to drive the company vehicles because of prior driving violations and the fact that his license had been revoked. Mr. Gallegos stated during his testimony that he had no license at that time and that was the reason he car pooled. Tr. at 106. Nevertheless, Mr. Gallegos misappropriated and drove the company vehicle. Further, BE submitted evidence that it had previously terminated employees for unexcused absences. Mr. Gallegos admitted that he left work at 2 p.m., without contacting Mr. Daniel or the Albuquerque office of BE. I believe that BE would have terminated Mr. Gallegos for misappropriation of the company vehicle and his unexcused absence, notwithstanding his alleged protected refusal to perform the requested work.

Mr. Sanchez claims that he left at lunchtime on December 8, 2000, because he was ill. BE maintains that Mr. Sanchez was fired for an unexcused absence. In response, Mr. Sanchez argues that the absence should be considered properly excused because he attempted to contact Mr. Daniel to let him know he was ill and leaving early. At the hearing, he stated that he tried to call Mr. Daniel's cellular telephone but did not get an answer or voice mail. He stated that he went home and slept for six or seven hours. However, after reviewing the evidence presented, I do not believe Mr. Sanchez' absence from work on December 8, 2000, was an excused absence. There is no evidence to support his assertion that Mr. Sanchez attempted to contact Mr. Daniel. In fact, there is evidence to the contrary. Mr. Sanchez' cellular telephone bill does not show a call to Mr. Daniel's cellular telephone.(7) Nor does Mr. Daniel's telephone bill show any incoming telephone call from Mr. Sanchez. Further, despite Mr. Sanchez' testimony that he did not receive voice mail when he called Mr. Daniel, there was testimony that his brother had reached Mr. Daniel's voice mail on that telephone prior to December 8, 2000. Also, the bill for Mr. Daniel's cellular telephone shows that voice mail was available. Further, Mr. Daniel's bill shows one minute telephone calls to Mr. Sanchez' cellular telephone at 1:05 p.m., 1: 20 p.m., 1:43 p.m., and 2:05 p.m. Mr. Sanchez' bill shows corresponding voice mail retrieval on his cellular telephone.

The record before me, therefore, casts significant doubt as to Mr. Sanchez' account as to why he left the warehouse early and whether he attempted to contact BE to inform him he was leaving. I believe that Mr. Sanchez tried to construct an explanation for his absence after he found out that evening that he was going to be terminated at BE. My belief is based on the following. His co-worker Gallegos provided no support for Mr. Sanchez' account of his illness. At no time prior to the hearing did Mr. Gallegos state that Mr. Sanchez told him he was ill on December 8, 2000. Mr. Sanchez claimed that he was vomiting that day, something that Mr. Gallegos would have noticed since they worked closely together.(8) Further, Mr. Sanchez' story has been inconsistent. He has stated that he visited the doctor on December 8, directly from work. He did not. He stated that Mr. Gallegos drove him home. He drove himself home. His doctor's note is dated December 9, 2000, after he had been informed that he would be terminated because he left work early on December 8.

Both Mr. Gallegos and Mr. Sanchez have also tried to claim that they were permitted to leave work early if they had completed their assigned tasks for the day. I do not believe that is the case. Mr. Gallegos was

disciplined on September 13, 2000, for leaving work early without informing Mr. Daniel. Also, the Complainants' prior time sheets do not show that either Complainant had left work early at any time before December 8, thereby disputing their claim that it was permitted. Both Mr. Gallegos and Mr. Sanchez admit that they would normally inform Mr. Daniel that they were leaving early for the day. Given the inconsistencies in Mr. Sanchez' story and the fact that the only support for his contention that he was sick was obtained after he found out he was to be terminated, I find that BE has shown, by clear and convincing evidence, that Mr. Sanchez' absence was unexcused and that BE had cause to terminate(9) Mr. Sanchez for reasons independent of his refusal to perform the requested work.

V. Conclusion

The record convinces me that the failure of the Complainants to complete the work asked of them on December 1, 2000, and again on December 8, 2000, is not a "refusal to participate" protected under Part 708. I do not believe the Complainants had a reasonable belief based on the preponderance of the evidence presented that entering the site with "whited-out" paperwork, with the proper signatures, would violate a health and safety regulation at LANL. Further, the record shows that BE has proven by clear and convincing evidence that the Complainants' discharge would have happened notwithstanding their refusal to performed the requested work. Mr. Gallegos' termination occurred because he took the company truck without authority and without a driver's license and because he left work early without informing his direct supervisor. Mr. Sanchez' termination occurred because he left work early without informing his direct supervisor. Thus, their discharge would have occurred even in the absence of the refusal to perform the work.

Accordingly, I will deny Mr. Gallegos and Mr. Sanchez' requests for relief under 10 C.F.R. Part 708.

It is Therefore Ordered That:

(1) The complaints for relief under 10 C.F.R. Part 708 submitted by Raymond Gallegos, OHA Case No. VBH-0070, and Andrew Sanchez, OHA Case No. VBH-0071, are hereby denied.

(2) This is an initial agency decision, which shall become the final decision of the Department of Energy unless, within 15 days of issuance, a notice of appeal is filed with the Office of Hearings and Appeals, in which a party requests review of this initial agency decision.

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: **April 22, 2002**

(1)Site-specific training would have allowed him to go into the area by himself to move the furniture. Without the site-specific training, he had to be escorted or accompanied by someone who had site-specific training.

(2)The pertinent part of Section 708.5 provides that an employee of a contractor may file a complaint against his employer alleging retaliation if the employee "refus[ed] to participate in an activity, policy, or practice [he] believe[d] . . . would – (1) constitute a violation of a federal health or safety law; or (2) cause [the employee] to have a reasonable fear of serious injury to [himself], other employees, or member of the public." 10 C.F.R. § 708.5(c).

(3) At the hearing, Mr. Sanchez alleged that there was no way for them to do the work, because they were waiting for a truck to make a delivery. He stated that Mr. Daniel told them to split up. He implied that they could not because he was not site-specific trained and Mr. Gallegos could not drive the truck. I agree that

Mr. Gallegos could not drive the truck; however, at the Hearing, I questioned Mr. Noble, the facility coordinator at the site where the work was requested, if it would be permissible for one of the Complainants to enter the area with an escort such as Mr. Brandow. Tr. at 101. He stated that it would. Therefore, Mr. Sanchez could have contacted Mr. Brandow and asked him to escort him into the area.

(4) At the Hearing, I asked Mr. Daniel if he had ever used such paperwork previously. He stated that he had. Mr. Larry Noble, facility coordinator for LANL at the site where the work was requested, stated that he did not see a problem with using a form where old information had been "whited-out." Mr. Mike Daniel, Mr. James Daniel's brother and supervisor at BE, testified that the "white-out" procedure is still being used and submitted to me, as evidence at the Hearing, a form from October 9, 2001, as an example. Tr. at 155. In addition, an example of Form 1694 entitled Activity Hazard Analysis submitted by BE appears to have been "whited-out" previously and authorized Mr. Gallegos to perform work at LANL. Form 1694 was one of the forms Mr. Daniel requested the Complainants to "white-out." Therefore, it is apparent that Mr. Gallegos had used "white-out" forms previously and should have known or inferred that it was permissible to do so as long as the proper signatures were obtained.

(5) BE has submitted a copy of the transcript of Mr. Gallegos' hearing before the New Mexico Department of Labor Unemployment Compensation Officer. Statements made at that hearing conflict with other statements Mr. Gallegos has made about the facts of this case. Be Ex. No. 16.

(6) To facilitate any potential appeal of my opinion, I will review the issue of whether BE would have terminated the Complainants notwithstanding their refusal to "white-out" the paperwork.

(7) After the hearing, I kept the record open to receive a copy of Mr. Sanchez' cellular telephone bill, which would show whether he attempted to call Mr. Daniel on December 8, 2000. There is one call to Mr. Daniel on December 8 at 7:54 a.m. There are no other calls shown to Mr. Daniel's cellular telephone number or to the BE office in Albuquerque. In fact, the bill seems to belie Mr. Sanchez' claim that he left work around noon on December 8, 2000, and "passed out." The bill shows voice mail retrieval at 1:05 p.m., 1:21 p.m., 1:30 p.m., 1:43 p.m., 1:56 p.m. 2:05 p.m., 2:16 p.m., 4:18 p.m., 4:20 p.m., 5:36 p.m., 7:04 p.m., 7:11 p.m., and 8:13 p.m. The longest period is between 2:16 p.m. and 4:18 p.m., a time of two hours, not the six or seven hours Mr. Sanchez claims during which he slept or passed out.

(8) At the hearing, Mr. Gallegos stated that Mr. Sanchez asked him if it was okay for him to leave because he was sick. Tr. at 125. Mr. Gallegos then stated that as of the morning of December 8, 2000, he knew Mr. Sanchez was sick because of the way he sounded when he spoke. *Id.* However, Mr. Gallegos admitted that he never mentioned Mr. Sanchez' illness in either his written statement or in the interview with the OHA Investigator. *Id.* at 126. He claimed he didn't believe it was important at the time. *Id.* Even if Mr. Sanchez was ill, both he and Mr. Gallegos knew that they needed to contact Mr. Daniel, or if he was unavailable his brother, if they needed to leave early. In fact, Mr. Gallegos had been disciplined in October 2000 for leaving work sick without contacting Mr. Daniel. Tr. at 163-64; BE Ex. No. 23 at 5.

(9) BE submitted evidence showing that at least two previous employees had been terminated for being absent without authorization. BE Ex. No. 27.

August 5, 2002
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: William Cor

Date of Filing: February 1, 2002

Case Number: VBH-0079

This Decision involves a whistleblower complaint filed by William Cor under the Department of Energy's (DOE) Contractor Employee Protection Program. From August 1998 to September 2001, Mr. Cor was employed as a glovebox systems engineer at Los Alamos National Laboratory (LANL), one of three national laboratories operated by the University of California (UC) for the DOE. Mr. Cor alleges that LANL management retaliated against him for activity protected under the DOE Contractor Employee Protection Program.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

B. Procedural History

On August 1, 2001, Mr. Cor filed a complaint with the DOE's Albuquerque Operations Office (DOE/AL). After attempts at informal resolution were not successful, DOE/AL referred the complaint to the DOE's Office of Hearings and Appeals (OHA) for a hearing without an investigation. Memorandum from Michelle Rodriguez de Varela, Employee Concerns Program Manager, DOE/AL, to George B. Breznay, Director, OHA (January 23, 2002). On February 1, 2002, the OHA Director appointed me hearing officer in this matter. I convened a hearing held at Los

Alamos, New Mexico on April 10-12, 2002. The OHA received post-hearing submissions from the parties and closed the record on June 7, 2002.

II. Analysis

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." 10 C.F.R. § 708.29. Accordingly, in the present case, if Mr. Cor establishes that a protected disclosure, participation, or refusal was a factor contributing to his termination, UC must convince me that it would have taken the action even if Mr. Cor had not engaged in any activity protected under Part 708.

After considering the record established in the investigation by the parties' submissions and the testimony presented at the hearing, for the reasons stated below I have concluded that Mr. Cor has met his burden of proving by a preponderance of the evidence that he engaged in protected activity that contributed to certain actions taken against him, including his termination. However, I find that UC has shown by clear and convincing evidence that it would have taken these same actions absent Mr. Cor's protected activity.

A. Whether Mr. Cor Engaged in Activities Protected Under 10 C.F.R. § 708.5

Mr. Cor worked for the Nuclear Materials Technology (NMT) division of LANL as an engineer responsible for gloveboxes in Technical Area 55 (TA 55) of the lab. Mr. Cor was a member of the TA 55 Facility Operations Group (NMT-8).

> TA-55, among other things, is involved with the handling of nuclear and other hazardous materials, and one of the ways in which those things are handled is in a special facility, and within that special facility there are . . . approximately 300 gloveboxes . . . .
>
> Gloveboxes come in all different sizes and all different configurations, and they're just like they sound: they're big or somewhat smaller boxes, you stick your hands inside in gloves and you manipulate materials.
>
> . . . .
>
> A glovebox is basically a simple structure in concept. It's made up of mostly stainless steel, glass and rubber sealing materials, but there's a lot that can go wrong

> with them and there's also a lot of penetration that can be made in and out of, including electrical connections, piping, utility connections. There are locks to transfer materials in and out, back ports, so on, so there's a lot of accouterments and sub-assemblies that are often attached to and become part of the structure.

Transcript of Hearing (Tr.) at 13, 22.

In March 2000, there was an accident in the PF 4 facility of TA 55, in which a worker inadvertently jiggled a loose fitting on a pipe leading to a glovebox, causing a leak of plutonium. "Because of the exposure to workers, the accident was considered a serious one. The DOE convened a Type A Accident Investigation Board that converged on TA 55 with selected experts to determine the cause of the accident and impose corrective actions." Respondent's Post-Hearing Brief at 5.

Mr. Cor alleges that a number of activities in which he engaged are protected under Part 708. The Part 708 regulations states that the following conduct by an contractor employee is protected from reprisal by his employer:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--
>
> (1) A substantial violation of a law, rule, or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --
>
> (1) Constitute a violation of a federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5. I address each of Mr. Cor's alleged protected activities below, in chronological order, and find that Mr. Cor engaged in protected activity on three occasions.

1. March 1999 - Initiated Pressure Testing for Glovebox Utility Piping

Mr. Cor states that in March 1999, he initiated a "policy to pressure test new and modified glovebox utility piping to [a] higher degree prior to certification for service." Complainant's Exhibit 0.2. The complainant presents an April 2000 e-mail message in which he refers to the fact that "we have been requiring much higher pressures in leak tests of most of the new and modified piping to gloveboxes and equipment." Complainant's Exhibit 2.-.[1] He contends that the initiation of the new policy was protected activity under 10 C.F.R. § 708.5(a)(2). Complainant's Exhibit 0.2. I disagree. Mr. Cor has not demonstrated that he made a disclosure of any safety concern in conjunction with this action, let alone that he made a disclosure of a "substantial and specific danger to employees or to public health or safety" protected under Part 708. 10 C.F.R. § 708.5(a)(2).

2. May 1999 "Request for Work"

On May 17, 1999, Mr. Cor submitted a standard LANL form entitled "TA 55 Request for Work," in which he initiated a work order to "[d]evelop and implement methods for safe maintenance access and restraints on top of gloveboxes, trolley tunnels, and upper level gloveport locations, . . ." Complainant's Exhibit 1.1. Mr. Cor contends that this action was also protected activity under 10 C.F.R. § 708.5(a)(2). Complainant's Exhibit 0.2. Again, however, Mr. Cor raised no safety concern in this work order. For example, the work order does not indicate that there was a safety problem with gloveboxes, but rather proposes "to verify that each can support the live load of workers on top" and "to verify support capability of inside/outside restraints for heavy equipment." Complainant's Exhibit 1.1. Attached to the form are minutes from a March 24, 1999 meeting of Mr. Cor, his co-worker Curtis Sandoval, and two employees of Johnson Controls Northern New Mexico (JCNNM). The minutes refer to a discussion of "developing methods for safe access to perform maintenance on top of gloveboxes," "safe maintenance access issues," and the possibility of "permanent installation of some safe access features." However, nothing in the documents refers to what could be called a "substantial and specific danger to . . . health or safety." 10 C.F.R. § 708.5(a)(2).

3. June - September 2000 Input to DOE Type A Accident Investigation

As discussed above, in the summer of 2000 a DOE Type A Accident Investigation Board conducted an on-site investigation in the aftermath of a plutonium leak in the PF 4 facility of TA 55. Mr. Cor contends that he offered input to the investigators through his line management, and that this input constitutes a disclosure protected under 10 C.F.R. § 708.5(a)(2). However, Mr. Cor points to no information that he provided to the investigation board (or to his line management with the intent

---

1/ Mr. Cor marked his exhibits to correspond to a numbered listing of allegations of protected activity and retaliation. Complainant's Exhibit 0.2. Thus, the first exhibit relating to his first allegation was labeled Exhibit 1.1, the second exhibit related to the first allegation was labeled Exhibit 1.2, etc. This pattern was generally followed for the remaining allegations, except that in some cases, later-added exhibits were not assigned a number to the right of the decimal point. For example, Exhibit 2.1 is followed by Exhibit 2.-.

that it be presented to investigators) that discloses a "substantial and specific danger" to health or safety.

4. October 2000 Appointment to Chair Glovebox Specifications Committee

In an October 12, 2000 memorandum, the NMT Division Director, Tim George, announced the formation of a working group to respond to one of the "Judgments of Need" identified by the DOE Type A investigation, specifically the need "to develop and implement a process to assure that effective quality assurance practices are in place to verify that existing glovebox and airlock auxiliary systems (such as argon and dry vacuum) are in compliance with applicable codes and requirements." Complainant's Exhibit 5.1. NMT management appointed Mr. Cor to chair this working group (referred to often in the record as the "glovebox committee"). *Id.* Mr. Cor points to his participation in this group as protected activity under sections 708.5(a)(2) and 708.5(b) of the Part 708 regulations. I find no evidence that Mr. Cor made any disclosures during his work with the group that revealed a substantial and specific danger to health or safety, the type of disclosure that is protected under section 708.5(a)(2). In addition, his participation was not part of "a Congressional proceeding or an administrative proceeding conducted under this regulation" and therefore is not protected under section 708.5(b).

5. November 2000 Request for Additional Resources

The complainant states that in early November 2000 he met with the TA 55 Facility Manager and NMT-8 Group Leader "to request time, staff and computer support for added duties responding to [the] DOE judgments of need." Complainant's Exhibit 0.2. He also cites a memorandum to his team leader in which he states,

> I would like you to help us stress at every opportunity, that we are spread very thin in terms of staff, software, and training, in order to handle the tasks before us. We will make every effort to reach milestones, but have not obtained sufficient support over the past year to feel at all comfortable with the mission.

Complainant's Exhibit 6.1. Mr. Cor claims that these communications were protected activity under sections 708.5(a)(2) and 708.5(b) of the Part 708 regulations. First, nowhere in the memorandum quoted above, or in Mr. Cor's description of his November 2000 meeting with management, is there any mention of a health or safety issue. And these communications clearly were not part of "a Congressional proceeding or an administrative proceeding conducted under this regulation" and therefore are not protected under section 708.5(b).

6. December 2000 AM111 Employee Complaint

On December 11, 2000, Mr. Cor filed an employee grievance under LANL policy AM111. In the AM111 complaint, Mr. Cor notes, "Even though the attention was not sparked by a glovebox failure, the DOE declared a number of glovebox related judgments of need in July 2000. NMT committed

to corrective actions with dates certain, . . .” Complainant’s Exhibit 8.1 at 2. Mr. Cor stated that the job of chairing the glovebox specifications committee “and many other new tasks were delegated to the same individual . . . .” *Id.* He contended that “NMT reorganized in a way that multiplied the supervision of the glovebox systems engineer for NMT-8,” and after listing those to whom he reported, Mr. Cor asserted, “This is simply too much direction for one individual, or even a small team.” *Id.*

Describing NMT’s corrective action plan as going “beyond the current state of the art,” Mr. Cor concluded

> Although the systems engineer has the capability to manage the changing needs, in an area where subject matter experts are rare, this results in a workload that is too demanding for the current staff and resources. Requests for additional staff and resources over a year have been met with the consistent response that no budget is available. Requests for additional time have been refused because of DOE urgency. Placement within an individual facilities group is proving to be inappropriate for the high level of interest and scrutiny. LANL should instead open an office of glovebox technology, reporting to the director’s office, and appoint the NMT-8 glovebox engineer to manage the office.

Id. at 3.

Mr. Cor also proposed that he receive a 25% increase in salary. *Id.* Mr. Cor contends that his AM111 complaint was a protected disclosure revealing a “substantial and specific danger to employees or to public health or safety” and “gross mismanagement . . . .” 10 C.F.R. § 708.5(a)(2), (a)(3). I do not agree. Mr. Cor’s complaint never refers to health or safety issues. Neither does the complaint reveal what Mr. Cor could reasonably believe was “gross mismanagement.”

> “Gross mismanagement” is more than de minimis wrongdoing or negligence. *Embree v. Department of Treasury*, 70 M.S.P.R. 79, 85 (1996). It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. Id. There must be an element of blatancy. Therefore gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission. Id.

Roger H. Hardwick, 27 DOE ¶ 87,539, Case No. VBA-0032 (1999). Mr. Cor’s AM111 complaint faults NMT management for saddling him with “a workload that is too demanding,” subjecting him to “too much direction,” and not providing him with sufficient staff and resources. Though seeming to recognize the time constraints imposed by “DOE urgency,” he implies that less strict deadlines could have been negotiated, stating that “NMT and LANL must negotiate with the DOE at arms length in the area of glovebox systems, with reasonable expectations of costs, time, and quality of

services."[2] However, while the complaint suggests that Mr. Cor was personally suffering what he felt was an adverse impact due to management's action (or inaction), the complaint does not reveal "a substantial risk of significant adverse impact upon" NMT or LANL's "ability to accomplish its mission." Thus, I find that the AM111 complaint does not reveal "gross mismanagement," and Mr. Cor has articulated no basis for reasonably believing that his complaint revealed such information.

Mr. Cor also asserts that his AM111 complaint is protected as a refusal "to participate in an activity, policy, or practice if you believe participation would . . . [c]ause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public." 10 C.F.R. § 708.5(c)(2). However, since Mr. Cor's complaint never references any refusal by him to participate in any activity, the complaint cannot be so protected.

7. January 2001 "Walk-Around" Database Entry

On January 11, 2001, Mr. Cor submitted an on-line form for entrance into a "walk-around" database, a system for the reporting of safety problems observed by employees. In this form, he contends the DOE's Type A accident investigation was

> fundamentally flawed. The investigators did not interview the current glovebox systems engineer, . . . Yet the report identifies several broad areas of glovebox related needs . . . . This disconnect has caused great confusion in attempting to plan and implement corrective actions. For example, in one case the DOE appears to have been unaware of the quality assurance process for glovebox and auxiliary systems that NMT has had in place for years. In the confusion of attempting to respond to this need, it was assumed until recently that DOE was aware of the existing process and was not satisfied. As a result, plans were laid to go beyond the state of the art in glovebox specification, in an unreasonably short period of time. Even if the misunderstanding is resolved, the time allowed to respond may still not be adequate or appropriate.

2/ When asked at the hearing about the need to negotiate with DOE "at arms length," Mr. Cor provided the following explanation:

> A . . . . My view of this relationship between the laboratory and the DOE is that the Department of Energy represents the owner of the institution and the laboratory is a contractor or a building manager for the facility; there's a contractual relationship between the two and they shouldn't be confused and merged together such that the owner's interests necessarily become what the contractor agrees to perform.
>
> Q So are you saying then that the lab shouldn't always do what the DOE tells it to do?
>
> A The lab must comply with the mission of the DOE but at the same time there has to be a recognition that the resources and the budgets and the conditions of the work are negotiated on a periodic or even a continuing basis, particularly in light of a emergency -- or not an emergency but a serious accident such as occurred in 2000.

> NMT is rushing to respond to several of the glovebox related needs, relying on limited engineering resources, and apparently resisting long-standing requests for additional support and time. This is dangerous because of the obvious risks of miscommunication combined with inadequate support in responding to such serious findings.
>
> In the meantime the findings of the Type A investigation have diverted attention and resources from addressing an even greater glovebox safety hazard than those which led to the March 16, 2000 multiple intake. *The greater safety hazard is by the crafts and technicians in attempting to gain access to the top and sides of PF-4 gloveboxes for construction, maintenance, and surveillance. In many cases it is not possible to place adequate lifts, tie-off points or scaffolding for glovebox systems access, yet the access may be required for compelling reasons. The gloveboxes have either not been structurally analyzed to accommodate the activity and weight, or design of built-in scaffolding has not been initiated. Stress and activity upon relatively fragile glovebox structures, whether in use or isolated, could result in deflections sufficient to cause surprising release and exposure to hazardous materials.* NMT management has been aware of this hazardous condition since well before the Type A investigation.

Complainant's Exhibits 11.1, 11.-.

The above excerpt summarizes what appears to be the crux of Mr. Cor's complaints. I find that Mr. Cor's entry of this information into the "walk-around" database is a disclosure to his employer protected under Part 708 since it contained information that Mr. Cor reasonably believed revealed a substantial and specific danger to employees or to public health or safety. 10 C.F.R. § 710.5(a)(2).

UC argues that no incidents such as that posited by Mr. Cor in his complaint ever occurred, that there were existing systems to avoid such an incident, that the issue had been known to management for some time, and that Mr. Cor did nothing to actively pursue this issue from the time he submitted the May 1999 work order discussed above, until he again raised the issue in the January 2001 walk-around database entry. Respondent's Post-Hearing Brief at 4-5.

I am not persuaded by UC's arguments. First, the fact that no such incident as that posited by Mr. Cor has yet occurred does not logically rule out the possibility of a future occurrence; nor does it necessarily make unreasonable a belief that there is a substantial and specific risk of such an occurrence. *Rosie L. Beckham*, 27 DOE ¶ 87,557, Case No. VBA-0044 (2000) ("[F]or purposes of Part 708, it does not matter whether the information a putative whistleblower disclosed is ultimately factually substantiated."). Second, regarding the adequacy of existing systems to address this issue, UC points to "the use of on-site scaffolding, rails and ladders or other portable platforms that allowed the desired access." However, a reasonable question as to the adequacy of these systems is raised by the following testimony of the former deputy group leader of NMT-8, Tom Blum:

Q Let me go back, then, to what you've already discussed about the access to glovebox upper reaches, shall we say, by both -- well, initially this came about from the crafts representing Johnson Controls maintenance workers. Is that correct?

A Yes. It's Johnson Control crafts people.

Q Okay. Is it fair to say that the gloveboxes in the PF-4 facility are fairly congested?

A You mean they have a lot of surfaces that go to them? Is that what --

Q Well, in addition to that, but there is just a lot of clutter in the area, limited space for all of the work that's going on in there?

A Well, the rooms have a lot of equipment in it. I don't -- I think we do a good job of keeping the aisleways clear between the boxes. There's certainly a lot of surfaces that go to the boxes, there's a lot of surfaces above the boxes. But --

Q Is it possible that there are some or many instances where it's so congested that it's not possible to bring scaffolding and ladders to bear on the surface that needs to be accessed?

A There are -- no. I will say that the boxes against the walls of the laboratories are -- the rear of the boxes are pretty much inaccessible, very difficult to get to. But in other cases, I think -- it's a requirement that the corridor, if you will, or the spaces between the boxes be clear so that you can move a box in and out of the room once it's decommissioned.

Q Well, so --

A I mean, that's always been one of the requirements, that you have a -- I don't know what that spacing is. I don't remember. But --

Q Well, so was it your understanding, then, that the complaint or the concern of these crafts was more to the inconvenience of having to bring in temporary scaffolding and bringing it to bear on the surface rather than the inability to access certain parts even with scaffolding?

A A little bit of both. Part of it is, it delayed -- or it was time consuming to erect scaffolding, to get that scheduled and in place, as well as, once the job is done, to take it down. A lot of work was going on, and scaffolding would have to be moved and located in other areas of the facility. In addition to that, I don't want to say

> inaccessible because they were working on ladders, as well. But in many cases a ladder wasn't adequate, as you well know.
>
> Q Okay.
>
> A There were places in -- to finish answering your question, there are places that are fairly inaccessible, and most of those deal with boxes that are up against the walls of the laboratory rooms.

Tr. at 350-52. Clearly, there was a disagreement between Mr. Cor and others as to whether existing systems were in fact sufficient to address the concern Mr. Cor raised. The fact that Mr. Cor initiated a work order in 1999 indicates that he believed something needed to be done at that time. The fact that the proposed work was never approved indicates that LANL did not consider to be a high enough priority. While the ultimate merits of Mr. Cor's concern is not at issue in this case, the evidence in the record leaves room for reasonable disagreement as to whether the situation then existing presented a legitimate safety concern.

Third, this office has rejected an interpretation of the word "disclosing" that would only encompass providing information not already known by management. *META, Inc.*, 26 DOE ¶ 87,504, Case No. VWZ-0007 (1996) ("Imposing the interpretation [respondent] suggests would require an employee to first ascertain whether his or her information is unknown to DOE or the contractor in order to assure his or her protected status and that process could be an elaborate and difficult one. In any case, it would tend to inhibit employees from freely coming forward with sensitive information and concerns.").

8. January 2001 Submission of List of Roles and Responsibilities

On January 5, 2001, the NMT-8 systems engineering team leader, Stuart McKernan, directed the members of his team, including Mr. Cor, to "work up a draft list of what you feel your roles and responsibilities are. Submit these to me via e-mail by Friday the 19th. The idea is to formalize job content for our positions." Complainant's Exhibit 10.-. On January 18, 2001, Mr. Cor provided to Mr. McKernan a "draft for glovebox engineering, in Excel format." Mr. Cor contends that his response to Mr. McKernan's directive was protected under 708.5(b) of the Part 708 regulations. However, since this submission was clearly not part of "a Congressional proceeding or an administrative proceeding conducted under this regulation," it is not protected activity under section 708.5(b).

9. February 2001 E-Mail Rebuttal to Management's Response to AM111 Complaint

On February 6, 2001, Mr. Cor submitted to a LANL Human Resources employee a rebuttal to NMT's response to his December 2000 AM111 complaint. As did the original AM111 complaint, the rebuttal focuses on what Mr. Cor alleged was his "excessive" workload, and criticizes NMT's "efforts to bring more resources to glovebox engineering" as reflecting "an intent to micromanage

the priorities and activities of the glovebox manager." Complainant's Exhibit 15.1. Mr. Cor maintains that this rebuttal constitutes protected activity under section 708.5(a)(2) and 708.5(b). However, the rebuttal only mentions safety in a vague reference to "a glovebox safety concern" and the lack of resources available to address the issue. Thus, the rebuttal did not reveal a substantial and specific danger to employees or to public health or safety, and therefore is not protected under section 708.5(a)(2). And, again, since this submission was not part of "a Congressional proceeding or an administrative proceeding conducted under this regulation," it is not protected activity under section 708.5(b).

10. February 2001 Request for Family and Medical Leave

On February 20, 2001, Mr. Cor submitted to his employer a request for Family and Medical Leave. Complainant's Exhibit 16.1. The complainant contends that this request is protected as a refusal "to participate in an activity, policy, or practice if you believe participation would . . . [c]ause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public." 10 C.F.R. § 708.5(c)(2). Mr. Cor contends that his request was related to a "concern of injury to self." However, given several choices on the form for indicating the purpose of the leave, Mr. Cor chose "Care for parent, child under age 18 (or age 18 or older if incapable of self-care because of a mental or physical disability), or spouse with serious health condition." He did *not* choose "Your own serious health condition that makes you unable to perform the functions of your job." In a March 19, 2001 e-mail to the Systems Engineering team leader, Mr. Cor states, "Due to some current family issues, combined with stress of office workload, I plan to be taking some intermittent leave under FMLA, beginning March 20th." Complainant's Exhibit 16.-. Even if I were to determine that "the stress of office workload" was the primary basis for Mr. Cor's leave request, I cannot equate the need to alleviate stress with a fear of injury to self, let alone a fear of serious injury. Thus, I reject the contention that this request constitutes activity protected under Part 708.

11. February 2001 Request for Decision on AM111 Complaint

After NMT management declined the opportunity for informal resolution of Mr. Cor's AM111 complaint, discussed above, Mr. Cor, on February 21, 2001, requested that a decision on his complaint be made by "the next higher-level manager in the chain of command," Steven Younger. Complainant's Exhibit 17.1. Mr. Younger was LANL's Associate Director for Weapons. Mr. Cor claims that this request is protected activity under section 708.5(a)(2) and 708.5(b) of the Part 708 regulations. I reject this contention for the same reasons I found above that Mr. Cor's rebuttal of NMT management's response to the complaint was not protected under these provisions.

12. March 2001 Notification of Medical Condition

In a March 21, 2001 e-mail to his systems engineering team leader, Stuart McKernan, Mr. Cor stated, "The purpose of [my family and medical] leave has gotten more complicated in the meantime. ESH-2 recently ran some tests as part of my annual physical, and found some problem with my blood. They say it suggests cancer, but I don't think it is that serious at this point. More tests will tell."

Complainant's Exhibit 19.1. Mr. Cor contends that this notification is activity protected as a refusal "to participate in an activity, policy, or practice if you believe participation would . . . [c]ause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public." 10 C.F.R. § 708.5(c)(2). I disagree, as this notification simply provides further basis for his family and medical leave, and nowhere does the notification mention that Mr. Cor was taking leave to avoid serious injury to himself in the workplace.

13. May 2001 Attempt at Mediation of AM111 Complaint

According to his contemporaneous records, Mr. Cor met with the NMT Division Director, Tim George, and the NMT-8 Group Leader, Ray Wallace, as part of an effort to mediate his AM111 complaint. Mr. Cor noted in his calendar for May 14, 2001,

> Mediation effort this afternoon with NMT went badly, as I was afraid it would. Tim George, Ray Wallace seemed determined to agree to nothing I proposed, and only insisted on micromanaging me as a solution. Went on for two hours, and I thought both were very arrogant, dishonest and manipulative. The mediators appeared intimidated by them also. No doubt that I will need to proceed with formal complaint resolution.

Complainant's Exhibit 21.1. As he does regarding his February 2001 rebuttal to NMT's response to the AM111 complaint, Mr. Cor characterizes this as activity protected under 10 C.F.R. § 708.5(a)(2), (b). I disagree for the same reasons I found above that Mr. Cor's original AM111 complaint and his rebuttal of NMT management's response to the complaint were not protected under these provisions.

14. May 2001 Amendment of FMLA Request and June 2001 Return to Work

On May 16, 2001, Mr. Cor submitted to his employer a revised request for Family and Medical Leave. Complainant's Exhibit 24.1. In this request, from the choices on the form for indicating the purpose of the leave, Mr. Cor chose "Your own serious health condition that makes you unable to perform the functions of your job." *Id.* Also submitted was a "Certification of Health Care Provider" signed by a physician, describing Mr. Cor's "fatigue, emotional distress, medical evaluation of anemia." Complainant's Exhibit 24.2. On June 21, 2001, Mr. Cor "returned to work on [a] limited schedule." Complainant's Exhibit 0.2. Mr. Cor contends that this request and return to work is activity protected as a refusal "to participate in an activity, policy, or practice if you believe participation would . . . [c]ause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public." 10 C.F.R. § 708.5(c)(2). I disagree, as this notification simply provides further basis for his family and medical leave, and nowhere does the notification mention that Mr. Cor was taking leave to avoid serious injury to himself in the workplace. And clearly, his return to work on June 21, 2001, was not a refusal to participate in any activity.

15. June 2001 Participation in American Glovebox Society Conference

In June 2001, Mr. Cor made plans to participate as a presenter at the American Glovebox Society (AGS) Annual Conference. Complainant's Exhibit 26.1. The planned presentation was titled "Insuring Proper Installation & Testing of Piping Systems; Use of Teflon Seated Valves in Nuclear Applications." *Id.* Although Mr. Cor ultimately did not attend this conference (discussed as an alleged retaliation below), he states that he nonetheless engaged in protected activity under Part 708 in connection with the conference, specifically sections 708.5(a)(2) and 708.5(b). However, Mr. Cor has not shown that he made any kind of disclosure in this regard. Even if he had presented at the conference, there is no reason to believe his presentation would have contained information that revealed a "substantial and specific danger to employees or to public health or safety." And his participation in the conference would not have been part of "a Congressional proceeding or an administrative proceeding conducted under this regulation," and therefore would not have been protected activity under section 708.5(b).

16. July 2001 Complaint of Retaliation for Filing AM111 Complaint

In a July 3, 2001 e-mail to LANL human resources personnel, Mr. Cor cites "many instances of retaliation, abuse of authority, slander and bad faith on the part of some of my line management in recent month, . . ." Complainant's Exhibit 28.1. Mr. Cor contends that this e-mail is a disclosure of information revealing "abuse of authority" by LANL management. In response, UC argues that "disputes over grievances are not evidence of mismanagement or evidence of an abuse of authority" and that there "was no capricious exercise of power that would have adversely affected some right that Mr. Cor had or that would have resulted in personal gain to his supervisors in this instance." Respondent's Post-Hearing Brief at 29.

It is important to note here that to determine whether this communication by Mr. Cor contained protected disclosures does not require a determination as to whether LANL management *in fact* abused its authority. The question is whether Mr. Cor believed the information he was conveying revealed an abuse of authority, and whether that belief was reasonable. 10 C.F.R. § 708.5(a)(3). An abuse of authority occurs when there is an "arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 232 (1993) (interpreting Whistleblower Protection Act). Among the allegations leveled in Mr. Cor's e-mail was that there "has been such a climate of fear fostered by the NMT-8 group leader, that one of my witnesses to the fact finder [appointed to investigate Mr. Cor's AM111 complaint] has asked to be excused from being interviewed." Complainant's Exhibit 28.1. I conclude that Mr. Cor's e-mail reflects his genuine belief as to the events that were occurring. His allegation of a "climate of fear" resulting in the intimidation of witnesses reveals what is at least arguably an "arbitrary or capricious exercise of power . . . that adversely affects the rights of" Mr.

Cor. Thus, while venturing no opinion as to the truth of Mr. Cor's allegations, I find that the allegation was a disclosure protected under Part 708.[3]

17. August 2001 Filing of Part 708 Complaint

On August 1, 2001, Mr. Cor filed his Part 708 complaint with the DOE's Albuquerque Operations Office. There is no question, and UC does not dispute, that the filing of a Part 708 complaint, and therefore participation in "an administrative proceeding conducted under this regulation," is conduct protected under the Part 708 regulations. 10 C.F.R. § 708.5(b).

In summary, I find that Mr. Cor engaged in activity protected under Part 708 on the following three occasions: (1) his January 11, 2001 entry into the Walk-Around Database; (2) his July 3, 2001 e-mail to LANL human resources, and (3) the filing of his Part 708 complaint on August 1, 2001. I will next review Mr. Cor's allegations of retaliation.

B. Whether Mr. Cor's Protected Activity Was a Factor Contributing to Retaliation

Under the Part 708 regulations,

> Retaliation means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart.

10 C.F.R. § 708.2.

Mr. Cor alleges many instances of retaliation. Complainant's Exhibit 0.2. As an initial matter, I will not consider any allegation of retaliation occurring prior to January 11, 2001, the date of what I found above to be Mr. Cor's first protected disclosure. I will now address the remaining allegations in chronological order to determine whether they are actions of the type described in the definition of retaliation above. I find below that two of the alleged instances of retaliation are actions of the type described in the definition of retaliation, and that Mr. Cor's protected activities were contributing factors in both of these actions.

3/ I disagree with UC's contention that *Thomas Dwyer*, 27 DOE ¶ 87,560, Case No. VBH-0005, stands for the general proposition that "disputes over grievances are not evidence of mismanagement or evidence of an abuse of authority." In *Thomas Dwyer*, I made a finding specific to that case that the grievances at issue did "not contain disclosures that evidence mismanagement or abuse of authority."

1. January 2001 Response to Walk-Around Database Entry

Mr. Cor contends that in late January 2001 the NMT Division Leader, Tim George, "closed out [my] entry in Management Walk Around Database, without addressing any merits and indicating to [the] employee that entry was inappropriate." Complainant's Exhibit 0.2. The complainant relies on an e-mail response from Mr. George in which he states,

> Some of the issues you raise in your finding certainly bear further investigation. However, I don't believe that the management walkaround system is the appropriate venue for raising or resolving these issues. We are already actively evaluating most of these issues as part of your recent [AM111 complaint], and expect to be in a position to address these concerns by January 31.

Complainant's Exhibit 12.1. The e-mail then goes on to address the merits of Mr. Cor's concern, precisely what Mr. Cor claims Mr. George did not do. *Id.* No sanction was applied to Mr. Cor. I find no basis for an argument that Mr. George's action in his e-mail response or in closing out the concern was "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment)." 10 C.F.R. § 708.2. Therefore, this action cannot be retaliation as defined in Part 708.

2. February 1, 2001 Memo from NMT Division Leader

In January 2001, Mr. Cor submitted a draft memo to his supervisors entitled "Establishing Requirements for Glovebox Auxiliary System Configuration, LANL TA-55 Corrective Action Plan Item CAP05076." Complainant's Exhibit 13.-. On February 1, 2001, Tim George issued a revision of that memorandum. Complainant's Exhibit 13.2. Mr. Cor complains that Mr. George made "minor changes to content," "removed employee's name entirely from document, issued the memo under his own name, and did not even copy the employee on distribution." Complainant's Exhibit 0.2. However, Mr. George testified that it was not uncommon for him to issue memoranda, even though drafted by subordinates, under his own name, and to not include the subordinate on the memorandum's distribution list. In any event, the act alleged here by Mr. Cor clearly is not in the category of a "negative action with respect to the employee's compensation, terms, conditions or privileges of employment." This action therefore cannot be retaliation as defined in Part 708.

3. NMT's January 2001 Response to AM111 Complaint

On January 30, 2001, the NMT-8 Group Leader issued a memorandum responding to Mr. Cor's AM111 complaint. Mr. Cor contends that this response contained "false and misleading statements" and constitutes retaliation against him. First, I note that I found above that Mr. Cor's AM111 complaint did not contain disclosures protected under Part 708. In any event, I need not address the factual accuracy of NMT's response in order to find that the response does not constitute a "negative

action with respect to the employee's compensation, terms, conditions or privileges of employment." And even though the response finds unwarranted Mr. Cor's request to be made director of a LANL-wide glovebox technology office and to receive a 25% increase in salary, I would need to stretch the definition of "retaliation" too far to bring within its scope NMT's refusal to agree to what was by all appearances an extraordinary request.

4. LANL Management's Request for Fact Finder on AM111 Complaint

As discussed above, in February 2001, Mr. Cor requested that a decision on his AM111 complaint be made by "the next higher-level manager in the chain of command," Steven Younger. Complainant's Exhibit 17.1. The memorandum from LANL human resources relaying this request states that management or Mr. Cor could request that the issues be submitted to a "neutral Fact Finder . . ." Mr. Cor did not ask for the appointment of a fact finder. LANL management, however, did, and one was appointed. Complainant's Exhibit 18.1. Mr. Cor characterizes the request by LANL management for a neutral fact finder, "with no provision of intermediate relief," to be retaliation. Complainant's Exhibit 0.2. I disagree, and find nothing in LANL's request that could be accurately described as a negative action with respect to Mr. Cor's employment.

5. April 2001 Refusal to Allow Work at Home

Mr. Cor states that, in April 2001, NMT management refused his "offer to work at home, and threatened to disallow time already worked at home, even with prior notification to supervisor." However, without some evidence that his management treated Mr. Cor differently from any similarly situated employees in this regard, I cannot find that NMT's failure to approve Mr. Cor's work from home is a negative action with respect to his employment.

6. May 2001 Work Load Management Memorandum

As discussed above, on May 14, 2001, Mr. Cor met with the NMT Division Director, Tim George, and the NMT-8 Group Leader, Ray Wallace, as part of an effort to mediate his AM111 complaint. On May 16, 2001, Mr. George issued a memorandum stating,

> Pursuant to my meeting on May 14, 2001 with Mr. William Cor, one of the issues he faces is a large number of competing demands on his time. I told him that this issue could be resolved best by having his Team Leader set all priorities for his work.
>
> I hereby direct that the NMT-8 Systems Engineering Team Leader [Stuart McKernan] review with Mr. Cor all of the work demands that he faces, and make a decision on which work requirements Mr. Cor will respond to and accomplish each week. Mr. Cor will not work on any tasks not set by his Team Leader.

Complainant's Exhibit 23.1. Mr. Cor contends that the issuance of the memorandum was an act of retaliation, though he testified that the solution proposed in the memorandum was never

implemented. Complainant's Exhibit 0.1; Tr. at 296-97. Nonetheless, the memorandum itself is an action by Mr. Cor's employer with respect to the terms and conditions of his employment, and therefore is the type of action described in Part 708 definition of retaliation. 10 C.F.R. § 708.2.

7. Failure to Authorize Attendance at Conference

As noted above, in June 2001, Mr. Cor made plans to participate as a presenter at the American Glovebox Society (AGS) Annual Conference. Complainant's Exhibit 26.1. The NMT Group Leader, Ray Wallace, testified regarding his decision whether to approve Mr. Cor's travel to the conference.

> I got a travel request from Mr. Cor to attend it, and I signed it. And as I was putting it into my out box, I realized that this went for five days, Monday through -- you know, Monday to Friday, leave Monday and come back Friday.
>
> At the time, under the FMLA, he was working only three days. Well, the Occupational Health & Safety rules at the lab are pretty strict. If they say three days, that's all you best be doing.
>
> So he at the time was out, he was home. I called and left a voice mail message on his phone, saying, Hey, I -- you know, this is for five days. I need to talk to you about this. You're only authorized three. Let's discuss it.

Tr. at 458-59. Mr. Cor returned Mr. Wallace's phone call and left a voice mail message. On Friday, June 29, 2001, Mr. Wallace sent an e-mail to Mr. Cor stating, "Bill, I got your voice mail re: attending the AGS conference. Please see me Monday morning." Mr. Cor responded as follows by e-mail on Monday, July 2, 2001:

> I understood through Larry that you gave prior approval for this some time ago. Upon that condition I agreed to take part in the presentation for the AGS training seminar.
>
> As I explained on the phone this is not a factor in my limited working hours, if they are still in place at that time.

Complainant's Exhibit 27.-. About one hour later, Mr. Wallace responded with an e-mail stating, "come talk to me, please." *Id.* Mr. Cor responded by e-mail approximately one and one-half hours later:

> Ray -
>
> You need to understand that I have long since been advised not to meet on short notice in your office in a peremptory way, without taking certain precautions. Under

> present circumstances I must take this position with my line management, not just yourself. Most people are content to communicate with me without force, and that is the way it should be at a national laboratory.
>
> I would like to work out whatever your concerns may be, so I invite you to choose between phone, e-mail, or coming by my office when I am in. If we really need to meet in your office, then we could also arrange an appointment with sufficient advance notice and agenda that I may invite my representative.
>
> Sorry if this is inconvenient for you.
>
> - Bill Cor

Id. After receiving this e-mail, Mr. Wallace

> called Pat Trujillo, the Chief of Staff, and said, This is what just transpired. You know, I've never had this happen before. Give me some advice.
>
> And he said, This is management of the group. This is not disciplinary. He said, If a person under lab policy is being disciplined for something, he or she rates having a representative there of their choice. But this isn't discipline, this is just regular operation of the group.[4] That's [not applicable]. Thank you.
>
> So I called Mr. Cor back and said, Come down and see me, and told him basically that, You don't rate a representative. We're talking just general group operations. He wouldn't come.
>
> And so I invited him to go tell that to the Chief of Staff. He did, and subsequently left the lab.

Tr. at 460-61. Mr. Cor describes what happened next:

> What followed immediately after that, as I did go to Mr. Trujillo's office, he insisted that the orders should stand, that I should go without delay to Mr. Wallace's or suffer a possible charge of insubordination or being AWOL. And I tried to explain my concerns again with Mr. Trujillo, to no avail.

4/ To support his contention that he was entitled to have a representative while meeting with Mr. Wallace, Mr. Cor relies on a LANL memorandum stating that "managers and supervisors must allow employees, on request, to have a representative with them in meetings or interviews of an investigative nature . . . when a purpose of the interview is to obtain facts which could lead to disciplinary action that is probable or that is seriously considered." Complainant's Exhibit 27.-. Mr. Cor has not shown, and I do not find, that the LANL memorandum entitled Mr. Cor to have a representative present with discussing his travel request with Mr. Wallace.

Tr. at 91-92. Following this meeting, Mr. Cor left the work site, and never returned. Tr. at 463.

Mr. Cor contends that Mr. Wallace's refusal to approve his travel, as well as Mr. Wallace's insistence that Mr. Cor go to his office, was retaliation. What the documentation produced by Mr. Cor indicates, however, is that while Mr. Wallace was certainly considering disapproving the travel, he wanted to speak to Mr. Cor before making the decision. Once Mr. Cor left the lab on July 2, 2001, and did not return, whether NMT would approve his travel to the conference obviously became a moot point. Thus, while a decision to not allow Mr. Cor to attend the conference arguably is the kind of action described in the Part 708 definition of retaliation, such a decision apparently was never made. Moreover, I do not find that Mr. Wallace's insistence that Mr. Cor report to his office to talk is an action with respect to Mr. Cor's compensation, terms, conditions or privileges of employment, and therefore falls outside the definition of retaliation. 10 C.F.R. § 708.2.

8. September 2001 Termination

As will be discussed in more detail below, Mr. Cor was terminated from employment on September 21, 2001. Clearly, termination is an action with respect to Mr. Cor's employment, and therefore would fall within the Part 708 definition of retaliation.

I have therefore identified above two actions by NMT management that are the type of actions defined as retaliation in the Part 708 regulation, the proposal by Tim George in his May 2001 memorandum regarding managing Mr. Cor's workload, and Mr. Cor's September 2001 termination.[5] The next question is whether any of the following activities by Mr. Cor (already found above to be protected under Part 708) was a contributing factor to either Mr. George's memorandum or Mr. Cor's termination: (1) his January 11, 2001 entry into the Walk-Around Database; (2) his July 3, 2001 e-mail to LANL human resources, and (3) the filing of his Part 708 complaint on August 1, 2001.

In prior decisions of the Office of Hearings and Appeals, we have established that,

> A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

5/ Mr. Cor also contends that LANL retaliated against him by "refusing to respond to [his] Part 708 complaint" and by finding, in a December 11, 2001 letter from LANL Human Resources, no "evidence to support your claim that NMT management's actions toward you constituted retaliation." Complainant's Exhibit 0.2. However, in this regard, Mr. Cor makes no allegation that LANL took any action with respect to his employment. Indeed, the first allegation concerns a "non-action" and the second a letter issued by LANL after Mr. Cor had already been terminated.

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54 (1997) (quoting *Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993)); *Ronny J. Escamilla*, 26 DOE ¶ 87,508 at 89,046 (1996).

After reviewing the events from the time of Mr. Cor's first protected activity on January 11, 2001, through Mr. Cor's termination some eight months later, I conclude that there is close enough temporal proximity to find, under the circumstances, that Mr. Cor's January 2001 protected activity was a contributing factor in the proposal in Tim George's May 2001 memorandum regarding Mr. Cor's workload. For the same reason, I also find that all three of Mr. Cor's protected actions (in January, July, and August 2001) were contributing factors in the September 2001 decision to terminate Mr. Cor.[6] Looked at in context, all of the relevant events, both protected activities and alleged retaliation, were not isolated occurrences, but instead were part of a continuing and growing dispute between Mr. Cor and his management over an eight month period.

Notwithstanding these findings, it is clear that a large part of the dispute had nothing to do with Mr. Cor's protected activities. Moreover, as I discuss below, UC has proven by clear and convincing evidence that Mr. George would have issued the May 2001 memorandum and LANL would have terminated Mr. Cor in the absence of Mr. Cor's protected activities.

C. Whether LANL Would Have Take the Alleged Retaliatory Actions Absent Mr. Cor's Protected Activities

The primary issue of contention between Mr. Cor and his management, throughout the last eight months of his employment, appears to have been related to workload, i.e., Mr. Cor's contention that there was too much work and not enough resources, and that the deadlines for the completion of work were unrealistic. Variations on this theme can be found in Mr. Cor's AM111 complaint, his walk-around database entry, and his requests for FMLA leave due in part to stress at work. However, as I found above, Mr. Cor's communications and actions related to this issue are not protected under 10 C.F.R. § 708.5. Nonetheless, I have also found that Mr. Cor made protected disclosures related to a safety issue in his January 2001 walk-around database entry.

The temporal proximity between this disclosure and Mr. George's May 2001 memorandum regarding managing Mr. Cor's workload is such that I cannot rule out his January 2001 protected disclosure as a factor in the decision to issue the memorandum. But it is abundantly clear to me that Mr. George would have issued this same memorandum even if Mr. Cor had made no protected

---

6/ The record indicates that Mr. George, the individual responsible for both the May 2001 memorandum and Mr. Cor's termination, had the requisite knowledge of Mr. Cor's protected activities. As discussed above, Mr. George responded to Mr. Cor's January 2001 walk-around database entry. And, prior to making his decision to terminate Mr. Cor, Mr. George was provided, among other relevant documentation, a copy of messages authored by Mr. Cor. One of those messages contained his July 2001 protected disclosure, and another referred to the fact that he had filed a complaint under Part 708. Respondent's Exhibit 138.

disclosure. The genesis of the memorandum was Mr. Cor's AM111 complaint, which I have already found was related primarily to the workload issue and contained no protected disclosures. It was in the context of attempting to mediate the AM111 complaint that Mr. Cor met with Mr. George and Ray Wallace, the NMT-8 Group Leader. Not surprisingly, in his memorandum Mr. George states that one of the issues discussed was "a large number of competing demands on his time. I told him that this issue could be resolved best by having his Team Leader set all priorities for his work." Complainant's Exhibit 23.1. Mr. George testified credibly at the hearing that he issued the memorandum in an attempt to "pinpoint the actual specific duties that were amounting to this inordinate workload." Tr. at 650. Because I find that it was the "workload" issue that prompted Mr. George's memorandum, I am convinced that the memorandum would have been issued even if Mr. Cor had raised no safety issues in his January 2001 walk-around database entry.

What is even more clear to me is that Mr. Cor would have been terminated from his job in September 2001, his protected activities notwithstanding. As noted above, Mr. Cor left the workplace on July 2, 2001, after refusing to report to his Group Leader's office.

> MR. GOERING: Okay. As I understand, July 2, 2001, Mr. Wallace says, Come to my office. You refuse to go. You go to -- Mr. Wallace says, Okay, go to Mr. Trujillo's office.
>
> You go to Mr. Trujillo's office. Mr. Trujillo says, you know, You've got to go -- if Mr. Wallace asks you to go to his office, you've got to go to his office. And you, I guess believing that was wrong, left the workplace on July 2 and never returned. Is that right?
>
> THE WITNESS: That's correct.
>
> MR. GOERING: What I'm trying to understand is, what was it about the request to meet with Mr. Wallace that precluded you from showing up to work? Why couldn't you show up to work even though there was this pending request to see Mr. Wallace?
>
> THE WITNESS: Well, my understanding from Mr. Trujillo that the mere refusal to meet with Mr. Wallace was the source of their contention that I was insubordinate, if I --
>
> Since I was still under this Family Medical Leave Act and still had an iron deficiency, I could -- it appeared to me like I could invoke that, go home, and rely on that as a means of possibly ameliorating the situation, whereas if I had simply remained in the office and refused to meet under these circumstances, it would have been increasingly uncomfortable and confrontational.

MR. GOERING: Okay. As I understand it, though, as of July 2, the medical recommendation was that you could -- obviously, you know, that he couldn't foresee what happened on July 2. But the diagnosis was -- the recommendation was that you could return to work three days a week?

THE WITNESS: (No audible response.)

MR. GOERING: Okay.

THE WITNESS: This was the first day of the week.

MR. GOERING: Okay. Now, once you -- you indicated in a later exhibit, or in a later E-mail, which I think is Item 27, that -- yes -- 27.2, which doesn't seem to have a date as to when you wrote this. But -- or actually, no. I'm sorry. I'm talking about the part you wrote, which is August 12.

And you say that it may be you've exhausted your legal allowance of unpaid leave under FMLA.

My question is, once you had exhausted your FMLA leave, then, what did you think would be the effect of continuing not to go to work?

THE WITNESS: Well, I had hoped for some intervening relief or action through either some combination of Human Resources, the fact-finder, DOE, or some other authority above Mr. Wallace in the intervening time. I was going on hope here.

And at the same time, I was trying to make do with the situation as I had become enmeshed in at that point of trying to support the family. I continued to try to do what I could outside of the office, including responding to phone messages. And I was making contributions and not getting paid for them at this point.

But I didn't have an answer for what I could rely on at the expiration of my FMLA leave. But it's clear that I wasn't being offered any olive branch.

MR. GOERING: Right. But if -- and I'm not trying -- I don't mean to sound like I'm dismissing your concerns, but I'm just looking at it from the side of management.

If management says, We want you to come back to work, and then you've exhausted all your legal ability to be out of work, you realize you're at the end of that rope, I understand that you hoped for something that would intervene.

But at the point where your FMLA leave expired, it would seem to me that you might think, Well, I could really endanger my job if I don't go back to work when I'm supposed to go back to work and my leave has expired.

Isn't it reasonable for management to think, Well, he is AWOL if he doesn't show up and he doesn't have any reason -- he has no leave, he's not showing up to work?

THE WITNESS: Well, I think -- under the circumstances, I don't think that's a reasonable position for the management to take, given what they knew or appeared to be conveniently forgetting about the reasons for how this all came about, going over, as we've gone over here, a period of a couple of years at least.

MR. GOERING: But it sounds like the precipitating event on July 2 was Mr. Wallace wanted you to meet with him in his office. That's what caused you to leave on July 2?

THE WITNESS: Yes.

MR. GOERING: And then you said that you -- I asked you why that prevented you from coming to work, and you said, well, you figured you could use your FMLA leave and it might ameliorate the situation.

Once your FMLA leave is gone, then, what keeps you from, you know, maintaining your dispute, you know, and claiming to be in the right, understandably --

THE WITNESS: Yes.

MR. GOERING: -- but going to work and saying, you know, I'm going to --

THE WITNESS: Well, as a practical matter, I was already in South Carolina, nearly 2,000 miles away at that point, upon the expiration of my FMLA leave.

MR. GOERING: Okay. And so you couldn't go back?

THE WITNESS: Well, as a practical matter, I couldn't --

MR. GOERING: Okay.

THE WITNESS: -- at least not immediately.

Tr. at 260-64. Mr. Cor was in South Carolina by August 2001 because he had moved to accept employment with another firm. In the meantime, on August 6, 2001, Ray Wallace sent a certified letter to Mr. Cor, informing him that he was required to report to work by August 13, 2001, or else Mr. Wallace would "consider that you have abandoned your position and we will proceed with appropriate administrative action." Respondent's Exhibit 138 at Attachment D. In an August 12, 2001 e-mail to Ray Wallace, Mr. Cor stated that he

> cannot allow the false impression to foster or linger that I have abandoned my employment. It may be that I have exhausted my legal allowance of unpaid leave under FMLA, but in the meantime you are well aware that the primary cause for my absence has shifted due to your abusive and retaliatory actions manifested up to July 3rd, and continuing to date.

Complainant's Exhibit 27.2. Mr. Wallace responded by e-mail and regular mail, stating,

> Since you have failed to provide a legitimate basis for being absent from work, the Laboratory has determined you to be absent without leave and is following the procedures set forth in Laboratory policy AM 319 Absence Without Leave. Application of this policy could result in termination of your employment. If you have a legitimate reason for being absent from your work you should contact me immediately with that information so that it can be considered in light of the Laboratory's application of AM 319.

Id.

NMT management then referred the matter to a Case Review Board, an "advisory body to advise the cognizant manager on the appropriate managerial response to whatever situation there is." Tr. at 721. Philip Kruger, LANL's deputy director for human resources and group leader for staff relations, sat on the board. Mr. Kruger testified at the hearing and described the board's conclusion regarding the case of Mr. Cor.

> The case review board was unanimous that this was insubordination. This was a situation in which management was telling Mr. Cor to return to work, was telling him if he had a medical reason, to send that through the medical folks.
>
> Basically, the reason that he was giving was that he felt he was being mistreated by his supervisor and would not work for this man and would not even meet to talk about anything with this person without a representative there.
>
> He was told on repeated occasions that he didn't have that option; that there were ways he could complain about treatment and so forth, but to simply say, No, I'm

not going to go to work because I will not report to this man, was in fact insubordination and that we wouldn't live with it. And that went on for several weeks.

Mr. Kruger was questioned regarding LANL's policy and practice in cases of insubordination.

Q Is insubordination in fact an offense that's taken seriously by the Laboratory?

A We take it extremely seriously. We have --

Q And why?

A Well, as any operation would, people have to -- managers have to be able to maintain order in their workplace. People have jobs to do. Somebody has to oversee that. And in that sense, we're not -- we're no different than any other place.

But when you look at the Laboratory here, we have enormous safety and security -- there are enormous safety and security implications with virtually everything that we do. We cannot have a situation where people feel that, Well, I'll follow the orders that I want or I'll work for the people I want and if I don't like the orders or I don't like the people, I'm not going to do it.

If we have work that is unsafe or we have work that is not secure, people have the right to stop work. But they don't have the right to stop work simply because they don't particularly like the person they're working for.

Q Other employees have been terminated from the Laboratory for insubordination?

A I would -- there are lots of ways of characterizing any particular case. I would say absolutely, there are other employees who have been terminated for insubordination. When you look at records, you may see something -- for example, we just recently had one where it would be insubordination and performance.

In Mr. Cor's case, we'd probably describe it as insubordination and absent without leave, so forth. Generally speaking, this is, in my short tenure at the Laboratory, the first case I have come across where an employee basically has said, Yes, I understand the order. I'm supposed to go into work and meet with this -- with my supervisor, and I'm not going to do it.

> And having been told, You put your job at risk if you don't do it, do you understand we will fire you if you continue along this path, and the person still continues along the path, in fact, in the some 25 years that I've been doing this kind of work, this is kind of unique that way. I have not run across many cases like that.
>
> Q This was a clear-cut case is what you're saying?
>
> A No doubt in my mind.

Tr. at 726-27. It is clear to me that the driving force behind Mr. Cor's termination was his refusal to report to work. Even if Mr. Cor had engaged in no protected activity, I am convinced that events would have transpired almost precisely as they did, resulting in Mr. Cor's termination. In sum, I find that with regard to both Mr. George's May 2001 memorandum and Mr. Cor's termination, UC has met its burden of proving "by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." 10 C.F.R. § 708.29.

IV. Conclusion

As set forth above, I have found that the complainant has met his burden of proof of establishing by a preponderance of the evidence that he engaged in activity protected under 10 C.F.R. Part 708. I also have determined that the complainant's activity was a contributing factor in actions taken against him, including his termination. However, I found that UC has proven by clear and convincing evidence that it would have taken the same action absent his disclosures. Accordingly, I conclude that the complainant has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted.

It Is Therefore Ordered That:

(1) The request for relief filed by William Cor under 10 C.F.R. Part 708 is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after receipt of the decision.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: August 5, 2002

April 21, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: S.R. Davis

Date of Filing: August 7, 2003

Case Number: VBH-0083

S.R. Davis (the Employee) filed a complaint against her former employer, Fluor Fernald, Inc. (the Contractor) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The Employee alleges that she engaged in protected activity and that the Contractor retaliated by subjecting her to two disciplinary actions, a job transfer, and ultimately a separation pursuant to an involuntary separation program. The Employee seeks relief including reinstatement and back-pay. As the decision below indicates, I have concluded that the Contractor would have taken the same actions in the absence of the protected activity and, therefore, the Employee is not entitled to relief.

I. Background

A. The DOE's Contractor Employee Protection Program

The DOE Contractor Employee Protection Program is set forth at 10 C.F.R. Part 708. Part 708 prohibits contractors from retaliating against contractor employees who engage in protected activity. Protected activity includes disclosing information that an employee believes reveals a substantial violation of a law, rule, or regulation or gross fraud, waste, or abuse of authority. Protected activity also includes participating in a Part 708 proceeding. If a contractor retaliates against an employee for protected activity, the employee may file a complaint. The employee must establish, by a preponderance of the evidence, that the employee engaged in protected activity and that the activity was a contributing factor to an alleged retaliation. If the employee makes the required showings, the burden shifts to the contractor to establish by clear and convincing evidence that it

would have taken the same action in the absence of the employee's protected activity. If the employee prevails, the OHA may order employment-related relief such as reinstatement and backpay.

B. Procedural History

In June 2001, the Employee filed her complaint. The complaint alleges that she made protected disclosures and that the Contractor retaliated with two disciplinary actions and a job transfer. In June 2002, the local employee concerns office referred the matter to OHA for an investigation and hearing, and the OHA Director appointed an investigator (the Investigator). In July 2003, as the Investigator was preparing his report, the Contractor terminated the Employee as part of an involuntary separation program. In August 2003, the Investigator issued his report, and the OHA Director appointed me to serve as the hearing officer. OHA provided a copy of the investigatory file to both parties.

During the pre-hearing phase, I required written submissions and conducted telephone conferences. Through a series of letters to the parties, 1/ I ruled on the scope of the proceeding, identified the disputed issues for the hearing, and discussed possible evidence on the issues.

The Employee requested that the alleged retaliations to be considered in this case include her July 2003 involuntary separation. I granted this request.

I tentatively determined that the Employee had alleged four Part 708 retaliations: the two disciplinary actions, the job transfer, and the involuntary separation. The Employee objected. She alleged that, over the course of her employment, she had made protected disclosures that resulted in the Contractor's failure to promote her and that the Contractor's current refusal to correct this situation was itself a retaliation. I ruled that these allegations were not part of the complaint and, in any event, were untimely.

I tentatively determined that the Employee had met her burden with respect to the two disciplinary actions and the job transfer. I identified two alleged protected disclosures, and I stated that it

---

1/ These letters were issued on August 14, 2003, September 9, 2003, September 24, 2003, November 12, 2003, and December 1, 2003.

appeared that the Contractor did not dispute that she made the disclosures or that they were protected. 2/ I also stated that under our precedent the circumstances permitted a reasonable inference that the disclosures contributed to the three actions. The Contractor did not object and, therefore, I determined that the Employee had met her burden with respect to the two disciplinary actions and the job transfer.

I also tentatively determined that the Employee had met her burden with respect to the involuntary separation. I noted that the Employee's participation in this proceeding is protected activity and that under our precedent the Employee's involuntary separation during the proceeding permits a reasonable inference that the participation contributed to the separation. The Contractor did not object and, therefore, I determined that the Employee had met her burden with respect to the involuntary separation.

Because the Employee met her burden with respect to the four alleged retaliations, I limited the hearing to the issue whether the Contractor would have taken the same actions in the absence of the protected activity. I stated that the clear and convincing standard applicable to contractors was a difficult standard to meet and that the Contractor should consider this high standard in determining what documents and witnesses to present. In order to permit the Employee a full opportunity to challenge the Contractor's evidence, I required that the Contractor produce the documents used to select who would be separated. I invited the Employee to review the documents and to identify any employee who she believed should have been separated in her place.

The hearing was held on four days in December of 2003. Both parties submitted exhibit books. The Contractor numbered his exhibits, and they are cited as "Ex. [number]." The Employee numbered the pages of her exhibits, and they are cited as "Ex. P-[page number]." The Contractor presented a wide range of witnesses, including the Employee's management chain, human resources (HR) and employee relations officials and staff, and several co-workers. The Employee's counsel cross-examined these witnesses extensively, and she presented witnesses, including a co-worker and a worker in another department, to testify about the

---

2/ The two disclosures related to business ethics rules concerning the acceptance of gratuities from vendors and the documentation of potential conflicts of interest.

Employee's performance and conduct. The Employee also testified. Post-hearing briefing was completed on February 23, 2004.

II. General Background

The Fernald site is scheduled to close. Because of the planned closure of the site, the Contractor has implemented a series of voluntary and involuntary separation programs. These are commonly referred to as VSPs and ISPs. The programs relevant to the instant case are a 2001 VSP, a Spring 2003 VSP, a July 2003 ISP, and an October 2003 ISP.

The Employee worked in the Contractor's Information Management (IM) department. Prior to the June 2003 ISP, the IM department consisted of five managers: the department head and four division managers. Two of the divisions were "network" divisions and two were "programmer" divisions. As part of the July 2003 involuntary separation program, the Contractor separated the IM head and a programmer division manager; the Contractor then promoted one of the programmer managers to be department head, leaving two divisions - a network division and a programmer division. The remaining network manager will be referred to as the Network Manager; the remaining programmer manager will be referred to as the Programmer Manager.

From 1998 to June 2001, the Employee reported to the Network Manager. In late June 2001, the IM department head reassigned the Employee to the Programmer Manager. The Employee reported to the Programmer Manager for the next two years, until she was separated in the July 2003 ISP.

During her tenure with the Network Manager, the Employee held the title of "Supervisor Information Management." Until approximately the beginning of May 2001, she was one of three team leaders. In August 2001, two months after she was reassigned to the Programmer Manager, the IM department eliminated the title "Supervisor Information Management." The seven employees who held that title, including the Employee, had their title downgraded to "Information Management Analyst III." Ex. 67. Another employee's title was downgraded from "Manager Information Management" to "Senior Information Management Analyst." *Id.*

III. The Disciplinary Actions and Job Transfer

A. Introduction

The two disciplinary actions and the job transfer occurred in the first six months of 2001, during the Employee's tenure with the Network Manager. The first disciplinary action was a March 21, 2001 written reminder, citing inconsistent work hours, failure to follow management direction, and unprofessional communication style. The second action was a May 31, 2001 "decision making leave," citing failure to establish and maintain backups and unprofessional communication style. In a "decision making leave," the Contractor places an employee on administrative leave for the rest of the day so that the employee can make a decision about whether or not the employee wishes to remain employed. The June 25, 2001 job transfer to the Programmer Manager cited, inter alia, the Programmer Manager's need for the Employee's skills.

As explained below, the Contractor has presented clear and convincing evidence that it would have taken the same actions in the absence of the protected disclosures. The record indicates that, over the course of her tenure with the Network Manager, the Employee had a number of conflicts with subordinates, co-workers, and managers, in which the Employee made inflammatory and disrespectful statements to, and about, others. Although the Employee states that her conflicts were limited to those about whom she made protected disclosures, the record indicates that her conflicts were not so limited and instead involved a variety of people and a variety of topics. Some of them are discussed below.

B. The Employee's Conflicts with Subordinates, Co-Workers, and her Managers

1. The Period 1999 to 2000

In August 1999, the Employee objected to her supervisor's reversal of her decision to rescind a subordinate's computer access. The Employee e-mailed the Network Manager that she "was not happy" with his actions and that their impact "calls into question the true nature of our work relationship." She continued that they "are typical of your tendency to act on the word of those with less experience and other agendas." Ex. 11 at 2. As an example of the impact of his actions, she referred to another team leader as making "demeaning, condescending, off-handed remarks" about the Employee "usually in the presence of others." *Id.*

In August 2000, another subordinate complained to the Employee and the IM department head about the way she treated him. The subordinate cited the following e-mail exchange, which began after he recommended a software product.

> [The Employee:] ... I find it very disappointing and disconcerting in what I perceive as your unwillingness to be flexible when there is something you want or don't want to do. I find this to be just one of a few negatives about your tenure here. This situation is an example, the other is/was your problem with . . . your desktop. Being paged when your systems go down is another example.
>
> Another negative is your tendency to be highly opinionated on just about every subject. I'm not going to discard software or computers based on the opinion of someone who may not be around in a few months. . . .
>
> [The Subordinate:] . . . I was doing nothing more than what you asked - further investigating the problem at hand . . . . I would have just as agreeably dropped the topic if that is what you had asked me to do.
>
> [The Employee]: I guess you couldn't figure out that my last e-mail was rhetorical in nature. It would have been much better if you simply took it under advisement.
>
> . . .
>
> I think you need to realize that I am your supervisor and your customer – - you can't OFFEND and won't be offending me.

Ex. 13. The subordinate e-mailed the Employee and the IM department head, stating that he would be leaving and referred to the e-mail exchange as "why." 3/ *Id.* After the Employee received

---

3/ In a subsequent e-mail to his employer, the subordinate explained his feelings:

> Unfortunately, after months of shrugging off statements that also appeared to be rude, I reached the point where I just wasn't going to take it any more, so I gave notice. . . .
>
> . . . [She] has some issues with how she presents criticisms/comments/etc. that unfortunately offend people who like myself don't just confront her for fear of offending her/hurting her feelings. To that end, if I were to have stayed, I would have had to expect grating presentation of comments to continue. Although I like

(continued...)

the subordinate's complaint, she limited his computer access. Ex. 14. When the Network Manager overrode that decision, the Employee complained to the HR department head about the "Situation In Information Management:"

> [N]either [the Network Manager or the IM department head] has any authority to tell me when or how to handle an irate or exiting employee's computer access.

Ex. P-21. The Employee further stated that people in the IM department did not like her, specifically another team leader and three of the team leader's subordinates. Ex. P-24. 4/ Over a week after her manager's instruction to restore the subordinate's access, the Employee's manager e-mailed her, stating that the subordinate still did not have access to certain systems and that the subordinate needed the access for tasks the manager had assigned to him. The Employee responded by objecting to the manager's assignment of tasks to her subordinate and stated that "it is my call about access to computers for those under my supervision." Ex. P-324.

3/(...continued)

> [her] as a person (and I do), working for her has been difficult at times, and I think that [the Network Manager] needed to know that also. I truly hope my outburst won't hurt her career, or get her in any trouble. I just needed to end the series of what I perceived as snide verbal criticisms.

Ex. 14.

4/ The Employee offered the following example:

> I corrected [one of the team leader's subordinates], who is also on my First Responder team, about an action he took during the last Tornado warning. During last week's Safety Meeting, he made a snide remark in reference to that correction.

Ex. P-24.

In September 2000, when the Employee learned from a third party that the IM department head had extended the subordinate's contract, she objected to her managers:

> Gentlemen:
>
> While this is news to me, although not unexpected, I have a new employee I am expecting on October 16, 2000. [The subordinate] will have to be out of the cubicle he now occupies, leaving all computer hardware in place, by that date.

Ex. 15. The Employee then forwarded her e-mail to the HR department head, stating that her managers' failure to tell her of the extension indicated that they "don't have to respond to me, as a manager or supervisor or anything else" and the "two of them have been 'sneaking' around for the past few weeks orchestrating this extension" and "didn't even have the decency to show me the courtesy of telling me that I was no longer to sign his timesheet." *Id.* The Network Manager responded that the subordinate would not be using his current cubicle and equipment, and he referred to the IM department head's inquiry about different equipment. *Id.* The Employee responded to him and the IM department head:

> I figured as much, but neither of you could be honest about even that. It was merely a safety walk through and equipment we didn't want to get lost.
>
> I'd prefer not to hear anything about Clinton, or any other politicians from either of you. You got nothing on them.
>
> I hope [the subordinate] is naive enough, not to pick up any of these traits.

Id. The IM department head forwarded the message to the HR department head, stating:

> Thought you might like to see this. I thought we were making progress with [the Employee] but old habits die hard. I will address her disrespect, but not through EMAIL. She is again making an assumption about something that is not true. Frankly I'm getting tired of this.

Id. In his notes of an October 4, 2000 conversation with the Employee, the IM department head stated that he told the Employee

that her e-mail was inaccurate. Ex. 16; *see also* Tr. at 331-332. His notes also stated that he objected to the e-mail's "inflammatory" tone and stated that this had happened in the past. Ex. 16.

In his notes of a November 6, 2000 meeting, the IM department head stated that the Employee (i) objected to her managers' evaluation of her on a Meyers-Briggs survey, and (ii) complained about the Network Manager. Ex. 16; *see also* Tr. at 332-334. The notes state that the IM department head told her that he attributed their differences to (i) her constant questioning of authority, (ii) her view of her own authority as higher than it is, and (iii) her inconsistent work habits and attendance - different hours. *Id.*

2. The First Six Months of 2001

From November 2000 to January 2001, the Employee, the Network Manager, and the HR department head spent considerable time addressing her objections to the process for, and the content of, her November 2000 performance appraisal. As a result of those discussions, the Employee's rating was raised. One of the Employee's objections concerned the Network Manager's negative view of some e-mails that she had written, see Ex. P-410-424.

In January 2001, the Employee e-mailed the HR department, stating that she did not want to work for the Network Manager:

> You witnessed the ultimate reason I don't wish to work for [the Network Manager] in this meeting today. In a nutshell, I have screamed and hollered, ranted and raved to convince him we need what security we have and then he sits there and takes credit for my work, with no acknowledgment to me at all.

Ex. 19. The HR department head e-mailed the Employee, stating that he told the employee relations department head that he wanted a beneficial resolution of her concern. *Id.* Shortly thereafter, the IM department head and the employee relations department head discussed options for reassigning the Employee. Ex. P-64.

In the beginning of February 2001, the Employee objected to the IM department head's decision to terminate the contract for an employee on another team leader's staff. The Employee stated that the contract for a different member of that staff should be terminated:

> After thinking about this over the weekend, I'm going to insist that it's [the second staff member] whose contract should be terminated.
>
> You know the reason why, but if not, I refresh your memory. When I asked him to work on Internet monitoring, he devised a routine to usurp the monitoring, passed it around, then lied about it - he told you that it was a routine. For this reason, he is damaged goods, as far as I'm concerned, i.e., not enough integrity to work on the security of this site.
>
> Of course, it's just my opinion, but if this were my IM Dept. I would not be protecting those who demonstrate a lack of integrity over someone who has not. . . .

Ex. 22. The IM department head replied, "I appreciate your input, but my decision stands." The Employee responded:

> Fine, but I don't want [the second staff member] working on any aspect of this site's security, including internet monitoring.

Id. This message somehow arrived in the second staff member's inbox, and he showed it to his team leader. The team leader in turn wrote to the IM department head, defending the second staff member. On February 6, 2001, when the IM department head expressed his concern about the e-mail to the Employee, she stated that someone must have tampered with her machine and redirected the e-mail to the second staff member. Ex. 23. On the same date, the Employee sent a memorandum to the employee relations department head, explaining why she believed that someone had tampered with her computer. Ex. 24. Ten days later, she followed up with a second memorandum. Ex. 27.

On February 13, 2001, in the early afternoon, the Network Manager e-mailed the Employee, asking her to prepare a plan to train a specified staff member as a backup for the firewall and intrusion detection. Ex. 25. The Network Manager stated that he would like to discuss the matter at the next morning's cyber security meeting and to have a plan ready the day after that. *Id.* The Employee missed the meeting; in the late morning she e-mailed the Network Manager, objecting to the short notice:

> Mandatory, last minutes meetings, arranged especially in an environment when people are on various schedules, and are seen

> and taken as ways of excluding differenting, though more experienced opinions. Especially, since we all have pagers. As I was assisting another Fernald employee until well after 9 P.M. last night, something I didn't have to do, but I'm already four or five hours into this workday.
>
> . . .
>
> This autocratic style of management doesn't work for most intelligent experienced people - it certainly doesn't work for me - I'm working on several solutions to this problem, so please bear with me.

Ex. 26.

On March 27, 2001, the IM department head issued written reminders to the Network Manager and the Employee. The written reminder to the Network Manager cited "using poor judgment in difficult situations" and his "communication style." Ex. 79. The written reminder to the Employee cited "failing to maintain a regular work schedule, failing to follow management direction, and communicating unprofessionally with your management and peers." Ex. 28.

Later that day, the Employee e-mailed her supervisors that she would "no longer be available evenings or weekends." Ex. 30. In an April 17, 2001 memorandum to the HR department head, she confirmed that she had told her supervisors that she would "not be available after hours or on weekends." Ex. 32. The next day, the employee relations department head met with the IM department to consider options for moving the Employee to a position that did not require on-call duties. On April 20, 2001, the Employee e-mailed the employee relations department head, citing health and religious reasons as bases for relieving her of after hours duties.

On April 26, 2001, the employee relations department head responded to the Employee's April 20, 2001 e-mail. Ex. 36. The employee relations department head stated that the Employee's job required that she be available for after hours work and that this was not a new requirement. She stated that the Contractor had no record of any health issues that would preclude the Employee from working after hours and that the Employee could "swap out" her responsibilities during her Sabbath. The Employee did not accept that solution, and on May 1 and May 2, the IM department head and the employee relations department head considered alternative assignments within IM. Exs. 38, 39. They discussed the

possibility of moving the Employee from the Network Manager to the Programmer Manager to do Oracle database work, which would not require after hours work. At some point at the end of April or early May, the Employee's subordinates were reassigned. Ex. P-114-116.

On May 3, 2001, the Employee presented a VSP application to her supervisor, who signed it that day. Ex. 56 at 4. Under the terms of the VSP, an employee had to separate by June 29, 2001.

On May 22, 2001, the Employee complained to her managers that she was being required to suggest her replacement. The Employee stated:

> For various reasons, technical and otherwise, which I will not specify here, there is no one currently working in the Systems Administration or Information Management who is qualified to take over responsibility for Internet Security at Fernald. . . .
>
> It is my plan to get the Intrusion Detection, etc. up and running before my departure, if I depart.

Ex. 41. The Network Manager forwarded the e-mail to HR, stating:

> This is the results of a very brief (1 min) meeting that I had with [the Employee] this afternoon. . . . I asked her to identify who would take over the work and to have that person involved in the next implementation of elron (internet monitoring). She said she would have to think about it. This is the same request I have made of her in the past and received the same response.

Id. The Network Manager and the Employee then had the following e-mail exchange:

> [Network Manager]: I would like for you to start training [a specified employee] in Elron. . . . I am not aware of any pressing task that would prevent either of you from starting the training this afternoon. I would like the training completed in two weeks . . . .
>
> After you have completed the training of [the employee] in Elron, I would like for you to begin training of [two other

> employees] in how to maintain and update the firewall. . . . I would like their training completed by June 29.
>
> [Employee]: As neither you or [the IM department head] have ever had or shown any appreciation for my experience, it is not unexpected that you would believe that I can transfer twenty-four years experience to novices in less than two months.
>
> . . .
>
> Do we have any training dollars for this effort?
>
> [Network Manager]: Are you saving (sic) can not or will not train these individuals?
>
> [Employee]: Do you think you can allow me to be the Security Project Leader? You tend to manage (as opposed to lead) where you are not needed.
>
> I am saying that beyond reading articles, etc. and pulling out and trying to use buzzwords, you lack the technical ability to know what you are asking and therefore are making an unreasonable request.

Ex. 42. The Employee then met with the IM department head and objected to the Network Manager's management style, specifically his instruction to train the employees. Ex. 44.

On May 23, 2001, the Employee objected to a co-worker's inquiry to the Network Manager on another project. Ex. 43. The Employee e-mailed her supervisors: "Who is running this project? You, [the co-worker], or me?" *Id.*

On May 24, 2001, the Employee e-mailed the Network Manager, stating that he had not answered her May 22 inquiry about

> "how to proceed, i.e., how do I supply the background these people need to understand the training so that they are effective?"

Ex 46. He replied:

> I would like for you to train backup personnel for network monitoring and the firewalls irregardless whether you take the

> **[VSP] or not. We have been discussing this for over two years.**
>
> **I would like for you to train these personnel in how to operate the systems. I would like for the backup personnel to be able to operate the software and answer questions in your absence. We do not normally hire individuals who have prior knowledge of the applications and in the current downsizing environment we do not plan on hiring people with specialized skills. What this means is that we have to take individuals with other skills and transfer knowledge from our senior personnel. You are correct in that you can not transfer twenty five years of knowledge to these individuals. What I am asking you to do is transfer the knowledge that you have in running these two specific applications.**
>
> **. . .**
>
> **If any one of the individuals needs [access privileges or passwords] please set up the individuals and document it. The objective is to have each one of the individuals fully capable of maintaining the application. The individuals running the firewall need not be expected to be Solaris experts.**
>
> **If you need additional help from [other named employees] to provide training in Solaris or NT I am sure they will oblige.**
>
> **We will not be sending [the individuals designated for training] to formal training outside of the company.**
>
> **The individuals named are aware that they do not possess all the skills required to run these applications but all of them feel that you have the ability to fill in the blanks. I would like for [a named employee] to be trained in Elron first with the firewall training to begin when [another named employee] finishes his portal work.**
>
> **Thanks for your help.**

Ex. 46 at 2. The Employee responded that she did have backups: for the firewall she cited an individual who had moved to another project; for internet monitoring she cited another individual although she indicated that that person could not analyze reports. Ex. 46 at 1. The Employee then questioned whether the Network Manager had identified the best individuals to be trained.

> For the most part, there is more to these applications than just running them and that is where their backgrounds come into play. I have been very busy especially today but I plan to sit down and decide what background each of these people need prior to what training I give them. If [named employees] or whomever wants to teach those background courses they can. However, I don't think all of that can happen by the end of June. Somehow the people you identify to back me up have to get the background or they will not understand what I'm trying to explain to them.

Id. On May 24, 2001, the employee to be trained in internet monitoring e-mailed the Network Manager, stating that the Employee had "laid out her plans for training me:"

> I spoke with [the Employee] yesterday afternoon and she laid out her plans for training me. She said she would give me my marching orders today so I could get started. She is going to give me a list of what she considers to be baseline knowledge requirements for installing and administering Elron. She made it clear that she expects me to acquire the knowledge in any areas in which I may be lacking. She said she will not bring me up to speed and that it is my responsibility to get myself up to speed. I may misquote her here, but I believe that she stated that if I don't demonstrate the baseline knowledge required, she is going to recommend that I not be trained. I told her that was fine with me.

Ex. 45. The Network Manager forwarded this e-mail to the IM department head, who forwarded it to HR, stating "Here's the latest on our attempt to get [the Employee] to train her backups. I'll have the Network Manager talk to [the named employee]."

On May 31, 2001, the Contractor issued the decision making leave to the Employee. Ex. 48. The document cited the Employee's failure to have backups and her "unacceptable communications style in recent e-mails" to the Network Manager.

In the morning of June 1, 2001, a meeting to followup on the decision making leave was convened. Ex. 51. The senior security official discussed the need for backups. The Network Manager presented the Employee with a transition schedule, changing the individuals to be trained on the firewall. The Employee questioned the suitability of those individuals.

On June 11, 2001, the Employee e-mailed the Network Manager, complaining about another team leader and one of her staff. She questioned the integrity of the staff member and then stated:

> I am dismayed that I can NEVER ask [the team leader and staff member] generally for anything and have them comply.

Ex. 53. The Network Manager responded that the Employee's comments about the two individuals were "totally inappropriate, uncalled for and inaccurate." *Id.* At the hearing, the team leader described the Employee's relationship with her and some other employees as "confrontational." Tr. at 668-674.

On June 25, 2001, the Employee withdrew her VSP application. Ex. 56. On the same day, the IM department head transferred her to the Programmer Manager. Ex. 57.

3. The Summer of 2001

During the summer of 2001, the Employee continued to have conflicts with the network division. *See* Exs. 61-66; Ex. P-229-246. The network division requested that she turn in various materials associated with her former responsibilities; she maintained that the Network Manager had already removed some of these materials from her file cabinet. In addition, when a member of the network division staff sought access to information from a software provider, she refused the provider's request that she authorize such access, citing the ongoing investigation of her disclosures. Although these specific matters were resolved, the Employee continued to have conflicts with the network division staff over the next two years. *See, e.g.*, Ex. P-246-265.

C. Findings of Fact and Analysis

As mentioned above, the Contractor has the burden of establishing, by clear and convincing evidence, that it would have taken the same actions in the absence of the protected activity. The Contractor has provided extensive documentary and testimonial support for the actions. Although the Employee attributes the actions to her protected activity, the Employee has not cast doubt on the Contractor's strong showing. I find that the Employee's testimony was not reliable. In some instances, her version of events conflicted with her contemporaneous e-mails of those events; in other instances, her testimony itself was contradictory. In still other instances, her version of events did not justify her conduct,

which included failure to take direction from her managers and communicate in a professional manner. Accordingly, after considering the entire record - all of the documents submitted, and testimony presented, in this case - I find that the Contractor has met its burden.

1. Whether there were non-retaliatory reasons for the actions

a. The March 27, 2001 written reminder

The written reminder to the Employee cited "failing to maintain a regular work schedule, failing to follow management direction, and communicating unprofessionally with your management and peers." Ex. 28.

The Employee agrees that she did not maintain a regular work schedule, but she contends that her schedule was nonetheless proper. Tr. at 870-874, 1060-63. She testified that staff members sometimes had to work after hours, either on a scheduled project or in response to an unexpected problem. Tr. at 873-874. She testified that the staff member could adjust his schedule so long as he notified his supervisor in advance. Tr. at 870-872, 1060-1062. *See also* Ex. 20. The Employee maintained that she always notified her supervisor, generally by voice mail or e-mail. Tr. at 871-875, 1062-1063. Finally, she testified that her manager's approval of her time sheet indicated approval of her schedule. Tr. at 871-872.

As an initial matter, the record supports the Employee's position that IM staff sometimes had to work after hours, that employees sometimes offset that time against their regularly scheduled hours, and that they were required to notify their supervisor if they wanted such an offset. The record also indicates, however, that the Employee abused this flexibility.

Although the Employee's testimony gives the impression that her managers never objected to her late arrivals, she never directly so testified. Instead, she testified that her managers approved her time sheets. The record indicates that, prior to the written reminder, the Employee's managers had objected to her late arrivals. The IM department head's November 6, 2000 daybook entry, and his testimony, indicates that he told the Employee of her manager's objection to her "inconsistent work schedule," Ex. 16;

Tr. at 332. In another context, the Employee confirmed the November 6, 2000 meeting, although she did not address this statement.

Moreover, the record indicates that the Employee's late arrivals did not always involve required work or notice to her manager. Although the Employee has a record of her e-mails, 5/ the Employee did not submit any documents to support her position that, prior to the written reminder, her late arrivals followed notification to her manager of necessary after hours work. The only evidence in the record about a late arrival is her February 13, 2001 e-mail, which indicates that her after hours work was discretionary and that she did not notify her supervisor of the work or her expected late arrival. Ex. 25. Finally, even if she notified her manager of an expected late arrival, her testimony indicated that she did not tell him when she expected to arrive. The Employee testified that when she scheduled after hours work, she gave general notice to users that the system would be down and that this general notice was notice to her supervisor. Tr. at 872-874. She further testified that when she had unscheduled after hours work, she notified her supervisor that she would be in late the next day and "usually" gave him "some idea of what time" she would arrive but "kind of backed off of that." *Id.* at 873. Accordingly, based on the entire record, I conclude that the Employee did not maintain a proper work schedule.

The written reminder also cited failing to follow management direction: repeatedly questioning her manager's decisions, disregarding his authority, being argumentative and insubordinate and, in some cases, disrupting the work and the morale of others. Ex. 28 at 2. The Employee attributes her conflicts with her managers to the fact that she made disclosures about personnel in the IM department, including her managers. The evidence is contrary to her claim.

The Employee failed to follow management direction. Examples are (i) her stated opinion that her supervisors did not have the authority to reverse her decision limiting a subordinate's computer access, Ex. 13, and (ii) her failure to follow management direction to restore the subordinate's access. Ex. 13; Ex. P-324. As discussed in subpart b below, a third example is her failure to comply with her managers' requests that she establish and maintain

---

5/ Ex. 77; Tr. at 1256-58.

backups. The fact that the Employee made disclosures concerning her management did not remove her from their supervision or justify insubordinate conduct.

Finally, the written reminder cited the Employee's communication style as "unprofessional" and creating "a tension filled atmosphere where teamwork is difficult to achieve." Although the Employee testified that, prior to the written reminder, no one had ever complained about her e-mails, see Tr. at 891, she acknowledged at least one instance in which she was cautioned about her e-mails. *See, e.g.,* Tr. at 855-859 (Ex. P-410-424). In any event, the Employee denies that her communication was unprofessional. Again, the evidence is contrary to her claim.

The Employee's communication style was unprofessional and created a tension filled atmosphere. The Employee's e-mails would springboard from a given issue into an attack on a person. The August 9, 2000 e-mails to a subordinate are an example. Ex. 13. From her disagreement with the subordinate's recommendation on a computer-related matter, she launched into a discussion of the "negatives" of his tenure with the Contractor, prompting him to complain about the message to the IM department head. Other co-workers complained about her conduct. *See, e.g.,* Tr. at 668-674; Ex. 17. Accordingly, the record supports the written reminder's statement that the Employee's communication style was unprofessional and created a tension filled atmosphere.

b. The May 31, 2001 decision making leave

The decision making leave cited the Employee's failure to establish and maintain backups. The Employee maintains that she had backups and that she was in the process of complying with the Network Manager's May 24, 2001 request to train others.

The decision making leave accurately cites the failure to have backups. Despite her assertion that she had backups, the Employee's May 24, 2001 e-mail to her managers indicated that she did not have backups for internet monitoring and the firewall: the individual identified for internet monitoring could not analyze reports, and the individual identified for the firewall had left. Ex. 46. *See also* Tr. at 1101-1110 (inadequacy of another employee as firewall backup). The Employee's protests about the difficulty of training anyone in IM for internet monitoring and the firewall confirm the lack of trained personnel. Ex. 46. The Employee's assertion that she was in the process of complying with her

manager's May 24, 2001 request, even if correct, does not change the fact that she did not have backups and that she might not have them by the time of her departure. 6/ Furthermore, her e-mails indicate that the Employee failed to follow specific management direction and improperly tried to establish preconditions before she would follow specific direction.

The decision making leave also cited the Employee's "unacceptable communications style" in recent e-mails to the Network Manager. The Employee denies that these e-mails had an unacceptable communication style.

The Employee's e-mails to the Network Manager had an "unacceptable communications style." Her May 23, 2001 statement that "You tend to manage (as opposed to lead) where you are not needed" is an example. Ex. 42. Her statement that "beyond reading articles, etc. and pulling out and trying to use buzzwords, you lack the technical ability to know what you are asking and therefore are making an unreasonable request" is another example. *Id.* Her May 24, 2001 statement "Who is running this project? You, [a co-worker] or me?" is a third example. Ex. 43. Accordingly, the decision making leave correctly cited recent e-mails to her manager as having an "unacceptable communications style."

c. The job transfer

The job transfer cited the Employee's withdrawal of her VSP application, the training of individuals to take her place, and the need for the Employee's skills in the Programmer Manager's area. Ex. 57. The Employee argues that other IM employees who rescinded their VSP application were able to stay in the same jobs.

The Contractor had strong reasons for the transfer. The facts recited in the transfer letter are accurate - there were individuals trained to take the Employee's place and the Programmer Manager had a need for the Employee's skills.

6/ As an example, on May 24, 2001, the individual to be trained for internet monitoring e-mailed the Network Manager that the Employee had "laid out her plans for training me;" that he needed to acquire certain background information on his own or she would "recommend that I not be trained." Ex. 46. *See also* Ex. 44 (Employee's objection to individual designated for training on the firewall).

Moreover, the record indicates that the job transfer was largely the result of the Employee's ongoing conflict with the Network Manager, including her repeated statements that she did not want to report to him, and her stated refusal to work after hours. As discussed earlier, the IM department head had begun considering alternative assignments in early 2001, *see, e.g.,* Exs. 19, P-64, and the Employee's April 2001 refusal to work after hours prompted the employee relations department head to conclude that she should be moved to a job that did not require her to be on call, Ex. P-108, 110; *see also* Ex. P-97, P-100, P-113 (discussions about transferring the Employee). Accordingly, I find that the Contractor would have transferred her to a different position in the absence of the protected disclosure and that the designated position accommodated both the Employee's refusal to be on call and her desire not to work with the Network Manager. Accordingly, the record amply supports the Contractor's position that it had strong, non-retaliatory reasons for transferring the Employee.

2. Whether the Contractor Would Haven Taken the Same Actions in the Absence of the Protected Activity

The Contractor has also demonstrated, by clear and convincing evidence, that it would taken the same actions in the absence of the protected disclosures. As explained above, the Contractor has demonstrated that it had strong reasons for the two disciplinary actions. The Employee's failure to follow a proper work schedule, her refusal to accept her managers' authority and follow their direction, her harsh style of communication, her refusal to be on-call, and her failure to train backups for the security systems are inconsistent with a productive work environment. Moreover, the Contractor has submitted evidence of disciplinary actions involving other employees, including one against the Network Manager. Ex. 79. The actions cover a variety of behavior including tardiness, absences, and communication style. Although the Employee maintains that any inappropriate conduct on her part is attributable to her disclosures, this argument is not persuasive. First, the inappropriate conduct extended to unrelated matters, such as the August 2000 situation with a subordinate. More importantly, employee disclosures do not insulate the employee from the consequences of unacceptable behavior. As for the job transfer, the Employee's repeated objection to reporting to the Network Manager and her refusal to be on-call necessitated the transfer. Accordingly, the evidence is clear and convincing that the contractor would have taken the same actions in the absence of the protected disclosures.

IV. The July 2003 Involuntary Separation

A. Background

The Employee reported to the Programmer Manager from June 25, 2001, the date of her transfer, until her involuntary separation on July 7, 2003. The Employee got along better with the Programmer Manager and her staff, although there were specific instances in which others objected to her behavior as "inappropriate" or "harsh." *See, e.g.*, Tr. at 1155 (a co-worker) & Tr. 1233-1234 (the Employee); Tr. at 754-758, 781 (the Programmer Manager); Ex. 72. Some of these instances are discussed below, in connection with the Employee's challenges to her separation.

On April 24, 2003, the Contractor announced a planned reduction of 77 positions. Ex. 74. The Contractor arrived at that number through its Management Planning System. Ex. 4. The Contractor used that system to determine the number of employees that it needed in various job classifications.

For job classifications in which it had excess employees, the Contractor used a standardized process for identifying which employees would be separated. Ex. 5. The Contractor established "core skills" that were applicable to all employees. They were "initiative," "communication skills," "quality of work," and "work habits." The Contractor established "job-specific essential skills" for each job classification or sub-classification. The Contractor used a standard form that provided a rating scale from "1" to "5" (with "1" being the highest). The form also contained two additional blocks: one for "Education/Certification" and one for "Skills Transferability." These two blocks provided for the identification of relevant material and comments, but did not provide for a rating.

A number of teams and offices participated in the ISP process. Ex. 5. The HR department was responsible for coordinating the process. A senior management team, consisting of the highest level management, oversaw the process. For each job classification, a functional job review team determined whether sub-classifications were appropriate and established the job-specific essential skills and weighting factors. Supervisors, without knowing the weighting factors, evaluated their employees against the criteria. The functional job review team then reviewed the evaluations and forwarded them to the HR department, which calculated the employee ratings and prepared a ranking list. The functional job review

team and then the senior management team reviewed the evaluation and ranking forms.

The IM department managers and staff fell into two job classifications: Information Systems Manager (hereinafter IM managers) and Information Systems Representative (hereinafter IM staff members). Ex. 6. The IM department had five managers and 29 staff members. The Contractor determined that it needed three IM managers and 21 staff, giving the IM department an excess of two managers and eight staff members.

The functional job review team for the staff members - the information systems representatives - consisted of the HR department head and the Administration head. Ex. 7. Those two officials identified two sub-classifications in the "information systems representatives" classification: a network group and a programmer group. With input from a former IM manager, the team developed job-specific essential skills for each group. The team also met with the IM division managers to identify the number of employees to be retained in each group. The managers determined that they needed a minimum of six employees in the network group. Since there were eight employees in that group, the managers determined that two employees would be separated from the network group, leaving six employees to be separated from 21 person programmer group.

Each IM division manager evaluated the employees under his or her supervision. Ex. 7. The two network managers consulted each other to assure the consistency of the ratings for the employees in their group; the two programmer managers did the same for the employees in the programmer group. The IM department head and the functional job review team reviewed the evaluations (which used a scale of 1 to 5 with 1 being the highest), and for each group the HR department calculated the employee ratings and ranking, reversing the scale so that 5 was the highest score.

For the network group, the ratings ranged from 4.75 to 1.95. Ex. P-499. The six retained employees had ratings from 4.75 to 3.00; the two separated employees had ratings of 2.50 and 1.95.

For the programmer group, the ratings ranged from 4.55 to 2.05. Ex. P-529 to P-531. The top 15 ratings ranged from 4.55 to 3.10. The bottom six ratings were 3.05, 3.00, 2.95, 2.75, 2.55, and 2.05. The Employee's rating was 2.75. The Contractor separated five of

those employees; the employee with the 2.95 was separated three months later, in October 2003. 7/

B. Findings of Fact and Analysis

At the outset, it is clear that the Contractor's decision to conduct the June 2003 ISP had nothing to do with the Employee. Rather, it was one of a series of voluntary and involuntary separation programs associated with the upcoming site closure. Moreover, the Contractor's determination that it had an excess number of employees in the IM department had nothing to do with the Employee. Finally, the Contractor's decision to create two groups for IM staff members had nothing to do with the Employee.

The Employee has not challenged any of the foregoing. The Employee's main argument is that the Contractor should have evaluated her according to the network group criteria. In the alternative, the Employee challenges her rating in the programmer group as too low.

1. Whether the Employee Belonged in the Programmer Group

In support of her position that she should have been evaluated according to the network group criteria, the Employee cites notes of manager discussions recognizing that some employees had skills in both the network and the programmer area and the "skills transferability" column on the evaluation form.

The recognition of diverse skills, either in management discussions or on the evaluation form, did not affect whether an employee was evaluated in the network group or the programmer group. The network group consisted of the staff members in the two network divisions; the programmer group consisted of the staff members in the two programmer division. Each division manager evaluated the staff members in his division. Consistent with this, the Employee, who was in a programmer division, was in the programmer group and evaluated by her manager. Accordingly, the Contractor's treatment of the Employee was consistent with its treatment of the other IM employees.

7/ The Contractor contemporaneously documented that the person with the 2.95 rating was being "skipped" because he had unique knowledge on a project that would be completed in October 2003.

The Employee further maintains that, even if she properly belonged in the programmer group under the ISP structure, she should not have been included in that group. The Employee reasons that she would not have been in that group if she had not engaged in protected activity. She points to her June 2001 job transfer, which she maintains was the result of protected activity.

As explained above, the Contractor has demonstrated, by clear and convincing evidence, that it would have transferred the Employee in the absence of the protected activity. Accordingly, there is no merit to this contention.

2. Whether the Employee Deserved a Higher Rating in the Programmer Group

The Programmer Manager testified in detail about why she assigned the ratings that she did. She stated that she evaluated the employees against the rating factors and relative to each other. She discussed her comments, and she gave examples. The Programmer Manager's testimony was highly credible. Based on her demeanor and the even-handed explanations that she gave, I believe that she was testifying honestly and candidly. Moreover, many of her comments and examples were corroborated by documents, including e-mails from the Employee and the testimony of others.

Although the Employee generally maintains that her rating was too low, the Employee did not specify what she thought her rating should have been or who she believes should have been separated in her place. Instead, the Employee objected to the rating in two ways.

First, she argued that the rating was inconsistent with her November 2002 performance appraisal. She sought to draw analogies between the criteria and rating scales for the performance appraisal and those for the ISP rating.

The November 2002 performance appraisal does not cast doubt on the accuracy of the ISP rating. The two are simply not analogous. The first rated performance during the last half of 2002; the second considered skills based on criteria and rating scales that were not coextensive with the performance appraisal.

Second, the Employee objected to the written comments on her evaluation. She viewed them as inaccurate or as understatements of her skills.

As an initial matter, I find that the written comments were not intended to be an all inclusive statement of the basis for the rating. They were a relatively small block on the evaluation form. Accordingly, arguments that the written comments do not reflect the full range of an employee's skills do not themselves cast doubt on the rating.

The Employee objected to the written comment for "initiative." 8/ The Programmer Manager rated the Employee a "4" ("occasionally fails to meet some standards and expectations"), with the following comment:

> Has not taken initiative to learn software development tools or our data/work processes that we support. This limits work that can be assigned from the remediation systems group.

Ex. P-605. At the hearing, the Programmer Manager cited the leachate system and the meteorological data system as examples. 9/

8/ Initiative was defined as follows:

> The extent to which the employee takes independent action, suggests work improvements and is able to achieve project requirements consistent with the current mission: Makes active attempts to influence events to achieve goals; self-starting rather than waiting to be told what to do; takes action to achieve goals beyond what is required; constantly looks for incremental improvements in work processes and results.

Ex. P-605.

9/ The Programmer Manager stated:

> When someone is introduced to a new area, you just don't throw the whole thing at them. I give her the first part, and then you expect that to take over.
>
> And the leachate system, for example, that could have been just do it, take the whole thing. Just do it. And that didn't happen. So we had some of those cases where things aren't being taken over.

Tr. at 799.

The Employee has not cast doubt on the rating. Although the Employee cited learning Winbatch, the Programmer Manager testified that the Employee learned that as the result of an assignment, not on her own initiative. Tr. at 820. Similarly, although the Employee cites learning JAVA and volunteering to use that skill for the portal project, that initiative did not involve remediation systems, the work done in her division. Tr. at 764. Finally, the Employee's statement that she had a lot of free time, Tr. at 961-962, generally supports the Programmer Manager's statement that she did not take the initiative to learn the tools and data/work processes that the group supported.

The second core skill was "communication skills." 10/ The Programmer Manager rated the Employee as a "4" ("occasionally fails to meet some standards and expectations), with the following comment:

> [The Employee's] statements that she is the best qualified in IM, the only one qualified to run it, her inflammatory emails and her questioning of others' competence and honesty make effective team work difficult. She does write and speak well.

Em. Ex. P-605. The Programmer Manager testified about the Employee's communication skills:

> [T]he way [the Employee] talked to people and worked with people, impacted our ability to do work well. It doesn't mean that she was mean or rude all the time.
>
> It means that there ... were cases in which she would be harsh. [She]'s very sensitive to anything other people would

---

10/Communication skills is defined as follows:

> The extent to which the employee communicates clearly and effectively and seeks to listen to and understand others: Expresses idea effectively in individual or team situations; adjusts language or terminology to the needs of the receivers uses proper grammar, organization and structure in written communications; listens to and acknowledges feelings, concerns, opinions, and ideas of others.

Em. P-605.

> say ... but not as sensitive to how other people would take harsh words.
>
> And assuming – questioning people's motives on some small things makes it difficult for those people to work. If you've been yelled at by someone at work, even once by someone, it impacts that.
>
> If someone speaks harshly to you in public, even if they're nice to you the rest of the time, that's just natural that people are going to have some problems with that.
>
> And I think it's just the core of the problems, is those kind of – that harshness, occasionally.

Tr. at 754-55. As an example, the Programmer Manager stated that one day she received a call from a first responder team member trying to get in touch with the Employee. When the Programmer Manager later asked the Employee if the team member had reached her, the Employee "yelled" at the Programmer Manager in front of others, stating "it wasn't any of [the Programmer Manager's] business." Tr. at 781. 11/ With respect to the Employee's

---

11/ The Employee apparently viewed the question as an affront to her authority on her first responders team. She later e-mailed the Programmer Manager:

> Apparently you were unable or unwilling to hear what I was trying to tell you regarding [the] phone call to you. As I see it, someone, whomever, called my boss and otherwise created a big uproar this morning, as if I am some kind of non-responsive, non-performing employee. Why? Because they wanted a thermometer. I didn't and don't appreciate it, especially when they weren't using or used to using the proper procedure.
>
> I also don't like or enjoy the middle-man arrangement of communication used too often here at Fernald. I'm used to taking care of issues myself.
>
> As with all my responsibilities over the last twenty-five years since becoming a professional employee, I have made arrangements for my absence, including First Responders, when necessary, such as during my recent 2-week vacation.
>
> Nice welcome home.

Ex. 72.

statement that she was the "only one qualified to run" the IM department, the Programmer Manager cited the Employee's November 19, 2002 letter to her, in which the Employee stated:

> I know who I am, what I have contributed, what I am capable of and where I am going. Only the envious and intimidated have tried and will try to deter me. Both they and I know who they are. Ultimately, I'm the one person in the department with the capabilities to run the whole operation, but I'm also the most under-valued.

Tr. at 755 (quoting Ex. 73). As for the e-mails, the Programmer Manager cited an incident in which the Employee did not want to give the network division access to her computer to install security software. Tr. at 756. The Programmer described the latter situation as follows:

> [I]t became a big thing, involved the management and HR and a lot of things. And really when you think about it, it was just, we need to install this on your computer like we installed on everybody's on the whole site's, you know? The president of the company, I assume got it. So that's what I mean.

Tr. at 758 (referring to Ex. 68 and 70). The Programmer Manager also cited a situation in which the Employee attributed her inability to access the Contractor's intranet to improper interference by others, but it turned out to be a technical glitch created by software that the Employee had installed on her computer. Tr. at 755-56; *see* Ex. 71.

The Employee's letter, her e-mails, and her testimony support the Programmer Manager's rating of her communication skills. Although the Employee testified that the purpose of her letter was to ask for additional work, Tr. at 977, the letter does not make any such request. Instead, it complains about the lack of promotion and

refers to "those who have repeatedly displayed a lack of integrity." If, as the Employee testified, her purpose was to ask for work, she did not communicate that purpose. The e-mails document other incidents, which turned routine matters into attacks on IM staff integrity and motives. Exs. 70, 71, 72. Finally, the Employee's striking indifference to how her communications are received by others supports the rating. The Employee testified:

> Q: Had [the Programmer Manager] ever counseled you on any e-mails that you wrote that she thought were improper?
>
> A: I don't know about improper. She didn't necessarily like a couple that I had written. But I felt like, number one, if I was – if in an e-mail I was complaining about somebody, the e-mail was not directed at them, okay? It was an attempt to address issues.
>
> Q: Did [the Programmer Manager] ever refer to any e-mails that you wrote as inflammatory?
>
> No, not that – use the word, inflammatory, no. I think one of them she said something about hostile, maybe. But I'm not sure I know what inflammatory means.
>
> My idea of inflammatory, to me that means how somebody else reacted to it. Not that any – I really can't control anybody else's reaction. Most people don't like to be criticized or corrected or anything.

Tr. at 977-78. Accordingly, the Employee has not cast doubt on the Programmer Manager's assessment of her communication skills.

The third core skill was "quality of work." 12/ The Programmer Manager rated the Employee as a "3" ("consistently meets all standards and expectations)" with the following comment:

> Does good job of developing working real time data loaders. She has performed all tasks directly requested but does not step up to take ownership.

Ex. P-605. The Programmer Manager testified:

> Again, you have to look at it related to the other people. In order to make a good system in the environment we're working in – we're not a big commercial software company.
>
> We work with our customers and deliver things they need, which sometimes they're not sure what they need. We have to be part of the process. So to be good you have to be able to deliver something useful to the people who are keeping us employed.
>
> And so you need that technical ability to make – which she did do, but then you also need to be able to go back and forth with customers. Go back and forth and make sure that this is the final, good product. That's the way we all work in both of the application areas.

Tr. at 761.

The Employee has not cast doubt on the accuracy of this rating. It is undisputed that, in general, the Employee did not work with the end-users, as did the other employees with higher ratings. Because the evaluation was based on demonstrated skills, the "why" is not relevant to the rating. Moreover, the Employee has not asserted that the Programmer Manager treated her differently than similarly situated employees in terms of allowing access to customers: she

---

12/ "Quality of work" was defined as:

> The extent to which the employee's work is accurate, well organized, thorough, and complete: Provides accurate information in an useable form to others that need to act on it; follows policies and procedures correctly; anticipates and prepares for problems that may interfere with desired outcomes.

attributed the difference to fact that the others had long tenures in the programmer division. Tr. at 980. Accordingly, the record indicates that the Programmer Manager properly rated the Employee as "consistently meets all standards and expectations."

The Programmer Group had three job-specific essential skills. 13/ The first skill was defined as follows:

> Skill and ability to write/code programming language with emphasis on Oracle, Power Builder, JAVA, JSP, ACCESS, and GIS.

Ex. P-606. The Programmer Manager rated the Employee a "3" with the following comment:

> Knows Oracle DBA, PL/SQL, SQL well. Learning JAVA. No Forms, Reports on Oracle. Knows WINBatch very well & Has NT/2000 Knowledge which is useful to developers.

The second essential skill was defined as follows:

> Ability to analyze and solve technical problems as demonstrated by application of skills via problem solving and high level of productivity.

Ex. P-606. The Programmer rated the Employee with a "3" with the following comment:

> Is very good at trouble shooting at a technical level, programming level but does not address data/functionality.

The third essential skill was defined as follows:

13/ Job-specific essential skills are defined generally as follows:

> The extent to which the employee's skills, knowledge and abilities apply to the required scope of work. Identify specific skills required to perform work in the job category that are essential to performing work to be done in the future. List most important skills (preferably 3-5).

Ex. P-606.

> Knowledge of user community data and functions to demonstrate application of skills and knowledge providing customer support.

Ex. P-606. The Programmer Manager rated the Employee as a "4" with the following comment:

> Does not know our customer work processes or database structure to a level sufficient to help in troubleshooting actual functionality or user issues to provide analysis for new user business needs.

Id.

The Employee has not cast doubt on the accuracy of the job-specific skills ratings. The Employee asserts that first comment understated her skills by stating that (i) she was "learning" when she had completed a course, (ii) she "has NT/2000 knowledge," and (iii) she did not know Oracle forms and reports. These asserted understatements are insignificant. The statement "learning JAVA" was accurate in that the Employee was just completing a course and had yet to demonstrate her knowledge on a project; the Programmer Manager testified that the division did not use NT/2000 knowledge or Oracle reports and, therefore, those skills would not have affected her rating. Tr. at 762-768. For the second skill, the Employee did not argue that she had a high level of productivity, and any such statement would be inconsistent with her statement about idle time. For the third skill, the Employee concedes its accuracy and has not alleged that the Programmer Manager treated her differently than similarly situated employees in terms of access to customers.

Aside from the core and job-specific skills, the Employee challenges the portion of the evaluation listing "Education/Certification." The Employee cites the use of an acronym, with two letters transposed, to describe "Microsoft Certified Systems Engineer," i.e., "MSCE" instead of "MCSE." The Employee also cites the Programmer Manager's failure to attach an e-mail message that she was completing a JAVA course.

These objections do not cast doubt on the accuracy of the Employee's rating. First, the "Education/Certification" was not part of the rating; even if it could serve as a tiebreaker, there was no tie to break in this case. *See, e.g.,* Ex. 9; Tr. at 92, 165. In any event, there is no evidence to indicate that the

transposed acronym would confuse anyone, and the evaluation clearly recognized her JAVA training in the skills comments. Accordingly, for the foregoing reasons, the omissions do not cast doubt on the rating.

The Employee argues that her "Skills Transferability" should have placed her in the group of retained employees. The Programmer Manager commented that the Employee knew "network and security related issues." The Employee maintains that her range of skills made her more valuable to the Contractor, and she notes that the other employees with a similar range of skills were not separated.

These objections do not cast doubt on the rating or the Employee's separation. The evaluation form did not provide for a rating for "Skills Transferability;" the "transferability" is to "other functional groups" and is intended to identify skills that might allow a person to be transferred to a job opening in another area. *See, e.g.,* Ex. 9; , Tr. at 42-45, 70, 73, 92-94.

Finally, the Employee submitted a matrix of the knowledge, skills, education, and certifications, of all the employees in both groups; for hers, she added information that was not on her evaluation form. Ex. P-617; Tr. at 1234-1235. Based on this chart, she concludes that she should have been retained.

As indicated above, the Contractor did not evaluate people according to whatever knowledge they might have. Instead, the Contractor evaluated employees according to their demonstration of core skills and the essential job-specific skills for their job classification or sub-classification. I find that the Programmer Manager evaluated the Employee against the relevant specified criteria honestly and fairly, notwithstanding the Employee's objections. Accordingly, I have concluded that the Contractor would have taken the same action in the absence of the protected disclosure.

V. Conclusion

As indicated above, the Contractor had the burden of demonstrating, by clear and convincing evidence, that it would have taken the same action in the absence of the protected activity. As also indicated above, the Contractor met that burden. For that reason, the employee is not entitled to relief.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by S.R. Davis, OHA Case No. VBH-0083, is hereby denied.

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

Janet N. Freimuth
Hearing Officer
Office of Hearings and Appeals

Date: April 21, 2004

May 20, 2003

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Steven F. Collier

Date of Filing: July 1, 2002

Case Number: VBH-0084

This Decision involves a whistleblower complaint that Steven F. Collier filed under the Department of Energy's (DOE) Contractor Employee Protection Program. From December 1994 through February 2002, Mr. Collier was employed by Coleman Research Corporation (CRC), a subcontractor of Fluor Fernald, Inc. (FFI), at the DOE's Fernald, Ohio site. Mr. Collier alleges that CRC and FFI management retaliated against him for activity protected under the DOE Contractor Employee Protection Program.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

B. Procedural History

On March 26, 2002, Mr. Collier filed a complaint with the DOE's Fernald Environmental Management Project. The Fernald project forwarded the complaint to the DOE's Ohio Field Office (DOE/OFO). After accepting jurisdiction of the complaint, DOE/OFO referred the complaint to the DOE's Office of Hearings and Appeals (OHA) for a hearing without an investigation. Letter from Anthony C. Eitreim, Chief

Counsel, DOE/OFO, to George B. Breznay, Director, OHA (July 1, 2002). On July 2, 2002, the OHA Director appointed me as the hearing officer in this matter. I convened a hearing held at Cincinnati, Ohio, on September 26-27, 2002, which was continued by telephone on October 3, 2002. The OHA received post-hearing submissions from the parties and closed the record on October 22, 2002.

II. Analysis

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." 10 C.F.R. § 708.29. Accordingly, in the present case, if Mr. Collier establishes that a protected disclosure, participation, or refusal was a factor contributing to a decision to deny him training or to his termination, CRC and FFI must convince me that they would have taken the actions even if Mr. Collier had not engaged in any activity protected under Part 708.

After considering the record established in the investigation by the parties' submissions and the testimony presented at the hearing, for the reasons stated below I have assumed that all fourteen of the disclosures of safety concerns that Mr. Collier alleges he made between October 10, 2000, and February 7, 2002, constitute protected activity under Part 708. I have concluded that Mr. Colllier has met the burden of proving by a preponderance of the evidence that many of these disclosures contributed to his termination, and I have assumed, for analytical purposes, that nearly all of the remaining disclosures were contributing factors as well. However, I find that CRC has shown by clear and convincing evidence that it would have taken the same action absent Mr. Collier's protected disclosures.

A. Whether Mr. Collier Engaged in Activities Protected Under 10 C.F.R. § 708.5

Mr. Collier worked for CRC as a "Senior Operations Specialist," one of five employed at the Fernald site. With a background in nuclear safety, Mr. Collier was hired in December 1994 to review the conduct of operations at Fernald. His responsibilities included identifying and reporting operations or conditions that were not in compliance with the many statutes, regulations and policies that govern the activities conducted at Fernald. *See, e.g.*, Transcript of Hearing (Tr.) at 56-57.

Mr. Collier alleges that he engaged in fourteen discrete activities that are protected under Part 708. The Part 708 regulations states that the following conduct by an contractor employee is protected from reprisal by his employer:

(a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--

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

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

(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or

(b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or

(c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --

(1) Constitute a violation of a federal health or safety law; or

(2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

Mr. Collier alleges that he made fourteen disclosures between October 10, 2000, and February 7, 2002, that meet the criteria of the above regulation. Although he states that most of the disclosures related to subsections (a)(1), (a)(2), and (a)(3) of section 708.5, a few related to only one or two of those subsections. *See* Complainant's "Summary Table of Details of Protected Activities" (submitted as an attachment to his August 21, 2002 cover letter to the Hearing Officer) (Summary Table). He does not allege that he engaged in any activities protected from reprisal by subsections (b) or (c). Solely for the purpose of analyzing Mr. Collier's complaint, I will assume that he made all fourteen disclosures "to a DOE official, . . . [his] employer, or any higher tier contractor," and that each disclosure contained information that he reasonably believed revealed "[a] substantial violation of a law, rule, or regulation; [a] substantial and specific danger to employees or to public health or safety; or [f]raud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R.§ 708.5(a). Because no report of investigation was produced in this proceeding, it is important to catalog the fourteen disclosures in this document. After describing each of the disclosures below, I will describe and analyze each of the acts of retaliation that Mr. Collier alleges in his complaint, and from that discussion reach a conclusion as to the relative merits of the positions of the parties.

Mr. Collier's fourteen disclosures can be grouped into six categories, according to the substance of the information revealed in them. I will describe the disclosures in these groups.

1. Waste Pits Remedial Action Project

On October 10, 2000, Mr. Collier delivered a written memorandum to William Previty, the CRC manager at the Fernald site, with a six-page analysis attached. This document appears in the record as Complainant's Exhibit 1, and appears on Mr. Collier's Summary Table as Protected Activity 1. The document catalogs and analyzes "events and occurrences" of dangerous or potentially dangerous activities that occurred from September 1999 through September 2000 at the Waste Pits Remedial Action Project (WPRAP). All the events and occurrences he reviewed had been reported and stored in appropriate databases, which were the sources of the information Mr. Collier presented in his memorandum and analysis. The analysis breaks down the events and occurrences by type, e.g., radioactive contamination, poor design, human error, chemical leak, and points out that the frequency of the events and occurrences after the WPRAP temporarily ceased operation in March 2000 was about the same as while it was operating.

Mr. Collier made oral disclosures regarding his concerns about nuclear safety at the WPRAP as well. On April 26, 2001, he spoke with Brinley Varchol, Fluor Fernald's Quality Assurance Manager at Fernald. This conversation is identified on his Summary Table as Protected Activity 3. In his complaint, Mr. Collier contends that he raised "significant safety and health and environmental hazards brought on by the operations at the WPRAP project, and in particular, my belief that the central source of the problem was the knowing and willful violation of nuclear safety rules by the WPRAP subcontractor project manager." Complainant's Letter to Hearing Officer, August 21, 2002 (August 21 Submission) at 5. At the hearing, Mr. Varchol recalled that the conversation concerned safety issues, Tr. at 155, and "the way the IT [International Technologies Group] manager was managing the work, and that some of the issues that you were bringing to his attention were not being taken seriously enough." Tr. at 154. Mr. Varchol must have felt the concerns were significant, because he spoke to Dennis Carr, FFI's Senior Project Director, about them, and reported the result of that conversation back to Mr. Collier. Tr. at 156. Mr. Collier contends that he raised similar concerns, though in less detail, when he met with Randy Morgan, a CRC vice president, on May 30, 2001. August 21 Submission at 6. This conversation is identified on Mr. Collier's Summary Table as Protected Activity 4. Mr. Morgan testified that he recalled that Mr. Collier had discussed safety issues with him concerning the WPRAP project, but was not clear about the details. Tr. at 276.

In a 66-page letter dated June 5, 2001, Mr. Collier informed Keith Christopher, the director of the DOE's Office of Price-Anderson Enforcement, about his belief that knowing and willful violations of nuclear safety rules were occurring at the WPRAP project. This document appears in the record as Complainant's Exhibit 2, and appears on Mr. Collier's Summary Table as Protected Activity 5. In his letter, Mr. Collier alleged that the IT manager of the project knowingly and willingly, through acts and omissions, violated DOE regulations "to the detriment of operator safety, and possibly public and environmental safety," and

requested that the DOE conduct an investigation of the violations he alleged. Complainant's Exhibit (Ex.) 2 at 1. Mr. Collier then went on to recount in great detail the history of the WPRAP project, listing reported and unreported safety problems, and explaining his role in providing oversight of the conduct of operations, his contention that the IT manager largely ignored the concerns he raised, and his ultimate removal from the project.

On the basis of Mr. Collier's letter, Mr. Christopher directed that an investigation be conducted of the WPRAP program. *See* Complainant's Ex. 3c. Dennis Riley and Tulanda Brown, DOE Price-Anderson Act Coordinators for the Fernald site and for the Ohio Operations Office, respectively, conducted a review of the issues Mr. Collier raised, and in September 2001 produced a report of their activities and conclusions. Mr. Christopher forwarded a copy of the report to Mr. Collier. Mr. Collier took issue with the results of the investigation, and on October 26, 2001, wrote again to Mr. Christopher, to advise him that the investigation was flawed. This letter appears in the record as Complainant's Exhibit 3d, and appears on his Summary Table as Protected Activity 12. In his letter, Mr. Collier expressed his disappointment that the review team felt constrained to investigate his issues solely in the limited context of the Price-Anderson Act, and reiterated that significant problems, including nuclear safety problems, had riddled the project.

2. Respirator Issuance Program

On April 26, 2001, Mr. Collier sent by e-mail to James Barber, a Duratek employee at Fernald, a review he had prepared concerning the procedures for issuing respirators to workers at the Fernald site. The review document appears in the record as Complainant's Exhibit 8b, and appears on Mr. Collier's Summary Table as Protected Activity 2. This review contained comments and recommendations for improving or correcting two distinct documents in use at the site: the Respirator Issuance Procedure (SH-0017) and the Respirator Protection Requirements Manual (RM-0007). Mr. Barber was responsible for the most recent revision of SH-0017, and after reviewing the comments told Mr. Collier that his "comments and questions [pertaining to that document] were unfounded based on the fact [Mr. Collier] hadn't had the training" in the area of respirator issuance. Tr. at 114 (testimony of Mr. Barber). However, because Mr. Barber was not the subject matter expert for RM-0007, he asked Mr. Collier's permission to forward the review to those who were responsible for the regulatory requirements that RM-0007 set in place. Mr. Collier assented, and Mr. Barber sent Mr. Collier's review to Tony Renk and Bob Cullison, and discussed the review orally with Walt Mingle, the subject matter expert for respiratory protection. Tr. at 117-19, 147. These gentlemen all appear to be FFI employees. In time, William Previty and Ronald Houchins, CRC employees, as well as other FFI employees became aware that Mr. Collier had prepared and released this review. Finally, Mr. Collier produced a contemporaneous diary entry that indicates that on July 25, 2001, he spoke with Dennis Riley of the DOE about his concerns regarding the respirator issuance program. Complainant's Ex. 12 at 50. This conversation appears on his Summary Table as Protected Activity 8.

3. Nuclear Project Startup

Mr. Collier was a member of a sub-team formed to provide information to FFI's Integrated Task Team (Team) regarding the proposed reduction or elimination of the Standard Startup Review (SSR) program, which verified the readiness to start or restart nuclear projects at the Fernald site. After the sub-team provided its response to the Team, Mr. Collier prepared and, on June 26, 2001, delivered to the Team a package of materials that amounted to a dissenting opinion concerning the SSR process. The package appears in the record as Complainant's Exhibit 17, and appears on Mr. Collier's Summary Table as Protected Activity 6. Mr. Collier apparently prepared this package because he felt that the SSR program was essential to the safe conduct of nuclear operations and that the Team needed to be aware of his opinion. The package contains e-mail from supporters of the program, dissenting opinions to the proposal to eliminate the SSR, the results of an informal survey Mr. Collier conducted in which he sought the opinions of site managers on this issue, and an historical background of the program with discussion of problems from Mr. Collier's perspective. Mr. Collier produced a contemporaneous diary entry that indicates that on July 2, 2001, he met with Terry Hagen, FFI's Vice President for Site Closure, and contends that he disclosed the same information to Mr. Hagen as was contained in his package. Complainant's Ex. 12 at 47. This conversation appears on Mr. Collier's Summary Table as Protected Activity 7. Mr. Previty's testimony supports Mr. Collier's contention that the meeting had taken place, because Mr. Previty "followed up" on Mr. Collier's discussion with Mr. Hagen and "gave him a briefing and strongly supported that we keep the program." Tr. at 178.

4. "Smoking Train"

Mr. Collier contends that on three occasions he disclosed his concerns regarding the possibility that pyrophoric matter– spontaneously combustible substances, including radioactive material– were being loaded onto trains at the WPRAP facility and shipped across country for disposal in Utah. His concerns were that a small number of fires caused by pyrophoric matter had been reported at the Fernald site, and that the public safety would be threatened by radioactive smoke emanating from such a fire were it to occur once the train left the site, as he set out in his August 21, 2002 letter to the Hearing Officer. Mr. Collier first raised these concerns with Dennis Riley of the DOE on October 19, 2001, according to his diary entry for that date. *See* Complainant's Ex. 12 at 59. This conversation appears on his Summary Table as Protected Activity 9. In a second meeting with Mr. Riley, on October 29, 2001, Mr. Riley responded to Mr. Collier's concerns on the basis of information he had acquired from FFI, but Mr. Collier apparently contends that he expressed doubt that the information Mr. Riley had received was accurate. The occurrence of this second conversation is again noted in a diary entry, and appears on his Summary Table as Protected Activity 10. Between the two meetings with Mr. Riley, on October 25, 2001, Mr. Collier spoke with Mr. Previty, the highest ranked CRC employee at the Fernald site, about the same concerns. Mr. Previty testified that he remembered this conversation, though he did not join in those concerns because his "opinion was that the project had taken corrective action to fix our plans and procedures." Tr. at 559. This conversation appears on Mr. Collier's Summary Table as Protected Activity 11.

5. Chemical Management

Mr. Collier was a member of the Chemical Management Assessment Team, a team that was created by FFI's Independent Safety Review Committee to perform a site-wide assessment of chemical management at Fernald. The areas he reviewed were compliance with contractual requirements for chemical management by FFI's subcontractors, and compliance with the annual reporting requirements of the Superfund Amendments and Reauthorization Act. *See* August 21 Submission at 17-18. Mr. Collier contends that on October 30, 2001, he discussed potential violations of the Superfund reporting requirements and "apparent failure of FFI to properly enforce its contractual requirements of on-site subcontractors related to chemical inventory management" with James Curry, Sr., the team leader of the Chemical Management Assessment Team. *Id.* at 17. Mr. Curry testified that he had asked Mr. Collier to join the team because of his assessment experience, and that Mr. Collier's investigation uncovered wildly incorrect quantities of chemicals recorded in the database from which the Superfund reports were generated. Tr. at 481-82. This disclosure appears on Mr. Collier's Summary Table as Protected Activity 13. (Although Mr. Collier stated in his August 21 Submission that his diary entry for October 30, 2001, supports this disclosure, it does not. *See* Complainant's Ex. 12 at 60. Consequently, the date for this disclosure cannot be established, but Mr. Curry's testimony demonstrates that a disclosure was indeed made.)

6. Silos Project

Mr. Collier contends that on February 7, 2002, he spoke with Linda England, an FFI employee who was charged with revising and producing a document entitled the Integrated Project Execution Plan (IPEP) for the Silos Project at Fernald. He alleges that he pointed out to Ms. England a number of errors in the IPEP, first in conversation, then by e-mail at her request. He maintains that his comments disclosed matters of gross mismanagement. August 21 Submission at 19. This disclosure appears on Mr. Collier's Summary Table as Protected Activity 14. When shown a copy of Mr. Collier's e-mailed comments at the hearing, Ms. England testified that she must have received them, because the e-mail indicated she had responded to them. Tr. at 76; Item #6 produced by FFI at request of Mr. Collier. Nevertheless, Ms. England testified that she did not recall the content of any conversation she might have had with Mr. Collier on February 7, 2002. Tr. at 77.

In summary, Mr. Collier alleges that he made fourteen disclosures to CRC, FFI or the DOE related to six distinct concerns that he had about events that occurred at the Fernald site. He contends that each of these disclosures is protected under 10 C.F.R. Part 708 because it was the type of disclosure described in section 708.5(a). He also contends that each of them was a contributing factor in the two alleged retaliatory acts in which CRC and FFI engaged. The evidence presented in the record, as described above, clearly shows that most of these disclosures, particularly those reduced to writing, took place. Regarding other disclosures, specifically those Mr. Collier contends he made to Dennis Riley of the DOE and has labeled Protected Activities 8, 9, and 10, the only evidence in the record that Mr. Collier actually made the disclosures at all consists of the reproductions of his contemporaneous diary entries in which he

recorded his disclosures. Weak evidence though these may be, CRC and FFI have not argued that these events did not take place. In any event, as stated above, I will assume for the purpose of analysis that all fourteen of Mr. Collier's disclosures are protected under 10 C.F.R. § 708.5(a), and will move on to consider Mr. Collier's allegations of retaliation.

B. The Alleged Acts of Retaliation

Under the Part 708 regulations,

> Retaliation means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart.

10 C.F.R. § 708.2.

Mr. Collier alleges two instances of retaliation. They are (1) that on November 8, 2001, Joel Bradburne, the FFI manager of the Silos Project, where Mr. Collier was currently assigned, informed him that his request to attend Plant Automation Equipment training had been denied, and (2) that on February 28, 2002, his employment with CRC was terminated. Complainant's Ex. 6 (Complaint) at 5.

1. Denial of Training

As an initial matter, I must determine whether the first alleged retaliation can properly be considered in this proceeding. After the DOE's Ohio Field Office received Mr. Collier's complaint, it issued a jurisdictional decision in which it stated, "Your 708 complaint is not timely with regard to the denial of training that occurred on November 8, 2001, because the complaint was filed more than 90 days after you learned of this alleged retaliatory action. *See* 10 C.F.R. § 708.14(a)." Letter from Jack R. Craig, Acting Manager, Ohio Field Office, to Steven F. Collier, June 5, 2002. That provision states: "You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a). In a letter to Mr. Craig requesting a hearing with this Office, Mr. Collier argued that he did not know that the denial of training was a retaliatory act until some time in January 2002, so his complaint was in fact made within the 90-day period established in the regulations. Mr. Collier reiterated his position in his closing argument following the hearing:

> It wasn't until the sudden notification that my performance was somehow deficient, as told to me by Joel Bradburne on January 14, 2002, (when I knew my performance for him had to date been the best I could give), that I put together two and two and first KNEW that the earlier training cancellation must have been for retaliatory reasons.

Closing Argument of Steven F. Collier, October 14, 2002 at 13 (emphasis in original). Giving Mr. Collier the broadest possible latitude with respect to this argument, I thought it appropriate to receive and weigh evidence on this issue. After considering the evidence in the record, as discussed below, I have reached the same conclusion that DOE/OFO did– that the denial of Mr. Collier's request for training is not an act of retaliation that I may consider in this proceeding, because it occurred more than 90 days before the complaint was filed.

The crux of Mr. Collier's argument in favor of considering this alleged retaliation as part of the complaint he filed on March 26, 2002 is as follows. Mr. Collier states that the date on which Joel Bradburne told him he would not be permitted to attend the training was November 8, 2001. He contends, however, that the date on which he knew that Mr. Bradburne's action constituted retaliation was January 14, 2002. If I regard November 8, 2001, as the date on which Mr. Collier "knew, or reasonably should have known, of the alleged retaliation," then the complaint is clearly not timely with respect to this alleged retaliation. If, however, I accept Mr. Collier's contention and deem January 14, 2002, as the date on which he "knew, or reasonably should have known, of the alleged retaliation," then the complaint is timely with respect to this alleged retaliation. To resolve this issue, I will first consider the language of the governing regulation, 10 C.F.R. § 708.14(a). On its face the language is unclear. One interpretation is that an individual must file his complaint by the 90th day after he was aware of an action (here, Mr. Bradburne informing Mr. Collier that he would not be sent to training) that, upon further contemplation, he perceived to be an alleged retaliation. Under this interpretation, the critical date in this case would be November 8, 2001, the date on which Mr. Collier heard those words. A second interpretation is that the individual must file his complaint by the 90th day after he became aware that an alleged retaliation had transpired. Under this second interpretation, the critical date would be January 14, 2002, because, according to Mr. Collier, that is when he first perceived the November 8 action to be a form of retaliation. From a policy standpoint, neither interpretation is entirely satisfactory. On one hand, we want to encourage complainants to raise their allegations soon after retaliatory actions occur (or as soon as they learn that the retaliatory actions occurred, in those situations where complainants lacked contemporaneous knowledge of the actions having occurred), so that the allegations may be investigated promptly, and so that employers need not fear open-ended exposure to liability from complainants that perceive retaliation years after the alleged retaliatory actions occurred. On the other hand, we do not want to bar complainants from raising allegations of retaliatory actions that cannot be recognized as such until a pattern of behavior establishes itself. The latter is the position upon which Mr. Collier's argument relies. Without resolving which interpretation of section 708.14(a) is correct, I will adopt the interpretation that is more in Mr. Collier's favor, for the purpose of analysis in this proceeding. Even under that interpretation, it is my opinion that the alleged retaliation of November 8, 2001, nevertheless falls outside the scope of this proceeding.

I find that, at least in theory, an employer could conceivably engage in conduct that might not be perceived at the time to be retaliatory, but might later turn out to have been. Such a situation might occur when an employer engages in a personnel action of little import– perhaps an involuntary lateral transfer– but follows this action with a series of progressively more adverse actions that form a pattern of conduct that a complainant might perceive to be retaliatory. Under such circumstances, the complainant should not be

barred from alleging that the first, apparently innocent, personnel action was itself retaliatory merely because too much time passed between the date of that action and filing of the complaint. Rather, the complainant should be allowed some time to recognize the retaliatory action for what it is. The evidence in the record of this proceeding, however, indicates that such are not the circumstances in this case.

Mr. Collier asserts that he did not know that FFI's decision not to send him to the training program he desired was retaliation at the time Joel Bradburne so informed him, on November 8, 2001. The record reflects, however, that by the fall of 2001, Mr. Collier had already formed the perception that FFI and CRC were engaging in retaliation against him for protected disclosures. In his complaint, Mr. Collier enumerated a series of alleged disclosures and retaliation that predated the protected disclosures he asserts in this proceeding. Complainant Ex. 6 at 5-8. In addition, he admitted at the hearing that "as far back as September 2000 . . . I did have reason to believe that there was retaliation against me for some things that are not a part of my [present] complaint." Tr. at 53. As of October 24, 2000, when he filled out his portion of his performance evaluation, he "already had reason to believe that retaliatory events were headed my way. . . . I cannot separate whether it was Fluor or Coleman, I only knew that retaliation had already occurred [about] some issues which are not the subject of this case, and I foresaw the possibility of more in the future." Tr. at 528. Moreover, his diary entry for November 8, 2001, states in part:

> Joel [Bradburne] told me this morning that he was not going to send me to the Siemens PCS-7 training he had previously scheduled me for. Reason was vague– something about inability for subcontractors to travel on Fluor money. (I know Bill Previty was recently traveling on Fluor money.) Joel said he thought I was the best person for the job, but the fact that I was a subcontractor limited his ability to send me. . . . I think the timing of Joel's cancelling this training for me, the best person for the job (along with Bruce Ledbetter, also scheduled to go) is fishy, particularly after my meeting yesterday afternoon with Dennis Riley [about the "smoking train" issue]. To get to Riley's office, I have to walk through the Admin building where all the top Fluor offices are located, so it's not unreasonable to assume they've seen me travel that path a lot lately and put two and two together, as they prepare for their Nov 14 Enforcement Conference in Washington on the WPRAP issues. And Joel is closely related to one of the top company officials (son of the company Chairman of the Board). . . .

Complainant's Ex. 12 at 61. Given this evidence, in particular the diary entry that Mr. Collier maintains was made contemporaneously, it is difficult for me to conclude that Mr. Collier did not perceive the alleged retaliatory nature of FFI's decision until January 14, 2002. Apart from his own assertions to that effect, the record establishes that he was suspicious that retaliations were being taken against him, and was specifically suspicious that FFI "top officials" made the decision to deny him training in retaliation for his discussing WPRAP safety issues with the DOE's Mr. Riley. Although Mr. Collier may not have known with certainty on November 8, 2001, that the training decision was a retaliatory action, such certainty is not required. In fact, if complainants did not raise Part 708 concerns until they were certain of their allegations, they might never be in a position to do so. In light of the record in this case, I find that Mr.

Collier has not met his burden of establishing that he did not know, or could not reasonably have known, that the November 8, 2001 decision not to send him to training manifested retaliation until January 2002. I place the date of his knowledge of the retaliatory act at November 8, 2001, which is considerably more than 90 days before the date of his Part 708 complaint. I therefore uphold the Ohio Field Office's jurisdictional decision, and will not consider this alleged retaliation in this proceeding.1/

2. Termination

As will be discussed in more detail below, Mr. Collier was terminated from employment on February 28, 2002. Clearly, termination is an action with respect to Mr. Collier's employment, and therefore would fall within the Part 708 definition of retaliation. Moreover, Mr. Collier clearly met the regulatory time constraints by filing his complaint on March 26, 2002, within 90 days of this alleged retaliatory action. The next question is whether any of Mr. Collier's fourteen disclosures (assumed above to be protected under Part 708) was a contributing factor to his termination.

C. Whether Mr. Collier's Protected Activity Was a Factor Contributing to Retaliation

In prior decisions of the Office of Hearings and Appeals, we have established that,

> A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54 (1997) (quoting *Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993)); *Ronny J. Escamilla*, 26 DOE ¶ 87,508 at 89,046 (1996).

1/ Even if I were to consider this alleged retaliation in this proceeding, I would find that FFI met its burden of establishing, by clear and convincing evidence, that it would have taken the same action absent Mr. Collier's protected activities. Mr. Previty, the manager of CRC operations at Fernald, Mr. Carr, FFI's senior project director at Fernald, and Mr. Bradburne, Mr. Collier's FFI supervisor at the Silos project, all testified that the reason Mr. Collier's training was cancelled was that FFI was not willing to pay for the training of subcontractors during a period of staff reductions. Tr. at 189-90 (testimony of Previty), 410 (testimony of Carr), 443 (testimony of Bradburne). Mr. Carr also testified that FFI wanted to create job opportunities for its own employees, and that this training was regarded as a step in that direction. Tr. at 410. Mr. Bradburne testified that he recalled telling Mr. Collier that if CRC would pay for his training, FFI would be happy to send him. Tr. at 444-45. Based on this evidence, even if Mr. Collier had not made his protected disclosures, it appears to me that FFI would not have paid for his training and, unless CRC paid for it, would not have sent him to the training he requested. (Mr. Collier contends that FFI's policy of not paying for the training of subcontractors was not applied consistently. He points to a trip to Virginia that Mr. Previty took at FFI's expense. The record reflects, however, that Mr. Previty was heading a team of FFI employees at FFI's request, and that no training was involved. Tr. at 210, 229-31.)

The retaliatory action remaining to be analyzed is that of Mr. Collier's termination from employment at CRC on February 28, 2002. The parties have stipulated that Mr. Collier's termination occurred in response to a business decision by FFI to reduce the size of the workforce at the Fernald site. On January 11, 2002, FFI notified CRC that it was reducing the estimated number of hours of "Senior Operations Specialist" work it would be requiring of CRC by 2400 hours, or the equivalent of two positions. *See* First Stipulation of Steven F. Collier and Fluor Fernald, Inc. As stated above, Mr. Collier was one of five senior operations specialists, out of total of seven CRC employees working at the Fernald site. The "official taking the action," the individual who notified Mr. Collier by letter of his termination, was Raymond Ross, Executive Vice President/General Manager of Coleman Federal. Complainant's Ex. 5. Although Mr. Ross was the signatory of Mr. Collier's termination letter, the record is clear that Mr. Previty was instrumental in developing and applying the criteria that were used in selecting which CRC employees would be terminated as a result of the required downsizing of personnel. Tr. at 212. There is considerable evidence that Mr. Previty had knowledge of several of Mr. Collier's protected disclosures: his October 10, 2000 WPRAP memorandum, Complainant's Ex. 1; the April 26, 2001 e-mail about the respirator issuance program, Tr. at 173; the May 30, 2001 discussion between Mr. Collier and Mr. Morgan, Tr. at 175; his June 26, 2001 dissenting opinion concerning nuclear project startup requirements, Tr. at 177, and his July 2, 2001 meeting with Terry Hagen of FFI on the same issue, Tr. at 178; and his October 25, 2001 discussion with Mr. Previty about the "smoking train" issues, Tr. at 559. In addition, he was aware of Mr. Collier's concerns about the chemical management program. Tr. at 182. In sum, Mr. Previty had knowledge of seven of Mr. Collier's fourteen protected disclosures before he submitted his proposal for terminating the employment of Mr. Collier and one other senior operations specialist to CRC headquarters for approval, on February 2, 2002. *See* Tr. at 561. (Of the seven disclosures of which he was not aware, six concerned the same issues and concerns as those raised in the seven disclosures known to Mr. Previty. The seventh disclosure unknown to Mr. Previty related to the Silos Project and was made to Linda England of FFI on February 7, 2002, after Mr. Previty had completed his decisionmaking process regarding Mr. Collier's termination.)

It is also clear that Randy Morgan, the CRC vice president to whom Mr. Previty reported, had knowledge of at least one of Mr. Collier's protected disclosures, the one made directly to him on May 30, 2001. The evidence is clear that he was involved in the development of the termination assessment criteria. Tr. at 212.

In addition, many FFI managers contributed their comments and observations to the assessment process itself. These individuals did not partake in the development of the criteria by which each CRC employee would be evaluated, nor did they rate or rank the CRC employees. Tr. at 253. Those tasks fell to Mr. Previty. But Mr. Previty continually sought feedback from the FFI managers, such as Joel Bradburne, to whose projects his CRC employees had been assigned. Tr. at 248-51. Consequently, even though FFI in no direct way issued the termination letter that Mr. Collier alleges is a retaliatory action, their input into the assessment process, through discussions with Mr. Previty, could have influenced the result. Any knowledge they had of Mr. Collier's protected disclosures could also have contributed to a retaliatory action carried out on their behalf, wittingly or not, by Mr. Previty.

After reviewing the events from the time of the first protected disclosure Mr. Collier alleges in his complaint, his October 10, 2000 memorandum about nuclear safety issues at WPRAP, through his termination some sixteen months later, I conclude that there is close enough temporal proximity to find that many of Mr. Collier's protected disclosures– those disclosures of which Mr. Previty had knowledge at the time of his decision to recommend Mr. Collier's termination– were contributing factors in the February 2002 decision to terminate Mr. Collier. Looked at in context, virtually all of the relevant events, both protected disclosures and alleged retaliation, were not isolated occurrences, but instead were part of a pattern of frustration and poor communication between Mr. Collier and his management, both FFI and CRC. For example, although his first protected disclosure occurred more than a year before his termination, Mr. Collier continued through May 30, 2001, to revisit the same issues (with Randy Morgan of CRC), and Mr. Previty had requisite knowledge of that discussion. Moreover, concerning those few protected disclosures of which Mr. Previty disavows any contemporaneous knowledge, such as those made to Keith Christopher of the DOE, I will assume, solely for the purpose of analysis, that they too were contributing factors in Mr. Collier's alleged retaliatory termination. I do not, however, find that Mr. Collier's last protected disclosure, to Linda England of FFI on February 7, 2002, was a contributing factor in his termination on February 25, 2002. First of all, Mr. Previty testified that he had no knowledge of this disclosure. Tr. at 560-61. Moreover, although this disclosure occurred before the date of CRC's letter officially informing Mr. Collier that he had been terminated, Mr. Previty had completed his evaluation of his employees and submitted his recommendations for termination to CRC management and human relations staff on February 2, 2002, five days before the disclosure took place. *See* CRC Ex. at 000001.

Notwithstanding these findings, it is clear to me that a large part of the mutual frustration and dissatisfaction had nothing to do with Mr. Collier's protected disclosures. Moreover, as I discuss below, CRC has proven by clear and convincing evidence that it would have terminated Mr. Collier in the absence of Mr. Collier's protected activities.

D. Whether CRC Would Have Taken the Alleged Retaliatory Action of Termination Absent Mr. Collier's Protected Activities

The nature of Mr. Collier's role as a consultant at Fernald required his monitoring of safety at the Fernald site and his occasional delivering "bad news" of noncompliance with safety requirements to managers of site operations. There is no dispute that much of Mr. Collier's work product would qualify as protected disclosures. Moreover, though many of the protected disclosures enumerated in Mr. Collier's complaint concern practices at Fernald that lay beyond the scope of his assigned posts, the parties have conceded that he was entitled to make those disclosures. Because I have concluded that most of Mr. Collier's protected disclosures were contributing factors in his termination, the burden now falls to CRC to prove by clear and convincing evidence that it would have terminated Mr. Collier in the absence of his protected disclosures. *See* 10 C.F.R. § 708.29. The contractor's burden is clearly heavier than that of the complainant, but meeting this burden effectively defeats the allegation of retaliation for whistleblowing conduct, despite evidence that its action appears to have been taken, at least in part, in response to the complainant's protected conduct. Therefore, CRC's burden is to demonstrate independent bases for its

decision to select Mr. Collier for termination, to such a degree that I am convinced that it would have reached the same decision had he made no protected disclosures.

The essence of Mr. Collier's position is that CRC retaliated against him by orchestrating several sequential acts. He contends that Mr. Previty retaliated against him for making protected disclosures beginning in October 2000, by giving him lower ratings than in previous years on his Performance Appraisals for October 1999 through September 2000 (CRC Ex. at 000021-25) (2000 Performance Appraisal) and for October 2000 through September 2001 (CRC Ex. at 000026-30) (2001 Performance Appraisal). (Although the 2000 Performance Appraisal covered a period preceding the first protected disclosure he listed in his complaint, Mr. Collier notes that the appraisal was signed in November 2000, by which time Mr. Previty had knowledge of that disclosure.) Mr. Collier then argues that Mr. Previty developed the employee evaluation process, by which he ranked his employees and recommended to CRC management which two employees should be let go, with the intent of assuring that the result of the process would support his selection of Mr. Collier as one of the two.

I note that, though the record contains references to prior reductions in force taken by CRC under its contract with FFI, *see* Tr. at 217-18, 232-33, the parties did not provide any evidence of how those reductions were conducted. Consequently, I cannot compare the process Mr. Previty developed for the 2002 staff reduction with others in which Mr. Collier was not selected. (I note that Mr. Collier has not advanced any argument that the 2002 downsizing differed in any material respect from previous staff reductions.) I have, however, considered to what extent the evidence demonstrates that the process was developed to meet legitimate business needs rather than to assure an outcome adverse to Mr. Collier in particular. To this end, I find the following. The procedures for the staff reduction were specified in advance. Mr. Previty's "Termination Selection Process" was submitted to and approved by CRC's management, including Randy Morgan. In his February 2, 2002 memorandum to Mr. Morgan, Mr. Previty set out the assessment process he developed.

> The assessment process is a multi-step process selected and conducted by the CRC Ohio Field Office Manager [Mr. Previty] to determine which two of the five assigned Senior Operations Specialists would be recommended for involuntary reduction. Steps included:
>
> Step 1: Determine core skills and job specific skills for individual employee evaluation
> Step 2: Perform the individual employee assessments
> Step 3: Rank the individual employees
> Step 4: Provide recommendations to CRC for approval.

CRC Ex. at 00004. The "Core Skills" identified were communications skills, teamwork, quality of work, and work habits. The "Job Specific Skills" were job/technical knowledge, skills applicability, skills transferability, and customer satisfaction. *Id.* at 000005. Although my understanding of the service CRC provided to FFI at Fernald is imprecise, the eight skills Mr. Previty identified to be assessed appear to me

to be correctly identified as critical qualities for CRC employees working under that contract. 2/ Moreover, I am convinced that, generally speaking, the assessment process, of which skills identification and ratings were a part, was properly developed to address the present and future business needs of CRC rather than as a means of terminating Mr. Collier's employment.

In performing the assessments of the five individuals, Mr. Previty wrote that he considered the last three annual performance appraisals for those employees who had worked that long, but two of the five were new employees for which no annual performance appraisals were available. *Id.* at 000006. Mr. Previty testified that, in addition to the annual performance appraisals, he also assessed the employees' performance for the most recent four months (for which no performance appraisals had been made) by seeking the comments of the FFI managers to whose project the CRC personnel had been assigned and reflecting on his own observations. Tr. at 204. It is unclear the degree to which Mr. Previty relied on the ratings on annual performance appraisals in reaching the score he arrived at in his assessments, rather than his contemporaneous observations or the comments of FFI managers. Tr. at 206. 3/ Under these circumstances and in view of the nature of performance appraisals in general, I must conclude that the assessments performed through this process were to some degree subjective in their nature.

Nevertheless, the assessment Mr. Collier was given appears to be reasonable and well supported by fact. Of the eight skills that were evaluated, Mr. Collier's scores were the lowest of the five assessed employees in the areas of quality of work, communication skills, teamwork, and customer satisfaction. I will focus on these areas, as did the parties. Mr. Previty testified that in the past few years Mr. Collier had fallen below the levels of the other employees in these skills, and the scores Mr. Previty assigned both in the annual performance appraisals for 2000 and 2001 and in the assessment reflected his opinions. Although it is possible that Mr. Collier's protected disclosures influenced Mr. Previty's evaluations of him, Mr. Previty impressed me as taking a realistic view of Mr. Collier's performance on the job and performing his

---

2/ Rather than assigning each of the skills equal weight in the scoring process, Mr. Previty doubled the weight of two skills in the assessment, skills applicability and customer satisfaction. I have no reason to question whether those two skills were so critical to CRC's success that the scores an employee received in those areas should have been given twice their values. I will note, though, that even if those scores had not been doubled, Mr. Collier's overall score still would have been the lowest of the five employees. *See id.* at 000008 (summary scoring chart).

3/ It is also unclear why Mr. Previty chose to consider only the past three years of annual personnel appraisals rather than all that had been made, which in Mr. Collier's case was seven years' worth. Mr. Collier contends that not considering all seven appraisals is evidence that Mr. Previty designed the process to work against him. I cannot agree with Mr. Collier in this regard. The decision to consider three years of appraisals has a logical basis, because it placed the three long-term employees on equal footing. Reviewing any more than three years of appraisals would have been impractical because only two of the five employees had been on staff for more than three years. CRC Ex. at 000015. As stated above, to place all five employees on even ground with respect to prior performance appraisals would have required considering none of the appraisals, as the remaining two employees were recent hires and had none. Moreover, three years of appraisals included at least one appraisal that was issued before the date of any of the protected disclosures listed in the complaint.

evaluation based on a broad range of issues. For example, when questioned at the hearing about the drop in Mr. Collier's annual performance appraisal scores from 1999 to 2000, Mr. Previty stated,

> In the year 2000, I spent two and a half months concurrently with you on [the WPRAP] project. . . . So, I saw first-hand what you were doing out [at] the project. I interfaced with you over the next couple of months, probably in January, February time frame on an infrequent basis on what you were doing out [at] the project. I separately visited the project. In March, I was fully assigned to that project to help the recovery process. It was very obvious to me that your strained relationship with all the senior managers assigned to the project was really a factor in your effectiveness in helping them. I was very concerned about your communications problems. I was concerned about your ability in team work, and you didn't fit in the team anymore. There were too many senior managers that you couldn't work with to get the job done, and your inability at that time to pull this team together, address the issues and fix the problems, I felt that your effectiveness as a Coleman employee had been seriously reduced after the project.
>
> Then when we went onto the issues of communications, personally, with me in April in a heated exchange of e-mail, I have to tell you to stop. I get back in the fall and you still have another big issue on the standing orders. I was very concerned that you weren't doing as well as you had always done before. You were one of our best employees previously. This year you were not. Your communications were down. Your team work was down and they certainly affected your overall performance, and those are the areas that I focused on in this evaluation in 2000. You were lower. I didn't give you an unsatisfactory grade which is a 1; I gave you a 2 in communications. I lowered you in your team work category from a 4 to a 3. I lowered you in the corporate culture category from a 4 to a 3 because your attitude and your inability to work as a team, it affected the whole Coleman reputation on the site, and I lowered your grade [in] customer orientation because you no longer had a happy customer, and that's why you had a significant drop because of your performance in those areas.

Tr. at 214-16. I note that the categories on which he was evaluated in his 2000 performance appraisal had been unchanged for many years, and Mr. Collier does not contend that the process used in 2000 was unfair. That unfairness argument applies only to the evaluation procedure developed for termination purposes, and I have addressed that argument above. Mr. Previty also testified about the low score in communication skills he gave Mr. Collier on his rating form in the termination selection process. When asked to explain his stated rationale for that score, as it appeared at CRC Ex. at 000010, Mr. Previty responded,

> You're the only employee in Coleman that's ever had problems in this area with our job. I have never had to counsel anyone else about their performance in communications. You had difficulty early on in dealing with the fact that you were not in charge. . . . You were

> not in charge of any project. You made recommendations. You weren't in charge. I'll go back to early events that you had with Mr. Paige. Your verbal discussions with him and e-mails were so controversial that I was called to the Deputy Director of the site and [told] if I could not get the Coleman people in order and act professionally, we'd be out of here, specifically, the individual. [That was in] Ninety-six, '97, I don't know. You asked a question about your history [in] communications. When I went out to the WPRAP project in . . . late August, September, October, 2000, I met with the Project Director, the Deputy Project Director, the Operations Oversight Manager, the Project Engineer [at] Fluor . . . and Con Murphy in the IT project who was their project manager. Your relationship with those people was extremely stressful. They had great difficulty in doing business with you. I was out there and I made my own observations and I sensed that your relationship . . . with Mr. Murphy was poor.
>
> As we moved on I have e-mails when you were . . . reassigned from the project [and] not included in something. I had to send you e-mails to stop sending me e-mails about your performance. I didn't question your performance. You refused until I sent you formal, an e-mail that said stop discussing these performance matters; it's not professional.
>
> I come back from a week's vacation, later that year, I get an e-mail where you've been involved in some discussion about standing orders from IT that you wanted over in the Silos project with a personal note on it from the project manager. "You should please consider firing this employee."
>
> Steve, you had numerous problems communicating, and you would go through periods with . . . few problems to [periods with] very, very serious problems, and I gave you every opportunity. [On] your own personal evaluations that you submitted . . . [y]ou cite your own difficulty in dealing with issues like this.

Tr. at 207-09.

The record also supports finding that Mr. Previty's evaluation was based on input from FFI managers in addition to his own observations. For example, Joel Bradburne's testimony establishes that he, as the FFI manager on whose Silos project Mr. Collier had most recently consulted, conferred with Mr. Previty frequently. Mr. Collier had spoken with Mr. Previty several times about his sense that he was given little work at the Silos project, and Mr. Previty testified that he had responded: "I suggested to you to use your initiative to figure out where you could add value to the customer and do everything you could to help make them be successful. We always had that discussion." Tr. at 196. Nevertheless, Mr. Bradburne explained that his opinion of Mr. Collier's work declined after they began working together on the Silos project in 2001 and 2002, and he reported that he told the following to Mr. Collier about his mediocre performance. Tr. at 430.

> Previous interaction before, you know, I always thought, my estimation [was that you had] great talent, great attitude and what caused the mediocre performance . . . as we worked through the Silos, to me it was great talent, disinterest in some of the things that we were doing, [because] there was not . . . a lot of field activities going on, but a lot of administrative activities which nobody really jumps up and down about doing . . .

Tr. at 431. Mr. Bradburne testified as follows regarding communicating his concerns about Mr. Collier to Mr. Previty:

> I don't do a formal performance [assessment] on you or any of the other subcontractors that work for me or have at the time, but Bill [Previty] as the Coleman rep would . . . ask me about performance and I did relay to him . . . we had talked and I thought your performance was mediocre.

Tr. at 437.

In my role as hearing officer, I am called upon to judge the credibility of the witnesses who appeared before me at the hearing. Were I to believe any witness to be less than fully credible, I would assign less weight to his or her testimony. The lesser weight of that witness's testimony could well affect my making a factual finding that in turn could affect a conclusion of law, such as whether a party had met its burden. In this case, however, I find that the major witnesses were all highly credible. I must therefore consider the weight of the evidence presented in determining whether CRC has shown, clearly and convincingly, that it would have terminated Mr. Collier even if he had not made his protected disclosures. The crux of CRC's position is set forth above. Evidence demonstrating that Mr. Collier did not merit his lower ratings is highly circumstantial. For example, his annual performance appraisals for years before 1999 were relatively consistent to that of 1999, the first year included for consideration in the termination assessment criteria and, like 1999, higher than his 2000 and 2001 appraisals. The range of overall scores for all seven years of appraisals, however, is relatively small: 3.42 to 4.43 on a scale of 5. In addition, Mr. Collier produced three farewell electronic mail messages that praised his work at Fernald. While these messages show that at least some of his coworkers did not share CRC management's opinion of Mr. Collier's ability to perform well at his assignments, they do not challenge the weight and specificity of the evidence that supports CRC's decision.

Having considered the entirety of the record in this case, the weight of the evidence convinces me that the CRC employee assessment process was fairly developed and administered, that Mr. Collier was fairly rated as the lowest of the employees, and that CRC clearly would have terminated Mr. Collier's employment even if he had not made the protected disclosures he described in his complaint. 4/

4/ In his closing argument, Mr. Collier articulates a number of reasons that CRC might have been biased against him when evaluating which two of its employees to terminate. He contends that these biases illustrate that the decision to terminate him was founded in retaliation for his protected disclosures. These biases, however, instead demonstrate

(continued...)

III. Conclusion

As set forth above, I have presumed that the complainant has met his burden of proof of establishing by a preponderance of the evidence that he engaged in activity protected under 10 C.F.R. Part 708. In this regard, I have construed some of the evidence in a manner most favorable to the complainant. I also have determined, based on temporal proximity, that the complainant's activity was a contributing factor in one action taken against him, the termination of his employment with Coleman Research Corporation. However, I found that CRC has proven by clear and convincing evidence that it would have taken the same action absent his disclosures. Accordingly, I conclude that the complainant has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted.

It Is Therefore Ordered That:

(1) The request for relief filed by Steven F. Collier under 10 C.F.R. Part 708 is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after receipt of the decision.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: May 20, 2003

4/ (...continued)
that CRC had numerous reasons, unrelated to his protected disclosures, to select him for termination. He points to Joel Bradburne's testimony in which Mr. Bradburne specifically requested the assistance of Eric Harper and Thomas Woodroffe, two CRC co-workers of Mr. Collier's, on his project. Tr. at 458-59; Complainant's Closing Argument at 15. He also contends that while he and Roger Hiss, the other CRC employee whom Mr. Previty selected for termination, had been hired by Mr. Previty's predecessor, the three not selected had been hired by Mr. Previty himself. *Id.* In addition, he contends that Mr. Previty had a bias in favor of selecting for termination the employees who had worked for CRC the longest, and therefore, he believes, were more highly paid. *Id.* I note that no evidence was taken on the two latter allegations of bias. Nevertheless, if we accept any of these allegations of bias by Mr. Collier, they furnish independent, if unfair, bases for Mr. Previty's decision to terminate Mr. Collier's employment. Those bases support, if anything, a finding that the decision to terminate Mr. Collier would have been taken even if he had not made his protected disclosures.

June 25, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Elaine M. Blakely

Date of Filing: September 30, 2002

Case Number: VBH-0086

This Decision involves a whistleblower complaint that Elaine M. Blakely filed under the Department of Energy's (DOE) Contractor Employee Protection Program. From 1986 to April 2002, Ms. Blakely was employed at the DOE's Fernald, Ohio site, most recently by Fluor Fernald, Inc. (FFI). Ms. Blakely alleges that FFI management retaliated against her for activity protected under the DOE Contractor Employee Protection Program.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

B. Procedural History

On February 21, 2001, Ms. Blakely filed a complaint with the Manager of DOE's Ohio Field Office (DOE/OFO). In that complaint, Ms. Blakely alleged that she had made a safety-related disclosure to FFI in September 1998, that this disclosure was protected under Part 708, and that in retaliation for the disclosure, FFI assigned her in March 1999 to a different project at the site. On March 14, 2002, the DOE/OFO manager dismissed Ms. Blakely's complaint for lack of jurisdiction, noting that Ms. Blakely did not file the complaint until 23 months after the alleged retaliation. *See* 10 C.F.R. § 708.14 ("You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation."). Ms. Blakely appealed the dismissal of her

complaint to the Director of DOE's Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18. The OHA Director denied Ms. Blakely's appeal on April 3, 2002.

On April 4, 2002, FFI laid off Ms. Blakely, along with 60 other FFI employees, as part of ongoing downsizing at the Fernald site. On April 9, 2002, Ms. Blakely filed a new Part 708 complaint with the Manager of DOE/OFO, alleging that her termination was a retaliatory action. She claims she was terminated "because I challenged the safety basis for the Waste Pits Remedial Action (WPRAP); I requested the Office of Inspector General to investigate; and I filed a previous 10 CFR 708 complaint for retaliation." Administrative Record of Investigative File, VBI-0086 (hereinafter "AR") at 14. DOE/OFO forwarded this complaint to the OHA, and the OHA Director appointed a staff attorney to investigate the complaint. After the investigator issued his report on September 30, 2002, the OHA Director appointed me as hearing officer in this case. I convened a hearing held at Cincinnati, Ohio, on December 10-12, 2002. The OHA received post-hearing submissions from the parties and closed the record on March 27, 2003.

II. Analysis

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." *Id.* Accordingly, in the present case, if Ms. Blakely establishes that a protected disclosure, participation, or refusal was a factor contributing to her termination, she is entitled to relief unless FFI convinces me that it would have terminated her even if she had not engaged in any activity protected under Part 708.

After considering the record established by the parties' submissions and the testimony presented at the hearing, for the reasons stated below I find that Ms. Blakely engaged in protected activity under Part 708 beginning in October 2000 with communications to her employer and the DOE Office of Inspector General (DOE/IG), and continuing with the filing of her first Part 708 complaint in February 2001. However, I have concluded that Ms. Blakely has not met the burden of proving by a preponderance of the evidence that her protected activities contributed to her termination. Even assuming that Ms. Blakely's protected activities contributed to her termination, I find that FFI has shown by clear and convincing evidence that it would have terminated Ms. Blakely absent those activities.

A. Whether Ms. Blakely Engaged in Activity Protected Under 10 C.F.R. § 708.5

Ms. Blakely alleges in her present complaint that she was terminated "because I challenged the safety basis for the Waste Pits Remedial Action (WPRAP); I requested the Office of Inspector General to investigate; and I filed a previous 10 CFR 708 complaint for retaliation." Letter from Elaine M. Blakely to Susan Brechbill, DOE/OFO (April 9, 2002).[1]

The Part 708 regulations states that the following conduct by an contractor employee is protected from reprisal by his employer:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--
>
> (1) A substantial violation of a law, rule, or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or

---

1. The report of investigation in this case stated, *inter alia*, that because "the complaint that Blakely filed in February 2001 was dismissed," the "only issue to be considered in this investigation is whether the termination of Blakely's employment in April 2002 was retaliation for her pursuit of a Part 708 claim." Report of Investigation (ROI) at 2 & n.1. The investigation therefore did not consider whether the termination was retaliation for her earlier alleged protected activities, i.e. her disclosures related to WPRAP in September 1998 and her disclosures to the DOE Inspector General, which took place in the fall of 2000.

   I believe the investigation framed the issue in this case too narrowly. Clearly, the fact that Ms. Blakely's February 2001 complaint was dismissed as time-barred precludes her from raising in a new complaint allegations of retaliation that formed the basis of her earlier complaint. For example, as Ms. Blakely was barred in February 2001 from complaining of her March 1999 transfer, she surely is barred from raising the same issue in her April 2002 complaint now before this office. Thus, I agree with the investigation's finding that the only allegation of retaliation not time-barred is her termination. However, while the regulations clearly bar allegations of retaliation that occur more than 90 days before the filing of a complaint, they just as clearly do not bar allegations of protected conduct, no matter when they occurred, so long as they are alleged to have contributed to a retaliatory action taken within the 90 days preceding the filing of the complaint. Thus, I determined prior to the hearing that Ms. Blakely should be allowed to argue that protected conduct aside from the filing of her February 2001 complaint were contributing factors in Fluor Fernald's decision to terminate her. Electronic Mail from Steven Goering, OHA, to Mark Sucher, FFI, and Elaine Blakely (November 21, 2002).

(c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --

(1) Constitute a violation of a federal health or safety law; or

(2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

1. Disclosures Prior to October 2000

I will first examine evidence of disclosures that predate Ms. Blakely's later communications with DOE/IG and her employer in October 2000, the protected status of which will be discussed further below. I find that Ms. Blakely has not proven by a preponderance of the evidence that these earlier disclosures constitute activity protected under Part 708. Ms. Blakely refers to a number of documents in an attempt to prove that she engaged in activity protected under Part 708 when she "challenged the WPRAP safety basis." Complainant's Post-Hearing Brief at 1-3. However, only one of them predates her October 2000 disclosures.[2] This document is a handwritten note to the WPRAP project manager, Bob Fellman, dated October 9, 1998, "Re: Revised Hazard Category Calculations submitted for blue sheet review on 10/09/98." It states:

---

2. Ms. Blakely indicated prior to the hearing in this matter that some documentary evidence of her disclosures might be missing. "I did assemble several 'safety basis development' files so someone could recreate the thought process from the [sic] pre-Sept. 18, 2002. However, the record which I left was altered by the Records Custodian, by his own admission. Whether those documents survived his editing of the Administrative Record or not, I do not know." Electronic Mail from Elaine Blakely to Steven Goering, OHA (November 25, 2002).

FFI argues that Ms. Blakely's allegation regarding "editing of the Administrative Record" by an FFI records custodian is "unfounded and should be disregarded. First, Ms. Blakely never identified a single specific document that she believed to be missing. Second, Ms. Blakely never requested the production of any such records so that she could review them. Third, her own exhibits include the exchange of e-mail messages involving Ms. Blakely and the records custodian that demonstrates the lack of foundation for her allegation. In this exchange, the records custodian makes it clear that he destroyed only duplicate copies of certain documents. Where he had a question about whether the documents should be in the record, *he returned the documents to Ms. Blakely for review*. Fourth, Ms. Blakely's exhibits also include an evaluation by the OFO (in response to Ms. Blakely's OIG complaint) concluding that the Fluor Fernald records custodians complied with applicable procedures. There is no basis for Ms. Blakely's implication in her OIG complaint and at various points during the hearing that there would be written documentation supporting her allegations but for some misconduct by other Fluor Fernald personnel. Indeed, Thurle Moss indicated in his testimony that six boxes of records left behind in WPRAP by Ms. Blakely were available for review, but Ms. Blakely made no request to review the documents." Respondent's Post-Hearing Brief at 5 (citations omitted).

I agree with FFI. Ms. Blakely may not escape her burden of proof in this proceeding by making unsubstantiated allegations of improper document destruction.

> I regret that I cannot support you in this matter. I have asked you not to put me in a position where I would be compelled to disobey a direct order. I understand that by not supporting you in this review, I am placing my almost 12 years of employment at the Fernald site in jeopardy.
>
> I cannot act contrary to my conscience. I have faith that my actions are the right actions to take in this matter.

Respondent's Exhibit R.

There is simply nothing in this cryptic communication that one could reasonably believe reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. This note is therefore not a disclosure protected under Part 708.

Ms. Blakely acknowledges that there is "little in writing to document that I challenged [the WPRAP safety basis]; my discussions with Mr. Fellman were verbal, there were one or two hand-written notes from me to him." Electronic Mail from Elaine Blakely to Steven Goering, OHA (November 25, 2002). Thus, the complainant points to Mr. Fellman's hearing testimony to support her contention that she made a protected disclosure. Complainant's Post-Hearing Brief at 2. However, Mr. Fellman's recollection of Ms. Blakely's communication is similarly devoid of any information the disclosure of which is protected under Part 708:

> A My recollection of this is that you stated either that you had moral or ethical objections and that is as far as it went, that for whatever those reasons were, you could not participate any further in the activities that we had now embarked upon using Doug Daniels as well as that database, which had been basically signed off on -- at least in my opinion, and I think there is a document somewhere on that, but anyway, the deal is, yes, you told me that you had ethical or -- I don't remember the words -- moral objection.
>
> Q You don't recall if I had explained them.
>
> A You did not explain them to my recollection.
>
> Q And did you ask for an explanation?
>
> A No.

Transcript of Hearing (hereinafter "Tr.") at 298.

Ms. Blakely also cites the testimony of another FFI manager to whom she reported at WPRAP, Thurle Moss. Complainant's Post-Hearing Brief at 2. However, Mr. Moss's testimony merely confirms that Ms. Blakely never explained in any more detail the basis for the concern set forth in the October 9, 1998 handwritten note quoted above. Tr. at 755.

Thus, while there is evidence that Ms. Blakely raised "moral or ethical objections" to participation on the WPRAP project, there is no evidence that she ever specified what those objections were in a way that could possibly bring her disclosures under the protection of 10 C.F.R. § 708.5.[3]

As such, Ms. Blakely has not met her burden to prove by a preponderance of the evidence that she made any disclosures related to WPRAP, or engaged in any other activity protected under Part 708, prior to her communications to DOE/IG and FFI management beginning in October 2000, which I will address next.

2. Disclosures Beginning in October 2000

On October 24, 2000, Ms. Blakely sent a memorandum to FFI management, a copy of which she provided to DOE/IG on October 25, 2000. In this memorandum, Ms. Blakely's disclosures begin to focus specifically on questions of safety at WPRAP, and thus move into territory protected under Part 708. For example, the memorandum contains the following:

> In September 1998, I withdrew my support for completion of the safety basis documentation because I considered the direction [of] the Project, Safety Analysis Team, and Independent Safety Review Committee to be inconsistent with my knowledge of the waste pit material characteristics, my best judgement as a mechanical engineer, and my best judgement as a safety analyst.
>
> . . . .
>
> I knew that if I was correct, then the Project would have continuing problems with safety issues. There would be nonconformance reports, incident reports, change proposals and project delays. These would not be immediate problems, but appear as the project progressed. These events have since occurred and are a matter of record.

Memorandum from Elaine Blakely to Lynn Macenko (October 24, 2000). FFI contends that this disclosure "still fails to articulate information that discloses a reasonable belief that one of the specified problems listed in Section 708.5(a) had occurred." Respondent's Post-Hearing Brief at 14.

---

3. In its post-hearing brief, FFI notes two other written communications not cited by the complainant. Respondent's Post-Hearing Brief at 12-13. The first is a document authored by Ms. Blakely and dated February 9, 2000. In it, she relates that she "withdrew as the designated project engineer for safety analysis in September 1998 because, in my opinion, the WPRAP Project Manager and Engineering Manager expected me to perform and support activities [that] I considered unethical." Complainant's Exhibit 1. The second is a July 18, 2000 electronic mail authored by Ms. Blakely, in which she contends that "WPRAP released me because I would not support an activity I considered unethical. . . . I had become a continuous reminder that someone knowledgeable in safety analysis did not approve of the direction the project was taking with respect to establishing their safety basis." *Id.* I agree with FFI that neither of these communications reveals the type of information required to make them protected disclosures under Part 708. While both mention safety in general, neither reveals a "substantial and specific danger to employees or to public health or safety." 10 C.F.R. § 708.5.

I find the above disclosure protected under Part 708. While the statements in her memorandum are general in nature, they must be understood in context. The purpose of WPRAP is to remediate the contents of waste pits containing low-level radioactive waste byproducts of uranium and thorium processing generated at the Fernald site.[4] To allege "continuing problems with safety issues" that "have occurred and are a matter of record" at a hazardous waste site such as WPRAP certainly reveals a "substantial and specific danger to employees or to public health or safety."

The same can be said of a December 6, 2000 electronic mail message Ms. Blakely addressed to the recipients of her October 2000 memorandum (DOE/IG and FFI management personnel). In this message she states, "It is my contention that the data used to determine the [WPRAP] hazard category determination were manipulated to achieve a pre-conceived answer. . . . There are also worker safety issues if the process used to identify and evaluate potential hazards is flawed." Electronic Mail from Elaine Blakely to Ray Madden, DOE/IG (December 6, 2000). Ms. Blakely was apparently of the opinion that the data and the process used to identify and evaluate potential hazards on the WPRAP project were flawed and had been manipulated to achieve a preconceived answer. Again, given the nature of WPRAP, it is not at all unreasonable to conclude that such a situation, if true, would pose a substantial and specific danger to employees or to public health or safety.

FFI raises a fair question as to whether Ms. Blakely could have reasonably believed that the "direction" of the WPRAP project in fact had negative safety implications. Respondent's Post-Hearing Brief at 11-12. FFI offered persuasive testimony that the change in the assumptions as to the contents of the waste pits resulted in a more conservative analysis of the dangers posed in the remediation process. *See, e.g.*, Tr. at 612. It appears, however, that Ms. Blakely's concerns were not focussed on the merits of the new methodology as much as on the way in which the old methodology for analyzing the contents of the waste pits was discarded. She testified,

> There was no attempt on the part of those who came in September 1998 to understand what built the methodology that we used. There were a lot of things in there. It wasn't just that these were the numbers that were -- the upper confidence level. There were reasons why we chose those numbers and the reasons for that choice were never explored. There was a presumption on the part of the leadership team that it was done for this reason. There was no attempt to go back and understand why.

Tr. at 457-58.

In her October 2000 memorandum, Ms. Blakely made clear her opinion that the "direction" taken by WPRAP would lead to "continuing problems with safety issues." In December 2000, she warned of an impact on "worker safety" caused by a "flawed" methodology. She has explained the basis for her beliefs, i.e., that going forward with a new methodology without fully understanding the old has negative safety implications. In this instance, she may have been wrong, but I am not prepared to

---

4. "Waste Pits Remedial Action Project," http://www.fernald.gov/Cleanup/wpits.htm.

find that Ms. Blakely's concerns were so baseless that they are outside the zone of reasonable belief. I therefore conclude that both of these communications are protected disclosures under Part 708.

3. February 2001 Part 708 Complaint

There is no dispute that by filing her first Part 708 complaint in February 2001, Ms. Blakely was "participating in . . . an administrative proceeding conducted under this regulation" and therefore her filing was activity protected under Part 708. 10 C.F.R. § 708.5(b); *see* Electronic Mail from Mark Sucher, FFI, to Steven Goering, OHA (November 21, 2002).

B. Whether Ms. Blakely's Protected Activity Was a Contributing Factor in Her Termination

As will be discussed in more detail below, Ms. Blakely was terminated from employment on April 4, 2002. Clearly, termination is an action with respect to Ms. Blakely's employment, and therefore would fall within the Part 708 definition of retaliation. 10 C.F.R. § 708.2. Moreover, Ms. Blakely clearly met the regulatory time constraints by filing her complaint on April 9, 2002, within 90 days of this alleged retaliatory action. 10 C.F.R. § 708.14. The next question is whether Ms. Blakely's protected activity was a contributing factor in her termination.

In prior decisions of the Office of Hearings and Appeals, we have established that,

> A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54 (1997) (quoting *Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993)); *Ronny J. Escamilla*, 26 DOE ¶ 87,508 at 89,046 (1996).

1. The Official Taking the Action Was Ms. Blakely's Supervisor, Shelby Blankenship

In the present case, Ms. Blakely's termination was part of an ongoing process of downsizing at the Fernald site. Tr. at 385-95. In this process, several rounds of layoffs have occurred. *Id.* Ms. Blakely has not alleged that the ongoing downsizing, or the particular layoffs that occurred on April 4, 2002, in which Blakely and 60 other FFI employees were terminated, was motivated in any way by her protected activity. I would, in any event, find such an allegation implausible on its face.

As part of the Involuntary Separation Process (ISP) that preceded the April 4, 2002 layoffs, at least 25 different job categories were targeted for reductions in personnel, including Ms. Blakely's category of Engineer. Respondent's Exhibit K. In the Engineer category, FFI management set a target reduction of five positions. *Id.* Because two engineers voluntarily separated prior to the April 4 layoffs, only three engineers were involuntarily separated, i.e. terminated. *Id.* Again, Ms. Blakely

has not alleged that FFI management's decision to reduce the number of Engineer positions by five was motivated by a desire to terminate her. Moreover, I find it highly unlikely that Ms. Blakely's protected activity could have led to, or in any way contributed to, a decision by FFI to layoff four of Ms. Blakely's fellow engineers as a pretext to also terminate Ms. Blakely.

There being no plausible connection between Ms. Blakely's disclosures and the April 4 layoffs in general, or the decision to reduce the number of engineers by five, "the official taking the action" in the present case would by necessity be the official(s) whose decisions resulted in Ms. Blakely being one of the three engineers who were laid off on April 4, 2002. After examining the details of the ISP process, I conclude below that "the official taking the action" in this case was Ms. Blakely's supervisor at the time of her termination, Shelby Blankenship.

For each potentially affected employee, the ISP process required the employee's supervisor to fill out an "Individual Employee Rating Form." Mr. Blankenship completed Ms. Blakely's form in February 2002. Respondent's Exhibit L. As was the case with 22 other engineers, Ms. Blakely was rated in six categories, "Initiative," "Communication Skills," "Quality of Work," "Work Habits," "Technical Knowledge," and "Skills Applicability." *Id.* On a five-point scale, Ms. Blakely scored the next to lowest rating in five of the six categories, and scored a "3" in one category, "Work Habits." *Id.* For purposes of comparing ratings, each employee's ratings were averaged for the six categories (assigning 1 point for the lowest rating and 5 points for the highest), using the following weighting:

		Ms. Blakely's Rating
Initiative	20%	2
Communication Skills	20%	2
Quality of Work	10%	2
Work Habits	15%	3
Technical Knowledge	15%	2
Skills Applicability	20%	2

Respondent's Exhibit H. Thus, Ms. Blakely's weighted average rating was 2.15, on a scale from 1 (worst) to 5 (best). Respondent's Exhibit J. Compared against the 22 other employees in the Engineer job category, Ms. Blakely ranked last, the next highest average score being 2.55, held by both the second and third lowest ranked employees. Combining these ratings with the need to reduce the number of Engineers by three, FFI chose to terminate the three lowest rated employees. This process was followed in other job categories as well, such that there is no evidence that FFI chose a particular process for terminating engineers in an attempt to retaliate against Ms. Blakely. Tr. at 504. Ms. Blakely admits as much. Tr. at 667-69.

The method for ranking engineers differed from other job categories only in the weights that were assigned to each skill category. Looking at Ms. Blakely's rating in each category, and to the weights assigned each category, I cannot conclude that the weighting of one category versus another

contributed to Ms. Blakely's last place ranking. For example, Ms. Blakely's "strongest" category, "Work Habits," was assigned a 15% weight. But even had that category been given the heaviest weight of 20%, Ms. Blakely's weighted average would have increased only slightly, from 2.15 to 2.3.

Thus, put simply, the FFI official whose decision resulted in Ms. Blakely's termination was the person who filled out her Individual Employee Rating Form, her supervisor Shelby Blankenship.[5]

2. Whether Mr. Blankenship Had Actual or Constructive Knowledge of Ms. Blakely's Protected Activity

Mr. Blankenship testified at the hearing in this case, and was asked specifically whether he was aware of Ms. Blakely's disclosures to DOE/IG or her February 2001 Part 708 complaint. With respect to her Part 708 complaint, Mr. Blankenship testified as follows.

> THE HEARING OFFICER: Did you become aware that she filed a Part 708 complaint with the Department of Energy in February 2001?
>
> THE WITNESS: I don't know if I was aware of this in that time frame or not.

Tr. at 860. Aside from this testimony, there is no evidence in the record that sheds any light on whether Mr. Blankenship was aware of Ms. Blakely's February 2001 Part 708 complaint.[6] Given this lack of evidence, and the fact that Ms. Blakely bears the burden of proving that her protected activity contributed to her termination, I cannot conclude that Mr. Blankenship was aware of her February 2001 complaint. However, Mr. Blankenship's testified that in December 2000 or January 2001, Ms. Blakely informed him of her communications with DOE/IG. Tr. at 859-60.

3. Whether Mr. Blankenship Acted Within Such a Period of Time that a Reasonable Person Could Conclude that the Ms. Blakely's Disclosures to DOE/IG were a Factor in Her Termination

Mr. Blankenship testified that Ms. Blakely told him of "complaints" to DOE/IG in either December 2000 or January 2001, shortly after he became her supervisor. The action taken by Mr. Blankenship

---

5. Ms. Blakely alleges that the "system used by [FFI] Human Resources (HR) to ensure that skills assessments were performed uniformly either failed or were [sic] not applied to my case." However, Ms. Blakely cites testimony that merely describes the processes used by FFI HR as they are applied to all employees, not only Ms. Blakely. Complainant's Post-Hearing Brief at 5 (citing Tr. at 698-700, 831-34, 871, 873-877). Thus, this testimony is not evidence that a non-uniform application of the skills assessment process played a role in Ms. Blakely's termination.

6. In the absence of actual or constructive knowledge of protected activity, such knowledge has been imputed to the person alleged to have engaged in retaliatory action, upon a showing "that the person was influenced by the negative opinions of those with knowledge of the protected conduct." *Janet Benson*, OHA Case No. VBA-0082 (August 21, 2002). Because Ms. Blakely has made no such showing, I will not impute others' knowledge of her protected conduct to Mr. Blankenship.

that caused Ms. Blakely's termination, his completion of her Individual Employee Rating Form, took place in February 2002. Thus, Mr. Blankenship filled out the rating form 14 months after Ms. Blakely's December 2000 communications to DOE/IG, and approximately 13 months after Mr. Blankenship recalls being informed of these communications.

Based on this period of intervening time (13 months), would a reasonable person conclude that Ms. Blakely's disclosures to DOE/IG were a factor in the ratings Mr. Blankenship gave Ms. Blakely on the Individual Employee Rating Form? While there certainly can be no mathematical formula to make this determination, I note that decisions in prior Part 708 cases have relied on closer temporal proximity in reaching a conclusion that a protected activity contributed to an adverse personnel action. Those decisions range from cases where adverse action came the same day as protected activity, *Timothy E. Barton*, OHA Case No. VWA-0017 (April 13, 1998), or where a series of protected activities are interspersed with adverse actions, *e.g.*, *John Gretencord*, OHA Case No. VWA-0033 (November 4, 1999), to a case where the adverse action took place 9 months after the protected activity, *Luis P. Silva*, OHA Case No. VWA-0039 (February 25, 2000). On the other hand, a protected disclosure was found not to be a contributing factor in an adverse action that took place 24 months later. *Jean G. Rouse*, OHA Case No. VBH-0056 (March 6, 2001).

Thus, there is no precedent in Part 708 cases for finding that a period of 13 months is sufficiently short to infer a connection between a protected activity and an adverse personnel action. Of course, "[a]pplying a reasonable-person standard to this issue requires considering the circumstances of each case." *Barbara Nabb*, OHA Case No. VBA-0033 (April 5, 2000). For example, in the *Nabb* case, "although more than seven months passed between the two events, it is reasonable to conclude that contractor officials did not forget about Ms. Nabb or her disclosures in the interim, particularly in light of the ample evidence of Ms. Nabb's outspoken nature and the number and variety of situations in which she had made her disclosures." *Id.* By contrast, in the present case, Mr. Blankenship's knowledge of Ms. Blakely's protected activity was limited to her disclosures to DOE/IG in the fall of 2000. Nor is there any evidence that Mr. Blankenship would have been reminded of these disclosures any time after Ms. Blakely informed him of them in December 2000 or January 2001. Although it may be appropriate under more compelling circumstances, the present case is not one that calls for stretching the outer limits of sufficient temporal proximity to 13 or more months.

4. Other Circumstantial Evidence Cited by Ms. Blakely

The "temporal proximity" analysis discussed above is one way to support an argument that protected activity was a contributing factor in alleged retaliation. But the Part 708 regulations do not limit a complainant to only this means of meeting her burden of proof, and Ms. Blakely cites other evidence in contending that she has met her burden. Complainant's Post-Hearing Brief at 5-6. However, I conclude below that the evidence to which she refers does not prove that her protected conduct contributed to her termination.

Ms. Blakely cites instances where she "was reassigned to groups who stated that they had no work for me," the "system used by [FFI] to ensure that skills assessments were performed uniformly either

failed or were [sic] not applied to my case," and her "work assignments often involved tasks which were limited by my work restrictions." She also notes that she was labeled as "disruptive" and "difficult." Complainant's Post-Hearing Brief at 5-6.

It is important to reiterate here, as discussed above, that Ms. Blakely's first protected activity occurred on October 24, 2000, with her memo to FFI management. Thus, any actions allegedly taken against her prior to that date could not have been in retaliation for protected activity. Ms. Blakely's reassignments are a case in point. Ms. Blakely was assigned three different jobs after she left WPRAP in March 1999, and before she began to work for Shelby Blankenship in January 2001. However, these three assignments began, respectively, in March 1999, February 2000, and June 2000. *See* Tr. at 226. Similarly, while Ms. Blakely notes that her "work assignments often involved tasks which were limited by my work restrictions," she refers to assignments given her prior to any of her protected activities. As a result, none of these reassignments, or the way in which they were handled, could possibly have been in retaliation for her protected activities, since no protected activities had yet occurred.[7]

Ms. Blakely's reassignment to Mr. Blankenship's organization, occurring in late 2000 or early 2001, did take place after she had engaged in protected activity. However, responding to questions posed by Ms. Blakely, Mark Cherry, the FFI official responsible for making the reassignment, testified credibly that he simply transferred Ms. Blakely to where there was an opening he believed matched her qualifications.

> Q [By Ms. Blakely]: Do you recall towards the end of the year 2000 I had brought up an issue with Walt Fick?
>
> A Yes.
>
> Q Can you describe from your memory what that was?
>
> A I'm not sure what the specific issue was. I know that near that time -- I know that you and Walt had some real differences, I guess, between you two, as far as the work environment went and that's what I remember.
>
> Q Do you remember me describing it as a hostile work situation?
>
> A You may have.
>
> Q From the time when we had these discussions on the work situation with Walt Fick that it was not particularly workable for me at that time, when was the decision made to reassign me?

---

7. In her post-hearing brief, the complainant also raises anew an allegation that she had complained concerning her treatment by FFI medical personnel, but that the complaint was not addressed or resolved. Complainant's Post-Hearing Brief at 6. This allegation concerns events that took place in April 1999, *see* Tr. at 807, prior to her first protected activity on October 24, 2000, and therefore could not have been connected to her protected activities.

> A If you are looking for a discrete time period, I don't know. I think it was rather quickly.... But basically, openings were made available within facility engineering, I believe, and at that point, obviously your technical background was more suited to facility engineering . . . , something more technical towards the engineering field, and that it was supported by the openings that were available in Shelby [Blankenship]'s operation. . . .
>
> . . . .
>
> Q And this occurred shortly before or shortly after this Walt Fick situation.
>
> A About the same time.
>
> Q About the same time as Walt Fick, things started coming up. When you were discussing with Bob Nichols or whoever else in that organization, trying to find a place for me, were you presenting me as a general engineer or as a mechanical engineer or as an engineer of whatever classification?
>
> A Basically, I provided your resume at that time and that was pretty much the way it was presented with -- that was the way it was presented.

Tr. at 175-77. It is even difficult to describe this transfer as a negative action toward Ms. Blakely. There is no dispute that Ms. Blakely had a strained relationship with her supervisor prior to the transfer, Walt Fick, under whom she claimed to have been subject to a "hostile work situation."[8] Viewed in this context, moving Ms. Blakely to a different job looks to be an attempt to do something positive for her.

Ms. Blakely also contends that, once she was in Mr. Blankenship's group, he "excluded me from staff meetings with the engineers that I worked with; Mr. Blankenship did not have regular contact with me nor did he respond to my requests for technical direction; and Mr. Blankenship was aware that I had contacted the Office of Inspector General." Complainant's Post-Hearing Brief at 5. However, each of these contentions are either not supported by the record, or are not evidence of any retaliatory intent on the part of FFI or Mr. Blankenship.

First, the testimony of one of Ms. Blakely's co-workers under Mr. Blankenship supports Ms. Blakely's contention that regular meetings were held by Mr. Blankenship with engineers who worked in the same building as he did, and that these meetings did not include Ms. Blakely, who worked in another building. Tr. at 235-36. However, another of Ms. Blakely's co-workers testified that there were no such meetings, as did Mr. Blankenship. Tr. at 102-03, 866, 868-69. Moreover, even if there were such meetings and Ms. Blakely did not attend, I could conclude from those facts

---

8. Ms. Blakely does not claim that this allegedly "hostile work situation" was in retaliation for her protected activity. It would, in any event, be difficult to make such a connection. Ms. Blakely began working for Mr. Fick in the summer of 2000, several months before her first protected disclosure in October 2000, and worked for him until she transferred to Mr. Blankenship's group in January 2001. Mr. Fick's testimony indicates that the relationship between the two was strained from the outset, *see, e.g.*, Tr. at 257-58, and that Mr. Fick had no knowledge of Ms. Blakely's issues, whether they were raised during her time at WPRAP or in her protected disclosures to FFI management and the IG. Tr. at 278-79.

alone that she was excluded from the meetings. And there is no other evidence in the record that would lead me to that conclusion. Finally, even if Mr. Blankenship chose to hold certain meetings with only the engineers in his building, this is not on its face a negative action against Ms. Blakely.

Second, the record does not support Ms. Blakely's contention that Mr. Blankenship did not have regular contact with her. Mr. Blankenship testified that, when Ms. Blakely first began working for him, he held one-on-one meetings with her

> every week or every other week. Perhaps less frequently than that, but no more often than once a week, I don't believe.
>
> BY MS. BLAKELY:
>
> Q Okay. What were the purpose of those meetings?
>
> A Just to -- just to provide you some support and some -- kind of get you kicked off and get you moving on your work.
>
> Q Why were they discontinued?
>
> A I'm unable to provide that level of one-on-one support over a long period of time.

Tr. at 895. Ms. Blakely also cites numerous e-mail exchanges between her and Mr. Blankenship. These e-mails indicate that, in fact, there was regular contact between Ms. Blakely and Mr. Blankenship, albeit electronically. Although Ms. Blakely contends that Mr. Blankenship did not respond to the requests for guidance submitted by e-mail, Mr. Blankenship provides a reasonable explanation for this in his testimony.

> Q Okay. As a manager, you have engineering -- engineers reporting to you. Those engineers communicate back and forth by e-mail for whatever reason. At some point -- the gist of those e-mails is a request for a response. It is a repetitive request for a response that's not closing. At what point as a manager do you decide, let's cease the e-mails back and forth and have a sit-down discussion?
>
> A Well, we did that on numerous occasions and that didn't -- that didn't produce a resolution. It just generated another series of questions. So that -- in my -- in my mind, that became an unproductive process and I didn't have time to support it.

Tr. at 896.

Finally, Ms. Blakely cites to testimony by people outside of Mr. Blankenship's group describing her as "difficult" and "disruptive." Complainant's Post-Hearing Brief at 6 (citing Tr. at 188, 201-03, 259, 260-61). However, there is no evidence that Mr. Blankenship's opinion of Ms. Blakely was in any way influenced by those of others with whom she had worked. Mr. Blankenship credibly testified at the hearing in this matter as to why, from first-hand experience, *he* found Ms. Blakely difficult to supervise. Nothing in that testimony indicates that his opinion was in any way based on Ms. Blakely's protected activities. Rather, Mr. Blankenship stated that Ms. Blakely "required a high

level of supervision. You required an awful lot of interaction in order to get things done whereas I was accustomed to giving engineers work and they -- they performed it without much direction." Tr. at 911; *see infra* pp. 18-20 (discussing basis for Mr. Blankenship's opinion that Ms. Blakely was relatively unproductive, needed too much supervision, and tended to be argumentative).

Based on the above, I find that Ms. Blakely has not met her burden of proving by a preponderance of the evidence that her disclosures to DOE/IG were a contributing factor in Mr. Blankenship's low ratings of Ms. Blakely that led to her termination. Moreover, as I discuss in the following section, even if I were to assume that Ms. Blakely's protected activities were contributing factors in her termination, I would find that FFI has proven by clear and convincing evidence that it would have terminated Ms. Blakely had she engaged in no activity protected under Part 708.

C. Whether FFI Would Have Terminated Ms. Blakely Absent Her Protected Activities

As discussed above, Ms. Blakely's termination in April 2002 was a result of the low ratings Shelby Blankenship gave her on an Individual Employee Rating Form he completed in February 2002. Below I discuss whether Ms. Blakely would have received these low ratings, or at least ratings low enough to rank her among the bottom three in the Engineer job category, had she made no protected disclosures to DOE/IG and FFI beginning in October 2000 nor filed a Part 708 complaint in February 2001.

Again, the fact that Ms. Blakely's first protected activity occurred on October 24, 2000 is an important piece of the analysis. Obviously, any actions allegedly taken against her prior to that date clearly reflect events as they would have occurred had Ms. Blakely engaged in no activity protected under Part 708.

Thus, Ms. Blakely's experience working in the WPRAP project, which she left in March 1999, provides a good example of how she fared in the absence of protected activity. It also, in my opinion, is the key to understanding why Ms. Blakely found herself without a job after the April 2002 ISP. Ms. Blakely describes the circumstances which led to her departure from WPRAP as follows:

> I say that WPRAP released me because I would not support an activity I considered unethical. I was the same employee then as I had been the two previous years. The project liked me well enough to offer me a full time position and even had my responsibilities delineated in their Project Execution Plan. The difference was that now I had become a continuous reminder that someone knowledgeable in safety analysis did not approve of the direction the project was taking with respect to establishing their safety basis. This disapproval was so great that I refused to support the activity, withdrew from it, and diverted my energies to closing some outstanding reports.

AR at 153.

Essentially, Ms. Blakely refused to do the work that she was assigned. As FFI points out, "While another company might well have disciplined or terminated Ms. Blakely for her insubordination, Fluor Fernald went out of its way to attempt to find other meaningful work for her; this is hardly an act of retaliation." Respondent's Post-Hearing Brief at 21. Had FFI taken such action, it would not have run afoul of Part 708, as Ms. Blakely had not yet engaged in any conduct protected under the regulations.[9] Disagreement with management alone is not a basis for affording protection to an employee under Part 708. *Narish C. Mehta v. Universities Research Association*, 24 DOE ¶ 87,514 at 89,065 (1995). In any event, the hearing testimony of the WPRAP project director describes the steps he took to find her new work.

> Q Can you describe the process that used to ultimately find me a place outside of WPRAP to work? My subsequent assignment?
>
> . . . .
>
> A . . . The first thing I did was to try to accommodate you through the new operating regime, which was unacceptable to you.
>
> Q Which -- to clarify, was Doug Daniel's inclusion.
>
> A That is correct.
>
> Q Okay.
>
> A The next thing I did was I talked to others to see if there was some kind of job that we could give to you within the organization that frankly saved your participation. I considered your participation to be net positive, Elaine. There was never an issue like that. I was dismayed that you were unable to accept Doug's primacy in that particular role. So, I went around and I said well, what can we do internally? Would could I do to try to find a spot for you?

---

9. The Part 708 regulations do prohibit retaliation, under certain specified circumstances, against a contractor employee "refusing to participate in an activity, policy, or practice . . ." 10 C.F.R. § 708.5(c). In the present case, it is not necessary to determine whether the circumstances surrounding Ms. Blakely's refusal meet the criteria set forth in that section, since another section of the regulations states,

> You may file a complaint for retaliation for refusing to participate in an activity, policy, or practice only if:
>
> (a) Before refusing to participate in the activity, policy, or practice, you asked your employer to correct the violation or remove the danger, and your employer refused to take such action; and
>
> (b) By the 30th day after you refused to participate, you reported the violation or dangerous activity, policy, or practice to a DOE official, a member of Congress, another government official with responsibility for the oversight of the conduct of operations at the DOE site, your employer, or any higher tier contractor, and stated your reasons for refusing to participate.

10 C.F.R. § 708.7. There is no evidence in the record that Ms. Blakely took either of the two actions required to bring her refusal to participate within the protection of Part 708.

> THE HEARING OFFICER: Let me just clarify. Internally, you mean within --
>
> THE WITNESS: Within the project, within my own project. What could we do? I couldn't find something that made a lot sense. Then I prepared and I submitted to Dennis a statement of potential participation -- a statement of work, a job description, if you will, wherein you might have a role to support our legal team, because they were very often getting -- you were really knowledgeable about process knowledge, where data sources resided, the various information that we had and I thought, well, I know that there are inquiries going on within legal, specifically through Dan Yeager, who is part of the legal staff here and through Rene Holmes, also who was part of the legal staff, that you could be an assistant to them.
>
> So, I discussed this with Carr and he said that he didn't see that as being a fit for you and moreover, there was opportunities, there was a demand for help in the WAO [FFI's Waste Acceptance Organization] area.

Tr. at 311-13.

Thus began a pattern wherein Ms. Blakely was moved from one job to another. As discussed above, three of these moves (including her transfer out of WPRAP) took place before Ms. Blakely engaged in any protected activity, and so each clearly would have taken place in the absence of that activity. I have also found above that there is no evidence that Ms. Blakely's last transfer, in January 2001 to Mr. Blankenship's group, was tainted in any way by her protected disclosures, and in fact appeared to be an helpful attempt to get Ms. Blakely out of what she considered a "hostile work situation."

This last transfer, though by all appearances well-intentioned, did not result in a good fit between Ms. Blakely and Mr. Blankenship's group. Mr. Blankenship testified credibly at the hearing as to what the source of the difficulties was, and I am convinced that the same problems would have arisen in the absence of any protected conduct by Ms. Blakely. The three principal issues seem to have been Mr. Blankenship's opinion that Ms. Blakely was relatively unproductive, needed too much supervision, and tended to be argumentative.

According to Mr. Blankenship, when Ms. Blakely first came to his organization, "the project that we felt was best fitted to her skill mix was the development of some engineering standards that we had been talking about establishing and hadn't had time to do. And that was the assignment that we made to her." Tr. at 843.

> [H]er job was to coordinate that information, pull it together, and get it produced in whatever form we -- we felt was appropriate.
>
> Q How successful was she in accomplishing this task?
>
> A Not very. To my recollection, the original list of I think about two dozen things, and we may have -- we may have struck some of those off during the

process. My recollection is that -- that two or three of those got completed during her tenure.

Tr. at 844; *See also* Tr. at 916 ("You had worked on some of it for 14 months and had, you know, had 14 percent of it done. In my mind, I felt like that was a job that -- that probably could have been completed in three months or so.").

Mr. Blankenship also testified that Ms. Blakely "required a high level of supervision. You required an awful lot of interaction in order to get things done whereas I was accustomed to giving engineers work and they -- they performed it without much direction." Tr. at 911.

> MS. BLAKELY: Okay. The question is, we -- we have the question of the amount of time that had to be devoted to me being one of the issues which made me difficult to supervise. We have established that it is a normal expectation when a new employee joins a group that there is more time necessary to bring that individual on board than it would be to manage folks that have been there for a long time.
>
> THE HEARING OFFICER: Mm-hmm.
>
> MS. BLAKELY: I'm trying to establish how long this getting me on board process took and whether that is included in his description that I was a difficult employee, since it seems to be a time-related thing.
>
> THE WITNESS: It took 14 months and we never achieved it.
>
> MS. BLAKELY: Okay.
>
> THE HEARING OFFICER: How long do you think it should take?
>
> THE WITNESS: I would have thought two or three months.

Tr. at 912-13; *see also* Tr. at 887 ("The fact that -- that you had an awful lot of trouble, you know, manipulating this and you required a tremendous amount of -- of interaction and direction I think places your level of competency below that of the other people in the peer group . . . .")

Finally, Mr. Blankenship described Ms. Blakely as argumentative. When asked by Ms. Blakely at the hearing, he explained why.

> A Well, we -- we frequently had -- had contests. There would be disagreement over what a procedure meant or where -- we had an argument at one juncture where some calculations belonged. And I -- you know, in several of those instances, you were arguing with the subject matter expert.
>
> Q Okay. Question: What is the difference between arguing with a subject matter expert versus requesting clarification from the subject matter expert?
>
> A I think the difference is that when you're provided direction and you don't follow it.
>
> Q But what if the individual has questions on the direction? Is that being argumentative if one asks for further clarification?
>
> A At some juncture that becomes argumentative, yes.

Tr. at 914-15; *see also* Tr. at 853 ("I found Ms. Blakely to be a little difficult to work with. You know, I've worked with a lot of -- a lot of engineers, and I found her to be difficult to function with.").

My assessment of Mr. Blankenship's testimony is that his were honest opinions, arrived at from first-hand experience with Ms. Blakely, that he would have held whether or not he knew she had engaged in any protected activity. In light of these opinions, it is not at all surprising that Mr. Blankenship gave Ms. Blakely the low ratings he did on the Individual Employee Rating Form, in which his comments included observations that Ms. Blakely "[d]emonstrates frequent need for direction in order to sustain progress on work," "is frequently argumentative," and "has demonstrated a limited amount of fully complete work." FFI Exhibit L. Because, as discussed above, it is these low ratings that led to Ms. Blakely's dismissal, I find clear and convincing evidence that Ms. Blakely would have been one of the three employees in the Engineer category who were involuntarily separated, whether or not she had engaged in activity protected under Part 708.

III. Conclusion

As set forth above, I have concluded that the complainant has met her burden of proof of establishing by a preponderance of the evidence that he engaged in activity protected under 10 C.F.R. Part 708. However, I have also determined that Ms. Blakely has not met her burden of proving that her protected activity was a contributing factor in her termination from FFI. Even assuming that Ms. Blakely had met her burden in this regard, I found that FFI has proven by clear and convincing evidence that it would have taken the same action absent his disclosures. Accordingly, I conclude that the complainant has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted.

It Is Therefore Ordered That:

(1) The request for relief filed by Elaine M. Blakely under 10 C.F.R. Part 708 is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after receipt of the decision.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: June 25, 2003

Case No. VBI-0045

June 22, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Decision and Order

Name of Case: Joseph P. Carson

Date of Filing: March 14, 2000

Case Number: VBI-0045

On March 14, 2000, Joseph P. Carson (Carson) filed a "Whistleblower Reprisal Complaint per section 3164 of the NNSA Authorization Act for FY 2000." Carson is employed by the Department of Energy (DOE) as a Safety Engineer, nominally assigned to the Office of Oversight, Planning and Analysis, Office of the Deputy Assistant Secretary for Oversight, Office of Assistant Secretary for Environment, Safety and Health (EH), but he is currently stationed in Oak Ridge, Tennessee. In the March 14, 2000 complaint, Carson alleges that in 1999 he made a number of protected disclosures about Glenn Podonsky, a senior National Nuclear Security Administration (NNSA) official, to the DOE Office of Inspector General (IG) and Congress, "related to Podonsky's five year long campaign of reprisal against me." Carson alleges that Podonsky and "his subordinate managers" retaliated against him by not offering Carson a position in DOE's Oak Ridge Operations Office (DOE/OR) after the Department eliminated the EH Office of Site Residents Program. Carson had worked for that program in Oak Ridge before his "directed reassignment" to the EH Office of Oversight, located at DOE Headquarters (DOE/HQ) in Germantown, Maryland.

Background

The statute which Carson cites in his complaint is section 3164 of the National Defense Authorization Act for Fiscal Year 2000 (the Act). The present complaint is the first of its type to be filed with the DOE Office of Hearings and Appeals (OHA). Carson seeks remedies afforded under the "Whistleblower Protection Program" mandated by section 3164. According to the Conference Report on the Act, section 3164 has a very narrow purpose: it requires the Secretary of Energy to establish a program to protect covered individuals from reprisal for disclosing "information relating to the protection of classified information" which the employee reasonably believes to provide direct and specific evidence of a violation of federal law or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a false statement to Congress on an issue of material fact. H.R. Rep. No. 301, 106th Cong., 1st Sess. at 919-20 (1999) (emphasis added). Reprisals based on anything else are not covered by section 3164. "Covered individuals" are defined in section 3164(b) as DOE employees and contractor employees who are "engaged in the defense activities of the Department." Sections 3164(f) and (g) establish special procedures to safeguard the security of the information disclosed, and to restrict the disclosure of that information to persons and governmental entities who are authorized to receive it. In other words, the statute not only provides protection for specific employees but also established approved mechanisms which those employees must use in order to make disclosures which are entitled to protection. Section 3164(l), entitled "Relationship To Other Laws," states that "The protections provided by this section are independent of, and not subject to any limitations that may be provided in, the Whistleblower Protection Act of 1989 (Public Law 101-512) or any other law that may provide protection for disclosures of

information by employees of the Department of Energy or of a contractor of the Department."

Section 3164(i) states that a covered individual who believes he has been discriminated against as a reprisal "for making a protected disclosure under this section" may submit a complaint to the OHA Director. (Emphasis added.) Under section 3164(j)(1), the OHA Director must first determine whether the complaint is frivolous. If the OHA Director determines the complaint is not frivolous, he will conduct an investigation of the complaint. For the reasons explained below, I have determined that (i) the present complaint is "frivolous" because it fails to state a claim for relief under section 3164, (ii) no investigation is warranted, and (iii) the complaint should be dismissed.

Analysis

Carson's three-page complaint does not mention the protection of classified information or refer to classified information in any way. Carson submitted 41 separate attachments in support of the complaint. OHA's review of the lengthy compilation of attachments to Carson's complaint confirmed the impression gleaned from the complaint itself that neither the alleged protected disclosures nor the alleged retaliation appear to have any connection to the disclosure of classified or other information relating to the protection of classified information. We also found that none of the information Carson allegedly disclosed requires the type of special security protection prescribed in section 3164. Quite to the contrary, the attachments contain statements like "I hold a ?Q' security clearance, but my work has almost never involved classified information," (June 7, 1999 letter from Carson addressed to U.S. Congressional Committee Chairmen Sensenbrenner, Burton & Bliley), and "I cannot point to a specific danger to the safeguards and security of America's nuclear stockpile" (May 11, 1997 letter from Carson addressed to President Clinton).

In addition, it appears that Carson is not raising a new reprisal claim under section 3164, but merely referencing other complaints he previously filed against DOE in other fora before the effective date of section 3164, seeking enforcement of prior rulings in those cases, or a "global" settlement of all his claims against DOE. For this reason as well, section 3164 does not appear to be germane to his present complaint. Nor did any of those previous complaints relate to the specific subject matter jurisdiction of section 3164. For example, his disclosures in the pending Office of Special Counsel (OSC) complaint proceeding before the Merit Systems Protection Board (MSPB) mentioned below concern the alleged abuse of the DOE security clearance process to suspend Carson's "Q" clearance. According to Carson, a "Q" clearance is a qualification for his job because it enables him to enter secure facilities. Carson's clearance was restored, and he is now claiming that it was questioned in retaliation against his prior "whistleblowing activities." Although they relate to Carson's security clearance, these alleged disclosures do not involve classified or other information relating to the protection of classified information, and thus do not fall within the narrow scope of section 3164.

Other parts of his complaint are likewise unrelated to disclosures relating to the protection of classified information. Carson's complaint further states that "this matter. . . is also being considered by OSC" and that he anticipates "filing another petition for enforcement with MSPB in the next week as it has not responded to my previous one." March 14, 2000 Complaint, page 2 (citations omitted). An excerpt from an Office of Personnel Management (OPM) background investigation report Carson filed with the OSC states that "His work as a safety inspector is not classified work. Safety is public information. He did not appear to have violated security regulations or to have divulged any classified information." (Exhibit 6 to August 25, 1999 OSC Complaint, at page 39.) On April 1, 2000, Carson sent OHA an e-mail message which included a copy of a new filing he made on March 31, 2000 with the MSPB, styled as a "Motion for Initiation of an Addendum Proceeding to Determine Consequential Damages." This appears to be the petition he refers to above. While it mentions section 3164, that motion does not refer to the disclosure of classified or other information relating to the protection of classified information.

Based on the review and conclusions described above, an OHA Deputy Director wrote a letter to Carson on April 28, 2000, advising him that OHA had tentatively determined the complaint was frivolous:

your complaint does not appear to involve reprisals by the DOE against you for the disclosure of "classified or other information relating to the protection of classified information," which the Congress intended to cover in section 3164. It therefore appears that your present complaint is frivolous under section 3164(j)(1), and does not warrant an investigation. However, on behalf of the OHA Director I will give you an opportunity to show cause why your present complaint should not be dismissed as frivolous for failure to state a claim that falls within the purview of section 3164. Your written statement showing cause why your present complaint should not be dismissed for the reasons explained in this letter should be received by the OHA by May 19, 2000.

April 18, 2000 "show cause" letter from Thomas O. Mann to Carson at 2.

Carson took full advantage of the opportunity offered in the April 18, 2000 "show cause" letter. On May 11, 2000, at Carson's request, the OHA Deputy Director held a telephone conference with Carson and his attorney, during which they discussed DOE's interpretation of the statute based on the Conference Report. They also discussed the reasons why Carson believes his disclosures and the alleged retaliatory acts by Podonsky fall within the purview of the statute, specifically regarding their connection to the "protection of classified information." Following the telephone conference, OHA faxed the relevant portion of the Conference Report to Carson and to his attorney. Memorandum of Telephone Call between Mann, Carson and Michael Kator, Attorney for Carson (May 11, 2000). Finally, on May 17, 2000, Carson submitted a four-page letter, responding to OHA's April 18, 2000 "show cause" letter. We next consider Carson's arguments that good cause exists why his complaint should not be dismissed as frivolous within the meaning of section 3164.

As noted above, Carson's March 14, 2000 complaint under section 3164 alleges that Podonsky and "his subordinate managers" retaliated against Carson by not offering him a new position in Oak Ridge after the Department eliminated the EH Office of Site Residents Program for which Carson had worked in Oak Ridge before his "directed reassignment." In his May 17, 2000 response to OHA's "show cause" letter, Carson alleges specifically that DOE/OR failed to allow him to compete for two positions in late 1999, and one in early 2000, and that DOE/OR's failure to select (and promote) Carson for one of those positions constitutes a reprisal within the meaning of section 3164(a). In addition, Carson asserts that he could be considered a "covered employee" under section 3164(b) because he holds a DOE "Q" security clearance. For purposes of this analysis, I will assume that Carson's present complaint satisfies the requirements of sections 3164(a) and (b).

However, for the reasons explained below, I have determined that Carson's present complaint, even as augmented by his May 17, 2000 response to OHA's "show cause" letter, fails to show that he has made a "protected disclosure" as that term is defined in section 3164(c). In his response, Carson cites section 3164(c):

PROTECTED DISCLOSURES.—For purposes of this section, a

protected disclosure is a disclosure—

(1) made by a covered individual who takes appropriate

steps to protect the security of the information in accordance

with guidance provided under this section;

(2) made to a person or entity specified in subsection (d); and

(3) of classified or other information that the covered individual

reasonably believes to provide direct and specific evidence

of any of the following:

(A) A violation of law or Federal regulation.

(B) Gross mismanagement, a gross waste of funds,

or abuse of authority.

(C) A false statement to Congress on an issue of material

fact.

According to Carson, his disclosures about "the suitability of Podonsky to hold a security clearance and/or hold the key position he does for the protection for all classified information and material in DOE" should be protected under section 3164, even though they are not themselves classified. Carson's May 17, 2000 response at 2. Carson reasons that DOE's personnel security program is part of the agency's overall program for the safeguards and security of classified information and materials. Based on that premise, Carson argues that a protected disclosure "that otherwise meets the statutory definition" can be about the suitability of an individual holding a security clearance and having access to classified information and/or materials. He further asserts that "it seems clear to me that the intent of Congress in passing this law includes offering protection from reprisal to people who report evidence of spying or other information relating to the suitability of an individual to hold a clearance in DOE." Id. Carson's argument on this critical point concludes with the claim that his protected disclosures "are reasonable and based on direct and specific evidence that Glenn Podonsky violated a law or Federal regulation; is blameworthy for gross mismanagement, a gross waste of funds, or abuse of authority; or made a false statement to Congress on an issue of material fact." Id.

It is clear from the facts alleged in this case, from the statutory language itself, and from the legislative history in the Conference Report, that the disclosures forming the basis for Carson's March 14, 2000 complaint were not made under section 3164(c), and they do not qualify for the protection of the statute. None of them was made by an individual "who takes appropriate steps to protect the security of the information in accordance with guidance provided under this section," as specified in section 3164(c). Carson's disclosures about Podonsky's alleged role in Carson's 1997 directed reassignment were made before the effective date of the statute. They concern actions occurring before the effective date of the statute, and they did not involve classified or other information "relating to the protection of classified information" as specified in the Conference Report. The logic of Carson's reasoning in his May 17, 2000 response, about why his alleged disclosures relate to the protection of classified information, is strained and unconvincing. The mere fact that Podonsky holds a DOE security clearance and some of his official duties involve the oversight of security functions within the Department does not mean that Carson's allegations about Podonsky's "fitness" for his job necessarily relate to the protection of classified information. In fact, there is no apparent connection between Carson's alleged disclosures about Podonsky and the protection of classified information. Carson's attempt to analogize his allegations about Podonsky to a covered employee who reports "evidence of spying" is both inappropriate and incredible. Moreover, there is no basis for Carson's allegation that Podonsky "perjured himself" about his role in ordering the Carson reassignment. No perjury charges have ever been brought against Podonsky, nor is there any evidence to support Carson's serious accusations against Podonsky. Finally, there is no connection between Podonsky's alleged involvement in an attempt to revoke Carson's security clearance and "the protection of classified information" within the meaning of the Act. This alleged reprisal also took place years before the enactment of section 3164 so it could not have possibly concerned "protected disclosures" under the statute.

Carson's May 17, 2000 response next claims that he made his alleged protected disclosures to persons and entities enumerated in section 3164(d), including members of Congress, employees of Congress, and the OSC. According to Carson, his disclosure to the OSC is, in effect, a disclosure to the DOE Inspector General (IG), another one of the persons listed in section 3164(d). Carson claims he also made disclosures

directly to the DOE IG. In view of my finding above that Carson's disclosures were not made under section 3164, and thus fail to qualify for protected status under the Act, it makes no difference that they were made to persons and entities enumerated in section 3164(d). Likewise, it is irrelevant for purposes of the present analysis whether the disclosures alleged in Carson's March 14, 2000 complaint under section 3164 were a contributing factor to any alleged reprisals, since Carson has failed to meet the jurisdictional requirements of the statute.

For the reasons set forth above, I have concluded that Carson's present complaint is frivolous for purposes of section 3164(j), and that no investigation is warranted. It should be noted, however, that this determination does not mean Carson is left without a remedy for the alleged reprisals mentioned in his March 14, 2000 complaint. As stated in section 3164(l), the whistleblower protections provided by section 3164 are meant to be independent of Carson's rights under the Whistleblower Protection Act of 1989 (WPA) or any other laws that may provide protection for disclosures of information by DOE employees. Carson is already pursuing the same claims under the WPA. Section 3164 is a very specific statute, designed to deal with a specific type of disclosure. In this determination I simply conclude that Carson has failed to show that his alleged disclosures were made under the statute, and thus, he has failed to show they qualify for protection under section 3164. Carson's March 14, 2000 complaint under section 3164 will therefore be dismissed.

IT IS THEREFORE ORDERED THAT:

(1) The March 14, 2000 complaint filed by Joseph P. Carson under section 3164 of the National Defense Authorization Act for Fiscal Year 2000 is hereby dismissed.

(2) This is a final order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 22, 2000

Case No. VBR-0002

January 24, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: Westinghouse Savannah River Company

Date of Filing: November 12, 1999

Case Number: VBR-0002

This supplemental order concerns a Motion for Reconsideration (Case No. VBR-0002) filed by Westinghouse Savannah River Company (WSRC) on November 12, 1999. The reconsideration motion relates to an Initial Agency Decision issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on November 2, 1999 (Case No. VBH-0002). In the Initial Agency Decision, I granted relief to the Complainant on the whistleblower complaint he had filed against WSRC under 10 C.F.R. Part 708.(1) I found that WSRC had failed to prove by "clear and convincing" evidence that it would have terminated the Complainant absent his protected disclosure. In its reconsideration motion, WSRC contends that met its evidentiary burden in this case, and urges me to deny the relief to the Complainant.

I. Background

The facts pertaining to the Complainant's whistleblower complaint are fully set forth in the Initial Agency Decision, Don W. Beckwith, 27 DOE ¶ 87, 534 (1999), and will not be reiterated here. For purposes of the reconsideration request, the following procedural information is relevant. WSRC stipulated at both the investigatory and hearing stages of the Part 708 proceeding that (1) the Complainant had made a protected disclosure as defined in 10 C.F.R. § 708.5, and (2) the Complainant's protected disclosure can be considered a contributing factor to WSRC's decision to terminate the Complainant because of the temporal proximity that existed between the protected disclosure and the Complainant's termination. Decision at 3. In view of WSRC's stipulations, the Complainant was deemed to have met his regulatory burden of proving "by a preponderance of evidence that there was a disclosure . . . described under § 708.5, and that such act was a contributing

factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). The burden then shifted to WSRC to prove "by clear and convincing" evidence that the company would have terminated the Complainant even if he had not disclosed information about alleged misconduct by a WSRC management official.

WSRC's entire case rested on its assertion that it terminated the Complainant because he allegedly violated WSRC's short-term disability policy. To support its position, WSRC stated that two of its managers observed the Complainant at a construction site working while the Complainant was drawing 100% disability pay under WSRC's short-term disability policy. WSRC maintained that it was a violation of its disability policy to work while drawing disability pay. Alternatively, WSRC argued that it terminated the Complainant for lying at a meeting.

II. The Initial Agency Decision

After reviewing all the documentary and testimonial evidence in the case, I held in the Initial Agency Decision that the unresolved conflicting testimony in the record made it impossible to know with any confidence whether the Complainant was working at the construction site on the days in question, as alleged by the WSRC managers.

I also found that WSRC had failed to provide the most probative evidence of the Complainant's alleged violation of WSRC's short-term disability policy, namely the policy itself. Moreover, I determined that the evidence submitted by WSRC did not clearly and convincingly demonstrate that the company consistently terminates employees who violate the terms of WSRC's short-term disability policy.

In addition, I was not convinced by WSRC's alternative purported justification for terminating the Complainant, i.e., that the Complainant had lied in a meeting. I pointed out in the Decision that the WSRC Disciplinary Committee had recommended that the Complainant be terminated one day before the meeting in question had occurred. Moreover, I found that the evidence did not necessarily support WSRC's position that the Complainant had "lied" in the meeting in question.

III. Motion for Reconsideration

In its reconsideration request, WSRC maintains that it produced its entire short-term disability policy prior to the hearing, contrary to a finding set forth in the Initial Agency Decision. Request at 1. WSRC acknowledges that it did not submit its entire Disability Benefits Book but maintains that the two-page document it did provide constituted the company's entire short-term disability policy.

WSRC next highlights a sentence in its short-term disability policy that states, in relevant part, as follows: "[I]f you are disabled and **unable to work** . . ." (emphasis added by WSRC) a worker can qualify for short-term disability benefits. It is WSRC's contention that the short-term disability policy is unequivocal in that "unable" means "incapable." WSRC then reasons that the Complainant clearly was capable of working, as he admitted at the hearing that he had climbed on a homeowner's roof to inspect work that his subcontractors had completed while he was on short-term disability.

In response, the Complainant objects to WSRC's motion on the ground that it is not provided for under the Part 708 regulations and is designed to delay the resolution of the case. Complainant's Objection to Motion (November 18, 1999). It is WSRC's position, however, that while a request for reconsideration is an extraordinary remedy, it is appropriate in circumstances where an error must be rectified.

As an initial matter, the Complainant is correct that the filing of motions for reconsideration is not specifically enumerated by the Part 708 regulations. Nevertheless, Hearing Officers have all the powers necessary to regulate the conduct of proceedings which would include ruling on requests such as the one before me. See 10 C.F.R. § 708.28(b). Since WSRC is suggesting I made an error in reviewing the evidence, I deem it appropriate at this juncture to examine that issue.

WSRC's Short-Term Disability Policy

Prior to the hearing, WSRC submitted a two-page document (numbered as pages 2 and 3) bearing no title but having the heading mid-way down the first page "How the Plans Work" and a subtitle, "Short-Term Disability." See Exhibit 23a. At the hearing, WSRC's Policy Representative testified that she implemented all of WSRC's Human Resource policies from 1994 through 1998 and ensured, among other things, that WSRC's recommendations regarding disciplinary actions and termination were consistent throughout the site. Hearing Transcript (Tr.) at 210. In this regard, she testified that WSRC's "disability policy requires an employee to be at home, be available at any point in time for management or medical to get in touch with

him. Our disability policy does not allow any other type of work." Id. at 221. The two-page document WSRC submitted as Exhibit 23a, however, did not contain any language to support the WSRC's Policy Representative's testimony. Therefore, at the hearing I questioned the WSRC Policy Representative about a reference she had made in her earlier testimony to a 20-page disability policy:

Q.: . . . you mentioned that there's a 20-page written policy that details an employee's obligations when they're on short-term disability; is that correct?

A.: Um-hum [yes]

Q: . . . I want to hand you what we've marked as Document 23a . . . is that two-page document a part of this 20-page brochure that you're referring to?

A: It's just a short glimpse of the policy. This is in a handbook, benefits handbook that's given to the employee when they're employed out at Westinghouse.

Q: Can you take a minute to look at that and see where, if anywhere, it mentions the employee's obligations?

A: In this two-page, I do not see --[it].

Tr. at 232. From the testimony of WSRC's own policy representative recounted above, I inferred that there must be more to WSRC's short-term disability policy than the two-page document the company submitted. Otherwise, the WSRC Policy Representative's testimony regarding the restrictions placed on employees drawing short-term disability and the employee's obligations under WSRC's short-term disability policy made no sense to me.

On December 9, 1999, WSRC submitted a 14-page document entitled, "Disability, WSRC & BSRI" (2) that describes the three programs comprising WSRC/BSRI's disability benefits. The three programs mentioned in the 14-page document are Short-Term Disability, Total and Permanent Disability, and Special Benefits. Of particular note is the section entitled, "Short-Term Disability" which appears to be identical to Exhibit 23a. Assuming the 14-page document submitted by WSRC after the hearing was the disability policy in effect at the time the Complainant was employed by WSRC, it now appears that Exhibit 23a constituted the company's entire short-term disability policy. If I accept Exhibit 23a as WSRC's complete short-term disability policy then I must reject as unfounded the WSRC Policy Representative's testimony regarding the contents of that policy. The policy, by its own terms, simply does not support her assertions as recounted at the hearing.

I turn now to WSRC's assertion in its reconsideration request that Exhibit 23a prevented the Complainant from "working" while on short-term disability. WSRC points out that its policy states that "[I]f you are disabled and **unable to work** . . . (emphasis added by WSRC)," an employee may obtain short-term disability. According to WSRC, there is no qualifier, and it is clear from the context that "unable" means "incapable." Furthermore, WSRC contends that the fact the Complainant admitted at the hearing that he climbed up the ladder on a Saturday to inspect his subcontractors' work means he was capable of working. I disagree.

I find it curious that WSRC fails to mention the bolded definition of "disabled" in its short-term disability policy. The definition states in its entirety as follows:

"Disabled" under Short-Term Disability means that you are unable to perform the normal duties of your own job and are not at work. Medical evidence of disability may be required.

In the 14-page document WSRC submitted on December 9, 1999, there is a table entitled, "Disability Benefits at a Glance" that highlights, among other things, the key provisions in WSRC's Short-Term Disability program, its Total and Permanent Disability program, its Special Benefits' program, and its

Incapability Benefit program. Under the short-term disability column, it is stated, "Must be unable to perform your **own** job." The policy highlights the word "own." In contrast, in the Total and Permanent Disability column, it is stated, "Must not be able to perform **any** job." The policy highlights the word "any."

Since the Complainant was drawing short-term disability at all times relevant to this proceeding, the focus must be on whether the Complainant was able to perform his own job at WSRC, not whether he was incapable of working at any job. At the time he was placed on short-term disability, the record reflects that the Complainant was employed as a tritium maintenance mechanic. Exhibit 2b, Tr. at 73. The Complainant's medical records reflect that he has a long history of chronic back pain and suffers from degenerative arthritis of the spine. Exhibits 2b, 2d, 2f, 2g and 2h. According to medical documentation in the record, a WSRC physician opined in January 1998 that the Complainant was unable to perform his normal work assignment because he had difficulty sitting or standing for a long period and lifting over 40 pounds. Exhibit 2a. The Complainant's first-line supervisor testified at the hearing that tritium maintenance mechanics work on valves and pumps, are required to lift up to 50 pounds of weight, and use torquing wrenches that require twisting and turning. Tr. at 73-74. It seems reasonable to conclude from the evidence in the record, namely the documentation about the Complainant's medical condition and the medical opinion that the Complainant was unable to perform the duties of a tritium maintenance mechanic, that the Complainant was properly placed on short-term disability.

Next, I must look at what restrictions, if any, were placed on the Complainant by the terms of WSRC's short-term disability policy. After reviewing the policy, it appears that there were no restrictions placed on him. That having been said, it is only logical that if the Complainant were working at a construction site performing the same functions expected of him as a tritium maintenance mechanic, i.e., twisting and turning, and lifting 50 pounds of weight, that he should have been working in his position at WSRC. However, the evidence in the record that I deemed credible does not demonstrate that the Complainant was performing physical labor of the same kind required of him in his tritium maintenance mechanic position.

To be sure, there is the Complainant's own testimony that he hobbled up a ladder at the construction site to inspect the roof work his subcontractors had performed for a homeowner. (3) I am not convinced, however, from the evidence submitted by WSRC that the Complainant's actions in this regard were inconsistent with his short-term disability status. I therefore will not disturb my finding in the Initial Agency Decision that WSRC has failed to prove by clear and convincing evidence that it would have terminated the Complainant for having violated WSRC's short-term disability policy.

In conclusion, the new evidence submitted by WSRC supports its position that WSRC had submitted its entire short-term disability policy into the record of the proceeding prior to the hearing. Since it is now clear that Exhibit 23a constitutes WSRC's complete short-term disability policy, I must find that the testimony of the WSRC Policy Representative regarding the content of WSRC's short-term disability policy is unfounded and entitled to no weight. I make this finding because the WSRC Policy Representative's assertions about the restrictions placed on those drawing short-term disability are not supported by the terms of the policy itself or by any other credible evidence presented in this proceeding. I find further that WSRC has not presented "clear and convincing" evidence that it terminated the Complainant for his violation of the short-term disability policy or any other credible reason except for his protected disclosure.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Westinghouse Savannah River Company on November 12, 1999, Case No. VBR-0002, be and hereby is granted as set forth in paragraph (2) below and denied in all other respects.

(2) The Initial Agency Decision issued on November 2, 1999, Case No. VBH-0002, be and hereby is modified to reflect as follows: (1) Westinghouse Savannah River Company (WSRC) submitted its entire

short-term disability policy prior to the hearing; (2) the contents of the short-term disability policy do not support the testimony of the WSRC Policy Representative; (3) the testimony of the WSRC Policy Representative regarding the contents of WSRC's short-term disability policy appears to be unfounded and hence will be accorded no weight; (4) the terms of WSRC's short-term disability policy did not place any restrictions on outside employment; and (5) WSRC has not presented "clear and convincing" evidence that the Complainant, Don W. Beckwith, violated the terms of its short-term disability policy.

(3) This is a final Order of the Department of Energy.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: January 24, 2000

(1)The regulations codified at 10 C.F.R. Part 708 govern the DOE's Contractor Employee Protection Program, a program established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government- owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). The Program's primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers.

(2)It is unclear to me what the initials "BSRI" stand for, or the interrelationship between WSRC and BSRI. It is also not clear to me whether the 14-page document submitted by WSRC on December 9, 1999 is a part of the 20-page Disability brochure the WSRC Policy Representative alluded to in her hearing testimony, whether the 20-page document is another Disability Policy WSRC has, or whether the WSRC Policy Representative was mistaken as to the length of WSRC's Disability Policy. On December 10, 1999, WSRC tendered some documents relating to the remedial phase of this proceeding. Among the documents it submitted was a 14-page document entitled, "Disability WSRC & BSRI" and a 15-page document entitled, " General Information, WSRC & BSRI." The 14-page document WSRC submitted on December 10 is almost identical to the 14-page document it tendered on December 9. However, the version WSRC submitted on December 10 does not contain one page that is included in the December 9 version. The page in question contains a chart entitled, "Disability Benefits at a Glance."

(3)I point out that the Complainant's admission in this regard does not support WSRC's contention that the Complainant lied about working at the construction site on two other days. It is not even clear to me that the individual's act of hobbling up a ladder should be considered work in the sense of "physical labor."

Case No. VBU-0016

September 15, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Gary Roybal

Date of Filing:June 23, 1999

Case Number:VBU-0016

On October 6, 1998, Gary Roybal (Roybal) filed a complaint under the Department of Energy (DOE) Contractor Employee Protection Program, codified at 10 C.F.R. Part 708. The regulations governing the program were revised in a new interim final rule that took effect on April 14, 1999. Along with other procedural changes, the interim final rule reassigned the investigative function to the Office of Hearings and Appeals. All of the pending whistleblower cases in the investigative stage, including Roybal's case, were then transferred to OHA.

The OHA investigator assigned to the case dismissed Roybal's complaint on June 11, 1999. On June 23, 1999, Roybal filed this Appeal of the dismissal with the Director of OHA. In the Appeal, Roybal requests that OHA reverse the dismissal and reinstate his complaint. 10 C.F.R. § 708.18.

I. Background

Roybal was formerly employed by Johnson Controls World Services, Inc. (Johnson) at the Los Alamos National Laboratory in Los Alamos, New Mexico. Roybal alleges that he disclosed information regarding safety issues and mismanagement to his employer while employed by Johnson. On July 10, 1998, Roybal's employment was terminated. On this ground, Roybal filed a whistleblower complaint under Part 708 with DOE's Albuquerque Operations Office.

The Part 708 regulations in effect at the time of filing allowed an employee 60 days after the alleged retaliation to file a complaint. 10 C.F.R. § 708.6 (1992). Roybal, however, filed his complaint after the 60-day time period had expired since his July 10, 1998 termination from Johnson. Nonetheless, the complaint was not dismissed by DOE, and was still pending on April 14, 1999, when the interim final rule went into effect. The interim final rule increased the maximum time period for filing a complaint to 90 days after the date of the alleged retaliation. 10 C.F.R. § 708.14 (a). Roybal's complaint was filed within the 90 day time limit.

As noted above, in April 1999, after the effective date of the interim final rule, Roybal's complaint was transferred to the OHA for investigation. The investigator assigned to Roybal's complaint noted that the complaint was filed under the old regulations (which had the 60 day limit) and asked him to provide a reason for the late filing. When Roybal did not provide a reason for filing beyond the 60 day limit, the investigator dismissed his complaint on June 11, 1999. Roybal filed this Appeal on June 23, 1999, requesting that we reverse the dismissal. In his Appeal, he explained that he believed that the last act of alleged retaliation occurred on or about September 28, 1998 (when he was not re-hired by Johnson and

other allegedly less qualified individuals were hired), not on July 10, 1998, when his employment was terminated. Roybal, who is not represented by counsel in this matter, maintains that the regulations mean that retaliation could occur by omission (e.g., not being re-hired for an appropriate vacancy).(1)

II. Analysis

We find that the complaint was timely filed. This complaint was still pending and had not been dismissed by DOE prior to the effective date of the new interim final rule (April 14, 1999). The interim final rule provides an employee 90 days after the date of the alleged retaliation to file a complaint. § 708.14. According to the new regulations, "[t]he procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8. Therefore, because Roybal's complaint was pending on the effective date of the interim final rule, we find that the 90 day deadline in the interim final rule applies to this case. Section 708.8 was added to the interim final rule in order to explicitly state DOE' s intention that the revised procedures shall apply in any complaint proceeding pending at the investigative stage on the effective date of the rule. 64 Fed. Reg. 12,865 (1999). Roybal filed his complaint 88 days after his termination, which is within the 90 day deadline. The case shall be reinstated and processed in accordance with Part 708.

It Is Therefore Ordered That:

(1) The Appeal filed by Gary Roybal, Case No. VBU-0016, is hereby granted, as set forth in Paragraph (2) below.

(2) This matter is hereby reinstated and the complaint shall be investigated under 10 C.F.R. Part 708.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 15, 1999

(1)/ The regulations clearly state that retaliation is "an *action* . . . taken by a contractor against an employee with respect to employment . . . as a result of [a protected disclosure] . . . ." 10 C.F.R. § 708.2 (emphasis added).

Case No. VBU-0039

November 30, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Decision of the Director

Name of Case: Edward J. Seawalt

Date of Filing: November 2, 1999

Case Number: VBU-0039

Edward J. Seawalt (the complainant) appeals the dismissal of his complaint against Contract Associates, Inc. (the Contractor) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The program prohibits a DOE contractor from retaliating against an employee for disclosing certain information (a protected disclosure). As explained below, I have determined that Mr. Seawalt's appeal should be granted in part and his complaint remanded for further processing.

I. Background

A. The DOE Contractor Employee Protection Program

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

Part 708 prohibits contractors from retaliating against contractor employees who engage in protected conduct. Protected conduct includes disclosing information that the employee believes reveals a violation of a law, rule, or regulation. If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish, by a preponderance of the evidence, that the employee made a protected disclosure and the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, the burden shifts to the contractor to establish by clear and convincing evidence that it would have taken the same action in the absence of the employee's disclosure. If the employee

prevails, the OHA may order employment-related relief such as reinstatement and back pay.

Under Part 708, the office initially receiving the complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

B. Factual Background

The complainant was an employee of the Contractor. The Contractor, in turn, was a subcontractor to the University of California, the managing and operating contractor for the DOE's Los Alamos National Laboratory (LANL).

Prior to February 1, 1999, the complainant reported to a LANL official safety concerns about a product that the Contractor was installing at LANL. On February 1, 1999, the complainant resigned his position with the Contractor.

On May 6, 1999, the Contractor filed a state court action against the complainant, based, in part, on what the Contractor alleged were his wrongful disclosures to LANL. On June 11, 1999, the complainant filed a counterclaim, including one for retaliatory constructive discharge.

C. The Part 708 Complaint

The complainant filed his Part 708 complaint on August 3, 1999. In his complaint, he alleges that the Contractor retaliated against him for his disclosures. He maintains that these alleged retaliations gave him no choice but to resign. Accordingly, he claims that he was constructively discharged. In addition, the complainant cites the Contractor's May 1999 state court action against him as a retaliation.

The complainant seeks various types of relief. The complainant seeks employment-related relief in the form of any differential between his prior pay and benefits and his current pay and benefits at his new job. The complainant also seeks damages for emotional distress and the costs of defending the state court action. Finally, the complainant seeks to have the DOE seek relief against the Contractor for the alleged delay in the project attributable to the safety concerns.

D. The Dismissal

On October 19, 1999, the DOE employee concerns office at Albuquerque dismissed the complaint, based on lack of jurisdiction. The office found that the complainant's state court counterclaims constituted pursuit of a remedy under state law and, therefore, precluded consideration of his Part 708 complaint. Dismissal letter at 1 (citing 10 C.F.R. § 708.17(c)(3)). The office also opined that Part 708 could not provide relief with respect to the Contractor's pending state court action against the complainant, and that the complaint was untimely with respect to the constructive discharge claim.

E. The Appeal

On November 2, 1999, the OHA received the complainant's appeal. The complainant contends that the DOE employee concerns office erred in dismissing his appeal. The Contractor filed comments opposing the appeal, essentially arguing that the dismissal letter was correct.

II. Analysis

It is undisputed that if a complainant is pursuing a "complaint" under state law, the complainant may not pursue a Part 708 complaint. Section 708.17, which provides for dismissals of complaints, provides in relevant part:

(c) Dismissal for lack of jurisdiction or other good cause is appropriate if:

. . . .

(3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this part: or . . . .

10 C.F.R. § 708.17(c)(3). The dispute on appeal is whether the complainant's counterclaims are "complaints" under state law within the meaning of Section 708.17.

Although Part 708 does not define the word "complaint," Section 708.15 describes what constitutes the

pursuit of a remedy under state or other applicable law. Section 708.15, entitled "What happens if an employee files a complaint under this part and also pursues a remedy under State or other applicable law? " provides in relevant part:

(a) You may not file a complaint under this part if, with respect to the same facts, you choose to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless:

. . . .

(c) You are considered to have filed a complaint under State or other applicable law if you file a complaint, or other pleading, with respect to the same facts in a proceeding established or mandated by State or other applicable law, whether you file such a complaint before, concurrently with, or after you file a complaint under this part.

. . . .

10 C.F.R. § 708.15(a), (c) (emphasis added). As explained below, I have concluded that Section 708.15 does not preclude a Part 708 complaint where the complainant is pursuing a counterclaim in another forum.

Initially, I note that the word "complaint" is not further defined in the regulations. In other words, the regulations do not specify that the word "complaint" includes a counterclaim. A counterclaim is different from a complaint, especially because it does not have the element of voluntariness. Section 708.15(a) indicates that only a voluntary pursuit of a remedy in another forum bars a Part 708 complaint: Section 708.15(a) states that a Part 708 complaint is barred where the complainant "choose[s] to pursue" a remedy in another forum. In this case, the complainant did not "choose" to pursue a remedy in state court; rather, the complainant was forced into that forum by the Contractor's action against him. Accordingly, the complainant's counterclaims do not preclude a Part 708 complaint.

In reaching this conclusion, I have considered and rejected the Contractor's contention that a counterclaim is a "complaint, or other pleading" within the meaning of Section 708.15(c). The Contractor cites Section 708.15(c), which states that a complaint includes "a complaint or other pleading, with respect to the same facts in a proceeding established or mandated by State or applicable law." The Contractor argues that the word "mandated" indicates that a pleading need not be voluntary in order to bar a Part 708 complaint. The word "mandated," however, refers to a "proceeding," not a "pleading," and, therefore, does not mean that a counterclaim is a pleading precluding consideration of a Part 708 complaint. Moreover, the Contractor's interpretation of Section 708.15(c) is inconsistent with Section 708.15(a), which, as indicated above, precludes a Part 708 complaint where the complainant "choose[s] to pursue" a remedy elsewhere. The Contractor has not even attempted to reconcile its interpretation of Section 708.15(c) with the language of Section 708.15(a), which clearly contemplates that a complainant's pursuit of another remedy be voluntary. Finally, the Contractor's concern that, at some future point, the impact of one proceeding on the other might need be considered, does not provide a basis for concluding that the Part 708 complaint should be dismissed.

The conclusion that the complainant's state court counterclaims do not warrant dismissal of his Part 708 complaint is consistent with the purpose of Part 708, which is to protect contractor employees who make protected disclosures. If a contractor could file a state court action against an employee based on the employee's protected disclosures and then cite the employee's response as the basis for dismissal of a Part 708 complaint, a contractor could easily negate an employee's Part 708 protections. Indeed, such a rule would encourage retaliatory lawsuits - retaliations than can have a far greater impact on an employee than employment-related retaliation such as demotion or discharge. This would give too much power to the contractor. Accordingly, it would be contrary to the purpose of Part 708 to preclude Part 708 jurisdiction based on a complainant's state court counterclaims.

Having concluded that the complainant's state court counterclaims do not warrant dismissal of his Part 708 complaint, I address the two other issues mentioned in the dismissal letter, i.e., that Part 708 could not provide a remedy to the employee with respect to the Contractor's state court action and that the complaint was untimely with respect to the constructive discharge claim.

The dismissal letter correctly concluded that Part 708 could not provide a remedy for a retaliatory state court action against an employee. Part 708 provides for employment-related relief and the recovery of the costs of pursuing a Part 708 complaint. Part 708 does not provide remedies for other negative actions that an employer can take. For example, Part 708 would not protect an employee against a fraud action brought by the employer. Indeed, much of the complainant's requested relief is beyond the scope of Part 708 (damages for emotional distress, repayment of the cost of defending the state court lawsuit, and a DOE action against the Contractor for the delay in the project).

Although the dismissal letter correctly concluded that the complaint was filed over 90 days after the February 1, 1999 alleged constructive discharge, it is not clear that the complaint should be dismissed for this reason. Section 708.14(d) provides in relevant part:

If you do not file your complaint during the 90-day period, the Head of the Field Element or EC Director (as applicable) will give you an opportunity to show any good reason you may have for not filing within that period, and the official may, in his or her discretion, accept your complaint for processing.

10 C.F.R. § 708.14(d). Accordingly, Part 708 provides for consideration of whether the employee had "good reason" for not filing within the 90 period and permits discretionary acceptance of the complaint.

On appeal, the complainant contends that he had good reason for not filing a complaint within 90 days of the constructive discharge. The complainant contends that he did not know, until the Contractor's filing of the state action, of the full extent of the alleged contractor retaliation. The complainant's contention, in essence, is that the highly negative impact of the Contractor's court action, and its close proximity to the alleged constructive discharge, provides good reason for allowing him to pursue his untimely constructive discharge claim. In addition, the complaint suggests that health considerations may have been a factor in the delay.

I have concluded that the dismissal should be remanded to the DOE employee concerns office for full consideration of the issue whether the constructive discharge claim should be accepted despite its untimeliness. As indicated above, Section 708.14(d) provides that the complainant show "any good reason" for untimeliness to the office where he files his complaint, and for that office's "discretion" in determining whether to accept the untimely complaint. The dismissal letter does not directly consider whether good reason existed for the untimeliness; indeed, it is unclear whether the complainant raised that issue to the office. Accordingly, it is appropriate to remand the issue to the DOE employee concerns office so that it can request any additional information it deems appropriate and consider whether good reason exists for the untimeliness.

III. Conclusion

As indicated above, I have ruled that the complainant's counterclaims in the Contractor's state court action do not bar his Part 708 complaint. In addition, I have concluded that the complaint should be remanded to the DOE employee concerns office for its consideration of the complainant's contention that he has presented good reason for the acceptance of his untimely constructive discharge claim.

It Is Therefore Ordered That:

(1) The appeal filed by Edward J. Seawalt is hereby granted in part and his Part 708 complaint is hereby remanded to the DOE employee concerns office for further processing consistent with this decision and order.

(2) This decision is the final decision of the Department of Energy unless, by the 30th day after receiving the appeal decision, a party files a petition for Secretarial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 30, 1999

Case No. VBU-0047

April 17, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Decision of the Director

Name of Case: Edward J. Seawalt

Date of Filing: March 20, 2000

Case Number: VBU-0047

Edward J. Seawalt (the Complainant) appeals the second dismissal of his whistleblower complaint. In a prior decision, I remanded the first dismissal for consideration of whether good reason existed for the Complainant's late filing of his complaint. Edward J. Seawalt, 27 DOE ¶ ____ (1999) (Seawalt). As explained below, I have determined that the Complainant has shown good reason for the late filing of his complaint and, therefore, that the complaint should be remanded for further processing.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE Contractor Employee Protection Program is set forth at 10 C.F.R. Part 708. The DOE's new Part 708 regulations are set forth at 64 Fed. Reg. 12862 (1999) (interim final rule), amended, 64 Fed Reg. 37396 (1999), amended and finalized, 65 Fed. Reg. 6314 (2000). See also 65 Fed. Reg. 9201 (2000) (technical correction). Under those regulations, the DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, conducting hearings, and considering appeals on these matters. A copy of the regulations, as well as OHA decisions, can be found at the OHA's web site <http://www.oha.doe.gov>.

Part 708 prohibits contractors from retaliating against contractor employees who engage in protected conduct. Protected conduct includes disclosing information that the employee believes reveals a substantial and specific danger to employees (a protected disclosure). If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish, by a preponderance of the evidence, that the employee made a protected disclosure and the disclosure was a contributing factor to the alleged retaliation. If the employee makes the required showings, the burden shifts to the contractor to establish by clear and convincing evidence that it would have taken the same action in the absence of the employee's disclosure. If the employee prevails, the OHA may order employment-related relief such as reinstatement and back pay.

Under Part 708, the DOE office initially receiving the complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

B. Factual Background

The Complainant was an employee of Contract Associates, Inc. (the Contractor). The Contractor, in turn, was a subcontractor to the University of California, the managing and operating contractor for the DOE's Los Alamos National Laboratory (LANL).

Prior to February 1999, the Complainant reported to a LANL official safety concerns about a product that the Contractor was installing at LANL. On February 1, 1999, the Complainant resigned his position with the Contractor.

On May 6, 1999, the Contractor filed a state court action against the Complainant, based, in part, on what the Contractor alleged were his defamatory disclosures to LANL. The Contractor also alleged that the Complainant refused to recognize his status as an employee and engaged in various actions that ultimately resulted in the Contractor's loss of its LANL contract to a competitor. In June 1999, the Complainant filed counterclaims, including one for retaliatory constructive discharge.

C. Procedural History

On August 3, 1999, the Complainant filed his Part 708 complaint with the cognizant DOE employee concerns office (the DOE Office). The Complainant alleges that his February 1999 resignation was a constructive discharge. In addition, the Complainant alleges that the Contractor's May 1999 state court action was a further retaliation. The Complainant seeks employment-related relief in the form of any differential between his prior pay and benefits and his current pay and benefits at his new job. The Complainant also seeks other relief that is beyond the scope of Part 708. Seawalt, 27 DOE at ____ (Part 708 does not include damages for emotional distress, repayment of the cost of defending the state court action, and DOE action against the Contractor for delay in the project).

In October 1999, the DOE Office dismissed the complaint, based on lack of jurisdiction. The DOE Office found that the Complainant's state court counterclaims constituted pursuit of a remedy under state law and, therefore, precluded consideration of his Part 708 complaint. The DOE Office also opined that Part 708 could not provide relief with respect to the Contractor's pending state court action against the Complainant, and that the complaint was untimely with respect to the constructive discharge claim.

The Complainant appealed the October 1999 dismissal to the OHA. The Complainant argued that (i) his state court counterclaims did not preclude a Part 708 complaint, (ii) his complaint was timely because it was filed within 90 days of the Contractor's state court action against him, and (iii) if his complaint was untimely he had good reason for the late filing.

In November 1999, I issued the Seawalt decision, granting the appeal in part. Seawalt held that the Complainant's filing of the state court counterclaims did not preclude his Part 708 complaint. However, Seawalt agreed with the DOE office that the complaint was untimely, because the state court action was not a retaliation within the meaning of Part 708 and because the complaint was filed more than 90 days after the February 1999 alleged constructive discharge. Nonetheless, Seawalt noted that, on appeal, the Complainant had argued that the Contractor's filing of the state court action provided good reason for his late filing. Seawalt stated:

On appeal, the complainant contends that he had good reason for not filing a complaint within 90 days of the constructive discharge. The complainant contends that he did not know, until the Contractor's filing of the state action, of the full extent of the alleged contractor retaliation. The complainant's contention, in essence, is that the highly negative impact of the Contractor's court action, and its close proximity to the alleged constructive discharge, provides good reason for allowing him to pursue his untimely constructive discharge claim. In addition, the complaint suggests that health considerations may have been a factor in the delay.

Seawalt, 27 DOE at ____. Accordingly, Seawalt remanded the complaint so that the DOE Office could have an opportunity to consider the Complainant's assertion that good reason existed for the late filing of

the complaint.

On remand, the DOE Office received comments from the parties on the issue of whether good reason existed for the late filing. On March 7, 2000, the DOE Office dismissed the complaint a second time, stating that in its judgment no good reason existed to warrant accepting the late filing. On March 20, 2000, the Complainant filed the instant appeal. The Contractor filed comments, arguing that the appeal is untimely and, in any event, without merit.

II. Analysis

A. Whether The Instant Appeal Is Timely

The Contractor argues that the appeal is untimely because it was filed 11 days after the Complainant's receipt of the DOE office's dismissal letter. The Contractor correctly notes that under the regulations, a complainant has 10 days from receipt of the dismissal to file an appeal. See 10 C.F.R. § 708.18(a).

The Complainant's appeal is timely. The Complainant received the DOE Office dismissal letter on March 9, 2000. Because the tenth day after receipt was Sunday, March 19, 2000, the appeal was due the next day, Monday, March 20, 2000. See 10 C.F.R. § 1003.5(a)(1) (if last day of time period falls on weekend day or federal holiday, submission is due on the next day that is not a weekend day or federal holiday). The appeal was filed on Monday, March 20, and, therefore, is timely.

B. Whether Good Reason Exists for the Late Filing of the Complaint

It is undisputed that the DOE may accept an untimely complaint for processing if the complainant establishes "good reason" for the late filing. It is also undisputed that the Contractor's state court action is based, in part, on the alleged protected disclosures. As explained below, the filing of such an action provides "good reason" for the late filing.

The issue in this appeal is one of first impression. The revised Part 708 regulations contain a new provision with respect to the timeliness of complaints, which provides as follows:

If you do not file your complaint during the 90-day period, the Head of the Field Element or EC Director (as applicable) will give you an opportunity to show any good reason you may have for not filing within that period, and the official may, in his or her discretion, accept your complaint for processing.

10 C.F.R. § 708.14(d). Because this regulation is new, there are no cases interpreting it. The prior Part 708 rule on timeliness did not expressly provide for a "good reason" or "good cause" exception, but the Deputy Secretary decisions recognized the possibility of such an exception. See Therese A. Quintana-Doolittle, 27 DOE ¶ 88,035 (1999); Susan W. Hyer, 27 DOE ¶ 88,032 (1999); Matthew J. Sollender, 27 DOE ¶ 88,031 (1999). Those decisions upheld the dismissal of the complaints involved, but none involved the unusual situation presented in this case – a contractor's filing of a state court action against a former employee. Accordingly, I now turn to an analysis of whether the situation presented in this case provides good reason to accept the late Part 708 complaint.

An employee's decision whether to file a Part 708 complaint depends in part on the extent of the negative consequences flowing from a disclosure. A state court action against an employee based on the employee's disclosures has immediate negative consequences (in the sense that the employee must prepare to defend against the action) and potential future negative consequences (e.g., the payment of damages to the contractor). For this reason, when such an action is filed reasonably promptly after the deadline for filing a Part 708 complaint, the action may provide good reason for accepting a late complaint. Such an action is akin to a "changed circumstance" that can warrant reconsideration of a prior order. See generally 10 C.F.R. § 1003.55(b)(2)(iii).(1)

In this case, the Contractor's state court action provides good reason for accepting the Complainant's untimely constructive discharge complaint. It is undisputed that the Contractor's state court action is based in part on the employee's disclosures, and that the action was filed less than a week after the due date for the Complainant's Part 708 complaint. It is also undisputed that the Complainant filed his Part 708 complaint within 90 days of the filing of the state court action. Under these circumstances, good reason exists for the late filing, and the complaint is being remanded to the DOE Office for further processing.

III. Conclusion

As indicated above, I have ruled that the filing of the state court action in this matter provides good reason for the late filing of the complaint. Accordingly, I have concluded that the complaint should be remanded to the DOE Office for further consideration.

It Is Therefore Ordered That:

(1) The appeal filed by Edward J. Seawalt is hereby granted and his Part 708 complaint is hereby remanded to the DOE's employee concerns office for further processing consistent with this decision and order.

(2) This decision is the final decision of the Department of Energy unless, by the 30th day after receiving the appeal decision, a party files a petition for Secretarial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 17, 2000

(1)Although the contractor may believe that its court action is meritorious and that the Part 708 complaint is not meritorious, consideration of any such arguments is not appropriate in the preliminary procedural context of determining if good cause exists for a late filing. In this decision, I address only whether a state court action based in part on alleged protected disclosures can constitute good reason for extending the time to file a Part 708 complaint.

Case No. VBU-0050

June 15, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Decision of the Director

Name of Case: Darryl H. Shadel

Date of Filing: May 30, 2000

Case Number: VBU-0050

Darryl H. Shadel (the complainant) appeals the dismissal of his whistleblower complaint under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. As explained below, I have determined that the complaint was improperly dismissed, and that further processing should be accorded.

I. Background

A. The DOE Contractor Employee Protection Program

Part 708 prohibits contractors from retaliating against contractor employees who engage in protected conduct. Protected conduct includes disclosing information that the employee believes reveals a substantial and specific danger to employees (a protected disclosure). If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish by a preponderance of the evidence that he made a protected disclosure, and the disclosure was a contributing factor to the alleged retaliation. If the employee makes the required showings, the burden shifts to the contractor to establish by clear and convincing evidence that it would have taken the same action in the absence of the employee's disclosure. If the employee prevails, the Office of Hearings and Appeals (OHA) may order employment-related relief such as reinstatement and back pay. 10 C.F.R. § 708.29.

Under Part 708, the DOE office initially receiving the complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18

.

B. Factual Background

The complainant was an employee of Comforce Technical Services, Inc. (Comforce). Comforce, in turn, was a subcontractor to the University of California, the managing and operating contractor for the DOE's Los Alamos National Laboratory (LANL).

The complainant was assigned by Comforce to the Los Alamos Neutron Scattering Center (LANSCE) from May 1, 1995 until December 10, 1999, when his assignment was terminated. LANSCE is a division of LANL.

The complainant states that he disclosed safety concerns in November 1999. These concerns related to the allegedly improper performance of work done on a high energy electrical device with a high initial hazard rating. The complainant maintains that he was fired on December 10, 1999, on the pretense that he had threatened another employee in the workplace.

C. Procedural History

On February 8, 2000, the complainant filed his Part 708 complaint with the cognizant DOE employee concerns office (the DOE Office). He seeks the following relief: (i) back pay since his termination; (ii) return of his licensing badge; (iii) compensation for long distance telephone calls that he made to DOE offices in connection with the reprisal; (iv) a letter of apology from those who claimed that he made threats to other employees; (v) a hearing concerning the reprisal and the "circumstances existing in LANSCE since December 1998;" (vi) compensatory damages resulting from mental distress, loss of professional reputation, exclusion from work- related meetings and other similar circumstances. (1)

On May 16, 2000, the DOE Office dismissed the complaint, based on lack of jurisdiction. The DOE Office gave the following reasons for this action: (i) the complainant filed his complaint of retaliation against LANSCE, rather than against Comforce, his actual employer (Section 708.5); (ii) the complainant failed to demonstrate a connection between the protected disclosure and the alleged retaliation (Section 708.29); (iii) the complainant failed to ask Comforce to correct the violation prior to filing the complaint (Section 708.7); and (iv) the complainant failed to exhaust all applicable grievance-arbitration procedures (Section 708.13).

On May 30, 2000, the complainant filed the instant appeal of that dismissal. Comforce and LANL filed comments supporting the determination of the DOE Office. Comforce maintains that the complainant failed to comply with Section 708.7, by neglecting to ask it for assistance in correcting the alleged LANSCE safety violation. Comforce also contends that it should be dismissed from this proceeding because it is not a required party, it had no knowledge of the protected disclosure, and it had no involvement in the termination. Finally, Comforce states that because the complainant did not invoke the firm's appeal process, he failed to exhaust all applicable grievance-arbitration procedures. In its comments, LANL supports the dismissal on the grounds that the complainant failed to exhaust his employer's appeal process. LANL further states that complainant was terminated as a result of his own willful misconduct. In this regard, LANL cites Section 708.4(b), which provides in relevant part that an employee may not file a complaint against his employer if "[t]he complaint involves misconduct that [the complainant] acting without direction from [his] employer deliberately caused, or in which [he] knowingly participated."

II. Analysis

Part 708 enunciates the circumstances under which a DOE Head of Field Element or Employee Concerns (EC) Director may dismiss a complaint of retaliation. 10 C.F.R. §§ 708.13(b); 708.15(d) and 708.17(c). These sections set forth several procedural bases for dismissal. For example, a complaint may be dismissed if a complainant fails to show that he has exhausted all applicable grievance or arbitration procedures. 10 C.F.R. § 708.13(b). He may also face dismissal if he files his complaint in an untimely manner. 10 C.F.R. § 708.17(c)(1). Part 708 also permits dismissal on substantive grounds, including the filing of a frivolous complaint, or a complaint that is substantially resolved. 10 C.F.R. § 708.17(c)(4),(5).

The dismissal in the present case is based on both procedural and substantive grounds. As discussed below, I find the reasoning set forth in the DOE Office's determination to be unconvincing and ultimately without merit. The comments filed by LANSCE and Comforce are similarly unpersuasive and indicate a misunderstanding of the relevant regulations.

A. The Complainant Failed to Name his Employer

Section 708.5 provides that an employee of a DOE contractor (including a DOE subcontractor) may file a complaint against his employer alleging retaliation. In this case, the complainant named only LANSCE as the entity that subjected him to retaliation. Given the complainant's failure to name his actual employer, Comforce, the complaint as originally filed was deficient. However, the complainant states in his appeal that in addition to LANSCE, he now also names Comforce as the subject of his complaint. This amendment is sufficient to correct the deficiency. Furthermore, allowing this correction at this point in the proceeding creates no particular burden on Comforce, since it has been well aware of this complaint of retaliation and has participated in this proceeding from the outset. See Darryl Shadel (Case No. VBI-0048)(dismissed on other grounds, April 28, 2000). Even though the firm was not named in the original complaint, it was afforded an opportunity to comment on the complaint, and in fact did so in Case No. VBI-0048. As stated above, it has also filed comments in the instant proceeding. Accordingly, I find that this filing requirement has been satisfied, and there is no basis for dismissal on the grounds of failure to name the proper respondent.

In its response filed in connection with this appeal, Comforce states that it is not a proper party to this proceeding, and that it had no knowledge of the complainant's protected disclosures or of the reasons for LANL's termination of the complainant. Comforce therefore maintains that it should be dismissed from the proceeding. I will not make a determination on this issue at this point. This is an issue that should be fully considered after an investigation and hearing. It would be premature to dismiss Comforce at this early stage.

B. Failure to Demonstrate a Connection Between the Protected Disclosure and the Alleged Retaliation

According to Section 708.29, an employee who files a complaint of retaliation has the burden of establishing that he made a protected disclosure and that such act was a contributing factor in an act of retaliation by his contractor employer. In its determination, the DOE Office states that LANL indicates that it terminated the complainant because he posed a threat of physical violence and not because of a protected disclosure. The DOE Office therefore concluded that the complainant had failed to demonstrate that the protected disclosure contributed to the retaliation.

This determination precipitously reaches an issue which is at the heart of this case. In deciding this issue adversely to the complainant, the DOE Office dismissal prematurely ends this entire proceeding. That determination may not stand. The complainant has never been afforded an opportunity to present evidence on a pivotal issue in this case, or rebut LANSCE's claims. The complainant contends he was terminated because of the disclosure. The reason for the termination is therefore key in this proceeding, and is still in dispute. In fact, this is the very type of issue that the OHA is charged with investigating under Section 708.22 and considering through the hearing process described at Section 708.28. As a rule, a DOE Office may not dismiss a case by reaching this type of substantive determination under the provisions of Section 708.17, unless the facts do not present issues for which relief can be granted under Part 708, or the complaint is frivolous on its face. 10 C.F.R. § 708.17(c)(2) and (4). I find that the claims raised here present issues for which relief can be granted and which are not frivolous. Accordingly, I find that this determination by the DOE Office was incorrect.

In this regard, I believe a response to LANL's reference to Section 708.4(b) is warranted at this point. As stated above, that Section precludes an employee from filing a complaint "involving" his own deliberate misconduct. I find LANL's reference to Section 708.4(b) in this regard to be inapt. This Section was designed to prevent an employee who intentionally engages in misconduct from shielding himself by reporting that very same misconduct under the guise of a protected disclosure. For example, if an employee intentionally created a safety hazard, and then reported the hazard as a safety concern, his disclosure would not be protected under Part 708, because he deliberately engaged in the conduct that created the concern. In the instant case, the complainant's disclosure admittedly involved some safety concerns. However, the misconduct for which he was purportedly fired involved his allegedly violent

behavior towards other employees in the workplace. This is clearly unrelated to the protected disclosure at issue here. His complaint does not "involve" his own deliberate misconduct within the meaning of Section 708.4(b).

C. The Complainant's Failure to Request that his Employer Correct the Violation

Part 708 provides protection to an employee who refuses to participate in an activity if he reasonably believes that participation would be in violation of a federal health or safety law or cause him or others serious injury. 10 C.F.R. § 708.5(c). This protection is accorded only if the complainant has, prior to the refusal to participate, asked his employer to correct the violation or remove the danger, and the employer has refused to do so. 10 C.F.R. § 708.7. However, this section does not apply to a complainant who discloses a health or safety danger, but does not refuse to participate in an activity based on the perceived fear of injury or violation of law.

In the instant case I see no allegation by the contractors or any other evidence that the complainant ever refused to participate in any work-related activity based on his belief that it constituted a safety or health threat. The record suggests that the complainant simply alerted LANSCE to the existence of a hazard. I note in this regard that LANSCE's basis for terminating the complainant was his alleged threatening behavior, and not that he refused to perform his responsibilities. Thus, Section 708.7 does not appear applicable in this case. Accordingly, the DOE Office erred in dismissing this complaint on the grounds that the complainant failed to request that his employer correct the violation.

D. The Complainant's Failure to Show Exhaustion of Grievance- Arbitration Procedures

Section 708.13 generally requires that a complainant exhaust all "applicable grievance-arbitration" procedures prior to filing a complaint. The complainant must affirm in his complaint that he has completed all applicable grievance or arbitration procedures. 10 C.F.R. § 708.12(d). If he does not do so, his complaint may be dismissed for lack of jurisdiction. 10 C.F.R. § 708.13(d).

In the instant case, the complainant has admittedly failed to pursue an appeal process that Comforce has set out in its Employee Handbook. The relevant portion of the Handbook provides:

EMPLOYEE APPEAL

Employees who believe that they have been disciplined unfairly, too harshly, or inappropriately, may appeal the discipline within 10 working days by filing a written complaint with their COMFORCE TECHNICAL SERVICES, INC. supervisor or organizational manager.

Employee Handbook at 17.

In their filings with the DOE Office, both Comforce and LANL argue that the grievance-arbitration procedures referred to in Section 708.13 include the Comforce appeal process, and that since the complainant failed to use this appeal process, he is barred from filing a Part 708 complaint. The DOE Office adopted this reasoning in dismissing the complaint. Comforce and LANL continue to press this position in the current appeal phase of this case. I do not agree with the Comforce and LANL reasoning or the DOE Office's determination.

The term "applicable grievance-arbitration procedure" is not defined in Part 708. However, the expansive reading that the DOE Office has given this term is in my view unjustified. A more limited reading is called for. As stated in the 1998 Notice of Proposed Rulemaking, it was the intent of the DOE to continue a policy that bargaining unit employees must use available negotiated procedures to resolve their complaints of retaliation. 63 Fed. Reg. 373, 378 (January 5, 1998). I believe that in the context of the Part 708 rules,

"applicable grievance-arbitration procedure" is intended to cover negotiated grievance procedures available to bargaining unit employees, and similar procedures leading to determinations under binding arbitration pursuant to a bargaining unit agreement. This requirement was included in order to ensure that the remedies offered by Part 708 did not permit or encourage employees to bypass procedures set forth in negotiated labor agreements. The Comforce "Employee Appeal" procedure is obviously very different. It is more akin to a reconsideration procedure. I do not find that it is covered by Section 708.13.

I therefore conclude that the term "grievance-arbitration procedure" used in the context of Part 708 has a specialized meaning related to procedures negotiated by employees and management. It should thus not be considered to include every unilaterally-created appeal process offered by an employer. Accordingly, I will not sustain the determination of the DOE Office on this point.

III. Conclusion

As indicated by the foregoing, I find that the DOE Office incorrectly dismissed the complaint filed by Darryl Shadel. Accordingly, the complaint should be accepted for further consideration.

It Is Therefore Ordered That:

The Appeal filed by Darryl Shadel (Case No. VBU-0050) is hereby granted and his Part 708 complaint is hereby remanded to the DOE Employee Concerns Program Office located in Albuquerque, New Mexico, for further processing as set forth at 10 C.F.R. § 708.21.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 15, 2000

(1) Even if the complainant is successful overall, he is not likely to prevail on his request for compensatory damages for emotional distress or on his claim for an apology, since these are beyond the scope of Part 708. Edward J. Seawalt, 27 DOE ¶ 87,558 (1999)(Case No. VBU-0039)(Part 708 does not allow damages for emotional distress). Since the dismissal at issue here will be overruled, the complainant is entitled to have a hearing regarding the circumstances of his own termination, but he is not entitled to have a hearing concerning the overall work environment at LANL. This is a matter between LANL and the DOE, and no relevant remedy is permitted under Part 708.

Case No. VBU-0077

October 25, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: Ronald E. Timm

Date of Filing: September 25, 2001

Case Number: VBU-0077

Ronald E. Timm (the Complainant), the President of RETA Security, a Department of Energy (DOE) subcontractor, appeals the dismissal of his whistleblower complaint filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. On September 10, 2001, the Employee Concerns Program Manager at the DOE's Albuquerque Operations Office dismissed the Complainant's complaint for lack of jurisdiction. As explained below, I uphold the dismissal of the subject complaint.

I. Background

A. The DOE Contractor Employee Protection Program

The regulations governing the DOE Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. See 64 Fed. Reg. 12862 (1999) (interim final rule), amended, 64 Fed. Reg. 37396 (1999), amended and finalized, 65 Fed. Reg. 6314 (2000). See also 65 Fed. Reg. 9201 (2000) (technical correction). Part 708 prohibits contractors from retaliating against contractor employees who engage in protected conduct. Protected conduct includes disclosing information that an employee reasonably and in good faith believes reveals a substantial and specific danger to employees or to the public health or safety. 10 C.F.R. § 708.5 (a)(2). The employee must establish, by a preponderance of evidence, that the employee made a protected disclosure and the disclosure was a contributing factor to any alleged retaliation. 10 C.F.R. § 708.29. If the employee makes the required showings, the burden shifts to the contractor to establish by clear and convincing evidence that the contractor would have taken the same action in the absence of the employee's disclosure. Id. If the employee prevails, the DOE's Office of Hearings and Appeals (OHA) may order the contractor to provide appropriate relief. 10 C.F.R. § 708.36.

Under Part 708, the DOE office initially receiving the complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

B. Factual Background

The Complainant is the President of RETA Security, a company that provides technical support services to the DOE's Office of Safeguards and Security (OSS) pursuant to a subcontract with Science Applications International Corporation (SAIC).

Among the tasks assigned to RETA Security beginning in 1997 was the review and verification of the

DOE's "Site Safeguards and Security Planning Process (SSSP)(1) at certain DOE sites. Between 1997 and 1999, the Complainant claims that RETA Security identified serious security issues at various DOE sites as part of its support role associated with evaluating the DOE's SSSP. The Complainant charges that in 1999 he suffered systemic retaliation and retribution by DOE officials for raising those security concerns.

On January 5, 2000, the Complainant sent a letter to a senior DOE official in which he voiced concerns about a number of matters, including his perception that he had been retaliated against for raising security concerns. The senior DOE official immediately forwarded the Complainant's letter to the DOE's Inspector General (IG) for appropriate action. The IG initiated an inspection that spanned nine months and issued a Report in September 2000 (IG Report). The IG Report examined all of the Complainant's allegations in detail, ultimately concluding that there was no evidence that the Complainant had suffered any retaliation from DOE officials.

C. Procedural History

On February 16, 2001, the Complainant filed his Part 708 complaint with the cognizant DOE Employee Concerns Office. The complaint was subsequently transferred in July 2001 to the Albuquerque Operations Office for processing.

On September 10, 2001, the Employee Concerns Program Manager at the DOE's Albuquerque Operations Office dismissed the subject complaint for lack of jurisdiction. In the dismissal letter, the Employee Concerns Program Manager explained that there was no nexus between any retaliation the Complainant may have suffered and any action taken by his employer, SAIC.

On September 25, 2001, the Complainant filed an appeal of the dismissal of his Part 708 complaint. In his appeal, the Complainant clarifies that his Part 708 complaint is filed against the DOE, not SAIC. Appeal at 1. The Complainant subsequently confirmed his position that it was the DOE and not SAIC that retaliated against him. See Record of Telephone Conversation between Ronald E. Timm and Ann S. Augustyn, OHA Attorney (September 27, 2001).

II. Analysis

The threshold issue in this case is a novel one, whether a DOE subcontractor can file a complaint against the DOE under the Contractor Employee Protection Program, 10 C.F.R. Part 708. In deciding this jurisdictional question, I first examine the purpose of the program. I then turn to the plain language of the program's implementing regulations.

The purpose of the Contractor Employee Protection Program is set forth in Part 708 as follows:

> This part provides procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities.

10 C.F.R. § 708.1. As a result, the clear focus of the program is upon DOE contractors and their employees.

The regulations also describe the kinds of conduct for which an employee of a contractor may file a Part 708 complaint against his/her employer. 10 C.F.R.§ 708.5. While the term "employer" is not defined in the Part 708 regulations, I find that it is reasonable to interpret "employer" as meaning an entity in the contractor chain, not the DOE. Several references in the Part 708 regulations and elsewhere support this interpretation.

First, the term "retaliation" is defined, in relevant part, as "an action (including intimidation, threats,

restraint, coercion or similar action) taken by a *contractor* against an employee with respect to employment . . . as a result of the employee's disclosure of information . . ." 10 C.F.R. § 708.2 (emphasis added). Second, in describing the burden of proof ascribed to each party, Part 708 states that "[o]nce the employee has met this burden, the burden shifts to the *contractor* to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal" (emphasis added). 10 C.F.R. § 708.29. Third, with regard to remedies for retaliation, Part 708 states that if an initial agency decision contains a determination that an act of retaliation occurred, the decision may order the *contractor* to provide [the employee] with appropriate interim relief. See 10 C.F.R. §708.36(b). Further, in the section of the regulations addressing the issue of how a final agency decision is implemented, Part 708 indicates that the DOE element having jurisdiction over the contract under which the employee is employed will forward the decision to the *contractor, or subcontractor* involved. See 10 C.F.R. § 708.38(a). Finally, Part 708 states that "[a] *contractor's failure* or refusal to comply with a final agency decision and order under this regulation may result in a contracting officer's decision to disallow certain costs or terminate the contract for default." (emphasis added) 10 C.F.R. § 708.38(b).

In addition, the preamble to Part 708 indicates that retaliation against contractor employees may also lead to the imposition of penalties under the Price Anderson Amendments Act of 1988 (Pub. L. 110-49)(August 20, 1988), implemented under 10 C.F.R. Part 820. 64 Fed. Reg. 12862 (March 15, 1999). That preamble also states that an act of *retaliation by a DOE contractor* may be subject to the investigatory and adjudicatory procedures of both Part 820 and Part 708(emphasis added). Id.

The DOE has consistently articulated the scope of Part 708 as including actions by DOE contractors only. The agency's treatment over time of issues arising under Part 708 is entirely consistent with the foregoing interpretation. When the DOE issued its Notice of Proposed Rulemaking in connection with Part 820 in 1992, the DOE addressed the relationship between 10 C.F.R. Part 708 and 820, stating in relevant part as follows: "Part 708 deals with *reprisals by DOE contractors* against contractor employees. . ." 57 Fed. Reg. 20796, 20797 (May 15, 1992)(emphasis added). "To the extent a *reprisal by a DOE contractor* results from an employee's involvement in matters of nuclear safety in connection with a DOE Nuclear Safety activity, the reprisal would constitute a violation of a DOE Nuclear Safety Requirement if proposed part 820 is adopted as a final rule." (emphasis added). Id.

Moreover, nowhere in Part 708, its history, or its preamble is the DOE mentioned as a potential litigant. In fact, were OHA to allow this proceeding to go forward with the DOE as a party and were OHA to find in favor of the complainant, OHA would lack the authority to order the DOE to do anything with regard to remedy in this case.

For all the reasons set forth above, I find that OHA is not the proper forum to consider the Complainant's allegations. Simply put, OHA lacks jurisdiction under 10 C.F.R. Part 708 to proceed further with the processing of the Complainant's complaint. Accordingly, I must affirm the decision made by the Employee Concerns Program Manager at the DOE's Albuquerque Operations Office to dismiss the subject complaint.

III. Conclusion

As indicated above, I have determined that the plain language of the Part 708 regulations precludes OHA from accepting jurisdiction in this matter. For this reason, I uphold the decision made by the Employee Concerns Program Manager at the DOE's Albuquerque Operations Office to dismiss the Complainant's Part 708 complaint.

It Is Therefore Ordered That:

(1) The appeal filed by Ronald E. Timm on September 25, 2001, Case No. VBU-0077, be and hereby is denied and his Part 708 complaint is dismissed.

(2) Within 30 days after his receipt of this Decision, the Complainant may file a petition for Secretarial Review with the Office of Hearings and Appeals.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 25, 2001

(1)"The SSSP is "the primary instrument that the DOE Operations Office Managers use to certify to the Secretary of Energy the accuracy of risk and the measures used to assure that the public, employees, environment, and national assets are adequately protected." See Appendix B to Unclassified Summary Report of the DOE Inspector General on "Allegations Concerning the DOE's Site Safeguards and Security Planning Process" (September 2000).

March 2, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: S. R. Davis

Date of Filing: February 6, 2004

Case Number: VBU-0083

S. R. Davis, a former employee of Fluor Fernald, Inc. (Fluor), a Department of Energy (DOE) contractor, appeals the DOE Ohio Field Office's (OFO) dismissal of the whistleblower complaint against Fluor she filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. As explained below, I am affirming OFO's dismissal of the subject complaint.

I. BACKGROUND

A. The DOE's Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, the DOE office initially receiving a complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

B. The Procedural History

On June 21, 2001, the Complainant filed her original whistleblower complaint with OFO. 1/ On May 31, 2002, OFO issued a letter which granted jurisdiction and attempted to refine the issues set forth

---

1/ The June 21, 2001 Complaint is not at issue in the present case.

in the Complaint (the May 31, 2002 Letter). On June 14, 2002, the Complainant wrote to OFO. The June 14th letter attempted to clarify the Complaint and requested that the Compliant be forwarded to this office for an investigation and hearing. The June 14th letter further indicated that, in addition to the allegations set forth in OFO's May 31, 2002 Letter, the Complainant was also alleging: "over the years, my disclosures to [Fluor] and DOE management have caused me to be demoted and/or passed over for promotions." June 14th letter at 3. Apparently, there was no further correspondence between the OFO and the Complainant before I appointed an OHA Staff Attorney to investigate the allegations contained in the Complaint. A Report of Investigation (ROI) was issued by this office on August 7, 2003. After the ROI was issued, I appointed a Hearing Officer, and the case proceeded to the hearing stage. During the preliminary stages of the Hearing proceeding, however, the Hearing Officer issued two letters indicating that the Complainant's allegations that she was demoted or passed over for promotions would not be considered. These letters are dated September 24, 2003 and November 12, 2003.

After the Hearing Officer issued her first letter indicating that she would not consider the Complainant's allegations that she was demoted or passed over for promotions, the Complainant filed with OFO a second complaint (the November 10th Complaint) which contained these allegations. It is this November 10th Complaint which is at issue in the present case.

On January 22, 2004, OFO issued a Jurisdictional Decision dismissing the November 10th Complaint. The Jurisdictional Decision was based on OFO's determination that November 10th Complaint had not been filed in a timely matter. On February 6, 2004, the Complainant filed the present appeal.

II. ANALYSIS

10 C.F.R. § 708.17 sets forth those circumstances under which a complaint may be dismissed for lack of jurisdiction or for other good cause. 10 C.F.R. § 708.17(c)(1) provides: "Dismissal for lack of jurisdiction or other good cause is appropriate if: Your complaint is untimely." OFO's January 22, 2004 Jurisdictional Decision cites § 708.14(a)(1) as the basis for its dismissal of the November 10th Complaint. Section 708.14(a)(1) states: "You must file your compliant by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation."

The November 10th Complaint clearly sought relief from the Hearing Officer's ruling that certain allegations would not be considered at the hearing stage of the proceeding. 2/ However, OFO could not have properly considered the November 10th Complaint. The DOE's whistleblower regulations do not provide for interlocutory relief from Hearing Officer's rulings, nor allow for review of a Hearing Officer's ruling by a DOE field office. The only appeal of a Hearing Officer's ruling provided by the regulations is set forth at 10 C.F.R. § 708.32. Section 708.32 allows a party who is dissatisfied with the Hearing Officer's *"initial agency decision"* to appeal that decision to the

---

2/ There is no indication that OFO was aware of the Hearing Officer's rulings when it decided to dismiss the 2nd Complaint. However, the 2nd Complaint asked that the issues raised in the 2nd Complaint be considered in the same proceeding as the issues in the Original Complaint, and that fact should have led OFO to consult with OHA.

Director of the Office of Hearings and Appeals. 10 C.F.R. § 708.32(a) (emphasis supplied). OFO does not have the regulatory authority to review an OHA Hearing Officer's ruling, therefore OFO should have dismissed the complaint filed by S. R. Davis on November 10, 2003. Since the Hearing Officer has not yet issued a initial agency decision, the Hearing Officer's ruling that certain allegations would not be considered is not yet ripe for appeal. Since this matter is not yet ripe for appeal, I will not consider it at this time. Moreover, I note that the interests of fairness and efficiency would be poorly served by allowing a party to appeal a Hearing Officer's ruling to DOE field offices or by allowing for interlocutory appeals, except in extraordinary circumstances.

III. Conclusion

As indicated by the foregoing, I find that the DOE Ohio Field Office correctly dismissed the complaint filed by S. R. Davis on November 10, 2003. However, OFO dismissed the November 10th Complaint for the wrong reason. Since the November 10th Complaint was not yet ripe for review and OFO did not have jurisdiction to consider a matter that was before a Hearing Officer, OFO should have dismissed the November 10th Complaint on those bases rather than by ruling on the timeliness of the allegations contained in that compliant. Accordingly, the present appeal should be denied. However, if the Complainant remains dissatisfied with the Hearing Officer's ruling after the issuance of the initial agency decision, she may appeal that issue under the provisions set forth at 10 C.F.R. § 708.32.

It Is Therefore Ordered That:

The Appeal filed by S. R. Davis (Case No. VBU-0083) is hereby denied.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 2, 2004

Case No. VBX-0014

April 25, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Case: Roy Leonard Moxley

Date of Filing:January 10, 2000

Case Number: VBX-0014

This Decision supplements an Initial Agency Decision, dated December 29, 1999, that I issued as the Hearing Officer in a case involving a "whistleblower" complaint. The complaint was filed by Roy Leonard Moxley under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. See Roy Leonard Moxley, 27 DOE ¶ 87,546 (1999) (the Initial Agency Decision). In that Decision, I found that Westinghouse Savannah River Company (WSRC), a DOE contractor, had violated the provisions of 10 C.F.R. § 708.5 by reducing Mr. Moxley's salary grade level (SGL) from SGL 31 to SGL 30 on October 1, 1996, in reprisal for his making protected disclosures related to mismanagement. The Decision further determined that Mr. Moxley was entitled to relief as provided for in Part 708, directed him to supplement the record with a statement of the relief he was seeking, and permitted WSRC to file a response to Mr. Moxley's claim. Mr. Moxley submitted this information on January 10, 2000. WSRC submitted a response to the January 10 submission on January 24, 2000. This Supplemental Order requires WSRC to correct Mr. Moxley's personnel file to reflect that he was reclassified to SGL 32 as of October 1, 1996.

I. The Submissions

A. Mr. Moxley's Claim

In his January 10 submission, Mr. Moxley listed a total of 16 remedies that he felt would restore him to a status that he would now occupy had no retaliations occurred. These proposed remedies may be characterized into two groups. The first three remedies concern reclassification to a higher grade level and monetary compensation based on that reclassification. The remaining 13 remedies would require WSRC to take additional personnel or administrative action that go beyond mere compensation for its prohibited acts.

Mr. Moxley's first three proposed remedies relate to compensation. He asks that I order WSRC to reclassify his current salary grade level from SGL 32, to which he was promoted on February 1, 1997, to SGL 35, which is what his peers in his current position earn. He then specifies that his salary as an SGL 35 employee should be $7750 per month, effective January 1, 2000. Finally, he calculates that the total monetary compensation due him is $375,580, composed of two figures: (1)

the difference in pay between the salary he received at SGL 30 rather than at SGL 32 for the period of October 1996 (when he was reclassified from SGL 31 to SGL 30) through January 1997 (when he was reclassified to SGL 32); and (2) the difference in pay between the salary he now receives at SGL 32 and

what he contends he should receive at SGL 35 for the period January 2000 through the date of his retirement 13 years from now.

The remaining 13 proposed remedies can themselves be broken down into categories. Three concern ordering WSRC to permit Mr. Moxley to place various documents related to this case in his permanent employment record. Three more would order WSRC employees to issue written statements to him either acknowledging that WSRC engaged in retaliatory action against him or apologizing for such behavior. Two proposed remedies would require the on-site ethics office to investigate the decision process that resulted in Mr. Moxley being reclassified from SGL 31 to SGL 30 and to investigate WSRC's Employee Concerns Office and one of its employees. The remaining five proposed remedies would all require WSRC to make promises regarding future action: that it never again retaliate against Mr. Moxley; that it not reassign him to any other work location; that it not reassign him to work "under the management span" of two specified managers; that one of those managers never again manage employees on the site; and that it guarantee Mr. Moxley a Monday-through-Thursday 10-hour-day schedule.

B. WSRC's Response

WSRC responded to Mr. Moxley's claims by stating generally that his remedies do not address the retaliation that was taken against him, but rather seek a monetary windfall, a promotion, and sanctions against numerous employees. WSRC also focused on the regulatory intent of the remedy provisions as a measure against which to consider each of Mr. Moxley's claims. After analyzing each of the 16 proposed remedies, WSRC concluded that none was appropriate, and that the correct and complete remedy would be modifying his official WSRC personnel file to reflect that he was reclassified up to SGL 32 on October 1, 1996, rather than to SGL 30.

II. Discussion

A. Forms of Relief Provided by Part 708

As both parties have pointed out in their respective submissions, Part 708 clearly defines the forms of relief that a hearing officer may order if he determines that an act of retaliation has occurred. They are:

(1) Reinstatement;

(2) Transfer preference;

(3) Back pay;

(4) Reimbursement of your reasonable costs and expenses, including attorney and expert- witness fees . . .; [and]

(5) Such other remedies as are deemed necessary to abate the violation and provide you with relief.

10 C.F.R. § 708.36(a).

In discussing the comments it received when it proposed changes to Part 708 in 1999, DOE stated that the remedies "are intended to correct unwarranted employment actions. The goal of this regulation is simply to restore employees to the position they would have occupied but for the retaliation." 64 Fed. Reg. 12862, 12867. With that goal in mind, I will now consider each remedy claim that Mr. Moxley has requested.

B. Monetary Claims

The first three of Mr. Moxley's claims relate to adjustment of pay, both back pay and future pay, as

remediation for the retaliatory act of reclassifying him in October 1996 from SGL 31 to SGL 30. The back pay aspect of these claims is the request for SGL 32 pay for the four-month period from October 1996 until February 1, 1997, when he was promoted to an SGL 32 position and given a raise of $295 per month. Although the Initial Agency Decision determined that reclassifying Mr. Moxley to SGL 30 rather than to SGL 32 in October 1996 was an act of retaliation, it did not consider his failure to receive a raise at that time, and Mr. Moxley has not shown that he should have received such a raise. The fact that he received both a promotion to an SGL 32 position and an accompanying raise in February 1997 does not support Mr. Moxley's claim for back pay, because the February 1997 personnel action was taken for reasons independent of the October 1997 reclassification. See Roy Leonard Moxley, 27 DOE at 89,239 (Initial Agency Decision at 6). Moreover, in its response, WSRC points out, and substantiates through contemporaneous records, that during the massive reclassification in October 1996, many employees who were reclassified up one SGL did not receive raises, though some did. Of the 98 employees under Mr. Kilpatrick's management, 24 were reclassified up one SGL at that time, but only six of them received pay raises as well. The remaining 18 received the same pay despite the SGL increase. From this evidence, it is clear that SGL reclassifications were not necessarily linked to raises. There is simply no evidence in the record that demonstrates that had Mr. Moxley been reclassified to SGL 32 in October 1996, he would have received an accompanying raise at that time. Therefore, I will not grant his claim for back pay.

Calculations of Mr. Moxley's remaining monetary claims are predicated upon my ordering WSRC to reclassify Mr. Moxley to SGL 35, effective January 1, 2000. In his submission, he gives the following justification for this claim:

The mind set of WSRC management against me because I made protective disclosures caused me to be demoted in October 1996. This demotion and mind set has carried over and has caused future raises and promotions to be delayed or non- existent. I should be classified as a SLG 35 as others in my present job assignment. My present SGL 32 and not a SGL 35 are a result of the 1996 retaliation.

In this case the retaliation, as limited by Mr. Moxley before the hearing, was WSRC's reclassification of Mr. Moxley to SGL 30 rather than to SGL 32. The appropriate remedy for this retaliation would therefore be reclassification at SGL 32 as of October 1, 1996. Although it is logically possible that WSRC's "mind set" is still set against Mr. Moxley because he made disclosures protected by Part 708, it would be extremely speculative to conclude from the record that this "mind set" is the reason that Mr. Moxley has not received all the promotions and raises that he feels he has deserved. More than three years have passed since the October 1996 retaliation took place. In the intervening period, Mr. Moxley has received a promotion and a raise, and has transferred to an organization not under the direction of Mr. Kilpatrick, the manager who approved the retaliatory personnel action. There is no evidence in the record that demonstrates that Mr. Moxley would have received a promotion to SGL 35 by January 2000 had the retaliation not occurred. Under these circumstances, to attribute the course of Mr. Moxley's employment history since then to continued retaliation for his protected disclosures goes well beyond the scope of the complaint in this case, which Mr. Moxley himself limited to the October 1996 reclassification. Consequently, I will not order that Mr. Moxley be reclassified at SGL 35.

C. Non-Monetary Claims

Mr. Moxley also requests as remedies that WSRC be ordered to take or refrain from a number of personnel-related actions in the future. He contends that each of these proposed remedies would "abate the violation and provide relief" as permitted in 10 C.F.R. § 708.36(a)(5). I have described them in section I.A. above. After considering each of these claims, I reject them as being beyond the scope of relief appropriate in this case. None of these remedies, if granted, would further the goal of the regulations by restoring Mr. Moxley to the position he would have occupied but for the retaliation. Some of these, such as dictating the terms of Mr. Moxley's future employment, would instead provide him with extraordinary protections that he would not have obtained under any normal circumstances. Part 708 protection is not intended to insulate the whistleblower from all future actions that his employer might take. Other remedies Mr. Moxley proposes, such as demoting Mr. Kilpatrick from his management position, and requiring the

Ethics Office to investigate the Employee Concerns Office, would not only not restore Mr. Moxley to his pre-retaliation position but appear to be punitive. Remedies that require apologies for and acknowledgments of the retaliation and remedies that order placement of documents related to this proceeding in Mr. Moxley's official personnel file would not "abate the violation and provide relief," but would merely memorialize that the retaliation occurred, and that relief has already been provided in the Initial Agency Decision.

For similar reasons, I need not order WSRC to promise that it will not retaliate against Mr. Moxley in the future. The intent of Part 708 is to prevent retaliation against whistleblowers by defining protected conduct and establishing remedies, and the regulations plainly state that DOE contractors have an affirmative duty not to retaliate. See 10 C.F.R. § 708.43. The regulations thus provide the assurance that Mr. Moxley seeks. Therefore, I will not order WSRC to promise that it will not retaliate against Mr. Moxley in the future. If Mr. Moxley feels he is retaliated against in the future, because of protected conduct or disclosures, he may pursue Part 708 protection once again.

III. Conclusion

Based on the entire record in this proceeding, including the submissions filed by Mr. Moxley and WSRC concerning the remedy issues at stake, I find that the sole appropriate remedy for WSRC's reclassification of Mr. Moxley from SGL 31 to SGL 30 on October 1, 1996, is to require WSRC to correct Mr. Moxley's official personnel file to reflect that he was reclassified to SGL 32 on that date.

It Is Therefore Ordered That:

(1) Westinghouse Savannah River Company shall modify its official personnel file on Roy Leonard Moxley to reflect that he was reclassified to SGL 32 on October 1, 1996.

(2) This is a Supplemental Order to the Initial Agency Decision issued on December 29, 1999. This Order, together with the Initial Agency Decision, shall become the final decision of the Department of Energy unless, within 15 days of the receipt of this Order, a party files a notice of appeal with the Director of the Office of Hearings and Appeals, requesting review of this Order or the Initial Agency Decision or both.

William M. Schwartz

Hearing Officer

Office of Hearings and Appeals

Date: April 25, 2000

VBX-0042

April 20, 2001

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Case: Richard R. Sena

Date of Filing: April 3, 2001

Case Number: VBX-0042

This Decision supplements an Initial Agency Decision, dated March 1, 2001, in which I found that Sandia Corporation had retaliated against Richard R. Sena in violation of Title 10, Part 708 of the Code of Federal Regulations. 10 CFR Part 708; http://www.oha.energy.gov/cases/whistle/vbh0042.htm. That determination found that Sandia should be required to compensate Sena in the amount of $342,324.77. In addition, the Decision noted that Sena is entitled to reasonable attorneys fees and costs, and that Sena claims that he should be compensated for the amount he has removed from his retirement plan for living expenses while this matter has been pending. The Decision required that Sena submit a report as to the amount claimed within 30 days after receipt of the Decision, and that Sandia provide comments or objections within 10 days of the Sena filing, after which I would issue a supplemental order establishing Sandia's total liability in this matter.

On March 30, 2001, counsel for Mr. Sena submitted an affidavit along with supporting schedules requesting $22,663 in fees. Those fees cover 160 hours of work at rates of $140 and $160 an hour. In addition, counsel submitted bills for expenses totaling $2,682.92. These expenses include $700.93 for court reporter fees for depositions, $1,819.99 for expert witness fees, and $162.00 for copying costs. Copies of bills for the expert witnesses and court reporter fees have been submitted.

On April 17, 2001, Sandia Corporation submitted comments on the March 30th submission. In its comments, Sandia points out discrepancies between the time records submitted and the stated total amount of attorney fees requested. Sandia notes that pursuant to its calculations the actual amount is $18,768 for attorney fees through March 2001 rather than the $22,663 requested.

In response to Sandia's comments, counsel for Sena submitted new billing records indicating that the total amount of fees earned is $22,086. The difference between the first set of billings and the second set appears to be mainly the result of one week of billings, right before the hearing, that was omitted from the first set of billing records.

As a result of Sandia's comments, I have reviewed the materials submitted in support of the request for fees and costs. Sandia's analysis appears to be correct. However, the newly submitted billing supports an award of $22,086 in legal fees. As for the costs requested, there appears to be an overstatement of $5.00 for the cost of court reporting services. I will therefore approve $2,677.92 in costs.

With respect to the issue of compensation for withdrawals from retirement accounts, Sena has provided two submissions indicating that he has in fact made withdrawals from his retirement accounts while this matter has been pending. The March 9th and 14th submissions neither indicate nor suggest that Mr. Sena

suffered any loss, such as adverse tax consequences or the payment of penalties, when he made withdrawals from his retirement accounts. The amount I indicated I would require Sandia Corporation to remit to Mr. Sena includes funds that cover the period in question and can be used to replenish those retirement accounts. To make an award on the withdrawal of funds from these accounts as well would be double counting the amount of loss that Mr. Sena experienced during this period.

This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by each affected NNSA element, official, or employee, and by each affected contractor.

It Is Therefore Ordered That:

(1)Sandia Corporation shall pay Richard R. Sena $367,088.69 within 30 days of the date of this order.

(2) This is a Supplemental Order to the Initial Agency Decision issued on March 1, 2001, in the matter of Richard R. Sena and shall be subject to review by the Director of the Office of Hearings and Appeals.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: April 20, 2001

October 3, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Case: Janet L. Westbrook

Date of Filing: June 17, 2002

Case Number: VBX-0059

Janet Westbrook (Westbrook or Complainant) filed a Complaint of Retaliation alleging that her former employer, UT-Battelle, LLC (Battelle or the Company), the DOE contractor that manages the Oak Ridge National Laboratory (the Laboratory or ORNL), terminated her as part of a reduction in force (RIF) as a retaliation for making disclosures that are protected under 10 C.F.R. Part 708. On May 9, 2002, the Office of Hearings and Appeals (OHA) of the Department of Energy issued a Decision and Order granting relief to Westbrook in connection with that complaint. *Janet L. Westbrook*, 28 DOE ¶ 87,021 (Case No. VBA-0059 (2002) (*Westbrook*). 1/ In *Westbrook* we noted that the Complainant was eligible for relief including reinstatement, back pay, costs and attorney fees. The instant decision will determine the amount and type of relief that Westbrook will be accorded.

We asked the Complainant to file a detailed statement showing the relief she is claiming, including a justification for any expenses claimed. She submitted a request for reinstatement, back pay of $171,190.91, and attorney fees of $27,439.39. The Company filed its own calculation of appropriate back pay for Westbrook, which it believed should total $69,814. The Company also claimed that the $200 per hour rate charged by Westbrook's attorney for her services in this proceeding was excessive for this type of case and recommended that Westbrook's attorney be allowed no more than $150 per hour.

1/ *Westbrook* was an appeal to the Director of the Office of Hearings and Appeals of an Initial Agency Determination (IAD) of an OHA Hearing Officer. The IAD found that Westbrook was not entitled to relief. *Janet L. Westbrook* (Case No. VBH-0059), 28 DOE ¶ 87,018 (2001). *Westbrook* reversed that determination and granted the Complainant relief.

Calculation of Back Pay Relief

We have now had extensive briefings from the parties in connection with making a final calculation of the level of back pay appropriate for Westbrook. Battelle calculated Westbrook's basic back pay as $6,484 per month, including a three percent upward adjustment made retroactive to October 2000. The Complainant did not dispute that figure. We also considered a number of issues involving what types of offsets should be deducted from Westbrook's back pay, and what allowances for benefits should be included as part of the relief. A summary of our conclusions in that regard is set out below.

1. Offset for Company Pension Payments to Westbrook: Westbrook's pension payments of $350.51 per month from the Company should be offset against the monetary relief in this case. Westbrook is not entitled to receive back pay and a pension for the same period.

2. Offset for "Payments in Lieu of Notice" and Severance Pay: As part of the RIF program, the Company offered affected employees pay in lieu of notice for a period of 60 days. 2/ The Complainant worked for four days after the date she received notice of termination and received payment in lieu of notice for 56 days. Both parties agree that the offset for both the severance and "in lieu" payments is appropriate. However, a key area of disagreement between the parties was how the offset should be accounted for. It was the difference in manner calculation of this offset that was in large measure responsible for the great discrepancy between calculation of back pay relief by the two parties. The Complainant believed that the offset for these payments should be made as a lump sum deduction from the total back pay amount for the entire relief period. Battelle believed that the deductions for these payments should be made on a "running" basis for each month of the relief period. We find the Company's calculation to produce a more nearly accurate result, since Westbrook received these payments as a lump sum when she was terminated in December 2000, i.e., at the beginning of the relief period. 3/

2/ The Company's reduction in force program included a commitment to provide notice to employees who were being terminated, or pay-in-lieu-of-notice for a period of 60 days.

3/ In fact, it would have been more precise to deduct those payments as a lump sum offset in December 2000, the month in which they were received. However, if we had taken this approach, Westbrook would have had a number of months of a

(continued...)

3. Health Insurance, Dental Insurance and Battelle Pension Contribution Offsets: Both parties agree that such offsets should not be included.

4. Westbrook's Teaching Salary and Benefits: During the period December 5, 2001 through July 19, 2002, Westbrook was employed by the University of Tennessee (UT). Both parties agree that offsets for UT salary and benefits are appropriate. However, Westbrook's relief calculation deducted her total salary from UT as a lump sum from total back pay, whereas Battelle's calculation deducted the monthly UT salary as an offset in each month. Since Westbrook received her UT salary on a monthly basis, we will adopt Battelle's approach, and deduct Westbrook's UT salary on a running basis from each month's back pay total. This approach yields a more accurate result, since the offset is deducted in the month in which the salary payment was received. See Note 3 above. The Company also states that Westbrook voluntarily ended her employment with UT effective July 19. Battelle claims that Westbrook has a duty to mitigate damages, and that the amount of her potential UT earnings for the relief period after she left her UT employment should be offset against back pay amounts for the months of July and August 2002. We do not agree that Westbrook is required to keep her employment with UT based on the duty to mitigate theory. Accordingly, this offset was not included in back pay calculations.

5. Offset for Hearing Delay: Battelle contends that Westbrook's relief should be reduced because it was she who requested that the hearing be delayed. Given that the delay was only one month and therefore not unreasonable, we do not find that a reduction on this basis is warranted.

3/ (...continued)
negative total entitlement, before her back pay balance would have turned positive. This methodology would have significantly lowered her total back pay, by reducing the accrual of interest. Battelle's methodology, the one we have adopted, although technically somewhat less accurate, is less harsh to Westbrook. Yet, it still respects to some degree ordinary cash flow principles.

6. Relief Period: The Complainant asserts that relief should be provided through September 30, 2002. However, we find that the Company's calculation of relief, which runs through August 31, 2002, provides a reasonable and appropriate relief period in this case.

The Company has been especially helpful and accommodating in producing numerous corrected relief calculations in this case. It has used its own records when it was necessary. After reviewing the Company's most recent relief calculation, we find it to be reasonable, correct, and consistent with the principles enunciated above. See September 23, 2002 Battelle Revised Exhibits. Accordingly, we will award Westbrook back pay in the amount of $79,929, as calculated by Battelle. 4/ The Complainant did not file any objections to the Company's last calculation, although she was given the opportunity to do so.

Attorney Fees

As stated above, Westbrook's attorney requested fees based on an hourly rate of $200. The Company believes that hourly rate is excessive. Westbrook's attorney has asserted that the fees for employment law attorneys in the city where she practices, Knoxville Tennessee, range from $150 per hour for beginning attorneys to $250 per hour for attorneys with more than 10 years experience. Westbrook's attorney asserts that since she has five years of experience in this area, she is entitled to an hourly fee in the middle of that range. We agree. Westbrook's attorney has requested additional fees in connection with preparation of a response regarding a Petition for Secretarial Review in this proceeding. We find she is entitled to be compensated for these additional services, and that she should receive her total requested fee of $36,691.39.

Reinstatement

Our May 9 Order indicated that Westbrook is eligible for reinstatement as part of the relief in this case. She has indicated that she would like reinstatement to her former position

---

4/ This amount includes interest calculated at the Treasury Department short term interest rate plus two percentage points, compounded quarterly. *Lawrence C. Cornett* (Case No. VWX-0010), 26 DOE ¶ 87,510 (1997).

or to a substantially equivalent position at ORNL. Accordingly, Battelle shall take appropriate steps to reinstate Westbrook.

It Is Therefore Ordered That:

(1) Within 30 days of the date of this Order, UT-Battelle, LLC shall pay Janet L. Westbrook the amount of $79,929 for lost salary and benefits during the period December 2000 through August 2002.
(2) Within 30 days of the date of this Order, UT-Battelle shall pay Westbrook $36,691.39 in attorney fees incurred in this proceeding for services of her attorney, Margaret Beebe Held.

(3) UT-Battelle shall immediately reinstate Westbrook to the position she held at the time of her termination or to a substantially equivalent position at Battelle at ORNL in Oak Ridge, Tennessee.

(4) An appeal of any of the determinations made in this Order may be made by filing a supplemental submission in the petition for Secretarial review proceeding that is currently pending with respect to Westbrook's Part 708 complaint (Case No. VBB-0059). A party must file this submission within 10 days of receipt of this Decision and Order.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 3, 2002

March 28, 2003
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: Robert Burd

Date of Filing: March 13, 2003

Case Number: VBX-0060

On November 16, 2001, BWXT Pantex, as successor to Mason & Hanger Corporation (M&H) (collectively referred to as "the contractor"), filed an appeal of an Initial Agency Decision (IAD) issued by an Office of Hearings and Appeals (OHA) Hearing Officer under the Department of Energy (DOE) Contractor Employee Protection Program, 10 CFR Part 708. *Robert Burd*, 28 DOE ¶ 87,017 (2001). The IAD found that the contractor terminated Robert Burd (the complainant), a former employee at the DOE's Pantex nuclear weapons plant, in retaliation for making disclosures protected under Part 708. The IAD ordered the contractor to reinstate Burd, provide him with back pay, and reimburse him for the reasonable costs and expenses of prosecuting his complaint. *Id*. at 89,113. It further directed the complainant to file a report providing a calculation for back pay, and if there is no immediate reinstatement offer, to update that back pay report every 90 days. *Id*.

On August 5, 2002, I issued an Appeal Decision affirming the IAD in part, and reversing the IAD in part. *Robert Burd*, 28 DOE ¶ 87,025 (2002). 1/ Specifically, the Appeal Decision modified the IAD in two respects: (1) ordering that the contractor pay restitution to the complainant for all travel, lodging, and relocation expenses incurred as a result of the complainant's having to move to Los Alamos, New Mexico to find comparable employment after being wrongfully terminated in September 2000, and (2) ruling that the contractor not be required to offer reinstatement to the complainant at the Pantex Plant. The Appeal Decision also awarded the complainant $3,477.12 for lost holiday pay, based on the Complainant's Damages Brief submitted in response to the IAD, and awarded the complainant $2,318.08 in "back pay without any offsets from the date of

1/ The DOE's National Nuclear Security Administration (NNSA) reviewed both decisions, pursuant to a Memorandum of Understanding (MOU) by which NNSA authorized OHA to adjudicate for NNSA whistleblower complaints brought by employees of NNSA contractors under 10 CFR Part 708. Under the MOU, NNSA is responsible for implementing a final decision issued under Part 708.

discharge, September 29 through October 20, 2000, which corresponds to the period during which he was out of work after being terminated by the contractor" (hereinafter referred to as "period one"). Appeal Decision at 12, 28 DOE ¶ 87,025 at 89,199. In addition, the Appeal Decision directed the parties to confer with each other and agree upon a proper calculation of back pay for the period from October 20, 2000 through the date of the Appeal Decision, taking into account the average number of overtime hours worked by radiation control technicians at the Pantex Plant during that period (hereinafter referred to as "period two"). The Appeal Decision also directed the complainant's attorney to submit an updated, itemized statement, and confer with the contractor to agree upon a proper amount of attorneys fees and expenses. Finally, the Appeal Decision order the contractor to pay interest "at the rate specified in the IAD, one-half percent per month, on all monies paid to the complainant." *Id.* at 13. Neither party challenged this interest rate during the course of the appeal.

The parties have conferred at length and reached agreement on all but two of the remedy issues remanded to them by the Appeal Decision. *See* February 14, 2003 Letter from Richard Thamer, Attorney for BWXT Pantex, to Michael A. Warner, Attorney for Robert Burd and Thomas O. Mann, OHA Deputy Director; February 17, 2003 E-Mail Message from Warner to Thamer and Mann; February 19, 2003 Letter from Thamer to Warner and Mann. The items on which the parties were able to agree are set forth in the stipulation below. OHA is issuing this Supplemental Order to resolve the remaining remedy issues in this case.

I. Areas of Agreement

The complainant and contractor have stipulated to the following facts for purposes of calculating the remedies in this case. *See* February 14, 2003 Letter from Thamer to Warner and Mann. 2/

1. Back Pay from discharge through Oct. 20, 2000 (period one)
   $2,318.08

2. Time off work for Travel
   $1,883.44

3. Attorney's Fees
   $23,510.22

4. Medical Insurance
   $3,449.08

2/ While the parties have reached agreement on the numbers in their stipulation, they retain the right to seek further administrative or judicial review of the final order issued by the OHA Director in this appeal. See 10 CFR §§ 708.34,35.

5. Incidental Expenses
   $23,438.12

II. Areas of Disagreement

First, the parties cannot agree on the holiday pay calculation. Complainant submitted a damages brief seeking $3,477.12, representing that he lost pay for the following 24 days: Nov. 10, 2000; Nov. 23-24, 2000; Dec. 25, 2000 through January 1, 2001; January 15, 2001; February 19, 2001; May 28, 2001; and July 4, 2001. The Appeal Decision adopted this figure from the Complainant's Damages Brief without discussion.

The contractor challenges the amount of lost holiday pay stated in the Appeal Decision for the reason that M&H did not provide 24 paid holidays. Instead, the contractor claims that M&H paid for 10 holidays between the time Burd was discharged and OHA issued the IAD: Oct. 16, 2000; Nov. 23 and 24, 2000; Dec. 25, 2000; Jan. 1, 2001; Apr. 6, 2001; May 28, 2001; July 4, 2001; Sep. 3, 2001; and Oct. 15, 2001, for a total of $1,448.80. The contractor is the best source of information about the number of paid holidays it gave its employees. Moreover, the complainant has not submitted any new evidence to contravene the latest information from the contractor on the number of paid holidays lost by Burd during the period concerned. The complainant no longer worked at Pantex during that period, and the numbers in his damages brief appear to be incorrect. For example, the dates listed in the complainant's damages brief do not add up to 24 days. Accordingly, I will rule for the contractor on lost holiday pay, and reduce the amount of damages awarded for that item from $3,477.12 to $1,448.80.

Second, the parties cannot agree on what they call "the lost overtime offset" for period two. The parties have reached agreement on the amount of overtime that the complainant would have earned at Pantex and the amount of compensation he has earned at his subsequent employer, both in his base salary and in overtime pay. But they have not been able to agree whether or to what extent the contractor is entitled to offset these subsequent earnings against the compensation the complainant could have earned at his old job. 3/

The disagreement has arisen because the complainant earns a higher base salary at his new job than he did at Pantex. Standing alone, this disparity would mean that the complainant would not be awarded any back pay for the period after he began his new job. *See Ronald Sorri (Sorri)*, 23 DOE ¶ 87,503 (1993). However, the complainant maintained that the back pay calculation for period two should take into account the amount of overtime pay he would have earned at Pantex, which, when added to his Pantex base salary, would exceed his new base salary. The complainant

---

3/ We understand that the contractor does not seek to offset any subsequent compensation earned by the complainant in period two–after he began his new job–against the amount of back pay awarded "without offset" for period one. Thus, the back pay award for period one–from Burd's termination on September 29 through October 20, 2000 when he began his new job–is not in contention.

asserts that the back pay calculation for period two should not include the amount of overtime he earned at his new job.

The contractor argues that the amount of back pay for period two after the complainant began his new job should be determined by comparing his total compensation (base salary plus overtime) at his new job to the total compensation he would have earned from his old job. According to the contractor, "back pay is an equitable remedy subject to offset by subsequent earnings, including overtime, and Burd's subsequent earnings exceed his [Pantex] earnings." February 14, 2003 Letter from Thamer at 2.

As authority for their respective positions, each party cites decisions issued by the Merit Systems Protection Board (MSPB) dealing with damages awarded to Federal employees for retaliation under the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at scattered sections of 5 U.S.C.), as amended. One case is directly on point. In *Deskin v. United States Postal Service*, **http://www.mspb.gov/decisions/1999/ch342rdo.html,** the MSPB held that "overtime pay in interim employment can be deducted from a back pay award, if and to the extent that the overtime pay replaced compensation that would have been earned in the desired position." Applying that principle to the present case, I agree that the overtime pay Burd earned at his new job should be taken into account in determining whether he should be awarded back pay after he started his new job, because it replaced the overtime pay he would have earned at his old job. I take notice of the fact that radiation control technicians who work for DOE contractors at both Pantex and Los Alamos routinely earn a substantial amount of overtime pay. Thus, to be equitable, a comparison of Burd's compensation at his new job with the compensation he would have earned had he remained at his old job must compare the total amount earned from base salary plus overtime under both scenarios. Since Burd's total compensation at his new job is greater than the compensation he would have earned had he not been terminated at Pantex, he should not receive a damage award for back pay covering the time after he began his new job. This result is consistent with prior OHA decisions on back pay. *See Ronald Sorri (Sorri)*, 23 DOE ¶ 87,503 (1993) (no back pay awarded for period two–after Sorri's new job began).

The complainant interprets *Deskin* to mean that Burd may use his current base salary to offset any overtime compensation that he would have earned at Pantex, but the overtime from his current employer should not be included in the offset "because it is not overtime compensation that would have been earned in the desired position." February 17, 2003 E-Mail Message from Warner. I reject this view. The complainant's interpretation runs counter to the principle of comparability applied in *Deskin*, since the overtime pay Burd earned on his new job replaced the overtime pay he would have earned at his old job.

III. Conclusion

After considering the joint stipulation of the parties on the damage items remanded to them by the Appeal Decision, and considering their respective arguments on the two items remaining in

dispute, I will direct the contractor to pay the complainant and his attorney the sum of $56,047.74, representing back pay, restitution for other reasonably foreseeable monetary damages incurred by the complainant as result of his termination, and attorneys fees and costs. The amount of each item included in that sum is set forth in the ordering paragraphs below. The contractor shall pay interest on that amount calculated at the rate of one-half percent per month.

It Is Therefore Ordered That:

(1) BWXT Pantex and Mason & Hanger Corporation (collectively referred to as "the contractor") shall pay to Robert Burd the following amounts as restitution for actions taken against him in violation of 10 C.F.R.§ 708.5:

(a) $2,318.08 for back pay without offset from Burd's discharge on September 29, 2002 through the beginning of his employment with Duratek on Oct. 20, 2000;

(b) $1,883.44 for time off work for travel reasonably incurred to bring his complaint under Part 708;

(c) $3,449.08 for replacement of medical insurance and related benefits lost as a result of his discharge by complainant;

(d) $23,438.12 for reasonably foreseeable incidental expenses to mitigate his damages incurred as a result of his discharge by complainant;

(e) $1,448.80 for holiday pay lost as a result of his discharge by complainant;

(f) $23,510.22 for attorney's fees for services rendered by Michael A. Warner to bring Burd's complaint under Part 708; and .

(g) the contractor shall pay interest on those amounts calculated at the rate of one-half percent per month.

(2) This is the final agency decision unless a party files a petition for Secretarial review by the 30th day after receiving this supplemental order.

(3) This Supplemental Order and the Appeal Decision issued on August 5, 2002, *Robert Burd*, 28 DOE ¶ 87,025 (2001), have been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of a petition for Secretarial review or upon conclusion of an unsuccessful petition for Secretarial review, the Appeal Decision as modified by

this Supplemental Order shall be implemented by each affected NNSA element, official or employee and by each affected contractor.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 28, 2003

January 14, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Case: Janet Benson

Date of Filing: September 26, 2002

Case Number: VBX-0082

Janet Benson (Benson or Complainant) filed a Complaint of Retaliation alleging that her former employer, Lawrence Livermore National Laboratory (LLNL or the Laboratory), retaliated against her for engaging in activity that is protected by 10 C.F.R. Part 708, the Department of Energy's Contractor Employee Protection Program. On August 21, 2002, the Office of Hearings and Appeals (OHA) of the Department of Energy issued a Decision and Order granting relief to Benson in connection with that complaint. *Janet K. Benson*, 28 DOE ¶ 87,027 (2002) (*Benson*). In *Benson* we found that LLNL had not shown by clear and convincing evidence that it would have given Benson a "less than satisfactory" performance evaluation in the absence of her protected disclosures. Since the Complainant was successful on this issue, we found she was eligible for relief, which included removal of the performance evaluation from her personnel file, and attorney fees and costs. 1/ The instant decision will determine the amount of attorney fees and costs that should be awarded in this case.

We asked the attorney to file a statement showing the fees and costs she is claiming, including a justification for any expenses claimed. She submitted a request for attorney fees of $80,693 and costs of $1,012.36. The attorney fees were calculated as follows. The hourly rate applied was $310. The attorney calculated that she worked a total of 457.5 hours on this proceeding. At the hourly rate of $310, she would be entitled to receive a total of $141,685, if she were reimbursed for all hours spent on this case. However, she points out that she did not prevail on the issue covered in the

---

1/ We did not find that LLNL had retaliated against Benson by (i) assigning her to work on a different project; (ii) assigning her to work in a different building; or (iii) terminating her employment.

second hearing held in this case, which considered Benson's claim that she was improperly terminated by LLNL. The attorney therefore subtracted all professional hours associated with this second hearing (197.2)and requested fees in the amount of $80,693 based on 260.3 hours at $310 per hour. The $1,012.36 in costs were in large part associated with expenses incurred in connection with attending the first hearing in this proceeding.

LLNL filed a response to the fee request in which it contends that the fees should be further reduced because Benson prevailed on only one out of three remaining alleged retaliations by the Laboratory that were the subject of the first hearing. LLNL believes that the attorney should receive only one third of the total $80,693. LLNL further contends that the attorney costs should be denied in full because (i) they are not substantiated by documentation, such as receipts; and (ii) they are not the types of costs ordinarily allowed. LLNL maintains that allowable costs are those such as docket fees, expert witness fees, court reporter and printing costs.

Attorney Fees

We are inclined to agree with LLNL that a further reduction in fees is warranted in this case. We believe that the fees awarded should in some measure reflect the degree of success achieved by counsel. However, while the attorney only prevailed on one out of four issues, we do not think that means she should receive only one fourth of the total possible fees. For example, the issue on which she prevailed may have required more research or other services than the ones on which she did not prevail. Moreover, much research in litigation is general in nature. We do not believe that each professional hour spent can be discretely assigned to an issue on which the attorney prevailed or to an issue that she lost. There are certainly some overlapping hours that apply to all issues of the case, whether they were won or lost. For example, the attorney needed to read documents submitted to her by her client, filings of LLNL and other LLNL material in order to familiarize herself with this case, and decide which issues to pursue and what approach to take. She is entitled to be fully paid for that time. It would be unreasonably burdensome, if not impossible, to dissect all the hours spent and determine precisely which merit a fee award, based on the one issue in which Benson prevailed. Accordingly, after reviewing all the activities and services outlined by the attorney in Appendices A and B of her fee request, we find that $58,000 is a reasonable award. This represents about 40 percent of the asserted total fees of $141,685.

Attorney Costs

As an initial matter, we do not agree with LLNL's position that the attorney costs should be fully denied because they are not typically the types of costs that are reimbursed, such as witness fees and printing and filing costs. The attorney has asked for and is certainly entitled to be reimbursed for her expenses associated with attending the hearing. We would award her those costs whether she included them as part of her fees in this case, or, as she has done here, designated them as costs. After reviewing each of those costs, we find them to be utterly reasonable. The hearing lasted from February 1 to February 3. For these three days, the attorney requested, for example, hotel expenses of $241, airfare of $167 (from Seattle, WA to Oakland, CA), rental car costs of $201 and meal costs of $90. All of these types of costs are entirely ordinary expenses to be expected in attending a hearing. Further, the amounts requested are moderate and well within the norm. Therefore, we will not require the attorney to provide specific documentation for those costs.

This Supplemental Order has been reviewed by the National Nuclear Security Administration (NNSA), which has not objected to the above determinations, provided any substantive comments, or specified any changes. Accordingly, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the Supplemental Order shall be implemented by each affected NNSA element, official or employee, and by each affected contractor.

It Is Therefore Ordered That:

(1) Lawrence Livermore National Laboratory shall pay A. Alene Anderson the amount of $58,000 for attorney fees and $1,012.36 for costs incurred in this proceeding.

(2) Interest shall begin to accrue on that amount at the rate of 2/3 of one percent per month compounded monthly, beginning on February 1, 2003.

(3) The obligation to make the payment to Ms. Anderson shall be stayed pending the outcome of the Petition for Secretarial review (Case No. VBB-0082) that is currently pending with respect to Janet Benson's Part 708 complaint.

(4) An appeal of any of the determinations made in this Order may be made by filing a supplemental submission in the petition for Secretarial review proceeding referred to in Paragraph (3) above. A party must file this submission within 10 days of receipt of this Decision and Order.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 14, 2003

Case No. VBZ-0003

June 21, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner:Carl J. Blier

Date of Filing:May 11, 1999

Case Number: VBZ-0003

This determination will consider a request to dismiss filed by Oak Ridge Associated Universities (ORAU) on May 11, 1999. ORAU seeks dismissal of the underlying complaint filed by Carl J. Blier under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. This matter is before me as the investigator assigned to investigate Mr. Blier's complaint.

I. Background

Mr. Blier's Part 708 complaint arises from his employment with ORAU. In his complaint, Mr. Blier alleges that in April 1996 he became aware of possible irregularities regarding the approval of higher cost air-fares by ORAU officials to permit employees to upgrade their airline tickets to first class. Mr. Blier subsequently informed the ORAU Ethics Officer and the DOE Office of the Inspector General (OIG). Mr. Blier alleges that as a result of his disclosure, OIG conducted an audit of travel expenditures at Oak Ridge.

In his complaint, Mr. Blier asserts that, in early 1996, he became the subject of reprisals for making his disclosure to the OIG. Specifically, Mr. Blier claims that his contacts with outside clients were significantly reduced and he was denied an opportunity to participate in a 6 month fellowship with Representative Zach Wamp. He further alleges that in March 1998 his supervisor became very upset with him when he was absent while taking an early lunch and criticized him in front of a co-worker. During a conversation afterwards, Mr. Blier accused the supervisor of trying to reduce his role at work to just "punching a clock." Mr. Blier alleges that the supervisor responded "You know your options." Mr. Blier interpreted that phrase to mean that he could resign and did so. On April 30, 1998, Mr. Blier filed a Part 708 complaint with the DOE's Oak Ridge Operations Office alleging constructive dismissal because of his disclosures concerning possible irregularities regarding air- fares. Subsequently, on August 28, 1998, Mr. Blier filed a complaint under the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 (RA). In this complaint, Mr. Blier alleged that he had experienced reprisals because of his prior disclosure to ORAU officials that he had an illness.

In its Motion, ORAU asserts that the exact same acts of retaliation form the basis of both the ADA/RA claim and the Part 708 claims. In this regard, ORAU notes that the language describing the alleged reprisals are in some instances identical. ORAU further asserts that Mr. Blier's ADA/RA complaint has been investigated by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and that OFCCP found that Mr. Blier had not suffered any discrimination, harassment or retaliation by ORAU.(1) ORAU argues that the Part 708 complaint should be dismissed pursuant to 10 C.F.R. §§ 708.15 and 708.17 because he has pursued another remedy under federal law based upon the

same facts that underlie his Part 708 claim. ORAU asserts that to allow further proceedings under Part 708 would essentially reopen allegations that have been already been subject to a finding by the OFCCP. ORAU argues that the Part 708 regulations indicate that deference should be given to a determination made under other applicable laws when a complainant pursues another remedy based upon the same facts.

II. Analysis

Section 708.15 of the Part 708 regulations states in pertinent part:

(a) You may not file a complaint under this part if, with respect to the same facts, you choose to pursue a remedy under State or other applicable law . . . .

. . . .

(c) You are considered to have filed a complaint under State or other applicable law if you file a complaint or other pleading, with respect to the same facts in a proceeding established or mandated by State or other applicable law, whether you file such complaint before, concurrently with, or after you file a complaint under this part.

(d) If you file a complaint under State or other applicable law after filing a complaint under this part, your complaint under this regulation will be dismissed under § 708.17(c)(2).

Section 708.17(c)(2), (3) goes on to state:

(c) Dismissal for lack of jurisdiction or other good cause is appropriate if:

. . . .

(2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this part; or

(3) You filed a complaint under State or other applicable law with respect to the same facts as a complaint under this part; . . . .

I will assume, for purposes of this analysis only, that a complaint under the ADA/RA may be considered as "other applicable law" under Section 708.17(c)(3) and that the facts regarding the reprisals that Mr. Blier alleged in each complaint are identical. However, even with these assumptions, I do not find that Section 708.17(c)(3) mandates that Mr. Blier's complaint be dismissed.

Section 708.17(c)(3) would require dismissal of Mr. Blier's Part 708 complaint if his ADA/RA complaint was based on the same facts. While the alleged reprisals to which he refers are the same in both complaints, the complaints differ significantly as to the cause for the reprisals. In Mr. Blier's ADA/RA complaints, a necessary factual requirement to establish a prima facie case is that he suffered adverse employment consequences because of a physical or psychological condition. See Stradley v. Lafourche Communications, Inc., 869 F. Supp. 442 (E.D. La. 1994) (under the ADA a plaintiff must prove that he suffers from a disability, that he is a qualified individual, and that he suffered adverse employment action because of his disability); Guterriero v. Schultz, 557 F. Supp. 511 (D. D.C. 1983) (under RA, elements of a cause of action are: plaintiff possesses a handicap, is qualified for a position and is excluded from the position solely by reason of a handicap). The pleading and underlying facts which would support this type of claim are very different from those which would underlie a complaint filed under Part 708, the DOE contractor employee whistleblower protection program. For Mr. Blier's Part 708 to prevail on his complaint, the alleged reprisals must have been motivated by his disclosures to the Ethics Officer or OIG. See 10 C.F.R. §§ 708.5, 708.5(a) (Part 708 complaint may be filed if individual has been "subject to retaliation for: (a) Disclosing to . . . your employer . . . information that you reasonably and in good faith

believe reveals - . . . (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority"). It is evident that these regulatory schemes are very different in each complaint. Because the factual motivation alleged to have caused ORAU to take adverse action against Mr. Blier differs in the Part 708 and the ADA/RA complaints, I do not find the complaints to be based upon the "same facts" for section 708.17(c)(3) purposes.

With regard to ORAU's arguments as to the preclusive effect of the OFCCP report, I find that the report's investigative findings are not binding upon us for purposes of making a determination on Mr. Blier's Part 708 claim. As an initial matter, the OFCCP report is not an formal adjudication which requires us to apply the doctrine of collateral estoppel. ORAU argues that the provisions of Part 708, such as section 708.17(c)(3), mandate deference to the OFCCP report. However, I believe these provisions at most only mandate deference to State or other law determinations regarding reprisals specifically resulting from a protected disclosure of the type described in section 708.5(a).(2) Nevertheless, any information which OFCCP uncovered which led it to its conclusion that Mr. Blier did not suffer any retaliation from ORAU would be relevant to my investigation and will be considered if submitted. Consequently, ORAU's Motion to Dismiss should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Oak Ridge Associated Universities on May 11, 1999 is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the hearing officer on the merits of the complaint.

Richard A. Cronin, Jr.

Staff Attorney/Investigator

Office of Hearings and Appeals

Date: June 21, 1999

(1) OFCCP issued a report on March 5, 1999, entitled "Notification of Results of Investigation," regarding its investigation of Mr. Blier's ADA/RA complaint.

(2)Section 708.5(a) prohibits retaliation against employees who reasonably and in good faith disclose to officials information relating to: a substantial violation of a law, rule or regulation, a substantial and specific danger to employees or to public health and safety or fraud, gross mismanagement, gross waste of funds or abuse of authority. See 10 C.F.R. § 708.5(a).

Case No. VBZ-0005

October 4, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: Fluor Daniel Fernald

Date of Filing: September 7, 1999

Case Number: VBZ-0005

This decision will consider a Motion to Dismiss Fluor Daniel Fernald (FDF) filed on September 7, 1999. FDF moves to dismiss a Complaint filed by Thomas W. Dwyer under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Dwyer's Complaint has been assigned Office of Hearings and Appeals (OHA) Case No. VBH-0005.

I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against its employee on the basis of certain activities by the employee, including certain disclosures by the “to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), . . .” 10 C.F.R. § 708.5(a)(1).

Mr. Dwyer worked for FDF from January 15, 1996, to October 16, 1997, when FDF terminated his employment. The Complainant alleges that he raised safety concerns with his employer in April 1996 and September 1997, and that he suffered retaliation, including his termination, as a result of these disclosures. On June 23, 1999, an OHA investigator issued a Report of Investigation on Mr. Dwyer's complaint, and I was subsequently assigned as the Hearing Officer in this matter.

After his October 1997 termination, Mr. Dwyer's labor union, the Fernald Atomic Trades and Labor Council, AFL-CIO, hereinafter referred to as the “Union,” filed a grievance alleging that FDF violated the applicable collective bargaining agreement between the Union and FDF by terminating Mr. Dwyer without just cause. A hearing was held before an arbitrator on May 18, 1999, and the arbitrator issued his “opinion and award” on August 17, 1999, in which he found that FDF “did not violate the applicable contract and that it discharged the grievant for cause.” Arbitrator's Opinion and Award at 47. Under the collective bargaining agreement, the arbitrator's decision is “final and binding” on both parties. Id. at 4.

On September 7, 1999, FDF filed the present Motion, arguing that the “arbitrator considered the same issues and facts under a collective bargaining agreement with employee protections virtually identical to

those in the [Contractor Employee Protection Program]. The Secretary should defer to the arbitrator's opinion and award." Motion to Dismiss at 1. FDF specifically cites a provision of the Part 708 regulations stating that a complaint may not be filed if a complainant has chosen "to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless" the complainant has "exhausted grievance-arbitration procedures . . . and issues related to alleged retaliation for conduct protected under [Part 708] remain." 10 C.F.R. § 708.15(a)(3). FDF argues that, in light of the arbitrator's decision, no issues remain. Motion to Dismiss at 5.

A Motion to Dismiss should only be granted where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. See M&M Minerals Corp., 10 DOE ¶ 84,021 (1982). The OHA considers dismissal "the most severe sanction that we may apply," and has stated that it will be used sparingly. See Boeing Petroleum Services, 24 DOE ¶ 87,501 at 89,005 (1994). For the reasons discussed below, I do not find the grounds for dismissal in this case are clear and convincing, and therefore will deny the present Motion.

II. Analysis

A. Application of Recent Revisions to Part 708

FDF is correct that the current Part 708 regulations effectively bar a complaint where the complainant has pursued binding grievance-arbitration procedures and no issues related to alleged retaliation for protected conduct remain. However, this provision of the regulations has only been in effect since recent revisions to Part 708 took effect on April 14, 1999. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862, 12863 (March 15, 1999). Prior to the revisions, the regulations had no similar provision and, while barring complaints from those who had "with respect to the same facts, pursued a remedy available under State or other applicable law," specifically stated that the "pursuit of a remedy under a negotiated collective bargaining agreement will be considered the pursuit of a remedy through internal company grievance procedures and not the pursuit of a remedy under State or other applicable law." 57 Fed. Reg. at 7542 (1992).

The threshold issue, therefore, is the extent to which the provisions of the new regulations should be applied to Mr. Dwyer's complaint, which was pending when the recent revisions took effect. The revised regulations state that the "procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8 (1999). The preamble to the revised regulations explains,

It is well established in the law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. DOE will apply the revised procedures to pending cases consistent with the case law.

64 Fed. Reg. 12862, 12865 (citing Landgraf v. USI Film Products, 511 U.S. 244, 275 (1994), Lindh v. Murphy, 117 S. Ct. 2059, 2063-64 (1997); Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 810, 817 n.17 (D.C. Cir. 1982) (citing Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966))).

Thus, the intent of the drafters of the Part 708 revisions seems quite clear that the revised regulations apply to pending cases only "as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party." This interpretation is consistent with the case law the drafters cited. Specifically, in Landgraf, the Supreme Court states,

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e.,

whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280 (emphasis added).

In the present case, I find that the application of the new regulations, specifically 10 C.F.R. § 708.15(a)(3), would effectively bar a complaint that Mr. Dwyer had a right to file under the previous regulations. Thus, I conclude that it would be inconsistent with the intent of the drafters and the case law to apply this provision of the new regulations to Mr. Dwyer's complaint.

B. Application of the Prior Regulations

Accordingly, rather than applying regulations that mandate deference to final and binding arbitration decisions, I must apply regulations that are silent on the effect such prior decisions should be given in a Part 708 proceeding. This could arguably lead to the same result, since there is nothing in the prior regulations that would prohibit me from doing what the new regulations would require, i.e. affording the opinion of the arbitrator in the present case the traditional “deference given to final and binding arbitration decisions issued under collective bargaining agreements.” 64 Fed. Reg. 12862, 12864.

I am not convinced, however, that this would be the appropriate method of applying regulations designed to protect whistleblowers. “While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.” Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 737 (1981). Thus, the Supreme Court has rejected the notion that an individual gives up his “independent statutory right” to file a lawsuit under the Fair Labor Standards Act, Barrentine, and Title VII of the Civil Rights Act, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), as a result of “seek[ing] to vindicate his contractual right under a collective-bargaining agreement. . . . The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.” Id. at 49-50.

As noted above, prior to their recent revision, the Part 708 regulations explicitly provided a right to pursue a remedy independent of any available to a DOE contractor employee under a collective bargaining agreement. Thus I conclude that considerations similar to those cited by the Court in Barrentine and Gardner-Denver apply to the present case, and militate against the necessary finding of clear and convincing grounds for dismissal. This does not mean, however, that I will accord no weight to the findings of the arbitrator regarding the grievance filed on behalf of Mr. Dwyer.

It is wrong for courts to . . . allow the Secretary [of Labor, in enforcing the whistleblower protection provision of the Surface Transportation Assistance Act] to ignore arbitral proceedings without even examining the proceedings in question. At the same time, 'we adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the [Secretary's] discretion with regard to the facts and circumstances of each case.'

Roadway Express, Inc. v. Brock, 830 F.2d 179 (11th Cir. 1987) (quoting Gardner-Denver, 415 U.S. at 60 n.21; Barrentine, 450 U.S. at 743 n.22). Thus, while I will consider as part of the record of this proceeding the arbitrator's findings and accord them appropriate weight, I do not agree with FDF that those findings preclude Mr. Dwyer's right under the Part 708 regulations (prior to their recent revision) to proceed to a hearing in this matter. The Motion to Dismiss will therefore be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Fluor Daniel Fernald on September 7, 1999, Case No. VBZ-0005, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Steven Goering

Staff Attorney

Office of Hearings and Appeals

Date: October 4, 1999

Case Nos. VBZ-0014 and VBZ-0013

August 23, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Names of Petitioners:Sandia Corporation

Roy F. Weston, Inc.

Dates of Filings:June 22, 1999

July 15, 1999

Case Number: VBZ-0014

VBZ-0013

This determination will consider a Motion to Dismiss that Sandia Corporation (Sandia) completed filing on June 22, 1999 and a request Roy F. Weston, Inc. (Weston) submitted on July 15, 1999. Sandia seeks its dismissal as a party against whom relief may be awarded pursuant to the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708, in the matter concerning Luis Silva. Weston also contends that it is not a proper party in this same matter.

I. Background

On October 2, 1997, Mr. Silva filed a Part 708 complaint with the DOE's Albuquerque Operations Office. Mr. Silva's Part 708 complaint arises from his employment with GTS Duratek. In his complaint, Mr. Silva alleges that in 1997 (1) he reported to the Director of the Occupational Safety and Health Division at the Albuquerque Operations Office six safety/health concerns regarding material handling operations at Sandia's Radioactive Mixed Waste Management Facility (RMWMF); (2) he anonymously submitted two Personnel Safety Concern forms to GTS Duratek management regarding radiation exposure and ramp danger and also reported these concerns to Sandia's Director of Environment, Safety, and Health; and (3) he submitted a Personnel Safety Concern form to GTS Duratek management concerning a lightning danger. Mr. Silva alleges that as a result of his disclosures concerning safety problems, GTS Duratek laid him off from his employment.

A. The Sandia Motion

In its Motion, Sandia asserts that the DOE violated its own rules set forth in 10 C.F.R. Section 708.6(e) (1992) (amended effective April 14, 1999) when it failed to give Sandia timely notice that it was considered a party in the Silva complaint, and that without timely notice, Sandia has been prejudiced because it is unable to provide a complete defense to its position. Sandia contends that it was not notified that it might be considered a party in this matter until the DOE Office of Inspector General issued its Report of Inquiry and Recommendations (OIG Report) on April 27, 1999. The OIG issued its Report more

than 18 months from the date Mr. Silva filed his complaint with the DOE. Sandia argues that between the time that the investigation of Mr. Silva's complaint began and the date of the issuance of the OIG Report, Sandia may have destroyed relevant records in the ordinary course of its business that are necessary to its defense in this matter and that it would not have destroyed these records had Sandia received timely notice from DOE that it considered Sandia a party in this proceeding.

B. The Weston Request

Following the expiration of GTS Duratek's contract with Sandia in March 1998, Weston succeeded GTS Duratek as a subcontractor at Sandia's RMWMF. Weston contends that it is not a party to this action because (1) it has not been named in the proceeding; (2) the regulations apply only to complaints employees file against their employers and Mr. Silva has never been an employee of Weston; and (3) it was never properly notified, as required under the applicable regulations, of the underlying complaint. Finally, Weston contends that even if the governing regulations apply to non-employees of Weston, Mr. Silva has not fulfilled the regulatory prerequisite for proceeding with a claim against Weston: exhaustion of Weston's internal complaint procedures.

II. Analysis

Section 708.6(e) of the Part 708 regulations in effect at the time of the complaint stated,

(e) Within 15 days of receipt of a complaint filed pursuant to paragraph (a) of this section, the Head of Field Element or designee shall notify

(1) the contractor, person, or persons named in the complaint, and

(2) the Director, of the filing of the complaint.

A copy of the complaint shall be forwarded to the Director.

10 C.F.R. Section 708.6(e) (1992) (amended effective April 14, 1999). Although neither Sandia nor Weston received notification of the Silva complaint at the time it was filed, neither party has sufficiently demonstrated that it has been prejudiced by not receiving notification of the complaint until the time of the issuance of the OIG Report. As stated above, Sandia contends that between the time when the investigation of Mr. Silva's complaint began and the date of the issuance of the OIG Report, Sandia, in the normal course of its business operations, destroyed records. These destroyed records were in the files of an employee named Barbara Boyle (then Barbara Botsford) and included calendars, E-mail files, periodic status reports, correspondence regarding discussions with GTS Duratek management, notes from staff and contractors regarding safety concerns, copies of presentations discussing safety responsibility issues and policies, and handwritten notes relating to discussions with GTS Duratek management on personnel matters. Sandia contends that these destroyed records may have included items necessary to its defense in this matter. Furthermore, Sandia states that it would not have destroyed these records had Sandia received timely notice from DOE that it considered Sandia a party in this proceeding. However, Sandia states in its Motion that the records it destroyed are only "potentially" relevant to this proceeding.

Sandia has not pointed to any particular document or documents it destroyed that it claims are necessary to a proper defense in this matter. While it would have been ideal for Sandia to have received earlier notification of the complaint, Sandia's arguments are too speculative to find prejudice. Without further evidence detailing how specific documents are relevant and germane to this proceeding and an explanation showing how Sandia has been prejudiced through the loss of these documents, I find that Sandia's arguments that it has been prejudiced are conjectural and premature. Accordingly, I do not find that there is good cause to dismiss Sandia as a party in this proceeding. However, Sandia may submit additional evidence prior to the hearing that specifically demonstrates how the loss of certain documents has

prejudiced it. Similarly, Weston has also failed to show how its formal notification of the filing of the complaint at the completion of the investigative phase of this proceeding is prejudicial to it.(1)

As stated above, Weston also contends that it has not been named as a proper party to this proceeding and that the regulations only apply to complaints employees file against their employers. I do not agree with these arguments. The applicable regulations apply to succeeding contractors, such as Weston, in cases involving a complainant who worked for a previous contractor (in this case GTS Duratek) when the complainant alleges that the succeeding contractor would have hired him but for an act of retaliation. Furthermore, where reinstatement of an employee is necessary to restore the employee to the position that he or she would have occupied absent the acts of reprisal, the DOE clearly possesses authority under Part 708 to order such reinstatement by a succeeding contractor, even where the succeeding contractor did not participate in any way in the acts of reprisal. Daniel L. Holsinger, 25 DOE ¶ 87,503 at 89,015 (1996).(2) In this case, the OIG Report found by a preponderance of the available evidence that the complainant's prior employment termination and protected disclosures contributed to Weston not hiring him and that this constituted an act of reprisal. Under these circumstances, I do not find that good cause exists to remove Weston as a party in this proceeding.(3) Finally, I note that since Mr. Silva was never an employee of Weston, the regulations do not require that Mr. Silva exhaust Weston's internal complaint procedures. See 10 C.F.R. Section 708.6 (1992) (amended effective April 14, 1999). However, even at this juncture in time, nothing precludes Weston from attempting to resolve issues between Weston and Mr. Silva using internal company greivance procedures.

It Is Therefore Ordered That:

(1) The Motion to Dismiss Sandia Corporation filed on June 22, 1999 is hereby denied.

(2) The request Roy F. Weston, Inc. filed on July 15, 1999 to remove it as a party in this proceeding is hereby denied.

(3) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the hearing officer on the merits of the complaint.

Leonard M. Tao

Hearing Officer

Office of Hearings and Appeals

Date: August 23, 1999

(1)Weston had informal notice of the complaint. In fact, Weston's employees cooperated with the DOE during the investigation. Thus, I believe it is safe to assume that Weston's management had notice of the complaint.

(2)For those cases in which discrimination against an employee in reprisal for a protected disclosure is found to have occurred, the preamble to this version of Part 708 states that the goal of the DOE regulations is to restore the employee to the position to which he or she would otherwise have been absent the acts of reprisal, in a manner similar to other whistleblower protection schemes. 57 Fed. Reg. at 7539; see, e.g., Energy Reorganization Act of 1974, 42 U.S.C. § 5851; Whistleblower Protection Act of 1989, 5 U.S.C. § 1214(b)(4)(B). Section 708.10(c)(3) (1992) (amended effective April 14, 1999) of this version of the regulations provides that the Initial Agency Decision may contain an order for interim relief, "including but not limited to reinstatement, pending the outcome of any request for review."

(3)My findings in this case would not be any different if I had considered the issues both parties raised under the regulations that went into effect in April 1999.

Case No. VBZ-0028

October 12, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: Sandia Corporation

Date of Filing: August 24, 1999

Case Number: VBZ-0028

This decision considers a “Motion to Dismiss” filed by the Sandia Corporation (Sandia) on August 24, 1999. In its Motion, Sandia seeks judgment on the record of Complaint filed by Dr. Jiunn Yu (Yu) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. Yu’s Complaint under 10 C.F.R. Part 708 has been assigned Office of Hearings and Appeals (OHA) Case No. VBH-0028. The present Motion has been assigned Case No. VBZ-0028.

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The criteria and procedures for Part 708 were amended in an Interim Final Rule effective April 14, 1999. 64 F. R. 12862. The Interim Final Rule provides that its amended procedures will apply prospectively to any complaint pending on April 14, 1999. Part 708's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against an employee on the basis of certain activities by the employee, including certain disclosures by the employee to "a DOE official, a member of Congress, any other government official who has responsibility or oversight of the conduct of operations at a DOE site, [an] employer or any higher tier contractor, . . .” 10 C.F.R. § 708.5(a).

Yu was employed by Sandia as a Quality Assurance Verifier from 1993, when Sandia became the Management and Operations Contractor (the M&O Contractor) for the Sandia National Laboratory, to March 30, 1995 when Sandia terminated his employment. On April 4, 1995, Yu filed a complaint under 10 C.F.R. Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In this complaint, Yu alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement.

On May 5, 1999, pursuant to the Interim Final Rule, the complaint was transferred to the DOE’s Office of Hearings and Appeals (OHA) for investigation. On May 12, 1999, the OHA Director appointed an OHA Investigator. After conducting an investigation of Yu's allegations, the Investigator issued a Report of Investigation (the Report) on July 2, 1999. The Report found that: "[Yu] has met his burden of showing that his protected disclosures . . . were a contributing factor under the provisions of Part 708 to his March 30, 1995 termination from Sandia." *Report* at 10. The Report further states: "Whether in fact Sandia can show by clear and convincing evidence that [Yu’s] disclosure played no role in the actions leading to his

being laid off is an issue best resolved by a hearing officer after receiving the testimony of Sandia officials, [Yu], and other relevant witnesses concerning these disputed issues " *Id.* at 14.

Sandia's motion to dismiss urges that Yu's Complaint "be dismissed on the grounds that the Record of Investigation has established by clear and convincing evidence that the adverse personnel action taken against [D]r. Yu by Sandia was not made in retaliation for any protected disclosures that may have been made by [D]r. Yu under the auspices of 10 C.F.R. part 708." Motion to Dismiss at 1. Sandia further contends that: "the record, developed by [the] Investigator . . . overwhelmingly establishes that Sandia did not engage in retaliation against [D]r. Yu within the meaning of Part 708." *Id.* at 4. If the motion were granted, judgment would be entered in favor of Sandia without providing Yu with an opportunity to conduct discovery or to present the sworn testimony of relevant witnesses at a hearing.

It is well settled that a Motion to Dismiss in a 10 C.F.R. Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. *Lockheed Martin Energy Systems, Inc.*, 27 DOE ¶ 87,510 (1999) (*Lockheed*); *EG&G Rocky Flats*, 26 DOE ¶ 82,502 (1997)(*EG&G*). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely used it. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994). Sandia has not met the *Lockheed* standard. Moreover, the circumstances under which I may dismiss a complaint are specifically set forth at 10 C.F.R. § 708.17(c). I have reviewed each of the six enumerated bases for dismissal and it is clear that none of them applies to the present case. Therefore, I find that Yu should be given an opportunity to further develop his case though discovery and by the presentation of relevant testimony under oath at a hearing. Accordingly, the Motion to Dismiss filed by the Sandia Corporation on August 24, 1999 should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by the Sandia Corporation on August 24, 1999, Case No. VBZ- 0028, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy.

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: October 12, 1999

Case No. VBZ-0047

August 30, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Summary Judgment

Name of Case: Edward J. Seawalt

Date of Filing: August 23, 2000

Case Number: VBZ-0047

This decision will consider a Motion for Summary Judgment that Contract Associates, Inc., ("the contractor") filed on August 23, 2000. The contractor moves to deny a complaint filed by Edward J. Seawalt ("Mr. Seawalt" or "the complainant") under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Seawalt's complaint has been set for a hearing under Office of Hearings and Appeals (OHA) Case No. VBH-0047.

I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against its employee because the employee has engaged in certain protected activity, including when the employee has

> (1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences—
>
> (i) A violation of any law, rule, or regulation;
>
> (ii) A substantial and specific danger to employees or public health or safety; or
>
> (iii) Fraud, mismanagement, gross waste of funds, or abuse of authority;

57 Fed. Reg. at 7542 (1992).(1)

The complainant was an employee of the contractor, which was a subcontractor to the University of California, the managing and operating contractor for the DOE's Los Alamos National Laboratory (LANL). From May 1998 to February 1999, the complainant worked onsite at LANL, on a special project

in a high security area involving the upgrade of furniture in interior offices to meet strict safety standards that required a reduction in the amount of exposed combustible material in the offices. The complainant alleges that during this time he engaged in activity protected under Part 708. On February 1, 1999, the complainant resigned his position with the contractor.

II. The Contractor's Motion for Summary Judgment

In its motion, the contractor argues that

> Seawalt's complaint fails for each of the following reasons:
>
> 1. Seawalt did not make a disclosure regarding safety concerns.
> 2. Seawalt did not reasonably believe the safety concerns represent specific and substantial dangers.
> 3. Contract Associates did not retaliate against Seawalt.
> 4. Seawalt has not been damaged by Contract Associates.
>
> Accordingly, Contract Associates is entitled to summary judgment against Seawalt dismissing his complaint.

Motion at 1.

The Part 708 regulations do not include procedures and standards governing summary judgment motions. I note that the Federal Rules of Civil Procedure provide that such a motion shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Though the Federal Rules do not govern this proceeding, they may be used for analogous support, and Rule 56 presents a logical framework for evaluating the motion before me. Thus, I will not grant the motion absent a showing by the contractor that, upon the undisputed facts in the record, it is entitled to prevail as a matter of law.

In addition, prior cases of this office instruct that such a motion should only be granted if it is supported by "clear and convincing" evidence. Fluor Daniel Fernald, 27 DOE ¶ 87,532 at 89,163 (1999) (motion to dismiss should only be granted where there are clear and convincing grounds for dismissal); see also Boeing Petroleum Services, 24 DOE ¶ 87,501 at 89,005 (1994) (dismissal is "the most severe sanction that we may apply" and should be used sparingly). For the reasons discussed below, because I do not find clear and convincing evidence that the contractor is entitled at this point in the proceeding to prevail as a matter of law, I will deny the motion for summary judgment.

A. Whether Mr. Seawalt Did Not Engage in Activity Protected Under Part 708

The contractor contends in its motion that to "prevail on his 708 complaint, Seawalt must first prove he disclosed safety problems to LANL. Seawalt cannot do so. Contrary to the allegations of his complaint, Seawalt's testimony establishes that it was LANL who first reported safety concerns with the [office furniture] to Seawalt." Motion at 8. The contractor cites a July 11, 2000 deposition taken of Mr. Seawalt.

It is true that the July 11 deposition contains testimony by Mr. Seawalt that contradicts certain facts alleged in his complaint. For example, in his complaint Mr. Seawalt states, "I discovered that some of the product had warning labels which stated 'do not stack over 53 inches.'" Complaint at 3. In the excerpt of the July 11 deposition provided by the contractor, Mr. Seawalt testified that LANL personnel had seen the warning labels before he did. Transcript of July 11 Deposition at 76. However, Mr. Seawalt's complaint does not allege that he disclosed the existence of the warning labels to LANL. Moreover, there are at least

several other potentially protected activities alleged in Mr. Seawalt's complaint.

For example, Mr. Seawalt alleges that he "reported to Contract Associates that they had not followed the plans and specifications for the [furniture], . . ." Complaint at 3. He also alleges that he advised a LANL official that he was instructed by the president of Contract Associates to complete paperwork necessary to escort the president and another individual into a secure area at LANL, but to conceal from LANL the true reason for entering the secure area. Id. Mr. Seawalt states he was concerned that this was a violation of security regulations. Id.

In addition, in a November 30, 1998 letter to a LANL official, Mr. Seawalt opined that Haworth, the manufacturer of the office furniture,

> should have assembled the mock up at the factory and discovered the problem and not ship it to the client for possible injury and then 'cover up' a problem that was discovered during the installation. . . . . It's my recommendation that the existing 'prototype' furniture is removed from [LANL] and Haworth considers it a gift that [LANL] does not pursue the liability issue. . . . I truly feel that Haworth and Contract Associates have been dishonest in presenting this solution to both the DOE and [LANL] and have placed it in our facility in hopes we will accept the cost of them developing a prototype that they will profit from.

I make no finding here that these or any of Mr. Seawalt's other activities were protected under Part 708, as that is not the purpose of this decision. It is sufficient here to note only that I do not find undisputed facts upon which I can conclude that Mr. Seawalt did not engage in any protected activity.(2)

B. Whether Contract Associates Did Not Retaliate Against Mr. Seawalt

Part 708 prohibits reprisals by DOE contractors, specifically stating that a contractor "may not discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, intimidate, or otherwise discriminate against any employee" because the employee has engaged in protected activity. 57 Fed. Reg. at 7542.

The contractor argues that it "did not take any action against Seawalt to force [his] resignation, such as using intimidation, threats, or coercion." Motion at 9. The contractor cites Mr. Seawalt's February 4, 1999 resignation letter, in which he states, "To be blamed for the failure of the project by the company that I represented gave me no choice but to remove myself from [Contract Associates] immediately." Letter from Edward J. Seawalt to Karen Ruben, Contract Associates, Inc. (February 4, 1999). The contractor also cites portions of Mr. Seawalt's July 11, 2000 deposition in which he describes in more detail the circumstances under which he felt he had been unfairly blamed. Transcript of July 11 Deposition at 196, 204, 206. The contractor concludes that Mr. Seawalt's "resignation was prompted merely by the president of Contract Associates criticizing his job performance in a conversation with the LANL contract administrator . . . . Absent other action, an employee's decision to resign because he objects to comments made by his employer does not establish retaliation." Motion at 10 (citing Matthew J. Rooks, 27 DOE ¶ 87,511 (2000)).

First, I do not find support in the Rooks decision for the proposition set forth by the contractor. The Hearing Officer in Rooks found that "the evidence does not support the conclusion that [the employer's] comments can be reasonably construed as the type of intimidation that would reasonably cause [the complainant] to resign." Rooks, 27 DOE at 89,278. The finding of the Hearing Officer was clearly based on the evidence presented in that case, and contrary to the contention of the contractor, implicitly allowed for the possibility as a general proposition that an employer's comments can be reasonably construed as the type of intimidation that would reasonably cause an employee to resign.

Moreover, the evidence highlighted by the contractor arguably shows only that Mr. Seawalt considered being unfairly blamed for the failure of a project to be the "last straw" that caused him to resign. This

interpretation is supported by the investigator's notes of her interview with Mr. Seawalt, in which he recounted a number of other events leading to his resignation. Investigator's Notes of June 15, 2000 Telephone Interview with Edward Seawalt. Again, I do not conclude here that the contractor took actions that forced Mr. Seawalt to resign. I simply cannot find that undisputed facts support a conclusion that the contractor did not retaliate against Mr. Seawalt, and therefore the contractor's motion cannot be granted on that basis.

C. Whether Mr. Seawalt Has Not Been Damaged by Contract Associates

Finally, the contractor contends that "Seawalt cannot establish that he is entitled to any relief from Contract Associates because he is unable to show that he was damaged by the alleged retaliation." Motion at 10. The contractor cites determinations by the OHA Director in decisions on two jurisdictional appeals filed by the complainant. Edward J. Seawalt, 27 DOE ¶ 87,541 (1999); Edward J. Seawalt, 27 DOE ¶ 87,558 (2000). In the first decision, the OHA Director described Mr. Seawalt as seeking

> employment-related relief in the form of any differential between his prior pay and benefits and his current pay and benefits at his new job. The complainant also seeks damages for emotional distress and the costs of defending the state court action. Finally, the complainant seeks to have the DOE seek relief against the Contractor for the alleged delay in the project attributable to the safety concerns.
>
> . . . .
>
> . . . [Part 708 does not] provide a remedy for a retaliatory state court action against an employee. Part 708 provides for employment-related relief and the recovery of the costs of pursuing a Part 708 complaint. Part 708 does not provide remedies for other negative actions that an employer can take. For example, Part 708 would not protect an employee against a fraud action brought by the employer. Indeed, much of the complainant's requested relief is beyond the scope of Part 708 (damages for emotional distress, repayment of the cost of defending the state court lawsuit, and a DOE action against the Contractor for the delay in the project).

Edward J. Seawalt, 27 DOE ¶ 87,541 at 89,199, 89,201; see also Edward J. Seawalt, 27 DOE ¶ 87,558 at 89,323 (Mr. Seawalt seeks "relief that is beyond the scope of Part 708.").

Regarding relief in the form of any differential between Mr. Seawalt's prior pay and benefits and his pay and benefits at his new job, the contractor presents persuasive evidence that the complainant suffered no loss in pay due to his resignation from Contract Associates. In the July 11, 2000 deposition, Mr. Seawalt testified that his new employer matched the salary that he was making at Contract Associates, and made his hiring "retroactive and picked up the missing days that I would have been unemployed." Transcript of July 11 Deposition at 179, 181.

However, as the contractor notes in its motion, Mr. Seawalt claims that he suffered two weeks of lost pay at his new job because he had to undergo surgery and had not accumulated the necessary medical leave. Motion at 11. But the contractor points to testimony that Mr. Seawalt's annual salary increased by $2,000 in June 1999, and argues that this increase "is more than enough to cover the lost two weeks of pay." I disagree with this argument's unstated premise. The contractor offers no logical reason why the complainant's salary increase should be used to offset his other damages, and I cannot find one based upon the facts before me. Thus, the extent of potential damages suffered by the complaint due to alleged retaliation is an issue of fact that clearly remains in dispute.

For the reasons stated above, I do not find undisputed facts in the record upon which I can conclude that

the contractor is entitled to prevail as a matter of law. I will therefore deny the present motion.

It Is Therefore Ordered That:

(1) The Motion for Summary Judgment filed by Contract Associates on August 23, 2000, Case No. VBZ-0047, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Steven Goering

Staff Attorney

Office of Hearings and Appeals

Date: August 30, 2000

(1) Revisions to Part 708 took effect on April 14, 1999, including substantive changes to the scope of activity protected under 10 C.F.R. § 708.5. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862, 12863 (March 15, 1999). However, because the complainant's alleged protected activity and the retaliation alleged by the complainant took place prior to these revisions, I will apply the prior version of section 708.5 to this case. Linda D. Gass, 27 DOE ¶ 87,525 at 89,140-41 (1999) ("[T]o the extent that 10 C.F.R. § 708.5 defines the scope of employee disclosures that are protected from contractor retaliation, Part 708 clearly regulates the 'primary conduct' and affects the 'substantive rights' of the parties, and is thus subject to the presumption against retroactivity under well-established case law."); cf. Salvatore Gionfriddo, 27 DOE ¶ 87,544 at 89,224 (1999); Fluor Daniel Fernald, 27 DOE ¶ 87,532 at 89,164 (1999).

(2) I do not need to address the contractor's second argument in support of its motion, that Seawalt did not reasonably believe his safety concerns represented specific and substantial dangers, Motion at 8-9, because as a basis for summary judgment the argument is premised on the assumption that the only protected activity alleged by the complainant was a disclosure of a "substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5(a)(1)(ii). In fact, other disclosures alleged by the complainant arguably fall under subsections (i) and (iii) of 10 C.F.R. § 708.5(a)(1).

Case No. VBZ-0057

November 1, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motions to Dismiss

Name of Petitioner: Janet K. Benson

Date of Filings: April 6, 2000

August 7, 2000

Case Numbers: VBZ-0057

VBZ-0058

This determination considers Motions to Dismiss(1) filed by Lawrence Livermore National Laboratory (Laboratory)(2) under the Department of Energy's (DOE's) Contractor Employee Protection Program, 10 C.F.R. Part 708. In these Motions, the Laboratory contends that the claims asserted by Janet Benson in OHA Case No. VWA-0044 are defective as a matter of law and should not be determined on the merits.(3)

The Laboratory makes the following arguments in support of these Motions:

> (1) The Laboratory cannot be held liable for any acts of reprisal that occurred prior to September 23, 1994, the date it agreed to comply with Part 708 (OHA Case No. VBZ-0057);
>
> (2) Because the United States District Court for the Northern District of California entered summary judgment in favor of the Laboratory on claims filed by Ms. Benson under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq. (Title VII), and the Americans with Disabilities Act, 42 U.S.C. §§ 12203 et. seq. (ADA), the doctrine of collateral estoppel precludes Ms. Benson from litigating her claims under Part 708 (OHA Case No.VBZ-0057); and
>
> (3) Ms. Benson's claims concerning protected activities involving Building 415 must be dismissed because these claims were not filed timely or filed in the form that is required by the regulations (OHA Case No. VBZ-0058).

For the reasons detailed below, the Laboratory's Motions will be granted in part and denied in part.

I. THE CONTRACTOR EMPLOYEE PROTECTION PROGRAM

The Contractor Employee Protection Program was designed to protect the employees of DOE contractors who have made good faith disclosures about health, safety or management problems or who have refused to participate in work-related illegal or dangerous activities from acts of reprisal by their employers. See 57 Fed. Reg. 7533 (March 3, 1992).(4)

Part 708 prohibits a covered DOE contractor from discharging, demoting, reducing in pay, coercing, restraining, threatening, intimidating, or otherwise discriminating against an employee because he or she has engaged in activities that are protected under the regulations. 10 C.F.R. § 708.5. Part 708 protects an employee of a DOE contractor who engages in one of three different types of activities. Section 708.5(a)(1) protects an employee of a DOE contractor who discloses information to a DOE official, a member of Congress, or to the contractor (including any higher tier contractor) that the employee believes evidences (a) a violation of any law, rule or regulation, (b) a substantial and specific danger to employees or public health or safety, or (c) fraud, mismanagement, gross waste of funds or abuse of authority.

Section 708.5(a)(2) protects an employee who participates in a congressional proceeding or in a proceeding under Part 708.

Section 708.5(a)(3) protects an employee who refuses to participate in an activity when the employee's participation would constitute a violation of a Federal health or safety law, and, under certain circumstances, when the employee has a reasonable apprehension of serious injury to himself or others and the employee is not required to participate because of the nature of his or her employment responsibilities.

Section 708.9 sets forth the burden of proof for the employee and the employer. In order to prevail under Part 708, an employee must establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). If the complainant meets this burden, under Part 708 the burden shifts to the contractor "to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure. . . ." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993), citing McCormick on Evidence § 340 at 442 (4th ed. 1992).

The scope of Part 708 is limited. Section 708.5(b) provides that Part 708 will protect an employee of a DOE contractor only if the employee's actions relate to work performed by the contractor for DOE. Moreover, Part 708 does not protect contractor employees from acts of reprisal that result from discrimination on the basis of race, color, religion, sex, age, national origin, or other related reason. 10 C.F.R. § 708.2(b). Additionally, under § 708.2(a), for matters that do not involve health or safety, a contractor is not required to comply with the provisions of Part 708 unless it has signed a contract with DOE in which it has agreed to comply with the DOE Contractor Employee Protection Program. Mehta v. Universities Research Association, 24 DOE ¶ 87,514 (1995).

II. BACKGROUND

On August 4, 1986, the Laboratory hired Ms. Benson to work as a Senior Human Resources Specialist in the Personnel Operations Division of the Human Resources Department. In September of 1989, Ms. Benson transferred to the Education Program Division of the Human Resources Department (Education Division). OIG Exhibit 8.(5) After her transfer to the Education Division, Ms. Benson's office was located in the Almond Avenue School Office. OIG Report.

In 1991, Ms. Benson, working with the Director of the Education Division, obtained a grant from the National Science Foundation (NSF) to fund the National Physics Educational Program Collaboration (NPEPC Program). The NPEPC Program was designed to help retain and increase the number of minority students who were majoring in physics. The Laboratory and the California State University at Hayward (CSUH) jointly administered the NPEPC Program. Ms. Benson was appointed to serve as a "co-principal investigator" of the Program. OIG Report; OIG Exhibit 8.

On May 3, 1994, Ms. Benson filed a Part 708 complaint with DOE's Office of Contractor Employee Protection (OCEP).(6) In this complaint, Ms. Benson indicated that she had made disclosures about possible fraud and mismanagement in the administration of the NPEPC Program, and also alleged that the

Laboratory had retaliated against her for making these protected disclosures by removing her from the position of co-principal investigator of the program.(7) OIG Exhibit 1. At the time that Ms. Benson filed this complaint, the Laboratory had not yet agreed to comply with the provisions of Part 708. OIG Exhibit 3.

On July 13, 1994, Sandra Schneider, the Director of OCEP, sent a letter and a copy of Ms. Benson's Part 708 complaint to Robert W. Kuckuck, Ph.D., a Special Assistant to the President of the University of California. In this letter, Ms. Schneider asked the University to agree to be subject to the provisions of Part 708 in Ms. Benson's case. OIG Exhibit 3.

On September 1, 1994, Dr. Kuckuck indicated that the University would not agree to be subject to the provisions of Part 708 until the contract between the University and DOE had been amended, and that after the amendment of the contract, the University would not agree to the retroactive application of Part 708. OIG Exhibit 4. Soon thereafter, OCEP dismissed Ms. Benson's Part 708 complaint on the grounds that the Laboratory was not subject to the provisions of Part 708. OIG Report.

On September 23, 1994, the Laboratory modified its contract with DOE and agreed to comply with the provisions of Part 708. OIG Exhibit 61.

On or about October 12, 1994, Ms. Benson filed a second complaint under Part 708 with OCEP. In this complaint, Ms. Benson re-alleged the matters that she had raised in the complaint that had been filed in May of 1994, and also claimed that the Laboratory had retaliated against her by re- assigning and demoting her on September 23, 1994, and giving her an unsatisfactory performance appraisal on September 27, 1994.(8) OIG Report; OIG Exhibit 5.

In February of 1995, the Education Division moved from the Almond Avenue School Office to Building 415. Building 415 had been remodeled, and new carpeting was installed. Ms. Benson had a history of allergy problems and had a severe allergic reaction to the new carpets in Building 415. Because of her allergies, Ms. Benson told numerous Laboratory and DOE officials that she was unable to move into the building. For a substantial period of time, the Laboratory's medical staff restricted Ms. Benson from entering Building 415, and the Education Division permitted Ms. Benson to work in an office in a nearby trailer. OIG Report.

On November 29, 1995, at the Laboratory's request, Ms. Benson was evaluated by Abba Terr, M.D., an outside allergist. On December 27, 1995, Dr. Terr issued a report in which he concluded that Ms. Benson would not be able to enter Building 415 without becoming subjectively ill. This conclusion was based on Ms. Benson's severe reaction to Building 415, and Dr. Terr's inability to find objective evidence that Ms. Benson had a medical condition. OIG Exhibit 40.

On June 26, 1995, the management of the Education Division informed Ms. Benson that she was "released from work" and not expected to return because the Education Department was unable to reasonably accommodate her medical restrictions. Whether this action was with or without pay is unclear. OIG Exhibit 34. The management of the Education Division expressed concern that Ms. Benson's health would be at risk if she worked in Building 415 or any place else in the Laboratory, and that the Laboratory would be liable if Ms. Benson became seriously ill. OIG Exhibit 14.

Almost immediately, Ms. Benson reported her release from work to OCEP and to Mark Barnes, the official who served as the Part 708 Coordinator for the DOE Operations Office at Oakland. Ms. Benson told Mr. Barnes that she believed that she was being terminated because she was a whistleblower. In July of 1995, in an effort to investigate Ms. Benson's allegations, Mr. Barnes met with the management of the Education Division and other Laboratory officials. During this meeting, Mr. Barnes commented that Ms. Benson had filed a whistleblower complaint with DOE. OIG Exhibit 71.

By letter dated July 27, 1995, the management of the Laboratory informed Ms. Benson that she had not been terminated, but had been placed on leave with pay. Ms. Benson was also informed that if the

Laboratory was not able to reasonably accommodate her medical restrictions, it was possible that she could be medically separated from the Laboratory. OIG Exhibit 36.

On July 28, 1995, Ms. Benson filed a lawsuit in United States District Court for the Northern District of California in which she complained that she had been discriminated against because of her race. Employer's Post-Hearing Brief.

By letter dated August 25, 1995, the management of the Laboratory informed Ms. Benson that she would be on leave without pay until September 17, 1995, when she was scheduled to see a Laboratory physician to determine whether it would be necessary to continue the restriction from entering Building 415. Ms. Benson was again informed that if the Laboratory was not able to reasonably accommodate her medical restrictions, it was possible that she could be medically separated from the Laboratory. OIG Exhibit 37.

On September 10, 1995, Ms. Benson wrote a letter to Hazel O'Leary, the Secretary of DOE, stating that she was a whistleblower, and that the Laboratory had retaliated against her for making protected disclosures by requiring her to work in an environment that contained chemicals and toxins to which she was allergic. Ms. Benson also stated that the Laboratory had released her from her work assignments, placed her on leave, and strongly suggested that she leave on disability or the Laboratory could medically separate her from her employment. Ms. Benson expressed concern that she would lose her job because she was unable to work in this environment. Ms. Benson asked Secretary O'Leary to intercede on her behalf, and to prevent the Laboratory from putting forth any further acts of retaliation. OIG Exhibit 7.

On January 31, 1996, the management of the Education Division asked the Laboratory's Human Resources Department to medically separate Ms. Benson on the grounds that she was permanently restricted from entering Building 415 and no longer able to perform the essential assigned functions of her job. OIG Exhibit 44.

In March of 1996, the Laboratory terminated Ms. Benson's employment based on her "inability to perform essential, assigned functions fully" because of her medical condition. OIG Exhibit 49.

On March 6, 1996, Ms. Benson filed a lawsuit in state court in which she alleged that the Laboratory had terminated her employment in violation of the ADA. The Laboratory removed this action to Federal court, and these claims were subsequently consolidated with the Title VII action Ms. Benson filed and that was pending in the United States District Court for the Northern District of California. Employer's Post-Hearing Brief.

On July 25, 1996, Sandra Schneider, the Director of OCEP, wrote a letter to the Director of the Laboratory in which she stated that OCEP would be investigating the Part 708 complaint that had been filed by Ms. Benson. Ms. Schneider indicated that OCEP's investigation would focus on Ms. Benson's 1993 disclosures about possible fraud and mismanagement by the Laboratory in the administration of the NPEPC Program and Ms. Benson's refusal to participate in these activities, and the Laboratory's alleged acts of reprisal against Ms. Benson for making these protected disclosures. Employer's Post-Hearing Brief, Exhibit A.

Ms. Schneider specifically informed the Laboratory that the following matters would be investigated:

(1) The propriety of the Laboratory's reassignment of Ms. Benson on September 23, 1994;

(2)The propriety of the performance appraisal that was given to Ms. Benson on or about September 26, 1994;

(3) Whether the Laboratory intentionally exposed Ms. Benson to various chemicals to which she was allergic when they re-assigned her to new office space;

(4)The propriety of the Laboratory's refusal to provide reasonable accommodation regarding Ms. Benson's allergies; and

> (5) The propriety of the Laboratory's termination of Ms. Benson's employment based on health reasons in early 1996.

Id.

In this letter, Ms. Schneider also stated that "[i]t is possible that information gathered during the investigative process may result in the identification of additional issues to be investigated." Id.

On October 14, 1997, the United States District Court for the Northern District of California entered summary judgment in favor of the Laboratory on the claims filed by Ms. Benson under Title VII and the ADA, and vacated the proceedings. Employer's Post-Hearing Brief, Exhibit C.

On April 13, 1999, the Office of the Inspector General(9) issued the OIG Report in response to Ms. Benson's complaint under Part 708. The OIG Report reflects the comprehensive investigation conducted by OCEP and the Office of the Inspector General, and concludes that Ms. Benson's request for relief should be denied. The Office of the Inspector General sent copies of the OIG Report to Ms. Benson and the Laboratory. Ms. Benson's letter to Secretary O'Leary was appended as an exhibit to the OIG Report.

Subsequently, under 10 C.F.R. § 708.9, Ms. Benson requested that the Office of Hearings and Appeals (OHA) convene a hearing to adjudicate the issues that had been raised in her Part 708 complaint. In response to this request, a hearing was held before the undersigned Hearing Officer. During the hearing, both the Laboratory and Ms. Benson presented evidence concerning Ms. Benson's inability to enter Building 415, and the statements that Ms. Benson made to Laboratory management and DOE officials concerning her inability to enter the building because of her allergies. Both parties also introduced evidence of the circumstances surrounding Ms. Benson's termination for medical reasons.

After the hearing, both counsel filed post-hearing submissions. Because these submissions did not address several significant legal issues, counsel were asked to brief the following issues:

> (1) Whether Ms. Benson engaged in protected activity under § 708.5(a)(3) by refusing to work in Building 415, and whether the Laboratory retaliated against Ms. Benson for engaging in this activity;
>
> (2) Whether Ms. Benson made disclosures that were protected under § 708.5(a)(1) when she informed several DOE officials and Laboratory employees that she believed it was unsafe for her to enter certain buildings at the Laboratory, and whether the Laboratory retaliated against Ms. Benson for making these statements; and
>
> (3) Whether Ms. Benson is precluded from raising these claims because she failed to file a formal complaint under § 708.6, and failed to raise these issues at an earlier time.

In her supplemental submission, Ms. Benson alleged that she had engaged in protected activity under § 708.5(a)(3) by refusing to work in Building 415, and had made protected disclosures under § 708.5(a)(1) by informing several DOE and Laboratory employees that it was unsafe for her to enter certain buildings at the Laboratory. Ms. Benson also argued that OHA has jurisdiction to adjudicate these claims. In its supplemental submission, the Laboratory argued that these claims must be dismissed because they were not filed on time or in the form required by the regulations.

III. ANALYSIS

A. Liability For Events that Occurred Prior to September 23, 1994

The Laboratory contends that many of Ms. Benson's claims under Part 708 are invalid because the alleged

protected disclosures and many of the alleged acts of retaliation occurred before September 23, 1994, the date that the Laboratory agreed to be bound by the provisions of Part 708. The Laboratory argues that Ms. Benson is seeking to make Part 708 retroactively effective by attempting to hold it legally responsible for "protected activities" that were not legally protected when they occurred and acts of reprisal committed by the Laboratory before the date that it agreed to be bound by the provisions of Part 708. For the reasons detailed below, I have determined that the Laboratory is partially correct.

Under § 708.2, Part 708 did not automatically become applicable to all DOE contractors on the date that the regulations became effective. Rather, after the effective date of the regulations, Part 708 only became applicable "to complaints of reprisal . . . that stem from disclosures, participation, or refusals involving health and safety matters, if the underlying procurement contract . . . contain[ed] a clause requiring compliance with all applicable safety and health regulations and requirements of DOE (48 CFR 970.5204-2)." For complaints of reprisal that did not involve health and safety matters, Part 708 was "applicable to acts of reprisal . . . **if the underlying procurement contract . . . contain[ed] a clause requiring compliance with this part**." 10 C.F.R. § 708.2. (Emphasis added.)

Ms. Benson's statements about the NPEPC program did not involve matters of health and safety. Part 708 may thus only be invoked to protect Ms. Benson for making these statements if the procurement contract between DOE and the Laboratory contained a clause requiring compliance with Part 708 at the time that the Laboratory engaged in the alleged acts of reprisal. As the Laboratory did not sign such a contract until September 23, 1994, Ms. Benson may not seek redress under Part 708 for acts of reprisal that the Laboratory committed prior to the date. Mehta v. Universities Research Ass'n, 24 DOE ¶ 87,514 (1995). However, under the plain language of Section 708.2, the Laboratory is legally responsible for acts of reprisal that it committed after September 23, 1994, the date it agreed to comply with the provisions of Part 708, and the date that the employee engaged in the protected conduct that precipitated the act of reprisal is irrelevant. See Richard W. Gallegos, 26 DOE ¶ 87,502 (1996); See also Caminetti v. United States, 242 U.S. 470, 485 (1917)("the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.")

The Laboratory argues that this construction of Part 708 imposes retroactive liability upon it because the Laboratory would be liable for acts of reprisal committed against Ms. Benson for engaging in protected activities before the Laboratory agreed to be bound by the regulations. This argument must be rejected. The Laboratory is only liable under Part 708 for actions that were taken after the regulations became effective and the Laboratory agreed to comply with the regulations. In other words, the Laboratory did not become liable under Part 708 until it had actual knowledge of its contractual and regulatory obligations, and could prospectively avoid liability by complying with the regulations. It is clear that this construction of Part 708 does not impose retroactive liability on the Laboratory.

As the Supreme Court recognized in Landgraf v. USI Film Products, 511 U.S. 244 (1994):

> While statutory retroactivity has long been disfavored, deciding when a statute operates "retroactively" is not always a simple or mechanical task. . . . A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Id., at 268-269.

The Court further explains that, in order to determine whether a statute imposes retroactive liability, it is necessary to ascertain whether the statute:

> would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

Id., at 280.

Here, holding the Laboratory responsible for the acts of reprisal it committed against Ms. Benson after September 23, 1994 would not impair the rights that the Laboratory possessed when it acted, increase its liability for past conduct or impose new obligations for transactions that have been completed.

As this construction of Part 708 does not impose retroactive liability upon the Laboratory, I hold that the Laboratory is responsible for acts of reprisal committed after September 23, 1994, even if such acts were committed in response to activities that occurred before September 23, 1994. I also hold that OHA has jurisdiction to adjudicate the following matters that involve protected activities that occurred before the Laboratory agreed to comply with Part 708:

> 1)Whether Ms. Benson's disclosures about the NPEPC program were a contributing factor in the Laboratory's decision in September of 1994 to assign Ms. Benson to work in the Laboratory's Apprenticeship Program;
>
> 2)Whether Ms. Benson's disclosures about the NPEPC program were a contributing factor in the "less than satisfactory" performance appraisal that Ms, Benson received on September 27, 1994; and
>
> 3)Whether Ms. Benson's disclosures about the NPEPC program were a contributing factor in the Laboratory's decision to terminate Ms. Benson's employment because she was unable to enter Building 415.

B. Collateral Estoppel

The Laboratory also contends that the doctrine of collateral estoppel mandates the dismissal of Ms. Benson's claims under Part 708. More specifically, the Laboratory alleges that Ms. Benson should be estopped from litigating her claims under Part 708 because the United States District Court for the Northern District of California entered summary judgment in favor of the Laboratory on Ms. Benson's claims that the Laboratory violated Title VII and the ADA by changing her work assignments and terminating her employment in February of 1996. Benson v. Lawrence Livermore National Laboratory, No. C95-2746 FMS (October 14, 1997).(10) This argument lacks merit.

In general, collateral estoppel bars re-litigation of issues in a subsequent proceeding when: (1) the party against whom the doctrine is asserted was a party to the earlier proceeding; (2) the issue was actually litigated and decided on the merits; (3) the issues are identical; and (4) the party against whom the earlier decision is asserted had a "full and fair" opportunity to litigate the claim or issue. Duncan v. Clements, 744 F.2d 48 (8th Cir. 1984).

Here, collateral estoppel will not bar Ms. Benson's claims under Part 708 for several reasons. First, Ms. Benson's did not file a claim under Part 708 in the United States District Court for the Northern District of California. As a result, Ms. Benson's claims under Part 708 were not actually litigated and decided in that proceeding.

Second, Ms. Benson is not precluded from litigating her Part 708 claims because the District Court did not decide any of the issues that must be determined in this proceeding. In terms of Ms. Benson's claims under the ADA, the Court granted summary judgment for the Laboratory because it found that Ms. Benson's ADA claim failed "as a matter of law because she does not have a ?disability' as defined by the statute." Memorandum Opinion at 10.(11) Clearly, the District Court's finding that Ms. Benson does not have a disability as that term is defined in the ADA is irrelevant to the issues that must be determined in a

Part 708 proceeding, and will not preclude Ms. Benson from pursuing her claims in this forum.

In terms of the Title VII claims, the District Court entered summary judgment in favor of the Laboratory because it found that the Laboratory offered a legitimate non-discriminatory reason for changing Ms. Benson's work assignments and for terminating her employment at the Laboratory, and also found that Ms. Benson had failed to produce evidence that the Laboratory's explanation was a pretext for discriminatory or retaliatory behavior.(12) The Laboratory contends that Ms. Benson is precluded from contesting the legitimacy of the Laboratory's proffered reasons for changing her work assignments or for terminating her employment because these matters were conclusively determined by the Federal Court's grant of summary judgment in favor of the Laboratory. The Laboratory's argument is not persuasive.

An action under Title VII is very different from an action under Part 708. Title VII and Part 708 protect different interests. Title VII makes it unlawful for an employer to discriminate against any employee on the basis of race, color, religion, sex or national origin, or to retaliate against an employee who has engaged in activity that is protected under that statute. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq. On the other hand, Part 708 prohibits a DOE contractor from retaliating against an employee who "blows the whistle" about problems at the workplace.

Moreover, Part 708 and Title VII use different standards and varying burdens of proof to evaluate the propriety of an employer's actions. To prevail in a proceeding under Part 708, an employee must establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). Under Part 708, if the employee meets this burden, then the government contractor must prove by "clear and convincing evidence" that the same personnel action would have been taken absent the complainant's disclosure. 10 C.F.R. § 708.9(d). Under Title VII, after an employee has made a prima facie case of disparate treatment or retaliatory action, the burden shifts to the employer to articulate a legitimate non- retaliatory motive for its action. See Fisher v. Vassar College, 114 F.3rd 1332 (2d Cir. 1997). The standards imposed upon the employer as well as the employer's burden of proof in a Title VII suit is much less demanding than the contractor's burden of proof under part 708.(13) Accordingly, the issues determined by the United States District Court for the Northern District of California were not the same as the issues that must be determined in this action, and Ms. Benson is not precluded from disputing the Laboratory's proffered reasons for changing Ms. Benson's work assignments or for terminating her employment.

Finally, as Ms. Benson had not exhausted the administrative procedures set forth in Part 708 at the time that her case was pending in Federal court, she could not yet have filed her claims under Part 708 in the United States District Court. Ms. Benson therefore did not have a "full and fair opportunity" to litigate her claims under Part 708 in the earlier proceeding. For all of these reasons, the doctrine of collateral estoppel will not preclude Ms. Benson from litigating her claims under Part 708. See also Carl J. Blier, 27 DOE ¶ 87,514 (1999).

C. Ms. Benson's Claims Concerning Building 415

The Laboratory argues that OHA does not have jurisdiction to determine Ms. Benson's claims concerning Building 415. Here, the Laboratory contends that Ms. Benson failed to properly allege that she was discharged because she had made protected disclosures about the NPEPC program, and not because of her inability to enter Building 415. The Laboratory also requests the dismissal of Ms. Benson's claims that she engaged in protected activities under Sections 708.5(a)(1) and 708.5(a)(3) when she complained about, and refused to enter, Building 415 because these claims were not raised until after the hearing was held, and not filed in the form required by the regulations.

1. Ms. Benson's claim of retaliatory termination

OHA has jurisdiction to adjudicate Ms. Benson's claim that she was terminated in retaliation for making protected disclosures about the NPEPC program. First, Ms. Benson has alleged that, from the time that she first made disclosures about the NPEPC program, the Laboratory has continuously attempted to violate her rights under Part 708. Courts have long held that a plaintiff's time to file a complaint is extended when a defendant has continuously attempted to violate rights that are protected by federal law. See Schlei & Grossman, Employment Discrimination Law. Second, as set forth in the Factual Background, OCEP treated Ms. Benson's claim of retaliatory termination as if it had been properly filed, and OCEP's determination concerning such matters is entitled to "great deference." See Udall v. Tallman, 380 U.S. 1 (1965). Third, the Laboratory will not be prejudiced if Ms. Benson's claim of retaliatory termination is decided on the merits. As set forth in the Factual Background, the Laboratory had long been aware that Ms. Benson was claiming that she was terminated in retaliation for making protected disclosures. On July 25, 1996, the Director of OCEP told the Laboratory that Ms. Benson's claims of retaliatory termination were being investigated, and, after the completion of the investigation, the Laboratory was fully informed of the results of this investigation.

2. Ms. Benson's claims of protected activity

The Laboratory requests the dismissal of Ms. Benson's claims that she engaged in protected activities under Sections 708.5(a)(1) and 708.5(3) when she complained about, and refused to enter, Building 415 because these claims were not raised until after the hearing was held, and not filed in the form required by the regulations. The Laboratory's argument concerning Ms. Benson's claim that she made protected statements about Building 415 under Section 708.5(a)(1) is not persuasive. The Laboratory will not be prejudiced if the claim under Section 708.5(a)(1) is adjudicated on the merits. The Laboratory was well aware that Ms. Benson had complained to Laboratory and DOE officials that she had been unable to enter Building 415 because of her health. The Laboratory also knew that Ms. Benson had claimed that her "medical separation" was an act of reprisal by the Laboratory for making protected disclosures. During the hearing, the Laboratory presented substantial evidence concerning these issues. The fact that Ms. Benson is now contending that her statements about Building 415 are themselves protected disclosures does not prejudice the Laboratory or require it to present any additional evidence.(14) Accordingly, Ms. Benson's statements about Building 415 will be treated as protected disclosures under Section 708.5(a)(1).(15)

However, because the evidence required to prove a prima facie case under Section 708.5(a)(3) is very different from the evidence required to prove a prima facie case under Section 708.5(a)(1), the Laboratory will be prejudiced if it is not allowed to present any additional evidence or make legal arguments to rebut Ms. Benson's claim that she engaged in protected activity under Section 708.5(a)(3) by refusing to enter Building 415. Thus, the record in this case will be reopened for the limited purpose of permitting the Laboratory to supplement the record by presenting its defenses to Ms. Benson's claim that her refusal to enter Building 415 was a protected activity under Section 708.5(a)(3) that contributed to the Laboratory's decision to terminate her employment.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Lawrence Livermore National Laboratory on April 6, 2000, in Case No. VBZ-0057 is granted in part and denied in part as set forth in Paragraphs (3) and (4) below. In all other respects, this Motions is denied.

(2) The Motion to Dismiss filed by Lawrence Livermore National Laboratory on August 7, 2000, in Case No. VBZ-0058 is granted in part and denied in part as set forth in Paragraphs (5) and (6) below. In all other respects, this Motions is denied.

(3) As the Laboratory cannot be held liable for any acts of reprisal that occurred prior to September 23, 1994, all claims based on acts of reprisal that occurred before this date must be dismissed.

(4) Janet Benson is not "collaterally estopped" from litigating her claims under Part 708 because the

United States District Court for the Northern District of California entered summary judgment in favor of the Laboratory on claims that she filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq. (Title VII), and the Americans with Disabilities Act, 42 U.S.C. §§ 12203 et. seq. (the ADA).

(5) OHA has jurisdiction to determine Ms. Benson's claims that she was terminated in retaliation for making protected disclosures about the National Physics Educational Program Collaboration;

(6) Although OHA has jurisdiction to determine Ms. Benson's claims that she made protected disclosures about Building 415 under Section 708.5(a)(1) and engaged in protected activity under Section 708.5(a)(3) when she refused to enter Building 415, the record in this case will be reopened for the limited purpose of permitting the Laboratory to supplement the record and present a complete defense to Ms. Benson's claim under Section 708.5(a)(3).

(7) This is an Interlocutory Order of the Department of Energy.

Linda Lazarus

Hearing Officer

Office of Hearings and Appeals

Date: November 1, 2000

(1)Notwithstanding the fact that the Laboratory made these arguments in post-hearing submissions, they are properly treated as motions to dismiss because the Laboratory requested the dismissal of Ms. Benson's claims as a matter of law. The arguments contained in the post-hearing submission filed on April 6, 2000, are designated as Case No. VBZ-0057. The arguments contained in the post-hearing submission filed on August 7, 2000, are designated as Case No. VBZ-0058.

(2)The Laboratory is a facility of the University of California. Any reference to the Laboratory in this decision is intended to refer to the University of California and the Regents of the University of California.

(3)Ms. Benson has alleged that the Laboratory violated the provisions of Part 708 by instituting adverse actions against her because she made protected disclosures about the Laboratory's involvement in the administration of the National Physics Education Program Collaboration (NPEPC Program). Ms. Benson also alleges that the Laboratory violated Part 708 when it terminated her employment because she refused to work in an office that endangered her health. Ms. Benson further contends that the reasons proffered by the Laboratory for the adverse actions taken against her are pretextual, and also asserts that she is the only person who has been "medically separated" from the Laboratory because of allergies in the last twenty years.

(4)On April 14, 1999, an "Interim Final Rule" that revised the procedures and criteria for Part 708 became effective. 64 Fed. Reg. 12,862 (March 15, 1999). As Ms. Benson's complaint was filed before the effective date of the Interim Final Rule, this matter must be adjudicated in accordance with the substantive standards set forth in the original version of Part 708. See Linda D. Gass, 27 DOE ¶ 87,525 (1999). Accordingly, unless otherwise indicated, all references to Part 708 or the regulations contained in Part 708, refer to the provisions of Part 708 that were in effect before April 14, 1999.

(5)On April 13, 1999, the Office of the Inspector General issued a Report of Inquiry and Recommendations in response to Ms. Benson's Part 708 complaint (OIG Report). The exhibits appended to the OIG Report are referred to as "OIG Exhibits."

(6)Ms. Benson sent a copy of this complaint to Mark Barnes, a DOE official who served as the Contractor Industrial Relations Specialist and Part 708 Coordinator for the DOE Operations Office in Oakland. OIG

Exhibit 1.

(7)Ms. Benson also made other allegations in this complaint.

(8)Ms. Benson also made other allegations in this complaint.

(9)While this investigation was pending, the Office of the Inspector General became responsible for conducting investigations under Part 708.

(10)Ms. Benson also filed claims under the California Fair Housing and Employment Act (FEHA) in the District Court. However, except for two footnotes which indicated that California courts generally rely upon federal interpretations of the ADA and Title VII to interpret analogous provisions of the FEHA, the District Court did not address the claims that Ms. Benson had filed under FEHA. Employer's Post-Hearing Brief, Exhibit C.

(11)In entering summary judgment for the Laboratory on the ADA claims, the District Court failed to address the issues of whether Ms. Benson was qualified to perform the essential functions of her job, or whether the Laboratory terminated her because of her disability. Memorandum Opinion at 6-10.

(12) It appears that the Court was unable to determine whether Ms. Benson had made a prima facie case of disparate treatment under Title VII. The Court also found that Ms. Benson could not show a causal link between the filing of her EEOC complaint on March 15, 1994, and her discharge on March 22, 1996. Memorandum Opinion at 10-14.

(13)Our cases make it clear that the contractor in a Part 708 proceeding has a much heavier burden of proof than the employee. We have held that this burden of proof may be met if a contractor demonstrates that it treated similarly situated employees in the same manner as the employee who made the protected disclosure, and that it followed its own internal procedures when taking adverse actions against an employee who made protected disclosures. See Linda D. Gass, 27 DOE ¶ 87,523 (1999) (Granting petitioner's motion for discovery of layoff procedures and information regarding employees who were situated similarly to the employee who had made protected disclosures).

(14)The Laboratory has argued that Ms. Benson's statements about her inability to enter Building 415 do not rise to the level of a protected disclosure under the regulations because §708.5(a)(1)(ii) requires that a protected disclosures involve "substantial and specific danger to employees or public health and safety," and Ms. Benson only complained about her own health. This argument is without merit. Part 708 is remedial in nature, and should not be construed in an overly technical manner to the detriment of the individuals who that the regulations were designed to protect. See Sandia National Laboratories, 23 DOE ¶ 87,501 (1993) (Sandia).

(15)The Laboratory claims that it has been prejudiced by allowing Ms. Benson to go forward on this issue because Ms. Benson's original complaint under Part 708 did not arise from protected disclosures involving matters of health and safety. This argument is not persuasive. The Laboratory was aware of the general nature of this claim, and employees filing complaints under Part 708 must not be held to the strictest standard of technical pleading. See Sandia.

May 8, 2002

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Interlocutory Decision

Name of Petitioner: Sue Rice Gossett

Date of Filing: May 25, 2001

Case Number: VBZ-0062

This Initial Agency Decision concerns a whistleblower complaint filed by Sue Rice Gossett (Gossett) against her former employer, the Safety and Ecology Corporation (SEC), under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. SEC is a sub-contractor of Bechtel Jacobs Corporation (BJC), the DOE's Managing Contractor at the Portsmouth Site in Piketon, Ohio (Portsmouth). Gossett alleges that she engaged in activity protected by Part 708 and, as a result, was retaliated against by SEC. As discussed below, I have determined that Gossett is entitled to relief.

The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and to prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities by encouraging contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices. 57 Fed. Reg. 7533 (March 3, 1992). In order to achieve these objectives, the regulations protect whistleblowers from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. §§ 708.5(a)(1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

Procedural History

Gossett filed a whistleblower complaint with the DOE's Oak Ridge Operations Office on January 23, 2001. By a memorandum dated February 13, 2001, the Oak Ridge Operations Office forwarded it to the OHA. This complaint was received by the OHA on February 22, 2001 and OHA Attorney Kent Woods was appointed as the Complaint Investigator on February 23, 2001. (1) Mr. Woods conducted an investigation of the allegations in the Complaint and on May 24, 2001, issued a Report of Investigation (the ROI). The ROI found that Gossett had made several protected disclosures and had suffered an adverse

employment action, her January 19, 2001 termination. Citing both the temporal proximity between some of the protected disclosures and her termination as well as evidence reflecting manifest hostility on the part of SEC managers to Gossett's protected activity, the ROI found that Gossett's protected activities were a contributing factor to SEC's decision to terminate her employment. The ROI accordingly concluded that the evidence in the record of the investigation was sufficient to shift the burden from Gossett to SEC to prove by clear and convincing evidence that it would have terminated her even if she had not engaged in protected activity. The ROI further concluded that, at that stage, SEC had not met this burden.

Pursuant to 10 C.F.R. § 708.21(a)(2), the case proceeded to a hearing. On May 24, 2001, I was appointed as Hearing Officer by the Director of the Office of Hearings and Appeals. My appointment as Hearing Officer was followed by a period in which the parties engaged in discovery. A hearing was held on October 23, 24, and 25, 2001, in Piketon, Ohio. The hearing was followed by an exchange of briefs, and the Record of this proceeding was closed on February 15, 2002, when OHA received Gossett's Reply to SEC's Post Hearing Brief.

Background

The Complainant, Sue Rice Gossett began working for the Portsmouth Site's radiation control program in February 1996. (2) Although Gossett had a Bachelors Degree in Sociology and an Associates Degree in Health Physics, she was originally employed as an office clerk at the Portsmouth Site. While in this position she attended a six week night course which trained her for the position of Radiation Control Technician (RCT). There were two examinations in this course, one for core academic material and one for site specific material. She successfully passed these exams in August and September 1997 and was hired as an RCT at the Portsmouth Site on October 3, 1997. She was hired by Bartlett Nuclear Services, the subcontractor which supplied RCTs to the Portsmouth Site at that time.

In March 1999, SEC took over the contract for RCT services at the Portsmouth Site. Gossett was interviewed and hired for a junior RCT position with SEC in that month. In June 2000, while Mr. Phil Borris was SEC's Manager at the Portsmouth Site, Gossett was subsequently promoted to the position of senior RCT. During her three years as an RCT at Portsmouth, Gossett's performance was consistently evaluated as at least satisfactory.

DOE guidelines require that RCTs receive continuing education in radiation control. According to DOE guidelines, RCTs should be re-qualified every 24 months in order to document this continuing education process. Gossett took her first re-qualification examination on December 22, 2000. The examination consisted of a total of 100 questions. In order to pass the examination a score of at least 80 percent was required. Gossett received a score of 74 percent on her first examination. On January 8, 2001, Gossett took a second re-qualification examination. Again the examination consisted of a total of 100 questions and required a score of at least 80 percent to pass. Gossett received a score of 73 percent on this second examination. On January 12, 2001, Gossett was informed by SEC management that she would be terminated if she failed to obtain a passing score on her third examination. On January 19, 2001, Gossett was administered a third examination. Immediately after she finished taking the third examination, it was assigned a grade of 74 percent. Within 4 hours of completing the third examination, Gossett's employment with SEC was terminated.

The Complainant contends that SEC used her failure to pass this third examination as a pretext in order to obscure its true motivation: retaliation against the Complainant for her whistleblowing activities. (3) SEC maintains it terminated Gossett because, upon her failure of a third re-qualification examination, she was no longer qualified to work as an RCT at the Portsmouth site and SEC did not have any other open positions for which she was qualified.

It is the burden of the Complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate as described in § 708.5,

and that such act was a contributing factor to one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); McCormick on Evidence § 339 at 439 (4th Ed. 1992). (4)

Gossett's Protected Disclosures

In the present case, it is clear, as indicated by the evidence set forth in the appendix to this decision, that Gossett made numerous protected disclosures between March 1, 1999, and January 19, 2001, the period in which she was employed as an SEC RCT at the Portsmouth Site. (5) The significance of the evidence set forth in the appendix is threefold. First, it clearly shows that Gossett made numerous protected disclosures during her tenure with SEC. Second, it shows that Gossett's disclosures led to embarrassment and friction at the Portsmouth Site. Third, its shows a recurring pattern under which Gossett would make protected disclosures and then be reassigned to a different part of the Portsmouth Site.

Adverse Personnel Actions

Adverse personnel actions were taken by SEC employees against Gossett during her tenure with SEC as an RCT. The information set forth in the appendix reveals that Gossett was repeatedly taken off projects soon after she reported health or safety issues. This pattern of repeated reassignments constitutes an adverse personnel action, since it served to intimidate and harass Gossett as well as undermine her authority and stature as an RCT. More importantly, Gossett was fired on January 19, 2001. A termination clearly constitutes an adverse personnel action.

Gossett's Protected Disclosures Were a Contributing Factor to Several Adverse Personnel Actions

Having established, by a preponderance of evidence, that she (1) had made protected disclosures under 10 C.F.R. § 708.5, and (2) incurred several adverse personnel actions, Gossett must also show, by a preponderance of evidence, that her protected disclosures were a contributing factor to her adverse personnel actions. Gossett has met this burden. Specifically, the record contains evidence of a recurring pattern of hostility towards Gossett on the part of various managers at the Portsmouth Site that appears to be directly related to her whistleblowing. The record also establishes temporal proximity between Gossett's protected disclosures and the adverse personnel actions.

A Pattern of Hostility

Gossett's protected disclosures inspired hostility on the part of Gossett's co-workers and managers. For example, a July 18, 2000 report issued by Bonnie Spencer, BJC's Quality Engineer, entitled "Investigation of possible HF Exposure in the L-Cage" states in pertinent part: " This is not the first incident involving a disagreement between [Gossett] and the L-Cage supervisor. There have been personality clashes between them in the past, and also between [Gossett] and Waste Management personnel in other facilities."

A September 8, 2000 e-mail from SEC's then site manager Dave Hall to Gossett's supervisor Delores Stowe reflects the hostility of some of Gossett's co-workers to her whistleblowing, while showing that SEC's past management was appropriately supportive of her protected activities. Hall's e-mail states in pertinent part:

> I did not get a chance to talk to Sue [Gossett]. Please provide her with the following

> information.
>
> The PACE employees on the job she is supporting have commented to BJC regarding the note taking that Sue is doing. They expressed comment that the note taking might be directed at their performance. Neither BJC or SEC have any concern over the note taking. BJC is going to discuss the situation with the PACE workers. If there are any actions taken by anyone directed toward her, please let us know and we will address it through BJC.

September 8, 2000 E-mail from Dave Hall to Delores Stowe.

Apparently, Gossett's whistleblowing activities were of great concern to Dave Hall's successor as SEC's Portsmouth Site Manager, Joseph Shuman. After a November 17, 2000 meeting between Gossett and another SEC employee with a BJC official, Michael J. Eversole, Shuman wrote the SEC employees a memo in which he stated:

> It has come to my attention that you spent approximately 1.5 hours in a meeting this afternoon with Mike Eversole. I can only assume that a meeting for this length of time, with both of you in attendance, must involve a relatively significant issue that crosses the line of industrial and radiological safety.
>
> I expect that issues of this nature be brought to my attention immediately. I also expect that Angie Peterson and Delores Stowe, since they are in the RCT supervisory chain, would be informed immediately. I further expect that a lengthy meeting with the BJC PHP, Mike Eversole, regarding such issues would be attended by myself, Angie Peterson, and Delores Stowe.
>
> In the future, you are directed to contact me, in writing, of the nature of this meeting and its applicability to a project or activity in order for me to validate the time on your time sheets. Without this information, I cannot sign off for reimbursement from BJC. . . .

November 17, 2000 Memorandum from Joseph Shuman, SEC Senior Site Manager, to Rodney Gossett and Susan Rice [now Susan Gossett]. Shuman was well aware of, and clearly displeased by, Gossett's whistleblowing activities at the time that he wrote this memorandum. In that context, it is clear that this memorandum was an overt warning against further whistleblowing. Shuman's testimony at the OHA hearing strongly supports this inference. 10-24-01 Tr. at 149. At the hearing, Shuman admitted that he suspected that Gossett was discussing health and safety issues with Mr. Eversole. *Id.* at 147. Shuman then further admitted that he didn't ask other employees to provide written justifications for participation in meetings. *Id.* at 148.

Shuman's testimony at the hearing further revealed the discomfort Gossett's whistleblowing activities caused him. Shuman testified that he told Gossett [and another SEC employee, her soon-to-be husband, Rodney Gossett] that if he had their concerns he would not express them or handle them in the same way, and that if he had felt the way they did, he would leave the site and find another job. *Id.* at 150-151. Shuman further testified:

> . . . I did not agree with their perspective that the health and safety was that significantly compromised and, although I respect their rights under the law, and I respect the existence of what are called whistle blower standards in the law, in the nuclear industry and other industries, it is not a standard that, in my own personal mind set, I would ever use because I feel that it is my responsibility, as an employee with an organization is [sic] to do whatever I can do within the organization and with the other organizations on-site to resolve the issues in a timely and efficient manner. And if I feel strongly enough about an issue and if I feel that I cannot work with my – the company I'm employed with or the other companies on-site to resolve those issues, then I would terminate my employment because I don't believe that going through the whistleblower standard is going to create any more efficiency or cause the

> company to respond in any better way than if I put forth my best effort with them as an employee or even as a subcontractor.

Id. at 151-152. During his testimony, Shuman even admitted that he warned the Gossetts that if they were to continue going "behind his back," it could cause conflict with him. *Id.* at 152. Shuman also testified that the DOE Manager for the Portsmouth site, Sharon Robinson, wanted to put a stop to the Gossetts' whistleblowing activities. *Id.* at 160.

In his (1) testimony at the hearing, (2) comments to OHA investigator Woods and (3) post-examination review of Gossett's performance on her re-qualification examinations, Brad Andrie, an SEC manager who was on temporary detail to the Portsmouth Site at the time of Gossett's termination, exhibited a remarkable antipathy towards Gossett. This antipathy seems especially inappropriate, since Andrie testified that he had only conversed with Gossett on one occasion, and then for only a few minutes. At the hearing, he contended that Gossett failed the three re-qualification examinations because she lacked theoretical, radiological, and mathematics training. 10-25-01 Tr. at 120. Andrie also attributed Gossett's test scores to a lack of operational experience. *Id.* He then claimed to have examined her resume and transcripts and found that she had no technical training. *Id.* at 121. In his interview with Mr. Woods, Andrie claimed that Gossett had never been through a formal program of health physics and theory. Memorandum of May 9, 2001 Interview of Brad Andrie by Kent Woods at 5. Andrie further claimed that "Gossett was given training credit from Shawnee State Community College as if she were in a related field, when actually she took dance and sculpture and art, and there were no mathematics or health physics courses listed on her transcript." *Id.* Andrie's claims were unfounded. The record shows that Gossett had both a Bachelor's Degree in Sociology and an Associate's Degree in Health Physics. 10-25-01 Tr. at 126; Preliminary Statement of Susan Rice-Gossett to State of Ohio Unemployment Compensation Review Commission at 4. It appears that Andrie's antipathy towards Gossett may have resulted from one of her protected disclosures. At the hearing, Andrie testified that Gossett's concerns about potential radiological contamination in an area resulted in that area's being posted as contaminated, which in his view was unnecessary. 10-25-01 Tr. at 101-02. Andrie described this posting as ". . . a major thorn, I guess, in the side of many of the other technicians." *Id.* Andrie also testified, ". . . I literally tried to get that area unposted, had it surveyed completely, and it was completely clean and my customers said we can't do that, we can't unpost it because a precedence has been set, and there's a potential." *Id.* Andrie's testimony is yet another example of how Gossett's whistleblowing angered her management. The evidence discussed above reveals a pattern of hostility towards Gossett because of her protected activities. It also confirms that Gossett's protected disclosures were a contributing factor to her frequent re-assignments and termination.

Temporal Proximity

In most whistleblower cases, it is difficult or impossible for a complainant to point to or find a "smoking gun" that proves an employer's retaliatory intent. Therefore, Congress and the courts, recognizing this difficulty, have found that a protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993), *citing McDaid v. Department of Hous. and Urban Dev*., 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, the courts have found that "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F.2d at 148.

Since Gossett made numerous protective disclosures during her year and a half tenure with SEC, there was temporal proximity between her protected disclosures and her re-assignments and her termination. Moreover, it is clear that the SEC managers who decided to terminate her had actual knowledge of her protected activity and were bothered by it. (6) Therefore, the temporal proximity between Gossett's protected disclosures and the adverse personnel actions taken against her is sufficient to establish, by a

preponderance of the evidence, that her protected disclosures were a contributing factor to her re-assignments and eventual termination by SEC. The pattern of hostility discussed above and the temporal proximity between the protected disclosures and adverse personnel actions each meet Gossett's burden of proof to show that protected disclosures were a contributing factor to the adverse personnel actions taken against her.

Whether SEC Would Have Taken Adverse Personnel Actions Against Gossett in the Absence of Her Protected Activities

I have found that the Complainant has shown, by a preponderance of evidence, that (1) she made protected disclosures, and (2) these protected disclosures were a contributing factor to her re-assignments and termination. Therefore, the burden has been shifted to SEC to prove by clear and convincing evidence that the company would have continually reassigned and eventually terminated her even if she had not made protected disclosures. 10 C.F.R. § 708.29. Clear and convincing evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F. Supp. at 1204 n.3. For the reasons set forth below, I find that SEC has not met this burden.

SEC offers no explanation for Gossett's continual reassignments. It is evident from the record that these reassignments reflected SEC management's desire to avoid further conflict. However, this pattern of repeated reassignments constitutes an adverse personnel action since it served to intimidate and harass Gossett as well as undermine her authority and stature as an RCT. 10 C.F.R. Part 708 exists to protect DOE contractor employees' right to engage in protected activity and to ensure that DOE contractor employees do not suffer any adverse consequences as a result of engaging in protected activities. Accordingly, SEC violated 10 C.F.R. Part 708 by consistently reassigning Gossett when she made protected disclosures.

SEC contends that the sole reason it terminated Gossett was her failure "to achieve a passing score on any of three different ?re-qualification' examinations." SEC Post-hearing Brief at 3. According to SEC, it has an established policy under which an RCT is only allowed three attempts at passing a re-qualification exam (the three strikes rule). *Id.* at 8. If SEC had been able to show that it had an established three strikes rule and that it had applied that policy on a consistent basis, it might have met its burden of clearly and convincingly showing that it would have terminated Gossett regardless of her whistleblowing activities.

However, the Record does not support SEC's assertion that the three strikes rule was established company policy at the time of Gossett's termination. First, SEC has never documented the three strikes rule in writing. Second, SEC produced no reliable evidence that this "oral" policy had ever been implemented by SEC before. Third, the SEC employees who testified at the hearing contradicted each other and could not provide a consistent or cohesive account of how the three strikes policy came into being. Fourth, the three strikes rule was not "cast in bronze." SEC bears the burden of proving by clear and convincing evidence that the three strikes rule on which it relies was its existing policy at the Portsmouth Site at the time of Gossett's termination. SEC has not met this burden.

Despite SEC's claims that the three strikes policy was established company policy at the Portsmouth Site, it has not produced any written documentation of that policy. (7) A high ranking SEC official, Brad Andrie, testified that the company maintains an official procedures and personnel manual known as "the Whitebook." 10-25-01 Tr. at 8. The three strikes rule does not appear in the Whitebook. *Id.* at 99. In fact, SEC admits that the three strikes rule has not been documented in writing. Transcript of May 14, 2001 Unemployment Compensation Hearing at 9; 10-24-01 Tr. at 9, 137.

Nor is there any reliable evidence in the record that the three strikes rule had ever been applied to any SEC employee before. In fact, the testimony of present and former SEC employees at the hearing indicates that Gossett was the only SEC employee ever fired under the three strikes rule. 10-24-01 Tr. at 237, 279, 286, 292. Moreover, at least three other SEC RCTs at the Portsmouth Site failed two re-qualification (or

qualification) exams, yet there is no credible evidence that any of these three other SEC RCTs were warned that a failure on a third re-qualification examination would result in their termination. The record indicates that Rhonda Christopher, Delores Stowe, and Lou Ann Riggs each failed their first two re-qualification examinations. (8) SEC claims that Christopher, Stowe, and Riggs were each warned that they would be terminated if they failed their third examination. However, SEC has presented no direct evidence in support of these assertions.

No SEC employee testified to personal knowledge of Rhonda Christopher's being informed that she would be terminated if she failed a third re-qualification examination. Nor does the record contain any written documentation that Christopher was so warned. At a hearing before the State of Ohio's Unemployment Compensation Commission concerning Gossett's eligibility to receive unemployment benefits (the Unemployment Hearing), Andrew Henderson, SEC's Corporate Director of Human Resources testified that Rhonda Christopher had been informed of the three strikes rule after she failed her second re-qualification examination. Transcript of May 14, 2001, Unemployment Compensation Hearing at 11. However, Henderson did not testify that he had personal knowledge of any particular verbal communication of a warning to Christopher at the Portsmouth Plant and it is unlikely that Henderson would have had such personal knowledge, since Henderson was employed at SEC's corporate offices in Tennessee, not at Portsmouth. At the Unemployment Hearing, Billie Childers, SEC's RTC training coordinator, testified that Bruce Manninen, then SEC's acting site manager at Portsmouth, warned Christopher of the three strikes rule. Transcript of May 14, 2001 Unemployment Compensation Hearing at 20-21. Interestingly, although he testified at both hearings, Manninen himself never testified that he warned Christopher about the three strikes rule. In fact, Manninen's testimony at the OHA hearing was that he did *not* discuss the three strikes rule with Christopher. 10-23-01 Tr. at 154. At the Unemployment Hearing, SEC's former site manager, Phil Borris testified that he was not aware of Christopher being warned about the three strikes rule. Transcript of May 14, 2001, Unemployment Compensation Hearing at 89-90.

No SEC employee testified that they had personal knowledge of Lou Ann Riggs' being informed that she would be terminated if she failed a third re-qualification examination. Childers testified that Riggs was warned about the three strikes rule, but could not identify who informed Riggs of the policy. 10–24-01 Tr. at 9.

No SEC employee testified to personal knowledge of Delores Stowe's being informed that she would be terminated if she failed a third re-qualification examination. Bruce Manninen testified that he did not recall warning Stowe of the three strikes rule before her third re-qualification examination. 10-23-01 Tr. at 168. Childers would not have warned her of the three strikes rule, since he repeatedly testified he was unaware that it was Stowe's third re-qualification examination at the time. 10-23-01 Tr. at 205; 10-24-01 Tr. at 12-13. Michele Britt, SEC's Corporate Personnel Manager, testified that she was unaware of any attempt to warn Stowe about the three strikes rule. 10-24-01 Tr. at 253. SEC attempts to show that Stowe was warned of the three strikes rule by claiming that Phil Borris' testimony during the OHA hearing indicates that Stowe knew of the three strikes rule at the time she took her third re-qualification examination. SEC's Post Hearing Brief at 10-11. A careful reading of the hearing transcript, however, shows that SEC's claim is without merit. Borris testified that Stowe came to him complaining "that she was going to lose her job." 10-23-01 Tr. at 108. Borris then testified that:

> I told her that I thought the system was fair and I told her just to hang in there and things would probably work their way out of the system. She was in tears when she showed up at my office. She had just failed the test for the third [time] and she said quote unquote ?I'm going to have to quit because I just can't take it anymore. That damn Billie is out to get me.' That what she said. She was in tears.

10-23-01 Tr. at 108. Borris' account of Stowe's comments clearly indicate that she was thinking of quitting her job because of the examination's difficulty rather than indicating that she thought she would be fired under the three strikes rule. Borris, SEC's former Site Manager at Portsmouth at this time, further

testified that prior to Gossett's termination, he had never heard of the three strikes rule. Accordingly, it appears that Gossett was warned about the three strikes rule after failing two re-qualification examinations while the three other SEC RCTs who found themselves in a similar situation were not.

The past and present SEC employees who testified at the hearing provided conflicting accounts of how SEC's management developed and implemented the three strikes rule. Brad Andrie testified that the three strikes rule was a well known company policy and an industry standard known by all of SEC's RCTs. 10-25-01 Tr. at 103-04. Andrie then testified that Stanley Waligora made the ultimate decision to apply the three strikes rule and that Waligora communicated this decision to Childers. *Id.* at 103. However, Stan Waligora testified that SEC had no established or written three strikes rule. 10-24-01 Tr. at 201-02. Instead, Waligora testified that SEC had a flexible policy under which an RCT with a close exam score would get another try or "continued patience." 10-24-01 Tr. at 212-13.

Childers testified that Shuman requested that Childers ask Waligora about the existence and origin of the three strikes rule. 10-24-01 Tr. at 13-14. (9) Childers testified that he told Shuman about the three strikes rule and that it had been created by Manninen after Christopher had failed her second qualification examination. 10-24-01 Tr. at 13, 15.

Michele Britt testified that Shuman asked her to contact Waligora in order to ask about the rules concerning failures of RCT re-qualification examinations. 10-24-01 Tr. at 236-37. According to Britt, Waligora told her that SEC was giving RCTs three tries to pass re-qualification examinations. 10-24-01 Tr. at 239-40. Britt's account is at odds with Waligora's recollection. Nor did Shuman indicate that he had consulted with Britt about the three strikes rule.

Joseph Shuman, however, admitted that he did not know where or how the three strikes policy originated. 10-24-01 Tr. at 137. Shuman testified that, immediately after Shuman was told that Gossett had failed her third re-qualification examination, he asked Billie Childers to contact Stanley Waligora in order to ascertain SEC's policy on re-qualification examinations . 10-24-01 Tr. at 121-22, 131. Shuman then testified that after Childers contacted Waligora, Childers reported to him that the three strikes rule was SEC's corporate policy. (10) *Id.* at 121. Shuman also claimed that he had determined that the three strikes rule was SEC's preexisting policy by consulting with Bruce Manninen and the site managers of SEC's Paducah and Oak Ridge sites. 10-24-01 Tr. at 137-38, 168.

Although Shuman claimed he had learned about the three strikes rule by consulting Bruce Manninen and Childers, Childers claimed Manninen created the three strikes rule. Manninen, in turn, testified that SEC did not have an existing three strikes rule at the time that Christopher failed her second re-qualification examination. 10-23-01 Tr. at 153. (11) Manninen further testified that it was not his intent to create the three strikes rule by letting Christopher take a third qualification examination. 10-23-01 Tr. at 153.

SEC contends that once Gossett had failed her third re-qualification examination, she was no longer fully qualified to continue working as an RCT at Portsmouth until she passed a re-qualification examination. Since she was not qualified to continue working as an RCT, SEC contends, it checked to see if it had any other positions that she could fill at the Portsmouth Site. Having found no such positions, SEC contends, it had no choice but to terminate her employment. 10-24-01 Tr. at 137, 166, 168. However, the record shows that SEC could have taken less drastic action than termination in response to Gossett's failure to pass the third re-qualification examination. The testimony of Stanley Waligora indicates that he had advised SEC management that the three strikes rule was "not cast in bronze." 10-24-0-1 at 200-01. Waligora further testified that SEC had a flexible policy under which a RCT with a close exam score would get another try or "continued patience." 10-24-01 Tr. at 212-13. In fact, the record also contains evidence showing that SEC retained the services of a number of RCTs whose qualifications or training had temporarily lapsed. Moreover, SEC admits that its former Portsmouth site manager, Phil Borris, had a policy of remediation for RCTs whose qualifications had lapsed. SEC Post Hearing Brief at 11. It is clear that Gossett could have been placed on leave without pay or could have continued to perform her functions under the supervision of a qualified RCT until she re-qualified.

There is considerable evidence in the record indicating that terminating an educated, experienced, and competent RCT like Gossett was contrary to SEC's own business interests. Several witnesses acknowledged that SEC was experiencing difficulty in recruiting and retaining RCTs at the time of her termination. At least two of these witnesses noted that it would most likely have saved SEC money to have retained and retrained Gossett until she was able to pass a re-qualification test, instead of terminating her. 10-24-01 Tr. at 167; 10-25-01 Tr. at 88.

The evidence in the record has convinced me that SEC's decision to terminate her was instead based, in significant part, on its desire to end her whistleblowing activities. This conclusion is supported by noting the difference between the rigid manner in which SEC handled Gossett's case and the flexible manner in which SEC handled a similar case, that of its RCT Supervisor, Delores Stowe. Stowe, like Gossett, failed her first two re-qualification examinations. Stowe was then administered a third re-qualification examination. When Stowe's third re-qualification examination was first corrected, it appeared that she had missed 24 out of 100 questions. Since Stowe needed to have 80% correct in order to pass this re-qualification examination, a SEC health physicist, Bruce Manninen, reviewed the 24 questions Stowe missed. 10 -23-01 Tr. at 162-63. Manninen's review originally resulted in his identification of approximately eight questions that he believed to be "questionable or unreasonable." *Id.* at 163-64. At least four of these questions were brought to the attention of Stanley Waligora, a consultant who was ultimately responsible for the content and scoring of RCT re-qualification examinations. After a series of conversations and e-mail exchanges, which took place over a number of days, Stowe received credit for four of the 24 questions that had originally been found to be answered incorrectly by Stowe, thus raising her score to 80% and allowing her to pass this third re-qualification examination. Stowe is currently employed by SEC as its supervisor of RCTs at the Portsmouth Site.

Gossett, like Stowe, also failed her first two re-qualification examinations. On January 12, 2001, after Gossett had failed her second re-qualification examination, Gossett was informed that she would be fired if she did not pass her third re-qualification examination. There is no credible evidence in the record showing that Stowe was provided with a similar warning. Gossett was then administered a third re-qualification examination, on January 19, 2001. According to SEC, when Gossett's third re-qualification examination was first corrected, it appeared that she had missed 26 out of 100 questions. (12) Within 4 hours after she had finished taking her third re-qualification examination, Gossett's employment with SEC was terminated.

Moreover, the record shows that SEC clearly gave Stowe the benefit of the doubt when it re-scored her third re-qualification examination, while it assigned the review of Gossett's third re-qualification examination to an individual, Brad Andrie, who was highly biased against her and who apparently let his malice towards Gossett affect his analysis of her third re-qualification examination. The record shows that Stowe's score was adjusted upwards by four points as a result of SEC's post examination review. Originally, SEC found that Stowe had missed question numbers 6, 8, 19 and 26. However, as a result of SEC's post-examination review of Stowe's third re-qualification examination, SEC eventually gave Stowe credit for each of these question thus raising her score from a failing grade of 76% to the lowest possible passing grade of 80%. A close analysis reveals that SEC's post-examination review of Stowe's third re-qualification examination was generous to Stowe.

On question number 6, Stowe picked answer A, while the answer key originally used to score her test provided that the correct answer was B. However, Stanley Waligora, the consultant who was SEC's ultimate arbiter of the re-qualification exam contents, convincingly testified that the answer key was incorrect and that the correct answer was actually A. 10-24-01 Tr. at 188. Accordingly, SEC's awarding of a point to Stowe for her answer to question number 6 was perfectly appropriate and should have been expected under any circumstances.

On question number 8, Stowe again picked answer A, even though the answer key originally used to score her test again provided that the correct answer was B. SEC also found that the answer key to question number 8 was incorrect and gave credit to Stowe for question number 8. Apparently, the answer key was

corrected prior to Gossett's second re-qualification examination, since Gossett answered question 8 by picking answer A and was immediately given credit for it. Accordingly, SEC's awarding of a point to Stowe for her answer to question number 8 was perfectly appropriate and should have been expected under any circumstances.

On question number 19, Stowe again picked answer A, even though the answer key originally used to score her test again provided that the correct answer was D. However, the record shows that due to a typographical error (fixed by the time Gossett took her second re-qualification examination) the answer key originally used to score Stowe's third re-qualification examination was not accurate. Stowe should not have lost credit for picking answer A, since the typographical error rendered answer D incorrect. However, answer A was not correct either. (13)

On question number 26, Stowe's answer was D, while the answer key indicated that the correct answer was A. Apparently, Manninen contended that Stowe should get credit for her answer and she eventually did. However, the question and its answer key were never corrected and exactly the same question was given to Gossett in her second re-qualification examination. Gossett chose answer A and was given credit for it. Stanley Waligora, the consultant who was ultimately responsible for the content and scoring of RCT re-qualification examinations, testified that answer A was the correct answer and that answer D was an incorrect answer. 10-24-01 Tr. at 189-90. Thus, SEC gave Stowe the benefit of the doubt in order to allow her to pass her third re-qualification examination.

The record shows that SEC's reaction to Stowe's potential failure of her third re-qualification examination was markedly different than SEC's reaction to Gossett's potential failure of her third re-qualification examination. SEC implicitly acknowledges the significant discrepancy between its handling of Gossett and Stowe's third re-qualification examinations, since it offers a number of explanations for these discrepancies. Specifically, SEC contends that these discrepancies were the result of (1) a change in SEC's management, (2) Stowe's taking the initiative to challenge four questions as opposed to Gossett's failure to challenge any questions, and (3) SEC management's preliminary review of Gossett's third re-qualification examination which revealed that only four of the questions Gossett missed could reasonably be challenged, while SEC's preliminary management review of Stowe's third re-qualification examination showed that there were enough questions at issue to affect the outcome of the examination.

At the time of Stowe's third re-qualification examination and the post-examination review that ultimately raised her score from 76 percent to 80 percent, Phil Borris was SEC's Portsmouth Site Manager. However, Borris was subsequently demoted. When Gossett took her third re-qualification examination on January 19, 2001, Joseph Shuman was SEC's top manager at the Portsmouth site. It was Shuman who ultimately decided to terminate Gossett. SEC contends that the discrepancy between its handling of Gossett and Stowe's third re-qualification examinations can be explained by this change in management. SEC Post-hearing Brief at 11. (14) Simply put, the change in management does not relieve SEC of its burden to show by clear and convincing evidence that it would have terminated Gossett even if she had not made protected disclosures. Moreover, SEC's contention is internally inconsistent with SEC's own assertions since SEC, in order to show that the three strikes rule was a longstanding and established policy, attempts to argue that Stowe was aware of and affected by the three strikes rule. SEC's Post Hearing Brief at 10-11.

SEC also claims that the disparity in treatment resulted from a legitimate difference in the manner in which Stowe and Gossett handled the grading of their respective third re-qualification examinations. SEC claims that Stowe challenged four answers to her test, while Gossett did not challenge the grading of her exam. SEC's claim is without merit, however, since even if the distinction is relevant, SEC has failed to convincingly show that Stowe actually challenged these questions on her exam.

SEC attempts to explain the difference in the way Gossett and Stowe were treated by noting that although its post examination review of both tests found four questions were potentially graded wrong, four points were not enough to make a difference in Gossett's case while four points were sufficient to provide Stowe with a passing score. This contention is without merit. First, it fails to address the obvious discrepancy

between SEC's handling of Stowe, who got the benefit of the doubt for at least one point, and Gossett, whose termination appears to have occurred even before SEC completed its evaluation of her test. (Andrie testified that he had not even completed his evaluation of Gossett's examination at the time of her termination). 10-25-01 Tr. at 19. Second, SEC has failed to support the factual underpinnings of this contention. SEC could not even identify which four questions missed by Gossett were potentially graded wrong.

Conclusion

The Complainant, Sue Rice Gossett has met her burden of proving that she made protected disclosures, and that these protected disclosures were a contributing factor to adverse personnel actions taken against her by the Contractor, Safety and Ecology Corporation. The Contractor has failed to meet its burden of showing that it would have taken these actions in the absence of the Complainant's protected disclosures. Accordingly, I find in the Complainant's behavior on the issue of liability and will issue a Supplemental Order determining the appropriate remedies.

The Part 708 regulations provide that if a hearing officer determines that an act of retaliation has occurred, the hearing officer may order reinstatement, transfer preference, back pay, reimbursement of reasonable costs and expenses, and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36. Accordingly, I direct the Complainant to submit a detailed statement setting forth the precise remedies she is seeking, including supporting documentation, within 30 days of her receipt of this Decision. The Contractor will then have 30 days from its receipt of the Complainant's statement to respond to her remedy requests and to submit evidence contradicting or explaining the Complainant's proffered supporting documentation.

It Is Therefore Ordered That:

(1) The Complaint filed by Sue Rice Gossett under 10 C.F.R. Part 708, OHA Case No. VBZ-0062, is hereby granted.

(2) Within 30 days of receipt of this Interlocutory Decision, Sue Rice Gossett shall submit to the Office of Hearings and to the Safety and Ecology Corporation, a detailed statement setting forth the precise remedies she is seeking as well as supporting documentation. The Safety and Ecology Corporation shall, within 30 days from its receipt of Sue Rice Gossett's statement, submit a responsive document to the Office of Hearings and Appeals and to Sue Rice Gossett.

(3) This is an Interlocutory Decision which will become an Initial Agency Decision upon the issuance of a Supplemental Order determining the appropriate remedies for Safety and Ecology Corporation's violations of 10 C.F.R. Subpart 708. The present decision may not be appealed by either party until it becomes an Initial Agency Decision.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: May 8, 2002

Appendix

The record strongly supports Gossett's assertions that she made numerous protected disclosures during her employment with SEC. SEC does not dispute that Gossett made protected disclosures. An extensive, yet incomplete, listing of protected disclosures and reassignments follows:

- In July 2000, Gossett and nine other Portsmouth Site employees met with Congressman Ted Strickland. During this meeting, Gossett expressed her concerns about the destruction of medical specimens and other uncorrected safety problems. 10-23-01 Tr. at 58-9.
- On July 13, 2000, Gossett submitted a written "employee concern" expressing her concerns that (1) she had been exposed to Hydrogen Fluoride (HF) gas and (2) the site's medical personnel had not been responsive to her concerns about this exposure.
- On July 17, 2000, Gossett submitted an employee concern expressing her perception of a lack of responsiveness on the part of occupational health and safety personnel at Portsmouth.
- On October 19, 2000, Gossett and three other individuals employed at the Portsmouth Site met with Dr. David Michaels, who at the time was DOE's Assistant Secretary for Environment, Safety and Health, to express their concerns about health, safety and management issues at the Portsmouth Site. 10- 23-01 Tr. at 59-63, 70, 74.
- On October 23, 2000, and November 1, 2000, Gossett submitted an employee concern to the Oak Ridge Operations Office alleging that she had been retaliated against for engaging in protected activity.
- On November 1, 2000, Gossett submitted a memorandum to Rufus H. Smith, Diversity Programs and Employee Concerns Manager, Oak Ridge Operations Office. In this memorandum, Gossett asserts that DOE failed to fully investigate an earlier employee concern. The November 1, 2000 Gossett submission further asserted:

- While she was assigned to perform radiological control coverage for the Waste Management Program in the X-7725 Area, she reported "frequent accounts of eating, smoking and chewing in radiologically controlled areas, . . . unsafe work practices and near miss failures of the existing systems of safety." *Id.* at 2. She was reassigned to the X-745 Cylinder Lot Program as a consequence of these disclosures. *Id.*

- While she was assigned to the X-745 Cylinder Lot Program, she reported "frequent accounts of smoking in radiologically controlled areas." *Id.* She was reassigned to the X-744G Program as a consequence of these disclosures. *Id.*
- While she was assigned to the X-326 "I" Cage she reported "personnel contamination of two persons . . . and multiple ISMS violations that led to personnel HF exposures." *Id.*
- While she was assigned to the X-744G Program she reported "issues including disposing of trap materials in a ?burnables' container, lack of documentation of asbestos sampling and the absence of a Safety and Health Officer." *Id.*
- While she was assigned to work as a "rover" she "reported several accounts of smoking in radiologically-controlled area, requested a safety evaluation of an arriving load when the shipment driver expressed concerns, reported the presence of suspect soil on the bottom of incoming Hanford containers and reported that a Lock Out/Tag Out (LOTO) Permit was not available for review prior to the job even after it was requested [and] . . . successive accounts of elevated work without fall protection." *Id.*

· A memorandum dated November 2, 2000, from Gossett to her supervisor, Delores Stowe, as well as an Alliance Condition Report authored by Gossett on November 3, 2000, document Gossett's concern about the possibility that work had been inappropriately performed at Portsmouth without health physics coverage.

- In mid-November 2000, Gossett and other employees met with Leah Dever, the Manager of DOE's Oak Ridge Operations Office and Sharon Robinson, the DOE Manager of the Portsmouth Site, to discuss the employees' health, safety and management concerns. 10-23-01 Tr. at 58, 66.
- An undated memorandum from Gossett to her supervisor, Delores Stowe, and a Memorandum from Gossett to Stowe, dated November 15, 2000, as well as an Alliance Condition Report authored by Gossett on November 15, 2000, document Gossett's concerns about a number of bulging and rusting drums in the radio-material storage area at X7745R. Gossett's memo to Stowe also reports that a site employee, Greg Sowards, had expressed concerns to her about both the lack of health physics coverage at a plant operation and the actions of other site employees who had discouraged him from

reporting the lack of health physics coverage.
- A memorandum dated November 28, 2000, from Gossett to Stowe, states in pertinent part:

During requested follow-up drum count for Bechtel-Jacobs' subcontractor, WASTREN, Inc. on November 22, 2000, technicians discovered a bulging drum which had breached the lid area. Initial surveys revealed no contamination present. The condition was reported to supervision. During these discussions it was learned that there were other known breached containers in the same area.

· In an April 4, 2001 memorandum from Gossett to Kent Woods, Attorney-Investigator, Office of Hearings and Appeals, Gossett alleges:

- On February 27, 1999, she filed a Problem Report documenting a violation of a radiological work permit at the X326L area. April 4, 2001 memorandum from Gossett to Kent Woods at 1.

- On December 1, 1999, she filed a Problem Report asserting that a worker prohibited her from posting identified contamination in his area. *Id.*
- On January 6, 2000, she issued a Stop Work Problem Report documenting a Leaking (RAM-Tagged) poly bottle repaired without notification to health physics contractor. *Id.*
- On January 24, 2000, she issued a Stop Work Problem Report in which she reported a shipment lacking radiological release papers. *Id.*
- On February 9, 2000, she reported that the radiation background from a contamination area was too high for personnel. *Id.*
- On May 24, 2000, she filed a Problem Report in which she reported exposed contamination. *Id.*
- On October 11, 2000 Gossett issued a Stop Work Problem Report in which she reported gas fumes, insufficient lighting, and the presence of snakes at a job site. *Id. at 2.*
- On October 13, 2000 Gossett reported to SEC's Health and Safety Manager that a forklift operator substituted a handkerchief for a mask. *Id.*

Endnotes

(1) On March 6, 2001, at the request of Gossett and the SEC, the OHA Director permitted Gossett's request for an investigation to be held in abeyance for a period of thirty days in order to afford the parties an opportunity to reach an informal resolution of her complaint. The parties were unable to reach an informal resolution of the complaint and OHA's investigation resumed.

(2) During her employment at Portsmouth, Gossett's last name was Rice. Subsequent to her employment at Portsmouth, Gossett was married and her last name changed to Gossett.

(3) The Complainant also contends that SEC manipulated the testing process to ensure her failure.

(4) Once the Complainant has met this burden, the burden shifts to the Contractor, which then must show, by clear and convincing evidence, that it would have taken the alleged act of retaliation in the absence of the Complainant's protected activity.

(5) In the investigatory stage of this proceeding, SEC conceded that Gossett had made at least two protected disclosures. ROI at 8.

(6) The Record clearly shows that Gossett's whistleblowing activities were well known to her fellow employees at the Portsmouth Site as well as to SEC management in Portsmouth and Oak Ridge. 10-24-01 Tr. at 236.

(7) The only documented SEC policy concerning RCT's who score less than 80% on a test (or who miss a training meeting) is an SEC RADCON Alliance Training Program Work Instruction dated July 21, 2000, which indicates that "remedies" for these occurrences should be provided within 30 days. SEC RADCON

Alliance Training Program Work Instruction dated July 21, 2000 at 5. There is no suggestion that termination is a contemplated remedy.

(8) Rhonda Christopher had previously worked at Portsmouth for other contractors. She was hired by SEC and was required to undergo SEC's RCT training and then to qualify as a SEC Portsmouth RCT. There is some dispute between the parties as to whether Christopher was attempting to qualify or re-qualify when she took these examinations. However, I find that I need not resolve this issue since the distinction would have no effect on my ultimate decision in the instant case.

(9) Childers also testified that he did not remember asking Waligora about the three strikes rule, claiming that he did not need to ask Waligora since he already knew the policy. 10-24-01 Tr. at 15.

(10) Interestingly, Gossett had been warned, at Shuman's request, about the three strikes rule days earlier, on January 12, 2001.

(11) Manninen was SEC's acting site manager at Portsmouth when Christopher failed her second qualification examination.

(12) Brad Andrie testified that he had not completed his evaluation of the validity and accuracy of Gossett's test at the time of her termination. 10-25-01 Tr. at 19.

(13) Gossett answered (the corrected version of) question 19 by picking answers A, B, and C.

(14) SEC attempts to bolster this argument by citing *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612 (7th Cir. 2000) and *Stanback v. Best Diversified Products, Inc.*, 180 F.3d 903, 910 (8th Cir. 1999) which in the context of non-whistleblower employment discrimination actions hold that employees subject to different supervisors are not similarly situated. SEC Post-hearing Brief at 11. SEC's reliance on this case law is misplaced however. The cases cited by SEC, while holding that decisions made by different decision makers are rarely similarly situated in all respects, apply only to those discriminatory discharge cases which apply the burden shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973) (*McDonnell*). The present proceeding utilizes the burden shifting framework set forth in 10 C.F.R. § 708.29 rather than the burden shifting framework used in the cases cited by SEC. Under 10 C.F.R. § 708.29, once the complainant shows that she made protected disclosures and that these protected disclosures were a contributing factor to adverse personnel actions (as the complainant in the present proceeding has done) the burden shifts to the contractor who must then show by *clear and convincing evidence* that it would have taken the adverse actions in the absence of the protected disclosures. Therefore, under 10 C.F.R. § 708.29, a complaint is not required to show that she is similarly situated to a non-protected individual who was not subject to the adverse personnel action in order to establish a prima facie case.

September 24, 2003

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Interlocutory Order

Name of Petitioner: Steven F. Collier

Date of Filing: June 11, 2003

Case Number: VBZ-0084

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on May 20, 2003, involving a Complaint filed by Steven F. Collier (Collier or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his Complaint, Collier claims that Fluor Fernald, Inc. (FFI), the prime contractor operating the DOE's Fernald, Ohio site and his former direct employer, Coleman Research Corporation (CRC), an FFI subcontractor, terminated him in retaliation for making disclosures that are protected under Part 708. The termination came as part of a site-wide reduction in force (RIF) conducted by FFI. In the IAD, the Hearing Officer determined that CRC had shown that it would have terminated the Complainant, even in the absence of the protected disclosures. Collier filed a Statement setting forth the issues he believes should be considered in this review. CRC and FFI filed responses to the Collier Statement of Issues.

As set forth in this decision, I disagree with the IAD and have tentatively decided that the contractors have not made the requisite showing. However, as discussed below, I will allow the contractors to provide comments on this preliminary determination. I will also reopen the hearing to accept additional testimonial evidence, if the contractors convince me that such an unusual step would be productive. Because of this unusual approach, the instant determination is being issued as an Interlocutory Order.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices by protecting those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by Collier in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Collier's Complaint are fully set forth in the IAD. *Steven F. Collier*, 28 DOE ¶ 87,036 (2003)(*Collier*). I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Collier worked for CRC as a Senior Operations Specialist, one of five employed at the Fernald site. With a background in nuclear safety, Collier was hired in December 1994 to monitor the conduct of operations at Fernald. His responsibilities included identifying and reporting operations or conditions that were not in compliance with the many statues, regulations and policies that govern the activities conducted at Fernald. Collier claimed that between October 10, 2000 and February 7, 2002, he made fourteen disclosures that are protected under Part 708. Collier also alleges that there were two retaliatory actions against him: (i) on November 8, 2001, FFI recanted on a previous approval for him to receive training and (ii) on February 28, 2002, CRC terminated his employment through a Reduction in Force (RIF).

Collier filed a Complaint under Part 708 which was transmitted to the DOE's Ohio Field Office (DOE/OFO). The DOE/OFO accepted overall jurisdiction of the complaint. 1/ The complainant rejected the option that he had under 10 C.F.R. §§ 708.21 and .22 for an investigation of his allegations. Instead, he requested that a hearing be scheduled without an investigation. 10 C.F.R. § 708.22(a). Accordingly, an OHA Hearing Officer conducted a hearing on this matter. Including the complainant, there were 15 witnesses who provided testimony during a hearing that lasted three days. After considering the testimony at the hearing and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

C. The Initial Agency Decision

The IAD cited the burdens of proof under the Contractor Employee Protection Regulations. They are as follows:

> The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure. . . and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. . . .

10 C.F.R. § 708.29.

As the IAD further noted, Section 708.5(a) provides that a disclosure is protected if an employee reasonably believes that he is disclosing a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety or fraud, gross mismanagement, gross waste of funds or abuse of authority. 2/

1/ The DOE/OFO found that the training denial claim was untimely filed. This finding was reconsidered in the hearing phase.

2/ The regulation provides: "If you are an employee of a contractor, you may file a complaint against your employer alleging that you have ben subject to retaliation for: (a) Disclosing to a DOE official, a member of Congress, or any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your

(continued...)

The IAD then noted that Collier claimed that he made fourteen disclosures related to Section 708.5(a). The IAD found that the disclosures could be grouped into six categories: (i) Waste Pits Remedial Action Project (WPRAP); (ii) Respirator Issuance Program; (iii) Nuclear Project Startup; (iv) "Smoking Train;" (v) Chemical Management; and (vi) Silos Project. The IAD named the person to whom Collier purportedly made the disclosures and described in detail the nature of the health and safety concerns that were allegedly involved in these disclosures. 3/ The IAD then found that most of the disclosures clearly took place as described. The IAD did not specifically analyze whether the nature of the disclosures themselves made them protected for purposes of Part 708. Rather the IAD "assumed" for purposes of analysis that the disclosures were protected. The IAD then proceeded to consider the alleged retaliations. *Collier,* slip op. at 8.

The IAD noted that Collier alleged two instances of retaliation that took place as a result of his protected disclosures: (i) on November 8, 2001, Joel Bradburne, the FFI manager of the Silos project, to which Collier was then assigned, informed him that his request to attend Plant Automation Equipment training had been denied; and (ii) on February 8, 2002, his employment with CRC was terminated.

In considering the denial of training claim, the IAD pointed out that Section 708.14(a) requires that complainants file their complaint "by the 90th day after the date [they] new or should have known of the alleged retaliation." The IAD indicated that Collier did not file his complaint of retaliation until March 26, 2002, more than 120 days after the denial. Collier stated that it was not until January 14, 2002, when Bradburne "suddenly" told him that his performance was deficient, that he realized that the training denial was retaliatory. The IAD noted that Collier made a notation

---

2/ (...continued)
employer, or any higher tier contractor, information that you reasonably believe reveals--(1) A substantial violation of a law, rule, or regulation; (2) A substantial and specific danger to employees or to public health or safety; or (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a)(1), (2) and (3).

3/ It will serve no purpose to recount the specific nature of each of those concerns. The nature of the concerns and whether they fall within the purview of Part 708 is not at issue here.

in his diary on November 8 that he thought the timing of the training denial was "fishy." The IAD therefore concluded that Collier actually realized at that point that the training denial was retaliatory. Accordingly, the IAD found that Collier had waited too long to file the complaint regarding this alleged retaliation.

The IAD determined that Collier met the regulatory time frame in filing his Complaint regarding the termination of employment and that this termination fell within the Part 708 definition of retaliation. The IAD further found that several CRC managers were aware of Collier's protected disclosures and that the termination took place in close enough temporal proximity to the protected disclosures to permit the conclusion that the protected disclosures were a contributing factor to the termination.

The IAD next considered whether CRC had shown that it would have terminated Collier in the absence of the protected disclosures. In this regard, the IAD reviewed the RIF process through which Collier was terminated. The IAD found the performance assessment he was given was reasonable and factually supported. The IAD stated that of the eight skills that were evaluated, Collier's scores were the lowest of the five assessed employees in the areas of quality of work, communication skills, teamwork and customer satisfaction. The IAD gave detailed consideration to the testimony of CRC manager William Previty, who worked directly with Collier and performed the assessments. The IAD noted Previty's testimony that Collier had fallen below the levels of the other employees in these skills. The IAD considered this testimony regarding Collier and that of FFI managers to be highly credible. The IAD concluded that the weight of the evidence was convincing that "the CRC employee assessment process was fairly developed and administered and that Mr. Collier was fairly rated as the lowest of the employees, and that CRC clearly would have terminated Mr. Collier's employment even if he had not made the protected disclosures. . . ." *Collier*, slip op. at 18.

II. The Collier Statement of Issues and the CRC and FFI Responses

A. Collier Statement of Issues

1. Denial of Training

The Statement objects to the finding in the IAD that Collier knew or should have known before January 14, 2002, that the denial was retaliatory. The Statement indicates that in November 2001, when the training was canceled, Collier weighed the possible reasons for

the cancellation and came to the incorrect determination at the time that it was not retaliatory, based on "ill-placed" faith in Joel Bradburne, his Silos project boss. The Statement further indicates that previously all of the retaliatory indicators had come from FFI or CRC management or people related to the WPRAP project, not from individuals associated with the Silos project. The Statement therefore contends that Collier did not "know" that the denial was a retaliation. The Statement points out that Section 708.14(a) requires that a Complaint be filed by the 90th day after "you knew or reasonably should have known of the alleged retaliation." The Statement argues that Collier simply did not "know" that there was a retaliation, even though he may have suspected it. The Statement maintains that a Complainant is not obligated to report "suspected" acts of retaliation. The Statement maintains that in November 2001, Collier's suspicions did not yet rise to the level of "knew or reasonably should have known."

2. Collier's Termination Through Reduction in Force

The Statement makes the following assertions about the RIF and cites the following errors in the IAD leading to the determination that Collier would have been terminated absent the protected disclosures:

(a) The IAD incorrectly found that disagreements between Collier and CRC were unrelated to his protected disclosures and were caused by dissatisfaction with his communication style. To the contrary, the Statement argues that the disagreements were solely the result of CRC dissatisfaction with Collier's continued protected disclosures.

(b) The Statement contends that the highly developed RIF criteria were simply a means to deflect the focus away from what was really controlling the RIF process: FFI's interest in terminating Collier because he was a whistleblower. Furthermore, according to the Statement, the testimony of the key witness, Previty, is vague and evasive on why two CRC RIFs were handled differently. The Statement goes on to argue that if the two RIFs were handled similarly, CRC and FFI would have submitted evidence to support that fact.

(c) It was predetermined for Collier to be fired, even before the preparation of the termination procedures. The Statement cites to testimony by Previty that an FFI Silos project manager sent him a note stating "you should please consider firing this employee." The Statement dates this note to late in the year 2000. *See* Transcript of Hearing (Tr.) at 209.

(d) The IAD did not sufficiently consider the extent to which testimony by CRC and FFI witnesses was evasive. Examples include Previty's failure to be forthright and to indicate that Collier's protected activities were in line with CRC corporate ethics policy. Collier maintains that "Mr. Previty was upset with me. . . on a professional level because he was concerned about the affect (sic) my protected disclosures would have on the future of the CRC contract with FFI if I did not shut up." Statement at 21. The Statement also maintains that Bradburne's testimony about Collier's mediocre performance was vague, uncertain and evasive.

(e) The selection process was unfair to Collier, since it was entirely due to his protected activities that he was given a lower rating.

(f) The IAD incorrectly stated that Collier did not contend that the performance appraisal process used to rate him in 2000 was unfair. The Statement cites to evidence in the record that allegedly shows Collier did believe his performance appraisal for the year 2000 was not fair.

(g) The IAD give no weight to the animus shown towards Collier by FFI and CRC. In this regard, the Statement mentions that FFI and CRC purportedly did not give Collier appropriate, challenging work assignments. The Statement claims that Previty was offended by Collier's comments regarding inadequate safety measures.

B. The CRC and FFI Responses

1. CRC Response

CRC did not address the denial of training issue since it did not participate in that matter. CRC generally argues that the Statement of Issues failed to show that the factual determinations of the IAD were erroneous. Accordingly, CRC maintains that the decisions of the IAD should not be disturbed.

2. FFI Response

With respect to the denial of training issue, FFI claims that Collier's own contemporaneous diary shows that on November 8, 2001, he had formed a suspicion that the cancellation might be retaliatory. Accordingly, FFI argues that he should have filed the complaint of retaliation within 90 days of that time. While FFI does not believe that the cancellation of training actually was an act of retaliation, it does believe that for purposes of invoking the 90 day filing provision of Section 708.14(a), the "suspicion"

indicates that Collier "reasonably should have known" that the cancellation was possibly an act of retaliation.

With respect to the termination issue, FFI makes the following responses. FFI rejects the Statement's assertion that Collier was pre-selected for termination in late 2000 by an FFI manager. FFI claims that a request from a project manager to "please consider firing this employee" cannot be equated to a direction from FFI to CRC to fire Collier. If that had been the case, FFI argues that CRC would have taken more immediate action and would not have waited more than one year.

FFI rejects the assertion that Previty and Bradburne were evasive witnesses. FFI argues that Collier's inept questioning of the witnesses led to unclear responses. FFI addressed the assertion in the Statement that the CRC process used to select Collier for termination was unfair because it considered his lowered performance rating that was caused by his protected disclosures. FFI's response was that Collier had not presented any evidence that the problems that he was having with FFI managers were in any way related to his disclosures.

FFI also claims that virtually all of Collier's alleged protected disclosures occurred after his 2000 performance appraisal, and that Collier's 2001 performance appraisal reflected higher ratings. FFI argues that this is inconsistent with Collier's allegations of continuing retaliation.

With respect to the Statement's allegation of animus by Previty, FFI argues that Collier did not provide evidence that even if Previty was "offended" by Collier and biased against Collier, the animus was related to protected disclosures.

III. Analysis

Before beginning my evaluation of this case, I believe that a discussion of the factual development of the proceeding case is in order. As I indicated above, after the DOE/OFO accepted jurisdiction of his Complaint of Retaliation, Collier opted to proceed immediately to a hearing, and skip the normal route of having an investigation of his complaint. This approach, while authorized by the regulations, is, except in the most unusual cases, not one which will lead to a prompt resolution of a Complaint of Retaliation. For almost all cases, Part 708 envisions a four-prong development of these complaints: a jurisdictional phase, which is undertaken by a DOE field office; an investigation by an OHA investigator; a hearing by an OHA hearing officer; and,

through appeal, a review by the Director of the Office of Hearings and Appeals. 4/ Our experience indicates that each step in this process narrows and focuses the contested issues, each successive step building in an orderly, logical fashion upon the prior step. We believe that this process produces a final determination sooner than opting for a process that shortcuts or combines some of the steps.

Under Part 708, the first level of inquiry at OHA is the investigation. 10 C.F.R. § §708.21,.22, .23. At this level, an OHA investigator interviews individuals who have information about the complaint. The investigator develops information regarding the nature of the alleged protected disclosures/activities, and when they were made. He finds out the nature of the retaliation that the complainant is claiming. He interviews contractor management officials regarding the retaliation to find out their reasons for taking the personnel action about which the employee has made a complaint. The investigation is neither comprehensive or protracted.

The investigator writes up a report providing his findings and conclusions. The report of investigation sets out whether it appears that (i) the complainant has established by a preponderance of evidence that he made any disclosures that are protected or engaged in any protected activity under Part 708; (ii) the complainant has shown that he was subject to a negative personnel action which constitutes retaliation as defined in Section 708.2; (iii) the complainant has shown that the protected disclosures/activity contributed to the retaliation; and (iv) contractor officials have shown by clear and convincing evidence that they would have taken the negative action absent the protected disclosure/activity.

The Report is helpful in identifying the key issues for the hearing phase of the proceeding. For example, the Report may indicate that the complainant has made the requisite showing with respect to a protected disclosure or disclosures that were a contributing factor to an act or acts of retaliation. Based on a review of the Report, the contractor and the complainant will often agree with many of the findings of fact made by the investigator. This makes it possible for the hearing officer to focus the hearing on the issues

---

4/ A fifth prong, a review by the Secretary of Energy, is reserved for cases involving only the most extraordinary circumstances. 10 C.F.R. § 708.35. To date, the Secretary has never accepted a case to review under this section.

that remain in dispute. At this point, the contractor may be willing to stipulate that a protected disclosure or disclosures have been made. *E.g. Gary Vander Boegh*, 28 DOE ¶ 87,040 (2003); *Ronald White*, 28 DOE 87,029 (2002); *Lucy Smith*, 28 DOE ¶ 87,001 (2000); *Morris J. Osborne*, 28 DOE ¶ 87,542 (1999); *Roy Moxley*, 27 DOE ¶ 87,546 (1999). The Report can also alert the complainant and/or the contractor to matters where considerably more effort is required on their part to convince the Hearing Officer.

The investigation and the resulting Report of Investigation play a vital role in the Part 708 scheme: they enable the Hearing Officer and the parties to more closely focus the issues and to direct their energy to important contested issues in the case. At the hearing phase, the hearing officer is able to build upon and refine the tentative information on disputed issues developed by the investigator in the investigatory phase.

In the instant case, in which no investigation was performed, it was the hearing officer who had to undertake this initial identification and evaluation of what events took place, which events were important, what disclosures had been made, what retaliations took place and what the parties' positions were. Many of these determinations were made through taking evidence at the hearing itself. As it turned out, the hearing and the IAD devoted considerable attention to consideration of what the protected disclosures were. Yet, ultimately, these have turned out not to be an area of controversy. After all, it was Collier's job to monitor operations and compliance at the site. I am convinced that this entire Part 708 process could have been streamlined had Collier opted for an investigation. Had there been an investigation, I believe that it would have been quite evident that Collier made protected disclosures and there would have been very little need to focus attention on them at the hearing. It then would not have been necessary for the hearing and the IAD to devote such effort to identify and examine the nature of the disclosures.

The fact that the parties expended so much energy on the protected disclosures had an effect beyond consuming extra time. It meant that they devoted less time than necessary to determine the validity of the contractors' showing: that Collier would have been terminated in the absence of the disclosures. I believe that the hearing officer did a commendable job, given this rather unruly case involving 14 protected disclosures. But it is also clear that the evidence in this case would have been more fully developed had Collier elected to proceed with the normal development envisioned by Part 708, which includes the investigatory phase. Collier did himself and this proceeding a disservice by failing to request an

investigation. It resulted overall in an inadequate record, as explained below, with respect to the contractors' showing. Avoiding the investigation stage ultimately saved neither time nor effort here because, ultimately, as discussed below, I will ask the contractors for their comments as to why the IAD should not be reversed, and I intend to issue a new determination on the complaint after considering the comments. Further, I will provide them with an opportunity to show that the hearing should be reopened to take additional testimonial evidence about the critical issue of whether Collier's performance of his duties was deficient.

As is now evident from the Statement of Issues and the Responses, there are two main issues left in this case: (i) whether Collier should reasonably have known prior to January 14, 2002 that the November 8, 2001 denial of training was a retaliation; and (ii) whether FFI and CRC have clearly and convincingly shown that Collier would have been terminated in the absence of his protected disclosures.

A. Denial of Training

Collier argues that he did not know until January 14, 2002, when Bradburne told him that his performance was deficient, that the training cancellation was retaliatory. This is simply unconvincing. Collier was not a naive employee, unfamiliar with the whistleblowing process. As he indicates in his Statement: "my purpose in writing the November 8 diary entry was to weigh and document the evidence in favor of the act being retaliatory so that I would have the documentation to support a retaliation charge were I eventually to make one." Statement at 2. Thus, he was a sophisticated employee who was on the look-out for retaliations. I believe he thought that this cancellation was a retaliation and that his diary entry was designed to support that contention at some later date.

Moreover, he admitted in his diary that he was very suspicious. He stated in the diary entry: "I think the timing of [Bradburne's] canceling this training for me. . . is fishy, particularly after my meeting yesterday afternoon with Dennis Riley [about the smoking train issue]. To get to Riley's office, I have to walk through Admin building where all the top Fluor offices are located, so it's not unreasonable to assume they've seen me travel that path a lot lately and put two and two together, as they prepare for their Nov 14 enforcement conference in Washington on the WPRAP issues." Complainant's Ex 12 at 61. Thus, it is obvious that Collier was

more than suspicious. He actually linked up in his own mind the cancellation and his whistleblower activity.

Collier now suggests that there was a reason for him not to believe the action was a retaliation: Bradburne was his friend, whereas previous "retaliatory indicators" came from senior FFI or CRC managers. This seems to me a rather belated rationalization. The fact that there existed a possibility, however small, that the cancellation may not have been a retaliation is not sufficient here. The rule Collier would have us apply--a subjective test based entirely on what he believed--would violate one purpose of the regulation. Section 708.14(a), which requires filing of a complaint promptly, i.e. within 90 days of when the complainant knew or should have known of the alleged retaliation, is intended to alert the parties that a dispute exists, so that they can identify and preserve evidence at a time as close to the events as possible. The totally subjective rule that Collier advances would defeat this purpose.

In any event, based on Collier's own words in his diary, which was prepared with whistleblower litigation in mind, I am convinced that he concluded that there was a relationship between the cancellation and his disclosures. Thus, I believe at the time Collier wrote the November 8 diary entry, he did have a reasonable belief that the cancellation was retaliatory, and his 90 day filing period began on that date. Accordingly, raising the issue for the first time in his March 26, 2002 complaint of retaliation was untimely. The training cancellation claim is therefore denied.

B. Termination of Employment

As the IAD indicated, Collier's position is that CRC retaliated against him beginning in October 2000, by giving him lower performance ratings than in previous years on his appraisals for October 1999 through September 2001. Previty considered the last three annual performance appraisals in the RIF process for those employees who had worked that long. 5/ Further, Previty testified that in addition to the annual performance appraisals, he

---

5/ In this case, there is no question that the overall RIF was site-wide and not designed to target Collier. Further, given that FFI reduced its own personnel at the site by about 33 percent, the decision that CRC's staff of five employees should be reduced by two does not raise any red flags. *See* Stipulation of Steven F. Collier and Fluor Fernald, Inc; CRC Ex at 1-2; Tr. at 395-400.

also assessed for the RIF process the employees' performance for the most recent four months (for which no performance appraisals had been made) by seeking the comments of the FFI managers to whose project the CRC personnel had been assigned and by reflecting on his own observations. Tr. at 204. *Collier,* slip op. at 15.

The RIF procedures themselves involved a determination of core skills and job specific skills for individual employee evaluation. The core skills identified were communication skills, teamwork, quality of work, and work habits. The job specific skills were job technical knowledge, skills applicability, skills transferability and customer satisfaction. CRC Ex, at 00005. The IAD noted that of the eight skills identified, Collier's scores were the lowest of the five assessed employees in the areas of quality of work, communication skills, teamwork and customer satisfaction. The IAD found credible Previty's testimony regarding how the scoring on these elements was performed. In this regard, the IAD cites Previty's testimony about why Collier's performance appraisal for the year 2000 was lower than in previous years. Previty stated that "there were too many senior managers that Collier could not work with," and that Collier could not "pull this team together." Previty testified: "your communications were down. Your team work was down. . . . I lowered your grade [in] customer orientation because you no longer had a happy customer, and that's why you had a significant drop because of your performance in those areas." Tr. at 214-16; *Collier,* slip op. at 16.

With respect to Collier's communication skills, Previty testified: "I'll go back to early events that you had with Mr. Paige. Your verbal discussion with him and e-mails were so controversial that I was called to the Deputy Director of the site and [told] if I could not get the Coleman people in order and act professionally, we'd be out of here, specifically the individual. [That was in] ninety-six, '97, I don't know. In August, September, October 2000, I met with the [WPRAP] project director, the operations oversight Manager, the Project Engineer at Fluor. . . and Con Murphy in the IT project who was their project manager. Your relationship with those people was extremely stressful. They had great difficulty in doing business with you. I was out there and I made my own observations and I sensed that your relationship . . . with Mr. Murphy was poor." Tr. at 207-09. *Collier,* slip op. at 17.

The Hearing Officer was convinced by this testimony and found evidence to the contrary to be circumstantial. He cited several farewell electronic mail messages that praised Collier's work at Fernald. The Hearing Officer also pointed out that Collier's ratings for years prior to 1999 were somewhat higher than 1999-

2001, the years which were included in the RIF consideration. However, the Hearing Officer concluded that the overall range was relatively small: 3.42 to 4.43 on a scale of 5. *Collier,* slip op. at 18.

After reviewing this matter, I find that the record regarding Collier's allegedly deficient performance is not well supported. Even though the Hearing Officer was convinced by Previty's testimony that Collier had lower effectiveness in communication, teamwork and customer satisfaction, the testimony was both hearsay and very general, for the most part. 6/

With respect to communication issues, Previty cited an exchange of E-mails between himself and Collier that he believed demonstrated poor communication. Tr. at 215. But the thrust of Previty's testimony seemed to be that he downgraded Collier because Collier's allegedly poor communications resulted in an unhappy customer: FFI. In this regard, Previty cited two examples. He referred to one incident in 1996 or 1997 with Mr. Paige. That incident seems to me to be too far in the past to be relevant here. Mr. Previty also refers to a specific FFI IT manager, Con Murphy. Previty stated that he made his own observations and "sensed" that the relationship between Collier and Murphy was poor. Tr. at 208. Previty stated that Collier was the only person who had a "personality conflict" with Murphy. Tr. at 192.

However, there was testimonial evidence that suggests that other employees had difficulty relating to Murphy. Dennis Carr, FFI senior projects director, testified that Murphy "has a very strong personality" and a "very aggravating personality," and "quite a few of us had a personality conflict with Con Murphy from the beginning, including me." Tr. at 317. Tim Huey, FFI operations manager for the Silos Project, testified that he saw other people who had difficulties working and dealing with Murphy. Tr. at 263. Mark Cherry, FFI employee project director for WPRAP, stated that he saw other employees who had "personality conflicts" with Murphy. Tr. at 304. Thus, this particular allegedly bad relationship between Collier and Murphy does not seem to me to be an especially convincing reason on which to base the "poor communication skills," "poor customer satisfaction," or "poor teamwork" assessment, since

---

6/ Hearsay testimony is admissible in Part 708 hearings. 10 C.F.R. § 708.28(a)(4). However, it still suffers from its usual infirmity of inherent unreliability. Therefore, hearsay evidence must be carefully weighed and accorded the utmost scrutiny.

there were other employees who encountered similar difficulties with Murphy. The contractors did not provide testimony from Murphy as to whether he believed the complainant was a poor communicator. Providing such testimony to the Hearing Officer in support of the contractors' position is one of the key reasons for holding an evidentiary hearing.

Previty also testified that "it was very obvious to me that your strained relationship with all the senior managers assigned to the project was really a factor in your effectiveness in helping them." Tr. at 214. Previty further stated "there were too many senior managers that [Collier] couldn't work with." Tr. at 215. However, there was no solid testimony from those managers to support these assertions. This assessment by Previty is one that the contractor should have supported with testimony from the individuals that he was referring to. Yet, supporting testimony on this key point is thin. One person who did testify was not helpful. CRC Vice President Randy Morgan responded as follows to a question about what he had heard from FFI management about Collier's performance: "I think they thought your technical expertise was excellent and again that was pretty consistent in terms of commentary we had heard throughout the site. Comments were made I think more about--I don't want to say, I don't know if it's communication skills or a more combative nature in terms of interpersonal skills and interaction, that's about the extent I can remember." Tr. at 287. This hesitating and rather unspecific hearsay evidence does not provide clear, solid support for the position of CRC and FFI regarding Collier's allegedly deficient communication skills.

Other testimony from FFI and CRC witnesses who worked directly with Collier also does not support the Previty assessment regarding Collier's communication skills. For example, FFI employee Michele Miller testified about attending a meeting with Collier. She recounted that Collier wanted to state a difference of opinion and that he had a valid point. Miller did not suggest that Collier delivered his divergent opinion in an inappropriate manner, that his demeanor was unprofessional, or that his style of communication was poor. Tr. at 97-99. FFI Quality Assurance Manager Brinley Varchol testified about a meeting during which Collier made protected disclosures to him. Even though the meeting could have been heated and unpleasant, Varchol never offered any recollection at the hearing that Collier's communication style was poor or in any way inappropriate. Tr. at 153-172. 7/

7/ While it is true that Varchol was never specifically asked about Collier's communication, one might expect that

(continued...)

Joel Bradburne, an FFI project manager who worked directly with Collier on the Silos project, was a witness who testified directly about Collier's work. When asked about Collier's performance, Bradburne never mentioned communication problems. He saw work quality problems in Collier's performance. On the subject of Collier's performance, Bradburne testified as follows:

(1) "My surmise of your performance was mediocre." Tr. at 430.

(2) "For example, when we were doing a lot of graphics work basically, and again that's, you're not, you know a huge challenge I know, but you seemed to enjoy it and you did a good job and I appreciated the work, and once that kind of died down we got into the, you know, preparation review of things relative to operations within the projects safety basis stuff and it just seems like--To me it appeared that you knew we'd go through and --You know some of the assignments that I asked you to do, at least I thought I asked you to do just, you know, it wasn't timely on completion and from my estimation, you know it just didn't seem like something that you were that interested in doing, but and hence mediocre performance I guess from what I had seen in the past." Tr. at 432.

(3) "Well, basically in regards to the Silo 3 stuff, I mean you had pretty good knowledge of the Silo 3 proposed design and operation." Tr. at 435.

Thus, while Previty believed that Collier's failings related to communication, teamwork and customer satisfaction, Bradburne's view was that Collier's work was mediocre and untimely. In contrast, for the years 1995 through 2001, Collier's performance evaluations consistently show strength in the areas of job knowledge, quality and quantity of work and planning and communications. 8/

7/ (...continued)
Varchol would have mentioned inappropriate demeanor if it had been demonstrated, and that FFI would have asked questions about it had there been some negative actions that Varchol could report. Collier should have probed this issue on cross examination. I attribute Collier's failure to press this point to a reluctance to ask the witness questions about himself (Collier), or perhaps to his own inexperience in examination and cross examination of witnesses.

8/ Collier's quality of work was rated as a 4 out of 5 on his RIF form. This is hardly "mediocre." This was defined on

(continued...)

Further, as discussed above, there was at least one other witness, CRC Vice president Randy Morgan, who stated that he had heard from FFI managers that Collier's substantive skills were excellent and that he had a fine reputation throughout the site. Thus, Bradburne's negative testimony about Collier's performance is rather puzzling. It is self-contradictory in that while Bradburne claims that Collier's work was "mediocre," he also states that Collier did "a good job," had "good knowledge," and that Bradburne "appreciated the work." Moreover, the negative Bradburne testimony was contravened by other testimony and documentary evidence.

As indicated above, it has been the position of CRC and FFI that Collier was RIFed because he was difficult to work with, his communication skills were lacking and he was poor in teamwork and customer satisfaction. I am not persuaded on these points. Because, for the reasons explained above, it was difficult to focus the hearing on these critical issues, there was little direct evidence on these points. The testimony of Previty, Morgan and Bradburne, while of some weight, does not sufficiently support the FFI and CRC position.

I find that FFI and CRC did not provide testimony from their managers that specifically describes their dissatisfaction with Collier's performance in these areas. Further, they failed to provide testimony from Collier's co-workers who were in a position to support the managers' views of why they were dissatisfied with him. I therefore cannot find the evidence regarding Collier's performance in the areas of communication, teamwork and customer satisfaction meets the rigorous standard of proof required in this case.

In sum, it was the burden of FFI and CRC to provide clear and convincing evidence to support their position that they would have terminated Collier absent the protected disclosures. They attempted to show, mainly through the testimony of Previty, that Collier was the least able performer in the areas of communication, teamwork and customer satisfaction. I recognize that the Hearing Officer found Previty a dependable and convincing witness. Nevertheless, in a Part 708 proceeding there is an inherent risk in relying extensively on one or two key witnesses who have a significant stake in the outcome of a proceeding, and therefore an

---

8/ (...continued)
the RIF sheet as "occasionally exceeds standards and expectations." CRC Ex at 11.

interest in not being completely candid and forthcoming in their testimony.

In this case, Collier complains of a retaliation for protected disclosures made to the very same person who has rated his performance. Collier also contends that Previty was motivated by his lack of objectivity and personal animus towards Collier for making those disclosures because they resulted in the dissatisfaction of FFI. Under these circumstances and given the fact that the contractors' burden of proof is a rigorous one in Part 708 proceedings, the contractors should have provided supporting evidence from objective witnesses who had specific knowledge of the purported Collier performance deficiencies. The contractors should have supported their positions with evidence from witnesses that had direct contact with the complainant and who could testify from their own experience about these very matters. *Janet Westbrook*, 28 DOE ¶ 87,021 (2002). 9/

The companies were certainly in a position to call as witnesses employees who worked with Collier. They also could have presented witnesses to provide their own observations about Collier's ability to work with others. FFI and CRC have simply not provided clear and convincing evidence for their position. In order to meet the clear and convincing standard, a contractor in a Part 708 proceeding must do more than merely articulate a plausible reason for a termination. It must support that position. One method would be by providing testimony from co-workers and supervisors who are directly familiar with the issues. *Westbrook*, slip op. at 15.

In order to provide clear and convincing evidence, CRC and FFI should have established that the allegedly poor communications that they saw as the crux of Collier's work-related deficiencies were not the very same communications that are protected under Part 708. 10/ The contractors should have pinpointed through

---

9/ There is also some evidence in the record that the three CRC employees who were retained had some unique skills, and that it would be unacceptable to FFI if CRC would terminate any of those three individuals and retain either of the two terminated employees. CRC Ex. at 8.

10/ However, the contractors could have shown that the manner in which Collier delivered the disclosures was in some way inappropriate or unprofessional, and that this was the basis for the lowered ratings. This testimony should have been given by witnesses who have direct knowledge of the specific incidents involved.

direct testimony what the specific communications, teamwork and customer satisfaction incidents were that brought on the low ratings.

IV. CONCLUSION

As indicated by the above discussion, it is no longer disputed that Collier made health and safety-related protected disclosures. These disclosures were followed sufficiently quickly by CRC's termination of Collier to demonstrate that they were a contributing factor to that termination. I believe that the record sufficiently establishes these points. It was therefore the burden of CRC and FFI to show by clear and convincing evidence that Collier would have been terminated absent the protected disclosures. CRC and FFI offered a plausible explanation for the termination, i.e., that due to the site-wide RIF, CRC was forced to terminate two of its five employees. However, the Company failed to bring forth adequate substantiation to support its position that Collier merited his score as the lowest of the employees in the RIF process. Mere plausibility and reasonability are simply inadequate to meet the rigorous "clear and convincing evidence" standard applicable here.

Based on my review of the record, I found little evidence has been presented to support the companies' position that Collier had problems in communication, teamwork and customer satisfaction. Further, there is even some evidence that does not support the position that Collier had deficiencies in those areas.

Accordingly, I find that the result reached in the IAD is not sufficiently supported. However, I am reluctant to summarily reverse the IAD, due to the unusual history of this case. Accordingly, the above determination is only a tentative one. FFI and CRC may file comments regarding this decision within 30 days of the date of issuance. Collier may file a response within 10 days after receiving the contractors' comments.

Further, I am willing to consider whether it would be useful to take some additional testimonial evidence, especially from CRC and FFI, on the issue of Collier's performance. As a rule, I am not in favor of reconvening a hearing to receive additional evidence. I believe that parties in Part 708 proceedings should be well aware of the burdens of proof and are responsible for determining in

advance what information is necessary to present at the hearing to meet their burdens. In particular, contractors are on notice in the contracts that they sign of the applicability of Part 708 to protected activities. They should by now be familiar with what types of information they need to provide to support their positions. In this regard, parties are certainly able to discuss with the hearing officer at a prehearing conference what testimony might be important. They are also easily able to access our case law in order to determine what types of information hearing officers have considered in prior cases.

However, as I stated above, this case came for hearing with no investigation. In my view, selection of that option had a negative effect on the overall complaint process, because there was not an appropriate opportunity for factual and issue development regarding Collier's performance. Consequently, given that it was the complainant who opted to proceed immediately to a hearing, I believe that it is not unreasonable or unfair to consider providing the contractors with an opportunity for some additional development of their position here.

Accordingly, FFI and CRC may request that a new hearing be convened for the purpose of taking additional evidence of the type discussed above. However, I will direct that a new hearing be convened only if I am persuaded that it would serve an important purpose. Consequently, the firms will have to establish that they have some significant new testimony to provide about Collier in connection with his performance appraisal. They will have to state who the witnesses are and what <u>specific</u> incidents they will testify about that will support the deficient RIF ratings in the areas of customer satisfaction, teamwork and communications.

The contractors should be prepared to call Collier's co-workers as well as his supervisors to testify on these issues. Furthermore, each primary potential witness will be required to submit a signed statement describing what he will testify about, including the dates and places of contact with Collier. Each witness shall include in his written statement a detailed description of what he heard Collier say and what he saw Collier do that relates to the issues of deficient communication, teamwork and customer satisfaction. The contractor hearing submissions and witness statements should be filed at the same time as the contractor comments discussed above.

I recognize that it is very uncommon in a Part 708 proceeding to require potential witnesses to provide an advance written statement of the testimony they expect to provide. However, I believe this

unusual approach is warranted here to insure that if a new hearing is convened, there is new relevant evidence to be heard. The statements of primary witnesses should be sufficiently detailed to permit me to gauge whether a new hearing is warranted. Further, if a new hearing is convened, these witness statements will provide Collier with an opportunity to prepare appropriate questions on cross examination for the witnesses, as well as enable him to offer appropriate response witnesses. All in all, I believe that this approach will lead to a much more productive hearing, if one should be convened.

It Is Therefore Ordered That:

(1) The June 11, 2003 Appeal filed by Steven Collier of the Initial Agency Decision issued on May 20, 2003, is hereby granted as follows.

(2) Within 30 days of the date of this Decision, Coleman Research Corporation (CRC) and Fluor Fernald, Inc. (FFI) may file comments with respect to the above preliminary determination, as well as witness statements, as described in this determination. Collier may file a response within 10 days after receiving the CRC and FFI comments and witness statements.

(3) This is an interlocutory order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 24, 2003

Case No. VWA-0004

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Richard W. Gallegos

Date of Filing: June 27, 1994

Case Number: VWA-0004

This Decision involves a whistleblower complaint filed by Richard W. Gallegos (Gallegos) under the Department of Energy's (DOE) Contractor Employee Protection Program. Since 1957, Gallegos has been employed at DOE's Sandia National Laboratory (Sandia). At present, Lockheed Martin Corporation (Contractor) is the management and operating contractor at Sandia. Gallegos is employed as a Staff Technical Assistant, whose job is to facilitate and expedite the purchase of printed circuit boards for projects at Sandia. Gallegos alleges that the Contractor retaliated against him for making disclosures about mismanagement to various managers at Sandia, an auditor at Sandia, the ombudsperson at Sandia, and the DOE's Office of Inspector General.

I. Legal Standards Governing This Case

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[ ] fraud, mismanagement, waste, and abuse" at DOE's government-owned, contractor-operated (GOCO) facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers.

Proceedings under 10 C.F.R. Part 708 offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by providing for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee. *See David Ramirez*, 23 DOE & 87,505, *affirmed,* 24 DOE & 87,510 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has "[d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences [a] violation of any law, rule, or regulation [or] a substantial and specific danger to employees or public health or safety." 10 C.F.R. ' 708.5(a)(1); *see also Francis M. O'Laughlin*, 24 DOE & 87,505 (1994).

The Part 708 regulations were not self-executing. Rather, the DOE stated that the provisions of Part 708 would become operative after they were incorporated into each prime contract that the DOE maintains to operate its GOCO facilities. In the case of health and safety disclosures, incorporation into the contracts was immediate, since all existing contracts required contractors to adhere to health and safety requirements that the DOE promulgated. However, in the case of disclosures concerning waste, fraud and abuse, the Part 708 protections became operative only after the Part was incorporated by reference into a specific contract. Therefore, the Part 708 regulations do not apply to complaints that arise from disclosures that do

not concern health or safety where such alleged acts occurred before the underlying contract was amended to require compliance with Part 708 by the contractor. *Mehta v. Universities Research Ass'n*, 24 DOE ¶ 87,514 (1995). Furthermore, in *Mehta* the Deputy Secretary of Energy held that an extended leave of absence that spanned the effective date of the regulatory protections for the contractor did not bring that leave of absence under the purview of the regulations, since the retaliatory act occurred prior to amendment of the underlying contract when the contractor sent a letter to the complainant advising him of its decision to proceed with his termination. *Id*. at 89,065.

In the present case, Gallegos made disclosures related only to mismanagement. The Part 708 protections therefore did not operate until they were incorporated into the contract between the Department of Energy and the Sandia Corporation. The record is clear that those contractual provisions were adopted in the relevant contract on October 1, 1993. Therefore, Part 708 protections in this case apply only to alleged acts of reprisal that occurred after October 1, 1993.

Gallegos alleges that a number of reprisals were taken against him prior to October 1, 1993. Since these acts occurred prior to the start of Part 708 protections, I will not consider or discuss them here. However, Gallegos also has set forth a number of alleged reprisals that occurred after October 1, 1993:

Gallegos was placed on a performance action plan (PAP) on October 22, 1993 for a period of one year.

In October 1993 Gallegos was denied an opportunity to apply for a vacant position.

1 In October 1993 Gallegos was not given any work to perform.

In November 1993 Gallegos requested permission to attend a conference, but that permission was denied.

1In March 1994 Sandia improperly released documents related to him in response to a subpoena in a court proceeding.

In December 1995 Gallegos was improperly denied medical leave.

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under ' 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. ' 708.9(d). *See Ronald Sorri*, 23 DOE & 87,503 (1993) (citing McCormick on Evidence ' 339 at 439 (4th ed. 1992)). In the present case Gallegos must make two showings. First, he must demonstrate that he made a disclosure to a DOE official or to the Contractor that he believed evidences mismanagement. Second, he must show that the disclosure was a contributing factor to an adverse personnel action taken against him.

B. The Contractor's Burden

If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. ' 708.9(d). *See Ronald Sorri*, 23 DOE & 87,503 (1993) (citing McCormick on Evidence, ' 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Gallegos establishes that he made a protected disclosure that was a contributing factor to an act of reprisal, Sandia must convince me by clear and convincing evidence that it would have taken the action even if Gallegos had not raised any concerns. *Helen Gaidine Oglesbee*, 24 DOE & 87,507, at 89,034-35 (1994).

Factual Background

Gallegos started working at Sandia in 1957. Transcript of Hearing at 15 (hereinafter cited as Tr.). He moved to his current position in approximately 1985, when he started working as an expediter. Tr. at 17. Gallegos was a designated buyer for services purchased from L & L Electronics (L&L). L&L and Sandia maintained a contract whereby L&L supplied Sandia with circuit boards which it designed to Sandia's specifications. The contract allowed work to be sent to L&L without the need to competitively bid each circuit board that was needed by the engineering staff at Sandia. Gallegos believes that he had a good working relationship with L&L between 1985 and 1990, at which time the firm moved from California to Albuquerque, New Mexico. Tr. at 17-18. Shortly thereafter, Gallegos' son-in-law started working for L&L as a designer. Tr. at 19. In June 1990, Gallegos filed a conflict of interest form with Sandia and did not disclose that his son-in-law worked for L&L.

In 1991, the prices L&L charged increased substantially. Tr. at 20. Engineers for whom work was being done at L&L complained to Gallegos, who in turn raised the issue with L&L. Tr. at 20. As a result, Gallegos started seeking bids from multiple suppliers rather than giving jobs to L&L under the sole source contract maintained between Sandia and L&L. Tr. at 22. Sometimes Gallegos would initiate the bidding process, and other times Sandia engineers for whom the work was being done would ask Gallegos to use a bid process. Tr. at 23.

In June 1992 L&L fired Gallegos' son-in-law after discovering that Gallegos' daughter had started a design company that directly competed with L&L. She then hired her husband as a designer. In discussions with engineers he served, Gallegos told them about his daughter's company and said that it could bid on design jobs. Although L&L complained to Sandia about Gallegos' behavior, his manager investigated and concluded that Gallegos was not diverting business away from L&L to the company owned by his daughter. Tr. at 327. Indeed, the manager testified at the hearing that part of Gallegos' job was "to make certain engineers have available to them the best and most reasonable company to do the work," and that Gallegos telling engineers about his daughter's company was proper. Tr. at 325.

In 1992 it came to the attention of Sandia management that Gallegos had failed to disclose on financial disclosure forms that his son-in-law worked for L&L between 1990 and 1992. This matter was referred to the Disciplinary Review Committee, along with allegations that Gallegos had disparaged L&L to another outside firm, and that Gallegos had told a supplier that bids that it telephoned into Sandia could be heard by anyone passing the answering machine that accepted the bids, because the machine broadcast messages to anyone in its immediate vicinity. Tr. at 436-37. The Committee recommended to Gallegos' management that he be given a 30-day suspension, forfeit non-base compensation for one year, and be placed on a performance action plan that would prevent him from further conflicts of interest for a one year period. Tr. at 540-47. Sandia management implemented these actions between August and October 1993. The only action implemented after October 1, 1993 was the imposition of the performance action plan.

On November 15, 1993, Gallegos filed a complaint pursuant to the DOE's Contractor Employee Protection Program. 10 C.F.R. Part 708. The DOE's Office of Contractor Employee Protection conducted an on-site investigation of Gallegos' allegations of reprisal in September 1994. It issued a Report of Investigation and Findings on July 18, 1995, in which it concluded that Gallegos' disclosures did not contribute to any of the retaliatory acts which he claims were taken against him. Gallegos requested a hearing, and I held a hearing in this case on February 6 and 7, 1996, in Albuquerque, New Mexico. Post-hearing briefs were accepted through April 10, 1996.

III. Analysis

In the present case, Gallegos claims that he disclosed numerous events of mismanagement at Sandia over the course of approximately five years. Under 10 C.F.R. Part 708, Gallegos has to show two things with respect to each disclosure. First, he has the burden of establishing that he "[d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor) information that [he] in good faith believes evidences a violation of any law, rule or regulation [or]. . . a substantial and

specific danger to employees or public heath and safety." 10 C.F.R. ' 708.5(a)(1)(i) and (ii). *See Francis M. O'Laughlin*, 24 DOE & 87,505 (1994). This disclosure must be to a DOE official, a member of Congress, or to the contractor; a disclosure to a supplier of a contractor does not qualify for protection. Second, he has the burden of showing that the disclosure was a contributing factor to an adverse action that was taken against him. Each of these burdens may be shown by a preponderance of the evidence. I will go through each claimed disclosure in chronological order.

A. Alleged Disclosure in the Summer of 1989

Gallegos claims that in the summer of 1989, he informed his former supervisor of a co-worker's alleged misconduct. Tr. at 32. That misconduct involved the co-worker's allegedly excessive trips to a supplier in California and the co-worker's claim for overtime pay. However, assuming that the events occurred, there is no evidence, and Gallegos does not claim, that his information had any effect on any adverse action that was taken against him. The supervisor to whom Gallegos made the report retired prior to any alleged retaliation that occurred after October 1993, and there is no evidence that he communicated Gallegos' claims to anyone at Sandia. With respect to this disclosure, Gallegos has failed to meet his burden of showing the existence of a disclosure that contributed to an adverse action against him.

B. Alleged Disclosure in the Fall of 1991

In the fall of 1991, Gallegos informed his former supervisor and a lab buyer that a contractor was charging significantly higher prices for work. While Gallegos characterizes this as evidence of mismanagement, I do not believe that that is a fair characterization. That higher prices were being charged at the time by the contractor appears to have been a well known fact at Sandia. In fact, Gallegos notified the engineers for whom he expedited work that the contractor's prices had increased. Gallegos talked to the contractor about the increase in prices. There is no suggestion that these price increases were somehow illegal or not appropriate under the contract between Sandia and the contractor. At the time there were a number of other firms who were providing similar work to Sandia and who could supply competing bids. Nevertheless, Gallegos himself continued to do business with the firm and placed substantial orders with the firm after it had raised its prices. Under these circumstances, there is no evidence that disclosure of these higher prices relates to waste, fraud, or mismanagement. 10 C.F.R. ' 708.5(a)(1). Accordingly, this disclosure does not raise any concerns that are protected by the DOE's Contractor Employee Protection Program.

C. Alleged Disclosure in October 1992

In October 1992, Gallegos claims that he reported to David Barnes, a supervisor at Sandia, that a contractor had provided work of a shoddy nature. In the summer of 1993, Gallegos reiterated this statement to the Sandia ombudsperson. Tr. at 27-32. At the hearing that I held in February 1996, Mr. Barnes testified that he was already aware of the low quality of that particular job when Mr. Gallegos brought it to his attention. Tr. at 421. While Mr. Barnes was surprised at the low quality work because of the reputation for quality that the contractor enjoyed, Tr. at 421, he was not alarmed by it. Tr. at 422. Mr. Barnes testified that it was not unheard of for Sandia to reject a particular piece of work and to require the contractor to redo the project. That was what occurred in this case. Gallegos has not claimed the Barnes testimony on this issue to be incorrect. In any event, there is no suggestion that management at Sandia tried to cover up this episode or treat it in a manner that would otherwise evidence waste, fraud or mismanagement. Gallegos has therefore failed to show that these disclosures qualify for protection under of DOE's Contractor Employee Protection Program.

D. Alleged Disclosures in Fall of 1993

In the fall of 1993, Gallegos reported to the Sandia ombudsperson and A. T. Schwyzer, the Audit Services Manager at Sandia, possible violations of Sandia travel policies. Gallegos stated that Mr. Barnes and an

aide traveled from 1990 to 1993 about once a month to visit contractors in California and New Jersey. He stated that first class airline accommodations were used on these trips and that the aide should not have accompanied Mr. Barnes. In response to these disclosures, Sandia investigated and determined that no action was appropriate because there were no records that could corroborate Gallegos' allegations. Gallegos also reiterated his 1989 claim about a co-worker's alleged improprieties in 1992 and 1993.

Gallegos has failed to show how these disclosures about alleged travel improprieties and actions of a co-worker were contributing factors to any adverse action taken by Sandia. The only alleged reprisals that occurred after these disclosures are the March 1994 release of documents that Gallegos believes do not respond to a subpoena, and a refusal by Sandia to grant Gallegos medical leave in December 1995. Gallegos has not attempted to provide any factual basis on which I might conclude that these disclosures were a cause of these actions. With respect to the medical leave, as noted below, Sandia medical personnel received additional medical records while the hearing in this matter was occurring and approved the medical leave. At the hearing, the medical director of Sandia explained why the documentation previously provided by Gallegos was inadequate and what additional information was necessary. Tr. at 590-630. There is no information in the record which would lead me to believe that the medical leave had been improperly withheld by Sandia. With respect to the subpoena, the evidence shows that the attorney in charge of responding to the subpoena may not have been as attentive as he should have been to the precise requirements of the subpoena. Moreover, Gallegos has not shown that he was adversely affected by the release of these documents. He has therefore failed to convince me that these disclosures were a contributing factor to an adverse action taken by Sandia.

E. Alleged Disclosure in November of 1993

In November 1993, Gallegos informed the Sandia ombudsman that the son of a buyer of printed circuit boards for Sandia worked for a company with which the buyer placed business. While this disclosure evidences a conflict of interest that should be reported, the record indicates that management at Sandia took responsive action upon learning about the conflict. It reprimanded the employee concerned in September 1993 for failing to disclose that his son worked for a supplier. Thus, there does not appear to be any suggestion of waste, fraud, or mismanagement in this matter. Gallegos has therefore failed to show that these disclosures qualify for protection under of DOE's Contractor Employee Protection Program.

F. Alleged Disclosure in the Spring of 1994

In the spring of 1994, Gallegos informed the Office of Inspector General at the Department of Energy of possible contracting irregularities at Sandia. To take a reprisal action against Gallegos for this disclosure, Sandia would have to have known about it. However, there is no evidence that the Office of Inspector General notified anyone at Sandia that they had been contacted. Indeed, only one alleged act of retaliation occurred after the Spring of 1994 – the alleged denial of medical leave in December 1995. Gallegos alleged for the first time at the hearing that he had been denied medical leave in December 1995 as part of Sandia's ongoing retaliation toward him. However, while the hearing was in progress, Gallegos supplied additional information to Sandia, and Sandia granted Gallegos' request. As noted above, there is no information in the record which would lead me to believe that the requested medical leave had been improperly withheld by Sandia. Under these circumstances, Gallegos has failed to show that this disclosure qualifies for protection under of DOE's Contractor Employee Protection Program.

IV. Conclusion

Much of this proceeding was consumed by Gallegos attempting to show that the discipline that was imposed on him prior to October 1993 pursuant to the Disciplinary Review Committee recommendations was excessive and that there was a pattern of "negative" events in which Sandia did not treat him appropriately. However, this is not an appellate proceeding where the focus might be in the

appropriateness of the discipline Gallegos received. The burden in this proceeding is on the employee to show that he disclosed to an official of DOE, to a member of Congress, or to the contractor information that he in good faith believes evidences waste, fraud, or mismanagement. 10 C.F.R. § 708.5(a)(1)(i) and (ii). He also has the burden of showing that the disclosure was a contributing factor to an adverse action that was taken against him. Despite what I may think about the manner in which Sandia treated Gallegos, for the reasons set forth above I have concluded that Gallegos has not shown by a preponderance of the evidence that he made disclosures that are protected by 10 C.F.R. Part 708, or that, if they are protected disclosures, that they contributed to adverse actions taken against him after October 1, 1993. Furthermore, Gallegos has failed to establish that the alleged reprisals resulted from his disclosures. I therefore find that no violation of 10 C.F.R. ' 708.5 has occurred.

It Is Therefore Ordered That:

(1) The request for relief filed by Richard W. Gallegos under 10 C.F.R. Part 708 is denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Assistant Inspector General for Assessments.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date:

Case No. VWA-0005

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXX's.**

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Initial Agency Decision

Names of Petitioners:Daniel L. Holsinger

K-Ray Security, Inc.

Date of Filing:December 6, 1995

Case Numbers: VWA-0005

VWA-0009

I. Introduction

This Decision involves a complaint filed by Daniel L. Holsinger (Holsinger) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Holsinger contends that certain reprisals were taken against him after he raised concerns relating to the possible theft of government property from the DOE's Morgantown Energy Technology Center (METC). These reprisals allegedly were taken by Watkins Security Agency, Inc. (WSA), a DOE contractor that employed Holsinger as a security guard at the METC. The reprisals alleged by Holsinger included a one-day suspension on September 2, 1994, announcement of his prospective rescheduling to the midnight guard shift (12-8 a.m.) on September 18, 1994, a three-day suspension on September 19, 1994, and a three-day suspension on September 29, 1994. Because this last suspension was his third suspension within a period of six months, Holsinger's employment was terminated pursuant to WSA policy effective October 2, 1994. The DOE's Office of Contractor Employee Protection (OCEP) investigated the complaint and issued a Report of Investigation & Proposed Disposition (the Report) on November 9, 1995. In the Report, OCEP found that Holsinger had made a protected disclosure and that this disclosure contributed to Holsinger's September 19, 1994 suspension and his resulting termination of employment by WSA. Accordingly, OCEP proposed that WSA pay Holsinger back pay and benefits (minus any earned income and benefits), as well as certain other fees and expenses). OCEP also included the current METC security operations contractor, K-Ray Security, Inc. (K-Ray) as a party to the proceeding, and proposed that K-Ray should reinstate Holsinger to his former position as a security guard or to a comparable position.

In response to OCEP's Report, Holsinger, WSA and K-Ray all requested a hearing before the Office of Hearings and Appeals (OHA) under 10 C.F.R. § 708.9(a). The

hearing in this case was held on February 28, 1996 at the METC facility in Morgantown, West Virginia. After consideration of OCEP's Report of Investigation, the briefs of the parties and the testimony given at the hearing, I find that WSA committed an act of reprisal against Holsinger prohibited under 10 C.F.R. § 708.5, and that Holsinger is entitled to reinstatement by K-Ray.

II. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established for the purpose of "safeguarding public and employee health and safety; ensuring compliance with applicable laws, rules, and regulations; and preventing fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, the DOE will direct contractors to provide relief to complainants who are found to have been discriminated against for making such disclosures. The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for processing complaints of this nature.

Before Part 708 was promulgated, contractor employee protection at DOE's government-owned, contractor-operated (GOCO) facilities was governed by DOE Order 5483.1A (6-22-83) ("Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities"). As with Part 708, the Order prohibited contractors from taking reprisals against whistleblowers. However, no formal procedures existed under Order 5483.1A. The Part 708 regulations were adopted to improve the process of resolving whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee.

B. Factual Background

1. The Findings of the OCEP Report

On October 7, 1994, Holsinger filed a complaint pursuant to Part 708 with the OCEP. In the following months, OCEP personnel investigated Holsinger's complaint by conducting interviews with Holsinger, WSA officials, other security officers, and certain DOE employees at METC. They also collected relevant documentary evidence. This information and OCEP's analysis of this information is presented in its November 9, 1995 Report and the Report's accompanying exhibits. The Report finds that Holsinger was hired as a part-time security officer for the security contractor at the METC on January 10, 1990. When WSA began performance of the METC security contract in March 1990, Holsinger was retained in that status. In his May 1995 statement to the OCEP interviewer, Holsinger asserts that he had not received any performance appraisals or any disciplinary actions prior to September 1994. OCEP Report Exhibit 1 at 1. However, OCEP finds that Holsinger was suspended for three days in December 1990 for "[f]ailure to properly respond to an emergency situation" and two days in March 1991 for "[u]nauthorized use of government property." OCEP Report Exhibit 21. In its Report, OCEP summarized Holsinger's assertions of protected disclosures and his allegations of retaliation by WSA in 1994 as follows:

Mr. Holsinger alleges that in March 1994, Fred Munz, the security force Captain, held a meeting during which he advised the security staff that personal calls were to be kept to a minimum and no long distance calls were allowed from the site. Because Mr. Holsinger was not present at this staff meeting, Captain Munz explained the policy to Mr. Holsinger the day after the staff meeting. [Exhibit 1].

In July or August 1994, Mr. Holsinger allegedly advised Captain Munz that a security XXXXX [hereafter referred to as "the Accused Individual"], was wrongfully removing unspecified items from the site. [The Accused Individual] was reportedly removing the items in five gallon buckets covered with rags. Mr. Holsinger reportedly believed that [the Accused Individual] may have been "stealing" DOE property. Id. He also contacted Deborah Purkey, DOE-METC, Contracting Officer's Representative, to report the alleged possible thefts. Exhibit 12.

On August 18, 1994, James H. Watkins, President, WSA, issued a memorandum advising the security force that only Captain Munz could speak with DOE-METC security representatives regarding "company

matters." Exhibit 10.

On August 31, 1994, Mr. Holsinger sent an anonymous letter to DOE reporting the alleged thefts by [the Accused Individual] and alleging that WSA management had chosen to do nothing about the alleged thefts. Exhibit 12.

On September 2, 1994, Mr. Holsinger was notified that he would receive a one-day suspension for a 44 minute telephone call that he made on July 29, 1994. Exhibit 21.

On September 18, 1994, Captain Munz rescheduled Mr. Holsinger from the evening shift (3-11 p.m.) to the midnight shift (12-8 a.m.). This change in shift allegedly interfered with Mr. Holsinger's part-time position with the local Kingwood Police. Exhibit 1.

Mr. Holsinger received a three-day suspension on September 19, 1994 for failure to follow instructions. Mr. Holsinger reportedly took a cup of coffee on patrol after being informed by [the Accused Individual] that it was a violation of "post orders" to have food or beverages on patrol. Exhibit 21.

On September 29, 1994, Mr. Holsinger received a three-day suspension for excessive personal use of the telephone on August 18, 19, 25, 28 and September 1, 1994. Because this was his third suspension within a period of six months, Mr. Holsinger's employment was terminated pursuant to WSA policy effective October 2, 1994. Exhibit 21.

OCEP Report at 2-3. In the Report, OCEP finds insufficient evidentiary support to confirm that Holsinger made an oral disclosure to Captain Munz in July or August 1994. It does find that Holsinger's August 31 anonymous letter constituted a protected disclosure under Part 708 and that this disclosure contributed to Holsinger's September 19, 1994 suspension for failure to follow instructions. It therefore found that his termination of employment by WSA for receiving three suspensions in a six month period also was a retaliatory action. The Report finds insufficient evidence that WSA's disciplinary actions against Holsinger for excessive personal use of the telephone were retaliatory acts.

The Report's proposed disposition requires WSA to pay Holsinger back pay and benefits (minus any earned income and benefits), as well as certain other fees and expenses. The Report also requires the current METC security operations contractor, K-Ray, to reinstate Holsinger to his former position as a security guard or to a comparable position. Report at 27.

2. The Contentions of the Complainant and the Contractors

In letters to the OCEP dated December 4, November 28 and November 29, 1995, respectively, Holsinger, WSA and K-Ray all requested a hearing concerning the Report's findings and preliminary disposition. The OCEP forwarded these requests to the OHA, and I was appointed the Hearing Officer in this matter on December 18, 1995. I received a complete copy of the OCEP Complaint File on January 3, 1996, and by letter of that date established a filing schedule for the parties' pre-hearing briefs and a hearing date of February 28, 1996. See 10 C.F.R. § 708.9(b).

In his February 9, 1996 brief, Holsinger maintained that his transfer to the midnight shift on September 18, his suspensions by WSA on September 2, September 19 and September 29, and his termination of employment by WSA are all acts of retaliation for his efforts to disclose possible wrongdoing by certain members of the METC security force.

In its February 9, 1996 brief, WSA argued that the disciplinary actions taken against Holsinger were the normal and customary disciplinary measures which would be taken by WSA with respect to any employee who presented the types of employee disciplinary problems presented by Holsinger. It maintained that Holsinger's termination of employment was the result of his violation of WSA policies and the fact that he received three suspensions for these violations within a six-month period. It therefore concluded that this case shows no discriminatory treatment by WSA or any retaliatory action taken by WSA, and that

Holsinger's complaint should be dismissed.

In its February 5, 1996 brief, K-Ray contended that it is not in a position to either agree with or disagree with the analysis set forth in the Report, because it had no involvement nor knowledge of any such activities or actions. It notes that the Report contains no allegation or factual findings that K-Ray violated any federal regulations or discriminated against any employees. It argues that the Report's proposal that K-Ray reinstate Holsinger to his former position as a security guard or to a comparable position creates a hardship upon K-Ray and is totally unwarranted by the facts. It contends that if it is required to hire Holsinger, it must terminate one of its own employees. K-Ray therefore requests that the Report's proposed disposition be modified so as not to require K-Ray to hire Holsinger or to impose any other penalty or requirement upon K-Ray.

3. Holsinger's Settlement with WSA

On February 27, 1996, this Hearing Officer received telephone calls from the counsels for Holsinger and WSA. They announced that Holsinger and WSA were attempting to reach a monetary settlement concerning the claims by Holsinger against WSA for the actions covered in his complaint against WSA. This settlement would cover the Report's proposed requirement that WSA pay Holsinger back pay and benefits (minus any earned income and benefits), as well as certain other fees and expenses. The contemplated settlement contained no admissions by either party concerning Holsinger's alleged disclosures and the other events discussed in the Report. As a result of this settlement, counsel for WSA announced that WSA would drop its challenge to the Report and request to be dismissed as a party to the proceeding. Counsel for Holsinger stated that Holsinger would continue to assert his position that the Report was correct in finding that he was wrongfully terminated from his position as a security guard by WSA and that he should be reinstated as a security guard by K-Ray.

4. Issues and Participants at the Hearing

Accordingly, on February 28, 1996, I convened a hearing in this matter at the DOE's METC facility in Morgantown, West Virginia. At the outset of the hearing, counsel for Holsinger announced that Holsinger and WSA had reached a settlement. He stated that the settlement constituted a full release by Holsinger of all liability by WSA for all of the alleged retaliatory actions against Holsinger discussed in the OCEP Report. He stated that neither party had made factual admissions concerning any of the events discussed in the Report. Transcript of February 28, 1996 Hearing (hereinafter "Tr.") at 11. Counsel for Holsinger asserted that his client continued to support the Report's proposed requirement that K-Ray reinstate Holsinger to his former position.

I think the equities in this situation mandate that Mr. Holsinger be returned to his position that he held previous to his unlawful termination, and request that the Office of Hearings [and] Appeal[s] and you, particularly, order that K-Ray Security take Mr. Holsinger back.

Tr. at 10. No representative of WSA was present at the hearing.

In response to this information, counsel for K-Ray requested that I not proceed any further regarding the consideration of any matters involving the Report's proposal that K-Ray reinstate Holsinger. I responded by noting that the OCEP Report and its proposed requirement that K-Ray reinstate Holsinger remained in effect and that the hearing was K-Ray's opportunity to present its factual and legal challenges to that proposal. Counsel for K-Ray then restated the position taken in its February 5, 1996 brief that it was inappropriate for the Report to propose that K-Ray reinstate Holsinger because K-Ray was not a party to any actions that took place between Holsinger and WSA, and was not influenced by WSA when K-Ray hired security guards pursuant to its contract with METC. K-Ray then requested that the proceeding be dismissed on these grounds. I stated that I would respond fully to K-Ray's objections to the OCEP Report in the Initial Agency Decision issued in this matter, but that it would be inappropriate to dismiss the matter at this time.

The hearing proceeded with the presentation of witnesses by K-Ray and Holsinger, and focused on the appropriateness of the Report's proposal that Holsinger be reinstated by K-Ray. Counsel for K-Ray presented the testimony of Diane Lewis and Kenneth Jackson, officials of K-Ray involved in obtaining the DOE contract for guard services at METC and in hiring guards pursuant to that contract. He also presented the testimony of Ms. Purkey, the DOE's Contracting Officer and Technical Representative with respect to K-Ray's hiring practices and staffing constraints under its contract at METC. Counsel for Holsinger presented the testimony of Holsinger and of John Kisner, a security guard at METC currently employed by K-Ray.

5. Post-hearing Briefs and the Dismissal of WSA

At the close of the hearing, this Hearing Officer permitted post-hearing briefs from Holsinger and K-Ray concerning the legal and factual issues raised at the hearing. Post-hearing briefs were submitted by K-Ray and Holsinger on April 12 and April 17, 1996. In his post-hearing brief, Holsinger asserts that he was improperly discharged for making a protected disclosure, and that the equities of the situation favor an order for his reinstatement by K-Ray pursuant to Part 708's support for full protection of contractor employees who have been wrongfully discharged as a result of protected disclosures. In its post-hearing brief, K-Ray asserts that OHA holdings in Part 708 proceedings support its position that it would be inequitable to require K-Ray to perform any action, including reinstatement, to provide relief to Holsinger for actions taken against him by WSA.

At the hearing, Holsinger and K-Ray received notice that WSA had entered into a settlement with Holsinger and had ended its participation in this proceeding. This information constituted constructive notice to show cause why WSA should not be dismissed as a party to this proceeding. See 10 C.F.R. § 708.9(j). The post-hearing briefs of both Holsinger and K-Ray acknowledge Holsinger's settlement with WSA and the fact that the validity and appropriateness of the OCEP Report's proposed restitutionary actions for WSA are no longer at issue in this proceeding. Neither brief contended that WSA should remain a party to this proceeding, and I did not believe it necessary to maintain WSA as a party. See K-Ray Post-Hearing Brief at 2-3, Holsinger Post-Hearing Brief at 2. Accordingly, in a letter to the parties dated April 18, 1996, I ordered that WSA be dismissed as a party to this proceeding.

III. Analysis

Proceedings under 10 C.F.R. Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee. See David Ramirez, 23 DOE ¶ 87,505 (1994).

The settlement between Holsinger and WSA has significantly narrowed the factual matters at issue in this proceeding. In his pre-hearing brief submitted prior to the settlement, Holsinger objected to the OCEP Report's findings that certain of his allegations were not supported by sufficient evidence. However, Holsinger's monetary settlement with WSA rendered his objections irrelevant to the issue of compensation, and, at the hearing, counsel for Holsinger offered no argument or testimony concerning Holsinger's objections to any of the Report's findings. Instead, he indicated that his client intended to rely completely on the factual record and findings of the OCEP Report as support for the Report's proposed requirement that K-Ray reinstate Holsinger as a security guard. Tr. at 8-10. In his post-hearing brief, counsel for Holsinger reiterates this position:

We respectively pray that the Court adopt the findings and recommendations of the Report of Investigation and Proposed Disposition.

Holsinger Brief at 7. WSA and K-Ray never have objected to the Report's findings that certain allegations of Holsinger are not sufficiently supported by factual evidence. Accordingly, I will not review the Report's findings in those instances where OCEP found insufficient evidence to support Holsinger's allegations that he made protected disclosures or that specific actions of WSA were retaliatory acts for his disclosures.

Rather, I will confine my review to the Report's findings relevant to its proposed requirement that K-Ray reinstate Holsinger, and to the evidence and argument presented by the parties with regard to those findings and the reinstatement proposal. As discussed in more detail below, in order for me to uphold the OCEP Report's proposed reinstatement order, the evidence in the record must be sufficient to support its findings that (1) Holsinger made a protected disclosure, (2) this disclosure was a contributing factor to Holsinger's dismissal by WSA, and (3) reinstatement of Holsinger by K-Ray is an appropriate remedy in this instance.

As previously noted, WSA did not present any argument or witness testimony at the hearing, and K-Ray confined its argument and testimony to the equities of reinstatement as an appropriate remedy in this matter. Therefore, with regard to the first two OCEP findings listed above, the entire evidentiary record consists of the OCEP Report and complaint file, and the general objections contained in WSA's February 9 brief.

A. Legal Standards Governing Findings of Protected Disclosures and Adverse Actions in this Case

The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has " . . . *[d]isclosed* to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), *information that the employee in good faith believes evidences . . . a violation of any law, rule, or regulation* . . . [or] *[f]raud, mismanagement, gross waste of funds, or abuse of authority*." 10 C.F.R. § 708.5 (emphasis added).

1. The Complainant's Burden

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

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

10 C.F.R. § 708.9(d).

It is the task of the finder of fact to weigh the sufficiency of the evidence presented by both parties at trial. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F.Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the risk of error is allocated roughly equally between both parties. Grogan v. Garner, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). Holsinger has the burden of proving by evidence sufficient to "tilt the scales" in his favor that when he communicated the concerns discussed above, he *disclosed information which evidenced* his belief in good faith that there was *a violation of law, rule, or regulation* or an instance of *mismanagement or abuse of authority*. 10 C.F.R. § 708.5(a)(1)(i) and (iii). If this threshold burden is not met, Holsinger has failed to make a *prima facie* case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a *contributing factor* in a personnel action taken against the complainant. 10 C.F.R. § 708.9(d); see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994).

2. The Contractor's Burden

If the complainant has met his burden, the burden shifts to the contractor. The contractor must prove by "clear and convincing" evidence that it would have taken the same personnel action against the complainant absent the protected disclosure. "Clear and convincing" evidence is a much more stringent

standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". See Hopkins, 737 F. Supp. at 1204 n.3. Thus if Holsinger has established that it is more likely than not that he made protected disclosures that were a contributing factor to WSA's decision to discipline and eventually dismiss him, WSA or K-Ray must convince us that WSA would have taken these actions even if Holsinger had never made any communications concerning possible thefts of DOE property by an employee of WSA.

B. The Complainant's Allegation Was a Protected Disclosure

In its Report, OCEP conducted an extensive analysis of whether Holsinger's suspensions, shift rescheduling, and employment termination are to be considered acts of reprisal for a protected disclosure under Part 708. As an initial matter, OCEP found that Holsinger had failed to establish by a preponderance of the evidence that he had made a verbal disclosure to Captain Munz, sometime in July or August 1994, that the Accused Individual was apparently "stealing" government property, or that he had telephoned Ms. Purkey at her home and reported the alleged thefts. OCEP Report at 6-8. However, OCEP found that a preponderance of the evidence indicates that Holsinger wrote and sent the August 31, 1994 anonymous letter to Tom Bechtel, Director, DOE-METC. The letter indicated the WSA management had been informed that the Accused Individual was committing "thievery" and that WSA management had done nothing about the alleged thefts. OCEP makes the following findings regarding this letter:

Available information indicates that Mr. Holsinger is the only individual taking responsibility for writing the letter. The record also indicates that one or more members of the guard force were aware that Mr. Holsinger intended to write an anonymous letter to DOE-METC regarding the alleged thefts. The record further indicates that a number of security officers believed that [the Accused Individual] may have been committing theft and that WSA management was not taking appropriate action. Therefore, the record indicates that the letter was written under a good faith belief that the Accused Individual possibly had committed thefts and that WSA management had not properly addressed the issue of the alleged thefts. Under the circumstances, a preponderance of the evidence indicates that Mr. Holsinger wrote and sent the anonymous letter to DOE-METC and that the letter made "good faith" disclosures regarding possible thefts.

Report at 9. The OCEP Report concludes that sometime after September 7, 1994, when he had a conversation with Ms. Purkey concerning the August 31, 1994 anonymous letter, Captain Munz was probably convinced that Mr. Holsinger authored that letter. Report at 13, citing Exhibits 6 and 13.

After reviewing the Report and its supporting material concerning this issue, I conclude that the record in this proceeding supports OCEP's finding that Holsinger wrote and sent the anonymous letter to DOE-METC. The reports of OCEP's investigative interviews with two of Holsinger's co-workers indicate that they and others were aware that Holsinger wrote the anonymous letter. See Report Exhibits 5 and 10. I also conclude that Holsinger had a good faith belief that the allegations of misappropriation of government property contained in this letter were true. In this regard, I believe that the reports of OCEP's investigative interviews with three of Holsinger's co-workers (Report Exhibit 8, 9, and 10) provide independent support for Holsinger's allegation that the Accused Individual may have improperly removed certain items of DOE property to her home and that WSA management had not properly addressed the issue. I therefore hold that Holsinger's disclosure was protected by 10 C.F.R. § 708.5(a)(1)(i) and (iii).

C. Certain WSA Actions Constituted Retaliation

Based on its finding that Holsinger made a single, protected disclosure to the DOE on August 31, 1994, the OCEP Report proceeds to evaluate Holsinger's allegations of retaliatory actions by WSA. In this regard, it finds that Holsinger failed to meet his burden of establishing by a preponderance of the evidence that the anonymous letter contributed to his one-day suspension on September 2 and his three day suspension on September 29 for excessive personal use of the telephone. OCEP finds that in both instances the evidence is "clear and convincing" that, absent any knowledge of the anonymous letter, WSA still

would have suspended Mr. Holsinger for excessive personal telephone use. Report at 13 and 24. With respect to the September 18, 1994 announcement by Captain Munz that Holsinger would soon be placed on the midnight shift, OCEP concluded that "a preponderance of available evidence may indicate that the anonymous letter contributed to the shift change." However, OCEP finds that "the issue lost real significance" when Mr. Holsinger's employment was terminated on October 2, prior to the implementation of the shift change. Report at 25.

OCEP finds that Holsinger's three day suspension on September 20, 1994 was probably a retaliatory act by WSA. Holsinger was suspended because on September 11, 1994, he ignored an advisement by the Accused Individual that it was a violation of Post Orders to carry his cup of coffee while on his tour of the site. OCEP presented the following explanation for its finding that this suspension was probably related to discontent with Holsinger's disclosure to the DOE:

Mr. Holsinger was subjected to a suspension within fairly close proximity to when Captain Munz had reason to believe that he made a protected disclosure. [The Accused Individual], the individual who made the report that resulted in Mr. Holsinger's three-day suspension, was the subject of Mr. Holsinger's disclosure. [The Accused Individual] was given only a "counseling," for a similar breach of site rules. Given that [the Accused Individual] had reported Mr. Holsinger for the same breach, [the Accused Individual] clearly had knowledge of the applicable site rule. Additionally, there is also evidence . . . that WSA upper management and Captain Munz had concerns that the security force was reporting problems directly to DOE and that Captain Munz cited the anonymous letter as a communication with DOE that could lead to disciplinary action against anyone who made such a report in the future. Under the circumstances of this case, a preponderance of the evidence in the record supports the finding that the anonymous letter contributed, at least partially, to the three day-suspension [of Holsinger] for "failure to follow instructions." Accordingly, WSA must establish by clear and convincing evidence that it would have taken the action absent the protected disclosure.

Report at 15-16, quoting from WSA disciplinary action reports at Exhibits 20 and 21. The Report further concludes that WSA has not shown that its suspension of Holsinger would have occurred absent the disclosure. In this regard, the Report notes that interviews with the Accused Individual and others indicate that Holsinger was singled out for discipline in the enforcement of the rule against taking a beverage on a site tour. Report at 17. The Report notes that WSA procedures prescribe a policy of "progressive discipline" for repeated infractions of WSA rules of employee conduct. However, OCEP could find no support for Holsinger's treatment when it examined the record of disciplinary actions taken with regard to other WSA security guards.

The record indicates that some individuals were given more than one verbal warning when the second offense was different from the offense cited for the first warning. The record also indicates that no one else received more than a one-day suspension for any offense cited. [Exhibit 20] No one, except Mr. Holsinger, was cited for either a "failure to follow instructions" or insubordination.

Report at 19. OCEP also found that other employees received less severe disciplinary actions from WSA for what appeared to be more serious conduct infractions, i.e., a one-day suspension for taking milk without permission from the child day-care center, and a documented verbal warning for "falsifying information on an incident report". Report at 19-20. The OCEP concluded that the available evidence is not clear and convincing that WSA normally would have issued a three-day suspension or, indeed, any type of suspension, for the type of violation committed by Holsinger. Report at 21.

I agree with OCEP that the available evidence supports its finding that Holsinger's anonymous letter contributed to the WSA's decision to suspend him as a result of the "coffee carrying" incident. Although WSA was warranted in taking some form of corrective action for Holsinger's failure to respond to the Accused Individual's reminder concerning Post Orders, a three-day suspension is far more severe than any other employee disciplinary actions taken by WSA with respect to similar or even more serious offenses. Given the disparity between this suspension and other disciplinary actions of WSA security guards, I

reject WSA's argument that the actions against Holsinger were the normal and customary disciplinary measures which would be taken by WSA with respect to any employee who presented the types of employee disciplinary problems presented by Holsinger. WSA brief at 1. Furthermore, this severe act of discipline coincided closely in time with the identification of Holsinger by Captain Munz as the probable author of the anonymous letter to the DOE.<1> There also is strong evidence in the record that Captain Munz and WSA management considered the anonymous letter a serious breach of WSA policy. In their statements to the OCEP investigator, two of Holsinger's co-workers indicated that during the September 1994 staff meeting, Captain Munz informed the security force concerning the anonymous letter and advised that, in future, all issues were to be brought to Captain Munz and taken through the chain of command, or the offending employee would be disciplined. Report Exhibits 8 and 10. I therefore agree with OCEP that the record indicates that Captain Munz was concerned that the anonymous letter had been sent to DOE and advised his security force to interpret previous directives concerning WSA's chain of command in a restrictive manner. That advice restricted protected activity by the security forces. Report at 20.

Under these circumstances, I conclude that the record in this proceeding indicates that Holsinger's disclosures in his anonymous letter to the DOE were a contributing factor to his three-day suspension by WSA on September 20, 1994 and his subsequent dismissal by WSA (for incurring three suspensions in a six month period) on October 2, 1994. WSA has failed to show by clear and convincing evidence that it would have disciplined Holsinger in the same, severe manner if the disclosures had not occurred.

D. Reinstatement Is a Proper Remedy

Having concluded that a violation of Part 708 has occurred, I now turn to the remedy. As discussed above, Holsinger and WSA have entered into a settlement regarding the OCEP Report's proposals for remedial action by WSA. These provisions therefore are no longer at issue in this proceeding. However, the OCEP Report also finds that it is an appropriate remedial action to require K-Ray to reinstate Holsinger in his former position as a security guard. In this regard, the Report finds:

Information provided to OCEP by K-Ray indicates that all of the employees working for WSA at the time that K-Ray became security contractor at METC were retained as employees of K-Ray. Under the circumstances, OCEP finds that Mr. Holsinger would have been retained by K-Ray had his employment not been terminated in violation of Part 708 by WSA. Accordingly, OCEP proposes that Mr. Holsinger be reinstated to his former position as an employee of K-Ray and that his shift scheduling be done in an equitable manner. The payment of back pay, lost benefits, costs and fees will remain the responsibility of WSA.

Report at 26. K-Ray vigorously opposes the Report's proposed requirement that it reinstate Holsinger to his former position as a security guard at METC. Its objections to this requirement fall into the following general categories: (1) K-Ray had no role in any of the retaliatory actions taken by WSA against Holsinger, and the DOE cannot require it to redress those actions; (2) it is inequitable and inappropriate to require K-Ray to reinstate Holsinger when K-Ray was not a participant in the adverse actions taken against him by WSA; (3) reinstating Holsinger will place an undue hardship on K-Ray's other employees at the METC site. For the reasons discussed below, I conclude that it is appropriate to require K-Ray to reinstate Holsinger to a security guard position at METC.

1.The DOE Possesses Authority to Order Reinstatement by a Successor Contractor

In its Post-Hearing Brief, K-Ray asserts that there is absolutely no connection whatsoever between K-Ray and WSA.

[T]hey are two entirely distinct and separate entities and K-Ray did not purchase any of the assets of Watkins and no corporate nexus exists between the two companies.

It therefore concludes that K-Ray cannot be held liable for WSA's discriminatory acts on the grounds that

it essentially constitutes a continuation of WSA. See Kolosky v. Anchor Hocking Corp., 585 F. Supp. 746 (W.D. Pa. 1983).

The existence of a corporate nexus between K-Ray and WSA is not required to support the reinstatement order proposed by OCEP. The remedial provisions of Part 708 are applicable to all DOE contractors where they are necessary to effect equitable relief. Part 708's general policy provision indicates that the DOE may provide an "appropriate administrative remedy" to contractor employees who establish they have been subjected to discriminatory acts. 10 C.F.R. § 708.3. Section 708.10(c)(3) provides that the Initial Agency Decision may contain an order for interim relief, "including but not limited to reinstatement, pending the outcome of any request for review." Finally, Part 708 indicates that relief ordered by the Secretary in a final decision and order

... may include reinstatement, transfer preference, back pay, and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses ... reasonably incurred by the complainant in bringing the complaint upon which the decision was issued or such other relief as is necessary to abate the violation and provide the complainant with relief.

10 C.F.R. §708.11(c). For those cases in which discrimination against an employee in reprisal for a protected disclosure is found to have occurred, the preamble to Part 708 states that the goal of the DOE regulations is to restore the employee to the position to which he or she would otherwise have been absent the acts of reprisal, in a manner similar to other whistleblower protection schemes. 57 Fed. Reg. at 7539; see, e.g., Energy Reorganization Act of 1974, 42 U.S.C. § 5851; Whistleblower Protection Act of 1989, 5 U.S.C. § 1214(b)(4)(B).

Where reinstatement of an employee is necessary to restore the employee to the position that he or she would have occupied absent the acts of reprisal, the DOE clearly possesses authority under Part 708 to order such reinstatement by a succeeding contractor, even where the succeeding contractor did not participate in any way in the acts of reprisal. The DOE procurement contracts executed after the effective date of Part 708 generally incorporate a provision requiring full compliance with all pertinent health and safety regulations, including Part 708. In fact, K-Ray signed a contract of this type when it agreed to provide security services for the DOE-METC. K-Ray furnishes these services as a subcontractor to the U.S. Small Business Administration (SBA), the prime contractor to the DOE in this matter. See copy of Contract DE-AC21-95MC-32163 (SBA Subcontract No.0390-95-2-00018), hereafter referred to as the "K-Ray Contract", in the OCEP complaint file. With regard to Part 708, the K-Ray Contract specifically provides as follows at Part II, Section I.118:

(a) The Contractor shall comply with the requirements of the "DOE Contractor Employee Protection Program" at 10 C.F.R. Part 708.

(b) The Contractor shall insert or have inserted the substance of this clause, including this paragraph (b), in subcontracts, at all tiers, with respect to work performed on-site at a DOE-owned or -leased facility, as provided for at 10 C.F.R. Part 708.

Clearly, then, K-Ray is on notice that pursuant to the terms of its agreement with the DOE, it is subject to all of the requirements of Part 708, and these requirements include actions necessary to restore an employee's position that has been negatively impacted by acts of reprisal. One type of action necessary to restore an employee's rights is reinstatement by a subsequent contractor if such reinstatement actually is necessary to restore the employee to the position to which he or she otherwise would have occupied absent the acts of reprisal by the former contractor. Boeing Petroleum Services, Inc.; Dyn McDermot Petroleum Operations Company, 24 DOE ¶ 87,501 (1994)(Boeing).

2.Reinstatement of Holsinger by K-Ray is a Necessary Remedial Action in this Instance

In its Post-Hearing brief, K-Ray contends that reinstatement in a situation involving a subsequent contractor should not be viewed as a necessary or desirable remedy by the DOE. K-Ray cites two court

decisions, Holley v. Northrop Worldwide Aircraft Services, Inc., 835 F.2d 1375 (11th Cir. 1988)(Holley) and Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992)(Blackburn), where the remedy of reinstatement was deemed inappropriate. In Holley, the court noted that "not every employee recommended [by the former contractor] was hired by the new company," and that there was insufficient factual data to overturn the district judge's ruling that reinstatement was an inappropriate remedy. 835 F.2d at 1377. In Blackburn, the court held that the evidence in the record supported the Secretary of Labor's finding that in this instance the liability of the contractor ended when the contract under which the wrongfully discharged employee worked was terminated. It noted that in this instance all of the other employees working under the contract received reduction in force notices when the contract project ended. It also found that there was no evidence in the record to support the complainant's assertions that (I) the contractor routinely rehired its former employees for other projects or that (ii) the contractor had interfered with his ability to obtain other employment by blacklisting him. 982 F.2d at 129-130.

Holley and Blackburn clearly do not stand for the proposition that reinstatement by a successor contractor is never an appropriate remedy. In both of these cases, the available evidence clearly indicated that reinstatement was not necessary to restore the complainant to the position he would have occupied absent the acts of reprisal by his former employer. Blackburn specifically refers with approval to the Supreme Court's holding in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)(Albemarle), that the goal of remedial actions in the employment discrimination context is to make the victim of discrimination whole and restore him to the position that he would have occupied were it not for the unlawful discrimination. 982 F.2d at 129, citing 422 U.S. at 421. In Albemarle, the Supreme Court finds where a legal injury is of an economic character,

The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.

Albemarle, 422 U.S. at 418-19, quoting Wicker v. Hoppock, 6 Wall. 94, 99, 18 L.Ed. 752 (1867). It further states that back pay, reinstatement and other remedies are discretionary powers vested in the courts "to make possible the fashioning of the most complete relief possible." 422 U.S. at 421. Accordingly, if I find in this proceeding that it is likely that Holsinger would have been hired by K-Ray had he remained an employee of WSA, reinstatement would constitute an appropriate remedy.

In its Report, OCEP found that K-Ray hired all thirteen of the WSA security personnel employed at DOE-METC when it began to furnish security services at the METC site in June, 1995. K-Ray admits that this was in fact the case. K-Ray Post-Hearing Brief at 2. At the hearing, however, K-Ray asserted that it was not required by its agreement with the DOE to hire any of the WSA security personnel, and that it conducted an independent application and screening process prior to hiring these individuals. K-Ray contends that it is inappropriate for the DOE to require it to reinstate Holsinger under these circumstances. K-Ray contends that its position is supported by the following language from the OHA Hearing Officer's interlocutory order in Boeing:

Thus, as a general matter, we do not believe that reinstatement is an appropriate remedy under Part 708 where, as here, there is a new M&O contractor that has no connection with the firm actually employing the complainant or the circumstances surrounding the discharge of the complainant, and the retention of employees by the new contractor is not directly influenced by the former contractor but merely a condition of assuming the M&O contract.

K-Ray Post-Hearing Brief at 6-7, citing Boeing 24 DOE at 89,007.

I believe that K-Ray's reliance on Boeing is misplaced. The language immediately following this quotation clearly indicates that, as discussed above, the remedy of reinstatement by a successor contractor is equitable in nature and may be necessary to fully protect a whistleblower.

Nonetheless, we remain keenly aware of the strong policy dictates underlying Part 708, favoring full protection of contractor of contractor employees that have been wrongfully discharged as a result of a

protected disclosure. Therefore, we might exercise our equitable authority under Part 708 to order the reinstatement of a wrongfully discharged party under particular circumstances.

Boeing at 89,007. Nor is the holding in Boeing applicable to the facts of this case. The Hearing Officer in Boeing evaluated reinstatement in relation to an alternative remedy proposed by the Complainant, i.e., reimbursement for future lost wages and benefits. The Hearing Officer decided that the alternative remedy proposed by the Complainant would be more appropriate and ordered the dismissal of the successor contractor from the proceeding. Boeing at 89,007-8. In this instance, Holsinger has not argued that an alternative to reinstatement is an appropriate remedy. Moreover, as discussed below, the facts in this proceeding indicate that reinstatement is necessary and appropriate because it is reasonable to conclude that Holsinger would have been hired by K-Ray along with all of the other WSA security personnel at METC if he had been an employee of WSA at the time that K-Ray hired its security personnel.

The testimony at the hearing strongly indicates the willingness of K-Ray's executives to rehire all of the WSA security personnel. During his testimony, Kenneth Jackson, the President of K-Ray, related that Captain Munz of WSA provided K-Ray with information concerning the entire pool of WSA employees at METC prior to their interviews with K-Ray personnel.

Mr. Jackson: Mr. Munz did not make recommendations as far as who to hire. Mr. Munz supplied us with the -- more or less the records that he had as far as his employees and any information that we requested. So Mr. Munz was very helpful in that regard, and we conducted interviews, ...

Tr. at 76. Mr. Jackson stated that Diane Lewis, the contract administrator at K-Ray, interviewed each of the thirteen WSA employees at METC and brought back her recommendations to Mr. Jackson, who made the final hiring decisions. Tr. at 77. In describing his decision to hire all thirteen WSA employees and no one else, Mr. Jackson stated that on-the-job experience and continuity of operation were major considerations.

Mr. Jackson: The thing that influenced us with it is, you know, these are experienced people that, you know, have good track records that even someone that may have better credentials such as a degree in criminal justice, you know, didn't look as good as an experienced person, you know, to me. These people are experienced, they're on the job, and they were hard to replace.

Hearing Officer: Was continuity of operation a factor in this as well?

Mr. Jackson: It definitely played a part, you know; everything was working. And I have solid procedure that if the system's not broke, I'm not going to try to fix it, if the system was not broke.

Tr. at 76.

Based on this testimony in the record and on the fact that K-Ray filled every one of its positions at METC with a current WSA employee, I find that it is likely that, had Holsinger remained an employee of WSA, he would have been hired by K-Ray in June 1995. I therefore conclude that reinstatement of Holsinger by K-Ray is necessary to restore him to the position he would have occupied absent the acts of reprisal by WSA.

3.Reinstatement Will Not Cause Undue Hardship to K-Ray

Because reinstatement is an equitable remedy, it is appropriate to consider not only whether reinstatement is necessary to provide relief to the complainant, but also whether it would impose an undue hardship on others. At the Hearing and in its Post-Hearing Brief, K-Ray asserts that reinstatement is inappropriate in this instance because it will place an undue hardship on the other K-Ray employees working at METC. In this regard, K-Ray contends that if it is required to hire Holsinger, it will have to fire one of its current employees in order to comply with DOE hiring limitations. K-Ray also argues that the special requirements of Holsinger regarding the scheduling of his work shifts will place a hardship on K-Ray and

its employees. As discussed below, I find that these contentions do not raise concerns sufficient to outweigh the DOE's policy favoring full protection of whistleblowers.

According to K-Ray, one of the original thirteen WSA employees hired by K-Ray resigned in January, 1996. The individual who resigned was a part-time employee. K-Ray states that it has not replaced that employee because the DOE has informed K-Ray that it cannot hire any additional employees due to the personnel cutbacks being implemented at the METC site. K-Ray states that it has been forced to operate with eight full-time employees and four part-time employees. These twelve employees have had to assume the duties and hours of the thirteenth position. The four part-time employees now work an average of approximately 32 hours per week. Testimony of Ms. Lewis, Tr. at 32-34. K-Ray concludes that since it was not allowed to replace the part-time employee who resigned, the DOE would not permit it to reinstate Mr. Holsinger without firing someone else.

If K-Ray were forced to hire Holsinger by this Board that would require the termination of an innocent employee, independently selected by K-Ray.

K-Ray Post-Hearing Brief at 3.

As an initial matter, I am not convinced that the available evidence fully supports K-Ray's conclusion that the DOE will require it to terminate an employee if it is required to reinstate Holsinger. Testimony at the Hearing indicates that METC currently is using a hiring freeze coupled with attrition to reduce its work force. At the Hearing, Ms. Purkey of DOE-METC testified that K-Ray could not hire a new security guard because the METC has had "a hiring freeze for well over a year now." Tr. at 67. She also stated that METC had not taken steps to dismiss any of its employees as a result of budget concerns.

We are -- at this point right now, we are letting it trickle down with attrition without actually having to lay people off. We do not want to lay people off at this point, but it could come to that.

Tr. at 66. Nevertheless, Ms. Purkey concludes that the DOE will require K-Ray to dismiss one of its employees if Holsinger is reinstated. Her conclusion is based on her belief that METC management will not allow K-Ray to have more than twelve employees.

Well, as far as my management's position is, the twelve - - that's the limit they [K-Ray] are now. They'll either go below that; they will not go above that - - that twelve number of people.

Tr. at 66.

Certainly the remedy of reinstatement does not fully comport with the goals of an organization attempting to downsize its work force through employee attrition and a freeze on hiring. In this instance, however, the issue of whether K-Ray has twelve or thirteen employees at the METC site is of marginal significance to the DOE's cost-cutting efforts. K-Ray is paid a fixed sum for providing security services to the DOE. An additional part-time security guard on its payroll does not represent an additional cost to the DOE, and the number of hours of security services provided by K-Ray to the DOE is not increased. In this situation, it would be anomalous for METC to abandon its policy of attrition and require K-Ray to fire one of its employees.

However, even if the DOE requires K-Ray to terminate an "innocent employee" to maintain a security force no larger than twelve, this potential harm does not provide a basis for denying reinstatement to Holsinger. Holsinger too, is an "innocent employee" who but for the improper actions of WSA currently would be an employee of K-Ray. To deny him reinstatement on the basis of DOE hiring ceiling requirements would effectively single him out for discriminatory treatment in comparison to the other security personnel working at METC. Holsinger should be reinstated by K-Ray and thereafter be subjected to the same risks of downsizing as his fellow employees.

K-Ray also contends that Holsinger's demands regarding his reinstatement as a part-time employee are

unreasonable and would impose an unfair hardship on K-Ray and its current employees.

Holsinger is not only requesting that he be reinstated and hired by K-Ray in a part-time capacity, but that he also be able to dictate the days, hours and shift he would be able to work because he is currently employed on a full-time basis as a Deputy Sheriff by the Monongalia County Sheriff's Department. Holsinger works Thursday through Monday 3:00 p.m. to 11:00 p.m., and also works part-time as a police officer for the City of Kingwood. If K-Ray were forced to hire Holsinger it would result in a total restructuring of the hours and shifts worked by [K-Ray's] part-time employees and possibly its full-time employees just to accommodate the demands of Holsinger which would affect the performance, morale and harmony of the remaining 11 employees and be detrimental to the overall security services provided to DOE.

Post-Hearing Brief at 4. I reject K-Ray's assertion that Holsinger is attempting to dictate the days, hours and shift he will be able to work. At the Hearing, Holsinger testified that he had a full-time job (40 hours a week) at the Monongalia County Sheriff's Department. He also stated that he was working part-time as a police officer for the City of Kingwood, but that he was willing to terminate this part-time job if he were reinstated with K-Ray. Tr. at 86. While he stated that he preferred to work "a day or two a week" for K-Ray, he testified that he was able and willing to work up to four days a week (32 hours) to meet K-Ray's requirements. Tr. at 94. In his Post-Hearing Brief, Counsel for Holsinger reiterates his client's willingness to meet K-Ray's requirements.

[Holsinger] has expressed that although he would be unavailable for one shift from 3:00 to 11:00 p.m., he would be available for all remaining shifts, as well as all three shifts on Tuesday and Wednesday, his days off. Holsinger further testified that in the event that a real emergency occurred he would be able to take vacation days from his employment at the Sheriff's Department to fulfill any responsibilities which may be expected by him as a part-time employee at K-Ray.

Holsinger Post-Hearing Brief at 4. These assertions demonstrate that Holsinger is aware that he cannot dictate the days and hours of his work as a security guard at METC. If Holsinger is reinstated at METC, he will be required to meet the scheduling requirements of K-Ray in exactly the same manner as other security personnel. Similarly, K-Ray will be required to accommodate his scheduling conflicts only to the extent that it would accommodate its other employees.

The chief potential problem cited by K-Ray for scheduling Holsinger's part-time guard duty is working around his full-time position at the Monongalia County Sheriff's Department. However, testimony has established that another part-time employee of K-Ray, Mr. John Kisner, has been a full-time employee of the Monongalia County Sheriff's Department for several years, and that K-Ray has successfully accommodated the time requirements of his full-time position when scheduling his part-time guard duty at METC. Tr. at 106-11. Accordingly, if Holsinger is reinstated, K-Ray is not being required to accommodate potential scheduling problems that are more serious than those raised by another of its part-time employees. Nor is Holsinger requesting more in the way of schedule accommodation than K-Ray is already providing to another of its part-time employees.

Finally, K-Ray argues that it can accommodate Mr. Kisner because its three other part-time security guards have more flexible schedules. It contends that if it is required to replace one of these flexible, part-time guards with Holsinger, the resulting scheduling problems will be highly disruptive to its employees. Tr. at 112-113. This assertion is speculative and unsupported by the available evidence. In this regard, it should be noted that Mr. Kisner and Mr. Holsinger work different hours at the Monongalia Sheriff's Department and have different days off from that employment. Tr. at 107. Accordingly, there is reason to believe that it will be possible to reach an equitable resolution of Holsinger's shift scheduling that will not unduly inconvenience his fellow employees.

Based on these considerations, I find that reinstatement is a necessary and appropriate remedy in this instance.

IV. Conclusion

For the reasons set forth above, I have concluded that Holsinger has proven by a preponderance of the evidence that he engaged in protected activity under 10 C.F.R. Part 708 and that this activity was a contributing factor to his September 20, 1994 suspension and his October 2, 1994 dismissal by WSA. WSA and K-Ray have failed to prove by clear and convincing evidence that WSA would have taken these adverse personnel actions absent Holsinger's protected activity. I therefore find that a violation of 10 C.F.R. § 708.5 has occurred. I also find that reinstatement of Holsinger by K-Ray is a necessary and appropriate action to effect full relief for Holsinger. In light of WSA's settlement with Holsinger and its February 27, 1996 Stipulation of Dismissal with Holsinger, I find that no further remedial action by WSA is required in this matter.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 of Daniel L. Holsinger (OHA Case Number VWA-0005) is hereby granted as set forth in this Decision and denied in all other aspects.

(2) The request for relief under 10 C.F.R. Part 708 of K-Ray Security, Inc. (K-Ray) (OHA Case Number VWA-0009) is hereby denied.

(3) K-Ray shall reinstate Daniel Holsinger to his former position as a part-time security guard at the Department of Energy Morgantown Energy Technology Center or to a comparable position at that facility. K-Ray shall perform his shift scheduling in an equitable manner.

(4) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director of the Office of Contractor Employee Protection.

Kent S. Woods

Hearing Officer

Office of Hearings and Appeals

Date:

<1>/ Ms. Purkey reported to the OCEP interviewer that sometime after she concluded her investigation of the allegations in the anonymous letter, she had a conversation with Captain Munz and that they agreed that the author was probably Holsinger. Report, Exhibit 6. Ms. Purkey concluded her investigation on September 7, 1994. Captain Munz issued the three-day suspension to Holsinger on September 20, 1994.

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Names of Petitioners: META, Inc.

Logistics Applications, Inc.

Dates of Filing:April 22, 1996

May 22, 1996

Case Numbers: VWA-0006

VWA-0013

This Decision involves a whistleblower complaint filed by Mr. Eugene Greer under the Department of Energy's Contractor Employee Protection Program, codified at 10 C.F.R. Part 708. Until his employment was terminated on November 4, 1993, Mr. Greer was an audio-visual operator at DOE Headquarters employed by two DOE contractors, Omega, Inc., and its successor META, Inc. During Omega's tenure, the Office of Inspector General (IG) interviewed Mr. Greer in connection with an investigation of misuse of government property by two DOE employees responsible for supervising the audio-visual contract. Ultimately, one of the DOE employees was reprimanded. META succeeded to the Omega contract, hired Mr. Greer and later released him on November 4, 1993. Mr. Greer alleges that he lost his job because of retaliation through META by the two DOE employees who were the subject of the IG investigation.

On November 12, 1993, Mr. Greer filed a Complaint under Part 708 with the DOE's Office of Contractor Employee Protection (OCEP). OCEP investigated Mr. Greer's complaint and issued a Proposed Disposition on March 27, 1996. The Proposed Disposition concludes that Mr. Greer was retaliated against because of his cooperation with the IG investigation, and recommends that Mr. Greer receive compensatory back pay from META and be rehired by Logistics Applications, Inc. (LAI), the present audio-visual contractor. Both META and LAI filed requests with OCEP for a hearing on the Greer complaint under 10 C.F.R. § 708.9(a). OCEP transmitted META and LAI's requests to the Office of Hearings and Appeals (OHA) on April 22, 1996 and May 22, 1996, respectively, and I was appointed the hearing officer. The parties submitted additional material for the record, and sworn testimony was taken at a hearing held on July 9, 1996. META and LAI also made post-hearing submissions. On the basis of all this material and testimony, I find insufficient basis for the claim that termination of Mr. Greer's employment resulted from his cooperation in the IG investigation. The relief he requested shall therefore be denied.

I. The Whistleblower Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste, and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. These regulations provide that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has "[d]isclosed to an official of DOE, to a member of

Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences a violation of any law, rule, or regulation, [or] . . . a substantial and specific danger to employees or public health and safety." 10 C.F.R. § 708.5(a)(1); see also Francis M. O'Laughlin, 24 DOE ¶ 87,505 (1994).

Proceedings under 10 C.F.R. Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an impartial OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee. See David Ramirez, 23 DOE ¶ 87,505 (1994). The complainant under Part 708 has the burden of establishing "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." If the complainant makes such a showing, the contractor can avoid liability only by proving "by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993). As a practical matter, the application of these standards means that to prevail, Mr. Greer must establish that it is more likely than not that his disclosure to the IG contributed to his discharge.

II. Background

Mr. Greer alleges that he lost his job because of his involvement in the IG investigation. Specifically, Mr. Greer claims (i) there was a marked change in attitude towards him on the part of one of the DOE officials, Mr. Raymond Brown, and (ii) certain limitations were placed on Mr. Greer's duties in the wake of the IG investigation. These factors appear to be the main bases for Mr. Greer's complaint.

META claims that Mr. Greer's termination was part of a reorganization designed to remedy certain deficiencies in META's management of the audio-visual contract. According to META, the decision to terminate Mr. Greer's employment was made by Mr. Charles Craven, vice-president of the firm, with some input by Mr. Jackson Reavill. According to these two META officials, to remedy the management problems the firm decided to replace the on-site manager of the contract. META states that it did not dismiss the manager being replaced, but retained the manager in a lesser position at reduced pay. To remain within the contract's staffing and salary ceilings, META stated it believed it needed to take additional steps to reduce costs, and it released Mr. Greer, the highest paid audio-visual operator. META states that Mr. Greer's discharge yielded the required salary savings and that his release had nothing to do with his quality of work or the IG investigation. Transcript of Hearing at 23-24, 28-31, 133-34 (July 9, 1996) (hereinafter cited as Transcript).

The OCEP Proposed Disposition finds that Mr. Greer's discharge appears related, at least in part, to cooperation with the IG investigation. According to the Proposed Disposition, the two DOE officials who were the subjects of the IG investigation (Messrs. Branca and Brown) orchestrated Mr. Greer's dismissal by making negative comments about his work to META officials. However, nothing in the OCEP Proposed Disposition suggests that META intentionally did anything improper or even knew of the details of the IG investigation that took place while the contract was being administered by Omega, META's predecessor.

The conclusion of the Proposed Deposition is based largely upon inference. I must examine whether that inference is warranted. In doing so, I will review the circumstantial evidence upon which OCEP apparently relied. The proposed disposition relied primarily upon circumstantial evidence that (1) the two DOE officials knew that Mr. Greer cooperated with the IG investigation, (2) META was aware that one of the DOE Officials had a low opinion of Mr. Greer, (3) a notation was made on Mr. Greer's termination letter implying that DOE employees had some input to Mr. Greer's dismissal, and (4) terminating Mr. Greer was not the most logical option available to META.<1>

III. Analysis

In whistleblower cases it is often impossible for the complainant to find a "smoking gun" that proves an employer's retaliatory intent. Thus complainants must generally meet their burden of proof through circumstantial evidence. A retaliatory intent has been found, for example, where the retaliatory action took place within such a brief period of time from the date of the disclosure that a reasonable person could conclude that the disclosure must have been a factor in the personnel action. See Ronald A. Sorri, 23 DOE ¶ 87,502 at 89,010 (1993); David Ramirez, 23 DOE ¶ 87,505 at 89,029 (1994). Furthermore, I recognize that the testimony of contractor officials who have been accused of retaliating must be viewed with some skepticism and must generally be supported by corroborative evidence if it is to be relied upon in these proceedings. However, this does not mean that the testimony of contractor officials should be ignored. The weight to give circumstantial evidence and the testimony presented at the hearing must depend upon the circumstances of each case and the hearing officer's view of the value of the evidence and the credibility of the witnesses.

Based upon the record, including testimony received at the hearing held in this case, there is no doubt that Mr. Greer perceived a change in Mr. Brown's attitude towards him during the period leading to his dismissal.<2> Nor is there any doubt that Mr. Greer sincerely believes that DOE officials communicated their opinions of him to META and thereby contributed to his dismissal.<3> Transcript at 19-21, 155-61; Exhibit 6. However, there is simply no evidence to support that belief. As explained below, I am unwilling to find it sufficient that Mr. Greer was discharged following his cooperation with the IG investigation. Mr. Greer was discharged in November 1993, while his last interview with the IG was in November 1991 and Mr. Branca received a reprimand in the Fall of 1992. Thus, Greer's discharge occurred two years after he was interviewed by the IG and one year after Mr. Branca was reprimanded. While the delay between the disclosure and the retaliatory action alleged in this case does not necessarily rule out a connection, it does significantly reduce the value of this circumstantial evidence.

META's evidence in this case was presented primarily through the sworn testimony of Messrs. Craven and Reavill, the two META officials who made the personnel decision. In evaluating their testimony, I must emphasize that neither META nor its officials are alleged to have intentionally retaliated against Mr. Greer. It is alleged only that META was manipulated by the two DOE officials allegedly involved, Messrs. Brown and Branca. META should therefore have an excellent claim for reimbursement from DOE if Mr. Greer were awarded back pay. Under these circumstances, Messrs. Craven and Reavill would have no reason to distort their testimony out of fear of an adverse financial impact on their employer. These META officials presented consistent testimony and nothing in their demeanor leads me to question their veracity. Consequently, I find the testimony of Messrs. Craven and Reavill to be generally reliable.

These two META officials, as well as the two DOE officials allegedly involved, Messrs. Brown and Branca — all testified under oath that, except with respect to one incident discussed below, there had been no communications between DOE and META officials concerning Mr. Greer. Transcript at 48, 57-59, 69, 123-27, 130-32, 148; see also Exhibits 11 & 19. Nor is there any evidence in the record of such communications, subtle or otherwise.<4> Under the circumstances it is not possible to conclude that the DOE officials swayed META's thinking concerning Mr. Greer's employment. I therefore must reject the Proposed Disposition as well as Mr. Greer's request for relief.

A brief review of this case and of the factors relied upon in the Proposed Disposition will be useful. I certainly agree with OCEP's finding that the DOE officials must have at least assumed that Mr. Greer had been interviewed by the IG, as the matter under investigation involved matters for which Mr. Greer was responsible.

The Proposed Disposition found that META was aware that Mr. Brown had a low opinion of Mr. Greer. The basis for this finding was in connection with an incident in which Mr. Greer apparently attempted to choke another employee (no injuries resulted). Mr. Brown told Mr. Craven that he thought Greer should have been disciplined more strongly. Transcript at 27-28, 69. This incident was a potentially serious matter

about which Mr. Brown had a legitimate reason for concern, and I am unwilling to attribute any improper motive to his comments concerning it. According to the record, this was the only time in which either DOE official expressed any opinion concerning Mr. Greer to either META official involved in the 1993 personnel decision to release him. Since the chocking incident would have been an excellent pretext for discharging Mr. Greer, the fact that META did not do so at that time indicates that the firm was not looking for an excuse to terminate his employment.

The conclusion of the Proposed Disposition, i.e., that the DOE officials influenced META, is based largely upon the following handwritten notation that Mr. Craven made on Mr. Greer's termination letter: "NOTE/ADDENDUM: Mr. Greer will provide information regarding DOE's evaluation of his performance that contributed to this action. I will reconsider this action after I receive this Information." Exhibit 33. OCEP construed this to be an admission by Mr. Craven that he was influenced by DOE personnel. However, Mr. Craven has explained that when he told Mr. Greer that he would be dismissed, Greer argued that the real reason for his dismissal was the IG investigation. Mr. Craven states that he was taken aback by this comment which raised the specter of a new IG investigation and allegations by Mr. Greer of reprisal. Mr. Craven explained that while he did not think there was anything to the allegation, he wrote the notation on the letter and told Mr. Greer to "write me a letter, and tell me exactly what DOE official and how this reprisal came about." Transcript at 33. Mr. Craven also testified that he did not intend this notation to mean that he accepted Mr. Greer's contention that his dismissal had anything to do with the IG investigation. Transcript at 33, 60. It appears to me that Mr. Craven would have had no reason to ask Mr. Greer to explain his allegation if he believed there was any merit to it. I therefore find Mr. Craven's explanation of the notation, rather than the inference of the Proposed Disposition, to be reasonable and credible.

The Proposed Disposition also finds that it might have been more logical for META to have discharged some other employee, and infers improper influence because Mr. Greer was selected for dismissal.<5> According to the Proposed Disposition, META could have discharged a higher paid employee who was performing different functions, or a lower paid employee performing the same functions (but who was not so highly rated) and then reduced Greer's pay to obtain the desired cost savings. Also noted is the fact that Mr. Greer was not rehired six months later, when Mr. Henderson retired and META hired a different individual in Mr. Greer's job classification at a higher salary.

At the hearing, Mr. Craven explained the personnel decisions that he made as follows: (1) Discharging an employee in another job classification would not have been appropriate because only in the audio-visual operator classification was there an excess employee. (2) Downgrading Mr. Greer and discharging another employee would have simply increased the number of dissatisfied META employees, because then both the discharged employee and Mr. Greer (because of his downgrading) would have been unhappy. (3) Although the audio-visual operator META hired in April 1994 worked in the same job classification as Mr. Greer, she had additional skills which were needed because of changing requirements under the contract and which warranted a higher salary. Transcript at 49, 63-66, 71-72; see also Exhibits 11, 19, 29 & 30. I find this testimony believable and a reasonable response to the speculation in the Proposed Disposition on this issue.

Another matter raised in the Proposed Disposition concerns a statement made to the OCEP investigator in this case by the DOE Contracting Officer. The statement is that the Contracting Officer could not "understand" why Mr. Greer was selected for termination based upon economic considerations. During his testimony, the DOE Contracting Officer explained that he meant only that he did not know why Mr. Greer had been selected to be dismissed, and that he did not mean to suggest — as the Proposed Disposition infers — that META's rationale was invalid. Transcript at 84.

IV. Conclusion

In summary, the circumstantial evidence relied upon by OCEP is outweighed by the sworn testimony of

the two META officials responsible for terminating Mr. Greer's employment that no DOE official had any say at all in that decision. Both of these individuals, Messrs. Craven and Reavill, testified that their decision had nothing to do with Mr. Greer's performance, but was based solely upon the need to cut one person as part of a reorganization, and that terminating Mr. Greer yielded the desired cost savings. I find this testimony convincing and reasonable. They also testified that while the DOE officials communicated with them concerning the performance of the project manager, they seldom discussed other META employees. The only time in which either discussed Mr. Greer was in connection with the choking incident. Mr. Brown had legitimate reasons underlying his concern about that incident and no improper motive can be attributed to Mr. Brown's comments concerning it. I find their testimony to be credible. Affirming this testimony, both DOE officials independently also testified that they had no direct say in the decision to terminate Mr. Greer's employment.

Consequently, the weight of the evidence in this case is that Mr. Greer's discharge was the result of a reorganization by META of its audio-visual contract operation and that DOE personnel played no role in that decision. Accordingly, I find Mr. Greer has not proven, by a preponderance of the evidence, that his dismissal resulted in any way from his cooperation with the IG investigation. I therefore cannot find that a violation of 10 C.F.R. § 708 has occurred. The Proposed Disposition issued by OCEP in this case is therefore not accepted.<6>

It Is Therefore Ordered That:

(1) The request for review filed by META, Inc., (Case No. VWA-0006) is hereby granted as set forth in Paragraph (2) below.

(2) Eugene Greer's request for relief under 10 C.F.R. Part 708 is hereby denied.

(3) The request for review filed by Logistics Applications, Inc., (Case No. VWA-0013) is hereby dismissed.

(4) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the complaint in part unless within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director of the Office of Contractor Employee Protection.

Richard T. Tedrow

Hearing Officer

Office of Hearings and Appeals

Date:

<1>It is undisputed that even though Mr. Greer did not initiate the IG investigation, his cooperation in it constituted a protected disclosure under 10 C.F.R. § 708(5)(a)(1). Transcript at 8. Nonetheless, it is not certain that there is jurisdiction in this case. See id. § 708.2(b). However, the parties did not brief the issue of jurisdiction, and in view of my decision on the merits, it is not necessary to reach the issue.

<2>Evidence concerning whether there was in fact a change in Mr. Brown's attitude toward Mr. Greer is conflicting. See Exhibits 12 & 20. I also note that even if there were a change in attitude, it could have resulted from factors other than Mr. Greer's role in the IG investigation.

<3>OCEP also investigated other acts of alleged discrimination, including restrictions placed on Mr. Greer's duties and counseling him for tardiness. The Proposed Disposition found that there were reasonable business reasons for these actions and that they could not be traced to Mr. Greer's cooperation

with the IG investigation. Little evidence was offered on these actions at the hearing, and I fully agree with the Proposed Disposition's conclusions concerning them. Transcript at 45-47.

<4>The DOE officials may have discussed Mr. Greer's performance with Mr. Henderson, but the only matter concerning Mr. Greer that Henderson raised with Messrs. Craven and Reavill was a minor tardiness issues that was never a significant problem. Transcript at 57.

<5>OCEP also found that META was mistaken about the need under the contract to eliminate a position to bring on a new project manager. This may well be correct. There is some evidence that META might have been able to retain Mr. Greer. However, it is clear that an extra employee was not needed to perform the work required by the contract. Under these circumstances, I cannot attribute any improper motive to META's decision to discharge an employee. Transcript at 82-86.

<6>In view of this determination, it is not necessary for me to address the arguments raised by LAI as to why, in the event Mr. Greer had been wrongfully discharged, it should not be required to reinstate him.

Case Nos. VWA-0007 and VWA-0008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Names of Petitioners: C. Lawrence Cornett, Maria Elena Torano Associates, Inc.

Date of Filing: May 9, 1996

Case Numbers: VWA-0007, VWA-0008

This Decision involves a complaint filed by C. Lawrence Cornett (Complainant) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. Complainant contends that various types of reprisals were taken against him by his employer, Maria Elena Torano Associates, Inc. (META), after he raised public health and safety concerns regarding the Programmatic Environmental Impact Statement (PEIS).(1) At the time of Complainant's hiring in November 1992, META was under contract to the DOE to review and revise draft materials for the PEIS including the performance of data analysis. See DOE Contract No. DE-AC01-91EM40002, Attachment B.(2)

The Office of Contractor Employee Protection (OCEP) conducted an investigation of Complainant's allegations and issued a Report of Investigation and Proposed Order (Report) on April 17, 1996. OCEP, in the Report, found that the available evidence supported Complainant's allegations and proposed that he be granted relief, though not as much as Complainant felt he was entitled to. Both Complainant and META requested a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer under 10 C.F.R. 708.9(a). The hearing in this case was held on October 29-31, 1996 at DOE Headquarters in Washington, D.C.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE Contractor Employee Protection Program became effective on April 2, 1992. 57 Fed. Reg. 7533 (March 3, 1992). Its purpose is to encourage contractor employees performing work at DOE facilities to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers. 10 C.F.R. 708.1.

The Part 708 regulations were adopted to improve the prior, informal process of resolving whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee.

B. Factual Background

The following summary of the facts and allegations in this case is primarily based on the testimony of witnesses at the October 29-31 hearing and the OCEP investigation.(3) In November 1992, Complainant was hired as a Senior Environmental Scientist by META. Complainant was initially employed to provide analysis in the field of human health risk assessment with regard to various waste management options to be reviewed in the PEIS. See Complainant's (Plaintiff's) Exhibit (hereinafter Pl. Ex.) 3. META subsequently designated Complainant as one of its "key personnel" with regard to the PEIS contract. See

OCEP Ex. 59. Almost immediately upon beginning work at META, Complainant reviewed the text of the Draft Implementation Plan for the PEIS. The draft text stated that the role of risk assessment in environmental remedial action decision-making had been significantly decreased since the Comprehensive Environmental Response Compensation Liability Act (CERCLA) was passed.(4) Complainant believed that these statements were incorrect and notified XXXXX, Chief Scientist, Louis A. Berger Associates (Berger),(5) regarding his opinion that the text of the Implementation Plan should be changed. OCEP Ex. 1 (Complainant's Sworn Statement) at 3. Complainant subsequently wrote memoranda to management officials outlining his position, providing examples of the role of risk assessment in various Environmental Protection Agency (EPA) regulations and orders, and suggesting changes to the text. Id.; see also Pl. Ex. 9. Despite Complainant's attempts to influence management, XXXXX declined to change the text of the Implementation Plan in the manner proposed by the Complainant. On or about December 20, 1992, Complainant had a meeting with XXXXX who informed him that he could go along with the text of the Implementation Plan or "quit and picket." OCEP Ex. 1 at 3, Tr. at 66; see also OCEP Ex. 33 (XXXXX Interview Summary). Complainant then contacted Bob Morgan (Morgan), President of META, and informed him that the language in the Draft Implementation Plan regarding the importance of risk assessment was erroneous. According to Complainant, Morgan then assigned him to rewrite the section of the Implementation Plan dealing with the role of risk assessment and CERCLA. See OCEP Ex. 1 at 3. Complainant alleges that XXXXX appeared to resent Complainant going over his head to Morgan and subsequently refused to communicate with him or provide him with needed information, thus minimizing his participation in some project activities and reducing his responsibilities.

While reviewing data and other PEIS materials, Complainant would send reports to his supervisors such as Dave McGuire (McGuire), Project Manager of the Waste Management Section of the PEIS Project, and Frank Skidmore (Skidmore), Deputy Project Manager for Waste Management, reporting on the work he accomplished and detailing his opinions and concerns regarding matters affecting the PEIS. For example, in January 1993, Complainant sent a memo to Skidmore and McGuire detailing his opinions regarding the types of information which the DOE national laboratories should include in their analyses of human health risk assessments along with his opinion that the use of "time discounting" methods should not be employed to estimate risk to future generations.(6) See OCEP Ex. 44. Also included in that memo was an evaluation of High Level Waste (HLW) risk assessment reports submitted by Oak Ridge National Laboratory (ORNL) and ANL. Complainant continued to send reports and memos to META/Berger management officials throughout 1993 and early 1994 detailing his concerns about deficiencies in the draft PEIS materials.

In the summer of 1993, Peter Astor (Astor) became Director of Hazardous Waste Studies for the PEIS project. Complainant thereafter performed his risk assessment work under Astor's supervision. In the fall of 1993, Complainant became concerned with data about the West Valley Demonstration Project (WVDP). Specifically, Complainant believed that the data indicated that full scale treatment of HLW at the WVDP would result in a significantly higher cancer rate among the general public than treatment of all of DOE's HLW at all other sites combined. Complainant alleges that he contacted officials at META/Berger, ORNL and Pacific National Laboratory regarding this finding. Complainant then expressed his concerns regarding the WVDP during a meeting in November 1993. He alleges that he subsequently was informed by someone in META/Berger management that the WVDP data was in error, although Complainant was unable to find confirmation of that fact. OCEP Ex. 1 at 4. Subsequently, Complainant was removed from having primary responsibility for summarizing the impacts of waste management and was given duties involving less responsibility. Id. at 4-5. Complainant alleges that he contacted Bob Lee (Lee), Director of Federal Services at Berger, about his diminished responsibilities and exclusion from certain technical meetings, and was informed that he shouldn't be concerned since there was still important work for him to perform, but that DOE personnel did not want him to attend the meetings. Id. at 5, 15. According to Lee, DOE and ORNL employees had complained about the Complainant's tendency to refuse to let subjects drop, thus interfering with the progress of meetings, and some had requested that Complainant not attend meetings. OCEP Ex. 29 (Lee Interview Summary).

In mid-December 1993, Albert Tardiff (Tardiff) became the manager for the PEIS project.[(7)] A few weeks later, Dr. Sharon Segal (Segal; "Siegel" in the hearing transcript), was hired to be the lead person on the Human Health Risk section and became Complainant's immediate supervisor. During the period from January through the first week of March 1994, Complainant identified concerns he had regarding changes to the text he wrote for the PEIS about radionuclide impacts. Complainant believed that the changes produced a misleading impression regarding the seriousness of the human health impacts from radionuclides. Additionally, Complainant was concerned that the edited text omitted information regarding airborne radon at DOE's Fernald Environmental Management Project (Fernald) and that the health effects of contaminated game and fish at the DOE's Savannah River Site (SRS) were not being considered in assessing risks at that site. Complainant sent a Progress Report, dated January 10, 1994, to META/Berger management officials detailing these concerns. OCEP Ex. 3. Complainant alleges that on the same day he distributed the January 10 Progress Report, he was called to a meeting with Tardiff, who told him to "back off" and that META's job was to make DOE "look as good as possible." OCEP Ex. 1 at 12. Tardiff does not recall having a meeting with Complainant on January 10, 1994. Tr. at 432. Complainant subsequently sent a memo and Progress Report on January 14, 1994, in which he reiterated his concerns and asked why radiation exposure data at Fernald and SRS was deleted and misrepresented in the most recent draft of the Affected Environment section of the draft PEIS. See OCEP Exs. 5, 6. Complainant alleges that Tardiff met with him later that day and criticized him for his disclosure pertaining to radionuclide data and threatened to take him off the PEIS project once Segal no longer needed his input. OCEP Ex. 1 at 12. Tardiff denies that this meeting occurred. Tr. at 432-33. In another memo, dated February 15, 1994, Complainant expressed his concerns that necessary chemical exposure data was not being incorporated into the Affected Environment section of the PEIS. OCEP Ex. 9.

According to Complainant, Tardiff summoned him to his office on March 8, 1994, and informed him that his employment was being terminated effective March 22, 1994. OCEP Ex. 1 at 14. Tardiff states that at a meeting he attended in Tucson, Arizona in late February 1994, Glen Sjoblom (Sjoblom), a special assistant to the Assistant Secretary for Environmental Management at DOE, informed him that META/Berger should layoff a total of 10 employees. Tr. at 403. Tardiff states that he determined that Complainant could be released after consulting with Lee, Segal and Skidmore and being informed by them that Segal could perform the work previously performed by Complainant. Tr. at 407-8, 417. Tardiff denies this action was taken in retaliation for Complainant's expressing his concerns about the PEIS process to META and DOE. Tr. at 434.

C. Procedural History of the Case

On March 9, 1994, Complainant filed a complaint pursuant to 10 C.F.R. Part 708. As indicated above, OCEP conducted an investigation of Complainant's allegations and issued its Report on April 17, 1996. In the Report, OCEP concluded that Complainant had made protected disclosures regarding health and safety issues and that it had jurisdiction over his complaint. Further, OCEP concluded that a preponderance of the evidence supported a finding that Complainant's protected disclosures contributed to his selection by META to be terminated and that META had failed to show by clear and convincing evidence that Complainant would have been terminated absent his protected disclosures. OCEP proposed that Complainant be awarded back pay and benefits, minus any earned income and associated benefits, from the time his employment was terminated until the date of the issuance of the Draft PEIS in September 1995, as well as reasonable costs and expenses, including attorney fees, that he incurred in bringing his complaint.

In a submission to OCEP dated April 30, 1996, Complainant asked for a hearing under 10 C.F.R. 708.9.[(8)] On May 1, 1996, META also submitted a hearing request to OCEP. On May 9, 1996, OCEP transmitted these requests to OHA together with the Report, the complaint file, and a request that a Hearing Officer be appointed.[(9)] On May 13, 1996, I was appointed Hearing Officer in this matter.

META filed a Motion to Dismiss Complainant's Part 708 complaint on May 21, 1996. In its Motion, META argued that DOE did not have jurisdiction to hear the complaint since Part 708 applies only to

employees of DOE contractors who perform work at DOE-owned or DOE-leased facilities. META asserted that, with the exception of a limited number of visits to DOE sites to perform work ancillary to the primary purposes of the PEIS contract, it did not perform work at DOE sites. Because of the factual issues raised by META's Motion and the subsequent submissions by the parties on this matter, I issued an Order to Show Cause providing for a hearing on this jurisdictional matter. See C. Lawrence Cornett, 25 DOE 87,504 (1996) (Case No VWX-0009).(10) That hearing was held on July 31, 1996. In an Interlocutory Order dated August 22, 1996, I denied META's Motion because I found that META employees had in fact performed activities on DOE sites that could not be considered merely ancillary to the primary purposes of the PEIS contract. See META, Inc., 26 DOE 87,501 (1996) (Case No. VWZ-0006).

On October 4, 1996, META submitted a Motion to Dismiss the complaint for failure to state an actionable claim. META asserted that Complainant had not made a "disclosure" pursuant to Part 708 since DOE and META officials already knew the information in the claimed disclosures. Further, META asserted that Complainant's alleged disclosures did not involve a substantial and specific threat to any person's health and safety as required by Part 708. In an October 23, 1996 Decision, I denied META's October 4 Motion. META, Inc., 26 DOE 87,504 (1996)(Case No. VWZ-0007). In this Decision, I found that there is no requirement in Part 708 that a protected disclosure must contain unique information not known to the DOE or contractor. Additionally, I found that because the regulations only require that an individual in good faith believe that his disclosure concerns a substantial and specific danger and Complainant's good faith belief is a factual issue, it would be inappropriate to grant META's Motion.

Pre-Hearing Submissions were filed by both parties by telecopier on October 11, 1996. I conducted a pre-hearing conference call with the attorneys for the parties on October 17, 1996. At the October 29-31 hearing the following witnesses testified in addition to Complainant: McGuire, Tardiff, Sjoblom, Dr. Thomas Hale, and Dr. Jane Rose. The transcript of the October 29-31 hearing was received by OHA on November 7, 1996, and the record upon which I have based this Initial Agency Decision was closed at that time.

II. Discussion

A. The Complainant's Burden

It is the burden of a complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under section 708.5, and that such an act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. 708.9(d). Thus, in order to meet his burden under this section Complainant must prove by a preponderance of the evidence that it is more probable than not, see 2 McCormick on Evidence 339 at 439 (4th ed. 1992), that he was engaged in a protected activity that was a "contributing factor" in his termination.

The standard of proof adopted in Section 708.9(d) is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. 1221(e)(1), and the 1992 amendment to 210 (now 211) of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5851. In explaining the "contributing factor" test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation's chief House sponsors, stated:

The words "a contributing factor", ... mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant", "motivating", or "predominant" factor in a personnel action in order to overturn that action.

135 Cong. Rec. H747 (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20). See Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993) (Marano) (applying "contributing factor" test).

In addition, "temporal proximity" between a protected disclosure and an alleged reprisal has been held to be "sufficient as a matter of law to establish the final required element in a prima facie case of retaliatory discharge." County v. Dole, 886 F.2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that Complainant has met his burden under Part 708 of proving by a preponderance of the evidence that his health and safety disclosures were contributing factors in his termination by META.

1. Were there "Protected Disclosures"?

In its Report, OCEP chronologically listed 17 categories of alleged disclosures that Complainant made during his employment at META. OCEP concluded that these disclosures constituted "protected disclosures" without individually analyzing any of them. This conclusion has been vigorously contested by META, which has argued that none of the statements made by Complainant related to the preparation of the PEIS meet the regulatory requirements of a protected disclosure that are asserted to be applicable in this case, namely, that the employee disclosed to an official of DOE or the contractor information which the employee in good faith believes evidences a substantial and specific danger to employee or public health and safety. See 10 C.F.R. 708.5(a)(1)(ii). As discussed below, I find that META's general arguments regarding the nature of Complainant's disclosures are without merit. Further, I find that Complainant did indeed make protected disclosures. (11)

a. META's Arguments

META has argued that it, DOE and the public were already aware of all of the matters communicated by Complainant pertaining to the PEIS and thus Complainant did not make any "disclosures." Tr. at 573 (closing argument). As indicated above, in my Decision denying META's October 4 Motion to Dismiss, I rejected META's interpretation of the word "disclose" and found that information does not have to be unique to the recipient in order to be considered a disclosure for the purposes of Part 708. Moreover, Complainant's disclosures consisted not only of information that was communicated, but the manner in which that information was selected and presented. He was selecting certain information from a large body of material and using that information to argue that data or methodologies should or should not be included in the PEIS.

META also argues that Complainant's communications were not motivated by a desire to warn anyone of impending threats to health and safety but were instead motivated by an intention to prevent DOE and the contractor from embarrassment and to have decisions decided in his favor. E.g., Tr. at 575 (closing argument). Thus, META concludes that Complainant's communications were not based upon a good faith belief that they pertained to a specific and substantial threat to health and safety. In support of this position, META has pointed out, inter alia, the following excerpts from the Complaint:

Failure to include this [a discussion of radiation effects] will give persons commenting on the PEIS an opportunity to grandstand about the effects that the PEIS is not disclosing. . . .

* * *

Stakeholders reading the report would see this as a brazen attempt at a coverup. . . .

* * *

If the PEIS did not contain information on site impacts that were documented in site environmental reports stakeholders could bring this out in hearings and the media to embarrass DOE.

META's Motion to Dismiss for Failure to State an Actionable Claim at 7 (quoting from OCEP Ex. 1 at 8, 11-12).

META also notes that in his January 10, 1994 Progress Report, Complainant remarks:

Discrepancies or missing information that could lead to gross underestimates of impacts could undercut Hazel O'Leary's work establishing a good reputation for DOE concerning disclosure to the public of impacts. . . .

* * * *

I pointed out that the PEIS should take care not to undercut Hazel O'Leary's work establishing a good reputation for DOE concerning full disclosure, rather than taking a short term approach to this and trying to not bring attention to DOE problems, which the public and stakeholder groups are aware of (many of which are documented in Site Environmental Reports) and will drag into the open if DOE doesn't come forth with them first.

Id. (quoting from OCEP Ex. 3).

Complainant has testified that he used the "embarrassment" argument as a tool to motivate Tardiff who he felt would not respond to arguments relating to public health and safety. Tr. at 244-45, 280-282. In its cross examination of Complainant, META challenged Complainant's explanation especially in light of the fact that Complainant's supervisors had extensive experience in environmental matters and presumably would not need such a pretext to make appropriate decisions.

While Complainant used the "embarrassment" argument on occasion, I find that his disclosures were also motivated by a good faith belief that the information that he communicated evidenced a substantial and specific danger to public health and safety. This finding is significantly supported by the testimony of McGuire regarding Complainant's attitude when discussing PEIS issues in various meetings:

Yes, Larry [Cornett] is exceptionally articulate about the points of view he advances. . . . [H]e has a regard for the ultimate end for which we were all working; that is . . . he understood in a visceral way the fact that we were talking about actions which could conceivably harm or kill people over a period of time, and that therefore that was a serious responsibility.

. . . [W]ith Larry, it was visceral and honestly felt, and, so, he had a strong motivation more than as a technocrat to carry on and advocate his point of view.

Tr. at 207-08.

Moreover, the statements cited by META constitute a very small percentage of the voluminous communications by Complainant in the record. The vast majority of those communications refer to health effects either expressly or indirectly through reference to CERCLA and other environmental laws and regulations.(12) Consequently, there is no basis for finding that Complainant's sole motivation in making his communications was to prevent DOE from embarrassment. Further, Part 708 does not require that a concern about a substantial and specific danger to public health be the sole motivating force in order for an individual to make a protected disclosure. Accordingly, to the extent that motivation is relevant to a finding of good faith belief, I find that Complainant's disclosures were motivated by his genuine concern that a methodologically flawed PEIS would have an adverse impact on human health.

META has also argued that none of Complainant's communications involved a substantial and specific danger to public health and safety. E.g., Tr. at 575 (closing argument). Specifically, META asserts that almost all of the concerns by Complainant were in fact disagreements on technical policy issues regarding risk assessment methodology. Such disagreements, META asserts, are most appropriately settled in peer review journals. To buttress this argument, META has submitted a report from an Ad-Hoc Independent Work Group (AHWG Report) from the EPA which found that most of the allegations of inadequate risk assessment raised by Complainant were "technical policy issues."(13) META Hearing Ex. 11 at 1.

I do not believe that all of Complainant's communications involved only policy matters. However, even assuming arguendo that all of Complainant's disclosures concerned only technical policy issues that fact would not defeat his Part 708 complaint. Part 708 only requires that an individual have a good faith belief that the information he or she discloses evidences a substantial and specific danger to public health and safety. See 10 C.F.R. 708.5(a)(1)(ii); META, Inc., 26 DOE 87,504 (1996). The fact that all of Complainant's concerns could be considered as "policy concerns" would not foreclose his having a sincere and reasonable belief that those concerns involve substantial and specific dangers to health and safety. The record supports a finding that the Complainant had such a belief. The record also shows that the human health risk concerns raised by Complainant related to radioactive and other toxic waste at the nation's largest nuclear facilities. The subject matter of Complainant's disclosures is therefore precisely the type of disclosure that the Part 708 regulations were designed to protect. As the Secretary of Energy has stated, "[W]e have important environmental cleanup, national security and research missions that must be effectively and efficiently discharged. Maintaining a climate that allows for concerns to be raised without retaliation is critical to this task." Department of Energy, Energy Department Accelerates Whistleblower Reforms (DOE Press Release, March 26, 1996) <http://apollo.osti.gov/doe/whatsnew/pressrel/pr96038.html> (visited December 16, 1996). Compare Mehta v. Universities Research Association, 24 DOE 87,514 at 89,065 (1995) (Part 708 not intended to protect claim of "mismanagement" if it involves only a disagreement within the area of traditional management prerogatives). Moreover, as shown by the quote from McGuire above and as will be discussed below, the record clearly supports a finding that the Complainant had a good faith belief that certain changes were necessary in the PEIS in order to protect the public from increased risks of cancer and other adverse health effects.

b. Specific Disclosures

While Complainant's communications regarding the draft PEIS involved many issues, I shall only evaluate those major disclosures about which there is sufficient information in the record for me to make a finding that they meet the Section 708.5(a)(1)(ii) protected disclosure criteria.

i. Acceptable Level of Risk

As indicated in the Factual Background section, supra, Complainant pointed out to XXXXX that the Draft Implementation Plan was incorrect when it stated that the role of risk assessment had been reduced since the enactment of Superfund. He specifically objected to the statement in the plan that a one percent risk of cancer (10^{-2}) for an individual was an acceptable risk and proposed instead alternatives involving risk based objectives of 10^{-4}, 10^{-5}, or 10^{-6}. (14) Pl. Exs. 8, 9; Tr. at 63-65. I find that the disclosures Complainant made regarding the PEIS Draft Implementation Plan were protected disclosures. The PEIS was designed to be a nationwide study examining the environmental impacts of managing various types of radioactive and other hazardous wastes. See Draft Waste Management Programmatic Environmental Impact Statement Summary, Vol.1 at 2 (Pl. Ex. 130). The PEIS is to be used as a tool to assist DOE in deciding where to locate additional treatment, storage and disposal capacity for such wastes. Id. Given this function, the determination of what is the standard for assessing permissible risk directly impacts on the health and safety of individuals who may be located near a particular site. Further, Complainant's testimony at the hearing convinced me that his disclosures were based on a good faith belief that the risk levels initially proposed for the PEIS would have a direct adverse impact on public health and safety. See Tr. at 66-67, 348.

ii. Time Discounting

I also find that the memoranda regarding the issue of time discounting that Complainant provided to META/Berger management were protected disclosures. See Pl. Exs. 16, 25, 58, 85, 86. In these memoranda, Complainant stated his view that in general time discounting is an inappropriate technique for use in human health risk assessment in the PEIS since it could introduce large systematic errors that would understate human health risk calculations and make it harder for decision makers to understand risk issues,

thus adversely affecting waste management decisions based on the PEIS. See Pl. Exs. 25 at 3; 58 at 2. I am convinced by both the Complainant's memoranda and testimony that his memoranda regarding time discounting indicate a concern over what he believed was a specific and substantial danger to public health. See Tr. at 85-89. Moreover, the reasonableness of Complainant's concern is supported by the fact that time discounting was eventually not included in the Draft PEIS.

iii. Methodological Problems Regarding the PEIS

Complainant submitted numerous memoranda regarding methodological problems he believed existed in the risk assessments conducted by DOE national laboratories. Examples of these concerns are listed below:

Lack of analysis regarding the biases in various mathematical modeling methodologies which were to be employed in risk estimation for the PEIS. See, e.g., Pl. Exs. 15, 85, 87.

The failure to include the calculated uncertainties in various risk estimation figures. See, e.g., Pl. Exs. 52, 60, 69.

These disclosures involved possible errors in assessing the risk to human health implicated by various waste treatment options. After reviewing the memoranda and listening to Complainant's testimony about these methodological issues at the hearing, see Tr. at 72-74, I am convinced that the concerns raised in the memoranda evidence Complainant's good faith belief that without further analysis, unknown biases and lack of revealed uncertainties could produce a substantial and specific risk to public health and safety.

iv. High Level Waste Treatment at the WVDP

I further find that in November 1993 Complainant made protected disclosures concerning the potential threat to public health if WVDP were utilized to process high level nuclear waste. According to data from ORNL, cancer rates among the general public resulting from HLW treatment at the WVDP would be significantly higher than at other DOE facilities. META, however, argues that Complainant's communications regarding the WVDP did not involve a substantial and specific danger to public health and safety since they were based on data that assumed that the vitrification plant at West Valley would be completed without using the most efficient filters. Tr. at 576 (closing argument). Thus, given the hypothetical nature of the data upon which Complainant's communications were based, META contends that they were not protected disclosures. I disagree. Complainant's disclosures concerned an increased risk of cancer to the local population if the WVDP were fully utilized to treat HLW with the High Efficiency Particulate (HEPA) filters in use at the time the relevant risk assessment data were collected. As the Complainant stated at the hearing:

They [ORNL] were predicting killing six or seven people from cancer and causing cancer in about 23 people, and they got a pretty high impact on the most exposed individual, about three in 10,000, which is in excess of what's normally accepted for a level that would declare a place a Super Fund site.

Tr. at 91. See also Tr. at 243-46

As the Complainant acknowledged, the HLW treatment was not scheduled to begin at West Valley until 1996, and other more efficient filters existed. Tr. at 91-92, 245. However, the fact that a danger may not materialize if other options are taken does not mean that the Complainant did not have a good faith belief that a specific and substantial danger to public health existed. Here the record clearly shows that the Complainant had such a belief.

v. Exposure of Game at DOE Sites to Radionuclides

As indicated above, on January 10, 1994, Complainant submitted a Progress Report to META/Berger officials criticizing the fact that ORNL's risk assessment methods and site environmental reports did not take in account the possible adverse health effects from radionuclide exposure that might be experienced

by persons who consumed animal meat or fish obtained from SRS. See OCEP Ex. 3. This Progress Report and other communications addressing this issue, as well as Complainant's testimony at the hearing, see, e.g., Tr. at 99-100, 345, demonstrate that this concern was sincerely held by Complainant. Moreover, the reasonableness of Complainant's concern about the possible health effects has been acknowledged by META officials who were otherwise critical or complacent. See, e.g., OCEP Ex. 26 at 3 (Interview Summary of Ronald Feit (Feit), Chapter Leader for PEIS Affected Environment Section). Thus, Complainant had a good faith belief that the exclusion of the radionuclide exposure information involving game and fish posed a substantial and specific threat to public health, and his communications about this issue were protected disclosures.

vi. Airborne Radon at Fernald

In the same January 10, 1994 Progress Report in which he detailed deficiencies regarding contaminated game and fish, Complainant noted that radiation exposure data from airborne radon at Fernald had been excluded from the appendix to the Affected Environment section of the Draft PEIS and that the appendix failed to state that radon had been excluded. OCEP Ex. 3. Complainant raised this issue in two other memoranda a few days later. See OCEP Exs. 5, 6.(15) At the hearing, Complainant testified regarding his concern that radon exposure at Fernald implicated an approximate one percent risk of cancer to the most exposed individual in the surrounding community, which he calculated would probably result in more than 20 cases of cancer. Tr. at 101, 346-47. According to Dr. Rose, this concern was shared by Fernald management:

They [radon emissions] were very high, and I -- I can't remember how high, but I was at Fernald, and they showed me where this waste was stored that was emitting the radon. They knew it was a problem, and it's definitely a problem.

Tr. at 532. Given this testimony and the likelihood that nondisclosure of this data could impact decision-making based on the PEIS, I find that Complainant had a good faith belief that the information that he disclosed regarding radon evidenced a specific and substantial threat to public health and safety. Accordingly, I conclude that these disclosures were protected under Section 708.5(a)(1)(ii).

2. Did the Protected Disclosures Contribute to the Decision to Terminate Complainant?

The one alleged reprisal for which Complainant requests relief is his termination from employment in March 1994. META does not dispute that Complainant's termination is a "personnel action . . . against the complainant," as that term is used in Section 708.9(d). META does, however, strongly dispute Complainant's claim, and OCEP's finding, that Complainant's disclosures contributed to the decision to terminate his employment. In support of this position, META points out that his termination occurred more than 15 months after his first alleged disclosure (regarding the acceptable risk discussion in the Draft Implementation Plan for the PEIS). In this regard, META notes that Complainant was an employee at will and could have been terminated at any time.

On the basis of the entire record, I find that Complainant has established by a preponderance of the evidence that he was terminated in early March 1994 at least in part as a result of his protected disclosures. I am not persuaded by META's argument regarding the length of time Complainant was employed prior to the termination for two reasons. First, during that period prior to 1994, Complainant was subject to a number of reprisals by META.(16) The broad definition of reprisal which is set forth in Section 708.5(a), states that a DOE contractor "may not discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, intimidate, or otherwise discriminate against" an employee who makes a protected disclosure. 10 C.F.R. 708.5(a) (emphasis added). Under this broad definition, there is sufficient evidence in the record for me to find that the following actions constituted reprisals:

- In response to his disclosure regarding the Draft Implementation Plan, XXXXX began to withhold information Complainant needed to perform his job and prevented him from participating in a

portion of the PEIS project.

- Complainant was barred from meetings which he should have normally attended.
- Complainant was removed as lead for risk assessment when Astor was hired.
- In response to his disclosure regarding the WVDP, Complaint was removed from having primary responsibility for summarizing the impacts of waste management.

Second, and more importantly, a significant organizational change occurred in December 1993 when Tardiff became PEIS project manager. Complainant continued to make protected disclosures, and, based on the evidence, Tardiff swiftly responded in a manner adverse to Complainant.

As indicated above, on January 10, 1994, Complainant sent a Progress Report to META/Berger managers in which he noted his concern that the draft appendix to the Affected Environment section of the Draft PEIS did not contain data regarding radon exposure at Fernald and radionuclide exposure from contaminated game and fish at SRS. OCEP Ex. 3.The managers to whom the Report was addressed included Lee, Skidmore and Segal, but not Tardiff. However, Complainant states that later that day he was summoned by Tardiff who told him to back off from his position on the deletion of Fernald and SRS exposure data. (17) Tr. at 100-01; see also Tr. at 279-82. While Tardiff testified that he did not recall this meeting, Tr. at 432, I find that Complainant's testimony is more credible on this point. It is supported by a written report which Complainant states was prepared right after the meeting and it appears from the contents that this is so. See Tr. at 278-80, 283; OCEP Ex. 3 (1/10/94 Contact by Larry Cornett). (18) Moreover, in view of Tardiff's testimony about the meetings which he does remember, I find his failure to recall the January 10 meeting to be convenient, but not credible. Specifically, Tardiff testified that he had attended 12 meetings in which the Complainant was in attendance and that at none of these meetings did he notice the Complainant being insistent in making his view known. Tr. at 390. In contrast, other persons working on the PEIS project uniformly describe the Complainant in meetings as being unduly persistent in raising issues. See, e.g., Tr. at 205-07 (McGuire), OCEP Ex. 29 at 2 (Lee Interview Summary), OCEP Ex. 28 at 1 (Interview Summary of Mary Hassell, Environmental Scientist), OCEP Ex. 23 at 2 (Astor Interview Summary), OCEP Ex. 26 at 3 (Feit Interview Summary). OCEP Ex. 33 at 1 (XXXXX Interview Summary), OCEP Ex. 47 (Interview Summary of Kenneth Cornelius, ANL).

Subsequently, on January 14, 1994, Complainant sent a Progress Report to Segal in which he stated that he undertook to discover who was responsible for the deletions and misrepresentations concerning radiation exposure in the Affected Environment section of the PEIS. OCEP Ex. 6. On that same day, Complainant sent a memorandum to Lee and other META/Berger managers reiterating his objections to the exclusion of radon exposure and contaminated game data at Fernald and SRS, respectively, and requesting that the Affected Environment section be corrected. OCEP Ex. 5. Complainant testified that later that day he was summoned by Tardiff, who demanded to know who had appointed him as the "ombudsman" on PEIS issues and threatened to take him off the PEIS program as soon as Segal indicated that she no longer needed him. Tr. at 103-04, 296, 299-301, 325. Although Tardiff denies that this meeting occurred, Tr. at 432-33, for the reasons set forth in the previous paragraph I find his testimony not to be credible. Moreover, here again Complainant's testimony is supported by notes which appear to have been prepared right after the meeting. See Pl. Ex. 138. In his notes, as in his testimony about the January 14 meeting, Complainant states that Tardiff indicated that he would be phased into a META contract involving an EPA enforcement project. This is consistent with Tardiff's testimony regarding his intention to place Complainant in an EPA project around January or February of 1994 if META obtained the contract. Tr. at 422-24.

Complainant continued to send Progress Reports containing protected disclosures to Segal during

the seven weeks following the January 14 meeting. See OCEP Exs. 7 (January 31), 8 (February 14), 9 (February 15), 10 (February 18), 11 (March 3). All but one (Ex. 10) were copied to Lee, Skidmore and other META/Berger officials, and Complainant began including Tardiff on his distribution list with the February 14 Progress Report. As indicated above, Complainant was terminated from his employment at META on March 8. It is undisputed that this decision was made by Tardiff. See Tr. at 389. According to Tardiff, he made this decision after consulting Lee, Skidmore and Segal. Tr. at 417.

Significantly, the decision to terminate Complainant's employment was made less than two months after the two meetings in which Tardiff indicated his displeasure with Complainant for making certain protected disclosures. Given this relatively short time period, I find that the Complainant's protected disclosures were a contributing factor in his selection to be laid off by META. Cf. David Ramirez, 23 DOE 87,505, aff'd, 24 DOE 87,510 (1994) (Ramirez); Ronald A. Sorri, 23 DOE 87,503 (1993), aff'd, 24 DOE 87,509 (1994) (Sorri).

B. The Contractor's Burden

Subsection 708.9(d) provides that, once the complainant has met his or her burden under that subsection, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure. . . . " 10 C.F.R. 708.9. The "clear and convincing evidence" standard of proof is more stringent than the "preponderance of the evidence" standard applied to complainants, but not as high as the "beyond a reasonable doubt" standard used in criminal cases. See 2 McCormick on Evidence 340 at 442 (4th ed. 1992). It has been described as that quanta of evidence sufficient to persuade a trier of fact that the truth of a contested fact is "highly probable." Id. For the reasons set forth below, I have concluded that META has not met this stringent standard.

META has strongly asserted that it would have terminated Complainant notwithstanding any alleged disclosures he made. In support of this assertion META has put forth the following arguments:

- The individual who made the decision to terminate Complainant, Tardiff, testified that his decision was not based on anything Complainant had said or written.
- Complainant was just one of the employees META selected to eliminate from the PEIS project in accordance with Sjoblom's instructions to reduce its staffing on the PEIS project by 10 persons for financial reasons.
- By March 1994, the risk assessment work which still remained could be adequately performed by other employees who were as qualified or more qualified that Complainant.
- The fact that META considered Complainant for employment on possible META projects for the EPA and the Agency for International Development (AID) in the Philippines demonstrates that META had no intention to retaliate against Complainant.
- The fact that the PEIS was changed in response to the Complainant's disclosures demonstrates that Complainant's opinions were respected and that he would not have been terminated absent financial necessity.

I am not persuaded by these and similar arguments for the reasons discussed below.

Since Tardiff made the decision to terminate Complainant, his testimony is crucial in this case. After observing and listening to Tardiff at the hearing and reviewing the transcript, I am unable to accept as credible his denial that Complainant's protected disclosures were a factor in the decision to terminate his employment. Tardiff's testimony was characterized by evasiveness and contradictions as he tried to portray Complainant as one of ten individuals who happened to be selected for

termination for financial considerations. It is clear that other considerations also played a part, and Tardiff's testimony does not convince me that Complainant would have been selected absent his protected disclosures.

One way that Tardiff attempted to justify his selection of Complainant was by downplaying the importance of risk assessment work on the project in general and Complainant's role in that process in particular. For example, after testifying that during the period from September 1993 through early March 1994, META tripled its personnel on the PEIS project (from around 25-30 to about 85), Tardiff was asked by Complainant's counsel how many new META or Berger employees performed risk assessment. He initially stated "one" (Borghe), but after considerable evasiveness, he acknowledged that at least four other employees hired in the months prior to Complainant's termination had risk assessment responsibilities:

Q. Okay. Who else was brought on in that period of time who was working in the area of risk assessment?

A. I don't understand the question.

Q. Who else was brought on in that six-month time period who was working in the area of risk assessment on this contract?

A. I said Mr. Borghe.

Q. I just wanted to make certain of that.

* * *

Q. Was Sharon Siegel brought on in that period of time?

A. Yes.

Q. What was her field of responsibilities or responsibility?

A. Human health risks.

Q. Did she -- and was that risk assessment, a phase of it?

A. It was the core.

Q. So, in fact, there were at least two people then in the build-up period who were brought on in risk assessment?

A. Yes.

Tr. at 396-97 (emphasis added). After further questioning by Complainant's counsel, Tardiff acknowledged that John DeMarzio, Carmine Smedira and Lynn Fairobent were new employees who also had risk assessment responsibilities. Tr. at 396-99.

Tardiff's evasiveness and attempt to minimize the build up in risk assessment work just prior to Complainant's termination can be contrasted with the forthright testimony of McGuire:

Q. Okay. And was there an enlargement of staff at Berger occurring in late '93 or early 1994?

A. There -- you're asking the question about Berger. I can talk to you about META/Berger and the PEIS. Is that what you mean?

Q. Let's talk about -- yes, please.

A. Yes, a number of additional persons were hired around that time, maybe a little later.

Q. Were they hired in respect to areas of risk assessment?

A. Yes, some of those persons hired were competent in the area of risk assessment and were hired for that purpose.

Q. And why was there perceived a need to enlarge -- or why was there perceived a need to hire people in risk assessment at that time?

A. The obvious -- the most obvious reason was that the workload connected with calculating the risk assessment factors and coming to conclusions about them and given the various alternatives that were being advanced by the Department of Energy that it wished us to study and given practical problems of lack of the total data for everything that people would like to know, the workload had become extremely large and burdensome. So, we needed more people to do it.

Tr. at 200-01.

Despite this increased need to perform risk assessment work, Tardiff tried to minimize the need for Complainant's risk assessment activities as the following excerpt from the transcript shows:

Q. Let me ask you this. In the end, Ms. Siegel -- Dr. Siegel was performing some risk assessment work. She took over Larry Cornett's?

A. No.

Q. She did not?

A. No.

Q. Who, if anybody, took over the work Mr. Cornett was performing?

A. Dr. Siegel continued in that area. I don't believe she picked up anything he was doing.

Q. No. Did she pick up some of it?

A. She would have to.

Q. Approximately how much?

A. I have no idea.

Q. So, who picked up the rest?

A. It wasn't -- it was assessed that we didn't need everything he was doing.

Q. It was?

A. That's my understanding.

Tr. at 405.

Yet Tardiff acknowledged that prior to the hiring of additional persons with risk assessment responsibilities in the September 1993-early March 1994 period, Complainant was one of only two

persons working full time on risk assessment. Tr. at 436. Moreover, Complainant had been designated by META as one of the "key" personnel on the PEIS project. The work done by "key" personnel was work essential to the project. As explained by Tardiff:

Generally, key personnel clauses required for those individuals on a -- on a project are essential to the continuing scope of that particular project, and if one of those individuals were to leave or be replaced, he would have to be replaced by an equivalent, if necessary.

Tr. at 385. In addition, the importance of the contributions Complainant made to the PEIS risk assessment process was recognized by officials on the project, including those who were perturbed by the manner in which Complainant made his disclosures, such as McGuire, Tr. at 215-16; Lee, OCEP Ex. 29; Astor, Ex. 23. Complainant's contributions were also recognized by a 1993 year-end cash bonus that he received from META. See Pl. Ex. 144.

While Tardiff has claimed that there was no performance-based reason why Complainant was terminated, see, e.g., Tr. at 394, the record does not support his assertion. By performance, I refer not to Complainant's scientific accomplishments, but his interactions with others on the PEIS project. According to the OCEP Interview Summary, Tardiff stated that Complainant's relationship with ORNL indirectly affected his decision to lay off Complainant. OCEP Ex. 38 at 2. At the hearing, Tardiff denied that he had made this statement and denied that Complainant's relationship with ORNL affected his decision to lay Complainant off. Tr. at 389, 450. Nevertheless, as can be seen from the transcript excerpt below, shortly before he made his decision, Tardiff was aware that Complainant's supervisors felt that Complainant was unable to get along with others on the project, particularly personnel at ANL and ORNL:

Q. Mr. Tardiff, I'd like to turn your attention to [OCEP] Exhibit 38, which is the April 6th memo, turn to the first page, the first sentence of the fourth full paragraph. "Tardiff became aware that peers from Argonne National Lab did not want to work with him", meaning the Complainant. Do you see that?

A. Yes.

Q. Is that -- whether or not you said it then, is that correct at this point in time?

A. Today?

Q. Yes. There -- let me -- well, actually, let me rephrase this.

Was it correct as of the time you gave this statement?

A. Yes.

Q. And from whom did you become aware?

A. From his supervisors.

Q. Dr. Siegel?

A. Could have been her.

Q. Okay. The next sentence said, "Siegel had to take over all contacts with scientists at Oak Ridge National Lab."

A. Yes.

Q. Was that -- whether or not you said it at that point in time, was that statement correct as of the

time that statement was made?

A. I believe so.

Q. And that would have been something you would have heard from Ms. Siegel? Dr. Siegel?

A. Most likely.

Q. Now, what I'd like to do is take you to the next page of that document, Page 2, the last full sentence states, "Oak Ridge National Lab could not work with him", meaning Complainant, "and he could have a negative future impact on DOE projects."

* * *

Q. [W]as it at the time, this statement as recorded, to your knowledge correct, that ORNL could not work with Complainant?

A. I did not have firsthand knowledge of that.

Q. But that knowledge was conveyed to you by someone else?

A. Not in that form. This is reversed.

Q. Okay. Would you tell us what you would do to -- to make that a correct statement?

A. It's coupled with the second part of the sentence. If -- if ORNL could not work with him, he could have a negative impact.

Q. That's why I separated the two. Was it your knowledge -- was it a correct statement as of April of '95, just the part that ORNL could not work with Complainant? Was that a correct statement, to your knowledge, at that point in time?

A. I -- it's like a rumor that I heard. I was aware that there was a problem in that area, but I could not say for sure that ORNL, which is a big, couldn't work with Dr. Cornett.

Q. Okay. But you had information --

A. But I was aware that there was problems in that area.

Q. Okay. And -- and do you recall, did Dr. Siegel -- did she convey any information to that effect?

A. Yes.

Q. Okay. The next part, "and Complainant could have a negative future impact on DOE projects", was information to that effect also conveyed to you?

A. I don't recall referring to any DOE projects, other than this project, the PEIS.

Tr. 423, 453-456.

On the basis of the above testimony, and the statements to the OCEP investigators made by the three supervisors that Tardiff stated he consulted prior to his termination decision (Lee, Skidmore and Siegel), I find that Complainant's relationship with persons working on the PEIS project, particularly persons at ANL and ORNL, was a factor in Tardiff's decision to lay off Complainant rather than someone with less seniority on the PEIS project. Moreover, in my view, the conduct of Complainant that so annoyed some personnel at those national laboratories and META/Berger was inextricably

intertwined with his protected disclosures. Thus, the fact that he annoyed some personnel would not justify his termination under Section 708.9. (19) Cf. Ramirez, 23 DOE at 89,034-35 (citing Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984)). And while at least one supervisor, Feit, described Complainant as "disruptive" in meetings, OCEP Ex. 26, I find credible McGuire's description that Complainant conducted himself at meetings "without personal rancor or animosity. When I say that he was determined and persistent and so on, he -- he is not standing on the tables and pounding and screaming or yelling. Not that at all." Tr. at 208.

I am thus not convinced by META's claim that, absent the protected disclosures, Complainant would still have been selected for termination because the remaining individuals left to perform risk assessment work were more qualified than he and the amount of risk assessment work was decreasing. In view of the hiring of four persons to do risk assessment work in the months immediately preceding Complainant's termination, I give no credence to META's assertion that risk assessment work was decreasing.(20) As indicated above, Tardiff testified that his decision to lay off Complainant was made after his consultation with several senior management officials and supervisors who informed him that Complainant could be terminated without any effect on the project. However, META did not call any of those persons to testify, and their statements to the OCEP investigators appear inconsistent with Tardiff's testimony. For example, Tardiff stated that in making the decision to terminate Complainant, he relied on Lee's recommendation. Tr. at 408. According to the Lee Interview Summary, however, "Tardiff talked to Lee after the decision was made. Lee had no input in the firing decision." OCEP Ex. 29 at 1.(21) Similarly, contrary to Tardiff's testimony, Tr. at 417, "Segal denied having any input in the decision to terminate the Complainant from employment, nor was she consulted about the decision." OCEP Ex. 35 at 2 (Segal Interview Summary). A third person that Tardiff stated he consulted, Skidmore (see Tr. at 417), related that he told Lee (not Tardiff) that he felt that Segal was more valuable to the project than Complainant. OCEP Ex. 37 (Skidmore Interview Summary). It is clear from their statements, however, that these three supervisors had negative opinions about Complainant based upon the manner in which he made his protected disclosures. Thus, even if Tardiff's decision was based on conversations he had with Lee, Skidmore and/or Segal, I am not convinced that it would have been made absent those disclosures.

Other reasons exist supporting my finding that META has not met its burden of proof in this case. If reducing monthly expenditures on personnel was the reason for the lay off, as Tardiff testified, Tr. at 403-04, it would seem that some consideration would have been given to terminating Segal, whose salary was considerably higher than Complainant's.(22) However, from Tardiff's non-responsive answers to questions put to him by Complainant's counsel, it is clear that he did not consider salary differentials when he decided to retain Segal and lay off Complainant. See Tr. at 406-09. Nor is there any evidence that salary differentials played any part in Tardiff's decision to retain other persons in risk assessment that had less seniority than Complainant. Instead Tardiff stated that he relied on the opinion of Lee and other others that Complainant was expendable, and that the other persons doing risk assessment work were assigned to different tasks on the PEIS project than Complainant. Tr. at 395-99, 407-08. However, on the basis of information in the record regarding Complainant's experience and qualifications, it appears to me that he was fully capable of performing those tasks.

I am also not persuaded by META's argument that absence of discriminatory intent is evidenced by the fact that changes were made in the PEIS consistent with Complainant's disclosures. Some or all of these decisions may have been made in response to recommendations from others. Moreover, even if these changes were made in response to Complainant's disclosures, that would not convince me that there was no reprisal. See Sorri, 23 DOE at 89,006 (changes made by contractor to alleviate health and safety problems disclosed by complainant not treated as evidence of no reprisal, but as support for finding that the disclosures involved bona fide danger to safety).

Furthermore, neither the stated intention to transfer Complainant to a position on a META/EPA contract nor the putative AID job offer made to Complainant after his termination convinces me that META's termination of Complainant was not in reprisal for his disclosures. Given the account of the January 14 meeting provided by Complainant in his testimony and in his notes, summarized above, it is hard to believe that Tardiff's proposal to move Complainant to the EPA contract was anything other than a reprisal itself. Cf. Marano (Drug Enforcement Administration agent reassigned as a result of a reorganization inextricably intertwined with his disclosure).

The post-termination offer of possible employment with AID in the Philippines also does not provide any evidence of the absence of a retaliatory motive behind Complainant's termination. It is undisputed that this did not involve an actual job offer. According to Tardiff, AID issued a "task" to contractors who had a presence in Manila, including META, for the services of a health risk person, and someone in META's main office in the Washington, D.C. area (the Arlington office) asked him to see whether the Complainant was interested.(23) Tr. at 415. Moreover, the contrast between this vague potential offer and the treatment of the nine other META/Berger employees who were allegedly terminated for the same financial reasons as Complainant is revealing. (24) At the hearing, Tardiff testified that two of the nine, one META employee and one Berger employee. were later re-employed by META/Berger on the PEIS project, Tr. at 409-10, four other Berger employees were reassigned by Berger to other projects, Tr. at 412, and of the remaining three META employees, one was reassigned to the Arlington office, id., one was brought back for part time work on a separate contract, Tr. at 413, and one (Reife) was given a special status as available for work. Id. While Reife did not receive any pay or benefits, Tardiff indicated that he was given that status because META wanted him to be available in case certain work with the Nuclear Regulatory Commission or EG&G materialized. Tr. at 413-14. No such arrangement was made with Complainant vis a vis the possibility of the AID job or any other position.

In sum, I am unpersuaded by these and other arguments that META has presented in support of its claim that it had no retaliatory motive in terminating Complainant. I also find that META has failed to present clear and convincing evidence to demonstrate that it would have terminated Complainant absent his protected disclosures.

C. Remedy

In his October 11, 1996 Pre-Hearing Submission, Complainant requested the following relief: (i) back pay throughout the time that he would have remained employed at META, (ii) reimbursement for out of pocket expenses incurred in pursuing his complaint including printing, postage, travel, depositions, and telephone bills, (iii) attorneys fees, (iv) restitution for the 10 percent tax penalty for his early withdrawal of $32,050 from his Individual Retirement Account (IRA) and the lost interest on that money, and (v) front pay for a period of five years.

Subsection 708.10(c) provides that "[t]he initial agency decision may include an award of reinstatement, transfer preference, back pay, and ... all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision [is] based." In accordance with this provision, I find that Complainant is entitled to relief as described below.

1. Back Pay

Given the above findings, there can be no doubt that back pay is appropriate in this case. See Howard W. Spaletta, 24 DOE 87,511 at 89,058 (1995). OCEP proposed that back pay and benefits (less earned income and associated benefits) be awarded for the period from the last day for which Complainant was paid by META until September 1995, the month that the draft PEIS was issued. Complainant contends that he should receive additional back pay since he would have likely remained employed at META past that date and he has had no other employment. Pre-Hearing

Submission at 6; Tr. at 110. In support of his position, he has stated that he has the expertise needed to analyze the comments on the Draft PEIS in connection with the preparation of the Final PEIS. Tr. at 110-11. He has further asserted that Lou Borghi (Borghi; "Borghe" in the hearing transcript except as quoted supra) continues to work on the PEIS project, albeit as an employee of a META subcontractor.(25) Id. META disputes that Complainant would have remained employed until September 1995, contending that in view of his allegedly narrow set of skills, there would have been no need for him on the PEIS project long before that date. According to META, Segal left her position on the PEIS project in January 1995, and no one worked full time on risk assessment thereafter. Tr. at 580 (closing argument). META also notes that Complainant's employment history is marked by relatively brief job tenures, and suggests that he would have voluntarily left the PEIS project.

There is no way to know with certainty how long Complainant would have remained employed by META if he had not been terminated in March 1994. However, I believe that December 31, 1995 is a reasonable ending date for a back pay award in this case. I recognize that there were reductions in total employment on the PEIS project in late 1994 and throughout 1995. However, risk assessment continued to be an essential part of the PEIS project and Complainant had the experience and ability to perform that work. Although Borghi was selected in January 1995 to replace Segal as the PEIS key person for health risk issues, that determination was made by the same management person responsible for the reprisal termination of Complainant. To justify Borghi's selection, META told OCEP that Borghi was already working on risk assessment issues on the PEIS project and had developed a close working relationship with ORNL. OCEP Ex. 75 (META's March 15, 1996 Response to OCEP Request for Information # 12). However, if Complainant had not been unlawfully terminated in March 1994, he most likely would have still been working on the PEIS project at the time Segal left.(26) And, as indicated above, Complainant's purported poor relationship with ORNL was inextricably intertwined with his protected disclosures and the unlawful termination of his employment.

Furthermore, although it can be reasonably assumed that META's analytical work on the Draft PEIS was completed by the end of August 1995, neither META's role in the PEIS project nor the need for risk assessment expertise ended at that point. On September 13, 1995, the DOE issued a notice that announced the commencement of a 90-day public comment period on the Draft PEIS. 60 Fed. Reg. 49264 (September 22, 1995) (Notice of Draft PEIS Availability). For a few months after the issuance of the Draft PEIS, Borghi continued to work on the project, see Tr. at 430 (Tardiff), and in December 1995 some former META employees (Feit and Charles-Kondokov) were brought back temporarily to assist the comment response team. OCEP Ex. 75 (META's March 15, 1996 Response to OCEP's Request for Information # 9).

Under the above circumstances, I find that Complainant would have been employed until December 31, 1995. I reject, however, Complainant's contention that he is entitled to back pay after December 1995. While the comment response process did continue after that month and the Final PEIS has not yet been issued, by that point in time META's responsibilities on the PEIS project had apparently wound down considerably. In January 1996, for example there were only two people at META working on the project. See OCEP Ex. 74 at 11 (META Response to OCEP Letter dated January 24, 1996). It thus appears evident that Complainant would not have been employed by META under any circumstances after December 1995. Nor is there any evidence that the PEIS comment response work that has been done by Borghi or other contractor employees since January 1996 amounts to full time or even regular part time work.

Reviewing the entire record, I also find that Complainant has made diligent efforts to find work similar to his position at META. Accordingly, I find that Complainant is entitled to back pay and related benefits for the period from March 22, 1994 through December 31, 1995.

According to the information that META provided to OCEP, at the time that he was terminated,

Complainant's salary was $70,000 per annum and the value of the benefits provided by META was $21,000 per annum. Thus Complainant's back pay award will be calculated on the basis of $91,000 per annum plus any firm wide cost of living increases that META may have given during the March 1994-December 1995 period. Complainant's counsel will be directed to calculate the amount of back pay on a quarterly basis, less the amount earned by Complainant during the one very brief period that he stated he worked.(27) META should provide to Complainant's counsel any additional information they need in order to make these calculations. This will not preclude META from objecting to the relevance or appropriateness of that information in the calculation of the back pay award.

As part of his back pay, Complainant is entitled to receive interest to compensate him for the time value of money lost. In prior cases, the DOE has followed the practice of the Merit System Protections Board (MSPB) under the WPA in determining the rate of interest that should be applied to the back pay award to a contractor employee under Subsection 708.10(c). See, e.g., Howard W. Spaletta, 25 DOE 87,502 (1996) (Spaletta). The MSPB awards interest on back pay under the Office of Personnel Management regulation found at 5 C.F.R. 550.806(d). That regulation in turns refers to the "overpayment rate" established by the Secretary of the Treasury under 26 U.S.C. 6621 (a)(1). The overpayment rate is the Federal short-term rate plus two percentage points. The Federal short-term rate for a particular calendar quarter is the short-term rate for the first month of the preceding calendar quarter, rounded to the nearest whole percent.

2. Reasonable Costs and Expenses

In order for me to determine whether the more than $6,000 claimed by Complainant for costs and expenses (other than attorney fees) was actually spent and was (i) reasonable and (ii) reasonably incurred in bringing the complaint, Complainant will be required to submit a full, documented accounting for these expenses. However, reimbursement for costs relating to seeking employment is not provided for in Section 708.10(c). See Ramirez, 23 DOE at 89,037 n. 24. Consequently, I will not grant Complainant's request for such costs, with one exception. Since I have indicated that the back pay award should be offset by any income earned by Complainant, I believe it is reasonable to reduce the amount of that income by any costs reasonably related to the obtaining of that employment.

3. Attorney Fees.

I intend to follow other DOE whistleblower cases by applying the "lodestar approach" to determine the amount of attorney fees in this case. See, e.g., Spaletta, 25 DOE at 89,003 (citing Blanchard v. Bergeron, 489 U.S. 87 (1989)). Under this approach, a reasonable attorney fee is the product of reasonable hours times a reasonable rate. Interpreting the phrase "reasonably incurred" in this manner recognizes the public interest nature of whistleblower representation in Part 708 cases and encourages attorneys to take these cases. The fee applicant has the burden of producing satisfactory evidence that the requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonable comparable skill, experience or reputation. See Blum v. Stenson, 465 U.S. 886 (1984). Therefore, counsel for Complainant should submit appropriate evidence to show what is a reasonable hourly rate for them to receive in this case.

4. IRA Tax Penalty and Lost Interest Income

This portion of Complainant's claim is denied. In my view, these items do not meet the Section 710.10(c) standard of "reasonable costs and expenses . . . reasonably incurred by the complainant in bringing the complaint upon which the [initial agency] decision was issued." Cf. David Ramirez, 24 DOE 87,504 at 89,016 (1994), aff'd, 24 DOE 87,510 (1994). As Complainant's testimony makes clear, he needed the funds withdrawn from his IRA primarily to meet his living expenses. Tr. at 122. However, even if some of these funds were used for litigation expenses, I do not believe it is

reasonable to reimburse the individual for the expense of the tax penalty and the lost interest income. These items appear to be too remote from the type of litigation-related costs and expenses for which reimbursement is provided by Section 708.10(c). (28)

5. Front Pay

Complainant has also requested that he be awarded five years of front pay in light of the damage to his professional reputation that has resulted form META's actions. In his Pre-Hearing Submission, Complainant cited two cases, Simmons, v. Florida Power Corp., 89-ERA-28 (ALJ Dec. 13, 1989) (Simmons), and McNeil v. Economics Lab, Inc., 800 F.2d 111 (7th Cir. 1986) (McNeil), which hold that front pay be may an appropriate remedy in certain employee protection cases. These two cases are inapposite since relief in each case was granted under a broadly worded statutory remedy which has been construed to authorize remedies such as front pay. See 29 U.S.C. 626(b) (remedy provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq., applied in McNeil); 42 U.S.C. 5851(b)(2)(B) (remedy provision of ERA applied in Simmons). In contrast, Section 710.10(c) does not authorize a hearing officer to award front pay. Consequently, I deny Complainant's request for front pay.(29)

III. Conclusion

For the reasons discussed above, I find that Complainant has met his burden of proof of establishing by a preponderance of the evidence that he made health and safety disclosures protected by 10 C.F.R. Part 708. I also find that these disclosures were a contributing factor in his termination. Furthermore, I find that META has not proven by clear and convincing evidence that it would have terminated Complainant absent his disclosures. Accordingly, I conclude that a violation of Part 708 has occurred and that Complainant should be awarded back pay (including benefits) plus interest as a result of the reprisal taken against him, as well as all costs and expenses reasonably incurred by him in bringing the present complaint. After the parties have provided the information and comments referred to in the Order below, I will issue a Supplemental Order specifying the exact amount to be awarded to Complainant.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by C. Lawrence Cornett (Cornett) , OHA Case No. VWA-0007, is hereby granted as set forth in Paragraph (3) below and is denied in all other respects.

(2) The objections to Cornett's request for relief submitted by Maria Elena Torano Associates, Inc. (META), OHA Case No. VWA-0008, are hereby denied for the reasons set forth in the foregoing Decision.

(3) META shall pay to Cornett an amount to be determined based on the information provided pursuant to Paragraphs (4) and (5) in compensation for lost salary and benefits, and interest thereon, and for all costs and expenses, including attorney fees reasonably incurred by Cornett in bringing his complaint under Part 708.

(4) Counsel for Cornett shall, no later than 30 days after service of this Decision by the Assistant Inspector General for Assessments, the successor to the Director of the Office of Contractor Employee Protection, submit to the undersigned Hearing Officer and to counsel for META the following information:

(a) A schedule estimating the salary and other benefits that Cornett would have earned from his employment at META for each calendar quarter from the second quarter of 1994 through the fourth quarter of 1995. (30) This submission should specify the assumptions upon which it is based and any

information that is not in the record or which META has not voluntarily provided which is necessary for a more accurate calculation.

(b) A quarterly schedule of any income and benefits that Cornett earned during the period from April 1, 1994 through December 30, 1995, and any expenses reasonably incurred in the obtaining of the employment generating this income.

(c) Copies of Cornett's Federal Income Tax Return Form 1040 for 1994 and 1995.

(d) A detailed and itemized list of each and every expense incurred in bringing the complaint, the dates incurred and the provider of the good and service provided.

(e) Documentation for each requested expense such as bills, invoices, receipts or affidavits.

(f) For any attorney fee claimed, the identity of each attorney providing such service and the date, time, duration and nature of the service provided.

(g) For any attorney who provided services on behalf of Cornett, evidence that the hourly rate for services incurred is comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

(5) Counsel for META shall, no later than 15 days after receipt of a copy of the submission referred to in paragraph (4), submit to the Hearing Officer and counsel for Cornett:

(a) The information specified by Cornett's counsel as necessary for a more accurate calculation of back pay and benefits.

(b) A response to the submission by Cornett's counsel that is limited to the reasonableness and accuracy of the calculations set forth in that submission, including the assumptions underlying those calculations.

(6) Counsel for Cornett shall, no later than seven days after receipt of a copy of the submission referred to in Paragraph (5), submit to the Hearing Officer and counsel for META either a response to that submission or notification that they do not intend to respond.

(7) This is an Initial Agency Decision that shall become the Final Decision of the Department of Energy unless, within five days of its receipt, a written request for review of this Decision and/or the Interlocutory Decisions issued under Case Nos. VWZ-0006 and VWZ-0007 by the Secretary of Energy or her designee is filed with the Assistant Inspector General for Assessments.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date:

1. 1/ The purpose of the PEIS was, inter alia, to evaluate alternatives for the treatment, storage and disposal of radioactive and other hazardous wastes and explain the policy decisions of the DOE's Office of Environmental Restoration and Waste Management. See DOE Contract No. DE-AC01-91EM40002, Attachment B; META, Inc., 26 DOE 87,501 (1996) (Motion to Dismiss).

2. 2/ In October 1993, the University of Chicago, the contractor which operates Argonne National Laboratory (ANL), a DOE facility, contracted with META to continue to provide technical support regarding the development of the PEIS. See ANL Contract No. 34006426.

3. 3/ The OCEP investigation included the acquisition and analysis of relevant documents and the conducting of on-site and telephone interviews. Summaries of the interviews are contained in the OCEP Report.

4. CERCLA is often referred to as Superfund.

5. 5/ Berger was a principal subcontractor on the PEIS project and its employees performed essentially the same types of work as META employees. In some cases Berger employees supervised META employees and in some cases META employees supervised Berger employees. See Transcript of October 29-31, 1996 Hearing (Tr.) at 379-80; OCEP Ex. 18E.

6. Time discounting is a mathematical methodology in which calculated risks to future generations of individuals are reduced.

7. Tardiff was employed on the PEIS project by META beginning in September of 1993. Tr. at 394.

8. 8/ Although not indicated in the April 30 submission, Complainant requested the hearing to contest the level of relief proposed in the OCEP Report. See Complainant's Pre-Hearing Submission at 6-7 (October 11, 1996).

9. 9/ Cornett's hearing request was assigned OHA Case No. VWA-0007 and META's request was assigned Case No. VWA-0008.

10. 10/ Although the interlocutory proceedings in this case have been assigned separate OHA case numbers, all submissions and determinations are part of the record of Complainant's whistleblower complaint case.

11. In accordance with the Part 708 regulations, in arriving at this finding, it was not necessary for me to make any determination on the validity of Complainant's arguments concerning the data or methodologies that should be included in the PEIS and I have not made any such determination.

12. In its Report, OCEP did not make any finding as to whether Complainant's disclosures involved a violation of any law, rule or regulation under Section 708.5(a)(1)(i). See Report at 7-8. In his Pre-Hearing Submission, Complainant did not take issue with OCEP's limiting its disclosure finding to Section 708.5(a)(1)(ii) (danger to public health or safety). Nevertheless, the record is replete with communications in which Complainant either alleges violations of environmental laws and regulations or proposes methodologies to bring the PEIS process within what he believed to be the requirements of those laws and regulations. See, e.g., Pl. Exs. 9, 10.These laws and regulations are directly related to public health and safety. See, e.g., 42 U.S.C. 6901 (b) (Congressional findings with respect to the environment and health in the Resource Conservation Recovery Act (RCRA)).

13. Although the AHWG Report reviewed allegations made by Complainant after his termination, the allegations by and large involved the subject matter of his alleged disclosures.

14. 10^{-4} is a scientific notation representing 1×10^{-4} or 0.0001. Likewise, 10^{-5} represents 1×10^{-5} or 0.00001 and so forth.

15. Although OCEP Ex. 5 is dated January 14, 1993, it clearly was prepared in 1994.

16. In view of the fact that META was responsible for overall management of the PEIS project and that there was no operational distinction between META and Berger employees, see supra note 5, I find that META is responsible for reprisals against the Complainant made by Berger managers and supervisors.

17. Although Complainant testified on direct examination that the meeting occurred "about January 8," on

cross examination he was more specific and stated "January 10," a date for which there is considerable support in the record.

18. Although the "Contact" report is included in the same exhibit as the January 10, 1994 Progress Report, it is a totally separate document.

19. In a post hearing submission, counsel for META asserts that the "regulation in question does not prohibit firing an employee for monopolizing discussions [or] having bad manners . . . ." This may be true, but irrelevant since throughout this proceeding META has never claimed that Complainant was terminated for those reasons. A fortiori, META has not made a clear and convincing showing that Complainant would have been terminated for those reasons in the absence of his protected disclosures.

20. META has also not convinced me that the other 60 or so persons hired in the six months prior to Complainant's termination were better qualified to work on the PEIS project than Complainant.

21. Statements quoted from the OCEP Report are from the investigator's account of oral statements made by the persons interviewed and are not direct quotes from the interviewee.

22. META has also not explained why, if Complainant was laid off solely as part of a plan to reduce personnel out of financial considerations, its overall personnel numbers on the PEIS project appear substantially the same for months after the decision was made to terminate 10 employees on the PEIS project. While the firm's full time equivalents (FTE) calculations for the PEIS project show a decrease in the two months after the Tucson meeting (March and April 1994), from May through July, the FTE calculation exceeded the February figure and remained at or slightly below the February figure during the following three months. See OCEP Ex. 75 (Schedule of PEIS Monthly Expenditures).

23. Complainant testified that he tried without success to learn more about the possible job from META's Arlington office. Tr. at 128-29

24. While Complainant has alleged that the termination of the other nine META/Berger employees was a mere pretext to disguise the real reason for his termination, I find no evidence substantiating this assertion.

25. It is unclear from Complainant's testimony whether his information about Borghi was current as of the date of the hearing or as of the spring of 1996.

26. As indicated above, neither the EPA nor the AID contracts came through, and, according to META, the firm had no contracts other than the PEIS one that required Complainant's expertise. OCEP Ex. 74 at 10 (META's Response to OCEP's January 24, 1996 Request for Information # 6c). Although META suggests that Complainant may have been affected by PEIS staff reductions in 1994, id. at 11, the record indicates that the vast majority of the reductions occurred in 1995, after Segal left. See OCEP Ex. 75 (PEIS Monthly Expenditures). In view of Complainant's interest in the PEIS project there is also no basis for finding that Complainant would have voluntarily left META before December 1995.

27. As I indicated at the hearing, Complainant will have to verify his statement that he has had no regular income since his termination from META.

28. At the hearing, Complainant also stated that he had borrowed money from his father to pay for his living expenses and requested compensation for the loss of interest income that his father incurred as a result. Tr. at 122, 124-25. For the reasons stated above, I also will deny this claim.

29. I note however that the Secretary of Energy's authority to grant relief under Part 708 appears more extensive than that granted to a hearing officer. See 10 C.F.R. 708.11(c) (the Secretary may grant "such other relief as is necessary to abate the violation and provide the complainant with relief").

30. To simplify the calculation of interest, this schedule should be based on the assumption that Cornett

would have been paid for the last 10 days of March 1994 in April, but payment for the period ending December 31, 1995 would have been on that date.

Case No. VWA-0012

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Ronny J. Escamilla

Date of Filing: June 13, 1996

Case Number: VWA-0012

This Decision involves a whistleblower complaint filed by Ronny J. Escamilla (Escamilla) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. For a three-month period in 1993, Escamilla was employed by Systems Engineering & Management Associates, Inc. (SEMA), a DOE subcontractor, at DOE's Rocky Flats Plant (Rocky Flats). During his brief tenure at SEMA, Escamilla alleges that he made disclosures of waste and mismanagement to various managers at Rocky Flats. Escamilla contends that these disclosures resulted in his being harassed in the workplace and ultimately terminated.

I. **Background**

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed to a DOE official or to a DOE contractor, information that the employee in good faith believes evidences, among other things, fraud, mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. 708.5(a)(1)(iii). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee. See David Ramirez, 23 DOE 87,505, aff'd, 24 DOE 87,510 (1994).

B. **Factual Findings**

Many of the facts in this case are contested. My findings of fact set forth below are based on (1) the entire record developed in the case, including the Office of Contractor Employee Protection (OCEP) investigative file, all pleadings submitted by the parties and the transcript of the September 24, 1996 hearing, and (2) my observations of the witnesses' demeanor at the hearing and my concomitant determinations regarding those witnesses' credibility.

In October 1992, EG&G Rocky Flats, Inc. (EG&G), then the prime management and operating contractor at Rocky Flats, conducted a study of three computer systems to determine which system best met Rocky Flats' engineering needs in view of that facility's mission change from production to environmental clean-up and restoration. See Exhibit (Ex.) 1 to the Report of Investigation.(1) After an extensive analysis of these computer system options, EG&G management concluded that ComputerVision (CV) would best meet the functional requirements of its Engineering & Technical Services (E&T) Group. Id.

To assist the E&T Group in making the transition to the CV system, EG&G turned to SEMA, one of its subcontractors that was tasked with providing skilled computer support personnel to EG&G. See Transcript of September 24, 1996 Hearing at 32-33 (hereinafter Tr.). SEMA, in turn, placed a newspaper advertisement seeking, inter alia, a "CAD/CAM Engineer/Technician" who could provide "user training and support, productivity tool development and file translation" from AC to CV. See Ex. 2. The advertisement specified that applicants must have experience with ComputerVision. Id.

Mr. Escamilla responded to and was selected for the advertised position described above. See Ex. 5. Escamilla's qualifications for the position were set forth on his résumé as: two Bachelor of Science (B.S.) degrees, one in mathematics and the other in psychology; and experience with both AC and CV systems. See Ex. 3. When Escamilla reported to work at Rocky Flats on August 10, 1993, (2) he was required to fill out a number of forms, including an Application for Employment and a Verification of Degree form. Escamilla completed the employment application, certified to the veracity of all the information contained in that document, and signed an acknowledgment that any false and misleading information given on his application or in his interview may result in discharge. Ex. 6. As Escamilla was completing the degree verification form, however, he orally advised Larry Dyer, the hiring official at SEMA, that he did not have a college degree. Ex. 43, 44. Dyer was apparently unconcerned about Escamilla's revelation because he knew SEMA could hire an applicant for the computer position who did not possess a college degree provided the applicant had sufficient prior relevant job experience. See Ex. 43 at 2. Dyer claims he never reviewed the paperwork Escamilla completed on August 10, 1993 but simply sent the documents to SEMA's corporate offices in Virginia for further processing. Id.

Almost immediately after Escamilla assumed his new position at SEMA, issues related to his work performance began to surface. During Escamilla's first two weeks on the job, the CV system failed. Ex. 46 at 2. When Escamilla was approached by EG&G management to explain why he was sitting by idly in the computer room instead of rebooting the CV system, he claimed at first that he was the AC person, not the CV person. Id. Escamilla subsequently admitted to EG&G management that he simply did not know how to reboot the CV system. Id.

As the weeks went on, EG&G personnel who had daily contact with Escamilla commented that Escamilla refused to perform many of his assigned day-to-day systems administration duties. See Ex. 42, 46, 51. Those co-workers who offered assistance to Escamilla during these times found Escamilla to be very defensive and unwilling to admit he needed help. Id., Finally, Mary Ann Gaug, the EG&G Manager to whom Escamilla reported, determined that Escamilla "had no knowledge of CV and was unable to do the general CV support tasks he was hired to do." Ex. 46. In an effort to find something for Escamilla to do to earn his pay, Gaug assigned him the task of writing a manual to document CV systems procedures. Id.

Meanwhile at staff meetings and in one-on-one conversations, Escamilla was openly challenging EG&G's decision to implement CV for its E&T Group. Ex. 44, 46, 47, 49, 51, and 54. Escamilla constantly argued that AC was a better system than CV, citing AC's less expensive cost as sole support for his contention. Id. During his employment with SEMA, Escamilla never offered any facts or data to support his preference for AC or explained how AC could meet the EG&G's engineering needs more effectively than CV. Ex. 52.(3) When Escamilla raised his views regarding AC directly to EG&G and SEMA management, both responded in a similar manner. Both advised him that (1) EG&G management had selected CV after a careful in-depth analysis of other computer systems; (2) he was hired to support CV, not reopen the debate about which computer system best suited EG&G's engineering needs; and (3) the matter was not open for further discussion. Ex. 43, 46. Without any other indicators, Escamilla construed these comments as

validating his perception of waste and mismanagement associated with the implementation of the CV system, concluding that management would not be asking him to refrain from discussing his concern if nothing were awry. Ex. 19 at 3.

Eventually, Escamilla's unyielding advocacy for the AC system and relentless attack on CV caused his co-workers to view him as an arrogant, opinionated person who (1) had no regard for those whose views differed from his own, (2) possessed limited knowledge about CV and consequently could not intelligently discuss the differences between AC and CV, and (3) supported AC because it was the only system he knew well. Ex. 42, 46, 47, 51, 52. As a consequence, many of Escamilla's co-workers avoided him and ignored his opinions. Ex. 52. Conversely, Escamilla viewed his co-workers as combative and attributed their seemingly negative attitude towards him as a direct result of his revelations of waste. See Ex. 21 at 1; see also Ex. 44 at 3.

Escamilla's manner of communicating his views regarding CV also led to conflict in the workplace. Only five weeks into Escamilla's employment, Escamilla and another SEMA employee, Michael Glanert, became embroiled in an altercation related, in part, to Escamilla's views on CV. Ex. 19, 43, 54. The altercation culminated in Glanert accusing Escamilla of acting unprofessionally and using obscene language and Escamilla accusing Glanert of using racial slurs against him. Ex. 54. Ultimately, this incident formed the basis of an internal Equal Employment Opportunity (EEO) Complaint that Escamilla filed with SEMA.[(4)] It was during the course of this internal EEO investigation that SEMA's corporate headquarters in Virginia discovered for the first time that Escamilla had falsified his résumé and his employment application.[(5)] Ex. 54 at 3.

In the weeks that followed, Escamilla's work performance failed to improve. Those who reviewed Escamilla's drafts of the CV systems procedures manual opined that the drafts were written poorly from a grammatical standpoint and were technically inaccurate, jumbled, and confusing. See Ex. 51, 46, 42, 43, Tr. at 177. Both Larry Dyer, a SEMA Manager, and Maryann Gaug, an EG&G Manager, had discussions with Escamilla concerning his poor work performance. Ex. 43, 46.

On November 2, 1993, Dyer allegedly gave Escamilla a memorandum which reiterated Escamilla's job responsibilities and advised that if he were unwilling or unable to perform these responsibilities his services were no longer necessary. Ex. 18. According to Dyer, Escamilla responded by threatening that he would not go quietly. Ex. 18 at 7. Escamilla claims he was never given a copy of that memorandum. Ex. 44.

Escamilla filed a whistleblower complaint under Part 708 sometime between November 3 and 16, 1993.[(6)]

SEMA terminated Escamilla on November 19, 1993, citing two principal reasons: falsification of his educational credentials and poor work performance.

C. Procedural History

OCEP conducted an investigation into the allegations contained in Escamilla's Complaint and issued a Report of Investigation and Proposed Disposition on May 28, 1996. OCEP concluded in its Report that Escamilla had not met his regulatory burden as required by Part 708 and, as a consequence, was entitled to no relief.

On June 10, 1996, Escamilla submitted his request for a hearing under 10 C.F.R. 708.9 to OCEP. OCEP transmitted that request to OHA on June 13, 1996 and I was appointed hearing officer in this case on June 26, 1996.

Escamilla and SEMA filed pre-hearing briefs on July 31, 1996 and September 3, 1996, respectively. On September 24, 1996, I held the hearing in this case at the Rocky Flats Site in Golden, Colorado. At the conclusion of the hearing, I directed Escamilla and SEMA to file post-hearing materials to clarify certain

matters raised at the hearing. Escamilla submitted his post-hearing document on October 2, 1996; SEMA tendered its post-hearing statement on November 20, 1996. With the filing of SEMA's statement, I closed the record in this case.

II. Legal Standards Governing This Case

As noted above, the regulations set forth in 10 C.F.R. Part 708 provide an administrative mechanism for the resolution of whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the complainant and the contractor with regard to their allegations and defenses and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. 708.9(d). See Ronald Sorri, 23 DOE 87,503 (1993) (citing McCormick on Evidence 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F.Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence 339 at 439 (4th Ed. 1992). Under this standard, the risk of error is allocated roughly equally between both parties. Grogan v. Garner, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). In the present case, Escamilla must make two showings. First, Escamilla must demonstrate that he disclosed information to DOE, to SEMA, or to EG&G which he in good faith believed evidences gross waste or mismanagement. Escamilla can also show that he communicated to management his intention to file a Part 708 complaint. If Escamilla fails to meet this threshold burden, his claim must be denied. If Escamilla meets this burden, he must next prove that his disclosure was a contributing factor to his being harassed in the workplace and ultimately terminated. 10 C.F.R. 708.9(d); see Helen Gaidine Oglesbee, 24 DOE 87,507 (1994).

B. The Contractor's Burden

If Escamilla meets his regulatory burden as set forth above, the burden then shifts to SEMA. The regulations require SEMA to prove by "clear and convincing" evidence that the company would have terminated Escamilla even if Escamilla had not advanced his views regarding waste and mismanagement or announced that he had filed a complaint with DOE. "Clear and convincing" evidence is a much more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n. 3

III. Analysis

Escamilla contends that he made a series of disclosures related to EG&G's selection of the CV system for use at Rocky Flats. His disclosures fall into two categories: (1) those related to his allegations of waste and mismanagement, and (2) those announcing that he had filed a complaint. After reviewing the entire record in this case, and considering the credibility of the witnesses who testified at the hearing, I conclude as follows:

- Escamilla **has failed** to show by a preponderance of evidence that he disclosed information which he in good faith believed evidenced mismanagement or waste associated with the computer system he was hired to support;
- Escamilla **has shown** by a preponderance of evidence that he disclosed to SEMA the fact he had filed a complaint with DOE. Escamilla **has also proven** that the disclosure relating to the filing of his complaint was a contributing factor to his termination;

- SEMA **has proven** by clear and convincing evidence that it would have terminated Escamilla even if Escamilla had not disclosed to SEMA that he had filed a complaint with DOE.

Accordingly, I find that Escamilla is entitled to no relief under 10 C.F.R. Part 708.

A. Alleged Disclosures of Waste and Mismanagement

It is uncontested that Escamilla frequently voiced his opinion that EG&G's decision to implement the CV system was a faulty one, citing his belief that the AC system was a superior system. As discussed below, I find that Escamilla's vague allegations of mismanagement and waste associated with the CV computer system do not rise to the level of protected disclosures under Part 708.

1. Mismanagement

EG&G management decided to implement the CV system for its engineering needs after undertaking an examination and analysis of alternative computer systems. The reasons for management's decision are well documented in its extensive computer study. In fact, Escamilla's job existed only to facilitate the implementation of CV at Rocky Flats and for no other reason. In addition, Escamilla knew when he applied for and accepted the job with SEMA that his job would involve supporting the CV system, not any other system. (7) During his employment with SEMA, Escamilla implied, through his constant criticism of the CV system, that EG&G's selection and implementation of that system constituted mismanagement. There is not one scintilla of evidence in the record which supports a finding that Escamilla disclosed information which he, in good faith, believed constituted mismanagement.

I am convinced from the record that Escamilla's communications to management regarding the CV system simply reflected his disagreement with EG&G's decision to acquire and implement CV and nothing more. It is not disputed that Escamilla was more familiar with AC than CV and that he strongly preferred the AC system. The weight of the evidence in the record indicates that Escamilla was not as technically proficient in the use of CV as he should have been to perform the duties for which he was hired. His inability to reboot the CV system when it faltered, his inability to draft a technically correct CV manual, and his inability to perform his day-to-day systems administration duties support this finding. It is difficult for me to imagine how someone who could not perform his day-to-day computer support activities in a competent fashion could carefully evaluate and reject the multiple factors considered by EG&G management in deciding which computer system to utilize for its engineering division. While Escamilla would like me to believe that he was an expert in CV and hence able to opine intelligently about the virtues of all computer systems, I find the weight of evidence to suggest otherwise. Moreover, I find that EG&G's selection of the CV system was a reasonable exercise of its discretion. My decision to defer to EG&G on its selection of the CV system is also bolstered by the Deputy Secretary of Energy's determination in Mehta v. Universities Ass'n, 24 DOE 87,514 (1995)(Mehta). In the Mehta decision, the Deputy Secretary reversed the Initial Agency Decision which involved a complainant who made alleged protected disclosures of mismanagement. Particularly, the complainant alleged that procedures governing his access to a computer should be changed. The Deputy Secretary held that:

Equating a particular type of disagreement to "mismanagement" as contemplated by the "whistleblower" regulations demands a careful balancing lest the term encompass all disagreements between a contractor and its employees. While a conclusion with respect to the merits of a particular claim of mismanagement may not be required in all cases, there must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, at the same time granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork.

Id. at 89,065. For all the foregoing reasons, I find that Escamilla's disagreement with EG&G management's decision about the kind of computer system EG&G's engineering group would utilize does not rise to the level of a protected disclosure regarding mismanagement as contemplated by the Part 708 regulations.

2. Waste

Escamilla's criticism of the CV system focused on the purported waste inherent in EG&G's intended use of a computer system which was, in Escamilla's opinion, more expensive than the AC system. However, Escamilla's charges of waste were, at all times, general and unsubstantiated. He never, for example, articulated why AC better suited EG&G's engineering needs, or why he believed the use of the CV system constituted a gross waste of funds. Ex. 52. At the hearing, Escamilla was given the opportunity to clarify precisely why he believed his claims regarding the CV system rose to the level of gross waste. His testimony on this issue centered again on his general assertions that the AC system was cheaper and more efficient than CV. Tr. at 349 and 350. When asked to explain some of the benefits of utilizing the CV system, Escamilla responded " as far as cost goes, I can prove to you that Autocad is a lot cheaper and efficient." Id. However, he failed to communicate any fact to support his general assertion of waste.

Assertions of waste in the most general sense do not satisfy the regulatory standard set forth in Part 708. See Francis M. O'Laughlin, 24 DOE 87,505 (1994). The regulations provide, in relevant part, that:

A DOE contractor covered by this part may not discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, intimidate, or otherwise discriminate against any employee because the employee . . . has [d]isclosed . . . information that the employee in **good faith** believes **evidences** . . . gross waste of funds . . .

10 C.F.R. 708.5(a)(1)(iii) (emphasis added). Based on the record and my serious reservations about Escamilla's credibility, I find that Escamilla's vague allegations of waste based simply on his ethereal opinion do not rise to the level of a protected disclosure. In this regard, I am unable to conclude that Escamilla disclosed information which he in good faith believed evidenced gross waste of funds. The concept of good faith is closely linked to one's honesty. In this case, Escamilla's honesty is highly questionable. First, he impugned his own integrity by knowingly and willingly falsifying his educational qualifications. Then, at the hearing he continued to undermine his credibility by refusing to acknowledge that his falsifications and misrepresentations were serious matters. Instead, he attempted to divert focus from his actions by providing evasive responses and non-sequiturs to questions relating to his falsifications. The following excerpts from the transcript highlight my concern in this regard:

Q: . . . the Record reflects that you erroneously stated on a number of documents, including your resume and your application . . . that you had . . . two Bachelor of Science degrees. I'd like you to address that issue.

A: I have one. Do you want to see it?

Q: You have a Bachelor of Science degree?

A: I have a Degree. It doesn't say "Bachelor of Science," it says

"equivalence of."

Q: . . . Did you . . .put anything in writing which said, "the equivalent of?"

A: It was never during the interview process, the mention with Larry Dyer where I have the degree never became an issue.

Tr. at 286-87. I find equally as troubling other hearing testimony where Escamilla provided conflicting statements. For example, Escamilla implied at one point that Larry Dyer told him to state on his employment forms that he had a B.S. degree because Dyer knew he was working towards a degree. Id. at 290. In response to the direct inquiry whether Dyer told him to misrepresent his educational credentials, Escamilla responded, "He said, 'Go ahead and put it down, You're going to be working on it. It doesn't matter.'" Id. When asked more pointedly whether Dyer told him to lie, Escamilla responded, " He didn't

say, he said, 'Put that you're working toward one down.'" Id. at 316-17. In addition, under questioning, Escamilla revealed that he had misstated facts in Exhibit 14 relating to an incident with his colleague, Glanert. Id. at 321. Escamilla's explanation for the misleading statements was that he was emotionally upset when he wrote the subject document to his supervisor and, as a result, could not "think straight." Id. In addition, I find it significant that Escamilla lied about other matters at the hearing. When I asked him why he stated on his résumé and employment application that he had a B.S. degree, Escamilla responded "I didn't put it on the Application." Id. at 287. The employment application, on its face, reveals that Escamilla represented he had a B.S. degree from Metro State College. See Ex. 3. Another instance that demonstrates Escamilla's lack of candor involved his representation that SEMA hired him to support the AC system. Tr. at 21. The advertisement to which Escamilla responded, on its face, undermines Escamilla's testimony concerning this matter, as do other statements by management officials to Escamilla regarding his position description. See Ex.2; Ex. 46 at 3; Ex. 18; Ex. 43 at 1, 7, 10.

In addition, as noted in footnote 3 supra, I refused to entertain other contentions Escamilla raised during the proceeding because I determined that he never raised them during the course of his employment with SEMA, despite his argument to the contrary. Finally, Escamilla confused the record in this case by interjecting allegations of waste and mismanagement stemming from his disagreements in 1990-91 with L&M, a former DOE subcontractor at Rocky Flats that has no relationship with SEMA. Tr. at 19-20, 237, 275. At various times during the hearing, I explained to Escamilla that the 1990-91 issues were not relevant to this proceeding and attempted to refocus his line of argument. Id. at 20, 240-42, 258. Escamilla refused to accept my direction and continued to attribute to SEMA allegations of waste and mismanagement that Escamilla allegedly witnessed two years earlier as an employee of L&M. Id. at 275. Escamilla exclaimed at one point during the hearing, "I won't let them do to me what they did before." Id. This comment and others like it caused me to consider that the anger and hostility Escamilla was exhibiting and the allegations he was advancing might be misplaced. In conclusion, my observations of Escamilla during the 10-hour hearing and the record in this proceeding convince me that Escamilla was not acting in good faith when he raised his general assertions of waste against SEMA.

For all the reasons set forth above, I find that Escamilla has not met his threshold burden of establishing by a preponderance of evidence that he disclosed information which evidenced his belief in good faith that there was an instance of gross waste of funds.

B. Alleged Disclosure of Complaint Filing

1. Prima Facie Case

Escamilla alleges that on November 16, 1993, he advised Larry Dyer, his SEMA Manager, that he "was frightened by the hostile work environment and [he] felt the appropriate thing to do was to file an OCEP complaint with DOE." Ex. 44. Escamilla contends he told Dyer on that date that he believed his problems in the work environment stemmed from his disclosures of waste and mismanagement. Id. Dyer recalls that during the November 16, 1993 meeting Escamilla told him he had filed a harassment complaint with DOE. Ex. 43. According to Dyer, after the November 16 meeting, Dyer called SEMA's corporate office to tell them about, among other things, Escamilla's filing of a complaint. Id. at 8. Immediately thereafter Dyer called Gaug, however, he does not recall if he told her about Escamilla's complaint filing. Id. Gaug stated that she believes Escamilla told her directly that he had filed a complaint with DOE concerning waste or harassment. Ex. 46. Gaug added that she was not surprised because Escamilla had asked her for an OCEP brochure. Id.

The filing of a Part 708 complaint constitutes a protected disclosure pursuant to 10 C.F.R. 708.5(a)(2). The regulations specifically provide as follows:

A DOE contractor covered by this part may not discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, intimidate, or otherwise discriminate against any employee because the employee (or any person acting pursuant to a request of the employee) has -

(2) Participated . . . in a proceeding conducted

pursuant to this part;

10 C.F.R. 708.5(a)(2). Even if this provision did not apply to Escamilla's disclosure, the OCEP Director had the discretion to accept the complaint for processing under 10 C.F.R. 708.2(c). See Report of Investigation at 13, n.12.

The weight of the evidence in this case indicates that prior to his termination, Escamilla had communicated to SEMA that he had filed a Part 708 complaint with the DOE. Therefore, I find that Escamilla has established a prima facie case that he made a protected disclosure to a DOE contractor. I turn now to whether Escamilla has proven that this protected disclosure was a contributing factor to his being terminated.

2. Contributing Factor

A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." Ronald A. Sorri, 23 DOE 87,503 (1993) citing McDaid v. Dept't of Hous. and Urban Dev., 90 FMSR 5551 (1990); see also County v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) (County). In addition, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." County, 886 F. 2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that all three persons in Escamilla's management chain, i.e., Gaug, the on-site EG&G Manager; Dyer, the on-site SEMA Manager; and Anderson, SEMA's Senior Vice-President, had actual or constructive knowledge that Escamilla filed a Part 708 complaint with the DOE prior to his termination on November 19, 1993. Gaug stated that she knew in early November 1993 that Escamilla had complained to DOE about either waste in connection with a computer system and/or engineering practices or harassment. Ex. 46. She stated she was not surprised Escamilla complained to DOE because he had asked her for an OCEP brochure earlier. Id. Dyer admits that Escamilla told him on November 16 that he had filed a harassment complaint with the DOE and that he spoke with Gaug immediately thereafter. This fact, combined with Dyer's frequent communications with Gaug prior to and on November 16, persuades me that Dyer had at least constructive knowledge that Escamilla had filed a Part 708 action. As for Anderson, the ultimate decision maker with respect to SEMA terminations, he told OCEP investigators that he heard Escamilla had filed a complaint with DOE regarding harassment and waste relating to some sort of software prior to Escamilla's termination. Ex. 40 at 3. At the hearing, however, Anderson testified he did not know about Escamilla's Part 708 filing until after he had terminated him. Regardless of which version of Anderson's recollection is accurate, I find he had either actual or constructive knowledge that Escamilla had filed a Part 708 action.[(8)]

I find that a reasonable person could conclude that Escamilla's protected disclosure, i.e., that he had filed a complaint, was a contributing factor to his termination in view of management's knowledge of Escamilla's complaint filing and the temporal proximity between Escamilla's revelation of his complaint filing and his termination. For this reason, I have determined that the burden shifts to SEMA to prove by clear and convincing evidence that it would have terminated Escamilla even if Escamilla had not disclosed that he filed a Part 708 complaint.

C. SEMA's Burden

SEMA maintains that it based its decision to terminate Escamilla on two principal facts: (1) he falsified employment documents and (2) he performed poorly on the job. There is no dispute that Escamilla knowingly falsified his resume and employment documents and that he knew he could be terminated for so doing. Escamilla's varied attempts to negate the import of these falsifications has no impact on my

ultimate determination that his falsifications constituted an independent ground for his termination. For example, I was not swayed by Escamilla's attempts to minimize his falsification by offering excuses for his action at the hearing. See Tr. at 286-302. As for Escamilla's oral statement to Dyer regarding his lack of a degree, I observe that Escamilla was still in possession of the falsified documents at the time he made his revelation to Dyer and yet made no attempt to correct the falsified documents. Further, I observe that Escamilla continued to compound his falsification during and even after his term of employment by trying to perpetuate the myth that he held two college degrees. Ex. 14, Complainant's Pre-hearing Submission; see also note 4. Finally, I also note that SEMA's corporate policy is to terminate persons who are found to have falsified employment documents. In fact, in the only other situation involving an employee who falsified his educational credentials, SEMA was preparing to implement its policy when the employee quit. Tr. at 46; Ex. 54 at 4; Ex. 39. For all these reasons, I am convinced that one of the chief reasons SEMA terminated Escamilla was his falsification.

I am also convinced by the evidence in the record that Escamilla's work performance would have been an independent ground for terminating him. The record is replete with evidence from EG&G and SEMA management officials and co-workers that Escamilla lacked the ability to perform his job at the technical level expected of him. Ex. 46, 50, 51, 42. For example, Escamilla was unable to reboot the system for which he was hired to support and was unable to write a quality procedures manual. These duties were basic requirements for the job for which Escamilla was hired. The record indicates that management gave Escamilla several opportunities to prove himself in the workplace after orally advising him that his job performance was not satisfactory. For example, Gaug decided Escamilla was not capable of performing basic CV support skills; however, she assigned him to draft a manual outlining system administration procedures. Escamilla failed dismally at this task as well. Moreover, Escamilla was a probationary employee during his brief tenure with SEMA. SEMA's company manual, a copy of which Escamilla placed into evidence at the hearing, advises employees that they are on probation for six months and that SEMA can terminate them at its discretion without notice during this period. Escamilla Hearing Exhibit 3. SEMA has convinced me that Escamilla's poor job performance during his probationary period would have resulted in the company discharging Escamilla under the terms of its corporate policy.

Based on the foregoing, I have determined that SEMA has proven by clear and convincing evidence that it would have terminated Escamilla even if he had not advanced his communications that he filed a Part 708 complaint. Therefore, I find Escamilla is entitled to no relief under Part 708.

IV. Conclusion

As set forth above, I determined with respect to Escamilla's allegations of waste and mismanagement, that he has not met his regulatory burden as required by 10 C.F.R. Part 708.5. Thus, I did not analyze whether those disclosures were contributing factors to the alleged harassment Escamilla purportedly experienced and to his termination. However, with respect to Escamilla's allegation that he was terminated for communicating to management that he had filed a Part 708 complaint, I determined that he has met his burden of proof of establishing by a preponderance of the evidence that this was a disclosure protected under 10 C.F.R. Part 708. I also found that Escamilla's disclosure was a contributing factor in his termination. However, I found that SEMA has proven by clear and convincing evidence that it would have terminated Escamilla absent his disclosure. Accordingly, I conclude that Escamilla has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted under 708.10.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Ronny J. Escamilla under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Assistant Inspector General for

Assessments, Office of the Inspector General, Department of Energy.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date:

1. The three computer systems EG&G management examined in detail were the following: Computer-Assisted Three-dimensional Interactive Application (CATIA); ComputerVison (CV); and AutoCAD (AC). Exhibits 1, 46.

2. For the record, Escamilla was employed from 1990-1991 at Rocky Flats by another DOE subcontractor, L&M Technologies, Inc. (L&M) Ex. 3. According to Escamilla, L&M terminated him for voicing his disagreement with the CATIA computer system. Ex. 44

3. In his Statement to OCEP investigators 16 months after his termination, Escamilla advanced eight reasons why AC was an economical computer system which was efficient and adaptable to EG&G's future use. Ex. 44 at 5. There is no evidence in the record to indicate Escamilla ever discussed AC as being efficient and adaptable to EG&G's future use or articulated any of these eight reasons to anyone during the term of his employment with SEMA. I will therefore accord no weight in this Decision to these belated contentions.

Similarly, I will not consider Escamilla's unsupported assertion that he challenged the CV system because of safety concerns. During the hearing, Escamilla claimed for the first time that he advocated the use of AC instead of CV out of concern for the safety of workers at Rocky Flats . Tr. at 339-348. When asked at the hearing why he never articulated that concern orally or in writing previously, Escamilla responded, " Okay, is it wise to put all of your eggs in one basket?. . . am I going to tell you everything that I'm going to do? I mean, would that be wise?" Tr. at 340. Based on this response and my reservations about Escamilla's credibility at the hearing, I do not believe Escamilla ever raised the safety issue during the course of his employment with SEMA.

4. SEMA investigated the EEO complaint and found no evidence of discriminatory behavior, harassment, or improper conduct by Glanert or any other SEMA employee against Escamilla. Ex. 17. SEMA memorialized its findings in a letter dated October 5, 1993 to Escamilla. Id.

5. The altercation between Escamilla and Glanert also involved Escamilla's refusal to take direction from Glanert. Ex. 43 at 5. Escamilla advised Fredericka Wall, the Human Resources Manager at SEMA who conducted the internal EEO investigation, that Glanert should not be supervising him as Escamilla had "a good education and lots of experience." Ex. 54 at 2. It was these remarks that prompted Ms. Wall to review both Escamilla and Glanert's personnel files. Wall learned from the files that Glanert had a Master's Degree while Escamilla did not possess a college degree. Id.

6. The record is unclear regarding the exact date Escamilla filed his Part 708 Complaint. Escamilla maintains he filed the Complaint on November 3, 1993. Barbara Wade, the Manager of the Rocky Flats Whistleblower Program during the period in question, advised OCEP investigators that Escamilla filed his Complaint with her office shortly after his termination on November 19, 1993. Ex. 53 at 2. At the hearing, Wade stated that the OCEP statement accurately reflected her recollection of dates at the time. Tr. at 200. However, she also testified that Escamilla "was terminated real close or after submitting the complaint," suggesting the possibility that Escamilla might have given her the whistleblower complaint prior to his termination. Id. at 199. Unfortunately, the Rocky Flats Whistleblower office did not maintain a system to log in complaints as they were received. Id. at 204-205. Consequently, Rocky Flats cannot confirm the date of filing for Escamilla's complaint.

Other evidence in the record persuades me, however, that Escamilla filed his complaint sometime between November 3 and November 16, 1993. Larry Dyer, Escamilla's Manager at SEMA, acknowledged that Escamilla told him on November 16, 1993 that he **had filed** a harassment complaint with DOE. Ex. 43 at 8. Gaug, Escamilla's EG&G Manager, stated that "**in early November, Escamilla complained** to DOE about either waste of government money in regards to the computer system and/or unsound engineering practices or harassment because of his ethnicity." Ex. 46 (emphasis added). She further stated that she believed Escamilla complained to DOE because he had asked for an OCEP brochure earlier. Id. In addition, Wall recounts that on the day Escamilla was fired, he called her and stated his view that he was fired because he **had filed** a complaint with DOE.

7. Curiously, on numerous occasions, Escamilla asserts that he was hired to support AC not CV. These assertions are simply false.

8. If Anderson's earlier recollection of events is accurate then he had actual knowledge of the complaint filing. If his hearing testimony is accurate, then Anderson had constructive knowledge through Dyer, the person whom Anderson entrusted with overseeing SEMA's Rocky Flats operations.

Case No. VWA-0014

February 5, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner:Charles Barry DeLoach

Date of Filing:November 1, 1996

Case Number: VWA-0014

This Decision involves a whistleblower complaint filed by Charles Barry DeLoach (DeLoach) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. For a four year period, DeLoach was employed by Westinghouse Savannah River Company (WSRC), a DOE management and operating contractor, at DOE's Savannah River site (Savannah River). DeLoach alleges that during his tenure at WSRC, he made disclosures regarding health and safety issues to various supervisors or managers at Savannah River. On March 19, 1993, DeLoach was fired after an investigation by Wackenhut Services, Inc. (Wackenhut), a subcontractor at Savannah River, revealed that DeLoach had stolen government property with an estimated value of approximately $48,000. DeLoach contends that his safety and health disclosures were the true cause of his termination.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed to a DOE official or to a DOE contractor, information that the employee believes in good faith evidences, among other things, substantial and specific danger to employees or public health or safety. See 10 C.F.R. § 708.5(a)(1)(ii). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with

the DOE. The regulations entitle these employees to independent fact-finding and a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer, followed by an opportunity for review of their case by the Secretary of Energy or his designee. See David Ramirez, 23 DOE ¶ 87,505, aff'd, 24 DOE ¶ 87,510 (1994).

B. Factual Background

In 1981, DeLoach began working at Savannah River. In April 1989, WSRC became the prime management and operating contractor at the site. During his employment with WSRC, DeLoach made various Quality Improvement Safety Suggestions between 1990 and 1993. He also alleges that during that same time period, he made several other disclosures relating to safety and health concerns. These issues pertained to the following items: (1) leaking oil drums; (2) excessive radiation in his work area allegedly causing him to have high cesium levels in his whole body counts; (3) the lack of a fire extinguisher in the welding area; (4) being required to weld around combustible materials; (5) dirty drinking water; (6) excessive noise in his work area; (7) faulty welds and the use of uncertified welders; (8) misinformation allegedly provided by an official at a safety class regarding the cause of an earlier safety incident; (9) an accident in which a cabinet fell on him; and (10) his alleged exposure to asbestos and WSRC's resulting refusal to include a report of that incident in his medical files. DeLoach contends that all of these incidents caused him to be labeled as a "troublemaker," which in his view, resulted in his eventual termination.

On February 25, 1993, an anonymous person, who identified himself only as a WSRC management official, telephoned WSRC's Employee Concerns Office to report that he had overheard another employee in his carpool state that DeLoach had been stealing tools from the Savannah River site and possessed at his residence "orange tools," i.e., tools that had been exposed to radiation. See Ex. 6 (interview with Employee Concerns employee who took call); Ex. 25 (Notice of Employee Concern).(1) On March 8, 1993, the concern was forwarded to Wackenhut which began an investigation. DeLoach was informed of the investigation on March 12, 1993 and gave permission for Wackenhut and state police to search his home. Pursuant to that search, approximately $12,000 of suspected DOE equipment was seized. When a second search was conducted at DeLoach's house, $36,000 worth of additional equipment was seized. Although serial numbers had been removed from many of the tools, Wackenhut was able to determine that most of these tools were government property. DeLoach admitted having stolen much of the property.(2)

Upon hearing of the results of the investigation, WSRC President Ambrose Schwallie, based on the recommendation of a WSRC committee, decided to fire DeLoach. That termination occurred on March 19, 1993. Subsequently, DeLoach met with the WSRC Employee Concerns Office regarding some of the issues he claims were protected disclosures concerning health and safety at Savannah River. That office conducted an investigation of the complaints raised by DeLoach at that meeting and reported its findings to him in a letter dated May 24, 1993. Ex. 22. DeLoach then filed his whistleblower complaint dated February 26, 1994.

C. Procedural History

The DOE's Office of Contractor Employee Protection (OCEP)(3) conducted an investigation into the allegations contained in DeLoach's complaint and issued a Report of Investigation and Proposed Disposition on September 30, 1996. OCEP concluded in its Report that DeLoach had not met his burden as required by Part 708 and, as a consequence, was not entitled to any relief. Specifically, OCEP found that although DeLoach had shown that he made protected disclosures to officials at WSRC, he had failed to show that those disclosures were a contributing factor to any adverse personnel action taken against him by WSRC. It further found that there was clear and convincing evidence that, even in the absence of the disclosures, WSRC would have terminated DeLoach.

On October 8, 1996, DeLoach submitted his request for a hearing under 10 C.F.R. § 708.9 to OCEP. OCEP transmitted that request to OHA on November 1, 1996 and I was appointed hearing officer in this case on November 6, 1996. On December 17, 1996, I held the hearing in this case in Aiken, South Carolina. DeLoach testified for himself and WSRC presented the following witnesses: Meredith Metz, Manager of the Employee Concerns Office, WSRC; Betty Brunson, Human Resources Representative, WSRC; Mack Underwood, Chief Investigator, Wackenhut; Ambrose Schwallie, President, WSRC; Gary Cooper, Supervisor, WSRC; Benny Jackson, Maintenance Manager, WSRC; and Barry McDougal,

Maintenance/Work Control Liaison, WSRC. After the hearing, I directed WSRC to submit several documents in order to clarify certain matters raised at the hearing. WSRC submitted the last of these documents on January 6, 1997. With that filing, I closed the record in this case.

II. Legal Standards Governing This Case

As noted above, the regulations set forth in 10 C.F.R. Part 708 provide an administrative mechanism for the resolution of whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the complainant and the contractor with regard to their allegations and defenses and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 at 89,009 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)) (Sorri). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F.Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

In the present case, DeLoach must make two showings. First, DeLoach must demonstrate that he disclosed information to an official of DOE or to WSRC that he believed in good faith evidenced a substantial and specific danger to employees or public health or safety. See 10 C.F.R. § 708.5(a)(1)(ii); 10 C.F.R. § 708.9(d). If DeLoach fails to meet this threshold burden, his claim must be denied. If DeLoach meets this burden, he must next prove that his disclosure was a contributing factor to his termination. 10 C.F.R. § 708.9(d); see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994) (Oglesbee).

B. The Contractor's Burden

If DeLoach meets his burden as set forth above, the burden then shifts to WSRC. The regulations require WSRC to prove by "clear and convincing" evidence that the company would have terminated DeLoach even if DeLoach had not made protected disclosures. "Clear and convincing" evidence is a much more stringent standard than "a preponderance of the evidence"; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n.3.

III. Analysis

The parties contest many of the facts in this case. My findings of fact set forth below are based on (1) the entire record developed in the case, including the OCEP investigative file, all documents submitted by the parties and the transcript of the December 17, 1996 hearing and (2) my observations of the witnesses' demeanor at the hearing and my determinations regarding those witnesses' credibility.

After reviewing the entire record in this case, and considering the credibility of the witnesses who testified at the hearing, I conclude that DeLoach has shown by a preponderance of evidence that he disclosed information that he believed in good faith evidenced substantial and specific dangers to health and safety. I further conclude, however, that WSRC has proven by clear and convincing evidence that it would have terminated DeLoach even if DeLoach had not made protected disclosures to WSRC. Accordingly, I find that DeLoach is not entitled to relief under 10 C.F.R. Part 708.

A. Alleged Disclosures

As mentioned earlier, DeLoach alleges that he made a number of disclosures to WSRC officials between the time that WSRC assumed the contract to manage Savannah River in April 1989 and his termination in March 1993. DeLoach also made sixteen Quality Improvement Safety Suggestions (QISS), some of which relate to the same matters he contends were protected disclosures. Hearing Ex. 7.(4) One of the QISSs relates to DeLoach's complaint in 1990 that oil drums were leaking onto the ground. DeLoach testified that when building facility manager Wyatt Clark refused to address the problem, he called the state Department of Health and Environmental Control, which he said ordered WSRC to fix the problem. See Hearing Tr. at 16, 22-27. According to DeLoach, Clark then implemented DeLoach's suggestion to prevent the oil drums from leaking. DeLoach's allegation of having made this disclosure is confirmed by the record of his report to the WSRC Employee Concerns Office and by records of his QISS. See Hearing Exs. 6 and 7.

DeLoach also alleges that he complained several times during his employment with WSRC that a work assignment requiring welding on a cesium removal column caused him to have abnormal levels of cesium in his whole body count between 1989 and 1993. Hearing Tr. at 68-71, 76. He testified that in 1993, he was asked for three urine samples in two days and told he needed to be "chelated" to remove cesium from his body, although this procedure did not take place. Hearing Tr. at 73-76. He states that he complained about these cesium levels to supervisor Gary Cooper and managers Benny Jackson and Barry McDougal, as well as an unnamed Health Protection supervisor. Hearing Tr. at 70-71, 74. According to DeLoach, various WSRC employees told him that eating venison from the Savannah River area caused his high cesium levels. See also Ex. 22 (Report of WSRC investigation). He also claims that he was told that cesium was not detected in his body at the time of his termination. Hearing Tr. at 71. However, according to the WSRC Employee Concerns Office, cesium was detected in his whole body count at the time of his out-processing, as well as throughout his employment at Savannah River, but was considered by WSRC's Health Protection Office to be not an unusual level and consistent with the levels of other venison eaters from the Savannah River area. Ex. 22. at 11.

DeLoach stated that in 1990 he disclosed that there was no fire extinguisher in the welding area and complained about this to building facility manager Clark, who rejected his suggestion. Hearing Tr. at 17-18, 23. DeLoach also made a QISS regarding this matter and his suggestion to install a fire extinguisher was adopted. Hearing Ex. 7. DeLoach also noted that in October 1992, as well as several other times, he complained to a building facility manager, Ken Powell, about being assigned a job welding within fifty feet of combustible materials in an area where he and other employees could be injured. According to DeLoach, he refused to do the welding jobs until the combustible materials were removed. Hearing Tr. at 46-49.

DeLoach also alleges that at some time during his employment at the facility he complained to a building custodian, Burt Lancaster, about muddy drinking water at his worksite. Hearing Tr. at 28- 31. He also alleges that he complained to his supervisor (whose name he could not remember) and Lancaster regarding the level of noise in an area called the "cell" where he was required to work sometimes. Hearing Tr. at 34-36. According to DeLoach, the drinking water problem was corrected after two or three months. Hearing Tr. at 30. Eventually actions were also taken to abate the noise level in the "cell." Hearing Tr. at 35.(5)

DeLoach further alleges that he complained to Ken Powell, supervisor Ken Paradise, and manager Todd Wright that WSRC's use of uncertified welders was creating faults in the welds. Hearing Tr. at 39-42; Exhibit 1 at 6. He also asserts that in late 1992, a number of WSRC management employees, including Gary Cooper and Benny Jackson, were present when he corrected an instructor who gave what DeLoach believed to be incorrect information as to how a particular accident had happened at the plant sometime in the 1980's. Hearing Tr. at 62-64, 67.

DeLoach also notes that in either October or November of 1992, a storage cabinet fell on top of him when he opened one of the drawers. Hearing Tr. at 52. He stated that his supervisors, Gary Cooper and Ken Paradise, were immediately made aware of the accident. Hearing Tr. at 55-56. DeLoach claims that it occurred because the cabinet was not anchored to the wall or to other cabinets as required by safety rules and the cabinet's manufacturer. Hearing Tr. at 51. He stated that one day after the accident, the cabinet was anchored. Hearing Tr. at 58. The record indicates that DeLoach told Cooper and Paradise immediately after the accident that he was not injured and that none of them reported the incident as required by WSRC rules. He believes both Cooper and Paradise were reprimanded for their failure to report the incident and that this accident was therefore a further cause of resentment of DeLoach among WSRC management. Hearing Tr. at 60. WSRC's investigation that took place after DeLoach's termination concluded that Cooper, Paradise and DeLoach all improperly failed to report the incident. See Ex. 22 at 12.

DeLoach alleges that the last of his disclosures triggered his firing three months later. See Hearing Tr. at 135. The record indicates that in the evening of December 22, 1992, DeLoach entered building 241-58H in order to obtain welding rods to perform a job elsewhere on the site. While in the building, he saw three other employees working on a pipe and upon further inspection, believed there to be asbestos present on the pipe. Id. at 78.(6) DeLoach claims that he told the other employees and their manager, "Smitty" Smith, that he thought it was asbestos, and that it should be tested. DeLoach then left the area to complete his work shift. Id. at 80-81, 87-88. When he came back after completing his shift the following morning, he found the area roped off and was told that asbestos had been found.

According to DeLoach, he was told that morning by his supervisor, Gary Cooper, that he should remove all of his clothes in order for them to be destroyed, as a precautionary safety measure. Id. at 83. DeLoach also states that he told Cooper that morning that everyone present in the building since the previous night should be given nasal smears as tests for asbestos exposure. Id. at 90. He also claims that he informed Cooper, as well as Benny Jackson (Cooper's supervisor), Gerald Busbee, Maintenance Manager for H-Area (Waste Management), and Dr. E.R. Herman, the H-Area physician, that he wanted a report of the incident placed in his medical records. During the WSRC investigation of DeLoach's complaints after his termination, Dr. Herman confirmed that DeLoach requested this addition to his medical records.(7) See Ex. 22 at 12. DeLoach claims that a week or two after he requested the addition (and a week or two prior to his termination), he informed Jackson that if a report of the incident was not included in his medical records by April 1, 1993 he would inform the local newspapers of the incident. Hearing Tr. at 86-87, 95, 305.

DeLoach contends that all of these incidents caused him to be labeled as a "troublemaker" and a "big mouth." See Hearing Tr. at 31, 39. He believes that his complaining was probably discussed among supervisors at the plant and that it contributed to his eventual termination. Hearing Tr. at 73. He does not know who made the anonymous phone call leading to the Wackenhut investigation, but suspects that it was one of the supervisors with whom he had frequent contact, and that it was made in retaliation for his complaining so much. DeLoach stated, however, that he does not believe his immediate supervisor during the latter part of his employment, Gary Cooper, made the anonymous phone call. Hearing Tr. at 134. He is also unable to state with any certainty which supervisors or managers may have been involved in the decision to terminate him. See Hearing Tr. at 39, 122-23.

None of the three WSRC management employees who testified, Jackson, McDougal and Cooper, could recall DeLoach making any of the disclosures described above. Hearing Tr. at 260-65, 289, 300-01, 304-05, 307. This failure to remember DeLoach's complaints may be due in part to the long period of time that has elapsed since the alleged disclosures. I also believe that these supervisors do not remember DeLoach's alleged disclosures because they did not take them seriously or consider them significant at the time they were made. The record reveals that DeLoach complained often to many people about many matters. Benny Jackson said that DeLoach "like[d] to talk a lot and carry on." Hearing Tr. at 304. Barry McDougal said that DeLoach would "run his mouth all day long" and "kept something going all the time." Hearing Tr. at 286-87. It is therefore possible that the particular incidents DeLoach recalls were of more significance to

him than to the employees to whom he complained.

Nevertheless, I believe DeLoach has shown by a preponderance of the evidence that he made complaints to a number of WSRC supervisory employees and management officials on a number of different safety and health issues. Whether the complaints were considered valid and significant by WSRC management is not the critical question. If DeLoach made complaints to WSRC employees regarding what he believed to be substantial and specific dangers to safety or health, they qualify as protected disclosures.(8) I believe DeLoach's complaints were made in good faith and WSRC has not provided evidence to the contrary. Compare Ronny J. Escamilla, 26 DOE ¶ 87,508 (1996) (complaints found not to be in good faith). My finding that DeLoach made these complaints and acted in good faith as required by 10 C.F.R. § 708.5(a)(1)(ii) is supported by the fact that DeLoach received monetary bonuses for some of his QISSs and that some of the health and safety matters he raised were addressed and corrected. In several of the incidents DeLoach refers to, the matter was promptly investigated and if a serious health or safety problem existed, it was corrected. I therefore find that DeLoach made protected disclosures as contemplated by Part 708.

B. Contributing Factor

A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." Sorri, 23 DOE at 89,010; see also Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) (Couty). In addition, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." Couty, 886 F. 2d at 148.

In this case, there is clearly temporal proximity between DeLoach's disclosures regarding the discovery of asbestos, his requests for the incident to be included in his medical records, his threat to go the local newspapers and his termination. Under Sorri, if the deciding official in this case, WSRC President Ambrose Schwallie, had actual or constructive knowledge of the disclosures, in conjunction with the temporal proximity, DeLoach will have met his burden.

In both his statements to the OCEP investigator and in his sworn testimony before me, Schwallie has stated explicitly that he knew nothing about any health or safety complaints made by DeLoach, and that he terminated DeLoach solely on the basis of his theft of government property. Hearing Tr. at 243; Ex. 13. The record indicates that the decision to discharge DeLoach was made by Schwallie, based on the recommendation of a committee. According to Schwallie and Betty Brunson, WSRC Human Resources Representative, in cases involving the possible termination of an employee, WSRC's normal procedure is to form an ad hoc committee to recommend to Schwallie the action to be taken. The committee is usually composed of representatives from the Human Resources Office, the General Counsel's Office, the Equal Employment Opportunity Office, the employee's line management and Wackenhut if criminal activity is involved. Hearing Tr. at 241, 243, 252. The record indicates that in this case there was such a committee which met with Schwallie regarding the action to be taken with respect to DeLoach. Hearing Tr. at 241; Exs. 8 (interview with Findley), 13 (interview with Schwallie). However, Schwallie could not recall who served on the committee in this case. Hearing Tr. at 241, 243.(9) Both Schwallie and William "Dean" Findley, a consultant to the WSRC Human Resources Office who participated on the committee, have stated that there was no mention made during the committee meeting of any disclosures or complaints by DeLoach regarding health or safety. Hearing Tr. at 243 (Schwallie's testimony); Ex. 8 (interview with Findley).(10)

From the record, it is impossible to determine whether any of the managers DeLoach has identified as having first-hand knowledge of his disclosures had any input into the decision to terminate him. Nor is it possible to determine that the member(s) of line management who may have served on the committee or had input into the termination decision had no actual or constructive knowledge of DeLoach's disclosures.

However, it is not necessary for me to decide whether DeLoach has met this part of his burden, because WSRC has demonstrated by clear and convincing evidence that it would have terminated DeLoach even if DeLoach had not made any protected disclosures.

C. Justification for DeLoach's Termination

WSRC's policy was to terminate employees in all cases of proven theft, i.e., where there is conclusive evidence of intent to steal. Hearing Tr. at 241; see also Ex. 10 (report of Office of Personnel Management investigator). In this case, Wackenhut discovered approximately $48,000 worth of DOE property at DeLoach's home and DeLoach admitted prior to termination that he stole government property. Hearing Tr. at 214. It is clear to me, and DeLoach agrees, that WSRC was justified in terminating him, and would have done so even if he had not made disclosures. See Hearing Tr. at 103-04, 129-130.

Nevertheless, DeLoach argues that when he was fired for theft of government property, he was treated differently from other WSRC employees whom he considered to be similarly situated. DeLoach named two other employees of WSRC who he believes were treated differently (Employee One and Employee Two). These examples do not support DeLoach's position. The case of Employee One involved the discovery of seven tools, valued at $20 total, in the employee's vehicle as he was leaving the site. The employee claimed that he had not intended to steal the tools and there was no conclusive evidence of intent to steal.(11) The employee was therefore not fired but instead suspended for two weeks and placed on probation. Employee Two was observed taking 50 pounds of grass seed (valued at $35.00) from a government-owned vehicle and placing it into his own vehicle. Employee Two admitted taking the grass seed for personal use and since the intent to steal was clear, the employee was fired. Ex. 16 (review of Wackenhut investigation).

These examples do not demonstrate that WSRC treated DeLoach, or anyone else, inconsistently. In Employee One's case, there was no conclusive evidence of intent to steal, whereas in Employee Two's case there was such proof.(12) Furthermore, both of these cases involved property of relatively small value, and are therefore not similar situations to DeLoach's theft involving property valued at nearly $50,000.

Moreover, even if DeLoach had identified an isolated case involving theft of government property from WSRC where the employee was not terminated, this would not be sufficient to demonstrate that DeLoach was terminated in retaliation for his alleged disclosures. It is clear to me from the record that WSRC attempted to implement consistently its policy of terminating employees where there was conclusive evidence that they intended to steal government property. This is supported by a finding in the OCEP investigation that in the four cases in 1993, including DeLoach's, in which there was conclusive evidence of theft of government property, each employee was terminated. Ex. 16 (review of Wackenhut investigation). Further, WSRC has submitted evidence showing in each of the two cases in 1996 in which there was conclusive evidence of theft of government property, each employee was terminated. Memorandum of December 9, 1996 Pre-Hearing Telephone Conference; see Hearing Exs. 1, 5. In addition, the Wackenhut investigator testified that in the four major theft cases, including DeLoach's, that have occurred during WSRC's tenure at Savannah River (all involving theft of comparable magnitude to DeLoach's), the employees were terminated. Hearing Tr. at 218-221. He also testified that, based on his eleven years of experience, the decision to terminate DeLoach was justified and DeLoach was not treated differently from any other employees where there was clear evidence of intent to steal government property. Hearing Tr. at 222. This testimony is uncontroverted. I am therefore satisfied that DeLoach was not differentially treated by WSRC, and that he would have been terminated even if he had not made protected disclosures. See also Oglesbee, 24 DOE at 89,043.

IV. Conclusion

As set forth above, I have determined that DeLoach made protected disclosures of specific and substantial dangers to health and safety. I have also found, however, that WSRC has proven by clear and convincing

evidence that it would have terminated DeLoach absent his disclosures. Accordingly, I conclude that DeLoach has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted under § 708.10.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Charles Barry DeLoach, Case No. VWA-0014, under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments, IG-44, Office of the Inspector General, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0102, telephone number (202) 586-8289, fax number, (202) 586-3548.

Richard W. Dugan

Hearing Officer

Office of Hearings and Appeals

Date: February 5, 1997

(1) In this Decision, the OCEP investigative file exhibits will be cited as "Ex.," the transcript of the hearing will be cited as "Hearing Tr.," and the exhibits submitted directly to OHA by the parties will be cited as "Hearing Ex." The Hearing exhibits and OCEP exhibits are numbered separately.

(2)Ultimately, in 1993, DeLoach pled guilty in South Carolina state court to the charge of Grand Larceny and was sentenced to three years probation, suspended upon eighteen months of supervised probation and ten days of public service work.

(3)That office is now part of the Office of Inspector General and its director is the Assistant Inspector General for Assessments.

(4)In a prehearing submission, WSRC disputed that QISSs could be considered protected disclosures because they were part of a company suggestions system. See Letter from L.W. McCormack, Assistant General Counsel, WSRC, to Richard W. Dugan, Hearing Officer, OHA at 2 (December 3, 1996). I disagree. Nothing in the Part 708 regulations precludes QISSs from being deemed protected disclosures.

(5)DeLoach was unable to recall, and it is unclear from the record, whether these two incidents took place before or after April 1, 1989, the date WSRC took over the management of Savannah River site. Hearing Tr. at 33-34, 36-37.

(6)According to DeLoach the asbestos was present on a pipe. Hearing Tr. at 85. WSRC's investigation found it was only present on a gasket on a pipe flange. Ex. 22 at 9.

(7)According to the WSRC investigation, the Industrial Hygiene Office tested the air in the building the evening the asbestos fibers were found. That night, the air samples tested negative for asbestos. During the cleanup activities the next day, air samples were found to contain .007 and .072 fibers per CC which, according to the Industrial Hygiene Office, was considered well below any level requiring remedial action. Ex. 22 at 9-10.

(8)There is more evidence for some of these complaints being considered protected disclosures than there is for other complaints. However, there is sufficient evidence to find that at least three of the complaints, the leaking oil drums, the discovery of asbestos, and the failure to include a report of the asbestos incident

in DeLoach's medical records, qualify as protected disclosures.

(9)If DeLoach's line management was represented on the committee in this case, the representative would have probably been a management official at least three levels above DeLoach, because both DeLoach's immediate supervisor, Cooper, and Cooper's supervisor, Jackson, testified that they did not serve on such a committee and had no input whatsoever into the decision to terminate DeLoach. Hearing Tr. at 266-67, 297-98, 308-09.

(10)In addition, Findley stated that it would not have been unusual for the committee meeting to have been very brief, in view of the fact that Wackenhut had confirmed unauthorized possession of government property. Ex. 28 at 1 (letter from Findley).

(11)DeLoach asserted in a letter to OCEP that there had been a search of the employee's home and additional DOE tools were found. Ex. 4 at 4. OCEP's investigation found no evidence to confirm that assertion, see Ex. 16 (review of Wackenhut investigation), and no further evidence has been provided to me regarding the incident.

(12)At the hearing, DeLoach also mentioned a case of an employee (referred to here as Employee Three) who, according to DeLoach, stole some DOE tools and was terminated but was allowed to return to work at the site a year after termination. Hearing Tr. at 110-112, 324. When DeLoach first referred to this case in a letter to OCEP, he stated that it took place in approximately 1987. See Ex. 4 at 4. Because that date would place the incident prior to WSRC's tenure, this case was not investigated by OCEP or the WSRC Employee Concerns Office. At the hearing, DeLoach claimed that this incident took place after April 1, 1989, but he presented no evidence to support that claim. Hearing Tr. at 109. Nor did he in any way substantiate his account of the facts of Employee Three's case. I therefore have no basis to find that Employee Three and DeLoach were treated differently by WSRC.

Case No. VWA-0015

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Am-Pro Protective Services, Inc.

Date of Filing: October 15, 1996

Case Number: VWA-0015

This Initial Agency Decision concerns a whistleblower complaint filed by Barry Stutts, a former security officer for Am-Pro Protective Services, Inc. (Am-Pro). It is undisputed that:

- Mr. Stutts and a fellow security officer, Michael Wolfe, made a protected disclosure, i.e., that their supervisors did not prepare an "incident report" concerning an open top secret safe.
- Two weeks after the protected disclosure, Am-Pro terminated Mr. Wolfe, who had worked at the DOE for 16 years.
- Eight weeks after the protected disclosure, Am-Pro terminated Mr. Stutts, who had worked at the DOE for almost two years.

As explained below, Am-Pro has failed to demonstrate by clear and convincing evidence that Mr. Stutts would have been terminated in the absence of the protected disclosure. Accordingly, under the DOE whistleblower regulations, Mr. Stutts is entitled to relief.

As I was finalizing this Initial Agency Decision,(1)Am-Pro notified me that it had filed a Chapter 11 bankruptcy petition. Although Am-Pro contended that the instant proceeding should be stayed, Am-Pro did not provide any specific citations in support of that position, or explain why DOE whistleblower proceedings do not fall within a specific bankruptcy provision which permits the continuation of proceedings to enforce a governmental unit's regulatory power. 11 U.S.C. § 362(b)(4). See Board of Governors v. Mcorp Financial, 112 S. Ct. 459 (1991). This Initial Agency Decision does not impose any obligation on the parties: I have stayed any obligation to file a request for review or otherwise respond for such period as is necessary to determine the impact of the Chapter 11 proceeding on this case.

I. Background

A. Regulatory

The Department of Energy Contractor Employee Protection Program governs this matter. The applicable regulations are set forth at 10 C.F.R. Part 708 (the whistleblower regulations).

The whistleblower regulations protect contractor employees who make what are referred to as "protected disclosures." A protected disclosure involves information that the employee in good faith, believes evidences -

(i) A violation of any law, rule, or regulation;

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

(iii) fraud, mismanagement, gross waste of funds, or abuse of authority.

10 C.F.R. § 708.5. The whistleblower regulations prohibit a contractor from making reprisals against an employee for such a disclosure. Id.

The whistleblower regulations provide an employee with an avenue to seek relief for a reprisal. Id. § 708.6 et seq. Under the regulations, a complainant must make two showings. The complainant must establish "by a preponderance of the evidence" that 1) there was a protected disclosure and 2) the disclosure was a contributing factor in a personnel action. 10 C.F.R. § 708.9(d). If the complainant makes the two showings referred to above, the regulations shift the burden to the contractor. In that event, the contractor must "prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure." 10 C.F.R. § 708.9(d).

B. Procedural

This proceeding began when Mr. Stutts filed a whistleblower complaint. The Office of Contractor Employee Protection (OCEP)(2)investigated the complaint and issued a Report of Investigation and Proposed Disposition (ROI/PD).

In the ROI/PD, OCEP found Mr. Stutts' complaint to be meritorious. Upon receipt of the ROI/PD, Am-Pro requested a hearing. OCEP forwarded that request to the Office of Hearings and Appeals.(3)

In its pre-hearing brief, Am-Pro did not challenge the ROI/PD's conclusion that Mr. Stutts made a protected disclosure. Instead, Am-Pro contended that it would have terminated Messrs. Wolfe and Stutts in the absence of the protected disclosure. A hearing was held on February 12, 13, and 14, 1997. Subsequent to the hearing, each of the parties submitted additional information and briefing.

II. Analysis

A. Whether Mr. Stutts Established That He Made a Protected Disclosure

As stated above, Am-Pro does not dispute that Mr. Stutts made a protected disclosure on June 4, 1994. Am-Pro does not dispute that

- security rules require the preparation of an incident report for an open top secret safe,
- Messrs. Stutts and Wolfe discovered an open top secret safe and informed their supervisors, Lts. Sean Foster and Wade Joy,
- Lts. Foster and Joy did not prepare an incident report, and
- Messrs. Stutts and Wolfe disclosed to another Am-Pro supervisor the failure of Lts. Foster and Joy to prepare an incident report.

Similarly, Am-Pro does not dispute that the disclosure of the foregoing was protected under the whistleblower regulations.

I adopt the finding in the ROI/PD that the disclosure of the failure to prepare an incident report was protected. As just indicated, it is undisputed that security rules required the preparation of an incident report.(4)

The Order provides that "[a]ny person who discovers that classified information has been, or may have been, compromised shall take immediate action to secure the classified information and report the discovery to the security office." Order at 15. (5) The regulations protect the disclosure of information that

an employee "in good faith believes evidences ...[a] violation of any law, rule, or regulation ... or mismanagement." 10 C.F.R. § 708.5(a)(1). The preamble to the regulations specifically includes references to security violations. 42 Fed. Reg. 7533, 7535-6. The preamble provides in relevant part:

4. Disclosures Regarding Security Violations. Comment was received inquiring whether the protections afforded by the rule would extend to employees disclosing information respecting improper adherence to security requirements. Since the rule protects employees disclosing information pertaining to violations of laws, rules, or regulations, an employee disclosing a security matter evidencing a violation of law, rule, or regulation would be covered by the rule. The DOE believes the rule does not require amendment in this regard.

Id. at 7536. The inclusion of disclosures concerning security violations is consistent with the purpose of the DOE whistleblower regulations, which is to "involve DOE and contractor employees in an aggressive partnership to identify problems and seek their solution." Id. at 7533. Proper security at DOE's facilities is imperative and, therefore, information that rules are not being followed is vitally important to management.

Although not disputing the existence of a protected disclosure, Am-Pro argues that the supervisors acted properly in not preparing an incident report because they were following the instructions of a DOE security specialist. Who was ultimately responsible for the failure to prepare an incident report or whether the failure was justified is a management issue that is outside the scope of this proceeding.**(6)**It is sufficient that Mr. Stutts "in good faith believes" that the failure to prepare an incident report "evidences a "violation of any law, rule, or regulation" or "mismanagement." 10 C.F.R. § 708.5.

Once there is a protected disclosure under the DOE whistleblower regulations, as there is here, any reprisal for the disclosure is expressly prohibited. 10 C.F.R. § 708.5 ("Prohibition against reprisals"). The DOE has a frequently cited policy of "zero tolerance" for reprisals.

B.Whether Mr. Stutts Established That the Protected Disclosure Was a Contributing Factor in his Termination

In support of his position that the protected disclosure was a contributing factor in his termination, Mr. Stutts cites the termination of Mr. Wolfe two weeks after the disclosure and his own termination only six weeks after that. Mr. Stutts maintains that subsequent to the protected disclosure, Lts. Foster and Joy engaged in a pattern of harassment that ultimately provoked the conduct that Am-Pro cites as the basis for Mr. Stutts' termination.

Am-Pro maintains that, even if Mr. Stutts' contentions concerning Lts. Foster and Joy are true, the protected disclosure could not have been a contributing factor to Mr. Stutts' termination. Am-Pro maintains that the General Manager of the DOE contract (the General Manager) had no knowledge of the protected disclosure at the time he signed the July 28, 1994 memorandum terminating Mr. Stutts.

Whether or not the General Manager had actual knowledge of the protected disclosure is not determinative of whether Mr. Stutts has met his burden under Section 708.9(d). A complainant filing a whistleblower complaint is generally not in a position to present evidence concerning the knowledge of those making personnel decisions. Thus, a complainant can meet his burden under Section 708.9(d) by submitting sufficient evidence to permit a reasonable person to infer that the protected disclosure was a contributing factor to the determination. Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989).

Mr. Stutts has met his burden under Section 708.9(d). It is undisputed that three Am-Pro supervisors, Lts. Foster and Joy, and Major Dolores Ellison, knew of the protected disclosure on the date it was made. It is also undisputed that the three individuals, beginning on the same date, took various actions, including the following:

·June 4, 1994, the date of the protected disclosure:

Lt. Foster, in the presence of Lt. Joy and Major Ellison, reprimanded Messrs. Stutts and Wolfe for making the protected disclosure.

·June 18, 1994, two weeks after the protected disclosure:

Lt. Joy reported Mr. Wolfe for conduct that resulted in his termination on June 21, 1994.

·July 27, 1994, eight weeks after the protected disclosure:

Lt. Foster reported Mr. Stutts for conduct that resulted in his termination on July 28, 1994.

The knowledge of Lts. Foster and Joy and Major Ellison, coupled with the temporal proximity between the protected disclosure and the reprimand and terminations, is more than sufficient to permit a reasonable person to conclude that the protected disclosure was a contributing factor within the meaning of Section 708.9(d). Accordingly, under that section, the burden shifts to Am-Pro to establish by clear and convincing evidence that it would have terminated Mr. Stutts in the absence of the protected disclosure.

C.Whether Am-Pro Has Proved That It Would Have Terminated Mr. Stutts in the Absence of the Protected Disclosure

Am-Pro contends that the termination of Messrs. Wolfe and Stutts within eight weeks of the protected disclosure was merely coincidental. Am-Pro contends that both individuals engaged in conduct that would have resulted in their termination, even in the absence of the protected disclosure.

1. Mr. Wolfe's Termination

Lt. Joy reported the conduct cited by Am-Pro as the basis for Mr. Wolfe's termination. Lt. Joy reported that Mr. Wolfe had "pre-signed" SF702s ("Security Container Checksheets") for two rooms. The SF702 is the form on which security officers document the particular point in time that they check a security container, which can be either a room or a safe.(7) Mr. Wolfe had entered the time at which he was supposed to check the doors to the rooms, even though he had checked the doors over an hour earlier. Lt. Joy also reported that Mr. Wolfe had not locked three office doors in a separate wing of the building.

The Am-Pro memorandum terminating Mr. Wolfe cited falsification of official documents. Hrg. Ex. 5. The memorandum cited the pre-signing of the SF702s. The memorandum also cited the failure to lock the three office doors in a separate wing.

Mr. Wolfe did not file a whistleblower complaint. Although Mr. Wolfe viewed the termination as a reprisal for the protected disclosure, he believed that he could not file a whistleblower complaint since he had engaged in the conduct cited in the termination memorandum. ROI/PD, Ex. 4.

Although Mr. Wolfe did not file a whistleblower complaint, the circumstances surrounding his termination are obviously relevant to Mr. Stutts' complaint. They were both terminated within eight weeks of the date that they made the protected disclosure. Unless Am-Pro can establish that it "would have" terminated Mr. Wolfe in the absence of the protected disclosure, Mr. Wolfe's termination lends strong support to Mr. Stutts' complaint. Although Am-Pro's evidence concerning the reasons cited for Mr. Wolfe's termination is certainly relevant, the best evidence concerns how Am-Pro disciplined other employees engaging in similar conduct, taking into account any other relevant circumstances.

Am-Pro has not identified any instance in which it terminated an employee for pre-signing an SF702. Moreover, it is clear that Am-Pro suspended, rather than terminated, two other employees that pre-signed SF702s. During the hearing, in response to questions by Mr. Stutts' counsel, an Am-Pro lieutenant

reluctantly testified concerning his limited, second hand knowledge of those situations.(8)The General Manager, who testified subsequently, confirmed the existence of these suspensions.

The General Manager, in his testimony, sought to distinguish Mr. Wolfe's termination from the two suspensions. The General Manager testified that Mr. Wolfe was not terminated solely because he pre-signed SF702's. Instead, he testified, Mr. Wolfe was terminated because he also left three office doors unlocked.

Keeping in mind that Am-Pro has the burden of persuasion with respect to the General Manager's argument, I find that Am-Pro has failed to meet that burden. Am-Pro has not established that the three unlocked doors account for the disparity in discipline between Mr. Wolfe and the other officers. First, Am-Pro has not argued, or offered evidence to the effect, that it would have terminated or even suspended Mr. Wolfe or any other employee based on the three unlocked doors alone. The three doors were not entrances to security containers; the only reason that Mr. Wolfe was supposed to lock the doors was because the occupants had left them locked. ROI/PD, Ex. 49, at 3.4(9)Second, Am-Pro has not explained how the combination of the two offenses together resulted in a compromise of security. The pre-signing of the SF702s occurred on the "B" and "C" wings; the unlocked office doors occurred on the "A" wing. Third, even if the presence of the three unlocked doors was a cumulative factor, Am-Pro has not established that Mr. Wolfe's case, when viewed in its totality, warranted more serious discipline than the situations with the other officers, when viewed in their totality. Am-Pro has not provided information concerning the extent, or circumstances, of the pre-signing by the other individuals, nor has Am-Pro provided information concerning their service at DOE. Thus, there is no basis upon which to conclude that Mr. Wolfe, who was a good employee at the Germantown facility for 16 years, warranted more severe discipline than the suspended employees. Because Am-Pro has failed to explain the disparity in the treatment of Mr. Wolfe and the other officers, Am-Pro has failed to demonstrate that it would have terminated Mr. Wolfe in the absence of the protected disclosure.

2. Mr. Stutts' Termination

In support of its contention that it would have terminated Mr. Stutts in the absence of the protected disclosure, Am-Pro first denies Mr. Stutts' assertions of harassment. Am-Pro further maintains that Mr. Stutts' conduct on July 27, 1994 was insubordinate and disorderly and that Am-Pro terminates individuals who engage in such conduct.

a. Events leading up to the termination

It is undisputed that Lt. Foster reprimanded Mr. Stutts for making the protected disclosure. Lt. Foster maintains that Messrs. Wolfe and Stutts violated the chain of command, because they made the disclosure to another lieutenant and did not tell Lt. Foster. It is clear, however, that the whistleblower protections are not limited only to disclosures made through the chain of command. Accordingly, as the ROI/PD found, the reprimand itself was a reprisal in violation of the whistleblower regulations. ROI/PD at 7-8.

The remainder of Mr. Stutts' allegations of harassment by Lt. Foster relates to Lt. Foster's responsibility for Mr. Stutts' work schedule. Mr. Stutts maintains that Am-Pro supervisors generally resolved scheduling problems by notifying employees and relying on volunteers. Mr. Stutts maintains that prior to the protected disclosure, he did not have conflicts with Lt. Foster over his work schedule with the exception of one instance. Mr. Stutts maintains that after the protected disclosure, Lt. Foster refused his offers to work overtime and intentionally scheduled him in a manner that conflicted with his military reserve obligation and personal plans.(10)

Am-Pro contends that the record does not support Mr. Stutts' claim of harassment. Am-Pro contends that Mr. Stutts worked approximately the same number of hours before and after the protected disclosure. Am-Pro also contends that Lt. Foster scheduled Mr. Stutts in the same manner as he scheduled other

employees.

Am-Pro has not demonstrated that the post-disclosure schedule conflicts were unrelated to the protected disclosure. Am-Pro has not demonstrated that there was any problem with Mr. Stutts' attendance prior to the protected disclosure. In fact, the record indicates that Mr. Stutts received quarterly bonuses for good attendance prior to the protected disclosure. Stutts 5/5/97 Submission at 2. The only conflict, identified by Mr. Stutts, concerned his submission of his military drill schedule. Moreover, the fact that Mr. Stutts may have worked the same number of hours before and after the protected disclosure, as Am-Pro contends, does not address Mr. Stutts' allegation that after the protected disclosure, Lt. Foster refused to accord Mr. Stutts the same notice and flexibility accorded others. Indeed, as discussed below, the evidence submitted in this proceeding lends support to Mr. Stutts' allegation.

It is undisputed that on July 8, 1994, Lt. Foster refused to grant Mr. Stutts military leave for weekend drill duty.(11)Lt. Foster contends that Mr. Stutts did not give adequate notice, but this assertion is not convincing. First, Lt. Foster does not explain why he did not consult Mr. Stutts' drill schedule, which appears to have been standard practice.(12)Second, the circumstances strongly suggest that Lt. Foster would have known Mr. Stutts' once-a-month weekend drill schedule without referring to the written schedule. Mr. Stutts was the only member of the night shift who had military duty, and his monthly weekend drill schedule was simple.(13)Third, it is undisputed that prior to the protected disclosure Mr. Stutts did not have any difficulty, with the exception of one month, in obtaining the leave that he needed for his monthly weekend drill. (14)

It is also undisputed that (i) on July 20, 1994, Lt. Foster told Mr. Stutts that he would have to work overtime on Friday, July 22, 1994 and (ii) on July 27, 1994, Lt. Foster told Mr. Stutts that he would have to work overtime on Saturday, July 30, 1994. At this time, Mr. Stutts had Friday and Saturday nights off because he was working the "front end" of the night shift.(15)Lt. Foster contends that Mr. Stutts would have been ordered to work overtime based on the "low man" rule. Under that rule, if no security officers volunteer for overtime, the "low man," i.e., the officer with the lowest number of overtime hours, has to work the overtime. The record indicates that, except in emergencies, Am-Pro's practice of assigning overtime was based on notice and volunteers.(16) Although Lt. Foster made a general assertion of a shortage of personnel, that assertion still does not explain why he did not follow the "notice and volunteer" practice when he assigned the overtime.

Despite the foregoing, Am-Pro cites a memorandum prepared by Lt. Foster as evidence of Lt. Foster's asserted even-handedness toward Mr. Stutts. The memorandum concerned the fact that, with respect to the July 10 and July 22 incidents discussed above, Mr. Stutts had "called off." In the memorandum, Lt. Foster stated that he was not sure that disciplinary action was appropriate because other supervisors had excused the absences. Contrary to Am-Pro's characterization of the memorandum as indicating Lt. Foster's even-handedness, when it is put in proper perspective the memorandum could be interpreted to support Mr. Stutts' claim of disparate treatment. On July 27, 1994, the same date that Lt. Foster concluded in the memorandum that disciplinary action might not be appropriate, Lt. Foster told Mr. Stutts that he would have to work overtime on Saturday, July 30, which provoked the very conduct cited as the basis for Mr. Stutts' termination.

As indicated above, Lt. Foster's treatment of Mr. Stutts was not consistent with Am-Pro's general practice of flexible scheduling based on notice and volunteers. Thus, even assuming that there was a shortage of personnel during that period, as Am-Pro contends, there is no explanation for Lt. Foster's failure to follow that practice in these instances. Accordingly, Am-Pro has failed to meet its burden of explaining the disparate treatment of Lt. Foster.

b.Mr. Stutts' July 27, 1994 conduct and his July 28, 1994 termination

As stated above, on Wednesday, July 27, 1994, Lt. Foster told Mr. Stutts that he would have to work overtime on Saturday, July 30. Am-Pro has argued that, even if Lt. Foster had harassed Mr. Stutts as

discussed above, Mr. Stutts' subsequent conduct on July 27 warranted termination.

It is undisputed that on July 27, 1994, shortly after beginning his 6PM to midnight shift, Mr. Stutts telephoned Lt. Foster and volunteered to work overtime from midnight to 6AM Thursday morning. Lt. Foster told Mr. Stutts that the overtime was already taken by a lieutenant. Mr. Stutts objected, stating that Am-Pro policy required that overtime be offered to security officers first. Lt. Foster then told Mr. Stutts that he would have to work overtime on Saturday, July 30. Mr. Stutts objected, stating that he had made plans to be out of town with his family. Mr. Stutts told Lt. Foster that Lt. Foster was intentionally (i) refusing his offers to work overtime and (ii) assigning him overtime when Lt. Foster knew he had plans. Lt. Foster told Mr. Stutts that Lt. Foster would not engage in a "pissing match." Mr. Stutts responded that he would show Lt. Foster the same degree of respect Lt. Foster was showing him, put down the phone, and returned to his station. Shortly thereafter, Lt. Jacques Thompson relieved Mr. Stutts of duty and told him to go to the arms room to turn in his equipment.

It is undisputed that Mr. Stutts did not immediately proceed to the arms room as instructed, but waited for another security officer to accompany him. As the two security officers approached the arms room, they encountered the shift supervisor, Lt. Deatherage, and told him what had happened. Lt. Deatherage told Mr. Stutts to turn in his equipment and that he could talk to Major Ellison the next day. Lt. Deatherage then entered his office, which was across the hall from the arms room and adjacent to the Central Alarm System room (CAS). As Lt. Deatherage entered his office, Lt. Foster appeared in the CAS doorway and may have stepped into the hall.(17)Mr. Stutts complained about being relieved of duty, and Lt. Foster told Mr. Stutts to turn in his equipment. Mr. Stutts held out his keys and, when Lt. Foster did not take the keys, Mr. Stutts dropped them and they hit Lt. Foster's duty belt. Lt. Thompson stepped in between the two, and Mr. Stutts walked into the arms room and turned in his equipment. As Mr. Stutts left the arms room, Lt. Foster was still in the CAS doorway or the hall.(18) Mr. Stutts told Lt. Foster that Lt. Foster was not a professional or a good supervisor, and then left the building.

Mr. Stutts was terminated in a memorandum dated the next day. The memorandum was prepared either by Lt. Foster or Major Ellison, for the signature of the General Manager. The memorandum described Mr. Stutts as argumentative and disruptive. The memorandum described Mr. Stutts as having "stepped in front of Lt. Foster in a threatening manner."

The General Manager testified that he did not hear Mr. Stutts' version of events prior to signing the memorandum.(19)Nonetheless, the General Manager testified that even if he had heard Mr. Stutts' complaints of harassment and determined them to be true, he still would have terminated Mr. Stutts.

c. Am-Pro disciplinary practices

Am-Pro cites its employee handbook which permits termination for a first offense of insubordination or disorderly conduct. Am-Pro argues that it is a paramilitary organization responsible for safeguarding DOE facilities and, therefore, discipline is of utmost importance.

Under the whistleblower regulations, it is not enough for a contractor to demonstrate that it "could have" taken the same action against the employee for the cited conduct. Instead, the regulations require that the contractor demonstrate that it "would have" taken the same action in the absence of the protected disclosure. Although the Am-Pro handbook permits termination for a first offense of insubordination or disorderly conduct, the General Manager testified that Am-Pro may impose a lesser punishment based on extenuating circumstances. Thus, this decision considers whether Am-Pro has established "by clear and convincing evidence" that it "would have" terminated Mr. Stutts in the absence of the protected disclosure.

The General Manager's statement that he would have terminated Mr. Stutts regardless of the existence of any extenuating circumstances is not convincing. The General Manager testified that, as a general disciplinary matter, he holds lieutenants to a higher standard than he holds security officers. Hrg. Tr. II-1 at 177-78. Lt. Foster knew that the shift supervisor was handling Mr. Stutts' departure. Hrg. Tr. II-1 at

204-07. Yet, Lt. Foster chose to escalate the situation with Mr. Stutts. Thus, given the General Manager's stated practice of holding lieutenants to a higher standard, Am-Pro has not satisfactorily explained why Lt. Foster's conduct would not be an extenuating circumstance.

Moreover, Am-Pro's attempted analogies to other employee terminations are not convincing. Am-Pro has cited a January 1994 termination as analogous, but it clearly is not. In that case, the employee refused an order to leave his post, after he expressed a disagreement with his break schedule by "[getting] in [the lieutenant's] face and shout[ing] ?You're Crazy.'" Hrg. Ex. 11. The employee had a lengthy history of disciplinary problems, spanning the employee's tenure from 1990 to 1994. They included four instances of "improper conduct," 17 "unexcused lates," and violations of various other disciplinary rules. Id. Similarly, Am-Pro's attempted analogies to other terminations are unconvincing. In those situations, employees had compromised the safety of the facility,(20)cursed,(21)and/or flatly refused to obey an order.(22)Mr. Stutts' offense was of a lesser degree: he picked up a witness before going to the arms room, and he allowed himself to be provoked by Lt. Foster's presence. Moreover, there is no evidence in the record to support a conclusion that those employees, like Mr. Stutts, had good employment records.

The fact that the cited examples involve more serious conduct than that present here does not itself warrant a conclusion that Am-Pro would not have terminated Mr. Stutts. As Am-Pro indicates, it may not be possible for a contractor to identify a fact pattern closely analogous to that presented by the whistleblower. Nonetheless, the regulations place the burden on the contractor to establish by "clear and convincing evidence" that it would have terminated the employee in the absence of the protected disclosure. As discussed above, Am-Pro has not met that standard.

In concluding that Am-Pro has not demonstrated by "clear and convincing evidence" that it would have terminated Mr. Stutts in the absence of the protected disclosure, I have fully considered Am-Pro's argument about the need for discipline in the DOE's security force. There is no doubt that strict discipline is essential, but Am-Pro's citation of the need for discipline is selective. Part of discipline is following the agency's regulations. Lt. Foster did not follow those regulations when he reprimanded Messrs. Stutts and Wolfe for the protected disclosure. Am-Pro has not disciplined Lt. Foster or Major Ellison, who was present during the reprimand. In any event, it is fundamental that the whistleblower regulations do not allow a contractor to justify the termination of a whistleblower based on discipline unless it can demonstrate that the termination would have occurred in the absence of the protected disclosure. See Marano v. DOJ, 2 F.3d 1137 (Fed. Cir. 1993) (whistleblower is protected from adverse action based on investigation prompted by his protected disclosure, unless agency can demonstrate that the same personnel action would have occurred in the absence of the protected disclosure).

D. The Appropriate Remedy

Two provisions of the DOE regulations discuss the appropriate remedy in whistleblower cases. Section 708.10(c) governs initial decisions; Section 708.11(c) governs final decisions. Both regulations state that relief may include reinstatement, back pay, and all reasonable costs and expenses in bringing the complaint. Section 708.11(c) contains an additional provision authorizing "such other relief as is necessary to abate the violation and provide the complainant with relief." 10 C.F.R. § 708.11(c). As explained below, I find that Mr. Stutts is entitled to reinstatement, back pay, and reasonable costs and expenses.

As the ROI/PD concluded, reinstatement is an appropriate remedy for a termination. If Mr. Stutts decides not to accept reinstatement, he is free to decline that aspect of the relief.

With respect to back pay, there is general agreement between Am-Pro and Mr. Stutts that back pay, in theory, consists of the amount that Mr. Stutts would have received from Am-Pro had he not been terminated. Mr. Stutts has claimed regular pay, overtime pay, bonuses, a monetary benefit provided in lieu of health and life insurance, and a uniform allowance. The disagreements over the calculation of total back pay concern overtime and bonuses, but they are not the primary area of dispute.

The primary area of dispute concerns whether Mr. Stutts' total back pay should be adjusted to reflect his post-termination earnings and associated child care expenses. During his employment at Am-Pro, Mr. Stutts worked nights and cared for his children during the day while his wife worked. After his termination, Mr. Stutts was unable to obtain a comparably paying nighttime job. He accepted a daytime job, which meant that he could no longer care for his children during the day. The family adjusted to this change by obtaining day care for one child and having Mrs. Stutts leave work one-half hour earlier each day to pick up their other child at school. With respect to the foregoing, Am-Pro argues for an offset for post-termination earnings, citing common law cases limiting back pay to that necessary to make the victim "whole." On the other hand, Am-Pro opposes any adjustment for child care expenses or Mrs. Stutts' lost earnings on the ground that they are not specifically mentioned under Part 708.

As just indicated, Am-Pro shifts back and forth between the regulatory language and the principle of making a party "whole," depending upon which produces the lower amount of relief. This selective application of the principle of making a party whole, if accepted, would limit a complainant's relief to less than he would receive under either (i) a strict reading of the regulation or (ii) a consistent application of the principle of making him whole.

There is simply no logic or authority supporting a selective application of the doctrine of making a party whole. Either the express terms of the regulation govern, in which a party is entitled to "back pay" without any upward or downward adjustment, or the phrase "back pay" is given an interpretative gloss, pursuant to which the overriding standard is making the party "whole."

I rely on the express terms of the regulation, which does not provide for any adjustments to "back pay." The reason is simple. Rules of construction favor reliance on the express terms of statutory or regulatory provisions. Under this literal application of the regulations, Mr. Stutts would be entitled to $83,768.99 plus interest. The calculation of this amount is set forth in Appendix A and shows the amounts included for overtime and bonuses.

If, however, the regulation is interpreted to mean that Mr. Stutts should be made "whole", a source of guidance concerning the meaning of that provision is the Whistleblower Protection Act of 1989 as amended (the WPA). The regulatory preamble to the DOE whistleblower regulations makes a comment to the effect that the aim of the remedy provision is to make a party whole "in a manner similar to other whistleblower protection rules." 42 Fed. Reg. 7533, 7539 (March 3, 1992). The WPA, which is the statute generally applicable to federal government employees, provides as follows:

corrective action may include -

(1) that the individual be placed, as nearly as possible, in the position the individual would have been had the prohibited personnel practice not occurred; and

(2) reimbursement of attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.

5 U.S.C. § 1214(g). The legislative history of this provision indicates that its purpose is to make the complainant whole. Senate Report No. 103-358 at 11, 1994 U.S. Code Cong. & Admin. News 3549, 3559.(23) In any event, the Secretary has the authority under the regulations to order "such other relief as is necessary" to "provide the complainant with relief." 10 C.F.R. § 708.11(c). A remedy designed to make Mr. Stutts whole would entail consideration of Mr. Stutts' post-termination circumstances including alternative employment, child care expenses, his wife's lost earnings, and any other relevant matters. Under this theory, based on available data, Mr. Stutts would be entitled to $25,550.20 plus interest. The calculation of this amount is set forth in Appendix B.

The issues raised by the foregoing discussion have not been addressed in prior OHA whistleblower decisions in a comprehensive fashion. See Cornett, 26 DOE ¶ 87,507 (1996); Spaletta, 24 DOE ¶ 87,511 (1995); Ramirez, 24 DOE ¶ 87,504 (1994); Sorri, 23 DOE ¶ 87,503 (1994). Accordingly, the parties will

be given a further opportunity to brief the issues identified above, as well as (i) the accuracy of the calculations in Appendices A and B and (ii) the determination of reasonable costs and expenses in bringing the complaint, including attorneys fees.

III. Conclusion

As indicated above, Mr. Stutts made a protected disclosure on June 3, 1994 and has established that the protected disclosure was a contributing factor in his termination eight weeks later. Am-Pro has failed to establish by clear and convincing evidence that it would have terminated Mr. Stutts in the absence of the protected disclosure. Accordingly, under the regulations, Mr. Stutts is entitled to relief. Alternate calculations of relief are provided in Appendices A and B. Further briefing will be permitted on the remedy issue, including the reasonable costs and expenses of bringing the complaint.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by Barry Stutts, OHA Case No. VWA-0015, is hereby granted as set forth in Paragraphs (2) through (5) below.

(2) Am-Pro shall reinstate Mr. Stutts and reimburse him for back pay and the reasonable costs and expenses to be determined in a Supplemental Order.

(3) Counsel for Mr. Stutts shall submit to the undersigned Hearing Officer and to counsel for Am-Pro (i) a quarterly schedule of the amounts Mr. Stutts would have earned had he remained in Am-Pro's employ, and (ii) a list of all reasonable costs and expenses claimed by Mr. Stutts including attorneys fees. Counsel for Mr. Stutts shall also submit, for purposes of an alternative calculation, quarterly schedules of (i) Mr. Stutts' earnings since his termination and (ii) child care costs, Mrs. Stutts' lost earnings and any consequential damages. Counsel for Am-Pro will have an opportunity to file a response.

(4) This is an Initial Agency Decision that, in the absence of a stay, becomes the Final Decision of the Department of Energy unless a written request for review by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments within five calendar days of receipt of the Initial Agency Decision.

(5) Any requirement to take any action pursuant to Paragraphs (3) and (4) above is stayed for such period of time as is necessary to permit a determination of the impact of Am-Pro's Chapter 11 bankruptcy on this proceeding.

Janet N. Freimuth

Hearing Officer

Office of Hearings and Appeals

Date: June 13, 1997

APPENDIX A

Calculation of Back Pay

1994 Biweekly Pay = Regular Pay + Overtime Pay +Health & Uniform Benefit

Regular Pay $ 868.22 ($10.52 per hour x 82.53 regular hours)(24)

Overtime Pay $ 69.59 ($15.78 per hour x 4.41 overtime hours)(25)

Health &

Uniform Benefit $ 75.20

Total: $1,013.01

Biweekly Pay Periods

1994 (07/29/94 - 12/29/94):11

1995 (12/30/94 - 12/28/95):26

1996 (12/29/95 - 12/26/96):26

1997 (12/27/96 - 06/26/97):13

Bonuses

per calendar quarter: $172.77

1994: 1 quarter

1995: 4 quarters

1996: 4 quarters

1997: 1 quarter as of 03/31/97

Total Back Pay assuming 3% increase each January 1

1994: ($1,013.01 x 11 pay periods) + $172.77 (1qtr.) = $12,674.43

1995: ($1043.40 x 26 pay periods) + $711.80 (4 qtrs.) = $27,840.20

1996: ($1,074.70 x 26 pay periods) + $733.15 (4 qtrs) = $28,675.35

1997: ($1,106.94 x 13 pay periods) + $188.79 (2 qtrs) = $14,579.01

TOTAL BACK PAY: $83,768.99

APPENDIX B

Calculation of Back Pay with Adjustments

Back Pay With Adjustments = Back Pay - (Post-termination earnings - wife’s lost earnings - child care expenses)

1994: $12,674.43 - $ 6,029.35 ($ 8,987.10 - $ 636.75 - $2,321) = $ 6,645.08

1995: $27,840.20 - $16,885.06 ($24,469.76 - $1,602.70 - $5,982) = $10,955.14

1996: $28,675.35 - $18,933.25 ($25,287.20 - $ 223.95 - $6,130) = $ 6,742.10

1997: $14,579.01 - $ 1,667.88 ($ 3,067.88(26) - $ 0 - $1400)(27) = $ 1,437.88

TOTAL BACK PAY WITH ADJUSTMENTS: $ 25,550.20

Notes

(1)The DOE regulations require that I issue a decision within 30 days of the conclusion of post-hearing briefing. 10 C.F.R. § 708.10(b).

(2)OCEP has since been abolished and its functions transferred to the Assistant Inspector General for Assessments.

(3)Although Mr. Stutts questioned whether the request was filed within 15 days of service of the ROI/PD, Mr. Stutts did not pursue the matter. The record indicates that the request was timely; in any event, at most the request could have been four days late, a de minimis delay for which an extension is appropriate. 10 C.F.R. § 708.15.

(4)The record contains a memorandum from a DOE Office of Safeguards and Security (DOE Security) official who investigated the failure to prepare an incident report. ROI/PD, Ex. 40. He stated that security rules require that security infractions be documented, and he cited DOE Order 5639.1, “Information Security Program (10/19/92),” which is also in the record, see ROI/PD, Ex. 49.

(5)See also ROI/PD, Exs. 48 (DOE HQ General Order-010, “Safe Checks”) and Ex. 2 (Am-Pro Protective Agency, Inc. “Performance Test 62.7").

(6)The DOE security specialist was himself (i) the custodian of the open safe and (ii) the specialist to whom Am-Pro reported and sent incident reports. When DOE Security learned of the DOE security specialist’s instruction not to prepare an incident report, DOE Security admonished him for giving such an instruction and cited him with a security infraction for leaving his safe open. ROI/PD, Ex. 40.

(7)If the security container is a safe, the SF702 is located on the safe; if the security container is a room, the SF702 is located on the door outside the room.

(8)The lieutenant also testified that he had received a suspension for failing to do the required quality review of the SF702s, i.e., to review 25 percent of them to assure that the security officers were making the required checks.

(9)Those rooms contained safes, which were the security containers and, therefore, had SF702s attached. Am-Pro does not claim that Mr. Wolfe failed to check the safes or enter the correct time on the attached SF702s.

(10)The ROI/PD concluded that Mr. Stutts had not demonstrated that the schedule conflicts were reprisals for the protected disclosure. Am-Pro contended that Mr. Stutts’ failure to request a hearing barred any further consideration of those conflicts. Issues of the schedule conflicts are relevant to an assessment of Am-Pro’s argument that the termination was unrelated to the protected disclosure, and I am not bound by the ROI/PD. 10 C.F.R. § 708.10(b).

(11)Lt. Foster initially advised Mr. Stutts that he would have to work his entire shift beginning on Sunday, July 10, at 6PM, and ending on Monday, July 11, at 6AM, despite the fact that Mr. Stutts’ drill duty lasted until midnight Sunday night. According to Lt. Foster, he then compromised and advised Mr. Stutts that he would only require him to work half of the shift. Mr. Stutts “called-off,” citing his military duty, and received an excused absence (based on military duty) from another lieutenant who was unaware of his conversation with Lt. Foster.

(12)Another lieutenant testified that the drill schedules were kept on file and that he consulted them when preparing schedules. Hrg. Tr. I-1 at 228. Thus, the lieutenant testified, in the absence of a mistake, the

schedule, as initially prepared, would reflect military leave. Id. 228-29.

(13)Mr. Stutts' drill occurred the first weekend of each month, unless that weekend included a holiday in which case the drill was the second weekend of the month. Stutts 5/24/97 Submission.

(14)In May 1994, Lt. Foster refused to grant Mr. Stutts leave for his drill weekend; Mr. Stutts fulfilled his Am-Pro duty, received an unexcused absence from weekend drill, and provided a second copy of his drill schedule.

(15)The front end of the night shift worked from 6PM on Sunday, Monday, and Tuesday nights until 6AM the next morning, and from 6PM to midnight on Wednesday night. The back end of the night shift worked from midnight Wednesday night to 6AM Thursday morning, and from 6PM Thursday, Friday, and Saturday nights to 6AM the next morning. Approximately every three months, Am-Pro rotated employees so that all employees would have opportunities for weekends off.

(16)Many officers wanted overtime and usually agreed among themselves who would take it. Hrg. Tr. I-1 at 189 (former Security Officer Bonzano), 223-24 (Lt. Deatherage), II-1 at 23-25 (former Security Officer Stutts), II-1 at 366-67 (Security Officer Asmussen).

(17) Lt. Foster maintains that he stayed in the doorway; Mr. Stutts maintains that Lt. Foster stepped into the hall, in violation of security rules, and into Mr. Stutts' path to the arms room.

(18)See note 16 supra.

(19)The General Manager testified that it was his general practice to hear from all sides prior to taking disciplinary action. The General Manager testified that he attempted to contact Mr. Stutts, although the record indicates that such attempts occurred after the General Manager signed the termination memorandum and in response to Mr. Stutts' request for a meeting.

(20)The memorandum of the March 3, 1993 termination stated that the facility commander was about to interview and suspend a receptionist for insubordination when she quit without notice, leaving Am-Pro "in an extreme situation nearly having an open post." ROI/PD, Ex. 27.

(21)The memorandum of the April 20, 1995 termination stated that a security officer refused to resign his name on a post log, used "loud and abusive language," and "started cursing and questioning [his supervisor] as to why he could not have brought the document to [his] post." ROI/PD, Ex. 27.

(22)The termination memoranda described the conduct as follows:

A security officer (i) refused to report to the facility commander for a counseling session (April 2, 1993 report), (ii) refused to provide documentation concerning a "no call no show" absence and was "extremely hostile and vulgar" (January 3, 1995 memorandum), and (iii) refused to report to a particular post, used "verbal threats to harm," and engaged in "belligerent and abusive" conduct toward a lieutenant (April 11, 1995 letter). ROI/PD, Ex. 27.

(23)A different statute, the Energy Reorganization Act, prohibits certain conduct with respect to employees of Nuclear Regulatory Commission licensees and provides for back pay and "compensatory damages." 42 U.S.C. § 5851. See Blackburn v. Martin, 982 F.2d 123 (4th Cir. 1992) (case remanded for proper determination of amount of compensatory damages for mental and emotional distress).

(24)The number of regular and overtime hours represents the average number of such hours worked by Mr. Stutts during the pay periods in 1994 for which information was available. Mr. Stutts did not file pay information for the pay period 03/10/94 to 03/25/94.

(25)See note 1 supra.

(26)Post-termination earnings through March 13, 1997.

(27)Child care expenses through March 14, 1997.

Case No. VWA-0017

April 13, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Timothy E. Barton

Date of Filing: June 27, 1994

Case Number: VWA-0017

This Decision involves a whistleblower complaint filed by Timothy E. Barton under the Department of Energy's (DOE) Contractor Employee Protection Program. From June to September 1994, Barton was employed as a Quality Assurance/Safety Manager by R.E. Schweitzer Construction Company (RESCC), which was awarded a contract by the Fernald Environmental Restoration Management Corporation (FERMCO) to perform construction work on the Vitrification Pilot Plant at the DOE's Fernald site. Barton alleges that RESCC retaliated against him by terminating his employment for taking certain actions and making health and safety disclosures.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor- operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to independent fact-finding by the Assistant Inspector General for Assessments and a hearing before a Hearing Officer from the Office of Hearings and Appeals (OHA), followed by an opportunity for review by the Secretary of Energy or her designee. See David Ramirez, 23 DOE ¶ 87,505, aff'd, 24 DOE ¶ 87,510 (1994).

B. Procedural History of the Case

On December 31, 1994, Barton filed a complaint with the U.S. Department of Labor which was referred to the Department of Energy's Ohio Field Office on January 13, 1995. The Ohio Field Office was unable to resolve the complaint and forwarded it to DOE Headquarters. The Assistant Inspector General for Assessments investigated Barton's complaint and issued a Report of Inquiry and Proposed Order (hereinafter "ROI") on June 3, 1997.

The Assistant Inspector General found that Barton had made protected disclosures and engaged in protected actions that contributed to the termination of his employment with RESCC, and that RESCC had not provided clear and convincing evidence that it would have terminated Barton's employment at the time it took the action absent his protected disclosure and protected activity. Accordingly, the Assistant Inspector General proposed that the complainant "be awarded backpay and benefits, minus any earned income and associated benefits, from the time that his employment was terminated until the completion of the RESCC project to which he had been assigned, and during which RESCC had replacement employees assigned to perform the duties he had performed," as well as "payment of reasonable costs and expenses, including attorney fees, incurred in bringing this complaint." ROI at 22.

On June 10, 1997, RESCC sent a letter to the Assistant Inspector General, in which it requested a hearing under 10 C.F.R. § 708.9. The OHA received RESCC's request from the Assistant Inspector General on June 27, 1994. On July 22, 1997, the Director of the OHA appointed me as Hearing Officer. A pre-hearing conference was conducted via telephone on December 23, 1997. The hearing was held at Fernald, Ohio on January 8-9, 1998. At the conclusion of the hearing on January 9, the parties elected to forego oral argument, and requested permission to file post-hearing briefs. The OHA received parties' post-hearing briefs on March 13, 1998.

C. Factual Background

The following summary is based on the investigative file of the Assistant Inspector General for Assessments, the hearing transcript (hereinafter "Tr."), and the submissions of the parties. Except as indicated below, the facts set forth below are uncontroverted.

On June 16, 1994, FERMCO awarded a contract to RESCC to perform construction work on the Vitrification Pilot Plant at DOE's Fernald Plant. Tr. at 92. On or about June 19, 1994, RESCC hired Barton. ROI at 3; Tr. at 131. The contract between FERMCO and RESCC required RESCC to designate an onsite Quality Assurance Representative and Safety Representative, and RESCC designated Barton for both positions. ROI at 3; Tr. at 94. During the course of his employment, Barton maintained daily health and safety logs and daily quality assurance reports which he regularly submitted to RESCC management. See ROI Exhibits 4C, 4D. Barton was also responsible for reporting deficiencies through non-conformance reports that were to be submitted to, among others, FERMCO's Construction Contracts Manager. ROI Exhibit 9.

Shortly before or on September 12, 1994, RESCC discovered that it would need to cut certain steel reinforcement bars in an area at the Vitrification Pilot Plant construction site where a concrete foundation wall was to be poured. On September 12, 1994, an RESCC foreman ordered a worker to go into the area to cut the bars with a gasoline-powered saw. As the worker was cutting the bars, a FERMCO employee saw the worker and, because there was inadequate ventilation in the area, ordered that the work be stopped due to the risk that the worker would inhale excess amounts of carbon monoxide from the exhaust of the saw. Barton was at the Fernald Plant that day, but was not present at the construction site when the worked was stopped. FERMCO categorized the event as an "unusual occurrence" and reported it to the DOE as required by the relevant DOE Order then in effect.(1) In its report on the event, FERMCO stated, "It has been determined that use of the gas powered ?cut-off saw' in the enclosed area was inappropriate. The ? cut-off saw' should only be used in an open air situation, or in an enclosed area with ventilation." ROI Exhibit 4I.

On September 14, 1994, prior to pouring the concrete wall, RESCC installed waterstop in the area where the September 12, 1994 unusual occurrence took place. Waterstop is a material made of polyvinylchloride designed to prevent the passage of water through concrete foundation walls at construction and expansion joints. In order to install waterstop in a right-angled corner, the material must be cut and the ends fused together in place with a heat source. Tr. at 175. Barton, who was at the construction site, believed that the area where the waterstop was to be installed was a "permit- required confined space" as defined in FERMCO's Environmental Safety and Health Manual, and that RESCC would need to obtain a permit

before the waterstop could be fused. See Complainant's Exhibit 3; Tr. at 186. He therefore called a safety technician from FERMCO's Industrial Hygiene Department to the scene in order to obtain a permit. Tr. at 188. The safety technician arrived, assessed the situation, and told Barton that a permit would not be required and that the work could proceed. Id. Barton told the safety technician that he did not agree with the safety technician's assessment, and asked the safety technician to call a manager from Industrial Hygiene to the job site. Id. at 189. Upon arriving at the site, the Industrial Hygiene manager stated that he agreed with the safety technician that a permit was not required prior to fusing the waterstop. Id. Barton again expressed his disagreement and requested that Industrial Hygiene issue a written determination that a permit was not required. Id. at 190. After Industrial Hygiene had given its oral opinion that no permit was required, the RESCC Project Manager proceeded to install the waterstop. Tr. at 191, 396. FERMCO issued a letter to RESCC dated September 15, 1994, stating in part that, "FERMCO considers the space between the forms [where the waterstop was installed] as an enclosed space but not a confined space." ROI Exhibit 4K.

On September 15, 1994, RESCC terminated Barton's employment. There is a sharp factual dispute as to whether and when Barton made disclosures to RESCC and/or took actions that would be protected under the Part 708 regulations, and whether such disclosures or actions led to his termination. I will discuss Barton's alleged disclosures and actions in detail in the analysis below.

II. Analysis

It is the burden of the Complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Barton establishes that a protected disclosure, participation, or refusal was a factor contributing to his termination, RESCC must convince me that it would have taken the action even if Barton had not engaged in any activity protected under Part 708. Helen Gaidine Oglesbee, 24 DOE ¶ 87,507, at 89,034-35 (1994).

After considering the record established in the Assistant Inspector General's investigation, the parties' submissions, the testimony presented at the hearing, and the post-hearing briefs, for the reasons stated below I have concluded that Barton has met his burden of proving by a preponderance of the evidence that he made protected disclosures concerning health or safety that contributed to his termination. However, I have concluded that RESCC has shown by clear and convincing evidence that it would have terminated Barton absent these disclosures.

A. Whether Barton's Activities Are Protected Under 10 C.F.R. § 708.5.

The Part 708 regulations prohibit discrimination by a DOE contractor against its employee on the basis of certain activities by the employee, described as follows in 10 C.F.R. § 708.5(a).

(1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences--

(i) A violation of any law, rule, or regulation;

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

(iii) Fraud, mismanagement, gross waste of funds, or abuse of authority;

(2) Participated in a Congressional proceeding or in a proceeding conducted pursuant to this part; or

(3) Refused to participate in an activity, policy, or practice when--

(i) Such participation--

(A) Constitutes a violation of a Federal health or safety law; or

(B) Causes the employee to have a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation, and the activity, policy, or practice causing the employee's apprehension of such injury--

(1) Is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety resulting from participation in the activity, policy, or practice; and

(2) The employee is not required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities;

(ii) The employee, before refusing to participate in an activity, policy, or practice has sought from the contractor and has been unable to obtain a correction of the violation or dangerous activity, policy, or practice; and

(iii) The employee, within 30 days following such refusal, discloses to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy, or practice, and explaining why he has refused to participate in the activity.

The Assistant Inspector General's ROI found that "during the course of his employment, the Complainant made safety disclosures that are protected pursuant to Part 708.5." ROI at 10. In addition, the Assistant Inspector General determined that the Complainant's actions "in identifying the potential safety problem, halting the work and seeking approvals" regarding the installation of waterstop on September 14, 1994, "were protected under Part 708." ROI at 13. Finally, the ROI found that the Complainant faxed a letter to the President of RESCC on September 15, 1994, prior to his termination that day, and that this letter "constituted a disclosure protected under Part 708." ROI at 15.

1. Barton's Disclosures Through September 8, 1994

From July 18, 1994 through September 6, 1994, Barton completed health and safety logs and quality assurance reports which he regularly submitted to RESCC. See ROI Exhibits 4C, 4D.(2) As one would expect in documents of this type, I find a number of entries related to employee health and safety, such as the discovery of contaminated soil at the work site, the danger to workers of impalement from exposed concrete reinforcement bars, and injuries resulting from workers not wearing proper protective gear. Thus, after reviewing these documents, I find that they contain disclosures that the Complainant in good faith believed evidenced a substantial and specific danger to employees or public health or safety, and therefore are protected under 10 C.F.R. § 708.5(a)(1)(ii).(3)

In addition, the Complainant alleges that "probably three or four weeks" prior to his termination he addressed safety concerns in a meeting with RESCC President Ron Schweitzer. Tr. at 156. In a sworn statement provided to the Assistant Inspector General, Barton described an August 31, 1994 meeting in which he "complained that [the RESCC Project Manager] was not requiring men to adhere to safety and quality requirements, and observed that [the RESCC Project Manager] was emphasizing productivity at the expense of safety and quality." ROI Exhibit 2. The RESCC President testified that such a meeting "may

have" taken place, but that he had no specific recollection of it. Tr. at 503-04, 525. I found the Complainant's testimony regarding this meeting to be credible, and note that his recollection is corroborated by an entry in the August 31, 1994 health and safety log submitted by the Complainant stating, "I went to our office this afternoon to talk to Ron S. Didn't accomplish much." ROI Exhibit 4-C. In the absence of any testimony specifically denying that such a meeting took place, I conclude that the meeting probably took place.(4) Because 10 C.F.R. § 708.5(a)(1)(i) protects any disclosure of what the Complainant in good faith believed was a "violation of any law, rule, or regulation," I find that Barton's expressed belief that RESCC workers were not complying with safety requirements is a protected disclosure under Part 708.

Barton also testified at the hearing that he orally communicated safety concerns to the RESCC Project Manager throughout this period. Tr. at 153, 155. However, Barton's testimony describing these conversations provides only a vague reference to safety concerns in general. Thus, he has failed to show that information disclosed in those conversations evidenced a substantial and specific danger to employees or public health and safety. The Complainant also contends that he submitted a non-conformance report to the RESCC Project Manager on August 17, 1994. Tr. at 205; ROI Exhibit 2. Yet, there is no information in this report that evidences a safety concern, a violation of any law, rule, or regulation, or fraud, mismanagement, gross waste of funds, or abuse of authority. ROI Exhibit 4-F. Thus, the Complainant has not met his burden of showing that either his oral or written communications to the RESCC Project Manager contained disclosures protected under Part 708.

On September 8, 1994, Barton sent a letter to the RESCC President in which he primarily refers to scheduling matters related to the ongoing construction project. ROI Exhibit 4-H. This letter contains no references to health or safety matters or violations of any law, rule, or regulation protected under 10 C.F.R. § 708.5(a)(1)(i) or (ii). I do note that the letter states, "We should evaluate the effectiveness of some of the craftspeople on the project to determine if they are truly going to assist us in the successful completion of this project or just suck on the payroll." Id. However, a complaint that workers may not be earning their keep is not evidence of "[f]raud, mismanagement, gross waste of funds, or abuse of authority," the disclosure of which is protected under 10 C.F.R. § 708.5(a)(1)(iii). I therefore find that this letter contains no protected disclosure under 10 C.F.R. § 708.5(a)(1).

2. Barton's Activities Between the September 12, 1994 Unusual Occurrence and his Termination on September 15, 1994

a. Barton's Disclosure of the Unusual Occurrence

After the September 12, 1994 incident described in section I.C above, when RESCC's work was halted by FERMCO and RESCC was cited for an unusual occurrence, Barton alleges that he called the RESCC President and notified him of the incident. Tr. at 163. There is also in the record a document that RESCC had submitted to the Assistant Inspector General, that Barton testified he faxed to RESCC on September 13, 1994, and on which is a handwritten note from Barton to the RESCC President dated "9/13." ROI Exhibit 4-I; Tr. at 164. This document contained the report FERMCO issued regarding the September 12, 1994 unusual occurrence.

The RESCC President, on the other hand, testified that he first heard of the September 12 incident from either the RESCC Project Manager or FERMCO. Tr. at 504. The RESCC President does not believe he received the unusual occurrence report with the handwritten note from Barton on September 13, 1994, Tr. at 539, but is not certain whether he saw this document prior to terminating Barton. Tr. at 544. There is no dispute, however, that Barton and the RESCC President discussed the incident at some point after the event and prior to Barton's termination. See Tr. at 504-05.

With regard to this alleged disclosure, RESCC argues,

Whether or not the Complainant advised [RESCC President] Ron Schweitzer of the September 12, 1994

incident, it would not make any sense to classify it as a protected disclosure. The Complainant was not the first one to disclose the incident to Ron Schweitzer nor did he discover it. It was discovered by FERMCO and it was inevitable that Ron Schweitzer would learn of it. It would not make sense to permit an employee to achieve protected status as a whistleblower for simply repeating a safety concern that was a matter of general knowledge by the time the employee disclosed it.

Respondent's Post-Hearing Brief at 6.

However, the stated policy underlying Part 708 is that contractor employees "should be able to provide information . . . without fear of employer reprisal." 10 C.F.R. § 708.3. This policy would hardly be furthered by a construction of the regulations that would in essence require an employee to discern the knowledge of an employer before providing information to that employer, lest the employee's action go unprotected under Part 708. Nor would it further the purposes of Part 708 if an employee must be the one who discovers a safety problem for his disclosure to be protected. To convey to the appropriate authority an unsafe condition discovered by another employee can be just as valuable to the purpose of ensuring that DOE facilities are "operated in a manner that does not expose the workers or the public to needless risks or threats to health and safety." 57 Fed. Reg. 7533 (March 3, 1992). Thus, I find that Barton, by relating the facts of the September 12, 1994 unusual occurrence to the RESCC President, whether orally or by fax, disclosed information that he in good faith believed evidence a violation of safety regulations, and thereby made a disclosure protected under 10 C.F.R. § 708.5(a)(1)(i). See META, Inc., 26 DOE ¶ 87,504 (1996) (no requirement in Part 708 that a protected disclosure must contain unique information not known to the DOE or contractor).

b. Barton's Activities on September 14, 1994

As described above in section I.C of this decision, on September 14, 1994, Barton sought to prevent the installation of waterstop at the Vitrification Pilot Plant construction site in order to obtain a permit to perform the work. The Complainant testified that he believed at the time, and still believes, that a permit was required before installing the waterstop, and that to proceed with the installation without the permit would have been in violation of safety regulations, and specifically the requirements set forth in FERMCO's Environmental Safety and Health Manual. See Tr. at 186. Barton therefore sought the opinion of a safety technician from FERMCO's Industrial Hygiene Department (IH), and later that of an IH manager. Though FERMCO personnel were of the opinion that a permit was not required, it is clear that Barton believed otherwise, and thus his expression of that opinion to FERMCO constituted a disclosure of what Barton in good faith believed was information evidencing a violation of applicable safety rules and regulations. Accordingly, these disclosures are protected under 10 C.F.R. § 708.5(a)(1)(i).

I do not find, however, that Barton's refusal to approve the installation of the waterstop while awaiting the oral opinion of FERMCO personnel and subsequently requesting that FERMCO provide a written opinion constitutes an activity protected under Part 708. Section 708.5(a)(3) prohibits discrimination against a DOE contractor employee because the employee has

(3) Refused to participate in an activity, policy, or practice when--

(i) Such participation--

(A) Constitutes a violation of a Federal health or safety law; or

(B) Causes the employee to have a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation, and the activity, policy, or practice causing the employee's apprehension of such injury--

(1) Is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or

safety resulting from participation in the activity, policy, or practice; and

(2) The employee is not required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities;

(ii) The employee, before refusing to participate in an activity, policy, or practice has sought from the contractor and has been unable to obtain a correction of the violation or dangerous activity, policy, or practice; and

(iii) The employee, within 30 days following such refusal, discloses to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy, or practice, and explaining why he has refused to participate in the activity.

There are significant differences between the protection afforded disclosures under 10 C.F.R. § 708.5(a)(1), and that provided for refusals to participate under 10 C.F.R. § 708.5(a)(3). Under section 708.5(a)(1), an employee need only have a good faith belief that the information he provides evidences a violation of law or a danger to safety. By contrast, for a refusal to participate to be protected under section 708.5(a)(3)(i)(A), the participation must *in fact* violate Federal health and safety law, and to be protected under 708.5(a)(3)(i)(B), the participation must evoke a *reasonable* apprehension of serious injury and be of such a nature that a *reasonable person*, under the circumstances then confronting the employee, *would conclude* there is a bona fide danger of an accident, injury, or serious impairment of health or safety.

Bearing this in mind, and the fact that the burden is on the Complainant to show that his actions fell within the scope of those protected under Part 708, I find that Barton has not met this burden with respect to his refusal to approve the installation of waterstop on September 14, 1994. The Complainant has not shown by a preponderance of the evidence that the impending installation of the waterstop without a permit (1) would have constituted a violation of Federal health or safety law; (2) caused him to have an apprehension of serious injury to himself, other employees, or the public, or that such apprehension would have been reasonable; or (3) was an action of such a nature that a reasonable person, under the circumstances then confronting the Complainant, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety.

First, while the Complainant contends that installation of the waterstop without a permit would have violated applicable health or safety regulations, the weight of the evidence in the record supports the opposite conclusion. Barton's contention rests on his assertion that the space where the waterstop was to be installed was a "permit-required confined space" as defined in FERMCO's Environmental Safety and Health Manual. Barton presented little if any evidence to support this position, stating that he relied at the time

primarily on my own knowledge of what a non-permit as opposed to a permit require confined space is.

And secondly, the all too obvious ramifications of doing it on [September] 12th [when RESCC was cited for an unusual occurrence] and when Pete McCarthy went in on the 12th and changed the atmosphere of that confined space, making it a permit required confined space.

Tr at 186-87. However, the September 13, 1994 unusual occurrence report FERMCO issued refers four times to the area in question not as a "confined space" but as an "enclosed area." ROI Exhibit 4-I. FERMCO's opinion was reinforced by the September 15, 1994 written determination it issued to RESCC which states that "FERMCO considers the space between the forms as an enclosed space but not a confined space." ROI Exhibit 4-K. Thus, I cannot find that the Complainant has proven by a preponderance of the evidence that installation of the waterstop without a permit would have constituted a violation of a Federal health or safety law.

Second, though the Complainant testified that he believed the fusing of the waterstop would have produced toxic fumes, Tr. at 176, 177, his concerns regarding installation of the waterstop seemed to have

been primarily focused on his belief that the installation would have violated permitting requirements, not on an apprehension that the installation would have caused serious injury to himself, other employees, or the public. See, e.g., Tr. at 187-88 ("the reason was that we had guidelines that we had to perform this work by and as long as I was aware that it was taking place, I was going to make sure that we were going to abide by those guidelines, or those regulations"). That Barton had any apprehension of serious injury to anyone resulting from the waterstop installation is also contradicted by the fact that he was willing to go ahead with the installation if FERMCO provided a written determination that no permit was required. The following portion of Barton's testimony, describing his reaction to the FERMCO oral opinion that a permit was not required, illustrates this point.

So the [FERMCO IH] technician called . . . Craighead. And Jack came down to the job site. And he said that he agreed with his technician. And I said, well, I vehemently disagree with you. I said but you are the -- you know, you're the power out here. I mean you're the guys, your department is who determines what is a permit as opposed to a non-permit required confined space.

So. I'm just going to have to ask you to give it to me in writing. I said just for no other reason than to cover my ass. I said because I can see the handwriting on the wall. Some other individual is going to see what's going on, going to shut the job down just like they did on the 12th and we're going to have another unusual occurrence on our hands. And I'm not going to be responsible for that. I'm going to be -- I'm going to be sure that if in fact it's going to happen, it's going to be your responsibility as the guy who said that it could happen, that it could take place.

Tr. at 189-90.

Even assuming, arguendo, that Barton did have an apprehension that serious injury to himself, other employees, or the public, would result from the waterstop installation, I find that the Complainant has not shown by a preponderance of the evidence that such an apprehension would have been reasonable under the circumstances. Section 708.5(a)(3) requires that the Complainant's apprehension of serious injury be reasonable, 10 C.F.R. § 708.5(a)(3)(i)(B), and also that the activity, policy, or practice in which the Complainant refuses to participate is "of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety resulting from participation in the activity, policy, or practice." 10 C.F.R. § 708.5(a)(3)(i)(B)(1). I conclude that a reasonable person under the circumstances would not have concluded that there was a bona fide danger resulting from the installation of the waterstop.

The opinion of a reasonable person under the circumstances of September 14, 1994, is exemplified by the position FERMCO took that the waterstop could be installed without a permit. The testimony of the Complainant and others indicates that if FERMCO could ever be characterized as being unreasonable in its safety determinations, it is because it tends to err on the side of caution. Barton testified to the Fernald Site's "high standard for safety and quality. And when I say high standard, I mean an extremely high standard with regard to safety and quality." Tr. at 129. One of the Complainant's witnesses called by the Complainant, a fellow RESCC employee, testified that

Fernald is the safest place I've ever worked, period. There's no comparison. . . . I think safety is more important than production. I really believe that here. . . . [H]ere, if you ever saw a dust particle in the air, you can report it and you can guarantee you'd be in full-face respirator within hours.

Tr. at 45, 46. This witness also stated, "One thing you don't do at Fernald is defy the authorities . . . . Especially about your health and safety. Because that will get you fired and run off faster than anything else." Tr. at 58. Accordingly, though reasonable persons can obviously disagree in evaluating the danger of an activity, I find that Barton has not shown by a preponderance of the evidence that he had a reasonable basis for believing that serious injury or a bona fide danger of an accident, injury, or serious impairment of health or safety would result from the installation of waterstop.(5)

Finally, Barton testified at the hearing that in a regular meeting between RESCC employees with

FERMCO officials on September 14, FERMCO requested a special meeting with RESCC, including the RESCC President and Project Manager, "to specifically discuss schedule and the events that had taken place that had led up to that period of time, which was poor quality, poor safety and schedule slippage." Tr. at 244, 245. Barton stated that, sometime between this regular meeting and his termination on September 15, he discussed the requested meeting with the RESCC President, who asked, as related by the Complainant,

[W]hat are we going to be talking about? What do they want us to talk about? And I said, well, basically, Ron [Schweitzer, RESCC President], everything that we've encountered. They perceive there being big problems with what's going on in the field and they're not listening to Ray [the RESCC Project Manager] and I. You know, they want to hear it from you.

And, you know, I said, well, basically, up till now, you know, I've been trying to work with Ray on this and try to resolve these issues and get him to be safe, get him to be quality conscious, but I mean when we go into this meeting, you know, I mean they know what I'm up against. I'll have to come clean, I'll have to tell them the truth.

. . . .

[The truth being that] I got no cooperation in those issues -- on those issues, the safety, quality. Cooperation, you know, with Ray and his manpower regarding those issues.

Tr. at 250. Assuming this conversation took place as the Complainant related in his hearing testimony, the information conveyed by Barton that he was not getting cooperation from the RESCC Project Manager and others on safety issues would constitute a protected disclosure under 10 C.F.R. § 708.5(a)(1)(ii), just as the same information conveyed in the Complainant's late August or early September meeting with the RESCC President was similarly protected, as discussed above in section II.A.1.(6) However, unlike the Complainant's earlier meeting with the RESCC President, this latter conversation to which Barton testified is not corroborated by any contemporaneous documentation. Nor is there any mention of this conversation, as there was with the earlier meeting, in the sworn statement the Complainant gave to the Assistant Inspector General. See ROI Exhibit 2. I therefore do not find that Barton has proved by a preponderance of the evidence that this conversation took place.

I therefore conclude regarding the Complainant's activities on September 14, 1994, that his disclosures of information to FERMCO that he in good faith believed evidenced a violation of the applicable health and safety regulations were protected under 10 C.F.R. § 708.5(a)(1)(i), but that his refusal to approve the installation of the waterstop on this date does not qualify as a protected action under Part 708. Nor can I find that Barton's request to FERMCO personnel that it issue a written determination falls into any category of protected disclosure, participation, or refusal set forth in 10 C.F.R. § 708.5(a).

c. Barton's Disclosures on September 15, 1994

Barton alleges that on September 15, 1994, prior to his termination from RESCC, he sent two faxes to the RESCC President, one from home at approximately 5:00 A.M. and one from the construction site at approximately 2:00 or 2:30 P.M. Tr. at 196, 201; ROI Exhibits 4-F, 4-L. Barton's testimony regarding the fax he sent in the early morning is corroborated by his wife, who testified at the hearing that she recalled being awake in the middle of the night with her husband, prior to his termination, and the Complainant writing a letter which he faxed to the RESCC President sometime between 2:00 and 5:30 A.M. Tr. at 230-33.

The RESCC President testified that he did not receive either of the faxes the Complainant transmitted until the morning of September 16, 1994, the day after Barton was fired. Tr. at 514, 570. Tr. at 261. The RESCC President's son, who worked at the RESCC office, testified that on September 16 either he or a secretary found two faxes on the fax machine that morning, and that he gave the two faxes to his father.

Tr. at 262. He also testified that he was the last person to leave the office on September 15 and that before he left he checked the fax machine for incoming faxes and found none. Tr. at 261. The testimony of the RESCC President and his son is undermined, however, by a handwritten notation on the fax that the Complainant alleges he transmitted on the afternoon of September 15. This notation, which the RESCC President testifies he wrote, states "RCVD 9-15- 94." ROI Exhibit 4-F. When asked when he wrote the notation, the RESCC President testified,

I have no idea. I would assume it was done sometime after -- there was a suit filed and we were, I guess, requested to get documents together and we were trying to gather all the documents.

. . . .

Because I know I received these after I fired him, so I couldn't have already put the 15th on there.

Tr. at 515. I do not believe this RESCC President's testimony provides a sufficient explanation for the "RCVD 9-15-94" notation. Because I find that the credibility of the testimony of the RESCC President and his son is weakened by the notation on one of the documents, I put more faith in the relatively convincing testimony of the Complainant and his wife on this issue, and therefore conclude that the Complainant has shown by a preponderance of the evidence that both faxes were sent to the RESCC President prior to the Complainant's termination.(7) The next issue, then, concerns whether these faxes contained disclosures protected under Part 708.

One of the fax transmissions contained a cover sheet from Barton to the RESCC President stating, "According to P.O. VIII of the R.E.S.C.C. Quality Assurance Program, ?The Quality Assurance Manager will perform inspections which will be documented by utilizing the attached documents.' Please see attached documents." ROI Exhibit 4-F. Attached to the cover sheet were two non- conformance reports that Barton completed which were dated August 17, 1994, and September 15, 1994. I have reviewed these two reports and, as I have already found with respect to the August 17, 1994 report in section II.A.1 above, I find no information in either report evidencing a safety concern, a violation of any law, rule, or regulation, or fraud, mismanagement, gross waste of funds, or abuse of authority. Accordingly, I find nothing in this fax transmission that qualifies as a protected disclosure under 10 C.F.R. § 708.5(a)(1).

The other fax transmitted was a letter from Barton to the RESCC President dated September 15, 1994. This letter refers, among other things, to "a total lack of teamwork and an unwillingness to comply with safety requirements" and cites as an example the installation of the waterstop without a permit on September 14. ROI Exhibit 4-L. Section 708.5(a)(1)(i) protects disclosures of information that an employee in good faith believes evidences a violation of any law, rule, or regulation. I find that Barton believed in good faith, correctly or not, that installing the waterstop without a permit would violate safety rules, and that therefore this fax contains information protected disclosure under 10 C.F.R. § 708.5(a)(1)(i).

Barton also testified that on September 15, 1994, he handed to a FERMCO construction manager overseeing the RESCC contract a copy of the September 15, 1994 letter he had faxed to the RESCC President, along with the September 8, 1994 letter from Barton to the RESCC President discussed in section II.A.1 above. Tr. at 200. While I found above that the Barton's September 8 letter did not contain disclosures protected under Part 708, his September 15 letter did contain information evidencing what Barton in good faith believed was a violation of safety rules. However, the FERMCO construction manager to whom Barton alleges he gave the letters testified that he has no recollection of receiving them. Tr. at 366. Thus, I cannot find that the Complainant has proven by a preponderance of the evidence that he made a protected disclosure to the FERMCO construction manager.

3. Summary of Disclosures by Barton Found to be Protected Under Part 708

As detailed above, I find the following disclosures by Barton to be protected under 10 C.F.R. §

708.5(a)(1).

(1) information contained in the health and safety logs and quality assurance reports submitted by the Complainant to RESCC from July 18, 1994 through September 6, 1994;

(2) information Barton conveyed to the RESCC President in a meeting in late August or early September 1994 that the RESCC Project Manager was not requiring workers to adhere to safety and quality requirements;

(3) facts regarding the September 12, 1994, unusual occurrence conveyed by Barton to the RESCC President after this incident but prior to his termination;

(4) Barton's expression of his opinion to FERMCO personnel on September 14, 1994, that installation of waterstop without a permit would be in violation of application health and safety requirements; and

(5) information contained in a letter faxed from Barton to the RESCC office on September 15, 1994, in which Barton complained about the unwillingness of RESCC employees to adhere to safety requirements.

B. Whether Barton's Protected Disclosures Were Factors Contributing to his Termination

In prior decisions of the Office of Hearings and Appeals, we have established that,

A protected disclosure may be a contributing factor in a personnel action where ?the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.'

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54 (1997) (quoting Ronald Sorri, 23 DOE ¶ 87,503 at 89,010 (1993)); Ronny J. Escamilla, 26 DOE ¶ 87,508 at 89,046 (1996).

In this case, there is clearly temporal proximity between Barton's protected disclosures, the first made on July 26, 1994 and the last on September 15, 1994, and his termination on September 15, 1994. As explained below, I also find that the deciding official in this case, RESCC President Ron Schweitzer, had actual or constructive knowledge of each of Barton's protected disclosures.

First, RESCC President confirmed in an April 10, 1996 sworn statement he gave to the Assistant Inspector General that he had received health and safety logs and quality assurance reports from Barton on a weekly basis, ROI Exhibit 15, and the logs and records which were found above to contain protected disclosures were submitted to the Assistant Inspector General by RESCC. ROI Exhibits 4-C, 4-D. I therefore find that the RESCC President had actual knowledge of these disclosures. Second, the RESCC President obviously had actual knowledge of the protected disclosures conveyed by Barton when the two met in late August or early September 1994, and in conversations between the two relating to the September 12 unusual occurrence. Third, the RESCC President testified at the hearing that, prior to terminating the Complainant, he was aware of the September 14, 1994 disagreement between Barton and FERMCO IH personnel over the need for a permit to install waterstop, and therefore the RESCC had actual knowledge of Barton's protected disclosures to FERMCO that day. Finally, there is no proof that the RESCC President had actual knowledge of the letter from Barton to the RESCC President found above to have been faxed to the RESCC office on September 15, 1994. However, because Barton has proved by a preponderance of the evidence that he faxed the letter to the RESCC office prior to his termination that day, because the fax cover sheet and letter was addressed to the RESCC President, and because there is no dispute that the RESCC President was in his office on September 15, 1994, I conclude that there is sufficient evidence to find that the RESCC President had at least constructive knowledge of the information contained in that letter.

I therefore conclude that the Complainant had met his burden of establishing by a preponderance of the evidence that he made disclosures described under 10 C.F.R. § 708.5, and that these disclosures were a contributing factor in his termination. Therefore, the burden shifts to RESCC to prove by clear and convincing evidence that it would have terminated the Complainant absent his protected disclosures. 10 C.F.R. § 708.9(d).

C. Whether RESCC Would Have Terminated Barton Absent His Protected Disclosures

For the reasons set forth below, I find based on my review of the record in this case clear and convincing evidence that RESCC would have terminated Barton absent the protected disclosures described in section II.A above. My conclusion is based on the compelling evidence in the record pointing to two primary motivations behind the RESCC President's decision to fire Barton.

The first clearly apparent motivation was a disagreement between the RESCC President and the Complainant regarding the scope of the Complainant's duties. Though the precise genesis of this dispute is not clear from the record, it is clear that the RESCC President held the Complainant at least partially responsible for not preventing the September 12, 1994 incident that FERMCO subsequently categorized as an unusual occurrence, and that the Complainant's response to the RESCC President was that the primary responsibility for the incident instead rested with the RESCC Project Manager. The following excerpts from the hearing testimony illustrate this point. The first excerpt is from the testimony of the RESCC President.

Q Now, were you angry with Mr. Barton after this gas powered saw incident on September 12?

A Sure, I was upset. He wasn't on the job. Like I said, why weren't you there, Tim? You could have prevented that. And he said, he wasn't there because he had to -- he was just over there in the administration building on site.

Q Are you saying that the incident was all his fault?

A The gas powered?

Q Right. Or were there other people responsible, too?

A No, I couldn't say it was all his fault.

Q Okay, but you felt that he should have been there to prevent it, even though --

A On site, the primary responsibility for safety rested with Mr. Barton. And it was a safety problem.

Tr. at 507. The next excerpt is from the Complainant's testimony.

Q Did you ever have a discussion with Ron Schweitzer about that [unusual occurrence] report or the incident beyond that?

A Yes. And, you know, basically Ron said, well, you know, that's what I hired you for was to make sure that these things are prevented. And I in turn responded that I can't make Ray [the RESCC Project Manager] be safe. I mean Ray has got to take his own initiative to keep him and his people safe. I mean I can't lead him by the hand with every task and say, okay, now Ray, are you going to be safe on this task? Or, you know, do I need to stay here?

The existence of an ongoing dispute between the RESCC President and the Complainant over the scope of the Complainant's duties was corroborated by the hearing testimony of a FERMCO construction manager.

I was trying to oversee their [RESCC's] contract to get it done and they were supposed to provide quality assurance and quality control inspection, the whole gamut.

But I was aware also that [the Complainant] had this ongoing philosophical discussion with [the RESCC President] that that wasn't really what he had hired him for. That's [the Complainant] relating to me. That's not why he hired me. He hired me for the programmatic side of this stuff. I'm not supposed to be the quality control inspector type thing.

Tr. at 118.

The RESCC President testified that after the September 12 unusual occurrence he wasn't ready to fire Barton. "I wasn't happy with his performance. I wasn't ready to fire him." Tr. at 510. Asked what put him "over the edge," the RESCC President testified that "it was the incident of September 14th." Id. This is the second clearly apparent motivation for Barton's termination. September 14, 1994, was the day that Barton refused to approve the installation of waterstop without a permit, and both parties agree that the incidents of that day played a pivotal role in the RESCC President's decision to terminate Barton.

[RESCC President] ***Schweitzer expressly admitted that it was the incident of September 14, 1994 (the waterstop incident) which brought him to the point of firing Barton***. Specifically, Schweitzer was unhappy that Barton had requested Industrial Hygiene's position in writing because "[t]hat made us look foolish. . . ." Schweitzer considered the incident ***"the straw that broke the camel's back."***

Complainant's Post-Hearing Brief at 13 (citing Tr. at 510, 511, 563) (citations omitted) (emphasis in original). While both RESCC and the Complainant do not dispute the importance of the events of September 14, 1994, the Complainant contends that Barton's actions that day were protected under Part 708, while RESCC maintains they were not. See id. at 2; Respondent's Post-Hearing Brief at 2-3. For the reasons explained in section II.A.2, I have already found that while Barton's expression of opinion to FERMCO personnel that a permit was required prior to installation of the waterstop was a protected disclosure under 10 C.F.R. § 708.5(a)(1)(i), Barton's refusal to approve the installation of the waterstop and his request to FERMCO that it put its opinion on the matter in writing are not protected activities under the Part 708 regulations.

The critical issue here, then, is which of Barton's actions on September 14, 1994 precipitated his termination. I find clear and convincing evidence that it was not Barton's disclosures to FERMCO that day that upset his boss. As the Complainant states in his post-hearing brief, it was specifically Barton's request for a written determination from FERMCO that brought the RESCC President to the point of firing Barton. Tr. at 510; Complainant's Post-Hearing at 13. At the hearing, the RESCC President described Barton's request as

really unreasonable. That was not -- that was unnecessary. That made us look foolish and was just an unnecessary request I thought.

. . . .

Requiring a written authorization was not proper. That was not a proper decision. There was no reason we should say [to FERMCO IH manager] Craighead, I don't trust what you're telling me. Put it in writing for me so that I can let this work go ahead.

Tr. at 511, 564.

I therefore conclude that there is clear and convincing evidence in the record that the RESCC President's decision to terminate the Complainant was primarily motivated by a disagreement over the scope of the Complainant's duties, which manifested itself in the RESCC's President opinion that Barton bore a large amount of responsibility for the unusual occurrence of September 12, 1994, and Barton's refusal to approve the installation of waterstop on September 14, 1994, without first receiving a written

determination from FERMCO. Because I find that these were the reasons for the action taken by the RESCC President, I conclude that Barton would have been terminated absent his protected disclosures.

III. Conclusion

As set forth above, I have found that the Complainant has met his burden of proof of establishing by a preponderance of the evidence that this he made disclosures protected under 10 C.F.R. Part 708. I also have determined that the Complainant's disclosures were contributing factors in his termination. However, I found that RESCC has proven by clear and convincing evidence that it would have terminated the Complainant absent his disclosures. This result does not diminish the protection afforded the Complainant's health and safety disclosures. Part 708 unmistakably prohibited RESCC from taking any action in reprisal for these disclosures. But these regulations do not constrain an employer from taking what it sees as appropriate action in response to a employee's failure to perform his duties as envisioned by the employer, or in response to conduct that is outside that protected by Part 708. Accordingly, I conclude that the Complainant has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted under § 708.10.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Timothy E. Barton under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Assistant Inspector General for Assessments, Office of the Inspector General, Department of Energy.

Steven J. Goering

Staff Attorney

Office of Hearings and Appeals

April 13, 1998

Appendix - Case No. VWA-0017

Disclosures by Complainant in Health and Safety Logs and Quality Assurance Reports

Health and Safety Logs

Log Date Log Entry

7/26/94"FERMCO sprayed Dursban insecticide on our work area the A.M. This product is toxic! How about soil contamination after spraying?"

7/27/94"We discovered contaminated soil first rattle out of the box today."

8/10/94"I instructed Ray to have the vertical rebar covered with something to protect workers from impalement hazard."

8/11/94"I had to keep on the men about keeping their goggles or face shields on while placeing [sic] concrete. I have serious reservations regarding keeping the worker safe from concrete skin injuries as opposed to the hazard of impaired vision with the protection on."

8/15/94"I . . . instructed laborers to make sure all rebar ends are covered to protect workers from impalement."

8/17/94"James Stanley hit knee with small piece of board. See accident report in rear of log."

8/29/94"I conducted a safety meeting today about [Material Safety Data Sheets], the mud being a slip hazard and responsibility to read all [Material Safety Data Sheets]."

9/1/94 "James Stanley was trying to drive a nail through rebar when his hammer hit the rebar, bounce onto his nose. He incurred minor laceration on the bridge of his nose. SEE FILE."

9/6/94 "Yolanda Miller hit her finger with a hammer, caused laceration. SEE 1st Report of Injury (FILE)."

"Ms. Miller . . . did not have her leather palmed gloves on when she should have."

Quality Assurance Reports

Log Date Log Entry

7/27/94"Crew began excavation @ the lowest elevation and was planning on working uphill. But they encountered contaminated soil the first bucket of soil excavated. . . . Crew moved to uphill location until determination is made . . . by Rad. Safety."

"RESCC encountered contaminated soil today."

8/2/94 "Crew performing layout, notified Rick S. that "LASER" warning sign needed to be on the tripod."

8/8/94 "[E]xcavation was caution taped off as a secondary barrier per req."

8/9/94 "There were 2 deficiencies with safety found today during walk thru. Rebar caps on form pins and boards over extension cords @ walkway."

8/10/94"Wise guys are using P.V.C. cement without [Material Safety Data Sheet]."

8/24/94"I instructed crew to be aware of unprotected protruding rebar and to cover the ends with something to prevent impalement."

8/31/94"Crew was observing using improper picking devices for EFCO forms. Deficiency was corrected by utilizing shake out hooks instead of eye bolts."

9/1/94 "James Stanley hit himself on his nose with his hammer today. (SEE 1st Report of Injury)."

9/6/94 "Yolanda Miller hit her hand with a hammer today. SEE 1st Report of Injury."

(1)DOE Order 5000.3B, in effect from February 22, 1993, to October 30, 1995, defines an "unusual occurrence" as a "non-emergency occurrence that has significant impact or potential for impact on safety, environment, health, security, or operations" and provides that

[o]ral notification to DOE of unusual occurrences shall be as soon as sufficient information is obtained to indicate the general nature and extent of the occurrence but, in all cases, within 2 hours of categorization. However, oral notification to DOE should be accomplished as soon as possible for those occurrences judiciously determined to likely generate external interest. A Notification Report shall be prepared and submitted before the close of the next business day from the time of categorization (not to exceed 80 hours).

DOE Order 5000.3B (January 19, 1993).

(2)The Complainant notes that the Assistant Inspector General found in the ROI that the Complainant "reported a number of safety and quality issues in his daily safety and quality assurance logs which qualified as protected disclosures under Part 708" and contends that the "fact that Barton made these specific reports went unchallenged at hearing." Complainant's Post-Hearing Brief at 16. The Complainant therefore argues that I should adopt the findings of the Assistant Inspector General regarding these disclosures. Id. Though I agree with the Complainant that RESCC does not dispute the content of the health and safety logs and quality assurance reports submitted by Barton, RESCC has never conceded that the concerns reported in those logs and reports qualify as protected disclosures under Part 708. I therefore must determine whether, as found by the ROI, these logs and reports contain disclosures protected under 10 C.F.R. § 708.5(a)(1). See 10 C.F.R. § 708.10(b) ("[T]he Hearing Officer may rely upon, but shall not be bound by, the findings contained in the Report of Investigation.").

(3)In an appendix to this decision, I have set forth the specific log and report entries that I find are disclosures protected under 10 C.F.R. § 708.5(a)(1)(ii). I find that all other entries in the health and safety logs and quality assurance reports were either not related to safety or, if safety related, did not appear to be information that Barton in good faith believed evidenced a *substantial and specific* danger to employees or public health or safety. See Francis M. O'Laughlin, 24 DOE ¶ 87,505 (1994) ("Evidence that safety in the most general sense was referred to does not satisfy the regulatory standard of the complainant having actually disclosed information which in good faith is believed to evidence a substantial and specific danger, that applies to protected health and safety disclosures.")

(4)I am aware that Barton testified at the hearing that this meeting took place on a Saturday, Tr. at 156, while August 31, 1994, fell on a Wednesday. See ROI Exhibit 4-C. This seeming inconsistency, which is somewhat understandable given the passage of time since the events in question, is of little significance because by either account the meeting would have taken place prior to Barton's termination.

(5)In his testimony, Barton referred to portions of a Material Safety Data Sheet for "Specification Grade PVC Waterstop" which state that "P.V.C. involves Hydrogen Chloride, carbon monoxide and other toxic gases when burned," that "[f]umes from Molten Plastic should not be breathed unnecessarily," that a "self-contained breathing apparatus [should be used] if fusion welding in non-ventilated confined area," and that there should be "[v]entilat[ion] when fabricating (fusion welding) in confined area." ROI Exhibit 4-J; Tr. at 176-78. This document clearly points to the dangers of fusing waterstop in a *confined area* without ventilation or appropriate safety gear. But, as noted above, a preponderance of the evidence does not support a finding contrary to that of FERMCO that the area in question on September 14, 1994, was a confined area.

(6)I do not believe that the Complainant's statement that he intended in the future to disclose information in an upcoming meeting with FERMCO can be classified as a disclosure protected under Part 708.

(7)Both faxes contain date stamps generated by a fax machine, and both read September 13, 1994. However, since the parties agree that the faxes were not transmitted on that day, I find that the date stamps provide no evidence that helps resolve the factual dispute between the parties as to the time of the fax transmissions.

Case No. VWA-0018

May 21, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner:Thomas T. Tiller

Date of Filing:November 17, 1997

Case Number: VWA-0018

This Decision concerns two whistleblower complaints filed by Thomas T. Tiller (Tiller) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. At all times relevant to this proceeding, Tiller was employed by Wackenhut Services, Incorporated (Wackenhut), a DOE contractor that provides paramilitary security support services at the DOE's Savannah River Site in Aiken, South Carolina. Tiller contends in his first complaint that Wackenhut demoted him after he alleged that a senior level manager at Wackenhut had engaged in unethical and possible criminal conduct. In his second complaint, Tiller charges that Wackenhut retaliated against him after learning he had filed a Part 708 complaint.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to independent fact-finding by the DOE's Assistant Inspector General for Assessments (Assistant IG), a hearing before a Hearing Officer from the DOE's Office of Hearings and Appeals (OHA), and an opportunity for review of the Hearing Officer's Decision by the Secretary of Energy or his designee. See David Ramirez, 23 DOE ¶ 87,505, aff'd, 24 DOE ¶ 87,510 (1994).

B. Procedural History

On August 31, 1994, Tiller filed his first complaint pursuant to 10 C.F.R. Part 708. Tiller submitted a second Part 708 complaint to the DOE on April 18, 1996. The Assistant IG conducted an investigation into the allegations contained in Tiller's two complaints and issued a Report of Inquiry (ROI) and Proposed

Disposition on September 30, 1997. In the ROI, the Assistant IG concluded that Tiller had proven by a preponderance of evidence that he had made a protected disclosure and had participated in a protected activity. She found, however, that Tiller had failed to meet his regulatory burden of demonstrating that either the protected disclosure or participation in the Part 708 process was a contributing factor to any alleged adverse action taken against him by Wackenhut. As a consequence, the Assistant IG determined that Tiller was not entitled to any relief under the Part 708 regulations.

On October 28, 1997, Tiller submitted to the Assistant IG a request for a hearing under 10 C.F.R. § 708.9. The Assistant IG, in turn, transmitted the hearing request to OHA on November 17, 1997. The OHA Director appointed me as the hearing officer in this case on December 3, 1997.

Tiller filed a pre-hearing brief in this case on January 6, 1998, and amended that document twice, on January 20, 1998 and January 27, 1998. On February 6, 1998, Wackenhut tendered its pre- hearing submission in the case. On February 24 and 25, 1998, I convened a 22-hour hearing on the complaint in Aiken, South Carolina. At the conclusion of the hearing, I granted the parties' requests to file their closing arguments in written form and to submit post-hearing materials. With the filing of the last post-hearing submission on April 21, 1998, I closed the record in this case.

C. Factual Background

The record in this case is substantial and contains a plethora of material not relevant to the ultimate issues before me. The following summary focuses, therefore, only on those facts necessary for me to reach findings with respect to the issues defined by 10 C.F.R. Part 708. The relevant facts set forth below are extracted from the entire record developed in this case, including the investigative file generated by the Assistant IG, the submissions of the parties, and the transcript of the February 24 and 25, 1998 hearing (hereinafter Tr.).

In April 1991, Thomas Tiller accepted the position of Labor Relations Officer with Wackenhut at the DOE's Savannah River Site. Tiller quickly rose through the ranks in the labor relations field, assuming the position of Labor Relations Manager at the Site by 1992. As Wackenhut's Labor Relations Manager, Tiller served as a member of the management team that negotiated contracts with Wackenhut's guard union, the United Plant Guard Workers of America (UPGWA).

In April 1992 and February 1993, Tiller executed a Conflict of Interest Statement for Wackenhut, certifying, among other things that (1) neither he, nor any immediate family member had engaged, directly or indirectly, in any activity which created a conflict of interest, (2) he had read Wackenhut's Conflict of Interest Policy, and (3) he would immediately disclose any situation in the future that may possibly be interpreted as involving a Conflict of Interest. Exs. 39, 40. Wackenhut's Conflict of Interest Policy defines a conflict of interest, in relevant part, as follows:

any activity in which an employee . . . may participate that may conflict or may reasonably be interpreted to conflict with proper performance of their duty and responsibility to the Company, or with respect to transactions between the employee, the Company and other business interests . . .

Ex. 118 at 2. Among the examples cited in Wackenhut's Conflict of Interest Policy as activities that constitute a conflict of interest is a loan to or from any person or organization having any dealings with the Company.

In August 1993, Mr. Tiller encountered financial difficulties, leaving him unable to pay his bills. Ex. 9 at 26. Knowing that the local UPGWA union representative had assisted another employee during a time of financial need, Tiller asked the union representative for a $900 loan. Id. The union representative's wife advanced the $900 interest-free loan to Tiller; Tiller's wife repaid the loan two weeks thereafter. Id. Unknown to Tiller at the time, the local union representative photocopied the $900 check before giving it to Tiller and then showed a copy of the check to at least one UPGWA member. Tr. at 321-22. According

to a national UPGWA official and a senior Wackenhut official, the local union representative who loaned Tiller the $900 bragged, “I have Tiller in my pocket now and can get any information from him I want.” Tr. at 333, 545.

Senior managers at Wackenhut expressed disbelief when they first learned of Tiller’s loan during contract negotiations between the company and the UPGWA in October 1993. On or about October 12, 1993, two of Tiller’s fellow members on the contract negotiating team confronted Tiller about the loan. Wackenhut Hearing Ex.8; Ex. 19. Tiller confirmed that he had solicited and accepted the loan. Exs. 9, 19. Shortly thereafter, Wackenhut management removed Tiller from the negotiating team, orally advising him that he had compromised his position and damaged his credibility with the negotiating team. Wackenhut Hearing Ex. 8, Exs. 19, 23. When Tiller reportedly questioned whether he could be terminated for accepting the loan in question, a senior Wackenhut management official

responded affirmatively. Wackenhut Hearing Ex. 8.

Perplexed, Tiller queried why Wackenhut would punish him so harshly for a loan that he had already repaid when a senior Wackenhut management official had done something worse without any apparent adverse repercussion. Tiller then made the allegation that is at the heart of this case. Specifically, he disclosed to a Wackenhut manager that a senior management official at Wackenhut had (1) accepted a substantial quantity of stolen telephone wire from the same person who had lent Tiller $900 and (2) permitted that same person to install the telephone wire free of charge in the management official’s house. Tr. at 191. Tiller claims he acquired knowledge of the senior management official’s alleged questionable conduct sometime during the period of May to July 1993. Ex. 9. According to Tiller, at the conclusion of a labor relations meeting one Friday during that time period, Tiller overheard the local union representative offer to supply telephone wire to a senior Wackenhut management official and to install that wire free of charge in that official’s home that weekend. Id. Tiller alleges he saw the two parties to the alleged transaction wink and shake hands. Id. Tiller further claims he heard the local union official declare that the amount of material and labor at issue was $3,500. Id. The next Monday, according to Tiller, the local union official arrived at work looking tired and left work early that day as well. Id.; Ex. 1; Ex. 9 at 5. These observations led Tiller to conclude that the local union official had actually installed the telephone wire during the weekend. Tiller also asserts that the local union representative told him privately that he had obtained the telephone wire from his wife, a Southern Bell Telephone Company employee. Id. Tiller further relates that the local union representative implied to him that he had assisted in the installation of the telephone wire. Id.

The Wackenhut manager to whom Tiller disclosed the allegations regarding the “telephone wire transaction” dismissed Tiller’s allegations as baseless, believing them instead to be a thinly veiled attempt to justify his own error in accepting the loan. Wackenhut Hearing Ex. 8; Tr. at 177. It was a common belief, however, among UPGWA members that the local union representative had provided some telephone wiring to the senior Wackenhut management official in question. See Tr. at 302; 337; 385-87; 440.

In the days following Tiller’s admission that he had accepted the loan, Wackenhut management discussed Tiller’s fate with the company. During this time, Tiller lobbied to keep his job. Tiller pleaded with at least two managers to be retained with the company in any job, citing his need to support his family. Wackenhut Hearing Exs. 7& 8; Tr. at 192. Some urged that Tiller be terminated, an action sanctioned by the company’s Conflict of Interest Policy. Wackenhut Hearing Exs. 7 & 8; Ex. 23. One senior Wackenhut manager, however, persuaded the others that while Tiller may have damaged his labor relations career beyond repair, he was an otherwise loyal employee who had made valuable contributions to the company. Tr. at 192-93. Wackenhut ultimately decided to give Tiller a second chance with another division of the company.

In a memorandum dated October 25, 1993 entitled, “Management Direct Placement Reassignment,” Wackenhut first informed Tiller that he was being removed from his position as Labor Relations Manager

because he had violated Wackenhut's Conflict of Interest Policy. Ex. 44. Wackenhut then advised Tiller in the memorandum that it would offer him placement in the position of Personnel Security Supervisor, a position with a salary almost $20,000 per year less than the one from which he was being removed. The memorandum recited that if Tiller accepted the new position, Wackenhut would maintain Tiller at his higher salary for a period of time, after which the company would adjust his pay downward. The memorandum concluded by advising Tiller that if he chose to decline Wackenhut's offer of reassignment, he would be terminated immediately. Id. Tiller accepted the offer in writing. Id.

Tiller's transition to his new job position in the personnel security field can be best described as difficult and fraught with frustration. He received no formal training in his new field. Tr. at 381-383; 413. Instead, he was asked to review materials and ask others if he had questions. In addition, Tiller's lack of computer proficiency and poor typing skills compounded his frustration in acclimating to his new work environment. Moreover, since Tiller lacked substantive expertise in the personnel security field, it was challenging for him to supervise the two employees who looked to him for guidance in this area. Ex. 10, Tr. at 450, 456-57. Tiller's supervisor, however, believed Tiller was not making an effort to learn the responsibilities of his new job. Ex. 28. He believed that a person with Tiller's educational background (B.A. and J.D. degrees) and professional experience could develop a fairly sophisticated degree of expertise in the Personnel Security area through self- study.

Eight months after agreeing to accept the reassignment to the personnel security division, on June 12, 1994, Tiller filed a complaint with DOE's Office of Employee Concerns at the Savannah River Site. Two months later, in August 1994,(1) Tiller filed a Part 708 Whistleblower Complaint (1994 Whistleblower Complaint). In this complaint, Tiller claims that Wackenhut demoted him from Labor Relations Manager to a position for which he was not trained in retaliation for disclosing that a senior Wackenhut management official had engaged in unethical and possible criminal conduct.

In the months following the filing of his 1994 Whistleblower Complaint, Tiller alleges that Wackenhut retaliated against him for filing the Part 708 action in the following ways:

Wackenhut issued him a disciplinary letter on April 13, 1995;

Wackenhut officials treated him differently than other employees;

Wackenhut reduced his pay in 1995 and denied him merit increases;

Wackenhut gave him a poor performance evaluation in January 1996;

Wackenhut selected his personnel security supervisor's position for elimination in January 1996;

Wackenhut warned him in February 1996 of a possible further salary reduction and the elimination of his "exempt" status;

Wackenhut excluded him from supervisory training in March 1996;

Wackenhut managers criticized him for using the site medical facilities;

Wackenhut decertified him from its Human Reliability Program for alleged aberrent behavior and humiliated him in front of others while decertifying him.

On April 18, 1996, Tiller filed a second Whistleblower Complaint under 10 C.F.R. Part 708 in which he chronicles in specific detail the alleged acts of reprisal set forth immediately above (1996 Whistleblower Complaint). In his second Complaint, Tiller contends that Wackenhut initiated adverse personnel actions in retaliation for his filing the 1994 Whistleblower Complaint.

II. Legal Standards Governing This Case

As noted above, the regulations set forth in 10 C.F.R. Part 708 provide an administrative mechanism for the resolution of whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the complainant and the contractor with regard to their allegations and defenses and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F.Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the burden of persuasion is allocated roughly equally between both parties. See Grogan v. Garner, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). In the present case, Tiller must make two showings in connection with his 1994 Whistleblower Complaint. He must demonstrate at the outset that he disclosed information to Wackenhut which he in good faith believed evidences a violation of a law, rule or regulation. If Tiller fails to meet this threshold burden, his claim must be denied. If Tiller meets this burden, he must next prove that his disclosure was a contributing factor to his demotion and reassignment and its ancillary consequences, i.e., reduction in pay, damaged reputation, and exclusion from semi-annual bonus program. 10 C.F.R. § 708.9(d); see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994). With respect to Tiller's 1996 Whistleblower Complaint, he must show that he participated in a Part 708 proceeding and that his participation was a contributing factor in the actions Wackenhut allegedly took or intended to take against him.

B. The Contractor's Burden

If Tiller meets his regulatory burden as set forth above, the burden then shifts to Wackenhut. The regulations require Wackenhut to prove by "clear and convincing" evidence that the company would have demoted or reassigned Tiller and taken other personnel actions against him even if Tiller had (1) not disclosed information about alleged unethical and criminal conduct by a senior Wackenhut official and (2) not filed his 1994 Whistleblower Complaint. "Clear and convincing" evidence is a much more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n. 3

III. Analysis

I have thoroughly reviewed the extensive record in this proceeding, including the submissions tendered by the parties, the investigative file developed by the Assistant IG, and the testimony of the 33 witnesses presented at the hearing. After due deliberation, I conclude that Tiller is not entitled to any relief under 10 C.F.R. Part 708 on either of the two Whistleblower Complaints he filed against Wackenhut. The specific findings I make in support of my determination are discussed below.

A. The August 1994 Whistleblower Complaint

1. Tiller's Disclosure Regarding A Senior Management Official's Conduct

The regulations codified at 10 C.F.R. Part 708 provide, in pertinent part, as follows:

A DOE contractor covered by this part may not discharge or in any manner demote, reduce in pay . . . or otherwise discriminate against any employee because the employee . . . has (1) **disclosed to . . . the contractor information that the employee in good faith believes evidences a violation of any law, rule or regulation . . .**

10 C.F.R. §708.5(a)(1)(i)(emphasis added). It is Tiller's contention that he made a protected disclosure as defined above when he told a Wackenhut manager that a senior Wackenhut management official had accepted stolen goods (telephone wire) and services valued at $3,500 from the local union representative. The record indicates that Tiller disclosed this allegation to a Wackenhut manager prior to his demotion and reassignment to the Personnel Security Department. Specifically, Tiller communicated the information about the senior Wackenhut official either immediately after he was removed from the negotiating team on October 12, 1993 or shortly thereafter. Tr. at 173. According to Tiller, the senior Wackenhut management official's conduct violated Wackenhut's Conflict of Interest Policy which prohibits the receipt of services, gratuities, or gifts of more than nominal value. Ex. 118. In addition, Tiller believed that the telephone wire given by the local union official to the senior Wackenhut management official was stolen from the telephone company where the local union representative's wife worked.

Whether Tiller's beliefs as set forth above were factually accurate is irrelevant for purposes of Part 708. The focus instead is whether Tiller had a good faith belief that the senior Wackenhut management official's conduct in question violated a law, rule, or regulation. After reviewing the record, I am convinced that Tiller had a "good faith belief" that the senior Wackenhut management official's conduct in question (1) violated Wackenhut's Conflict of Interest Policy and (2) possibly constituted criminal activity. First, Tiller formed his "good faith" belief when he overheard the local union representative offer to supply and install telephone wire in the senior Wackenhut management official's house that was under construction at the time. Second, Tiller heard the local union representative state that he could save the senior Wackenhut management official $3,500 if the official accepted his offer of goods and services. Third, Tiller observed the two parties shake hands and wink, from which he inferred a consummation of the "deal." Fourth, Tiller's observations of the local union official's abbreviated work schedule and seeming fatigue on the Monday following the Friday Tiller overheard the "wire transaction" discussion fueled his belief that the transaction had occurred. Fifth, several union members testified that they had heard at the time in question that the local union official had supplied and/or installed telephone wire in the senior Wackenhut management official's home. Id. at 286-88; 302; 337-38; 385-89.

With respect to Tiller's contention that the local union official had implied to him that he had installed the wire into the senior management official's home, I noted with interest the testimony of a Wackenhut manager who characterized the local union representative as "a person who knew how to manipulate situations." Wackenhut Hearing Ex. 8; Tr. at 168. While that same manager questioned the factual accuracy of Tiller's charge, the manager admitted that it was possible that the local union representative did tell Tiller that he had done some work on the senior management official's home. Id. The manager also opined that Tiller accepted things at face value without double- checking the accuracy of the information conveyed to him. Id. The suggestion of Tiller's gullibility only serves to reinforce my view that Tiller earnestly believed the information he conveyed regarding what he perceived to be improprieties on the part of a senior Wackenhut management official. (2)

In sum, the substance of what Tiller overheard in discussions between the local union representative and the senior Wackenhut management official, the general observations Tiller made of the two parties to the alleged "telephone wire" transaction, and other persons' corroborating testimony about the transaction at issue establish Tiller's good faith belief that the information he communicated to a Wackenhut manager evidenced a violation of a law, rule or regulation. Accordingly, I find that Tiller made a protected disclosure as defined by 10 C.F.R. Part 708.

2. Contributing Factor

A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." Ronald A. Sorri, 23 DOE ¶ 87,503 (1993) citing McDaid v. Dept't of Hous. and Urban Dev., 90 FMSR ¶ 5551 (1990); see also County v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) (County). In addition, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." County, 886 F. 2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that there is clearly temporal proximity between Tiller's protected disclosure on or about October 12, 1993 and Tiller's subsequent demotion and reassignment on October 25, 1993. While there is conflicting testimony in the record as to how many Wackenhut senior officials knew of Tiller's protected disclosure, it is clear that at least one Wackenhut manager had actual knowledge of Tiller's disclosure. That manager is the one to whom Tiller made the disclosure around October 12, 1993, and is the same manager who persuaded others at Wackenhut to reassign Tiller instead of firing him.

Based on the foregoing, I find Tiller has established a prima facie case that his protected disclosure was a contributing factor to his demotion and reassignment. The burden now shifts to Wackenhut to prove by clear and convincing evidence that it would have demoted and reassigned Tiller absent his protected disclosure. 10 C.F.R. § 708.9(d).

3. Justification for Tiller's Demotion and Reassignment

Wackenhut asserts that it removed Tiller from his Labor Relations position and reassigned him to the Personnel Security Department solely because he had violated Wackenhut's Conflict of Interest Policy. Wackenhut explained that Tiller's acceptance of a loan from the local union representative's wife clearly constituted a conflict of interest as defined in Exhibit 118, and potentially subjected him to blackmail. Wackenhut Ex. 8; Hearing Tr. at 124 and 154. Wackenhut elicited testimony at the hearing from a national UPGWA official and a senior Wackenhut official who recounted the local union official's expression of glee, "I have Tiller in my pocket and can get any information from him that I want." Tr. at 333, 545. (3) Other evidence shows that the local union official photocopied the $900 check and showed the copy to at least one UPGWA member. These facts support Wackenhut's position that Tiller's acceptance of the $900 loan destroyed not only the arms-length labor management relationship required by the National Labor Relations Act but also Wackenhut's trust in Tiller's judgment as a Labor Relations Manager. Wackenhut Closing Statement at 3.

The record is clear, and Tiller now admits,(4) that Wackenhut would have been justified in terminating him for violating the company's Conflict-of-Interest policy. In fact, even before Tiller made his protected disclosure, a Wackenhut manager told Tiller that he could be terminated for having solicited and accepted the loan from the local union official. Wackenhut Hearing Ex. 8. But instead of firing him, Wackenhut responded to Tiller's plea to keep him employed in any job. The record shows that after Wackenhut decided to retain Tiller, it looked for vacant management positions with an eye toward minimizing any salary decrease resulting from the reassignment. Tr. at 179. The only position available at the time was the one to which Tiller was ultimately reassigned. Wackenhut supplied evidence that there had been five or six other cases where managers had encountered some "difficulties," and the company retained them in non-management positions. There is absolutely nothing in the record to suggest that Wackenhut reassigned Tiller in retaliation for making a protected disclosure.

In conclusion, the totality of the evidence convinces me that Wackenhut had clear and independent grounds for reassigning Tiller to the Personnel Security Supervisor position. It appears that Wackenhut was seeking a just solution to an unfortunate situation when it demoted and reassigned him. I therefore find that Wackenhut has met its burden of showing by clear and convincing evidence that it would have

demoted and reassigned Tiller even absent his protected disclosure. In addition, I find that the other acts of reprisal about which Tiller complains, i.e., reduction in pay, damaged reputation, exclusion from management semi-annual bonus, are simply natural consequences of the reassignment. I conclude, therefore, that Wackenhut has met its evidentiary burden on these allegations as well.

B. Tiller's 1996 Whistleblower Complaint

1. Protected Activity

The regulations set forth at 10 C.F.R. § 708.5(a)(2) state, in relevant part, that an employee's participation ". . . in a proceeding conducted pursuant to this part" is considered a protected activity. It is uncontested that Tiller filed a Part 708 Complaint on August 31, 1994 and that officials in Tiller's management chain knew he had filed that complaint. Exs. 1, 12, 24, 27, 63. The preponderance of evidence demonstrates, therefore, that Tiller engaged in an activity protected under 10 C.F.R. Part 708.

2. Contributing Factor

According to Tiller, after he filed his 1994 Whistleblower Complaint, Wackenhut began a "systematic, military" campaign to "undermine, harass, intimidate" and otherwise discriminate against him in violation of 10 C.F.R. § 708.5(a). Ex. 2; Tiller's Closing Brief at 1; Tiller's Post- Hearing Brief at 1. Specifically, Tiller charges that Wackenhut engaged in a pattern of discriminatory acts which were motivated by a retaliatory animus stemming from his filing of the 1994 Whistleblower Complaint. To support his position in this regard, he highlights a number of incidents in his 1996 Whistleblower Complaint which he characterizes as retaliatory.

The record demonstrates unequivocally that Wackenhut management had actual knowledge of Tiller's complaint filing, and that Tiller alluded to his 1994 Whistleblower Complaint in the workplace. When viewing each alleged discriminatory incident in isolation, it is not readily apparent that there is "temporal proximity" between those alleged incidents and the filing of his 1994 Whistleblower Complaint. However, the record shows that beginning in the fall of 1994, Tiller's supervisor met with him to discuss concerns about his performance in the personnel security department. Tr. at 424. This fall meeting occurred close in time to Tiller's complaint filing on August 31, 1994. If I view all the alleged discriminatory acts that are the subject of his 1996 Whistleblower Complaint in their totality, and in conjunction with entire record in this case, I find that a reasonable person could conclude that Tiller's filing of his 1994 Whistleblower Complaint contributed to the overall pattern of alleged discriminatory acts of which he complains. See Ronald Sorri, 23 DOE ¶ 87,503 at 89,010 (1993).

3. Wackenhut's Justification for its Various Actions

As noted in Section II. B. above, once Tiller has met his burden under 10 C.F.R. § 708.9(d), the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the personnel actions against Tiller absent Tiller's protected activity. While it is arguable that some of the alleged incidents of which Tiller complains may not technically be considered "personnel actions," I have elected to analyze all of the alleged discriminatory acts set forth in Tiller's 1996 Whistleblower Complaint.

a. Disciplinary Letter

Tiller complains that Wackenhut issued him a disciplinary letter on April 13, 1995, citing his absence from work on April 6, 1995 as its justification. Ex. 2. On April 6, 1995, the Personnel Security Department was scheduled to undergo an audit. Tiller was told that his presence was required at the audit, as he was the supervisor of the department subject to the inspection. Ex. 73. Tiller failed to report to work on the day of the audit and neglected to inform Wackenhut of his absence. Tiller testified that he was ill on the day in

question and failed to notify Wackenhut of his absence because he had over-medicated himself. Tr. at 84; Ex. 9.

Testimony in the record establishes that Tiller's supervisors were extremely dismayed at his dereliction of duty in not advising them of his illness on the day of the audit. Several persons testified that Tiller's absence placed an unwarranted burden on others to ensure the audit went smoothly. Tiller's immediate supervisor testified that he had advocated a harsher form of punishment than the disciplinary letter, but that more senior Wackenhut officials decided on the less severe disciplinary action. Tr. at 497.

The weight of the evidence demonstrates, to my satisfaction, that the reasons Wackenhut issued Tiller a disciplinary letter on April 13, 1995 were that Tiller had failed to report to work for the audit and had neglected to call in sick on that day. I find, therefore, that Wackenhut has proven by clear and convincing evidence that it would have issued Tiller the subject disciplinary letter absent Tiller's filing of his 1994 Whistleblower Complaint.

b. Differential Treatment by Management

Tiller asserts that he was treated differently than other employees after he filed his 1994 Whistleblower Complaint. Specifically, he alleges that his supervisors required him to report to senior management officials' offices for discussions, and that they escorted him there. Ex. 9.

On March 21, 1995, Tiller claims he was escorted by his supervisor to a senior manager's office where he was told that his position of Personnel Security Supervisor would be eliminated as the result of a restructuring proposal. Tr. at 44. Tiller viewed the manner in which he was escorted to this meeting as well as the fact that two managers were present throughout the meeting as intimidating and retaliatory. Id., Tr. at 45. The evidence in the record reflects, however, that the senior manager who requested the March 21, 1995 meeting, did so as a matter of Wackenhut policy, which provides that a director "advise affected employees in person of the potential effects of the restructuring." Wackenhut Ex. 24. According to the senior manager who called the meeting, Tiller's supervisor and the manager of Tiller's department were present because the senior manager wanted them to "witness the meeting and know the status of the restructuring proposals." Id. The record contains no further evidence that would give merit to Tiller's claim that this meeting was an act of retaliation.

Tiller further relates that he was summoned to meet with a senior manager on February 29, 1996 at which time a senior manager reprimanded him for discussing labor relations issues with the Union president. Tiller also viewed this meeting as intimidating and another act of retaliation. The evidence in the record reflects that the senior manager requested the meeting only after information surfaced during a Wackenhut law enforcement investigation that Tiller had engaged in labor relation discussions with a union official. Wackenhut Hearing Ex. 8. The record reveals nothing sinister about this meeting. It was appropriate for Tiller's line managers to advise him of the prohibition on his participation in labor relation matters. I conclude, therefore, that there was nothing even remotely retaliatory about the February 29 meeting.

Finally, Tiller complains that when he received the April 13, 1995 disciplinary letter referenced in Section III.B.3.a. above, several managers in his supervisory chain were present. Ex. 9. As mentioned above, Wackenhut had a valid reason for issuing a disciplinary letter to Tiller on April 13, 1995 in light of his failure to call in sick on the day of a scheduled audit. While Tiller may have felt uncomfortable with the presence of the managers during the meeting, I find that Wackenhut was justified in having several managers present to discuss this serious personnel action.

In all of the meetings discussed above, I find that Wackenhut managers had valid reasons to meet with Tiller and that these meetings would have occurred even if Tiller had not filed his 1994 Whistleblower Complaint.

c. Reduction in Pay in 1995 and Denial of Merit Increases

Tiller asserts that in April 1995, Wackenhut reduced his pay by approximately $18,000. Ex. 9. He further maintains that Wackenhut denied him at least two merit increases. Ex. 2 and 9. There is simply no evidence in the record to support Tiller's claim that his reduction in pay was a retaliatory act. As discussed above in Section III.A.3 above, Tiller's salary was reduced as a consequence of his demotion and reassignment to the position of Personnel Security Supervisor on October 23, 1993. Therefore, I will not analyze this claim further.

In addition, a review of the record does not support Tiller's claim that his filing of his complaint contributed, in any way, to his being denied two merit increases in 1994 and 1995. According to the evidence in the record, Tiller did not receive an annual performance review for 1994. Wackenhut considered this year as a "learning period" for Tiller to adjust and familiarize himself to his new position. Tr. at 491. Moreover, the record reflects that Tiller's salary had not yet been reduced during 1994, so his salary exceeded the top salary level of his new position as Personnel Security Supervisor. Tr. at 157. Thus, Tiller would not have been eligible to receive a merit pay increase for 1994. As for 1995, the evidence in the record indicates that Tiller received a poor performance review for that year, a rating that I determine below to be supported by the evidence in the record. Ex. 36. Thus, Wackenhut has met its burden by showing that there were independent, non-retaliatory reasons why Tiller would not have been eligible to receive a merit pay increase for 1994 and 1995.

d. Poor Performance Evaluation for the year 1995

Tiller relates that he received a poor performance evaluation in January 1996 for the period covering the year 1995. Ex. 9 at 22. According to Tiller, he lodged his disagreement with the evaluation at the time he received it, complaining that he was unfairly judged on only three projects during the 12- month period and that he had received no constructive criticism of his work prior to his receipt of the performance evaluation. See Ex. 37. It is Tiller's contention that the performance appraisal was given in retaliation for the filing his 1994 Whistleblower Complaint.

There is not a scintilla of evidence to support Tiller's contention that the performance evaluation in question was linked to Tiller's 1994 Whistleblower Complaint. To the contrary, the record contains overwhelming evidence that Tiller's performance in the Personnel Security Program was deficient in many respects. The following comment appears on the evaluation in question: "Mr. Tiller has been with the department two years and is still not thoroughly fimiliar [sic] with the elements of the Personnel Security Program. He needs to improve his job knowledge, commence tasks in a timely manner, [a]nd utlilize [sic] better judgement in prioritizing his task[s]." Ex. 36. Additional comments appended to the evaluation detail deficiencies in Tiller's work product on three projects. At the hearing, Tiller's supervisor related that he approached Tiller several times during 1995 to address concerns about Tiller's work. Tr. at 501. On each occasion, according to the supervisor, Tiller responded, "you're harassing me, you'll hear from my lawyer." Id. The supervisor also pointed to Exhibit 77, a memorandum he had written to Tiller in May 1995, as evidence that he had tried to address his concerns in writing. The memorandum outlined the specific responsibilities of the Personnel Security Supervisor's Position. The supervisor testified that he had written the memorandum after he uncovered a number of problems with Tiller's performance including, among other things, Tiller's failure to notify individuals about restrictions placed on them regarding their use of weapons, and his failure to notify the DOE promptly in cases where persons were decertified from Wackenhut's Human Reliability Program. Tr. at 502-506. The supervisor also cited Tiller's failure to report to work on April 6, 1995, knowing that a scheduled audit of his department was to occur, as evidence of marginal job performance. Id. at 494-498. Finally, there is evidence that Tiller was absent from work with some frequency during 1995. Id. at 452,455; Ex. 27.

Based on the foregoing, I find that the weight of the evidence conclusively demonstrates that Wackenhut has met its burden with respect to the performance evaluation at issue.

e. Elimination of Tiller's Supervisory Responsibilities

Tiller charges that Wackenhut eliminated the supervisory component of his Personnel Security position in January 1996 in retaliation for his filing the 1994 Whistleblower Complaint. Ex. 9 at 21- 22. The record shows, however, that the DOE criticized Wackenhut for its supervisor-to-subordinate ratio during the period in question and that the company tried to be responsive to that criticism. Tr. at 158. The record further reflects that there were several divisions in the company, including the Personnel Security Division, where supervisors supervised only one or two people. Id. As a consequence, beginning in 1996, Wackenhut began to flatten its organizational structure. Wackenhut Hearing Ex. 11. Many departments at Wackenhut were affected by the restructuring. Id. In the Personnel Security Department, Wackenhut eliminated four of five supervisory positions, including the one occupied by Tiller. There is simply no evidence to suggest that Wackenhut targeted Tiller's supervisory position during the restructuring process in retaliation for the filing of his 1994 Whistleblower Complaint. Like others affected by the restructuring, Tiller maintained his job and pay level after his supervisory responsibilities disappeared. After reviewing the record, I find that Wackenhut has proven by clear and convincing evidence that it would have eliminated Tiller's supervisory responsibilities absent the filing of his 1994 Whistleblower Complaint.

f. Warning of Potential Salary Reduction and Elimination of "Exempt" Status

Tiller alleges that in February 1996 Wackenhut warned him of a possible further salary reduction and the potential elimination of his "exempt" status pending the results of a "HAY job study" of his newly reorganized position. Ex. 2. This charge is inextricably intertwined with the allegation discussed in Section III.B.3.e. above which I found to be without merit. I will, therefore, not analyze this issue further.

g. Exclusion from Supervisory Training

Tiller complains further that he was excluded from attending supervisory training in March 1996. He maintains that this action constituted retaliation for his filing his 1994 Whistleblower Complaint. As discussed in Section III.B.3.e. above, I found that Wackenhut had independent, non-retaliatory justifications for the reorganization that led to Tiller's loss of supervisory responsibilities. It is only reasonable that Tiller would not participate in supervisory training once he lost his supervisory status. My finding in Section III.B.2.e. above dictates my finding here that Wackenhut has met its burden.

h. Criticism of Tiller's Use of Medical Facilities

Tiller states that his personal physician provided documentation to Wackenhut requesting that Tiller have his blood pressure taken three times each day. Ex. 9 at 20. According to Tiller, beginning in December 1995 or January 1996, his immediate supervisor questioned the length of time he was absent from the office to have his pressure readings taken at the medical facility on site. Id. Eventually, Tiller's second-line supervisor suggested that Tiller consider having his blood pressure monitored at the fitness facility instead of the medical facility on site as the fitness facility was closer to Tiller's office than the on-site medical facility. Id. at 21. Tiller alleged that Wackenhut's attempts to prevent his use of the on-site medical facility stemmed from the filing of his 1994 Whistleblower Complaint.

The record is clear that no manager at Wackenhut ever denied Tiller access to any medical facilities. Tr. at 585-86; 589. While two managers testified that they suggested Tiller use a site closer to his work to have his blood pressure checked, Wackenhut did not mandate that course of action.(5) Further, Wackenhut suggested that Tiller use the closer facility only to minimize the amount of time he was absent from the workplace. Id. at 589-590. I find that Wackenhut was justified in making the suggestion that Tiller use a closer facility and therefore met its burden on this issue.

i. Tiller's Temporary Decertification from the Human Reliability Program and the Humiliation He Suffered as a Consequence of that Action.

Tiller claims that his decertification from the Human Reliability Program (HRP)(6)on March 14, 1996 and the consequential humiliation he suffered during the decertification process was intimately connected with his filing of the 1994 Whistleblower Complaint. He points to the fact that the DOE and Wackenhut approved the reinstatement of his HRP certification within a short period after the decertification process as evidence that Wackenhut decertified him in retaliation for his filing of the 1994 Whistleblower Complaint.

The DOE is extremely sensitive to charges of irregularities in any process involving special reliability certification or access authorization imposed by DOE or its contractors as a condition of employment. Prior to the hearing in this case, I was concerned that the Wackenhut's decertification of Tiller was suspect. Therefore, I advised both parties that I would carefully examine the circumstances surrounding Tiller's temporary decertification from the HRP and suggested that both parties focus on this issue at the hearing.

Tiller's decertification from the HRP stemmed from a letter he authored on March 8, 1996 and sent to a senior Wackenhut manager. Relevant excerpts of the letter are set forth below:

. . . As a professing Christian, how can you allow yourself to be entangled with the unrighteous management cover-up. . . you know that upper management has used me as a "scapegoat" and [three senior Wackenhut managers] are guilty as sin. As a man of God, you are going to witness the move of Almighty God on my behalf like you have never seen. If any of these management personnel involved in this conspiracy are to be released, they are going to have to step forward and confess their mis-management cover-up actions. . .

Ex. 95. On the same day, Tiller wrote a second letter to the addressee of the letter described above. Ex. 96. In the second letter, Tiller complained about his hostile work environment and expressed his belief that he was being singled out for "blowing the whistle" on the senior Wackenhut management official's unethical conduct.

The Wackenhut manager who received Tiller's March 8, 1996 letters claimed he felt threatened by the language contained in the letters and, as a result, contacted an official in the company's Personnel Security Department. Wackenhut Hearing Ex. 8; Tr. at 160, 221. The Personnel Security Department official, in turn, took the letters to the Site Medical Director and a staff psychologist. Id. Both professionals agreed that the language contained in one of the letters could be considered a veiled threat and that Tiller should be evaluated by a competent medical professional to determine his mental state. Id. at 201-02, 210, 212. Based on the concerns expressed by the two professionals, Wackenhut decided to decertify Tiller from its HRP, citing his "aberrant behavior" as justification. Ex. 102.

Wackenhut informed Tiller of the company's decision to suspend him with pay and decertify him from the HRP on March 14, 1996 when they summoned him back from a luncheon engagement. Ex. 9 at 25. After completing the decertification paperwork in a conference room, two Wackenhut officials and an armed security protection officer escorted Tiller to his office. Wackenhut then searched Tiller's office before escorting Tiller to his car. Tiller maintains his co-workers were observing all this activity which was very embarrassing for him. Next, Tiller's car was searched for weapons. As Tiller was driving to leave the site, a security officer followed Tiller's car to the exit barricade where the car was stopped and searched again. The second search was for sensitive documents or Wackenhut materials. Wackenhut confiscated several documents.

As required, Tiller subsequently underwent an evaluation by a clinical psychologist who opined that while Tiller was under stress, he was neither a danger to anyone nor required any psychological treatment. Ex. 107. Wackenhut, with permission from the DOE, recertified Tiller based on the findings of the clinical psychologist.

Testimony from most of those involved in the decertification process has convinced me that Wackenhut's

decision to decertify Tiller and the manner in which it executed that decertification was

not in retaliation for Tiller's filing of the 1994 Whistleblower Complaint. At the hearing, officials from Wackenhut's Personnel Security Department emphasized that they are not medical experts, and that they always defer to medical experts in cases where there is potential employee violence, such as this one. Tr. at 221. There is ample testimonial and documentary evidence that Wackenhut consulted with medical and psychological authorities for opinions before they initiated the decertification and suspension actions. See Exs. 13, 99, 100; Tr. at 149-195; 208-213. While it is unfortunate that the medical experts neither spoke to Tiller before they rendered their opinions, nor realized that he was the same person with whom they dealt on a routine basis on HRP matters, it is uncontested that the medical experts expressed concern about the content of the letters after reviewing them. The experts' concern was sufficient under Wackenhut policy to allow the appropriate officials in Wackenhut's Personnel Security Department to label Tiller's conduct "aberrant behavior" and to commence the decertification process. See Ex. 136. Moreover, the armed security escorts and the searches conducted of Tiller's office and car appear to comply with Wackenhut's established company procedure in cases where there is a concern about employee violence. Id. While Tiller is adamant that a second search of his car at the exit barricade was unreasonable and designed to further humiliate him, I do not agree. Testimonial evidence indicates someone observed Tiller carrying documents to his car and that the first search of his car was for weapons only. It was certainly reasonable, therefore, for Wackenhut to re-search the car for proprietary documents. Moreover, since Tiller occupied a position in the Personnel Security Department where he had access to confidential, sensitive documents, Wackenhut had an interest in ensuring no such documents were in Tiller's possession during the time of his suspension. It is also significant, in my opinion, that Wackenhut did, in fact, confiscate some materials from Tiller at the exit barricade.

In sum, I find that Wackenhut had a legitimate business-related reason for decertifying Tiller from Wackenhut's HRP, and complied fully with its established company procedures in the decertification process. Accordingly, I conclude that Wackenhut has proven by clear and convincing evidence that it would have decertified Tiller from the HRP even if he had not filed his 1994 Whistleblower Complaint.

IV. Conclusion

As set forth above, I have determined that Tiller made one protected disclosure and has proven by a preponderance of evidence that the protected disclosure was a contributing factor to his demotion and reassignment. I determined, however, that Wackenhut has provided clear and convincing evidence to demonstrate that it would have demoted and reassigned Tiller even if he had not made his protected disclosure.

I also determined that Tiller participated in a protected activity when he filed his Part 708 Complaint in August 1994. I further determined that Tiller's 1994 complaint filing contributed to the pattern of alleged discriminatory acts set forth in his 1996 Whistleblower Complaint. I determined, however, that Wackenhut has proven by clear and convincing evidence that it would have taken the actions enumerated in Tiller's 1996 Whistleblower Complaint even if Tiller had not filed his 1994 Whistleblower Complaint.

In summary, I find that Tiller has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted under § 708.10. While it is apparent to me that Tiller has experienced much personal and professional frustration since his demotion and reassignment and that he genuinely views Wackenhut's actions in a conspiratorial, retaliatory light, there is simply no recourse for him within the confines of a Part 708 proceeding.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Thomas T. Tiller under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of

Energy denying the complaint unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments, Office of the Inspector General, Department of Energy.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: May 21, 1998

(1)The record is unclear whether Tiller attempted to resolve his dispute through an internal company grievance procedure, thereby tolling the 60-day deadline for filing complaints pursuant to 10 C.F.R. § 708.6(d). I note that in his Complaint, Tiller attests that "he made numerous attempts to resolve this complaint since December 1993 by mutual means without success." Ex. 2. Since the Assistant IG accepted the Complaint for processing pursuant to 10 C.F.R. § 708.8, I will presume the action was timely filed.

(2)Wackenhut argues that no reasonable person could believe that the alleged "telephone wire" transaction occurred. See Wackenhut Pre-Hearing Brief at 2. As an initial matter, the Part 708 regulations as currently written apply a "good faith belief" standard, not a reasonable belief standard. I note that the Part 708 regulations are currently being revised; however, any proposed revisions do not apply here. See generally 62 Fed. Reg. 245 (1997) (to be codified at 10 C.F.R. pt. 708) (proposed Dec. 22, 1997) (proposed rule would further define the nature of the "disclosure" under Section 708.5(a)(1), requiring that the employee's disclosure involves information he or she "reasonably and in good faith believes" is true.). Interestingly, the senior management official admitted at the hearing that he had indeed accepted a small quantity of telephone wire allegedly of nominal value from the local union official, but returned that wire almost one year later. Tr. at 116-117; 593. This admission reinforces my finding that Tiller had a "good faith belief" that the wire transaction had occurred and would even lend support to a finding that Tiller had a reasonable belief that the wire transaction had occurred.

(3)The local union official denied he made the statement in question. Tr. at 355. I have reservations about the local union official's credibility, however. Some of his responses at the hearing appeared to be evasive (Tr. at 351, 354), others directly contradicted testimony I find to be compelling (compare Tr. at 326 with Tr. at 351). Finally, I am mindful of the testimony of a Wackenhut manager who characterized the local union official as someone who knew how to manipulate situations. At the hearing, I also asked a union member for his opinion as to whether the local union official was an honest and credible individual in his dealings with the union membership. Id. at 399. The response was "sometimes." Id. All these factors lead me to disbelieve the local union official's denial of his statement that he had Tiller "in his pocket."

(4)At one point in the proceeding, Tiller tried to justify his actions by stating he thought he was borrowing money from a friend. My review of Wackenhut's policy reveals no exception based on friendship. Even if such an exception were in Wackenhut's policy, I am skeptical that a friendship of any substance existed between Tiller and the local union representative. I think it is highly unusual that a true friend would brag that he had his friend in his pocket and could get any information from him that he wanted. I note, also, that the local union official made no mention in his hearing testimony that the loan was motivated by friendship.

(5)I noted with interest that while Tiller complains about being asked to use a facility closer to his work site to monitor his blood pressure, he apparently did not appreciate that Wackenhut accommodated his medical condition by permitting him to work half days for a period of time because of his hypertension. Id. at 590. During the period he worked half days, he easily could have monitored his blood pressure on his own time before and after work.

(6)"The Wackenhut Human Reliability Program was developed to impose safeguards against employee

complicity in nuclear theft, sabotage, or compromises in security." Ex. 136. The program, along with others, "is designed for early recognition of potential problems associated with employee mental or physical behavior that could threaten DOE security interests." Id. "The program monitors each individual's behavior, judgement, trustworthiness, attitude, and overall reliability, while performing nuclear and transportational-related duties on a day-to-day basis." Id.

Case No. VWA-0021

June 1, 1998

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Carlos M. Castillo

Date of Filing: February 2, 1998

Case Number: VWA-0021

This Decision involves a complaint filed by Carlos M. Castillo (Castillo or “the complainant”) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Castillo is the former employee of a DOE contractor, Kiewit Construction Company (Kiewit), and alleges in his complaint that during that employment certain reprisals were taken against him by Kiewit as a result of his raising a concern related to safety. These alleged reprisals include the complainant’s wrongful termination from employment and, after he had been rehired, being improperly selected for a company layoff. After a preliminary investigation of this matter by the DOE Office of Inspector General, Castillo and Kiewit exercised their option for an expedited hearing under 10 C.F.R. § 708.9. On the basis of the hearing that was conducted and the record before me, I have concluded that Castillo is not entitled to relief under 10 C.F.R. Part 708.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2,

1992, establish administrative procedures for processing complaints of this nature. These procedures typically include independent fact-finding by the DOE Office of Inspector General (IG), and a hearing before a Hearing Officer assigned by the Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision, followed by an opportunity for review by the Secretary of Energy or his designee. *See* 10 C.F.R. §§ 708.8-708.10. As explained in the succeeding section of this Decision, however, the pre-hearing investigative stage of the proceeding, generally conducted by the IG, was partially dispensed with in this case based upon the agreement of the parties.

B. The Present Proceeding

(1) Procedural History

In his complaint, Castillo claims that Kiewit took reprisals against him, first in the form of his wrongful termination from employment on October 19, 1994. Following this alleged reprisal, Castillo filed complaints with the State of Nevada Department of Industrial Relations, Health and Safety Division, and with the National Labor Relations Board (NLRB). However, Castillo's complaint before the State agency was dismissed for lack of jurisdiction, and the NLRB ultimately dismissed his complaint after he was rehired by Kiewit on November 21, 1994, under a negotiated settlement between the company and the complainant's union. On December 7, 1994, shortly after he was reinstated, Castillo filed a statement of safety concerns with the DOE Office of Civilian Radioactive Waste Management (OCRWM), Quality Concerns Program. At that time, OCRWM advised Castillo that his claim that he was terminated in connection with reporting a safety matter should be referred to the DOE Office of Contractor Employee Protection (OCEP), later reorganized into the DOE Office of Inspector General (IG), for review under 10 C.F.R. Part 708. Castillo accordingly filed a complaint, 10 C.F.R. § 708.6, that was received by the IG on December 17, 1994.

OCRWM then initiated an investigation into the safety matters raised by the complainant which allegedly resulted in his October 19, 1994 termination. Pursuant to that investigation, OCRWM issued a final report on February 24, 1995, in which it concluded that "[t]he site visit revealed there were no serious health or safety issues existing . . . [and] the expression of a safety concern played no part in the decision to terminate the employee." Thereafter, on May 31, 1995, Kiewit laid off the complainant under a reduction in force necessitated by budget cuts. Castillo then filed a second complaint with the NLRB; however, Castillo withdrew that complaint with the approval of the NLRB in June 1995.

On September 10, 1996, the IG agreed to accept jurisdiction of the "whistleblower" complaint filed by Castillo. *See* 10 C.F.R. § 708.8. Following its assessment that attempts at informal resolution of the matter were unavailing, the IG advised the complainant and Kiewit by letter dated February 11, 1997, that an on-site review and investigation of the complaint would be conducted. However, prior to issuing a formal Report of Investigation, 10 C.F.R. § 708.8(f), the IG offered the parties the option to proceed to a hearing before the Office of Hearings and Appeals (OHA), under 10 C.F.R. § 708.9, in order to expedite the agency's adjudication of this matter. That option was accepted by mutual agreement of the parties in letters received by the IG from Kiewit and Castillo, on December 12 and 15, 1997, respectively. Pursuant to that agreement, the case file was transmitted to OHA on February 2, 1998, and I was appointed as Hearing Officer, 10 C.F.R. § 708.9(b), on February 6, 1998. Unlike conventional proceedings conducted under Part 708, the absence of a Report of Investigation under the expedited procedure required substantially greater factual development of the record at the prehearing and hearing stages.(1) Thus, after numerous contacts with the parties in the form of written correspondence and conference calls, I scheduled a hearing in this proceeding, which was conducted on April 15-16, 1998. The official transcript of that hearing shall be cited in this determination as "Tr." and pertinent documents, received into evidence as hearing exhibits, cited as "Exh."

(2) Factual Background

The following summary is based upon the hearing testimony, the partial IG investigative file and submissions of the parties. Except as indicated below, the facts set forth below are uncontroverted.

The complainant is an ironworker, now retired, who was referred to Kiewit by the Ironworkers Union in March 1994, for employment in connection with construction work being performed at the Nevada Test Site, Yucca Mountain Project (YMP). Exh. 18 (Castillo Statement to IG, July 9, 1997) at 1. At that time, Kiewit was the subcontractor on the YMP under the prime contractor, Reynolds Electric & Engineering Company (REECO). Initially, there was a small crew of various construction craftsmen retained by Kiewit

to begin construction of the YMP tunnel portal (Portal). Castillo was one of only two ironworkers hired initially by Kiewit, along with Mr. Don Reed, although others were hired later. At that time, the Ironworkers Union business agent, Mr. Frank Caine, advised Kiewit that Don Reed would serve as foreman (Ironworkers Foreman) and Castillo would serve as ironworkers union steward. Tr. at 322, 347-48.

Kiewit is a company which is commonly acknowledged by all concerned, including the complainant, as being very safety conscious. Tr. at 263. Kiewit has a commendable safety record and utilizes the extraordinary measure of conducting a safety meeting at the outset of each work day. Tr. at 146-47. These meetings generally proceeded according to an agenda determined by management; however, all employees are encouraged to raise safety matters relating to the YMP work environment. Tr. at 54. Although safety was the primary focus, these assemblies were sometimes used as a convenient forum to discuss other matters of mutual concern, such as work assignments, usually before or after the meeting was called to order. Tr. at 73, 99-100, 353.

During the initial months while working at the YMP Portal, Castillo raised a number of safety matters both in and outside of safety meetings. One of the matters that Castillo raised concerned the placing of protector caps on steel concrete form stakes. Tr. at 56. These stakes were used to hold concrete pads in place during pouring. During the initial stages of work at the Portal, steel rebar (approximately 7/8th inch diameter) instead of conventional concrete stakes was used for this purpose. Tr. at 122. The rebar was cut and hammered into place leaving the top protruding approximately one foot above the surface of the concrete pad. Castillo was one of the most vocal workers at the site with respect to safety and other matters, discussed below, and he was perhaps the first to stress the capping of these rebar stakes as a safety precaution. Tr. at 51, 100, 183. The complainant and others reminded the work crew about the capping of stakes if the caps were forgotten or inadvertently knocked off. Tr. at 331, 374. The management and supervisory personnel agreed that the capping of stakes was a good idea and encouraged this practice. Tr. at 172, 323.

However, in his capacity as ironworkers union steward, the complainant was also very vocal to Kiewit management about a number of matters not related to safety. Tr. at 210-11. These matters sometimes related to ironworkers' pay but very often related to what Castillo believed to be improper work assignments by Kiewit supervisory personnel. Tr. at 113. For instance, the complainant was adamant that only ironworkers, and not miners working at the site, should be used to cut the steel rebar used as concrete stakes. Tr. at 58-59. Castillo often raised these types of union matters at inopportune times and disrupted safety meetings on several occasions. Tr. at 201, 323. As noted above, this daily gathering was often used as a convenient time to discuss issues not related to safety both before and after the safety meeting. However, in certain instances, Castillo would continue to voice his objections on union/work assignment issues sometimes in a loud and abrasive tone during the actual safety meeting, although he was warned to discontinue the discussion by his Kiewit supervisor. Tr. at 144, 210. Castillo was warned to desist in this behavior not only by Kiewit supervisory personnel, but by the Ironworkers Foreman and on two occasions, over the telephone and in person, by Frank Caine, the Ironworkers Union business agent who sent Castillo to the YMP and appointed him as union steward. Tr. at 212, 324-25.

Due to the sporadic nature of the work at the Portal, Castillo and other workers were laid off for brief periods during the initial months of the YMP. However, in late June 1994, Castillo was laid off once again and did not return to the YMP until September 1994. Exh. 18 at 2; Tr. at 210. At that time, the complainant was assigned to work at a YMP location referred to as the Precast Yard, a site several miles away from the Portal, which had recently been erected for the purpose of fabricating concrete slabs for the YMP tunnel. The supervisor of the Precast Yard was Mr. E.Z. Manos (Precast Yard Supervisor). Exh. 18 at 2. While working at the Precast Yard, the complainant continued to raise various safety matters. According to the complainant, the capping of concrete stakes was among the matters which he emphasized to the Precast Yard Supervisor. Tr. at 260-62. Although conventional concrete stakes rather than rebar were used at the Precast Yard, the complainant asserts that the stakes were not always capped. In addition, apart from these safety issues, Castillo continued to voice concerns on union/work assignment

issues in his capacity as union steward. Despite the warnings he had received while working at the Portal, the complainant continued to use safety meetings as a forum to address union/work assignment concerns. Tr. at 196-97, 201. The Precast Yard Supervisor complained to Kiewit management personnel that on a few occasions, Castillo impeded the start of safety meetings by persisting with union matters even when told to cease the discussion. Tr. at 326, 396- 97.

The burgeoning conflict between the Precast Yard Supervisor and the complainant came to a head on the morning of October 19, 1994, prior to the start of the daily safety meeting. At that time, the Precast Yard Supervisor announced a new procedure for transporting certain workers from the Precast Yard to the Portal, specifically that due to differing work-day schedules, the ironworkers, electricians and carpenters would ride a van to be driven by him, as opposed to a bus previously used to transport all workers. Exh. 2 (Castillo NLRB Affidavit, October 25, 1994) at 9; Tr. at 253-55. Castillo strongly objected to this new procedure on the basis that as a Kiewit management official, the Precast Yard Supervisor could not transport workers but instead a member of the Teamsters Union must be utilized for this purpose. *Id.*; Tr. at 173. A heated argument ensued between the complainant and the Precast Yard Supervisor, with loud exchanges lasting for about 15 minutes. Tr. at 74, 374-76. The Precast Yard Supervisor told Castillo to end the discussion in order to begin the safety meeting, but Castillo refused stating that he would seek resolution of the van matter from higher Kiewit management. Tr. at 174. The complainant abruptly left the Precast Yard and began walking to the Portal area where the Kiewit on-site offices were located. Upon arriving at the Portal area, Castillo was told by Mr. Jim Morris, the Construction Manager, that based upon the recommendation of the Precast Yard Supervisor who had phoned him, the complainant had been fired. Tr. at 213.

On the basis of an agreement negotiated by the Ironworkers Union business agent and the Kiewit YMP Project Manager, Castillo returned to work for Kiewit at the YMP in November 1994. Tr. at 216. A principal condition of Kiewit agreeing to rehire Castillo, recommended by the Ironworkers Union, was that Castillo would no longer serve as union steward. After his return, Castillo did not repeat the practices that led to his firing. The Precast Yard Supervisor who had initiated the complainant's termination left the company shortly after his return. Tr. at 29. Although Castillo continued to make safety recommendations, he was not obtrusive in doing so and the complainant maintained good working relations with his coworkers, the Ironworkers Foreman and the succeeding Precast Yard supervisors. Tr. at 89, 273, 276, 360-61.

In May 1995, the decision was made by Kiewit to lay off approximately 75% of the workers at the Precast Yard due to YMP budget cutbacks and because there was already a large inventory of concrete slab segments produced at the Precast Yard. Tr. at 217. The Ironworkers Foreman was told that he must lay off all but a minimum crew of the ironworkers. Tr. at 177. Under this direction and since there were no union seniority rights applicable at the YMP, the Ironworkers Foreman followed a straightforward selection process. Tr. at 182. Besides himself, the Ironworkers Foreman decided to retain two individuals, Mr. Pete Robles, who filled in as foreman in his absence and was considered to be a top worker, and Mr. Floyd Cooper, who then was the ironworkers union steward. Exh. 18 at 6; Tr. at 330. The remaining four Precast Yard ironworkers, including Castillo, were selected for layoff. This selection process was approved by the Mr. Jeff Moore, who was then supervisor of the Precast Yard, and by Kiewit management. Tr. at 191-92, 218. Thus, on May 31, 1995, the complainant was laid off by Kiewit. Although Kiewit designated Castillo "eligible for rehire" at the time of the layoff, the determination whether to return him to work at the YMP as ironworker positions became available was not in Kiewit's control but a matter between the Ironworkers Union and the complainant. Tr. at 177, 283-84. For reasons beyond the scope of this proceeding, the Ironworkers Union never referred Castillo to Kiewit for rehire at the YMP after he was laid off on May 31, 1995. The complainant retired in June 1996. Exh. 18 at 1.

II. Legal Standards Governing This Case

In 10 C.F.R. Part 708, we find the rule applicable to the review and hearing of allegations of reprisal based

on protected disclosures made by an employee of a Department of Energy (DOE) contractor. Proceedings under Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or his designee. *See David Ramirez*, 23 DOE ¶ 87,505 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has " . . . [d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences . . . a substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5 (emphasis added). In the present case, Castillo claims in his complaint that adverse personnel actions were taken against him by Kiewit, including the initial October 1994 termination and a subsequent layoff, as a result of his disclosing to Kiewit management personnel an unsafe working condition relating to the absence of safety caps on steel stakes used in the pouring of concrete slabs.(2)

A. The Complainant's Burden

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

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

10 C.F.R. § 708.9(d); *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993). "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the burden of persuasion is allocated roughly equally between both parties. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). As a result, Castillo has the burden of proving by evidence sufficient to "tilt the scales" in his favor that he disclosed information, in this case uncapped concrete stakes, which he in good faith believed evidenced a substantial and specific danger to employees or public safety. 10 C.F.R. § 708.5(a)(1)(ii). If the complainant does not meet this threshold burden, he has failed to make a *prima facie* case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a *contributing factor* in the personnel actions taken against him, specifically his termination on October 19, 1994, and later layoff on May 31, 1995, after the complainant was rehired. 10 C.F.R. § 708.9(d); *see Helen Gaidine Oglesbee,* 24 DOE ¶ 87,507 (1994); *Universities Research Association, Inc.*, 23 DOE ¶ 87,506 (1993). This standard of proof is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221(e)(1), and the 1992 amendment to § 210 (now § 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In explaining the "contributing factor" test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation's chief House sponsors, stated: “The words ?a contributing factor’, ... mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” 135 Cong. Rec. H747 (daily ed. March 21, 1989)(Explanatory Statement on Senate Amendment-S.20). *See Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying "contributing factor" test).

B. The Contractor's Burden

If the complainant meets his burden, the burden shifts to the contractor. The contractor must prove by "clear and convincing" evidence that it would have taken the same personnel action against the complainant absent the protected disclosure. "Clear and convincing" evidence is a much more stringent

standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F. Supp. at 1204 n.3. Thus, if Castillo has established that it is more likely than not that he made a protected disclosure that was a contributing factor to his termination and subsequent layoff, Kiewit must convince us that it would have taken these actions despite the safety matter communicated by the complainant.

III. Analysis

I have carefully reviewed the record in this proceeding, including the testimony of the witnesses at the hearing and the exhibits submitted into evidence by Castillo and by Kiewit. For the reasons set forth below, I find that although the complainant made a disclosure that is protected under 10 C.F.R. § 708.5(a)(1), he has failed to show by a preponderance of the evidence that this disclosure was a contributing factor in his October 19, 1994 termination or his subsequent layoff. I will therefore deny Castillo's request for relief under 10 C.F.R. Part 708.

A. Castillo's Disclosure

A protected disclosure for purposes of the Contractor Employee Protection Program is one that consists of "information that the employee in good faith believes evidences . . . (ii) a substantial and specific danger to employees or public health or safety." 10 C.F.R. §¡708.5(a)(1). It is essentially uncontroverted that on more than one occasion, the complainant brought to the attention of Kiewit management that certain partially embedded steel bars used to reinforce concrete did not have protective covers, or caps, thereby exposing their sometimes sharp or jagged ends to the construction workers. Tr. at 262. I am also convinced that Castillo harbored a good faith belief that this condition constituted a "substantial and specific danger" to his fellow construction workers.(3) I reach this conclusion because the complainant raised this issue on several occasions, Tr. at 262, 284, and because he had personal knowledge of an injury to at least one fellow construction worker caused by contact with an uncapped bar. Exh. 2, NLRB Aff. at 3.(4) I therefore find that the complainant made a protected disclosure for purposes of section 708.5(a)(1).

B. Was Castillo's Disclosure a Contributing Factor in Personnel Actions?

In most cases it is impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Thus, the complainant in these proceedings must usually meet his burden of proof through circumstantial evidence. For example, a protected disclosure has been found to be a "contributing factor" in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald L. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) (*Sorri*) *quoting McDaid v. Dep't of Hous. and Urban Dev*., 90 FMSR ¶ 5551 (1990). In this case, however, I find insufficient evidence, either circumstantial or direct, that Castillo's disclosure was a contributing factor in the personnel actions taken against him.

1. The October 19, 1994 Termination

At the hearing, Castillo testified that he initially stated his concern regarding the uncapped stakes in "March or April" 1994, and that he raised the issue again on October 18, 1994, the day before he was fired, in one of Kiewit's daily safety meetings. Tr. at 262. In all, the complainant stated that he raised the uncapped stakes issue with Kiewit management "3 or 4 times prior to October 19, 1994." Exh. 18, July 29, 1997 Statement to IG, at 4. Whether he actually raised it on October 18 is unclear.(5) Castillo also presented the testimony of George Christakis, a fellow construction worker at the Yucca Mountain site, in support of his contention that his October 19 termination was in retaliation for his safety disclosure. Mr. Christakis testified that he had heard, from unidentified fellow ironworkers at the union hall and from

Frank Caine, the Ironworkers Union business agent, that Castillo had been fired because of safety disclosures. Tr. at 157, 161. Castillo has provided no other direct evidence connecting his disclosure with his firing. For the reasons below, I find that the complainant has failed to carry his burden to show that his safety disclosure was a contributing factor in his October 19, 1994 termination.

I initially find Mr. Christakis' testimony to be of little probative value. Mr. Christakis was not hired as a construction worker at the Yucca Mountain site until December 8, 1994, almost two months after Castillo's initial termination in October 1994. Tr. at 159. He therefore had no direct knowledge of the termination or the events that led up to it. His claims that he had heard from fellow ironworkers at the union hall and from Mr. Caine, the Ironworkers Union business agent, that the complainant had been dismissed for making unspecified safety disclosures are hearsay on top of hearsay, and in the absence of corroborating evidence, are entitled to little weight. Furthermore, this assertion runs contrary to a statement given by Frank Caine, taken and summarized by the IG during its investigation, which recounts in pertinent part:

Caine said that [Kiewit] terminated Castillo for insubordination in October 1994 . . . . Caine said that had he been in the [Precast Yard Supervisor's] place, he would have fired Castillo "on the spot." Caine said that Castillo's conduct was improper . . . . Furthermore, Caine stated that he had advised Castillo in the past not to discuss union issues during safety meetings and not to get in confrontation with [Kiewit] management.

Statement of Frank Caine, Business Agent, Ironworkers Union Local 416, to IG, April 21, 1997, at 3. I note that it was Frank Caine who negotiated with Kiewit management to rehire Castillo three weeks later in November 1994, on conditions that the complainant would receive no back pay and would no longer serve as union steward. According to the Ironworkers Foreman, Caine would never have agreed to these conditions if he believed that Castillo had been fired for making a safety disclosure rather than for insubordination. Tr. at 328. I find his testimony convincing on this issue.

I recognize that the timing of the complainant's October 19, 1994 dismissal, coming as it did one day after Castillo purportedly reiterated his observation about the uncapped stakes during Kiewit's daily safety meeting, could lead to an inference that the two events were related. *See Sorri, supra*. Despite this proximity in time, however, several factors lead me to believe that the complainant's disclosure cannot reasonably be found to have contributed to his termination. As an initial matter, Castillo first relayed his concern about uncapped stakes in "March or April" 1994 and complained of this condition to Kiewit management on at least one other occasion prior to October 18, 1994. However, Castillo does not allege that any retaliatory actions occurred immediately after these earlier disclosures.

Moreover, several witnesses at the hearing testified that Kiewit took safety considerations very seriously. Tr. at 145, 197, 320. Indeed, Castillo himself admitted that the company was "very conscientious about safety." Tr. at 263. Kiewit's Employee Safety Handbook expressly requires that employees "[r]eport unsafe equipment, hazardous conditions, and unsafe acts to [their] supervisor at once." Exh. 28 at 5. The company held daily safety meetings for the purpose of affording employees an opportunity to raise safety related issues and consistent with this policy, the record contains a number of examples of other safety matters that were raised by the complainant and others.(6) I therefore find it difficult to believe that Kiewit would retaliate against the complainant for providing the very safety-related input that the company constantly sought and in this case received a number of times without any complaint prior to October 19, 1994.

Finally, no less than seven of the witnesses at the hearing testified that Castillo's termination was not related to any safety disclosure, but was instead the direct result of the complainant's practice of inappropriately raising issues related to his duties as shop steward at the safety meetings. This persistent behavior culminated in a loud, heated argument on October 19 between Castillo and the Precast Yard Supervisor over the latter's decision to transport certain workers on the site rather than using a Teamster.(7) In this regard, I find the testimony of five witnesses, Phillip Fey, Joseph Roach, James

Morris, Don Reed (Ironworkers Foreman), and Floyd Cooper (succeeding Ironworkers Steward) to be particularly significant. Mr. Fey and Mr. Roach, a carpenter and an operating engineer at the YMP who were present at the October 19 safety meeting and were called as witnesses by Castillo, testified that the complainant's dismissal was not due to his safety disclosures, but was instead the result of a "personality clash" between Castillo and the Precast Yard Supervisor regarding union-related issues. Tr. at 74, 109, 116, 119. James Morris was the Kiewit Construction Manager who made the decision to fire Castillo. He stated that he had previously instructed the complainant to stop raising union-related matters at safety meetings. Tr. at 212. He further testified that on October 19 he received a call from the Precast Yard Supervisor who described the occurrences at that morning's safety meeting and recommended that Castillo be terminated for insubordination. Tr. at 213. Mr. Morris also stated that although he had been made aware of the uncapped stakes, he did not know who had raised the issue, and it had nothing to do with the complainant's dismissal. Tr. at 214, 216.

The Ironworkers Foreman was also present at the October 19 meeting and witnessed the heated exchange between Castillo and the Precast Yard Supervisor. In discussing the complainant's termination, he stated that the Precast Yard Supervisor "didn't have any choice" but to recommend dismissal because the complainant was "undermining a supervisor's authority in front of the men." Tr. at 327. He further testified that he would have sought to fire Castillo too, adding that "I don't think safety had one thing to do with it." Tr. at 361.(8) Similarly, Floyd Cooper, the complainant's fellow ironworker who ultimately succeeded him as steward, who was also at the October 19 meeting, was of the same opinion that the Precast Yard Supervisor had no choice but to have Castillo fired, stating that the complainant's conduct was "disrespectful" to the degree that the Precast Yard Supervisor had to "take appropriate action . . . in order to keep the respect for himself from the other men that observed this." Tr. at 378.

I therefore conclude that the complainant has failed to show, by a preponderance of the evidence, that his safety disclosure was a contributing factor in his October 19, 1994 termination. The capping of concrete stakes was a safety practice advocated and asserted as a safety reminder by the complainant and other workers in the context of countless safety measures promoted regularly at daily safety meetings. The evidence presented in the record is overwhelming in support of the finding that Castillo was disruptive of safety meetings and confrontational with Kiewit management over union/work jurisdiction issues despite repeated warnings from Kiewit and his own union to desist in this behavior. It was that behavior that directly produced the firing. Irrespective of Castillo's present claim that he asserted the matter of caps on stakes the day before his firing, it is unreasonable to conclude that this purported disclosure was a contributing factor in that personnel action. Under the circumstances evidenced in the record, to exalt the caps on stakes issue to the level of a "contributing factor" would be tantamount to the tail wagging the dog.

2. The May 31, 1995 Layoff

The procedures utilized in the May 31, 1995 layoff were thoroughly addressed in the testimony of the Ironworkers Foreman and Jeff Moore, who was the supervisor of the Precast Yard at that time. Due to budget cutbacks and a large inventory of concrete slabs in stock, the determination was made to lay off approximately 75% of the workers at the Precast Yard in all construction crafts. Tr. at 217. The Ironworkers Foreman testified that he was instructed to lay off a given number of ironworkers, such that only three would be retained. Tr. at 329-330. As required by union regulations, he retained himself, as foreman, and Floyd Cooper, who had succeeded Castillo as the ironworkers shop steward. As the third retainee, he chose Pete Robles because Mr. Robles was the alternate foreman, who assumed Ironworkers Foreman's duties when he was absent. *Id.*

I find the record to be devoid of any indication that Castillo's safety cap disclosure was a contributing factor in his layoff. I note initially that after the complainant was rehired in November 1994, he had no further difficulties with Kiewit management or supervisors. Shortly after Castillo's return, the Precast Yard Supervisor who took action to terminate him left Kiewit due to personal family reasons. The Ironworkers Foreman, the complainant, his coworkers and subsequent supervisors all concur that the

complainant got along well and was a good worker from the time he was rehired until the layoff. Tr. at 89, 176, 273. 329. In this regard, I note that the complainant was laid off with the notation that he was "eligible for rehire." This meant that the Ironworkers Foreman had been satisfied with the job that the complainant had done, and that he was eligible for further employment as an ironworker with Kiewit. Tr. at 361. I think it very unlikely that this provision would be applied to someone who had been the victim of a retaliatory personnel action.(9)

Moreover, the criteria employed by the Ironworkers Foreman in determining who was to be retained in May 1995 were largely objective and do not reflect a retaliatory intent. Indeed, Castillo himself stated that he believed the layoff procedure to be fair. Tr. at 282.(10) Furthermore, I find it difficult to believe, and I do not conclude, that the Ironworkers Foreman, as a union member himself, would retaliate against a fellow union member for raising issues having to do with worker safety. For these reasons, I find that Castillo has failed to prove by a preponderance of the evidence that his disclosure was a contributing factor in the May 31, 1995 reduction in force.

IV. Conclusion

As set forth above, I have determined that the complainant has failed to establish the existence of a violation on the part of Kiewit for which he may be accorded relief under DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. Although Castillo made a protected disclosure, he has failed to demonstrate that the disclosure was a "contributing factor" in either the October 19, 1994 termination or the May 31, 1995 reduction in force, within the meaning of 10 C.F.R. § 708.9(d). Moreover, even if the record supported his belief that his disclosure was a contributing factor, I find clear and convincing evidence that Kiewit would have taken these actions even in the absence of the disclosure. Despite being instructed on more than one occasion by Kiewit management and his own union to refrain from raising non-safety related, union issues in safety meetings, the complainant continued this practice, culminating in the October 19 meeting, at which Castillo became involved in a loud, heated argument with his supervisor over a work assignment matter. Virtually all of the witnesses who were in attendance at that meeting, including those called by Castillo, testified that they too would have fired the complainant based upon his conduct; indeed, under the circumstances he had left the Kiewit supervisor and management with no other choice. The Part 708 regulations were never intended as a means to insulate contractor employees from the consequences of insubordinate behavior going beyond reasonable limits of toleration. *See* *Timothy E. Barton,* 27 DOE ¶ 87,501 at 89,013 (1998) (determination to terminate contractor employee primarily motivated by employee's aggravated refusal to follow work directive of company manager). With respect to the May 31, 1995 reduction in force, there is simply nothing in the record to indicate that the decision to include Castillo among those laid off would have been any different had it not been for his disclosure.

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

It Is Therefore Ordered That:

(1) The Request for Relief filed by Carlos M. Castillo under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments, Office of the Inspector General, Department of Energy.

Fred L. Brown

Hearing Officer

Office of Hearings and Appeals

Date: June 1, 1998

(1)The expedited procedure that was offered to the parties by the IG in this and other cases was a precursor to changes that have been proposed by DOE in the regulations governing the Contractor Employee Protection Program, 10 C.F.R. Part 708. *See* Notice of Proposed Rulemaking (NOPR), Criteria and Procedures for DOE Contractor Employee Protection Program, 10 C.F.R. Part 708, 63 Fed. Reg. 374 (January 5, 1998). Unlike the present regulations, where both parties must agree to the expedited procedure, under the proposed regulations, after the IG has accepted jurisdiction over a complaint and attempts of informal resolution have proven unavailing, a complainant is afforded two avenues for proceeding directly to the hearing stage absent an IG investigation and Report of Inquiry (previously a "Report of Investigation"): (1) the complainant may elect to have the complaint submitted directly to the Office of Hearings and Appeals for a hearing, bypassing the inquiry stage, NOPR § 708.7(b)(3); or (2) the complainant may request a hearing in the event a Report of Inquiry has not been issued by the IG within 240 days of being notified that informal resolution of the complaint was not reached, NOPR § 708.8(f). Under either alternative, without an IG investigation of the complaint and Report of Inquiry, the Hearing Officer must develop the factual record at the hearing stage of the proceeding. NOPR § 708.9. In this regard, it should be noted that the proposed rules provide that the Hearing Officer may order reasonable discovery upon the request of a party. NOPR § 708.9(c)(1).

(2)The specific disclosure and alleged retaliatory actions were determined by the IG in accepting jurisdiction over Castillo's Part 708 complaint in this matter, and initiating a preliminary investigation. *See* Letter from Sandra L. Schneider, Assistant Inspector General for Assessments, IG, to Carlos M. Castillo, February 11, 1997. These matters were principally gleaned by the IG from documents relating to Castillo's NLRB action, particularly his affidavit taken in that proceeding, which was forwarded to the IG by Castillo on December 17, 1994, and deemed by IG to contain sufficient information to constitute a Part 708 complaint.

(3)I note in this regard that a disclosure need not be correct in order to be protected under Part 708. In the Final Agency Decision recently issued in *C. Lawrence Cornett v. Maria Elena Torano Associates, Inc.*, 27 DOE ¶ 87,502 at 89,017 (1998), the Deputy Secretary emphasized that: "Whether [the complainant] was correct or not - which is not the issue here . . ., so long as it was both reasonable and in good faith, plainly is the sort of disclosure meant to be protected by the regulations . . . ." In the present case, I find and Kiewit does not dispute that Castillo was both reasonable and in good faith in raising the matter of capping stakes. *See* Tr. at 18.

(4)In the October 25, 1994 NLRB Affidavit, Castillo asserts that he brought up the matter of uncapped stakes to the Precast Yard supervisor "around October 11, 1994" and "[l]ater that day, Andy [Quintana], cement finisher, cut his arm on the stake." Exh. 2 at 3. However, an engineer who worked at the site testified that his recollection of the incident was that Andy Quintana cut his arm on a stake while trying to pull the stake out of the concrete, after removing the cap. Tr. at 199.

(5)Evidence regarding the timing of Castillo's stated concerns about protective caps on stakes is by no means conclusive. Several witnesses that testified at the hearing confirmed that Castillo raised the matter of uncapped stakes at one or more safety meetings during the period May through June 1994, while the pouring of slabs took place at the YMP Portal area and cut rebar was being used as concrete stakes. *See, e.g.*,Tr. at 56, 100, 183, 322. However, no one corroborated Castillo's present assertion that he brought it up in the morning safety meeting on October 18, 1994, just one day before the firing. Indeed, Castillo's memory of this matter appears to be faulty. In his NLRB affidavit taken just one week after the firing, he stated that on October 17 or 18, he noticed that duct tape instead of actual caps was being used on the stakes and, "I may have mentioned it at the safety meeting the following morning." Exh. 2 at 3. In his IG statement, taken July 29, 1997, Castillo states that he raised the matter of capping of stakes 3 or 4 times prior to October 19, 1994, but "I can't recall the specific dates." Exh. 18 at 4.

(6)For instance, the complainant's coworkers recall him and others raising safety issues relating to the use

of flagmen to direct trucks onto the site, Tr. at 88, a forklift spewing toxic fumes, Tr. at 105, safe operation of tarp rolling equipment, Tr. at 107-08, safe driving speed of construction equipment, Tr. at 112, and trucks unsafely loaded, Tr. at 114-15. However, it is not alleged that raising any of these matters resulted in a retaliatory response. The Ironworkers Foreman explained that employees raised safety matters "[c]onstantly, from signaling operators and equipment to back up bells on equipment, things like that. Everything relating to construction constantly came up because that was a big project." Tr. at 323. Amid this volume of safety reminders, the Ironworkers Foreman characterized the complainant's revelation concerning steel stakes as "no big issue." *Id.*

(7)In a number of instances, the complainant not only raised work-related issues relevant to the Ironworkers Union which he represented, but also raised matters on behalf of other craft workers which he did not officially represent. This penchant for assuming representation of workers outside of his union gained the complainant a reputation as what is referred to as a "bull steward." Tr. at 49-50; Exh. 2 at 3.

(8)The Ironworkers Foreman corroborated the testimony of the Construction Manager that Castillo had been previously admonished to stop disrupting safety meetings with union/work jurisdiction issues. Indeed, he stated that when the Ironworkers Union business agent who installed Castillo as steward found out about the complainant's behavior, the business agent chastised Castillo and directed him to stop these disruptions of safety meetings. Tr. at 324- 25, 342. Nonetheless, the complainant continued this behavior. According to the Ironworkers Foreman, sometimes Castillo was "representing Carlos Castillo and not the people." Tr. at 344-45.

(9)Although Castillo never returned to work for Kiewit at the YMP, the decision not to rehire him was not under the authority of Kiewit but a matter between Castillo and the Ironworkers Union which administered the work assignments of its members. Tr. at 283-84, 367-68.

(10)In his statement to the IG, Castillo expressed no surprise at the layoff selection:

There were 2 ironworkers that were not laid off. They were Floyd Cooper and Pete Robles. I understand why they were not laid off. Cooper was the union steward and he would be the last to get laid off because of his position. Robles was not laid off because he filled-in as foreman during Reed's absence. There was no seniority system at YMP.

Exh. 18 at 6.

December 9, 1998
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Russell P. Marler, Sr.
Date of Filing: August 31, 1998
Case Number: VWA-0024

This Decision involves a complaint filed by Russell P. Marler, Sr. (Marler or "the complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, codified at 10 C.F.R. Part 708. Marler is a former employee of a DOE contractor, DynMcDermott Petroleum Operations Company (DM), and alleges in his complaint that certain reprisals were taken against him by DM, including a poor performance evaluation and selection for termination under a Reduction-in-Force (RIF), as a result of his participating in an act protected under Part 708. More specifically, Marler alleges that these adverse personnel actions were improperly taken against him in retaliation for his serving as a witness in another proceeding brought under Part 708, and therefore seeks appropriate redress. On the basis of the hearing that was conducted and the record before me, I have concluded that Marler is not entitled to relief under 10 C.F.R. Part 708.

I. Background

A. The DOE Contractor Employee Protection Program

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

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. These procedures typically include independent fact-finding by the DOE Office of Inspector General (IG), followed by the issuance of a Report of Investigation setting forth the IG's findings and recommendations on the merits of the complaint. 10 C.F.R. § 708.8. Thereafter, the complainant may request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision, followed by an opportunity for further review by the Secretary of Energy or his designee. *See* 10 C.F.R. §§ 708.9-708.10.

B. The Present Proceeding

(1) Procedural History

Marler was terminated from employment by DM on September 22, 1994, and filed the present complaint under Part 708 with DOE on November 1, 1994. In his complaint, Marler alleges that his termination, under a company RIF, and a preceding poor performance evaluation, were the result of his participation as a witness in another proceeding brought under Part 708. The IG accepted jurisdiction over the complaint and conducted an on-site investigation of Marler's claims during the period September 24-27, 1996. The IG completed all of its investigative activity in the case on October 15, 1997.

Following its review of the summary of statements and documentary evidence assembled during its investigation, the IG issued a Report of Inquiry and Recommendations (ROI) in this matter on June 26, 1998. In the ROI, IG found that although Marler's participation as a witness in the collateral Part 708 proceeding was a contributing factor in the adverse personnel actions taken against him by DM, its investigation established clear and convincing evidence that DM would have taken the same actions against him even in the absence of such participation. Accordingly, IG recommends in the ROI that Marler be denied relief under Part 708.

In a letter received by the IG on July 28, 1998, the complainant exercised his right under Part 708 to request a hearing in this matter. 10 C.F.R. § 708.9(a). On August 31, 1998, the complainant's hearing request along with the ROI and supporting investigatory exhibits were forwarded to OHA. On September 4, 1998, I was appointed as Hearing Officer in this case. 10 C.F.R. § 708.9(b). After a number of contacts with the parties in the form of written correspondence and conference calls, I convened a hearing in this proceeding on October 28-29, 1998. The official transcript of that hearing will be cited in this determination as "Tr.". Pertinent documents that were attached to the ROI as exhibits will be cited as "Exh.".

(2) Factual Background

The following summary is based upon the hearing testimony, the ROI investigative file and the submissions of the parties. Except as indicated, the facts set forth below are uncontroverted.

Marler, the complainant, was hired in 1985 by Boeing Petroleum Services, Inc. (Boeing), the management and operating (M&O) contractor of DOE's Strategic Petroleum Reserve (SPR), until Boeing was succeeded by DM on April 1, 1993. Tr., vol. II at 70; Exh. 54. Subject to certain management and supervisory changes, discussed below, Marler served as a parts provisioner in the Integrated Logistics System (ILS) division under both Boeing and DM. The general function of the ILS is to ensure that there is an adequate inventory of parts, in terms of type and quantity, to maintain the equipment and machinery located at the various SPR sites. The ILS is essentially comprised of two functions, Provisioning and Cataloging. The complainant's primary area of provisioning related to parts for instrumentation control, site security and electrical maintenance. Tr., vol. II at 88.

During his first years of employment with Boeing, Marler's supervisor was Francis M. O'Laughlin (O'Laughlin), then the ILS Manager. Pursuant to a reorganization instituted by Boeing in May 1991, however, David M. Ryan (Ryan) was selected as Logistics Manager in the newly created Material Directorate, and O'Laughlin became Ryan's subordinate. This change was made in order to improve the performance of the ILS group and remedy a provisioning backlog that had developed under O'Laughlin. Tr., vol. II at 228. This realignment and demotion in authority ultimately led O'Laughlin to file an action under Part 708, on April 1, 1992, and later to resign from Boeing on May 15, 1992. At that time, Ryan became the complainant's supervisor.

By all accounts of ILS personnel, Ryan demonstrated a tougher, more "hands-on" management style than his predecessor, O'Laughlin, and immediately instituted changes to enhance the performance of the provisioning function in ILS. Tr., vol. II at 86, 173-74, 190-91. Most significantly, it was Boeing's desire and Ryan's mission to automate the provisioning function. Previously, the complainant determined the parts provisioning list through visits to SPR field sites and contacts with maintenance personnel and vendors; he then gave the list to a data entry clerk for entry into the ILS database. Tr., vol. II at 67-68. According to the complainant, he had absolutely no personal contact with the computer for his first seven years as an ILS provisioner. Tr., vol. II at 69. However, in 1992, Ryan instituted a new system which entailed an engineer determining the parts provisioning list and the three ILS provisioners, Marler, Crystal Verges (Verges) and Amelie Breaux (Breaux), providing computer support with ILS data entry and analysis. Tr., vol. II at 11-12. Ryan assigned Louise Wade (Wade), then the Cataloging supervisor, to also supervise the provisioners in implementing this change in operating procedure. Tr., vol. II at 12-13.

According to Wade, the provisioners were not immediately receptive to the new automated operating procedure requiring substantial use of the computer. Tr., vol. II at 23. She noted that the complainant was least able in use of the computer among the provisioners and, in her observation, frequently required the assistance of his colleagues. Tr., vol. II at 25-26. In this regard, Wade testified that there were often errors in Marler's work due to his inability to analyze and input data using the proper codes into the ILS database. Tr., vol. II at 14-18. The complainant's fellow provisioners stated that although the complainant was slow at data entry and sometimes needed assistance in accessing segments of the ILS database, they never had to do his work and the complainant was a good worker. Tr., vol. II at 169-70, 199- 200.

Beginning in 1992, many of Marler's coworkers noticed that a strained relationship had developed between Marler and Ryan, who was then the complainant's second line supervisor. Tr., vol. II at 176, 190. According to Verges and Breaux, the complainant and Ryan were previously friendly toward one another and were commonly known to go on fishing trips together, until an incident which occurred on a fishing trip in early 1992. *Id.* Marler relayed an account to them and to other persons in the organization, that in the course of the fishing outing, he and Ryan engaged in a conversation concerning the demotion and resignation of O'Laughlin. As recounted by Marler, he accused Ryan of betraying O'Laughlin for supporting Boeing and then assuming O'Laughlin's management position, since O'Laughlin had previously been Ryan's friend and had indeed helped Ryan to secure a job with Boeing. Tr., vol. II at 81-82. Marler stated that prior to the fishing trip confrontation, his relationship with Ryan "was great" but after the incident Ryan became: "Very cold. He ceased talking to me. . . . And it was obvious. Everybody in the department saw it." Tr., vol. II at 84-85.(1) Marler says Ryan became very "nitpicking" of his work following the fishing trip. Tr., vol. II at 86. Some time later after the fishing trip, Marler states that he was told by another ILS manager that Ryan was out to get him. Tr., vol. II at 156-58.

On April 1, 1993, DM succeeded Boeing as the M&O contractor of the SPR. Under conditions of its contract with DOE, DM was directed to hire all of Boeing's employees but to reduce the total number of employees, then approximately 1050, to less than 970 by fiscal year 1995, beginning October 1994. Tr., vol. I at 127-28, 204. In addition, the new DM management was made aware of DOE's continuing dissatisfaction with the performance of the ILS provisioning function. Tr., vol. I at 97-100. Under DM's proposal, the company agreed to make more extensive use of computers in the ILS. Tr., vol. I at 130. The determination was made by Ryan's superiors, including Ronald Jacobs (Jacobs), Manager, Maintenance and Material Department, and his boss, Robert McGough (McGough), Director, Operations and Maintenance Directorate, that the ILS provisioning group might function better by increasing the number of engineers, pairing one engineer with each provisioning analyst. Tr., vol. I at 133, 210- 11, 377.

In May 1993, following a confrontation with Wade, his supervisor, Marler received a Corrective Action Memorandum (CAM), a disciplinary personnel action placed in his employee file. During this time period, Wade remained dissatisfied with Marler's slow progress in acquiring the computer skills necessary to perform the automated provisioning function, stating that Marler was sometimes untimely in completing his assigned tasks, made errors and did not follow proper procedures. Tr., vol. II at 25-34, 49-51. While her yearly Performance Review, dated January 7, 1993, was not very critical, it admonished Marler to concentrate on "expanding PC skills and grasping the technical aspects of his job." Exh. 44. Wade clarified, however, that her issuance of the CAM was not specifically related to performance but to Marler's uncooperative behavior and disrespectful tone in responding to her request for a completion date for one of Marler's assigned provisioning projects. Tr., vol. II at 39-42. Ryan had nothing to do with Marler receiving the CAM, although Ryan supported Wade in her decision to issue the CAM. Tr., vol. II at 58-59.

By the fall of 1993, it became clear to DM management and the firm's Human Resources division, that DM would not be able to meet through attrition the personnel levels required by October 1994 under the DOE contract, and DM began to plan for a possible RIF. Tr., vol. I at 132, 186-87. Jacobs instructed his underlying managers, including Ryan, to provide the names of their two lowest performers. Tr., vol. I at 101. Ryan provided the names of three individuals for possible RIF, including two ILS provisioners, Marler and Breaux. Tr., vol. I at 102. Jacobs decided to target the ILS for layoffs since in his view the ILS would operate more efficiently with a smaller staff, with more "degreed" engineers and fewer analysts. Tr., vol. I at 133-34. Jacobs then had a meeting with the ILS managers, including Ryan, to review the tentative RIF

list. Those managers familiar with Marler's work supported Marler being included on the list. Tr., vol. I at 134; Tr., vol. II at 227, 240. Word of a potential RIF filtered to the ILS employees and during an ILS staff meeting, Breaux and Marler confronted Ryan, and Marler directly accused Ryan of trying to get rid of him, which Ryan denied. Tr., vol. II at 198, 213.

In December of 1993, Marler went to Jacobs, complaining that he had received no merit pay bonus and that Ryan had failed to give him a plausible explanation. Tr., vol. I at 80-81, vol. II at 103-04. Jacobs explained that merit pay bonuses that year were determined based upon a performance "totem" handed down by Boeing, that Marler was near the bottom of the totem and, in fact, even high ranking employees had received a substantially reduced bonus. Tr., vol. I at 93, 274. Marler then decided to discuss other matters with Jacobs. The complainant informed Jacobs of the strained relationship that had developed between him and Ryan following his expression of support for O'Laughlin on the fishing trip. Tr., vol. I at 92, vol. II at 106. Jacobs responded by informing Marler that a RIF was coming and his name had in fact "bubbled up" on the tentative RIF list. Tr., vol. I at 81; Exh. 26 (Jacobs' contemporaneous notes of meeting). Marler recalled the conversation as follows: "[Jacobs] said, I've got an iron worker and housewives doing provisioning work over there. And I said, how about eight years of provisioning, on-hands experience? And he said don't make no difference. He said if I had to make a cut today, I would cut you." Tr., vol. II at 105.(2)

In April 1994, Wade ceased to be Marler's direct supervisor as the result of an ILS realignment, and Ryan once again became the complainant's direct supervisor. Tr., vol. II at 54. Also in April 1994, McGough made the determination to move forward with the RIF downsizing plan required under terms of the DOE contract. Exh. 10.

On May 18-19, 1994, a hearing was conducted at the SPR offices in reference to the complaint brought by O'Laughlin against Boeing under Part 708. *Francis M. O'Laughlin*, OHA Case No. LWA-0005. Marler and Ryan were among the witnesses called to testify at the hearing although neither was aware that he would be called until a short time before the hearing. Tr., vol. I at 364, vol. II at 143-44. According to Marler, upon being notified that he would be called as a witness, Ryan approached him and threatened that Marler's future hinged on his testimony. Tr., vol. II at 113. Ryan stated that he only advised Marler that he should be careful about his testimony in terms of accuracy. Tr., vol. I at 364. Nonetheless, Marler informed in-house counsel for DM and a DOE official that he was fearful of possible retaliation by Ryan. Tr., vol. II at 113-14. Ryan stated that he had no direct knowledge of the content of Marler's testimony at the hearing, but following the hearing Jerry Siemers, a former Boeing manager, informed him "that [Marler] was very upset and asked what I had done to get him so mad." Tr., vol. I at 365.

Following the hearing, the already poor relationship between Marler and Ryan deteriorated even further in the view of many ILS workers. Tr., vol. I at 176, vol. II at 167. Wade, Marler's previous supervisor, stated that following the hearing, the rumors that Ryan was going to get rid of Marler became common. Tr., vol. II at 61. Pete Kelly, an engineer who was temporarily brought in to work in ILS during this time frame, testified that Ryan was "bitter" about Marler serving as a witness, and following the hearing became unduly critical of Marler's work, stating: "It was evident that [Marler] was being harassed heavily." Tr., vol. I at 167. Indeed, Kelly stated that on several occasions following the hearing, Ryan stated during private conversations in Ryan's office that he was going to get rid of Marler. Tr., vol. I at 155-56.

In a letter dated July 28, 1994, DM informed DOE of its proposed staffing changes under the RIF in the Operations and Maintenance Directorate, and the complainant's position was one of six proposed for deletion at DM's New Orleans, LA, site. Exh. 31. In deciding to include Marler, Ryan testified that he was directed by Jacobs to lay off an employee and he had only the three ILS provisioners, Verges, Breaux and Marler, to choose from. Tr., vol. I at 372. Ryan stated that he chose Marler because, based upon the position skill requirements to maintain the ILS database and do reports, Marler was "the most expendable of the three." Tr., vol. I at 373.

On August 16, 1994, Marler received his annual Performance Evaluation rating from Ryan, who gave the complainant an unfavorable overall rating of "Marginal." Exh. 43. Wade, who was Marler's direct

supervisor for a portion of the rating period, until April 1994, had only conversational input into this Performance Evaluation of Marler. Tr., vol. I at 371, vol. II at 38.

In a letter dated August 17, 1994, DM informed DOE of its determination to RIF twelve DM employees from its field sites and four from the New Orleans site, including the complainant. Tr., vol. I at 277; Exh. 33. By letter dated September 22, 1994, Marler was advised by DM that his employment was being terminated through involuntary RIF, effective that day. Exh. 35.

Within a few days of receiving notice of the RIF, several of Marler's coworkers, including Verges, Breaux and Henry Haskell, then an ILS engineer, went to McGough's office to express their view that Marler was productive and was unfairly selected for the RIF. Tr., vol. I at 195, vol. II at 171, 208-09. Although McGough does not recall, Verges and Breaux testified that the matter of possible retaliation was raised. Tr., vol. I at 196, vol. II at 209. Notwithstanding, McGough determined after conferring with Jacobs to let the selection of Marler for the RIF to stand. Tr., vol. I at 196.

Following the September 22, 1994 RIF, there were additional personnel changes in ILS Provisioning. Jacobs decided to bring in another engineer from the field, Larry Evans, to work in ILS to replace Henry Haskell, who retired. Tr., vol. I at 145-46. After the beginning of the 1995 fiscal year, McGough received permission from DOE to increase staff and, in November 1994, DM hired Cahn Tran, an electrical engineer, to work in ILS. Tr., vol. I at 211. Cahn Tran, coupled with a provisioning analyst, performed some of the same but more extensive duties than those previously performed by Marler. Tr., vol. II at 178-79. Timothy Hewitt, DM Operations Manager, testified that this system of pairing a degreed engineer with a provisioning analyst, long sought by Jacobs, has made ILS Provisioning much more effective. Tr., vol. II at 236-37.

II. Legal Standards Governing This Case

In 10 C.F.R. Part 708, we find the rule applicable to the review and hearing of allegations of reprisal based on protected disclosures made by an employee of a Department of Energy (DOE) contractor. Proceedings under Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or his designee. *See*David Ramirez, 23 DOE ¶ 87,505 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has "[p]articipated in . . . a proceeding conducted pursuant to this part." 10 C.F.R. § 708.5(a)(2). In the present case, Marler claims in his complaint that adverse personnel actions were taken against him by DM, including being selected for layoff under a company RIF and receiving an unfair Performance Evaluation, as a result of his participating as a witness in *Francis M. O'Laughlin*, OHA Case No. LWA- 0005 (*O'Laughlin*), a proceeding brought under Part 708 against Boeing, DM's predecessor M&O contractor.

A. The Complainant's Burden

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

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

10 C.F.R. § 708.9(d); *see* Ronald Sorri, 23 DOE ¶ 87,503 (1993). "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when

weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse,* 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the burden of persuasion is allocated roughly equally between both parties. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). As a result, Marler has the burden of proving by evidence sufficient to "tilt the scales" in his favor that he participated in a proceeding protected under Part 708. 10 C.F.R. § 708.5(a)(2). If the complainant does not meet this threshold burden, he has failed to make a *prima facie* case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a "contributing factor" in the personnel actions taken against him, specifically his low Performance Evaluation received August 16, 1994, and selection for the RIF, ultimately conducted on September 22, 1994. 10 C.F.R. § 708.9(d); *see Helen Gaidine Oglesbee,* 24 DOE ¶ 87,507 (1994); *Universities Research Association, Inc.*, 23 DOE ¶ 87,506 (1993). This standard of proof is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221(e)(1), and the 1992 amendment to § 210 (now § 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In explaining the "contributing factor" test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation's chief House sponsors, stated: “The words ?a contributing factor’, ... mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” 135 Cong. Rec. H747 (daily ed. March 21, 1989)(Explanatory Statement on Senate Amendment-S.20). *See Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying "contributing factor" test).

B. The Contractor's Burden

If the complainant meets his burden, the burden shifts to the contractor. The contractor must prove by "clear and convincing" evidence that it would have taken the same personnel action against the complainant absent the protected disclosure. "Clear and convincing" evidence is a much more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F. Supp. at 1204 n.3. Thus, if Marler has established that it is more likely than not that his participation in a protected activity was a contributing factor in his selection for RIF and poor Performance Evaluation, DM must convince me that it would have taken these actions despite such participation by the complainant.

III. Analysis

I have carefully reviewed the record in this proceeding, including the testimony of the witnesses at the hearing and the exhibits presented in the record. For the reasons set forth below, I find that the complainant’s participation as a witness in a Part 708 proceeding was protected under 10 C.F.R. § 708.5(a)(2), and that the complainant has shown by a preponderance of the evidence that such participation was a contributing factor in his selection for the RIF and receiving a poor Performance Evaluation. However, I have further determined that DM has established clear and convincing evidence that the firm would have taken the same personnel actions against the complainant even in the absence of such participation. I will therefore deny Marler’s request for relief under 10 C.F.R. Part 708.

A. Complainant’s Participation

At the outset of the hearing, the parties stipulated that a hearing was conducted under Part 708 on May 18-19, 1994, in *O’Laughlin*, and Marler served as a witness on behalf of O’Laughlin in that proceeding. Tr., vol. I at 9. The record is also clear that DM was aware of Marler’s participation as a witness in that proceeding. Although the*O’Laughlin* proceeding involved the predecessor contractor, Boeing(3), DM was put on notice since a number of DM employees were called as witnesses, as former employees of Boeing. Further, the record shows that Ryan, Marler’s direct supervisor at that time, approached Marler a few days before the hearing to discuss Marler’s participation as a witness in the proceeding, although there is disagreement as to whether Ryan’s comments at that time were threatening or merely advisory. Tr., vol. I at 364, vol. II at 113.

I therefore find that the complainant has met his threshold showing under section 708.9(d), that he engaged in an activity protected under Part 708, *viz.* participating as a witness in a collateral Part 708 proceeding, and that DM had knowledge of such participation.

B. Contributing Factor

A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993) *citing McDaid v. Dept't of Hous. and Urban Dev*., 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (County). In addition, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F. 2d 147, 148 (8th Cir. 1989).(4)

Applying these standards to the present case, I find that there is clearly temporal proximity between Marler's serving as a witness in the *O'Laughlin* hearing on May 18-19, 1994, and both the placement of Marler's position on the RIF list proposed to DOE in a letter dated July 28, 1994*, and the complainant receiving an unfavorable Performance Evaluation from Ryan, his supervisor, on August 16, 1994. The record shows that although Ryan did not have specific knowledge of Marler's testimony in the *O'Laughlin* hearing, Ryan was approached by a former Boeing manager present at the hearing who asked Ryan what he had done to make Marler so mad. Tr., vol. I at 365. In addition, there is ample testimony that following the hearing, the already poor relationship between Marler and Ryan grew worse, and the rumors of Ryan's threats to get rid of Marler more prevalent.

Based on the foregoing, I find Marler has established a *prima facie* case that his protected disclosure was a contributing factor to his being selected for the RIF and receiving a poor Performance Evaluation. The burden now shifts to DM to prove by clear and convincing evidence that it would have chosen Marler for the RIF and the complainant would have received a poor Performance Evaluation absent his protected disclosure. 10 C.F.R. § 708.9(d).

C. Contractor's Actions Absent Complainant's Participation

I have carefully weighed the evidence presented in the record of this case and I am led to conclude, on the basis of clear and convincing evidence, that DM would have taken the same adverse personnel actions against the complainant even in the absence of his serving as a witness in the *O'Laughlin* hearing. While I am not comfortable with the role that personal animosity between Marler and Ryan may have played in these matters, it is evident that this poor relationship predated the *O'Laughlin* hearing. More importantly, I am convinced that other objective factors beyond Ryan's control, including operating changes within ILS that diminished Marler's value to the organization and DOE contractual mandates that made a RIF necessary, would have resulted in the same adverse personnel actions being taken against Marler. These factors are discussed in greater detail below.

The evolution of circumstances leading to the adverse actions against Marler stemmed from certain commitments made to DOE by DM upon assuming the M&O contract in April 1993. First, there was a perception shared by DM management and DOE that the ILS was failing to adequately perform parts provisioning for the SPR sites, evidenced by the existence of a substantial parts provisioning backlog. Tr., vol. I at 97- 100, vol. II. at 228. Hewitt, Operations Manager, testified that the ILS was viewed to be "over strength" and "under performing" and Ryan was installed as ILS manager to correct this situation. Tr., vol. II at 228-29.(5) Thus a commitment was made by DM to improve the ILS provisioning function through

* This decision, as issued, contained a typographical error specifying the date of the RIF list letter as July 28, 1998. However, the correct date of the RIF letter was July 28, 1994, as accurately stated in the Factual Background (page 4) of the decision.

increased use of computers. Tr., vol. I at 130. The second commitment made by DM was to reduce overall staff levels at headquarters and field sites from approximately 1050 on board, to 970, by fiscal year 1995, beginning October 1994. Tr., vol. I at 127-28, 204. As explained below, the convergence of these commitments worked to the disadvantage of the complainant, setting aside any animus existing between the complainant and Ryan.

DM management believed that ILS productivity would be increased through greater reliance on automation and pairing an engineer with a provisioning analyst, with the latter performing computer input and analysis of the ILS database. Tr., vol. I at 130, 133-34, 210-11, 337. This new operating procedure radically changed the nature of Marler's work responsibilities, who had previously performed his provisioning duties in hard copy which he then gave to a data input entry clerk. Tr., vol. II at 66-67. Marler conceded that prior to the change in his provisioning duties, his skill level on the computer was "none whatsoever." Tr., vol. II at 70. Wade, who was brought in by Ryan as supervisor to facilitate automation, testified that none of the provisioners (Marler, Verges and Breaux) was receptive at first, but Marler was the least able to adapt. This comes as no surprise since Verges had functional computer skills from previous employment and indeed had been a data entry clerk before rising to become a provisioner. Tr., vol. II at 168. Similarly, Breaux had substantial prior data input experience through her position with a previous contractor. Tr., vol. at 206. Marler, on the other hand, had never been introduced to the use of a computer in any work or educational environment. Although the complainant made progress, he stated: "I am not computer literate. I learned to do what I had to do and that was it. I can get in and out and do my thing, but I don't type fast. I get by. I am slow." Tr., vol. II at 93. When asked whether his computer skills were as good as either Verges or Breaux, the complainant replied: "Not hardly.(6) Thus, Wade testified that the complainant often had problems with timeliness in completing his assigned projects related to use of the computer, and frequently required the assistance of Verges and Breaux. Tr., vol. II at 16-17, 22, 26-27, 29, 46-47, 49-50.

It is in this backdrop that it became clear in October 1993, that DM would likely be unable to meet the workforce reductions required under the DOE contract through attrition, and DM management began contingency planning for a possible RIF. Jacobs, Ryan's superior, requested all of his subordinate managers to identify their two lowest performers. Tr., vol. I at 101. Ryan responded by identifying three individuals, Paul Simon, who worked under Ryan as a logistics analyst, and Marler and Breaux from ILS Provisioning. Tr., vol. I at 101-02. When Marler's name was presented as a RIF candidate, there was no objection raised by any of the managers assembled at meeting by Jacobs to review the list. Tr., vol. I at 33. Marler was viewed as the most expendable from the provisioning group by other managers familiar with the nature and level of his work. Tr., vol. II at 227, 240. I am aware that many of the negative impressions of Marler on the part of upper level DM management (Jacobs and McGough) were drawn from Ryan, who may have had personal reasons to dislike Marler. Tr., vol. I at 74-75, 193-94. However, I find significant the testimony of Wade who was the complainant's immediate supervisor for nearly two years, ending in April 1994, who had a good personal relationship with Marler according to both Wade and Marler. Tr., vol. II at 9-10, 120. When asked which of the provisioners she would have selected for the RIF if it had been her decision, she responded: "[Marler] would have been the chosen individual because he was the weakest individual of the three there." Tr., vol. II at 53.

Thus, Marler's name was on the screen as a likely candidate for RIF approximately five months before DM management had any knowledge that Marler would be called to serve as a witness in the *O'Laughlin* hearing.(7) Based upon the circumstances confronting DM management, I find nothing which would arouse suspicion in its determination to target ILS Provisioning for downsizing and realignment, nor in the fact that Marler was deemed to be the lowest performer, in view of the new ILS operating procedure. Furthermore, the record indicates that McGough decided to go forward with the RIF in April 1994, at a time when he had no knowledge that Marler would be called to testify in the *O'Laughlin* proceeding. Exh. 10. Although the *O'Laughlin* hearing took place before DM actually notified DOE of its RIF selections in a letter dated July 28, 1994 (Exh. 31), the complainant's participation as a witness cannot reasonably be deemed to have had any impact upon a RIF selection process that had already been set in motion.

Furthermore, I find no "smoking gun" in the poor Performance Evaluation which Ryan gave to the complainant on August 16, 1994, one month prior to Marler receiving notice that he had been selected for the RIF on September 22, 1994.(8) In the August 1994 Performance Evaluation, Ryan gave Marler a rating of “Marginal.” Exh. 43. During the hearing, Ryan fully explained his position on Marler’s deficiencies with respect to all of the performance elements comprising this rating. Tr., vol. I at 294-330. I found this testimony persuasive, and reasonably supportive of the “Marginal” rating given to Marler on the descending scale of “Excellent,” “Above Expectations,” “Fully Satisfactory,” “Marginal,” and “Unsatisfactory.” Exh. 43. Indeed, a higher rating of “Fully Satisfactory” would have been inconsistent with the assessment of Marler’s work provided by Wade, who supervised the complainant for the first half of the rating period.(9)

Finally, I find nothing duplicitous in DM’s subsequent decision to hire an electrical engineer in ILS Provisioning, in November 1994, who performed many tasks previously performed by the complainant. McGough testified that DM was only able to increase its staffing level to allow for this position during the succeeding fiscal year 1995, beginning in October 1994, after receiving permission from DOE. Tr., vol. I at 211. From his testimony, I detected no intention by DM to delay asking DOE for this authority until after the RIF of Marler. Further, the determination to add a degreed electrical engineer to augment the provisioning function was always the goal of DM management. Tr., vol. I at 133, 210-11, 377, vol. II at 236-37.

For the reasons above, I have concluded that DM has carried its burden to prove by clear and convincing evidence that the firm would have taken the same adverse personnel actions against the complainant even the absence of his participation as a witness in the collateral Part 708 proceeding.

IV. Conclusion

As set forth above, I have determined that the complainant has failed to establish the existence of a violation on the part of DM for which he may be accorded relief under DOE’s Contractor Employee Protection Program, 10 C.F.R. Part 708. The record shows that Marler engaged in a protected activity by serving as a witness in the *O’Laughlin* proceeding brought under Part 708, and I am persuaded that Marler’s participation was a “contributing factor” in the adverse personnel actions taken against him by DM, including his selection for termination under a DM RIF and receiving a poor Performance Evaluation. Notwithstanding, I have determined that DM has carried its burden to show by clear and convincing evidence that the firm would have taken the same action even in the absence of Marler’s protected activity. In reaching this determination, I do not pass judgment on whether Ryan was in part motivated by personal bias in selecting Marler for termination. In the end, Marler was the unfortunate victim of DM’s plans to automate and restructure ILS Provisioning, which worked to devaluate his skills and experience. The record convinces me that the process of events leading to the adverse personnel actions began long before Marler’s serving as a witness in the collateral proceeding, continued apart from his participation as a witness, and would have occurred even in the absence of such participation.

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

It Is Therefore Ordered That:

(1) The Request for Relief filed by Russell P. Marler, Sr. under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments, Office of the Inspector General, Department of Energy.

Fred L. Brown

Hearing Officer

Office of Hearings and Appeals

Date: December 9, 1998

(1)Ryan asserted that he has no recollection of the conversation with Marler regarding O'Laughlin, although he recalls going fishing with Marler on one occasion. Tr., vol. I at 222; Exh. 13 (IG Summary of Ryan Interview). Verges and Breaux both knew about the fishing incident, but based only upon what Marler had told them. Tr., vol. II at 176, 190. Ryan conceded, however, that he and Marler had an "interpersonal problem." Tr., vol. I at 321.

(2)At this point, there is a factual divergence regarding further discussion at the meeting. According to Jacobs, he explained to Marler that his skills and background in construction were not well suited to provisioning and that Marler might want to consider taking a supervisory position at one of the SPR field sites, but Marler declined. Tr., vol. I at 125-26. Both McGough, Jacob's superior, and Ryan testified as to their belief that Jacobs had offered Marler a field position which Marler refused. Tr., vol. I at 188, 253. The complainant's provisioning coworker, Breaux, recalled that Marler told her that he and Jacobs had discussed a possible field position. Tr., vol. II at 217. Marler testified at the hearing, however, that Jacobs never mentioned anything about a field job during their meeting, and if Jacobs had he would have jumped at the opportunity. Tr., vol. II at 107-110.

(3)The parties further stipulated that DM was dismissed as a party early in the *O'Laughlin* proceeding. Tr., vol. I at 9; *see* *DynMcDermott Petroleum Operations Co.*, Case No. LWZ- 0027, 24 DOE ¶ 87,501 (1994).

(4)Recently, in a case involving a protected disclosure by a whistleblower, the Court of Appeals for the Federal Circuit stated:

If a whistleblower demonstrates both that the deciding official knew of the disclosure and that the removal action was initiated within a reasonable time of that disclosure, no further nexus need be shown, and no countervailing evidence may negate the petitioner's showing. The burden of persuasion thus shifts to the agency to prove by clear and convincing evidence, a higher standard, that it would have taken the action even in the absence of the protected disclosure.

Kewley v. Dept. of Health and Human Services, 153 F.3d 1357, 1362 (Fed. Cir., 1998).

(5)Breaux, one of the provisioners who worked with Marler, testified that from the time that the Material Directorate was formed under Boeing, and Ryan took over as ILS Manager, "we always felt that we were being watched all the time." Tr., vol. II at 207.

(6)"To Marler's credit, both Verges and Breaux testified that although they assisted Marler on the computer, Marler was much more adept at reading equipment diagrams for purposes of determining parts to be provisioned. Tr., vol. II at 134-35, 169-70, 200. However, as clarified by Wade, this skill became less valuable since under the new regimen, the engineer assigned to the provisioner was charged with making this kind of parts determination. Tr., vol. II at 31-34.

(7)As noted above, Marler had no knowledge that he would be called as a witness in the *O'Laughlin* hearing until shortly before the hearing, nor had he been contacted by O'Laughlin who left DM in May 1992. Tr., vol. I at 23-24, vol. II at 144. Ultimately, O'Laughlin's complaint under Part 708, based upon a purported health and safety disclosure, was found to be without merit by the agency. *Francis M. O'Laughlin*, 24 DOE ¶ 87,505 (1994), *affirmed*, 24 DOE ¶ 87,513 (1995).

(8)Although the RIF list had been finalized by this time, DM informed DOE in a letter dated August 17, 1994, that as a security precaution, selected employees would not be notified until the effective date, September 22, 1994, and would be "out processed the effective date of the reduction in force." Exh. 33.

(9)Moreover, Ryan had a reputation for being a tough evaluator among other ILS employees he rated, apart from Marler. Tr., vol. II at 174, 203-04.

Case No. VWA-0026

February 17, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Hearing Officer Decision

Name of Petitioner: Joseph Carson

Date of Filing: October 26, 1998

Case Number: VWA-0026

This Decision involves the referral of a whistleblower matter involving Joseph Carson (Carson), a Department of Energy (DOE) employee. Pursuant to an order of an administrative judge of the United States Merit Systems Protection Board (http://www.mspb.gov) (MSPB) that implemented a settlement agreement between the DOE and Carson, Carson was permitted to submit documents to the Office of Hearings and Appeals regarding six instances of retaliation that he claims occurred because of certain protected disclosures that he made. The DOE was also permitted to submit documents at the same time. Both parties were permitted to submit replies to the initial submissions of documents. No provision for personal appearances or oral testimony was made. The agreement (hereinafter referred to as "the settlement agreement") calls for an OHA Hearing Officer to evaluate whether there is merit to Carson's claims that DOE management took any of those six actions in reprisal for activities protected under the Whistleblower Protection Act of 1989 (WPA) (hereinafter referred to as protected disclosures). This Decision is that evaluation.

I. Introduction

Carson is a former site representative at Oak Ridge, Tennessee, for the Office of Environment, Safety and Health Residents (its most current name) within the Office of the Assistant Secretary for Environment, Safety and Health (http://www.eh.doe.gov) (EH). He worked as a site representative from 1990 through August 1993, when he was reassigned to another office within EH. Carson alleges that DOE management, including his supervisor, his second line supervisor, and a number of DOE managers, retaliated against him for making disclosures about safety and fraud concerns. During the time in question, Mr. William T. Cooper, Jr. was Carson's supervisor, Mr. Bernard Michael Hillman, the Director of the Site Representatives Program, was Carson's second level supervisor, and Mr. Joseph E. Fitzgerald, Jr. was the Deputy Assistant Secretary for Safety and Quality Assurance who supervised Mr. Hillman.

Carson has been fighting this fight for many years. Carson has filed multiple claims that the DOE retaliated against him for making protected disclosures. Carson has filed these claims, among other

places, with the U.S. Office of Special Counsel (http://www.osc.gov) (OSC) and the MSPB. OSC's primary mission is to safeguard the federal employee merit system by protecting federal employees and applicants from prohibited personnel practices. It does this by investigating claims of reprisal for whistleblowing and prosecuting them before the MSPB.

The record is voluminous. Carson has submitted 415 exhibits for my review--the record before the MSPB

with Exhibits labeled Exhibit A through Exhibit MA (339 exhibits) and 76 additional exhibits. I have read all of them. I will not summarize them, the factual background in this matter, or the procedural history in this determination because this is a process limited by the original MSPB order, and a number of the exhibits are not germane to my evaluation. Furthermore, the MSPB order establishing this process requires my evaluation to be based upon the law that the MSPB would follow in determining whether any of Carson's claims are meritorious. As a result, the record of evidence should be limited to those materials that Carson submitted to the OSC in support of his complaints that he made protected disclosures for which he was retaliated against.

In reviewing [a whistleblower's] claim, the Board is limited to review of only those materials submitted to the OSC. The rationale behind submitting the claim first to the OSC is to enable the OSC to remedy any wrongdoing it finds without involving the Board. See Ward, 981 F.2d at 526. The exhaustion requirement would be rendered meaningless if a claimant were permitted to submit evidence of protected disclosures to the Board that was not submitted to the OSC. In Ellison, we stated that a failure to explicitly raise disclosures a claimant believes are protected with the OSC precludes consideration of these issues by the Board. See Ellison, 7 F.3d at 1037.

Willis v. Department of Agriculture, 141 F.3d 1139, 1144 (Fed. Cir. 1998). Nevertheless, this evaluation procedure is significantly different from the process that would have occurred before the MSPB because there is no provision for the presentation of oral testimony at a hearing. Oral testimony would have been useful in clearing up some ambiguities in the documentary evidence. Oral testimony also would have allowed me to gauge the credibility of witnesses. This omission has hindered my evaluation process, because there are a number of factual issues as to whether Carson's view or his supervisors' views are accurate. However, the MSPB order established the procedures I am to follow, and my review of the entire record gives me some additional insight into the interchanges between Carson and his colleagues, supervisors, and managers.

In a case involving allegations that personnel actions were taken against a federal employee in retaliation for making disclosures protected under the Whistleblower Protection Act of 1989, the analysis can be stated quite simply. The employee must show that he or she made a protected disclosure and that the disclosure was a contributing factor in the agency's personnel action. The employee makes a prima facie case if he shows that the official taking the personnel action knew of the protected disclosure and that the action occurred within a reasonable time of that disclosure. *Kewley v. Department of Health and Human Services*, 153 F.3d 1357 (Fed. Cir. 1998). If the disclosure were a contributing factor, the burden of proof shifts to the agency, which in order to prevail, must prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure.

II. The Alleged Disclosures

Carson claims to have made a number of protected disclosures beginning in December 1991. First, he alleges that in that month he spoke with his supervisor about his concern that a former site representative who had recently resigned had been hired as a consultant for the program. Carson also complained about other aspects of the use of consultants. He complained to his supervisor that a particular consultant was charging for time that Carson considered to be nonproductive. (Carson characterized this as fraud.) He also claims that he was concerned that consultants were being hired who his second line manager liked on a personal basis.

Carson also states that in December 1991 he called a hotline maintained by the DOE's Office of Inspector General (hereinafter referred to as OIG) and "voiced concerns about the use of consultants in my program . . . ." Exhibit 1 at page numbered 5.

Carson also maintains that in April 1992 he alleged to the assistant to his second level manager that Carson's supervisor Cooper had falsified Cooper's time and attendance reporting because Cooper had not accounted for all hours that he was on sick leave. Carson also claims in one sentence to have made the

same allegation to the OIG, and then in the next sentence he says he thinks he also informed the OIG. Exhibit 1 at page numbered 6.

Carson also claims that allegations against his supervisors in grievances he filed in response to reprimands and performance evaluations were protected disclosures. Carson claims that a certification in his 1991 performance plan had been falsified, possibly by his second level supervisor. Carson also claims that he notified the OIG of what he characterized as threatening conversations with a DOE Deputy Assistant Secretary and a DOE Labor Relations Specialist.

In May 1993, Carson alleges that he told his supervisor of "specific instances indicative of widespread fear or retaliation for identifying and reporting inadequate safety programs in DOE and DOE contractor safety organizations." Exhibit 1 at page numbered 7. In July 1993, Carson claims to have complained to his supervisor that safety deficiencies he had uncovered were not included in a report that he had drafted. After he did not receive a response to that claim, Carson states that he wrote to the Secretary of Energy and the Manager of the DOE Oak Ridge Operations Office to disclose his concerns.

III. The Alleged Retaliation

Under the settlement agreement, the issues to be addressed here are whether there is merit to Carson's claims that DOE management took the following actions against Carson for making disclosures protected under the Whistleblower Protection Act of 1989:

1. The 1991 performance appraisal of Fully Successful signed by the Reviewing Official on August 9, 1992;
2. A written reprimand that Carson received on August 19, 1992;
3. An unacceptable performance evaluation that Carson received on September 29, 1992;
4. A marginal performance evaluation that Carson received on January 28, 1993;
5. The denial of a within grade step increase as a result of the unacceptable and marginal performance evaluations, as well as Carson's failure to receive notification of the denial of a within grade step increase after the marginal performance evaluation in January 1993; and
6. The unacceptable advisory rating that Carson received on October 14, 1993.

In making those determinations, the settlement agreement states that I will use "applicable legal precedents related to allegations of whistleblower reprisal, primarily those found in decisions issued by the Merit Systems Protection Board." Stipulation of Settlement and Dismissal, *Carson v. Department of Energy*, No. SL-1221-94-0179-B-1, Attachment A at 1 (MSPB Oct. 20, 1998). In other words, the issue here is whether any of these actions would be found under MSPB law to be unlawful retaliation for the making of a protected disclosure.

IV. Procedural History

The procedural history of the disputes between Carson and his management is long and complex. Since this evaluation is focused on a small part of the overall picture, it is not necessary to go into much detail about the larger disputes; the parties know the procedural history all too well. This evaluation process began when an administrative judge at the MSPB signed an order on October 20, 1998, approving a settlement agreement between Carson and the DOE. That agreement provides that "[t]he allegations of whistleblower reprisal made by Mr. Carson in this appeal will be evaluated by the process . . . before the Office of Hearings and Appeals ("OHA") to determine whether they were meritorious." Stipulation of Settlement and Dismissal, *Carson v. Department of Energy*, No. SL-1221-94-0179-B-1, at 2 (MSPB Oct. 20, 1998). The agreement provides for the submission of documents during the OHA evaluation process and a determination whether DOE management took any of six actions in reprisal for whistleblower activities. The evaluation is supposed to be governed by the criteria used by the MSPB in evaluating whistleblower complaints.

Under the rules governing this type of action at the MSPB, a person who claims to have been retaliated against for making a protected disclosure must first file a complaint with the U.S. Office of Special Counsel. That office will investigate the claim and either prosecute it before the MSPB or close its processing of the complaint without any action. If the OSC stops processing a complaint without any action, an individual can prosecute his claim by starting an "Individual Right of Action" at the MSPB. The MSPB has held that an individual's cause of action at the Board is restricted to the actions that the OSC investigated. In other words, an individual may not raise at the Board in the first instance a disclosure or personnel action that he did not call to the attention of the OSC. *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998).

The Office of Special Counsel issued three letters to Carson about his complaints, one dated June 2, 1992 (Exhibit BO but listed in the index as Exhibit BP), one dated October 26, 1993 (Exhibit 46), and one dated February 24, 1994 (Exhibit 50). In his first complaint to the OSC, Carson had alleged that the lowering of his 1991 annual performance appraisal from the previous year was because of his whistleblowing activity. Specifically, Carson alleged that he told his supervisor and the OIG about his concerns that the hiring of a former government employee as a consultant in the same program violated government rules. Carson also alleged that his second level supervisor was "hiring contractors based on his personal relationship with the contractors rather than adhering to government regulations." Exhibit BO. The Office of Special Counsel stated that it would not inquire further into this matter because the information reported to Carson's supervisor and the IG did not constitute a disclosure protected by the Whistleblower Protection Act of 1989. Furthermore, the OSC stated that Carson had not provided any evidence to support his belief that his second level supervisor was not following government regulations when hiring consultants. *Id*.

In its October 26, 1993 letter, the OSC found that with the exception of a disclosure alleging the misreporting of sick leave by his supervisor, it was not clear that the MSPB would find any of the other disclosures protected by the Whistleblower Protection Act of 1989. Those disclosures were (1) a disclosure to Carson's supervisor and OIG that a former site representative had been hired as a consultant in possible violation of DOE regulations, (2) a disclosure in December 1991 that Carson characterized as possible fraud among consultants in his program, (3) a disclosure about a concern that consultants were being hired based on their personal relationship with DOE management, (4) a disclosure to other site representatives about Carson's concerns about possible fraud among the consultants in the program, and (5) a disclosure that Carson's supervisor was misreporting his time and attendance. The OSC also concluded that the "personnel actions at issue were based on legitimate management concerns and not because of your disclosures or grievances." Exhibit 46 at 2.

The February 24, 1994 letter from the Office of Special Counsel found no basis for further inquiry into the marginal performance rating that Carson received in January 1993 and a subsequent denial of a within grade increase of salary in February 1993. The Office of Special Counsel found that it would not consider Carson's allegation of receipt of an unacceptable advisory performance rating in October 1993 because an advisory performance rating is not considered a personnel action that may form the basis of a whistleblower complaint. Exhibit 50.

V. Whether Carson Had Made A Prima Facie Case Of Retaliation

In order to establish a case on which the MSPB might grant relief, Carson needs to show that he has exhausted his remedies at the OSC. Exhibit 1 clearly shows that he did. He also needs to show that he made a protected disclosure under 5 U.S.C. § 2302(b)(8), that he was subjected to a "personnel action" within the meaning of 5 U.S.C. § 2302(a)(2), and that the disclosure was a contributing factor in the agency's personnel action. At the outset of my analysis, I want to make clear that I view the findings of the OSC in these matters to be evidence but not at all dispositive or binding on the issue of whether there is merit to Carson's positions. The findings are simply the OSC's views given the information and arguments presented to it. I will now turn to a discussion of Carson's disclosures.

Carson has made a number of allegations concerning the hiring and use of consultants in the Site Representatives program. He first alleged that he had concerns about the hiring of a former employee as a consultant in the same program. Carson has stated in the index to his exhibits:

6. Copy of pages of book on Federal Retirement that mentions "post-employment restrictions." Carson bases his concern about the rehiring of Myers as a consultant in a program in which he had been a manager based on what he read in this book.

Exhibit 6 is a portion of a booklet entitled **Your Retirement – How to Prepare for It, How to Enjoy It**. It was written by Bill Olcheski and published by Federal Employees News Digest Inc. of Reston, Virginia (http://www.clubfed.com/fedforce/fedforce.html). It is not an official government publication. Carson has provided in Exhibit 6 two pages of Chapter 11 that deals with Post-Retirement Employment. The discussion of post retirement restrictions on working as a consultant for a contractor to the federal government starts by saying that the rules are "long and involved . . . ." Exhibit 6. Then the author writes a very general summary of the restrictions that is three paragraphs long.

No reasonable person could read these passages and conclude that the hiring of a former government employee as a consultant is against government rules. The material that Carson claims is the basis for his knowledge and concern itself says that the rules are "long and involved and read like the small print on an insurance policy." Exhibit 6. While this would put people on notice that an issue exists when hiring a former government employee as a consultant, it is a leap to say that these passages indicate that the hiring of a former government employee is a violation of government rules. In a memorandum dated in July 1992, Carson said that he "was concerned that hiring Myers back so soon was a breach of regulations." Exhibit CE at 2. Yet, this concern rapidly shifted to the latter position, that hiring Myers was in fact a violation of regulations. The rules for hiring any federal employee are long and involved; the rules for letting any government contract are long and involved. This does not mean that merely pointing out that someone has been hired, or that a government contract has been let, constitutes a disclosure of wrongdoing.

Carson claims that he made this disclosure to both his supervisor and the OIG. The record in this case is unclear about what he disclosed to the OIG. Carson maintains that in December 1991 he called the OIG hotline and "voiced concerns about the use of consultants in my program . . . ." Exhibit 1 at page numbered 5. Nothing in the record shows what those concerns were. This characterization by Carson is in stark contrast to the lengthy explanation that he wrote about the concerns raised to his supervisors at the same time, and without further evidence causes me to question what transpired in the call to the OIG hotline, if it happened at all. Nevertheless, it appears that Carson did indeed raise this concern to the OIG. The record indicates that the OIG brought this issue to the attention of the DOE, and the DOE Office of General Counsel responded about this issue. Exhibits FI and GA. Nevertheless, the fact that an issue exists does not evidence a violation of law or an abuse of authority, and such a disclosure is not protected under the Whistleblower Protection Act of 1989. To hold otherwise would allow any question about federal employment or a federal contract to be a protected disclosure.

Indeed, the record indicates that DOE management was well aware that this issue existed. In a deposition given on January 24, 1994, Joseph Edward Fitzgerald, Jr., Deputy Assistant Secretary for Safety and Quality Assurance at DOE, testified as follows:

Q During that meeting did Mr. Carson bring up his concerns of - - [sic] about consultants and their use?

A Yes, I believe that was one of the issues that he had expressed.

Q What was your reply when he brought that up?

A I had indicated I had understood that - - [sic] that his concern had been relayed to me by [his second level supervisor] Mr. Hillman, and that we had, in fact, went through and reverified, if you may, that, in fact, all of the procedures were being satisfied, there was no conflict of interest from our standpoint, which

we had done.

Exhibit 54 at 14-15. This comment clearly points out that DOE management took steps to assure that government regulations were followed in the hiring of this consultant. The WPA, in 5 U.S.C. § 2302(b)(8), states in part that a protected disclosure must evidence a violation of law or regulations. Based on the record before me, I find that Carson's disclosure that he had a concern about the hiring of a former employee as a consultant in the Site Representatives Program, whether made to his supervisor or the OIG, is not such a disclosure, and it is not protected under the WPA.

Carson also alleged that contractors were charging time for which Carson believed was not productive. He also claims to have alleged fraud in the use of contractors in his program. With respect to the former claim, Carson apparently believes that time he spent with one consultant in particular was not productive. Five U.S.C. § 2302(b)(8) states that a protected disclosure must evidence a violation of law or regulations, or evidence "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Disclosing that several interactions with a particular contractor may have been less than ideally efficient hardly rises to the level of a protected disclosure evidencing a gross waste of funds.

Evidence that Carson submitted in this proceeding undercuts his position. In a December 3, 1998 memorandum that Carson asked him to write, Ari Krasopoulos, a site representative from 1989 to the present, stated his experience with consultants thusly:

Regarding my observations on the use of support contractors during the 91-93-time period: I worked with a lot of support contractors over the years and my experience has been overwhelmingly positive (with a couple of exceptions). That includes the time period you are interested in. The support contractors that I worked with all were professionals with good work ethic, they were good at what they were doing and yes with strong opinions and often with big egos. I guess if you are good at what you do, you can have the luxury of a big ego and strong opinion. For the most part I did not mind that because it did not interfere with what I did.

Although overall I have been pleased by the contractors performance and professional behavior not all of my experiences with contractors were great. Once I had a bad experience with one individual support contractor (near the time frame you are interested in). That fellow did not know his position in the organization and as a result I made sure he did not work for me or with me again. My supervisor at the time (Hillman) did not interfere with my decision not to have that fellow on my team again. Also there was another contractor who worked on my team once that I did not think he was being very productive. I made sure that he was not on my teams after that.

Memorandum Dated December 3, 1998, to Joseph Carson from Ari Krasopoulos regarding Response to Your Letter Dated Nov. 23, 1998 Requesting My Views at 2. It is a tautology to say that upon reflection not all time is spent being the most productive one can be. Statements about that do not evidence gross mismanagement or a gross waste of funds.

Carson also alleges that in April 1992 he told Carol Peabody, as assistant to the Deputy Assistant Secretary, that his supervisor reported his time and attendance inaccurately. As noted above, he also states that he notified the OIG of this matter, then in the next sentence says "I think I also informed the DOE IG of these allegations." Exhibit 1 at page numbered 6. These statements were included in an Appeal Form that Carson filed with the MSPB. The form is signed by Carson and dated December 20, 1993. Exhibit 1.

While further development of evidence might confirm these disclosures, there is no evidence in the record before me to support these allegations. Carson's conflicting statements about whether he informed the OIG of this concern in April 1992 cast doubt as to whether Carson in fact relayed these concerns to the Inspector General. Although Carson has submitted the deposition testimony of 15 people associated with the events here, Ms. Peabody's testimony is absent, even though she was available. Exhibit 52 at 2. There is no evidence to show what Carson said to Ms. Peabody, if indeed he said anything to her about Cooper's

reporting of his attendance. This lack of evidence is more compelling because the OSC informed Carson in its letter dated October 26, 1993, that one alleged action that the MSPB would likely consider a protected disclosure was his disclosure that his supervisor has falsified his time and attendance reporting. Exhibit 46. All of the depositions Carson has entered into the record before me took place in January 1994, approximately three months after the OSC letter and one month after he filed his appeal with the MSPB. Exhibits 51 through 65. Yet nowhere in those depositions is this disclosure mentioned. Indeed, Carson alleged that he also told his supervisor and his second level manager about his concerns. Exhibit 46. Nevertheless, the deposition of his supervisor, Exhibit 51, and his second level manager, Exhibit 52, are silent about this issue. Based on this record, Carson has failed to make a prima facie case that he made this protected disclosure.

Nevertheless, there is evidence in the record that he made similar disclosures to the OIG on July 8, 1992. Exhibit CF purports to be an unsigned memorandum from Carson to the OIG alleging that Carson's supervisor filed inaccurate time and attendance records. DOE has not challenged the authenticity of this document. While the July 1992 memorandum states that Carson has spoken to the OIG on a previous occasion, nowhere is it mentioned that the issue of time and attendance reporting came up. This lends support to my conclusion above that Carson had not in fact made a disclosure of this matter to the OIG in April 1992.

Carson also states that he disclosed safety lapses that his management deleted from drafts of reports that his office issued. The record indicates that he complained to his supervisor and management that safety lapses he uncovered had been later deleted from reports that he had drafted. When his supervisors were not receptive to reincorporating these matters into the final reports issued by the Site Representatives Program, Carson disclosed them to the Secretary of Energy and the Manager of DOE's Oak Ridge Operations Office.

In *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), the United States Court of Appeals for the Federal Circuit dealt with an issue similar to this. There, an employee argued that his supervisors reversed six findings that farms were not in compliance with approved soil conservation plans. Willis argued that his complaints to supervisors regarding the reversal of his findings constitute protected disclosures. In rejecting this position, the Court stated that:

Willis's complaints to supervisors are not disclosures of the type the WPA was designed to encourage and protect. Discussion and even disagreement with supervisors over job-related activities is a normal part of most occupations. It is entirely ordinary for an employee to fairly and reasonably disagree with a supervisor who overturns the employee's decision. In complaining to his supervisors, Willis has done no more than voice his dissatisfaction with his superiors' decision.

Id. at 1143. This holding applies in this matter as well. Carson complained to his supervisor and second level manager about the changes they made to reports that he drafted. He was particularly angered by items that were deleted from his drafts as his supervisor and second level manager made changes to conform his drafts to their ideas of quality. But as the *Willis* court held, these types of complaints are not disclosures protected by the Whistleblower Protection Act of 1989.

Carson further alleges that when his supervisors did nothing to include the matters that he thought should be in the report, he notified the Secretary of Energy and the Manager of DOE's Oak Ridge Operations Office of his concerns. Evidence in the record confirms these disclosures. See Exhibits 28 and FW. A DOE employee should be free to disclose safety concerns to high-level DOE officials without the fear of retaliation. While a disclosure that he disagreed with how his supervisors edited his reports would not be a protected disclosure, the allegation made to senior DOE officials—the Secretary of Energy and the Manager of DOE's Oak Ridge Operations Office—that safety concerns were not making it up the chain of command are the types of disclosures that are covered by the Whistleblower Protection Act of 1989.

In summary, the evidence shows that Carson did notify the OIG that he suspected that his supervisor was

reporting time and attendance inaccurately in July 1992. In addition, his disclosure to the Secretary of Energy and the Manager of the Oak Ridge Operations Office in July 1993 that safety deficiencies were deleted from reports was a disclosure protected by the WPA. I also find that the other disclosures that Carson has identified are not disclosures protected by the WPA.

After a finding that an employee has shown that he or she made a protected disclosure, the employee must show that the disclosure was a contributing factor in the agency's personnel action. The employee makes a prima facie case if he shows that the official taking the personnel action knew of the protected disclosure and that the action occurred within a reasonable time of that disclosure. The first issue to be analyzed is whether the actions complained about are personnel actions for purposes of the WPA.

As noted before, this evaluation focuses on whether any of six actions were taken against Carson in reprisal for activities protected under the WPA. Those activities include:

1. The 1991 performance appraisal of Fully Successful signed by the Reviewing Official on August 9, 1992;
2. A written reprimand Carson received on August 19, 1992;
3. An unacceptable performance evaluation the Carson received on September 29, 1992;
4. A marginal performance evaluation that Carson received on January 28, 1993;
5. The denial of a within grade step increase as a result of the unacceptable and marginal performance evaluations, as well as Carson's failure to receive notification of the denial of a within grade step increase after the marginal performance evaluation in January 1993; and
6. The unacceptable advisory rating that Carson received on October 14, 1993.

Clearly a formal performance evaluation or appraisal (items 1, 3, and 4 above) is a personnel action for purposes of the WPA. 5 U.S.C. § 2302(a)(2)(A)(viii). The remaining items on the list above are as follows: Item 2 is a written reprimand. Item 5 is a denial of a salary increase based on poor performance evaluations. Carson also complains that he did not receive notification of the denial of the salary increase. Item 6 is an unacceptable advisory rating that Carson received from his former supervisor after he was transferred to another program.

The reprimand Carson received is also a personnel action for purposes of the WPA. *McVay v. Arkansas National Guard*, 80 MSPR 120 (1998); *Gonzales v. Department of Housing & Urban Development*, 64 MSPR 314, 319 (1994). However, it presents some different considerations. By its terms, the August 1992 reprimand was to remain in Carson's personnel file for one year and be withdrawn from there after one year. Exhibit CY. A settlement agreement between Carson and the DOE dated February 25, 1994, stated that "all negative materials will be expunged from Mr. Carson's files. That is, any references to the matters contained in the 1991 or 1992 ratings and other derogatory references to him or to his work will not be maintained by the agency . . . ." Exhibit 14. The MSPB has held that "[w]hen an appellant cannot obtain effective relief before the Board, even if his [Individual Right of Action, namely whistleblower] appeal is within the Board's jurisdiction and he shows that he was subjected to a retaliatory personnel action, the appeal should be dismissed for failure to state a claim upon which relief can be granted." *McVay v. Arkansas National Guard*, 80 MSPR 120 (1998). As the MSPB has stated:

Under 5 U.S.C. § 1221(g), as corrective action, the Board is authorized to order "that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred," including "back pay and related benefits, medical costs incurred, travel expenses, and other reasonable and foreseeable consequential changes." Here, the appellant has lost no pay or benefits as a result of his oral reprimands and he has not alleged that he incurred medical costs, travel expenses, or other reasonable and foreseeable changes. Moreover, because there is no allegation and no evidence that the oral reprimands are a matter of record, there is no relief that the Board can fashion to return the appellant to the status quo ante; there is no file that the Board can order expunged and there is no action that the Board can order canceled. Indeed, we can conceive of no remedy at all. Under these circumstances, even assuming that the Board has jurisdiction over this appeal with respect to the three oral

reprimands, the appellant has failed to state a claim for which relief can be granted, and his appeal must be dismissed.

McGowen v. Department of the Air Force, 72 MSPR 601, 607 (1996). That reasoning applies here. By its terms the August 1992 reprimand remained in Carson's personnel file for one year. The February 1994 agreement between Carson and DOE confirmed that any derogatory references to Carson's work during the 1991 and 1992 period would be expunged from his personnel file. There is no evidence in the record that this has not occurred. Accordingly, with respect to the August 1992 reprimand, under the Board's precedents Carson has failed to state a claim for which relief can be granted. This portion of his submission should therefore be dismissed.

Other actions that Carson complains about are not personnel actions for which relief may be granted. While a denial of salary increase is a personnel action because it affects terms of employment, 5 U.S.C. § 2302(a)(2)(A)(ix), the lack of receipt of notification of the denial of a salary increase is not a personnel action that can sustain a whistleblower complaint. Nor is an advisory performance rating a personnel action for purposes of the WPA. *King v. Department of Health and Human Services*, 133 F.3d 1450 (Fed. Cir. 1998).

In summary, the following events are "personnel actions" within the meaning of 5 U.S.C. § 2302(a)(2)(A) for which Carson might receive relief:

1. The 1991 performance appraisal of Fully Successful signed by the Reviewing Official on August 9, 1992;
2. An unacceptable performance evaluation the Carson received on September 29, 1992 (Exhibit 9);
3. A marginal performance evaluation that Carson received on January 28, 1993 (Exhibit 11);
4. The denial of a within grade step increase because of the unacceptable and marginal performance evaluations.

In making a prima facie case of whistleblower retaliation, individuals generally show that disclosures were a contributing factor to agency personnel actions "by establishing circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action." *Wojcicki v. Department of the Air Force*, 72 MSPR 628, 636 (1996). I have found that Carson has shown that he made protected disclosures in July 1992 and July 1993. The disclosures in July 1993 cannot constitute protected disclosures for purposes of this proceeding because they occurred after the four personnel actions listed above. *See Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998). I have also found that Carson has provided no evidence to support his allegation that another protected disclosure—that his supervisor was misreporting leave—was a contributing factor to personnel actions. Indeed, the depositions of people who would have been in a position to take action on that matter are silent on this issue. Exhibits 52 and 54. There is no evidence in the record that suggests that his supervisor or anyone in his management chain knew that Carson had reported his suspicions about his supervisor's reporting of time and attendance to the OIG. A disclosure to the OIG that is not communicated to agency personnel that had responsible for taking personnel actions against Carson may not form a basis for a whistleblower action. *Brewer v. Department of the Interior*, 76 MSPR 363 (1997). Thus, Carson has failed to show that a protected disclosure was a contributing factor to personnel actions covered by the WPA.

VI. Evidence Concerning Personnel Actions

Even if Carson had shown that a protected disclosure was a contributing factor to an adverse personnel action, clear and convincing evidence in the record indicates that DOE would have taken the same personnel actions in the absence of any disclosures. For this part of the analysis, I will assume that Carson had been able to show that he made a protected disclosure that was known to his supervisors who took the personnel actions. Since its appears from the record that the personnel actions occurred over a short period of several months, and the criticism of Carson's work was very much the same, I will analyze as one issue

whether the record supports a finding that the agency has shown by clear and convincing evidence that it would have taken the same personnel actions.

After reading the entire record, I must say that at the bottom of this case seems to be a dispute between an employee and his management about what should be contained in official reports of the Site Representatives Program. Throughout the record are discussions between Carson and his supervisor and management about the analytic framework and focus of official reports to be issued from the Site Representatives Program. There is a general recognition by everyone that the focus of the reports changed when Michael Hillman became the director of the program. Mr. Hillman's supervisor, Mr. Fitzgerald, testified during his January 1994 deposition that:

I know that the adequacy of preparation of reports was an issue. In fact, I, personally, in terms of charging the objectives of the site representative program in terms of mission and functions, was asking for more comprehensive, more validated assessment reports as a going in proposition. I know there was a transition period by which we were asking that these reports be prepared with more validation, more evidence of facts, and more clearly stated conclusions, and that we were helping a number of site representatives achieve that.

Exhibit 54 at 9.

My summary of the voluminous evidence submitted by Carson is that he did not change the focus of the drafts he submitted and that this was the major contention between Carson, on the one hand, and his supervisor and management on the other. In his January 1994 deposition, Mr. Hillman, who was the director of the Site Representatives Program at the time in question, testified that both he and Carson's supervisor "were frustrated with trying to get Mr. Carson to write reports in accordance with the EH's instructions." Exhibit 52 at 16. Mr. Hillman testified that Mr. Humphries, someone familiar with Carson's work, told him that Carson had identified lots of specific instances of non-compliance with safety rules, but that his work failed to document management processes to carry out the safety programs. It was also disjointed and pejorative in nature. Exhibit 52 at 20. Mr. Hillman also testified that Ron Wright told him the same thing about Carson's work. *Id*. at 22. These comments reflect the same message that is contained in Carson's performance evaluations. *Id*. at 20 and 22. Rather than accept that there may be some truth to these evaluations, Carson's reaction was to challenge his supervisors and tell them why his work was good and correct.

Carson's performance standards for 1992 are instructive. The standards were formally adopted on March 19, 1992, and by their terms were effective for the 1992 calendar year. Exhibit 9 at 2. They contained six performance elements that were described at the marginal, fully successful, and outstanding levels. From my long experience in the DOE, they appear to me to be written very much like other standards with which I am familiar. Carson attached a comment at that time indicating that his supervisor had agreed to define what was expected of Carson at the fully successful level for each performance element. Id. at 3. Carson's supervisor did this in a memorandum dated April 8, 1992. Exhibit AN (listed as Exhibit AO in Carson's index). In an April 16, 1992 memo entitled "Meeting to Discuss Performance," Carson's supervisor said:

. . . I have some concerns with the writing style presented, the number of comments I am having to ask regarding the content. As Hillman would say, there have been several questions that begged to be asked. Also, I haven't seen your incorporation of my comments for those portions of the report you submitted to me on 4/8. 4/9. and 4/13. At the meeting on Monday, I would like to see all of the pieces of the Y-12 report assembled on one package so that I can review the entire report, and not review on portion at a time.

Exhibit AO. Carson's supervisor also stated that he had not seen the assessment guide that Carson was using, even though one week earlier he has told Carson that, as part of the fully successful level on Element 1 of his performance standards: "I should not have to come to you to request a status on your

current assessment activity." Exhibit AN at 1.

Carson's supervisor criticized his work product in a series of memoranda dated April 21, 1992 (Exhibit AR) and April 27, 1992 (Exhibit AT). Carson's reaction to this criticism was that one of his supervisors was "engaged in a process of discrediting me," Exhibit AS, or that he simply could not understand what changes he should make or what was expected of him. Exhibit AV. This is difficult to accept. Carson is a GS-14 General Engineer. He has earned the right to call himself a Professional Engineer. Nevertheless, Carson's work product clearly did not meet the standards of his supervisor and management. The Director of the Site Representatives Program routinely reviewed Carson's work. The director saw reports from all site representatives, and there was no indication that he did not understand the quality of work and the general quantitative range on which Carson's performance ratings were based.

Carson work was rated in September 1992 as unsatisfactory. Apart from the standard "check the boxes" evaluation, Carson's supervisor wrote a nine-page detailed evaluation covering each of the six performance elements in place. Exhibit 9. Carson's reaction, as reflected in comments he attached to the evaluation, was that the performance review was "further evidence of the concerted campaign EH management has been engaged in since December 1991 to retaliate against me for openly voicing concerns about possible abuses of consultant labor in this program." Id. at 11. (It is important to remember at this point that I have found that Carson's concerns in December 1991 are not disclosures that are protected by the WPA and that the DOE Office of General Counsel concluded that there was no violation of post-employment restrictions, as Carson suggested might have occurred.)

As a result of the September 1992 unsatisfactory rating, Carson was placed on a performance improvement plan. Exhibit 10. A progress report was given to Carson; it is dated December 15, 1992. Exhibit 12 at 7. The report notes where Carson is not performing at the fully successful level and states with specificity why his supervisor believes that and what actions Carson needs to take to achieve fully successful performance. His supervisor also notes successes that Carson has had as well as improvements since the performance improvement plan was implemented. Yes Carson's response, as recorded in comments that appear to be dated January 11, 1993, starts by saying: "This is little but misrepresentation and distortions . . . ." Exhibit 12 at 12. Carson's supervisor then gave him a performance evaluation at the end of the performance improvement plan. The rating he gave him was better than the rating in December, although still at the overall rating of marginal. Exhibit 11. In addition to the usual check box evaluation, Carson's supervisor wrote a 10-page evaluation justifying the level of the evaluation with respect to each performance standard. At this point, Carson simply disagrees with his supervisor's, and his second level supervisor's, evaluation.

Carson also argues that his performance standards and evaluation were stricter than other site representatives and suggests that this was done in reprisal for his disclosures. Carson offers the work product of other site representatives and asks that I compare that work product to his in order to confirm his position. This argument is also not persuasive. As has been pointed out to Carson many times by DOE personnel specialists, his performance rating is not done by comparing his work product to the work product of other site representatives. Rather, the rating is made by comparing his work to the performance standards in place for him.

VII. Conclusion

This evaluation proceeding started with an October 19, 1998 settlement agreement by Carson and the DOE to refer Carson's allegations of whistleblower retaliation to a hearing officer at the Office of Hearings and Appeals. Both parties were permitted to file documents in support of their positions; however, no provision was made for oral testimony. Carson has submitted more than 400 exhibits in support of his position.

My evaluation of the record indicates that Carson has failed to make a prima facie case that he made a disclosure protected by the Whistleblower Protection Act of 1989 that was a contributing factor to a

personnel action as defined in that Act. In any event, the record further shows that the DOE would have taken the actions it took even if Carson were able to show that a protected disclosure was a contributing factor to a personnel action.

It is Therefore Ordered That:

Having made the evaluation required by the order of the administrative judge of the U. S. Merit Systems Protection Board issued on October 20, 1998 in *Carson v. Department of Energy*, No. SL-1221-94-0179-B-1 (MSPB 1998), this matter is closed.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: February 17, 1999

Case No. VWA-0031

August 6, 1999

UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Petitioner: Barbara Nabb

Date of Filing: February 25, 1999

Case Number: VWA-0031

I. Introduction

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

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

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

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

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

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

II. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices by protecting those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for processing complaints of this nature.

B. Factual Background

1. The Findings of the RIR

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Contentions of the Complainant and the Contractors

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

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

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

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

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

April 29, 1999 Kaiser-Hill submission at 2.

3. Issues and Participants at the Hearing

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

4. Post-hearing Submissions

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

III. Analysis

Proceedings under 10 C.F.R. Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer leading to an initial agency decision, followed by an opportunity for an appeal of that decision to the OHA Director. If circumstances warrant, the employee or the DOE contractor may seek review of the OHA Director's decision by the Secretary of Energy or his designee. 10 C.F.R. §§708.32 and 35.

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

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

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

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

10 C.F.R. § 708.5(a).

1. The Complainant's Burden

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

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

10 C.F.R. § 708.29.

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both Mrs. Nabb and the contractors. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the risk of error is allocated roughly equally between both parties. Grogan v. Garner, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). Mrs. Nabb has the burden of proving by evidence sufficient to "tilt the scales" in her favor that when she communicated one or more of the specific concerns described above, she disclosed information which evidenced her reasonable and good faith belief that there was (I) a substantial violation of a law, rule, or regulation; or (ii) a substantial and specific danger to employees or to public health or safety. 10 C.F.R. § 708.5(a). If this threshold burden is not met, Mrs. Nabb has failed to make a *prima facie* case and her claim must therefore be denied. If the complainant meets her burden, she must then prove that the disclosure was a *contributing factor* in a personnel action taken against her. 10 C.F.R. § 708.29; see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994). A protected disclosure is likely to be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." Ronald A Sorri, 23 DOE ¶ 87,503 at 89,010 (1993) citing McDaid v. Dep't of Hous. and Urban Dev., 90 FMSR ¶ 5551 (1990). See also Russell P. Marler, Sr., 27 DOE ¶ 87,506 at 89,056 (1998).

2. The Contractor's Burden

If I find that Mrs. Nabb has met her threshold burden, the burden of proof shifts to the contractors. The contractors must prove by "clear and convincing" evidence that they would have taken the same personnel action against the complainant absent the protected disclosure. "Clear and convincing" evidence is a much more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". See Hopkins, 737 F. Supp. at 1204 n.3. Thus if Mrs. Nabb has established that it is more likely than not that she made a protected disclosure that was a contributing factor to an adverse personnel action taken by the contractors, the contractors must convince me that they clearly would have taken this adverse action had Mrs. Nabb never made any communications concerning possible statutory or health and safety violations by EG&G.

B. The Complainant Made a Protected Disclosure

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

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

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

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

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

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

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

C. Mrs. Nabb's Allegations of Contractor Reprisal

1. Mrs. Nabb Has Met the Contributing Factor Showing

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

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

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

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

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

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

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

In its post-hearing brief, Kaiser-Hill argues that all of the alleged protected disclosures at issue in this proceeding were made while Mrs. Nabb was an employee of EG&G, and that therefore Kaiser- Hill cannot be considered accountable under Part 708 for any adverse personnel actions that Mrs. Nabb may have experienced after it succeeded EG&G as the managing contractor at Rocky Flats. Kaiser-Hill Post-Hearing Brief at 2. I reject this position. Many of the same supervisors and officials who managed Rocky Flats for EG&G continued to perform the same operations under Kaiser-Hill. The Part 708 regulations do not exempt a contractor from accountability for acts of reprisal taken by its managers because the underlying protected disclosure was made to those managers while they were employed under a previous contract. Such a result would completely undermine the purposes for which the Part 708 regulations were enacted. Where an adverse personnel action against an employee in reprisal for a protected disclosure is found to have occurred, the goal of DOE's Part 708 regulations is to restore the employee to the position in which he or she would otherwise have been absent the acts of reprisal, in a manner similar to other whistleblower protection schemes. See, e.g., Energy Reorganization Act of 1974, 42 U.S.C. § 5851; Whistleblower Protection Act of 1989, 5 U.S.C. § 1214(b)(4)(B).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

April 27, 1999 Letter from Mrs. Nabb.

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

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

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

5. Conclusion

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

D. Remedy

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS THEREFORE ORDERED THAT:

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

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

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

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

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

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

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

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

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

Kent S. Woods

Hearing Officer

Office of Hearings and Appeals

Date: August 6, 1999

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

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

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

that she incurred in bringing this administrative action.

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

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

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

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

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

Case No. VWA-0032

July 6, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Roger W. Hardwick

Date of Filing: March 8, 1999

Case Number: VWA-0032

This Decision involves a complaint of reprisal filed by Roger W. Hardwick (also referred to as the Complainant) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Hardwick was employed by KenRob and Associates, Inc. and worked as a subcontractor on a contract that the DOE awarded to Science Applications International Corporation (SAIC). Mr. Hardwick contends that in January 1994, he made a protected disclosure to the DOE concerning the manner in which SAIC was performing its DOE contract. Hardwick states that he was terminated from the subcontract two weeks after the disclosure and that KenRob terminated his employment in August 1994, when his contract with KenRob expired.

I. Background

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government- owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. (1) The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed to a DOE official or to a DOE contractor, information that the employee in good faith believes evidences, fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a)(3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Director of the Office of Hearings and Appeals. 10 C.F.R. § 708.32.

The following information is not contested. In January 1992, Mr. Hardwick was an employee of KenRob and Associates, Inc. He was Telecommunications Manager at the firm's Las Vegas, Nevada Office, and his mission was to develop a base for new business in the western United States, with a primary emphasis on telecommunications and computer technical support services.

During 1993, Science Applications International Corporation (SAIC) was the prime contractor with the

DOE for a Technical and Management Support Services Contract for the Yucca Mountain Site Characterization Project (YMP). Under this contract SAIC was required to perform a wide range of scientific, technical management and administrative support services, including provision of computer support services to both DOE's Las Vegas Office, and DOE's Yucca Mountain Site office, located about 100 miles from the Las Vegas office. On December 6, 1993, SAIC awarded a contract to KenRob, which was staffed solely by Mr. Hardwick. Mr. Hardwick was named as telecommunications specialist, and his role was to provide computer support services (also referred to as information technology or IT) at the Yucca Mountain Site Office (YMSO). The performance period for this contract was from December 6, 1993, through March 31, 1994.

In January 1994 Mr. Hardwick met with John Gandi, DOE Team Leader for Information Resources Management at the Yucca Mountain office and offered his view that improvements in IT support at the YMSO were necessary. Mr. Hardwick prepared a draft letter outlining his concerns, and presented the draft to Winfred Wilson, then site manager of the YMSO.

Mr. Wilson adopted Mr. Hardwick's draft virtually without change, structured it as a memo from himself to Mr. Gandi, and sent it to Mr. Gandi. The memorandum as drafted seemed to indicate that Mr. Gandi should consider improvements in providing IT support to the YMSO. Copies of the memorandum, which was dated January 18, 1994, were sent to five SAIC employees and three DOE employees, who were located at the Yucca Mountain Site. Approximately two weeks later, Mr. Harold Brocklesby, a SAIC manager who received a copy of the memo, told Mr. Hardwick that his duties under the SAIC subcontract were over. On May 23, 1994, KenRob was awarded a contract by the DOE's Office of Civilian Radioactive Waste Management (OCRWM) to provide communications network and computer facilities support at Las Vegas, Nevada and Washington, D.C. locations. Mr. Hardwick was not offered any position under that contract. On July 13, 1994, KenRob issued a letter to Mr. Hardwick advising him that his employment would be terminated in 30 days. His employment was terminated on August 12, 1994.

On August 30, 1994, Mr. Hardwick submitted a letter to the DOE's Nevada Operations Office claiming retaliation for a protected disclosure. He alleged that facts disclosed in the January 18 memo constituted a protected disclosure, and that his removal from the SAIC subcontract, the failure of KenRob to offer him a position under the OCRWM contract and his ultimate termination all constituted retaliation for the disclosure. He submitted a formal Complaint to the Office of Contractor Employee Protection on December 23, 1994 raising the same allegations. The matter was investigated by the DOE's Office of the Assistant Inspector General for Inspections (OIG), which issued a Report of Inquiry and Recommendations on February 19, 1999. That report found that Mr. Hardwick made a protected disclosure under 10 C.F.R. Part 708, and that the disclosure was a contributing factor to his removal from the SAIC contract, and to his failure to be appointed to any position under the OCRWM contract. The OIG Report further found that SAIC and KenRob failed to provide clear and convincing evidence that these personnel actions would have been taken in the absence of the protected disclosure.

On March 3, 1999, KenRob submitted a request for a hearing under 10 C.F.R. § 708.9 to the Office of Contractor Employee Protection. That Office transmitted the request to OHA on March 8, 1999, and I was appointed hearing officer in this case on March 10, 1999. SAIC submitted its request to participate in the hearing on March 18, 1999.

Hardwick, SAIC, and KenRob filed pre-hearing briefs on May 10, 1999.(2) SAIC and KenRob filed Motions for Summary Judgment on May 25, 1999 and Hardwick filed his opposition to those Motions on May 28, 1999. I issued a letter on May 28, 1999, denying the Motions. On June 1, 1999, the contractors took Mr. Hardwick's deposition. On June 8, 1999, I held the hearing in this case at the DOE's Las Vegas, Nevada Office. I terminated the hearing after all evidence concerning the nature of Mr. Hardwick's disclosure had been received. I announced to the parties at that time that I believed Mr. Hardwick had failed to show by a preponderance of evidence that the disclosure he made in the January 18, 1994 memo was protected under 10 C.F.R. Part 708. Accordingly, I saw no need to proceed with a presentation of evidence concerning whether SAIC and KenRob would have terminated Mr. Hardwick in the absence of

the disclosure. I told the parties that I would provide a detailed explanation of the reasons for my conclusions in an Initial Agency Decision. I indicated to Mr. Hardwick that he would be able to appeal to the Director of the Office of Hearings and Appeals my determination that he had not made a protected disclosure. 10 C.F.R. §§ 708.30, 708.32, 708.33.

II. Legal Standards Governing This Case: The Complainant's Burden

It is the burden of a complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure. . . as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

The Contractor Employee Protection Program does not provide protection to employees for every disclosure. Part 708 enumerates the specific types of disclosures for which employment retaliation is prohibited. Generally, protected disclosures are those which reveal information concerning gross waste, fraud, abuse, gross mismanagement, substantial violations of law and substantial dangers to employees or to public health and safety. 10 C.F.R. § 708.5. Given the facts of the present case, Hardwick must, at the outset, demonstrate that he disclosed information to DOE, to SAIC or to KenRob which indicates gross waste, mismanagement, fraud or abuse. (3)

III. Evidence Regarding the Disclosure

A. Documentary Evidence and Discovery

Mr. Hardwick contends that he made a protected disclosure in a written document dated January 18, 1994 (OIG Exhibit 28). As stated above, that document is a memorandum from Winfred A. Wilson to John Gandi. Mr. Hardwick contends that he drafted most of this memorandum.

The memorandum describes the status of computer support services at the YMSO. It states that the primary area of concern is the coordination and communication of the Las Vegas computer support staff and the computer support staff at the YMSO. The memorandum contends that in several instances the YMSO did not receive prompt technical assistance because the Las Vegas support staff was busy. The memorandum alleges employees had experienced a "significant degradation of service" of the Local Area Network (LAN) at YMSO. The memorandum goes on to assert that the field operations have a lower priority than Las Vegas operations. In addition, the memorandum states that "[a]n additional concern is the lack of documentation and policies and procedures relative to the IS (information systems) operations and configurations at the YMSO."

These disclosures do not obviously fall within in any of the areas of protected disclosures set forth in 10 C.F.R. § 708.5. The facts alleged in the memorandum do not anywhere suggest, nor can they be read to indicate, a substantial violation of law, a substantial and specific danger to employees or to public health or safety, any fraud, gross waste of funds, abuse of authority, or mismanagement.(4) I do believe that on its face this memorandum raises areas in which Mr. Wilson believed that there was some room for improvement by Mr. Gandi in overseeing the provision of IT services.

In order to ensure that I was construing the memorandum properly, I consulted other evidence in the record of this proceeding. For example, I looked at the Complaint that Mr. Hardwick filed with Sara

Rhoades of the DOE's Nevada Operations Office. In that document, dated August 30, 1994, Mr. Hardwick stated that he had "identified several work areas that were not being done, even though SAIC had a contract to provide those services and were supposedly providing them." He further alleges that the January 18 memorandum "identified and reported Waste Fraud and Abuse by a major DOE/YMP contractor team. . . ." However, beyond these rather broad charges, this Complaint document provides no additional insight into the nature of why DOE's or SAIC's failure to provide better IT services at YMSO constituted waste, fraud, abuse or mismanagement. He did not explain how the facts described in the memo supported his claim that SAIC had committed gross waste, fraud, or mismanagement, assuming that it had in fact failed to provide those services.

I also reviewed the March 11, 1997 statement made by Mr. Hardwick to a DOE/IG investigator during the investigation phase of this proceeding. In that interview Mr. Hardwick described his January meeting with Mr. Gandi as follows. "I explained to him my belief that SAIC was not providing support that they were required to under the terms of their contract. I pointed out that SAIC was not providing necessary equipment and staffing to remedy a problem we were having with the network bogging down and not meeting user expectations or needs. I also pointed out that we were not receiving planning support for anticipated expansion of the network in new facilities." Thus, in the interview, Mr. Hardwick focused on the failure to provide adequate IT service at YMSO, and did not explicitly explain why he believed the failure to provide these services was covered by Part 708, or state the nature of the improper contractor activity. He seemed to be alleging non- performance of the contract, although his assertions could be construed to cover mismanagement issues. In any event, he did not explain to the investigator how and why the alleged failure to provide the services amounted to mismanagement, gross waste, abuse or fraud.

Thus, after reviewing all of the preliminary documents regarding the substance of the alleged protected disclosure, the January 18 memorandum, Mr. Hardwick's Part 708 Complaint filed with the DOE, and his statement to the OIG investigator, I still could not determine how the disclosed inadequate computer support constituted a revelation of gross waste, mismanagement, fraud, abuse or any other criterion mentioned in Section 708.5. The memorandum did not on its face point to any of the regulatory criteria, and none of the related documents clarified in what way SAIC's actions could have amounted to gross waste, fraud, abuse or mismanagement.

Accordingly, during the pre-hearing phase of this proceeding, I indicated to Mr. Hardwick that it was important that he provide me with additional information to support his position that the facts concerning inadequate computer support disclosed the types of concerns set forth in Section 708.5, and therefore rise to the level of a protected disclosure. I specifically discussed this issue in a May 17 letter, and during our May 19 prehearing telephone conference. I again referred to this issue in a letter of May 20.

In order to clarify whether the disclosure was protected, I allowed the contractors, SAIC and KenRob, to file Motions for Summary Judgment and briefs on whether the allegations concerning the improvements needed in IT support, as set out in the January 18 memorandum, qualified as protected disclosures under Part 708. Upon receiving those Motions, I sent a letter to Mr. Hardwick's attorney asking Mr. Hardwick to supply specific information concerning the reason he believed that the disclosed facts demonstrated serious mismanagement, gross waste, fraud or abuse. I asked him to indicate which statements in the January 18 memorandum Mr. Hardwick believed in good faith revealed serious mismanagement, gross waste or fraud. I asked Mr. Hardwick to indicate exactly what he in good faith thought the mismanagement, gross waste or fraud was. I stated that vague, general assertions that a contractor was not performing the work it was hired to do are not sufficiently specific to permit an analysis of whether Mr. Hardwick in good faith believed the information disclosed revealed gross mismanagement, gross waste, abuse or fraud. I stated that Mr. Hardwick must include what work he believed the contractor was improperly failing to perform and why this alleged failure constituted serious mismanagement, gross waste or fraud. Letter of May 26, 1999.

In a response to the Motion, Mr. Hardwick filed an affidavit describing in more detail the level of computer support at YMSO, and laying out what he believed the IT problems at the YMSO were. He

cited that the necessary equipment and personnel were not being provided by SAIC, and that repairs "took weeks." He stated the SAIC's project manager, Harold Brocklesby, refused to provide the additional personnel and support. He alleged in the affidavit that Brocklesby made a "conscious decision" to "allow the IT contract at the YMSO to go unperformed." Hardwick indicated that prior to drafting the memorandum he had a meeting with Mr. Wilson and Mr. Gandi to discuss the IT problems at YMSO. According to the Complainant, the additional allegations regarding Mr. Brocklesby's purported failure to perform the contract did not appear in the memo because Mr. Hardwick says he wrote it in a "non-threatening" manner. He indicated that he did not wish to provoke SAIC.

Mr. Hardwick did not provide an adequate response to my question concerning why he believes the information he revealed constitutes a protected disclosure. Nevertheless, based on the minimal information he supplied, and construing that information in a manner most favorable to the Complainant, as I am required to do in connection with a Motion for Summary Judgement, I denied the Motions, and I allowed him to proceed to the hearing.

In a letter of May 28, I noted the following evidentiary issues that I believed Mr. Hardwick should be permitted to develop at the hearing:

1. Whether in his discussions with Winfred Wilson and John Gandi prior to the drafting of Exhibit 28, Mr. Hardwick disclosed information that Mr. Hardwick in good faith believed revealed contract fraud or gross mismanagement. The testimony of Mr. Hardwick, Mr. Wilson and Mr. Gandi is obviously critical to that contention.

2. Mr. Hardwick has contended that operations at the Yucca Mountain project were being "derailed" as a result of the failure of Science Applications International Corporation (SAIC) to properly allocate computer resources. This seems to be a claim in the nature of gross mismanagement. Mr. Hardwick will be permitted to testify as to what the ill-effects of the alleged mismanagement were, what he thought the seriousness of this problem was, and exactly how it affected YMSO operations. Mr. Hardwick must show that his beliefs on this matter were in good faith. It will therefore be useful to test Mr. Hardwick's good faith in this disclosure and consider what other knowledgeable witnesses thought Mr. Hardwick believed in this regard.

3. With respect to his claim that SAIC was committing (contract) fraud, Mr. Hardwick should also be permitted to testify about what he thought the fraud was and how he thought it was being committed. We should also have testimony concerning the good faith of his beliefs on this issue.

Letter of May 28, 1999.

Further, in order to advance the development of the issue of whether the information that Mr. Hardwick revealed rises to the level of a protected disclosure, I permitted the contractors to take the deposition of Mr. Hardwick. At the deposition, the contractors were to specifically question Mr. Hardwick about the basis for his claim that the facts he revealed disclosed serious mismanagement, gross waste, fraud and abuse. I believed that if I and all parties were able to review the transcript of the deposition prior to the hearing, we would all be better able to understand the nature of Mr. Hardwick's contentions.

The contractors' attorneys questioned Mr. Hardwick very closely. They asked him about what if any fraud he believed SAIC committed, and what if any services SAIC did not provide but was paid for. Mr. Hardwick indicated that he did not have any knowledge of SAIC's billing practices. He simply believed that since the firm was hired to provide IT support and since, in his view, it was not providing full support, that this constituted contract fraud. Transcript of June 1, 1999 Deposition (Tr.) at 43-47. Mr. Hardwick reiterated his position that by failing to provide what he considered to be appropriate computer support at the YMSO, Mr. Brocklesby engaged in mismanagement, and his use of "his management authority to block resources to be provided to the Nevada Test Site" constituted a form of abuse. Tr. 48-49. Mr. Hardwick could point to no specific waste that was committed by SAIC under the contract, although he

raised some rather broad generalizations on this point. Tr. at 49.

Mr. Hardwick raised a new claim during the deposition. In various formulations, he contended that SAIC's failure to provide adequate IT support jeopardized the entire Yucca Mountain project. He contended that because Mr. Brocklesby was not providing appropriate support at the Nevada Test Site "the future of the staff management and the documents records center and all the other activity at the Test Site were in jeopardy unless we could get Harold [Brocklesby] to do something." Tr. at 115. Mr. Hardwick stated that he told Mr. Gandi that he feared for the "future ability of the Test Site to go forward and continue its characterization work. . . and that if we didn't document these issues as they came up. . . it could have to do with licensing, it could have to do with the integrity of the core samples, the implications could be far reaching." Tr. at 115-116.

Mr. Hardwick also claimed that he had indicated to Mr. Gandi that "SAIC was charging for support at the test site and you're not getting any support." Tr. at 120. He made the claim that "the entire $14.5 million SAIC contract was wasted and endangered" as a result of what he saw at the Yucca Mountain Site. Tr. at 190. He explained that "the licensing support system is the critical piece and the sample management facility data that was being collected without a license, you couldn't open a repository and you had to have some sort of licensing support system when you made your application at the NRC." Tr. at 191. Overall, Mr. Hardwick believed that "Brocklesby wouldn't provide any support,. . . wouldn't provide the staff, wouldn't provide the equipment, . . .that it was derailing the project, it was not able to go forward." Tr. at 267.

The information provided at the deposition does little to advance Mr. Hardwick's position that he had revealed to Mr. Gandi information which disclosed gross waste, fraud, abuse, or serious mismanagement. His support for his position amounted to no more than broad generalizations, and highly speculative assertions. At the deposition Mr. Hardwick did not provide the underlying specifics to support his claims.

In sum, as of the date of the hearing, Mr. Hardwick had made numerous, general claims, but had yet to state with specificity how the failure to provide what he believed to be the correct level of support at YMSO would result in gross waste, fraud, abuse, or serious mismanagement. In fact, he admitted at the deposition that he did not actually have any information from which he could reasonably conclude that contract fraud had occurred. Tr. at 42- 47. Overall, during the deposition, he had pointed to no specific instances of failure to provide computer support services that resulted in gross waste, fraud, abuse, or serious mismanagement.

B. The June 8, 1999 Hearing(5)

Four witnesses testified at the hearing: (i) Mr. Hardwick, (ii) Mary Ann Jones, a DOE computer specialist and Mr. Gandi's deputy, (iii) Mr. Gandi, and (iv) Mr. Wilson.

(1) Mr. Hardwick's Testimony

At the hearing Mr. Hardwick admitted that the January 18 memorandum did not on its face allege any gross waste, fraud, abuse or gross mismanagement. He further stated that he did not have any specific knowledge of any contract fraud related to the SAIC contract to provide IT support. He acknowledged that he had no information that would have led him to believe that SAIC was being paid for work that it did not do, other than his previously stated general assertion that SAIC was supposed to provide IT support to the YMSO, and he believed that its priorities were directed to the Las Vegas Office.

With respect to the January 18 memo, he claimed that he intentionally softened his assertions, believing that this was a more appropriate way of achieving his goal of obtaining more IT support for YMSO. However, he maintained that in the meeting with John Gandi prior to the drafting of the memo he specifically voiced all of his underlying concerns regarding waste, fraud, abuse and mismanagement. He stated that Mr. Gandi's testimony would support this assertion. He said that he did not believe that Ms.

Jones was present at the meeting.

At the hearing Mr. Hardwick produced two new documents. The first, dated May 17, 1994, was a memorandum to Mr. Wilson from Mr. Gandi, which, according to Mr. Hardwick, outlines some steps that SAIC took to address the "escalating need for services" at YMSO. Mr. Hardwick contended that the improvements noted in the memorandum reflect the full extent of the discussions that he had with Mr. Gandi at their January meeting and support his contention the discussions covered areas such as mismanagement, gross waste, fraud and abuse.

The May 17 memorandum refers to upgrading the communications line from a 56 Kb line to a 256Kb line, which would allow for an increased capacity of telecommunications traffic and improved user response time. It describes the creation of a Novell-based LAN test bed for testing by selected YMSO members. It cites the construction of a new communications equipment room with new power conditioning equipment. It mentions the installation of new laser jet printers. The memorandum also announces plans to assign additional personnel at the YMSO and implementation of a "Hotline" service. Finally, it refers to the publication of SAIC procedures, policies and work orders that the Information Systems Department will adhere to in supporting the YMSO. These policies related to logging in and tracking of "Hotline" calls, as well as developing appropriate statistics about the nature of the calls. Mr. Hardwick discussed these items in some detail, testified that the implementation of these improvements came about as a result of the January 18 memorandum, and asserted that the May 17 memo supports his overall claim that he discussed his concerns regarding serious mismanagement, gross waste, fraud and abuse with Mr. Gandi at the meeting prior to the drafting of that memorandum.

The other document that Mr. Hardwick introduced was a memorandum dated August 30, 1994, in which Ms. Rhoades described a conversation with Mr. Hardwick. She asked him to clarify for the record what areas SAIC was not performing and "if there were specific areas of concern, i.e., fraud, waste, abuse, safety, health, security, etc." She indicated that according to Mr. Hardwick, "the areas of concern dealt with not adhering to policy and procedures for the operation of the Information Systems Program at YMT (disaster plan, daily backup of information, communication within the organization, no backup of files, etc.)" Mr. Hardwick contended that this document further supports his position that the facts he disclosed in the January memo raised issues of serious mismanagement, gross waste, fraud and abuse.

(2) Ms. Jones' Testimony

Ms. Jones' testimony did not support Mr. Hardwick. (6) She did not believe that there was a significant IT problem at the YMSO. She stated that when additional computer support was necessary at YMSO, she could be out at the site in one and one-half hours from her Las Vegas location, and that she frequently went to the YMSO to assist in computer repairs and maintenance. She indicated that she was usually at the site several times a week in any event, and could provide needed assistance at that time. She indicated that some of the items referred to in the May 17 memo were discussed at the January meeting with Mr. Gandi and Mr. Hardwick. However, she did not believe that any of these items reflected gross waste, fraud, abuse or mismanagement. She testified that she was responsible for reviewing SAIC's requests for payment under the contract, and that she never had any reason to believe that SAIC requested or received payment for services that it did not perform.

She did not believe that in discussing possible areas of IT improvement at the January meeting, Mr. Hardwick intended to disclose concerns of waste, fraud, abuse or mismanagement. She believed that during 1993, when the YMSO operation was beginning to expand significantly, additional IT funds were needed as a rather routine matter to support the increased level of operation at the site. She testified that the purpose of the January 18 memorandum was to provide a document that would support a request from Mr. Wilson to the DOE for additional funding.

(3) Mr. Gandi's Testimony

Mr. Gandi's testimony was similar to that of Ms. Jones, although he expressed a stronger belief that additional IT services were necessary at the YMSO during the relevant period. He agreed with Mr. Hardwick that SAIC did not provide some IT services that would have been useful. He testified that he thought that obtaining additional support was a "serious" issue. However, he stated that he did not see the January 18 memo as "negative." He saw it as pointing out areas which could use some improvement. Like Ms. Jones, he testified that YMSO was an expanding operation in 1993 and 1994, and it was a matter of obtaining additional funding for IT services at that location. He believed that the purpose of the January 18 memorandum was to support a request for more funds. He did not vividly recall the May 17 memorandum, although he testified that some of the items included in that memo might well have been discussed at their meeting. He testified that he did not believe that SAIC had committed any gross waste, fraud, abuse or mismanagement, and that he did not believe that Mr. Hardwick intended to reveal any acts of that nature in the January 1994 meeting.

(4) Mr. Wilson's Testimony

Mr. Wilson confirmed the prior testimony that he did not participate in the discussion between Mr. Hardwick, Ms. Jones and Mr. Gandi. (7) According to Mr. Wilson, after that discussion took place, a conference call was placed to inform him of the discussion and ask his opinion as to how to proceed. Mr. Wilson stated that he recommended that Mr. Hardwick draft a memorandum reflecting his concerns about IT services.

Mr. Wilson agreed with Mr. Hardwick that more IT support was needed at YMSO, and believed that YMSO was given a lower priority than the Las Vegas Office in the provision of IT support. He stated that the effect of this lower priority was that it "sometimes it took a day to get people" to come out to YMSO and make necessary repairs. He attributed this to limited funds, and thought that there should be additional funding provided for YMSO. Like Ms. Jones and Mr. Gandi, he believed that the purpose of the January 18 memo was to convince the DOE to provide this additional funding.

Mr. Wilson also commented specifically on the portion of the January 18 memo citing the "lack of documentation and policies and procedures related to the IT systems operations and configurations at the YMSO." He testified that he was the DOE employee who would have had an interest in such documentation, but that he did not see this lack of documentation as a serious concern, or one that would have any important implications for the YMSO project. He stated that as a manager, he simply would have liked to be able to point to a complete set of policy documents. Overall, it was his testimony that SAIC had not committed any gross waste, fraud, abuse or mismanagement, and he did not believe that the January memorandum intended to convey acts of that nature.

IV. Analysis

As stated above, the Part 708 regulations in relevant part provide that a "protected disclosure" is one which reveals "fraud, gross mismanagement, gross waste of funds, or abuse of authority." § 708.5(a). Ordinarily, if a complainant states that he has made a protected disclosure in written form, I would look to the four corners of that document to determine whether it confirms that he revealed information raising a concern of that nature.

In the present case, the relevant document, the January 18 memorandum, does not specifically allege any action from which I can conclude that Mr. Hardwick revealed gross waste, fraud, abuse or mismanagement. Although he stated in a number of documents submitted in this case that he made disclosures of that nature, at no time did he ever describe in sufficient detail how the alleged deficiencies he reported, i.e., "problem of priorities" or "lack of support" specifically affected YMSO operations and caused concerns that are covered by Section 708.5 (8) Nor had he specified a particular safety hazard, violation of law or fraudulent incident. Up to the point of the hearing itself, Mr. Hardwick had not made what I considered to be a well-articulated statement of how the information he disclosed to Mr. Gandi fell

within the coverage of that section. This caused me to suspect that he did not in good faith believe that his disclosure was covered by Part 708. Even though he had yet to advance a rationale for why his disclosure was protected, in order to be scrupulously fair to Mr. Hardwick, I believed that it was important that he be given the opportunity to develop his case further through the presentation of witnesses at a hearing.

I will therefore consider whether any testimony at the hearing supports his view that he made a protected disclosure. At the hearing, Mr. Hardwick himself could point to no gross waste of funds, or fraud that arose as a result of the lesser prioritization of IT services to YMSO. He did not provide the type of testimony I referred to in my May 26 letter, noted above, in which I drew particular attention to the parties to the fact that I was seeking to hear about his beliefs and the actual and specific ill-effects of the alleged failure to provide IT services. (9)

Apart from his own repeated assertions as to his belief, which have been discussed above, there is virtually no support for his position. I cannot find that the belatedly introduced May 17 memorandum from Mr. Gandi to Mr. Wilson establishes that Mr. Hardwick disclosed acts that raised concerns regarding gross waste, fraud, mismanagement and abuse at the January meeting. This document talks of improvements that had been made, and Ms. Jones did confirm that some of the improvements were previously discussed at the January meeting. These areas included upgrading various computer-related systems. The witnesses generally believed that such additional services would be useful.

I cannot conclude, however, that the improvements mentioned, either individually or in the aggregate, suggest that there were concerns rising to the level of serious mismanagement, gross waste, fraud or abuse. Rather, they appear to be areas for possible improvement, subjects which employees and managers regularly discuss in order adjust resource allocation and to establish appropriate work priorities. Employees and managers may well disagree as to how and when to implement change, as Mr. Hardwick and Mr. Brocklesby purportedly did, but this, too, is part of the normal operational discussion and give-and-take between employees and management. Ultimately, decisions on these types of issues are a matter of management discretion. Ronny Escamilla, 26 DOE ¶ 87,508 (1996). Such discussions do not rise to the level of protected disclosures.

In sum, I believe that the May 17 memo referred to areas in which improvements and upgrades were made. I can accept that Mr. Hardwick, Ms. Jones and Mr. Gandi previously discussed these areas as ones in which IT enhancements could be useful, and that these areas represented priorities for improvement. However, the fact that such discussions of legitimate areas for improvement took place does not mean that Mr. Hardwick had made a disclosure that the DOE or SAIC engaged in mismanagement, gross waste, fraud, or abuse.

My conclusions about the nature of the May 17 memorandum and the January discussion are supported by the testimony of the witnesses Ms. Jones, Mr. Gandi and Mr. Wilson. Each individual was specifically asked whether he or she believed that SAIC's provision of IT services at YMSO in the relevant period amounted to gross waste, fraud, abuse or mismanagement. All the witnesses unequivocally stated that they did not believe that SAIC's oversight of the project raised concerns of that nature. Although they had an opportunity to do so, none of these three witnesses described any specific instance in which failure to provide IT services resulted in any significant problems for the YMSO. For example, no witness provided any support for Mr. Hardwick's broad, speculative claim in his deposition that "it [lack of IT services] could have to do with the integrity of the core samples," or that "all other activity at the test site [was] in jeopardy." Tr. at 115. Although these were among the most serious possible consequences cited by Mr. Hardwick, the witnesses provided no support for believing that effects of that nature were at all likely at the time, or even suggested by anyone. I simply cannot accept that Mr. Hardwick in good faith believed that the level of IT service provided at YMSO could jeopardize the entire activity at the site.

Further, all three witnesses firmly stated that they believed that in their January discussions and the January 18 memo, Mr. Hardwick did not intend to raise concerns regarding gross waste, fraud, abuse or mismanagement. They believed that the focus of their discussion was how to achieve an increase in

funding for IT at YMSO.

I also note that some testimony as to the seriousness of the IT problem at YMSO does not support Mr. Hardwick's contentions. Mr. Wilson indicated that computer repairs might take a day to accomplish. Ms. Jones testified that since she frequently visited the YMSO site, there was no repair backlog. Based on this testimony, Mr. Hardwick's assertion in his May 27 affidavit that "repairs took weeks" seems exaggerated, and causes me to question the good faith and overall truthfulness of his assertions.

Thus, Mr. Hardwick has presented no substantial evidence to support his position that the information he disclosed raised concerns that were protected under Part 708. Neither the documentary evidence nor the testimony of witnesses supports this claim. Given this fact, I expected Mr. Hardwick to explain and support how and why he in good faith held a belief that was so radically different from the testimonial evidence of the three other witnesses at the hearing. He did not provide such an explanation, although I alerted him to the opportunity to do so at the hearing. (10)

Finally, as a matter of law, I cannot conclude that the information disclosed here, that some reprioritization of the IT support at YMSO was necessary, rises to the level of a protected disclosure. I find that there is information to support that the Complainant genuinely, and with some legitimacy, believed that there were areas in which improvement was necessary. However, with nothing more, this certainly does not rise to the level of mismanagement, much less serious or gross mismanagement. (11) Mismanagement does not include a difference of opinion on decisions that are debatable. The mismanagement that is covered by Part 708 involves action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. See Carolyn v. Dep't of the Interior, 63 M.S.P.B. 684 (1994). The Complainant here cannot, through broad, speculative and unsupported assertions about possible ill-effects of limited IT services, bootstrap his discussion regarding IT improvements into a protected disclosure of serious mismanagement. There is no indication of mismanagement of any kind here.

Based on all the evidence, I believe that there were some differing views on the level of service necessary for the IT systems at the YMSO. Some areas needing improvement were identified and agreed upon. Several of these improvements were implemented. However, the fact that SAIC's prioritization scheme was subject to improvement or reevaluation does not in my view mean that SAIC was responsible for mismanagement of any kind. The speed at which the increased IT services could be implemented could well have been subject to budgetary constraints or other limitations. Informing DOE officials that SAIC should provide additional IT services at YMSO and that some IT services were not running as smoothly as Mr. Hardwick believed they should, does not in my view constitute a disclosure of gross waste, fraud, abuse, or serious mismanagement, as contemplated by the Deputy Secretary in Mehta and Holsinger.

V. CONCLUSION

I have therefore concluded that Mr. Hardwick has failed to show by a preponderance of evidence that he revealed information that he in good faith believed disclosed gross waste, fraud, abuse or serious mismanagement. Accordingly, his request for relief under 10 C.F.R. Part 708 will be denied.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Roger Hardwick under 10 C.F.R. Part 708 is hereby denied.

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

Virginia A. Lipton

Hearing Officer

Office of Hearings and Appeals

Date: July 6, 1999

(1)On March 15, 1999, the DOE published as an Interim Final Rule a revised regulation governing the Contractor Employee Protection Program. 64 Fed. Reg. 12862 (March 15, 1999). It became effective on April 14, 1999. Section 708.8 of the new rule provides that the new procedures "apply prospectively in any complaint proceeding pending on the effective date of this part." Thus, the Interim Final Rule is generally applicable to the instant case.

(2)In their briefs the contractors argued that Mr. Hardwick's Complaint was not filed with the appropriate DOE Field Office within the 60 day regulatory filing period set forth in the prior regulations. 10 C.F.R. §708.6. They also raised several other procedural defects in the Complaint. In view of my ultimate conclusion that Mr. Hardwick has not shown that he made a protected disclosure, I will not rule on the merits of the procedural challenges.

(3)If Hardwick meets this burden, he must next prove that his disclosure was a contributing factor to his being discharged. 10 C.F.R. § 708.29; see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994). If Hardwick meets the regulatory burden as set forth above, the burden then shifts to SAIC and KenRob. The regulations require the contractor to prove by "clear and convincing" evidence that it would have taken the same action against the complainant even if he had not made a protected disclosure. 10 C.F.R. § 708.29. In view of the fact that I find no protected disclosure in this case, I will give these additional requirements no further consideration.

(4) The Interim Rule covers disclosures of "gross mismanagement," whereas the prior regulation referred to a disclosure involving "mismanagement." Mr. Hardwick's attorney takes the position that Mr. Hardwick need only show that there was "mismanagement," and not "gross mismanagement." He contends that it would be unfair to retroactively apply the new Interim Rule, which he claims adopts a more rigorous standard. I do not agree with this contention. I indicated during our May 19 prehearing telephone conference and in my May 20 letter to all parties that the Interim Rule did not adopt a totally new standard with respect to "mismanagement." I stated that under well- established case law, the standard requires that the alleged mismanagement involve serious matters, and not just disagreements between managers and employees. Holsinger v. K-Ray, Inc., 26 DOE ¶ 87,506 (1996)(Holsinger); Mehta v. Universities Research Assoc., 24 DOE ¶ 87,514 (1995) (Mehta). Accordingly, I believe that I must consider whether allegations of mismanagement raised by Mr. Hardwick rise to the higher level set forth by the Deputy Secretary in Mehta. Since the Deputy Secretary did not actually use the term "gross mismanagement," in this Decision, I will refer to that level as "serious mismanagement."

(5)In a letter of June 15, I informed all the parties that I had learned that the court reporter's car was burglarized, and all the tapes made of the hearing were stolen. These tapes recorded testimony, comments of counsel and my comments at the hearing. No transcript of the hearing exists, nor can one be made. Accordingly, as I stated in my June 15 letter, my discussion of the hearing in this Initial Agency Decision will be based on my best recollection of the testimony. I have also referred to some notes that I made during the hearing.

(6)Mr. Hardwick testified that Ms. Jones was not present at the January meeting. Ms. Jones had no doubt that she was present. Given Ms. Jones' detailed and specific recollections of the discussion that took place, I believe that she was present at the meeting, and I found her testimony to be wholly credible.

(7)Mr. Wilson did not believe that the May 17 memo was written as a reply to the January 18 memo. Since he did not participate in the discussion that took place between Mr. Gandi, Ms. Jones and Mr. Hardwick, he could not testify as to whether Mr. Hardwick had raised any of the points in the May 17 memo during the January discussion.

(8)See e.g., Complaint, Opposition to Motion for Summary Judgment and Transcript of June 1, 1999 deposition.

(9)I recognize that the current regulations require that a complainant establish that he disclosed information that he "reasonably and in good faith" reveals gross waste, fraud, abuse or gross mismanagement, whereas the prior regulation required only that the employee disclose information that he "in good faith" believes evidences those types of concerns. 10 C.F.R. § 708.5. Reasonability is assessed objectively. The employee must show that the matter described was one that a reasonable person in his position with his level of experience would believe evidenced gross waste, fraud, abuse or gross mismanagement. Berkley v. Dept. of the Army, 71 M.S.P.R. 341, 347 (1996). A good faith standard is a subjective one, referring to what the individual himself honestly believed. In the present case, the Complainant argues that the more stringent standard of the Interim Final Rule, requiring a reasonable belief, should not be used. He asserts that this would be a retroactive application of the stricter standard and would be unfair. He asks me to judge his disclosure using only the good faith standard of the prior regulation. Even if I do so, I cannot find that Mr. Hardwick has met his burden of proof.

(10)Each time a witness stated that he or she did not believe that Mr. Hardwick intended to raise concerns of gross waste, fraud, abuse or serious mismanagement, I indicated to Mr. Hardwick that he would have an opportunity to challenge that testimony. At the end of the hearing I asked Mr. Hardwick specifically if he wished to enter any further testimony into the record. He declined to do so.

(11)In his testimony at the deposition and at the hearing, Mr. Hardwick virtually admitted that he had no support whatsoever for his claims of gross waste, and fraud. E.g., Tr. at 43-49. His claim of abuse is frivolous on its face. The only claim that might have some validity is that of mismanagement.

Case No. VWA-0033

November 4, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioners:Gretencord v. West Valley Nuclear Services Co., Inc.

Date of Filing: March 19, 1999

Case Number: VWA-0033

This decision considers a Complaint filed by John L. Gretencord (Gretencord) against West Valley Nuclear Services, Inc. (West Valley) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. Mr. Gretencord requested a hearing on his Complaint under 10 C.F.R. Part 708 on March 19, 1999.

I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The criteria and procedures for Part 708 were amended in an Interim Final Rule effective April 14, 1999. 64 Fed. Reg. 12862. The Interim Final Rule provides that its amended procedures will apply prospectively to any complaint pending on April 14, 1999. Part 708's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against an employee on the basis of certain activities by the employee, including certain disclosures by the employee to "a DOE official, a member of Congress, any other government official who has responsibility or oversight of the conduct of operations at a DOE site, [an] employer or any higher tier contractor, . . .” 10 C.F.R. § 708.5(a).

Gretencord was employed by West Valley as a Senior Quality Control/Quality Assurance Engineer from January 15, 1990 to March 18, 1997. On March 26, 1997, Gretencord filed a complaint under 10 C.F.R. Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In this complaint, Gretencord alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement.

After conducting an investigation of Gretencord's allegations, the IG issued a Report of Investigation (the Report) on February 11, 1999. The Report found that: "[A] preponderance of the available evidence supports a finding that during his employment and work in quality assurance, [Gretencord] disclosed various concerns to [West Valley] officials and to DOE about possible safety violations and incidents of possible rule infractions." Report at 5. However, the Report further found that: "[A] preponderance of the available evidence does not indicate that the substance of [Gretencord's] 'good faith' concerns contributed to actions that were taken against him." *Id.* at 6. The Report further states: "It is the conclusion of this

inquiry, based upon information obtained through interviews of [West Valley] employees and supporting documents, that the evidence is clear and convincing that [Gretencord] was terminated for reasons other than his protected disclosures." *Id.* at 8. On March 8, 1999, DOE received Gretencord's request for a hearing and I was appointed as the Hearing Officer.

II. Analysis

Under the DOE's Contractor Employee Protection Regulations, "the employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . as described under §708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employer by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure . . . ." 10 C.F.R. § 708.29.

West Valley admits that Gretencord made at least 14 protected disclosures while employed at West Valley. Moreover, the record shows that a number of negative personal actions occurred during Gretencord's tenure with West Valley. These negative personal actions include several letters of reprimand, poor performance evaluations, a suspension, and eventually an involuntary termination.

In most whistleblower cases, it is difficult or impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Therefore, Congress and the courts, recognizing this difficulty, have found that a protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993), *citing McDaid v. Department of Hous. and Urban Dev*., 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, the courts have found that "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F.2d at 148 (8th Cir. 1989).

Gretencord's protected disclosures were interspersed throughout his tenure at West Valley, as were the negative personnel actions taken against him. (1) Applying the above principles to the present case, I find that Gretencord has met his initial burdens under § 708.29 thereby shifting the burden to West Valley to prove by clear and convincing evidence that it would have taken the same actions without Gretencord's protected disclosures. However, I have also found that West Valley has clearly and convincingly proven that each of the personnel actions it took against Gretencord were motivated by legitimate managerial considerations instead of a desire to retaliate against Gretencord for his protected disclosures. Accordingly, I am denying Gretencord's compliant under 10 C.F.R. § 708.30(e).

Simply put, the record developed during the hearing I conducted, shows that Gretencord has, from the very beginning to the end of his tenure with West Valley, frequently engaged in unprofessional and socially inappropriate behavior. To some extent, Gretencord's behavior was merely eccentric, unusual or socially awkward. However, the record indicates that Gretencord would often engage in behaviors that compromised his effectiveness and interfered with the operation of West Valley's day- to-day business operations. (2)

As explained below, during Gretencord's eight years with West Valley, he had an extraordinary number of personality conflicts, confrontations, and arguments with other members of West Valley's workforce. Moreover, he repeatedly failed to control his temper, issued threats to fellow employees, and made bizarre and disturbing statements in the presence of co-workers.

Gretencord attributes these conflicts to an alleged conspiracy on the part of West Valley's management to cover up safety, financial and management deficiencies. Gretencord claims that his efforts to expose safety concerns and corruption at West Valley threatened management and that they responded by harassing him,

interfering with his ability to do his job and trumping up allegations about his behavior. Gretencord, however, failed to present any evidence in support of these allegations. In contrast, West Valley has clearly and convincingly rebutted these allegations by submitting Gretencord's personnel file and by presenting the testimony of co-workers, which show that Gretencord's actions provided West Valley with legitimate justification for taking negative personnel actions against him.

I find the evidence submitted by West Valley concerning Gretencord's behavior and conduct to be credible since, for the most part, Gretencord does not deny that he made the statements or performed the behaviors attributed to him and because of the sheer number of similar reported occurrences.

Gretencord's personnel file contains voluminous documentation of his unacceptable behavior and statements. My review of Gretencord's personnel file has convinced me that he frequently exhibited poor self-control and repeatedly treated his fellow employees in an abusive manner. The personnel file also documents that Gretencord's actions and statements insulted and frightened fellow West Valley employees. Moreover, Gretencord did not respond to any of West Valley's proactive attempts to help Gretencord modify his behavior.

Gretencord's personnel file shows that on March 14, 1990, a secretary complained to West Valley management that Gretencord had made public comments disparaging secretaries. Gretencord's supervisor at the time, David Crouthamel, indicated that he had discussed this incident with Gretencord. Gretencord has not denied that this incident occurred.

On February 6, 1991, two West Valley employees reported to Crouthamel that they witnessed Gretencord harassing a co-worker over a work order. Crouthamel spoke with Gretencord about this incident, but Gretencord denied it had occurred.

On or about March 18, 1991, a West Valley engineer complained to Crouthamel about Gretencord's behavior and refused to work with Gretencord in the future. Crouthamel indicated that he raised the matter with Gretencord. Gretencord responded by losing his temper, stating that he would leave West Valley if he "had to deal with personalities" and storming out. Gretencord has not denied that these incidents occurred.

On March 23, 1991, West Valley received another complaint from a secretary that Gretencord had been rude to her. After being informed of this complaint, Crouthamel counseled Gretencord to "work with people, not against them." Gretencord has not denied that this incident occurred.

On August 2, 1991, Crouthamel issued a memo to Gretencord's personnel file documenting his concerns about "Gretencord's abusiveness and lack of professionalism in inter-personal relations."

On September 19, 1991, David Shugars issued a memo to Gretencord's personnel file concerning Gretencord's verbal intimidation of an employee. Shugars counseled Gretencord about this incident, suggesting that Gretencord should attend interpersonal skills training. Apparently, Gretencord did not heed this advice.

On March 20, 1992, West Valley issued a reprimand letter to Gretencord in response to an incident in which Gretencord displayed unprofessional and abusive behavior towards a co-worker. That letter warned Gretencord that future behavior of this kind could result in his discharge.

On May 14, 1992, West Valley received a complaint from two cafeteria workers that Gretencord had been rude to them. The workers reported that Gretencord had stated that "women are beneath him." Crouthamel discussed this incident with Gretencord, who indicated that his statements were misinterpreted.

On May 19, 1993, a co-worker submitted a memo complaining about an incident in which she alleges Gretencord's behavior made her feel threatened. Gretencord has not denied that this incident occurred.

On October 27, 1993, a West Valley manager communicated the fact that he was concerned that

Gretencord presented a threat to his personal safety. In response, West Valley's Employee Assistance Program (EAP) was consulted. The EAP recommended that Gretencord should receive professional counseling. Apparently, Gretencord did not accept this offer of assistance.

On November 16, 1995, Dave Dempster and Jack Hummel met with Gretencord to discuss his behavior. During this meeting, Gretencord was told that his frequent outbursts would no longer be tolerated and he was informed that his employer was concerned about "his continued inability to interface with his co-workers in a professional or even a civil manner." In response, Gretencord allegedly threatened to report West Valley for incompetence and a cover-up. Gretencord has not denied that this incident occurred.

On December 21, 1995, a memo was placed in Gretencord's personnel file indicating that he had been instructed to seek help from the EAP because of his abusive language and inability to get along with co-workers. Gretencord has not denied that this incident occurred. Nor is there any indication that Gretencord took advantage of this offer of assistance from the EAP.

On February 17, 1997, a memo was placed in Gretencord's personnel file indicating that a co-worker had asked Gretencord to "watch his filthy mouth." The co-worker reported that Gretencord responded by becoming aggressive. Gretencord has not denied that this incident occurred.

On February 20, 1997, the Supervisor of West Valley's Electrical Department, Bruce Covert, encountered Gretencord engaged in a conversation in the Electrical Department's offices. Covert asked Gretencord why he was there. Gretencord informed Covert that he was assigned to conduct a surveillance of that department. Gretencord then asked to see some documents. Covert then telephoned Gretencord's supervisor, who informed Covert that Gretencord had not been assigned to conduct a surveillance of the electrical area. Gretencord then became angry. Covert reported that Gretencord said " I am coming back to write you up on paperwork issues and I am going to [West Valley] and DOE with this as you must be hiding something." A co-worker reported that he overheard Gretencord say "I just love doing that sort of thing." Another co-worker reported that Gretencord made a similar statement the next day.

On February 25, 1997, Gretencord met with Tom Crisler of West Valley's Human Resources Department. Crisler recounted that, during this meeting, Gretencord expressed his belief that direct, aggressive and disrespectful conduct was acceptable for a Quality Assurance Engineer. At this meeting, Gretencord was informed that he was being suspended pending an investigation into his conduct.

On February 27, 1997, Gretencord again met with Crisler. Crisler informed Gretencord that his employment with West Valley was being terminated because of his lack of respect for his co- workers. During this meeting, Crisler alleges, Gretencord held out his left arm. Allegedly, Gretencord noted that his arm was very steady and that enabled him to be good at aiming a gun. Crisler further alleged that Gretencord then said he needed to think about becoming a whistleblower.

The testimony presented at the hearing buttressed the impression that I formed from reviewing Gretencord's personnel file. A number of Gretencord's co-workers testified that they or other co- workers personally feared him. Transcript at 359, 603, 671-672, 818-19, 825-26, 830, 951, 1422-24, 1435. Moreover, a number of Gretencord's co-workers testified that they witnessed Gretencord engaged in disturbing behaviors. Thomas J. Holden testified that he had witnessed Gretencord engaged in loud and threatening confrontations on a few occasions. Tr. at 65-66, 80-81. Vitto Riggi testified that he witnessed Gretencord have violent outbursts on at least two occasions. Tr. at 201-04. Linda Baker testified that she saw Gretencord in a local mall. When Baker asked why he was at the mall he indicated that he was there to bump into little kids or to trip them. Tr. at 362, 424, 432. Baker also testified that she witnessed Gretencord get mad at people and yell and scream at them. Tr. at 423. Jerome E. Hager recounted an incident where Gretencord provoked a fellow employee to slap him by refusing to stop singing a song about that employee. (This song was sung by Gretencord to the tune of the Gilligan's Island theme song). Tr. at 470. Jack Gerber testified that Gretencord joked about stepping on little children's toes in the mall. Tr. at 652. Phil O'Brien testified that Gretencord had told him that he had a vendetta against Bruce Covert.

Tr. at 781. Dave Crouthamel testified that Gretencord had talked about poisoning and shooting "little Halloween kids." Tr. at 1150, 1214-15, 1240-42.

The actions and statements attributed to Gretencord in his personnel file and by the testimony of his co-workers provide an extraordinarily strong basis for any negative personnel actions taken against him, including his termination. Since Gretencord did not even attempt to specifically rebut the veracity of most of these allegations, I assume they happened as they were recounted in the record.

III. Conclusion

The documentation contained in Gretencord's personnel file and the testimony of his co-workers and managers show that while employed at West Valley, Gretencord frequently exhibited behaviors and made statements that understandably disturbed and frightened those around him. Moreover, Gretencord's unacceptable and unprofessional behavior unnecessarily interfered with West Valley's legitimate business operations. Accordingly, I find that West Valley Nuclear Services, Inc. has proven by clear and convincing evidence that it would have taken each of the negative actions it took against John L. Gretencord without his protected disclosures.

It Is Therefore Ordered That:

(1) The Complaint filed by John L. Gretencord against West Valley Nuclear Services Co., Inc., on March 19, 1999, Case No. VWA-0033, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party’s receipt of the initial agency decision.

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: November 4, 1999

(1)For example, in late 1996 Gretencord disclosed a concern about radiation exposure readings to West Valley and the DOE and on February 21, 1997, Gretencord informed West Valley of his plans to take an "employee concern" to the DOE. Both of these disclosures occurred in sufficient temporal proximity to Gretencord's February 1997 suspension and termination to establish a prima facie case, thereby shifting the burden of proof to West Valley.

(2)The record also shows that West Valley’s management attempted to help Gretencord by counseling him, recommending professional counseling and detailing him to a position where social skills were less important.

Case No. VWA-0034

September 27, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Frank E. Isbill

Date of Filing: March 29, 1999

Case Number: VWA-0034

This Decision concerns a whistleblower complaint filed by Frank E. Isbill (the complainant), a former employee of NCI Communications, Inc. (the contractor) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. For almost two years, the complainant was employed by the contractor at DOE's Oak Ridge, Tennessee site (Oak Ridge). The complainant alleges that while employed by the contractor, he made protected disclosures concerning a potential abuse of authority by a DOE employee whose wife worked for a rival contractor.(1) The complainant contends that his subsequent demotion and lay off were retaliatory acts, but the contractor disagrees. (2) In this Decision, I find that the complainant made protected disclosures and that these contributed to the lay off and the demotion. Although I find that the complainant would have been laid off despite his disclosures, I also find that the contractor failed to prove clearly and convincingly that it would have demoted him even had he not made disclosures. I therefore find that the complainant prevailed on that issue and order appropriate relief accordingly.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequent reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. The DOE recently issued revised Part 708 regulations that were published in the Federal Register on March 15, 1999. See 64 Fed. Reg. 12,862 (March 15, 1999) and by their terms, apply to all cases which were pending as of the date they became effective, April 14, 1999, including the instant case. 10 C.F.R. § 708.8. The regulations provide, in pertinent part, that a DOE contractor may not retaliate against any employee because that employee has disclosed to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes to evidence, among other things, an abuse of authority. See 10 C.F.R. §§ 708.5(a)(1) and (3).(3) Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower complaint with the

DOE. The regulations entitle these employees to independent fact-finding and a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer.

B. Factual Background

In 1987, the complainant began working at the Oak Ridge site doing abstracting and indexing tasks. In July 1995, the contractor took over the information technology contract at that site and hired the complainant. During his employment with the contractor, the complainant made alleged protected disclosures concerning the potential abuse of authority by a DOE task monitor whose wife worked for another contractor performing the same work. The complainant contends that his disclosures were contributing factors to his demotion and eventual lay off.

C. Procedural History

The complainant filed his whistleblower complaint on March 17, 1997, which he amended following his lay off about two months later. The Office of Inspector General (OIG) conducted an investigation into the allegations contained in the complaint and issued a Report of Inquiry and Recommendations on March 2, 1999. The OIG concluded that the complainant was not entitled to any relief.(4)

On March 22, 1999, the complainant submitted his request for a hearing under 10 C.F.R. § 708.9 (1998) to the OIG. The OIG transmitted that request to OHA on March 29, 1999 and I was appointed Hearing Officer in this case on March 30, 1999. On June 16, 1999, I held the hearing in this case in Oak Ridge, Tennessee. The complainant testified on his own behalf and he called as witnesses two of his supervisors, the contractor's Program Director Hunter Foreman and the contractor's Deputy Program Director Shirley Hembree. The complainant also called the following DOE employees: the task monitor, the Information Security Specialist Russ Morel, and Ken Williams. The contractor called as witnesses DOE supervisory information management specialist Judy Gilmore and DOE Contracting Officer's Representative Brian Hitson. I permitted the parties to submit post-hearing briefs. The complainant submitted the latter of these briefs on August 5, 1999. With that filing, I closed the record in this case. (5)

II. Legal Standards Governing This Case

As noted above, the regulations set forth in 10 C.F.R. Part 708 provide an administrative mechanism for the resolution of whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the complainant and the contractor with regard to their allegations and defenses and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

It is the burden of the complainant under Part 708 to establish by a preponderance of the evidence that there was a disclosure, participation, or refusal described under 10 C.F.R. § 708.5, and that such act was a contributing factor in a retaliatory action taken against the complainant. 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th ed. 1992).

In the present case, the complainant must make two showings. First, he must demonstrate that he disclosed information to an official of DOE or to the contractor that he believed in good faith evidenced one of the items enumerated in 10 C.F.R. § 708.5. If the complainant meets this burden, he must next demonstrate that his disclosure was a contributing factor to his termination. 10 C.F.R. § 708.29; see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994) (Oglesbee).

If the complainant meets his burden as set forth above, the burden then shifts to the contractor. The

regulations require the contractor to prove by "clear and convincing" evidence that the contractor would have taken the retaliatory action even if the complainant had not made the disclosure. "Clear and convincing" evidence is a much more stringent standard than "a preponderance of the evidence"; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n.3.

III. Analysis

The parties contest many of the facts in this case. My findings of fact set forth below are based on (1) the entire record developed in the case, including the OIG investigative file, all documents submitted by the parties and the transcript of the June 16, 1999 hearing and (2) my observations of the witnesses' demeanor at the hearing and my determinations regarding those witnesses' credibility.

After reviewing the entire record in this case, and considering the credibility of the witnesses who testified at the hearing, I conclude that the complainant has shown by a preponderance of evidence that he disclosed information that he believed in good faith evidenced an abuse of authority. I also find that these disclosures contributed to retaliatory actions taken by the contractor. I further conclude, however, that the contractor has proven by clear and convincing evidence that it would have laid off the complainant even if the complainant had not made protected disclosures. I also find that the contractor has failed to show by clear and convincing evidence that it would have removed the complainant's supervisory duties had he not made disclosures. Accordingly, I find that the complainant is entitled to relief under 10 C.F.R. Part 708.

A. Alleged Disclosures

The hearing focused on the complainant's disclosures that the DOE employee who was the task monitor for the complainant's abstracting and indexing (A and I) group was married to an employee of another contractor receiving A and I work.(6) Tr. at 43. The complainant saw two primary problems with this situation. First, he believed that the task monitor was steering work to his wife's company. Second, the complainant believed that the task monitor was treating the contractor's A and I group unfairly, in an effort to help his wife's company, e.g., by informing DOE about the contractor's allegedly poor productivity. See Tr. at 49-50, 194. Two supervisors, Ms. Hembree and Mr. Foreman, conceded that he had made a disclosure of his beliefs to each of them. Tr. at 82, 89, 111-112, 116-117. These disclosures appear to have been made during November 1996. Tr. at 43, 82; see Tr. at 112, 160; see also Ex. A-6 at 2 (supervisor Hembree thought the disclosure had been in January 1997).

These disclosures provide evidence of a potential abuse of authority. An abuse of authority occurs when there is an "arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." D'Elia v. Department of the Treasury, 60 M.S.P.R. 226, 232 (1993) (interpreting Whistleblower Protection Act). Certainly if the DOE task monitor either improperly directed additional work to his wife's company or harmed the contractor's interests with DOE to benefit his wife's company, those acts would be considered an abuse of authority.

Next, the complainant must show that he reasonably and in good faith believed his disclosures revealed an abuse of authority. A good faith standard is a subjective one, referring to what the individual himself honestly believed. Roger W. Hardwick, 27 DOE ¶ 87,517 at n. 9 (1999). Both of the witnesses who testified that the complainant had made these disclosures to them testified that they thought that the complainant honestly believed that the facts he relayed to them were true. Tr. at 89, 124. However, the contractor argued that if the complainant was truly making good faith disclosures of wrongdoing, he would have made the conflict of interest disclosure much earlier, when the DOE task monitor's wife previously worked for NCI. Thus, the contractor contended that the complainant was more concerned with his company's interest than in stopping conflicts of interest and therefore, his disclosures were not in good faith. Tr. at 34-36, 196, 199.

Good faith does not require either the absence of self-interest in making a disclosure or that a complainant make a disclosure as soon as he or she is aware of a problem. Cf. Frederick v. Dept. of Justice, 65 M.S.P.R. 517, 531, rev'd on other grounds 73 F.3rd 349 (Fed. Cir. 1996) (holding under the Whistleblower Protection Act that personal motivation to blow whistle does not make belief non-genuine). As explained above, both supervisors indicated that the complainant believed that a true conflict of interest existed. I therefore believe that the complainant has sufficiently demonstrated that these disclosures were made in good faith.(7)

The complainant must also show that he reasonably believed his disclosures to reveal an abuse of authority. In contrast to good faith, reasonability is assessed objectively. In this case, the complainant must show that the matter described was one that a reasonable person in his position with his level of experience could believe evidenced an abuse of authority. There was some dispute at the hearing as to whether the complainant's disclosures met this requirement. The NCI Program Director, Hunter Foreman, thought that the disclosures were reasonable. Tr. at 89. However, the NCI Deputy Program Director Shirley Hembree did not think that the disclosures were reasonable, since to her knowledge, the task monitor was not sending additional work to his wife's company and his wife did not perform A and I work. Tr. at 124-26; see also Tr. at 97-98, 159-161, 192.

However, whether the complainant's disclosures turned out to be true is irrelevant to the question of whether they are protected.(8) See META, Inc., 26 DOE ¶ 87,504 at 89,015 (1999) (actual health risk unimportant to determining whether disclosure is protected); cf. Rogers v. McCall, 488 F. Supp. 689, 697 (D.D.C. 1980) (civil rights case).(9) I find that a reasonable person in the complainant's position could have found the facts he understood to constitute a potential abuse of authority. For these reasons, I conclude that the complainant has shown by a preponderance of the evidence that he had a reasonable belief his disclosures evidenced an abuse of authority. Therefore, the complainant has shown that he made protected disclosures.

B. Contributing Factor

One way to show that a protected disclosure was a contributing factor in a personnel action is to show "temporal proximity" between a protected disclosure and an alleged reprisal. In this case, there is temporal proximity between the complainant's disclosures regarding the DOE task monitor and his termination. Since the disclosures occurred six months or less before the allegedly retaliatory actions, I believe that the complainant has met his burden to show that his disclosures were a contributing factor to the allegedly retaliatory actions. Barbara Nabb, 27 DOE ¶ 87,519 (1999) (eight months found to be proximate).

C. Justification for the Complainant's Lay off

The contractor presented evidence at the hearing that it would have laid off the complainant even had he not made disclosures, because the DOE had decided to no longer fund the contractor's performance of the A and I task. Tr. at 69-70(10) DOE officials had decided to proactively take steps to cut the Office of Scientific and Technical Information (OSTI) budget, since they anticipated a shortfall of approximately $800,000 in the coming fiscal year. Tr. at 139, 164. OSTI officials met in April 1997 to decide how to make up this shortfall. Tr. at 163-164. The officials made eighteen decisions, one of them being to no longer fund the contractor's performance of the A and I task, and to direct the A and I work to other contractors. See Tr. at 164; Ex. B-39 at 4.

OSTI notified the contractor verbally of its decision and then cut the money from the contractor's budget. Tr. at 178-79; Contractor's Ex. C-21. When the contractor received this news, it determined that it had no other work for these three remaining employees of the A and I group, which included the complainant, to perform, and therefore decided to lay them off in May 1997. Tr. at 63, 81. Evidence indicates that the complainant was not treated differently from other similarly situated employees. Between September 1995 and the remaining A and I group's lay off in May 1997, the contractor laid off 55 employees out of the

original 82 employees working on the contract due to DOE cuts. Tr. at 73, 182; Ex. A-6 at 3; Ex. A-7 at 1. The prior lay offs included A and I employees.(11) There was evidence confirming that when DOE told NCI to cut an entire task, as occurred in this case, all the NCI employees performing that task were laid off. Tr. at 92.(12)

Notwithstanding the contractor's arguments, the complainant states that his lay off would not have happened except for his disclosures. The complainant believes that because of his disclosures, the contractor refused to accept his suggestions in February 1997 as to how the A and I group could become more cost-competitive, which caused DOE to cut the contractor's funding for this task. See Tr. at 50-51, 114. However, this chain of events is extremely speculative. Moreover, even if the contractor had immediately implemented the complainant's suggestions, they would have been too late to affect DOE's decision-making since DOE started analyzing the contractor's cost- competitiveness that same month. Tr. at 138.

In addition, the complainant argues that one particular document is a "smoking gun" which proves, in his view, the retaliatory nature of the contractor's actions. This document states that a DOE employee reported to the OIG in April 1997 a rumor he had heard that the complainant was going to be fired because he had filed complaints with the OIG. See Ex. FI-6 at 2. Further, this DOE employee believed that DOE employee Williams had been meeting with the contractor's management to arrange for the complainant's termination. Id.

However, not only are these assertions unsupported by any evidence, they are irrelevant. (13)Even if the management contractor disliked the complainant intensely and wanted to fire him because of his disclosures, that scenario would not alone overcome the other evidence that the contractor would have fired him anyway. Once the contractor received notice that its A and I work would no longer be funded, it had no other work for him to do, and the decision to lay him off was unavoidable. The complainant has not suggested that there was other work for him to perform for the contractor at the time of the lay off. I am therefore satisfied that the complainant was not differentially treated by the contractor, and that the contractor has presented clear and convincing evidence that the complainant would have been terminated even if he had not made protected disclosures.(14)

D. Demotion

The complainant maintains that the removal of his supervisory duties in February 1997 was another retaliatory act.(15)This occurred less than three months after the complainant's disclosures, and therefore I find that the disclosures were a contributing factor to the personnel action. Thus, the burden shifts to the contractor to demonstrate that it would have demoted the complainant even in the absence of disclosures.

Mr. Foreman explained that DOE employee Hitson had told him earlier that month that according to the DOE statistics, it appeared that the other contractors were more cost-competitive than NCI. The contractor was not producing enough reports to make it cost-competitive, and further was charging a great deal of time in the "other" category used to account for supervisor's time spent doing supervisory tasks, among other things. Tr. at 51-52. In addition, the "other" category included such things as time taken for breaks, training, meetings, and computer down time. Tr. at 53. Mr. Foreman testified that to improve productivity and reduce the charges in the "other" category, he decided to have the complainant concentrate exclusively on abstracting and indexing, and not supervisory tasks. Tr. at 84-85. Following this action, NCI's time charged in the "other" category decreased from an average of 28 percent to sixteen percent of its total bills. Tr. at 86-87.

In response, the complainant has charged that the "other" category decreased at that time for reasons other than his demotion. First, the A and I group received a new DOE project to work on (causing its non-"other" hours to increase), second, the group had settled into its new location after two moves and third, the A and I group had completed their training on new computers. See Tr. at 54; Complainant's Post-Hearing Brief at 4 (August 5, 1999). It appears clear that there were many sources of the time spent in the

"other" category and there were therefore many different ways to decrease this time. In view of the number of ways to decrease the "other" time, the contractor appears to have had many other options aside from taking away the complainant's supervisory duties. I therefore find that the contractor has failed to prove clearly and convincingly that it would have taken this action even in the absence of the complainant's disclosures.

IV. Remedy

Section 708.36 provides that if the initial agency decision determines that an act of retaliation has occurred, the Hearing Officer may order: (1) reinstatement; (2) transfer preference; (3) back pay; (4) reimbursement of reasonable costs and expenses; and (5) such other remedies as are deemed necessary to abate the violation and provide relief to the complainant. Although no loss of pay resulted from the complainant's demotion, I will order the contractor to pay the complainant's reasonable costs and expenses incurred in bringing this Part 708 complaint. These costs would include the complainant's costs for photocopies, faxes, postage, telephone bills, transportation costs to and from the hearing, service of subpoenas, and any professional services retained.

V. Conclusion

As set forth above, I have determined that the complainant made protected disclosures regarding a potential abuse of authority. Further, the complainant has shown that the disclosures were a contributing factor to his lay off. I have also found, however, that the contractor has proven by clear and convincing evidence that it would have laid off the complainant absent his disclosures. Nevertheless, the contractor failed to prove by clear and convincing evidence that it would have demoted the complainant even in the absence of his disclosures. Accordingly, I conclude that there has been a violation of the DOE's Contractor Employee Protection Program for which relief is warranted under § 708.30 (d).

It Is Therefore Ordered That:

(1) The Request for Relief filed by Frank E. Isbill, Case No. VWA-0034, under 10 C.F.R. Part 708 is hereby granted to the extent set forth in paragraph (2) below and is denied in all other respects.

(2) NCI shall pay to Mr. Isbill an amount to be determined based on the information provided pursuant to Paragraph (3) in compensation for all costs and expenses reasonably incurred by Mr. Isbill in bringing his complaint under Part 708.

(3) Mr. Isbill shall, no later than 30 days after receipt of this Decision, submit to the undersigned Hearing Officer and to counsel for NCI a detailed and itemized list of each and every direct and reasonable expense incurred in bringing the complaint, the dates incurred and the provider of the good and service provided.

(4) Counsel for NCI shall, no later than fourteen days after receipt of a copy of the submission referred to in Paragraph (3), either submit to Mr. Isbill payment in the amount requested (and notify the Hearing Officer that they have done so) or submit to Mr. Isbill and the Hearing Officer an objection to that amount based on either reasonableness or accuracy.

(5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting in part the complaint unless, within 15 days of its receipt, a Notice of Appeal is filed requesting review of the initial agency decision by the Director of the Office of Hearings and Appeals with the Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0107, telephone number (202) 426-1566, fax number, (202) 426-1415.

Dawn L. Goldstein

Hearing Officer

Office of Hearings and Appeals

Date: September 27, 1999

(1)

(2)

(3)The complainant alleged other retaliatory acts as well. Since I have decided that the complainant has prevailed regarding the demotion (and as a result will recover his litigation costs), and because the complainant has requested no remedy for these other retaliations, see Email from Complainant to Hearing Officer (April 21, 1999), nor can I think of a likely one, it is not necessary to address these other retaliations. See Barbara Nabb, 27 DOE ¶ 87,519 (1999).

(4)This standard now specifies in its text that the employee must have reasonably believed that his disclosures revealed one of a list of enumerated items, including an abuse of authority. Compare 10 C.F.R. § 708.5(a)(1)(1998) with 10 C.F.R. § 708.5. I had informed the parties prior to the hearing that I believed it would be unfair to apply the new definition to a complaint filed under the old regulations. However, upon further reflection since the hearing, I do not believe that a substantive change has taken place in this standard since it is highly unlikely that this Office would have found a disclosure that was unreasonably believed by the complainant to reveal one of the items described in 10 C.F.R. § 708.5 to be protected. Therefore, I have used the new standard to evaluate the instant case. I note that the issue of the reasonableness of the complainant's belief was fully explored at the hearing. See infra.

(5)Specifically, OIG assumed that the complainant had made protected disclosures, but found that he had failed to show that those disclosures were a contributing factor to any adverse personnel action taken against him by the contractor. It further found that there was clear and convincing evidence that, even in the absence of the disclosures, the contractor would have taken the same allegedly retaliatory acts, including the lay off.

(6)The citations to exhibits in this Report are based on the list of documents compiled by the OIG. The exhibits submitted by the complainant are cited as "FI-" and the contractor's exhibits utilized the OIG's numbering system. The transcript of this case is cited as "Tr."

(7)The task monitor would, among other duties, inform the contractor of the tasks that DOE wished to have the contractor perform. Tr. at 187.

(8)The contractor also argued that the disclosures were in bad faith because the complainant failed to sufficiently investigate the subject matter of his disclosures prior to making them. Tr. at 201-202. As indicated above, no one has doubted that the complainant believed the facts he relayed to his supervisors and that these facts created a possible abuse of authority. Part 708 does not require that whistleblowers conduct full-scale factual and legal investigations prior to making their disclosures. In this case, the complainant meets the requirement of the regulations by reporting the facts as he understood them.

(9)With the obvious exception that if the complainant knew the disclosures to be false at the time he made them, the disclosures would not have been made in good faith.

(10)For the same reason, evidence that the contractor presented regarding whether the task monitor had met the legal requirement to disclose his wife's employer is irrelevant.

(11)The complainant believes that DOE and the contractor entered into a "conspiracy" to lay him off. However, I informed the parties at the hearing that Part 708 only covers retaliation by contractors, not DOE. I stated that only evidence relating to a judgment by the contractor to take a retaliatory action would

be considered relevant to this hearing and conversely, evidence relating to DOE motivation would not be considered relevant. See Tr. at 22-23, 177; 10 C.F.R. § 708.1 (referring to the regulation's goal as preventing retaliation by complainants' employers, DOE contractors); see also Decision by Deputy Secretary Affirming Summary Dismissal of Complaint of George E. Parris, Ph.D., IG Complaint No. HQ97-0006 (October 15, 1998, unpublished) ("Part 708 is specifically limited to covered contractor employees and nowhere extends to DOE or DOE officials. Part 708 . . . plainly does not encompass decisions within the legitimate discretion of DOE officials to reduce or stop funding for a project.").

(12)After earlier DOE cuts, the contractor had earlier laid off two A and I group employees in September 1995 and May 1996, and one A and I employee left the contractor's employment after being told she would be laid off in April 1996. Tr. at 73, 99.

(13)In some cases where the entire task was not cut, the contractor was able to hire back five employees in low paying, low-skilled jobs (unlike the complainant's position). Tr. at 90-91; Ex. A-6 at 3-4. Other employees were brought back if DOE added some funds back in, but that did not happen with the A and I task. Tr. at 108.

(14)The DOE employee who came forward to the OIG was not a witness at the hearing.

(15)The complainant has claimed that openings existed prior to the lay offs which were filled with retired DOE employees. Complainant's Post-Hearing Brief at 5 (August 5, 1999). However, the complainant has made no showing that he was qualified for such openings, that such openings existed during the lay off, or that the workload at the time of the lay offs justified retaining the A and I employees.

(16)Although the complainant received no loss of pay with this demotion, I believe this action affected the complainant's terms and conditions of employment. See 10 C.F.R. § 708.2.

Case No. VWA-0036

November 8, 1999

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Robert Gardner

Date of Filing: April 20, 1999

Case Number: VWA-0036

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

I. Background

A. The Contractor Employee Protection Program

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

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

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

B. The Present Proceeding

1. Procedural History

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

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

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

2. Factual Overview

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

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

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

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

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

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

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

II. Legal Standards Governing This Case

A. The Complainant's Burden

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

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

10 C.F.R. § 708.9 (d); *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (*Sorri*). "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F.Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th ed. 1992). As a result, Gardner has the burden of proving by evidence sufficient to "tilt the scales" in his favor that he disclosed information, in this case concerns regarding the workforce restructuring at GJPO, which he believed evidenced a substantial violation of a law, rule, or regulation. 10 C.F.R. § 708.5(a)(1). If the complainant does not meet this threshold burden, he has failed to make a prima facie case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a *contributing factor* in the personnel actions taken against him, specifically the denial of his merit increase in 1996 and interference with his prospects for future employment. 10 C.F.R. § 708.29; s*ee Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying "contributing factor" test). Temporal proximity between a protected disclosure and an alleged reprisal shows that a protected disclosure was a contributing factor in a personnel action. *See Sorri*, 23 DOE ¶ 87,503 (1993); *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

B. The Contractor's Burden

In the event that Gardner makes a prima facie case, the regulations require Rust to prove by "clear and convincing" evidence that the company would have denied Complainant's merit increase even if he had not made protected disclosures. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F.Supp. At 1204 n. 3. In evaluating whether Rust has met its burden, I will consider the following factors: (1) the strength of Rust's evidence in support of its decision to deny Gardner's 1996 merit increase; (2) the existence and strength of any motive to retaliate on the part of the officials who were involved in the decision to deny Gardner's merit increase; and (3) any evidence that Rust takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *See Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (quoting *Geyer v. Dep't of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff'd*, 116 F.3d 1497 (Fed. Cir. 1997)).

III. Analysis

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

A. Gardner's Disclosures

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

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

A finding of "temporal proximity," i.e., a finding that "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action," is sufficient to show that a protected disclosure was a contributing factor in a personnel action. *See Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993) *citing McDaid v. Dep't of Hous. And Urban Dev.*, 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

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

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

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

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

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

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

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

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

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

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

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

(2) Motive for Retaliation

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

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

(3) Rust's Actions Against Similarly Situated Employees

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

It Is Therefore Ordered That:

(1) The Request for Relief filed by Robert Gardner under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within 15 days of its receipt, a Notice of Appeal is filed requesting review of the Initial Agency Decision by the Director of the Office of Hearings and Appeals with the Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0107, telephone number (202) 426-1566, fax number (202) 426-1415.

Valerie Vance Adeyeye

Hearing Officer

Office of Hearings and Appeals

Date: November 8, 1999

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

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

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

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

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

Case No. VWA-0037

September 27, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Ann Johndro-Collins

Date of Filing: April 27, 1999

Case Number: VWA-0037

This Decision considers a complaint of retaliation and request for relief filed by Ann Johndro-Collins (the Complainant) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The Complainant alleged that her employer, Fluor Daniel Hanford (FDH), retaliated against her for making a protected disclosure as defined in the Part 708 regulations. As explained below, I have concluded that the Complainant's request for relief should be denied.

BACKGROUND

Procedural Background

The Complainant filed a complaint with the DOE's Office of Inspections, Office of the Inspector General, in July 1997. In the complaint, she alleged that FDH retaliated against her for disclosing "a conflict of interest, waste, fraud, and abuse" by her team leader at FDH. The Office of Inspections conducted an investigation and issued a report on March 30, 1999. In the report, the Office of Inspections found that the Complainant had established by a preponderance of evidence that she made protected disclosures to FDH management.

The Office of Inspections further found, however, that in six of seven alleged retaliatory acts, the Complainant failed to establish by a preponderance of the evidence either that the alleged retaliatory acts constituted adverse actions, or that her

protected disclosures were a contributing factor to the actions.(1) In regard to one alleged retaliatory act - the Complainant's transfer from the Strategic Planning team to the Reporting team - the Office of Inspections found that the Complainant's protected disclosures were a contributing factor, but that FDH had provided clear and convincing evidence that the reassignment would have taken place absent the disclosures. On April 20, 1999, the Complainant submitted a request for a hearing, which was received on April 27, 1999 by the Office of Hearings and Appeals. The hearing was held on July 13, 1999, at which the Complainant and six witnessess testified.

Before the hearing, the Complainant and FDH stipulated that the Complainant made a protected disclosure as defined at 10 C.F.R. § 708.5. As stipulated by the parties, the Complainant disclosed to the management of FDH alleged acts of abuse of authority by her team leader. *See* 10 C.F.R. § 708.5(a)(3). Although FDH did not concede that the Complainant's allegations were true, it did acknowledge that she made the

disclosures reasonably and in good faith.(2) *Id*.

The Complainant alleged that FDH committed retaliatory acts, as defined at 10 C.F.R. § 708.2, after her protected disclosure. Before the hearing, the parties stipulated that three acts alleged to have occurred by the Complainant could be remedied under the Part 708 regulations. These alleged acts are listed below.

1. In October 1997, the Complainant received an annual performance assessment that, she alleged, did not accurately reflect her performance. The complainant claims that the assessment evaluated her work at a lower level than it should have. As a result, the Complainant alleged that she was excluded from a cash bonus program that rewarded employees for high achievement.
2. The Complainant alleged that in January 1998, she received a promotion from Project Controls Associate Grade I (pay grade 14) to Project Controls Associate Grade II (pay grade 16) without a corresponding pay raise.
3. The Complainant also alleged that in January 1998, she was assigned to a position where she performed duties at a level expected of employees in pay grade 18, while she was compensated at pay grade 16.

The Complainant's work assignments

The Complainant began working for Westinghouse Hanford Company, a contractor at the Department's Richland Operations Office, in 1989. She was initially hired as a records management specialist. She attained the position of Project Control Analyst I in August 1994. On October 1, 1996, FDH took over Westinghouse Hanford's contract at the Richland Operations Office. The Complainant's duties and chain of supervisors remained essentially unchanged when FDH took over the contract.

At the time the Complainant made her protected disclosures, she worked on the Strategic Planning team. Her team leader in that group was XXXXX, the subject of her protected disclosures, and her supervisor was Larry Hafer. In July 1997, the Complainant was transferred to the Reporting team, where her team leader was Eileen Murphy-Fitch and her supervisor was Gordon McCleary. The transfer was made because Murphy-Fitch needed additional personnel and had requested the Complainant, and because management was aware that the Complainant and XXXXX, her team leader, were not getting along.

In January 1998, the Complainant was transferred back to the Strategic Planning team. The transfer was made because she had requested reassignment to the group and there was an opening caused by the departure of another employee, Dave Eder.(3) Her supervisor was again Larry Hafer, but her previous team leader had moved to another group. Her new team leader was Bill Ritter. In March 1998, McCleary was promoted to the position of Director of Reporting, where he had supervision over Hafer's Strategic Planning team.

FINDINGS AND ANALYSIS

The Part 708 regulations require that the employee who files a complaint must establish by a preponderance of the evidence that (1) he or she made a disclosure, and that (2) the disclosure was a contributing factor to one or more acts of retaliation. 10 C.F.R. § 708.29. The regulations define retaliation as "an action ... taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other *negative* action with respect to the employee's compensation, terms, conditions, or privileges of employment....)" 10 C.F.R. § 708.2 (emphasis added). Once a complainant has made this showing, the burden shifts to the contractor to show by clear and convincing evidence that it would have taken the same action without the complainant's protected disclosure. 10 C.F.R. § 708.29.

As discussed below, with respect to two of the alleged retaliatory acts, I find that the Complainant was unable to establish the acts had negative consequences with respect to her employment and that she has therefore failed to meet her burden of proof. With respect to the third alleged retaliatory act, I find that

FDH has provided clear and convincing evidence to show that it would have taken the steps it did absent the Complainant's protected disclosures. Consequently, I find that the Complainant's request for relief should be denied.

The Complainant's FY 1997 performance assessment

In October 1997, the Complainant received her performance assessment for Fiscal Year 1997 (FY 1997), which began on October 1, 1996. McCleary was the principal FDH official involved in the Complainant's FY 1997 performance assessment.(4) As noted above, the Complainant transferred to the Reporting team about nine months into FY 1997. The gist of her complaint is that the FY 1997 assessment takes insufficient account of her work on the Strategic Planning team. The Complainant states that:

On October 31, 1997, I received a performance appraisal that covered the Fiscal Year 1997 time period. However, I do not believe that this document is an accurate reflection of my performance. Specifically, the first nine months of the rating period was spent performing Integrated Site Baseline (ISB) functions, that included significant, complex deliverables, which my management at the time rated as an excellent effort. However, the majority of this performance evaluation was devoted to measuring my job performance for the tasks that I was reassigned to during the last three months of the rating period. Further, the evaluation did not give me credit for the many months that I performed as a Team Lead in support of ISB tasks. In summary, I believe that my overall FY 97 rating of "acceptable" is not reflective of my performance.(5)

The Complainant prepared a written response to her assessment, in which she contends that it:

significantly misses the mark on assessing my performance over the past year. Addresses less than three months of performance (fails to address performance from 10/1/96 through 7/9/97).

An indication of the quality of my performance from 10/1/96 through 7/9/97 is documented in a written response from my management team regarding the preparation and delivery of the Fiscal Year 1997 Site Summary Baseline ... a major deliverable to the customer:

Thanks for the excellent product. Puts us in a good position for the Integrated Site Baseline in July. L.R. Hafer - Manager - FDH Baseline Management.

Great job and many thanks . . . - XXXXX, Team Lead.(6)

The Complainant's written response also provides details of her work on the Integrated Site Baseline that she feels was excluded from the assessment. The response was placed in her personnel file.(7)

As a remedy, the Complainant asks that FDH "amend FY 1997 Performance Assessment to include appraisal for Integrated Site Baseline work completed during the first nine months of the rating period."

As an initial matter, the Complainant's assertion that the assessment does not accurately reflect her performance is highly speculative and unsupported by the evidence. In addition, it is not true that the assessment "fails to address performance" between October 1996 and July 1997, as the Complainant asserted. Both McCleary, who wrote and signed the assessment, and Hafer, who was the Complainant's supervisor for the first part of the fiscal year, deny that the assessment ignores the Complainant's work during the first nine months of FY 1997.(8)

An examination of the assessment corroborates the testimony of Hafer and McCleary. The Complainant's FY 1997 assessment consists of several parts. Part A of the assessment, titled "Culture Values," is the only part that contains general evaluations of performance. The part contains four generic sections, called "expectations" - "accountable," "client focused," "cost effective," and "empowering." The expectations are defined in such a way that they would refer equally well to either of the positions the Complainant held

during FY 1997. For each expectation, the employee can receive one of three ratings: "outstanding contribution," "acceptable contribution," and "needs improvement." The Complainant received a rating of "acceptable contribution" for each of these expectations.

Part B of the assessment, titled "Outcomes Expected," contains four boxes. In each box there is a brief, one-sentence description of a task that the Complainant performed, and a one- or two-sentence evaluation of her performance. As Hafer and McCleary pointed out at the hearing, and the Complainant herself acknowledged, one of the boxes deals with her work on the Integrated Site Baseline report while she worked on the Strategic Planning team.(9) Consequently, the Complainant's assertion that the assessment ignores her work during the first nine months of FY 1997 is clearly not accurate.

The Complainant has established, however, that the majority of the assessment addresses the last three months of FY 1997. Both Hafer and McCleary acknowledged this point.(10) McCleary explained why he wrote the assessment this way. He testified that the input he had received indicated that some of the people involved in supervising the Complainant thought her performance had been unsatisfactory, and he "wanted to give her a fresh start" and to "focus on the positive, not the negative aspects of the review."(11)

Evidence in the record supports McCleary's position. Although the Complainant says that management considered her performance during the first nine months an "outstanding effort," she has provided no corroboration for this assertion.

On the contrary, comments from two co-workers indicate that the Complainant's work was not considered generally outstanding. Murphy-Fitch testified that she received a comment from a person involved with the Integrated Site Baseline report suggesting that there had been problems with the report, and somebody had to "come to the rescue" of the Complainant to get the report out.(12) In addition, a comment submitted by E.A. Schultz, who worked in internal planning for FDH, stated that the Complainant had failed to participate in meetings and was uncooperative in communicating significant matters to FDH management. She said that she "could not rely on [the Complainant] to not 'drop the ball.'"

McCleary, discussing the two positive comments about the Complainant's work on the Integrated Site Baseline report, testified that "on balance with other comments I had, [the positive comments] would not have offset or changed the conclusion that I had already reached about acceptable performance."(13) In support of McCleary's view, Hafer, the Complainant's manager during the first nine months of the rating period, testified she worked at an acceptable level during that period.(14)

Furthermore, FDH provided evidence that the acceptable ratings received by the Complainant were typical for employees in her group. A chart of the ratings received by the eighteen employees on the Reporting team in October 1997 shows that they received a total of thirty-one "outstanding" ratings, thirty-eight "acceptable" ratings, and three "needs improvement" ratings.

I find the Complainant's previous performance assessment provides corroboration for McCleary's and Hafer's statements that her work is at an acceptable level. The previous assessment was completed in February 1995, before the Complainant made her protected disclosure. At the time the assessment was signed, the Complainant's employer was Westinghouse Hanford Company, and the manager who signed the form was R. B. Agee. The form, which differs from the FY 1997 form, contains blocks for rating the employee in fifteen areas. The possible ratings were "Exceeds," "Met," and "Not Met." In addition, there was a block provided for an overall rating. Of the fifteen areas in which the Complainant was rated, she received three ratings of "Exceeded," nine ratings of "Met," one rating of "Not Met," and two blocks indicated she was too new at the given task to be rated. The overall rating was "Met."(15) Thus, her ratings are essentially the same on the two assessments.

The Complainant alleged that her acceptable rating excluded her from a cash bonus program for employees. The program, called the "MVP" program, provides a cash payment for employees whose achievements and contributions "support the company's efforts in exceeding strategies, goals, and objectives." Documents submitted by FDH show that the MVP program was not based on performance

assessments, but on nominations submitted by the employee's manager, co-workers, or the employee himself.(16) An employee could receive an MVP bonus without having received an "Exceeds" rating in any area.(17) The Complainant's performance assessment thus had no bearing on whether she received an "MVP" bonus.

I find that FDH has given credible and convincing explanations for why the assessment emphasizes the last three months of the rating period, and that the assessment would have been written in this way absent the Complainant's protected disclosure. On the other hand, the Complainant's assertion that her work was outstanding is purely speculative and lacks any corroboration. In addition, she has not brought forth any rebuttal evidence to suggest that the decision to emphasize the last three months had any negative impact on her assessment. I therefore find that the Complainant's request for relief relating to her FY 1997 assessment should be denied.

The Complainant's promotion without a raise

The second item for which the Complainant requests relief is an alleged promotion that she received without a corresponding increase in her salary. In her complaint, the Complainant describes this incident as follows:

On February 3, 1998, I was summoned to Mr. Hafer's office where Mr. Hafer presented me with an Employee Status Change Authorization document dated January 21, 1998. Mr. Hafer explained that Mr. Brobst wanted me to have the document, and offered no additional discussion. After leaving the office, I reviewed the document and found that I had been promoted from a Grade 14 to a Grade 16, effective October 6, 1997. I also noted that this document was a correction to a previous Employee Status Change Authorization dated October 5, 1997, where a merit increase of 4% was awarded to me, but that the salary did not change between the merit increase amount and the promotion document.(18)

As a remedy for this alleged retaliatory act, the Complainant asks for "compensation equivalent to other team members."(19)

Before considering the merits of the Complainant's claim, reviewing some aspects of the FDH's pay scale will be helpful. The pay scale for non-union employees goes from grade 13 to 27.(20) Each grade represents a broad salary range. There is considerable overlap in the grades, so that an employee earning the maximum salary under grade 13 makes more than an employee earning the median salary under grade 15. In the Complainant's career field, the normal progression is from grade 13 to 14, 16, and then 18.(21)

The process by which an employee is advanced in pay grade while not simultaneously receiving an increase in salary is colloquially referred to as a "dry promotion." Becky Andersen, an FDH human resources specialist, estimated that are there about five dry promotions a year at FDH.(22)

Harold Lacher, the manager of Human Relations for FDH, testified that there were two benefits to receiving a dry promotion. First, the employee receives a potential for greater future pay increases. Second, the employee accumulates time in the new grade, which is a consideration when the employee is being considered for future promotions.(23) He explained that an employee typically remains in a pay grade for a minimum of two to three years before advancing to the next pay grade.(24) In addition, Lacher noted that he himself, as well as the attorney representing FDH at the hearing, had received dry promotions during their careers at the Hanford site.(25)

Shortly before receiving the dry promotion, the Complainant filed an EEO complaint, alleging gender discrimination.(26) According to both Hafer and McCleary, the EEO complaint elicited a review of the Complainant's work, which in turn led to the dry promotion. Both Hafer and McCleary stated that the Complainant did not receive the dry promotion merely because she filed an EEO complaint, but that the complaint caused management to review her performance and consider whether she was qualified for grade 16.(27) McCleary testified that the Complainant's EEO complaint resulted in "bringing forward

certain evidence that maybe we had overlooked her unfairly and should go back and take another look."(28)

Hafer testified that, after the Complainant filed her EEO complaint, "we went back and re-looked at the whole organization."(29) As a result of this review, one other female on the Strategic Planning team received the same dry promotion.(30) The Complainant and the other female who received a dry promotion were the only employees in the group at that time in grade 14.(31) After the two dry promotions, the group of approximately 40 employees consisted predominantly of grade 18's, with five grade 16's and no grade 14's.

Robert Gates was the Director of Planning for FDH at the time of the Complainant's promotion to grade 16. He stated in an interview with an investigator that a promotion from grade 14 to grade 16 would typically involve a raise of two to three percent, less than the Complainant received. He also stated that the promotion did not involve any additional duties for the Complainant.(32)

Although the Complainant has characterized her advancement to grade 16 as a promotion without a raise, this characterization is not accurate. The general procedure at FDH is for salary changes to occur once a year, in October. The ceiling for pay increases in FY 1997 was 5%. Approximately 80% of FDH employees received some increase, with most increases in the 3-4% range.(33) The Complainant received a 4% merit raise in October 1997. The following January, the merit raise was re-coded as a promotion, made retroactive to October 1997.(34) Consequently, it is accurate to say that the Complainant received a promotion to grade 16 with a 4% raise, effective in October 1997.

I find that the Complainant's dry promotion does not constitute a retaliatory act. The regulations define retaliation as "an action ... taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other *negative* action with respect to the employee's compensation, terms, conditions, or privileges of employment...." 10 C.F.R. § 708.2 (emphasis added). The Complainant has not shown any negative aspects to the promotion. I therefore find that her request for relief with respect to the promotion should be denied.

The Complainant's assignment to a position formerly held by an employee in pay grade 18.

The Complainant described the situation in her complaint as follows.

On January 7, 1998, Mr. Brobst [Philip Brobst, at that time FDH Director of Planning] communicated with me via return e-mail, and stated that ... Mr. Dave Eder's position was now vacant in Strategic Planning, and was available at a Grade 16 level.... I felt that the position offered was an excellent opportunity given that all other opportunities no longer existed according to Mr. Brobst. I noted that there was a significant disparity between the job requirements, the grade level and rate of pay for this position. I went to Mr. Brobst's office and told him I would accept the position in Strategic Planning.(35)

In support of her claim that she should be paid at grade 18, the Complainant stated that Dave Eder was a grade 18 employee. She argues that she works on the same projects as Dave Eder and other grade 18 employees.(36)

Hafer, however, testified that the Complainant performed the same functions as Eder had. He stated that Eder had been a manager before this assignment, and while on the team had much more of a lead role than the Complainant. When the Complainant came to the team, they "re-scoped" the work they had to do. The Complainant had more of a liaison role.(37) Hafer testified he does not think that the Complainant, in her current assignment, has the same level of responsibility for projects as a grade 18.(38)

I do not find that the assignment of the Complainant to the Strategic Planning team at pay grade 16 was a retaliatory act. The position was offered to her at pay grade 16, and she accepted it on those terms. There

is no evidence that she is performing work at a pay grade 18 level. On the contrary, Hafer has credibly testified that she does not bear the responsibility that grade 18 employees do. I therefore conclude that her request for relief with respect to this claim should be denied.

CONCLUSION

The Complainant has not prevailed on any of the three allegations of retaliatory acts. With regard to the allegation that her FY 1997 performance assessment was inaccurate, FDH has shown by clear and convincing evidence that it would have prepared the assessment as it did absent the Complainant's protected disclosures. With respect to the allegations that the Complainant was given a promotion without a raise and given a work assignment above the level of her pay, the Complainant has failed to show that these acts occurred. I will therefore deny her request for relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Ann Johndro-Collins under 10 C.F.R. Part 708, Case No. VWA-0037, is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within 15 days of its receipt, a Notice of Appeal is filed with the Director of the Office of Hearings and Appeals requesting review of the initial agency decision.

Warren M. Gray

Hearing Officer

Office of Hearings and Appeals

Date: September 27, 1999

(1) In view of the parties' stipulations, described below, some of these alleged retaliatory acts are no longer relevant.

(2) FDH conducted an internal investigation and cleared the team leader of the charge of wrongdoing that was the basis of the Complainant's disclosure.

(3) Tr. 125.

(4) Tr. 148.

(5) Exhibit 2, Complaint at 8.

(6) Exhibit 24, FY 1997 Performance Assessment. The name of the Team Lead, who was the subject of the Complainant's disclosures, has been withheld.

(7) Exh. 2, Complaint, 8.

(8) Tr. 115; 136; 149.

(9) Tr. 26; 136; 149-50.

(10) Tr. 136-37.

(11) Tr. 150.

(12) Tr. 22. Murphy-Fitch was not involved in work on the Integrated Site Baseline Report and could not testify as to whether this comment was accurate. Tr. 30.

(13) Tr. 154.

(14) Tr. 115; 136.

(15) Hearing Exhibit 2.

(16) Hearing Exhibit 4. The documents also note that "there is no significance to the initials MVP."

(17) Tr. 103.

(18) Exh. 2, 9.

(19) Exh. 2, 11.

(20) Tr. 88.

(21) Exh. 30, Fluor Daniel Hanford Salary Structure; Tr. 64.

(22) Tr. 77.

(23) Tr. 91.

(24) Tr. 92.

(25) Tr. 93.

(26) Tr. 71, 73.

(27) Tr. 137-38; 157.

(28) Tr. 154.

(29) Tr. 134.

(30) Tr. 62, 138, 157.

(31) Tr. 158. The other female employee had apparently not filed an EEO complaint. Tr. 75.

(32) Exh. 22, Memorandum of Interview by Office of Inspector General.

(33) Eh

(34) Tr. 60-61.

(35) Exh. 2, 9.

(36) Tr. 130-32.

(37) Tr. 123-25.

(38) Tr. 130-131.

Case No. VWA-0039

February 25, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Luis P. Silva

Date of Filing: April 27, 1999

Case Number: VWA-0039

This Initial Agency Decision concerns a whistleblower complaint filed by Luis P. Silva, a former employee of the Scientific Ecology Group (SEG) and its successor firm, GTS Duratek (GTS).(1) SEG, and then GTS, were subcontractors to Sandia Corporation at the Radioactive and Mixed Waste Management Facility (RMWMF) where Silva worked before he was laid off by GTS in August 1997. Sandia is a subsidiary of Lockheed Martin Company, the management and operating contractor at DOE's Sandia National Laboratories in Albuquerque, New Mexico. In March 1998, Roy F. Weston, Inc. replaced GTS as Sandia's subcontractor at the RMWMF. Silva alleges that he made protected disclosures concerning health and safety matters, and the contractors took retaliatory actions against him. For the reasons explained below, I have determined that Silva's request for relief should be granted in part because GTS has not met its burden in this case.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy (DOE) Contractor Employee Protection Program codified in 10 CFR Part 708 governs this matter. The DOE recently revised the regulations governing this "whistleblower" program. See 64 FR 12862 (March 15, 1999) (Interim Final Rule amending 10 CFR Part 708, effective April 14, 1999). The Interim Final Rule was amended in July 1999 to restore portions inadvertently omitted when the original version was rewritten in plain language.(2)

The whistleblower regulations prohibit a contractor from retaliating against a contractor employee who engages in certain protected conduct. Protected conduct includes disclosing information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation, or a substantial and specific danger to employees or to public health or safety. Protected conduct also includes refusing to participate in an activity that would result in a violation of law, rule or regulation, or cause an employee to have a reasonable fear of serious injury to himself, other employees, or members of the public. If an employee believes that a contractor retaliated against him for protected conduct, the employee can file a complaint. Under the current regulations, the DOE's Office of Hearings and Appeals (OHA) conducts investigations of whistleblower complaints, holds evidentiary hearings, issues initial agency decisions, and considers appeals. The employee must establish, by a preponderance of the evidence, that (1) the employee made a protected disclosure and (2) the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, the burden shifts to the contractor to prove, by clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure. If

the employee prevails, the OHA may order relief including reinstatement, back pay, legal expenses, and costs.

B. Procedural History

On October 2, 1997, Silva filed a Part 708 complaint with the DOE Albuquerque Operations Office. The complaint alleges that Silva made a series of protected disclosures to DOE and contractor officials about health and safety concerns, and that these disclosures were a contributing factor to retaliatory actions by GTS and Sandia that culminated in the issuance by GTS on August 5, 1997 of a "Layoff Notification" letter to Silva. The layoff letter indicated that August 4 was Silva's last day of work on site, and that the layoff was effective August 18, 1997. Ex. 1 to April 13, 1999 Report of Inquiry and Recommendations (IG Report).

Under the regulations then in force, Silva's complaint was referred to DOE's Office of the Inspector General (IG) for investigation under Part 708. The IG investigated the allegations in the complaint and the contractors' affirmative defenses. The IG Report found that Silva met his burden of showing by a preponderance of the evidence that he made protected disclosures, which were a contributing factor to the actions of GTS and Sandia which culminated in his layoff in August 1997. The IG further concluded that GTS and Sandia had failed to meet their burden of showing by clear and convincing evidence that they would have taken the same action against Silva in the absence of his protected disclosures. In addition, the IG Report found that a preponderance of the evidence indicates that Silva's employment termination and prior protected acts contributed to Weston not hiring him when it succeeded GTS as the RMWMF subcontractor, and that "evidence is not clear and convincing that the [employee] would not have been hired [by Weston] regardless of his protected disclosures...." IG Report at 26. Based on these findings, the IG Report recommended that: (1) Silva be reinstated as a Radiation Protection Technician at Sandia's RMWMF, subject to a final determination that equities support his reinstatement; (2) Silva be awarded back pay and benefits for the period between his employment termination and reinstatement, less any compensation, benefits or pay that he received for services during this period; and (3) Silva be awarded reasonable legal expenses and fees and other direct costs, incident to the complaint and incurred as a result of the termination of his employment. IG Report at 28. Copies of the IG Report were served on the three contractors.

In late April 1999, GTS and Sandia each filed requests for a hearing. On May 3, 1999, the OHA Director appointed Leonard M. Tao as the Hearing Officer. Sandia and Weston filed Motions to Dismiss the complaint, which were denied by Hearing Officer Tao on August 23, 1999. *Sandia Corp.; Roy F. Weston, Inc.*, 27 DOE ¶ 87,522 (1999). Tao subsequently withdrew, and the OHA Director appointed me to replace him. The hearing was held October 12, 13 and 14, 1999 in Albuquerque, New Mexico. Fourteen witnesses testified at the hearing, and I admitted 83 written exhibits into the record at the hearing, including the videotaped deposition of a GTS witness who declined to testify in person. I admitted five additional exhibits after the hearing, and closed the record. I permitted the parties to file post-hearing briefs, the last of which was received on December 21, 1999.

C. Factual Background

The following summary is based on the hearing testimony and exhibits, the investigation file and the submissions of the parties.

On December 19, 1994, Silva began working for SEG in a temporary job as a "Casual Field Technician." On March 13, 1995, Silva was promoted to the position of Radiation Protection Technician, a full-time permanent job. Silva received only one written performance evaluation while employed by SEG/GTS, an "Above Standard" rating, in March 1996. IG Report at 3.

The critical events in this case occurred during the period June 1996 through March 1998. The evidence in the record shows that from mid-1996 through the August 1997 layoff, two different series of events were

being played out. The first series of events involved Silva's disclosures to contractor managers and to DOE officials about legitimate health and safety concerns he had about operations at the RMWMF (and in some instances, Silva's refusal to work in conditions which he believed unsafe). These disclosures occurred in September 1996 (Silva reported hydrogen sulfide exposure to contractor management); January 1997 (Silva reported six concerns to Gene E. Runkle, Director of DOE/Albuquerque's Occupational Safety and Health Division: forklift ramp safety; inappropriate waste drum lifting techniques; hydrogen sulfide exposure; forklift tilted and dropped waste container when floor grate bent underneath it; lack of ramp tie- down safety chains; and curbs removed from platform used to provide forklift access to transportainers); and July 1997 (Silva reported three concerns to contractor management: radiation exposure; danger during modification of ramp; and lightning storm danger).(3) The contractors do not contest the fact that Silva made these and other disclosures, and that most of them raised legitimate safety concerns. In addition, the record shows that GTS and Sandia took appropriate corrective action in response to Silva's concerns.

The other series of events involved allegations that Silva was harassing a coworker, Vanessa Gasery. It began in June 1996, when Tim Forrester, the SEG and later GTS Project Manager at the Sandia site, accused Silva of making sexually offensive remarks to female coworkers. Joe Albenze, SEG's local Vice President for Human Resources (HR), relayed the accusations to Silva, who denied them. Forrester conducted an informal investigation and determined that no one had been offended. In July 1996, Silva filed an EEO charge, alleging that Forrester harassed him by unfairly accusing Silva of sexual harassment. SEG responded to Silva's EEO charge by telling the Equal Employment Opportunity Commission (EEOC) that Vanessa Gasery had filed a sexual harassment complaint against Silva. This was not true, since Gasery had repeatedly told SEG managers she would not charge Silva with sexual harassment. After several months, in late 1996 or early 1997, the EEOC told Silva about SEG's claim that Gasery had accused him of sexual harassment. Silva believed this information was true, and told some coworkers that Gasery had filed sexual harassment charges against him. Gasery felt that this harmed her reputation in the male-dominated work force at the RMWMF, and in February 1997, she complained to SEG managers that Silva was falsely accusing her of having filed sexual harassment charges against him. During the first quarter of calendar 1997, Westinghouse was engaged in the sale of SEG to GTS, and neither firm took any action to resolve the problem between Vanessa Gasery and Silva. In April 1997, after GTS took over, Gasery wrote a memo to Christine Seibel, the HR support person in the SEG/GTS Tennessee office, demanding that the firm set the record straight with Silva to quell the rumors circulating about her. GTS managers never took any action to address Gasery's problem. Instead of correcting the false impression the EEOC response had given Silva, and telling Silva that Gasery had not filed a sexual harassment complaint against him, GTS put off Silva and Gasery. Silva became angry at Gasery and made intimidating remarks to her. Forrester reported information about Gasery's accusations against Silva to Barbara Botsford (now Boyle), then Sandia's Radioactive and Mixed Waste Department Manager, and told her that GTS management was unlikely to take action to remedy the situation quickly. Gasery told Botsford that her work situation was stressful, and complained that she was frustrated with GTS's failure to resolve the problem with Silva. Ultimately, Botsford had Sandia order Silva's removal from the site, which led GTS to lay off Silva because they had no other work to offer him. Gasery herself quit one day after Silva was fired, and later filed her own EEO charge against GTS for failing to stop Silva from spreading false information about her. Further details about Silva's protected disclosures, where relevant, and details of the various harassment allegations are discussed below.

Silva and the contractors have advanced diametrically opposed interpretations of these events. Silva maintains that Forrester unfairly and falsely accused him of sexually harassing Vanessa Gasery, even though she never filed a sexual harassment complaint against him, in retaliation for his protected disclosures about safety concerns. According to Silva, Forrester reported the false harassment allegations against him, and made negative characterizations of his attitude toward safety, to Botsford. Forrester advised Sandia that GTS corporate management was unwilling to fire Silva because he was the only Hispanic on their staff at the RMWMF, and they feared Silva would file an EEO action against GTS. These reports led Botsford to invoke a clause in their contract with GTS that would allow Sandia to order the removal of a subcontractor employee from the site. Botsford wrote a memo (signed by Scott Shrader,

the authorized Sandia contract representative) to GTS requesting the immediate removal of Silva from the site as of August 4, 1997. GTS had no other work available for Silva on any of its other contracts, and laid him off, effective August 18, 1997.

The contractors contend the record is replete with evidence that shows they are serious about safety in the workplace and that they treated Silva's protected conduct with the appropriate degree of concern. The contractors argue that Silva was laid off because he did harass Gasery, thus creating a hostile work environment for her, and claim that this same action would have be taken against him even if he had not made any protected disclosures.

Silva also contends that after he was laid off in August 1997, and the RMWMF subcontract was awarded to Weston effective in March 1998, Jeff Jarry, a Sandia employee, retaliated against him by influencing Miles Smith, the Weston Project Manager, not to hire him because he had made protected disclosures to DOE rather than raising them at the contractor level. See IG Report at 26. Sandia and Weston maintain that the investigative record underlying these findings in the IG Report is factually inaccurate, and that Silva would not have been hired by Weston even if he had not made his protected disclosures while working for GTS.

II. Legal Standards Governing This Case

A. Silva's Burden

I will next consider whether Silva has met his burden under § 708.29 of establishing by a preponderance of the evidence that he made disclosures, as described in § 708.5, and that such disclosures were a contributing factor in one or more alleged acts of retaliation against Silva. *See* *Ronald Sorri,* 23 DOE ¶ 87,503 (1993). "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse,* 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence §§ 339 at 439 (4th Ed. 1992). Under this standard, the burden of persuasion is allocated roughly equally between both parties. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). As a result, Silva has the burden of proving by evidence sufficient to "tilt the scales" in his favor that he made a protected disclosure under Part 708. 10 C.F.R. §§ 708.5(a). If Silva does not meet this threshold burden, he has failed to make a *prima facie* case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a "contributing factor" in the personnel actions taken against him. 10 C.F.R. § 708.9(d); *see* *Helen Gaidine Oglesbee*, 24 DOE¶ 87,507 (1994); *Universities Research Association, Inc.*, 23 DOE¶ 87,506 (1993). This standard of proof is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221(e)(1), and the 1992 amendment to § 210 (now § 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In explaining the "contributing factor" test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation's chief House sponsors, stated: "The words ?a contributing factor' . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." 135 Cong. Rec. H747 (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20). *See Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying "contributing factor" test).

Since the contractors do not contest Silva's claim that he made a series of protected disclosures about legitimate safety and health concerns to contractor managers and DOE officials, I find that he has met the first part of the test under § 708.29. A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald Sorri, 23 DOE at 89,010, citing McDaid v. Dept. of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990); *see also County v. Dole,* 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In

addition,"temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *See County*, 886 F. 2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that the contractor officials taking the personnel actions involving Silva had actual knowledge of Silva's disclosures. I find that there was a temporal proximity between Silva's protected disclosures in January 1997 and July 1997 and the alleged retaliations occurring in 1997 by Forrester and Botsford, which culminated in August 1997, when Silva was ordered to be removed from the RMWMF by Sandia and laid off for "lack of work" by GTS. I also find that there is a temporal proximity between Silva's protected disclosures in July 1997 and Weston's refusal to hire him in early 1998.

I therefore find Silva has established a *prima facie* case that his protected disclosures were a contributing factor in the retaliations which he alleges. The burden now shifts to GTS, Sandia and Weston to prove by clear and convincing evidence that they would have taken the same actions absent his protected disclosures. 10 C.F.R.§ 708.29.

B. The Contractors' Burden

The regulations require GTS and Sandia to prove by "clear and convincing" evidence that they would have taken actions that ended Silva's job on the GTS-Sandia RMWMF subcontract in August 1997 even if he had not disclosed information about health and safety concerns and refused to work in conditions which he considered to be unsafe. In addition, they must prove by clear and convincing evidence that Weston would have refused to hire Silva when it took over the RMWMF subcontract in March 1998 even if he had not disclosed information about health and safety concerns and refused to work in conditions which he considered to be unsafe. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F. Supp. at 1204 n.3. In evaluating whether the contractors have met their respective burdens, I will consider the strength of their evidence in support of their decision to take the actions that resulted in the termination of Silva's job in 1997 and Weston's refusal to hire him in 1998; the existence and strength of any motive to retaliate on the part of the officials who were involved in the decision to terminate Silva's job at the RMWMF under the GTS subcontract and not hire him under the Weston subcontract; and any evidence that the contractors take similar actions against employees who are not whistleblowers but who are otherwise similarly situated. For the reasons explained below, I find that GTS has not met its burden with respect to the actions it took that resulted in Silva's termination in August 1997. By contrast, I find that Sandia has met its burden with respect to its actions leading to Silva's layoff, and that Sandia and Weston have met their burden with respect to Weston's refusal to hire Silva after it was awarded the RMWMF subcontract in March 1998.

III. Analysis

A. Introduction

The contractors base their defense on two principal claims. First, GTS argues that Silva made inappropriate sexual remarks in the presence of females, harassed Gasery, and thus created a hostile and disruptive work environment at the RMWMF. Sandia argues that in view of Silva's negative impact on the work environment, and GTS management's failure to take corrective action against Silva, it acted properly to order Silva's removal from the site. Sandia also takes the position that since it did not lay off Silva, its action was not responsible for ending his job with GTS. GTS argues that since it had no other work available for Silva, it had no other choice but to lay him off after Sandia ordered his removal from the site. Thus, GTS also takes the position that its action was not solely responsible for ending Silva's job. Second, GTS and Sandia contend the record shows they emphasized safety in the workplace, treated Silva's protected conduct and that of other employees appropriately, and did not retaliate against otherwise

similarly situated employees who reported safety problems, but were not "whistleblowers." Based on these assertions, they maintain they have shown by clear and convincing evidence that they had no motive to retaliate against Silva for reporting safety concerns, and that the same action would have been taken against him even if he had not engaged in any protected conduct.

GTS submitted extensive evidence through Alex Feldman, its former RMWMF Safety Officer, showing that after Silva's safety complaints to the DOE in January 1997, and GTS's acquisition of SEG, it set up a Radioactive and Mixed Waste Safety Committee (RMWSC) and established a process for the reporting and resolution of safety concerns. GTS Exhibit 18. Silva was a charter member on the RMWSC, which also included Sandians, and employees of other contractors. Feldman gave several examples of GTS employees other than Silva who brought personnel safety concerns to the attention of the GTS Safety Committee, including Feldman himself, but were not subjected to retaliation by GTS. Unlike Silva, however, none of those other GTS employees had ever reported safety concerns directly to the DOE. I have considered this evidence, and in my view, while the contractors' general concern for safety, and their treatment of other similarly situated employees who were not whistleblowers is instructive, *Carlos M. Castillo*, 27 DOE ¶ 87,505 at 89,047 (1998), it does not explain away the specific acts of retaliation that GTS committed against Silva.

There is evidence that Forrester and other contractor employees were displeased with Silva's concerns about safety, including his refusal to work in unsafe conditions, the timing of his complaints, and his bypassing of the "preferred" contractor channels to go directly to DOE. In addition, the evidence shows that Forrester fomented the original sexual harassment allegations against Silva without a reasonable basis, and that SEG later gave false information to the EEOC that Vanessa Gasery had filed a sexual harassment complaint against Silva. These were the first acts of retaliation against Silva. Although GTS filed nearly 80 exhibits during the course of the hearing, it failed to produce, explain or even mention the response SEG filed with the EEOC to Silva's July 1996 EEO charge. GTS's failure to submit this document, given what the EEOC told Silva, leads me to presume that it would have been unfavorable to its defense in this case. Moreover, the evidence shows that when Silva learned from the EEOC of SEG's false claim that Gasery had filed a sexual harassment complaint against him, and told others of this supposed "fact," GTS failed to set the record straight. This was the second act of retaliation against Silva. Forrester and Christine Seibel, then the "human resources support person" in SEG's Tennessee office, and others in GTS knew Silva's belief that Gasery had filed a sexual harassment complaint against him was wrong, but they withheld this information from both Silva and Gasery. Instead, they ignored Gasery's complaint that Silva was spreading false information about her, allowed the conflict between the two to fester, and took advantage of the situation by using Gasery's complaints of "harassment" to influence Sandia's decision to order Silva off the site. This was the final act of retaliation. GTS has failed to show by clear and convincing evidence that these acts would have occurred in the absence of Silva's protected activity

B. Silva's Reputation Preceded the Acts of Retaliation

The evidence shows that the contractors were displeased with Silva's approach to safety before the alleged acts of retaliation occurred. At the hearing, Silva testified that he had raised safety concerns with his SEG supervisors and managers before filing the written concerns with the DOE in January 1997. Tr. at 57-59; 175-176; 233-236. According to Silva, his SEG superiors considered him to be a "whiner," a "trouble maker, not a team player." Tr. at 57. This was corroborated by David Schweitzer, a Radiological Control Technician who worked at the RMWMF, who testified that Jack Reust and Percy Gasery of SEG, and Bill Rhodes of Sandia were spreading rumors about Silva. Tr. at 255. Silva felt that the contractors were slow in taking appropriate remedial actions for his pre-January 1997 safety complaints about the ramp, forklifts, and hydrogen sulfide. Tr. at 73; 179-180; 186-187; 233-236. Silva testified that he began keeping a personal "log book" around May 1996, to protect himself from harassment and to avoid blame if coworkers were hurt because they engaged in unsafe practices. Tr. at 241. Thereafter, Silva always carried a small notebook in his pocket in which he noted safety concerns, and this practice was annoying to his coworkers and contractor managers who feared he was engaged in a "tit for tat" process of reporting them for every minor indiscretion. IG Report at 16; Tr. at 686; 901. As a result, some of the technicians asked

not to be assigned to work with Silva. Id.

There is also evidence that Silva's supervisors and coworkers were unhappy with him because he reported safety concerns after the events in question occurred. Tr. at 188; 688-689. In addition, Silva believed the contractor managers were displeased that he bypassed the chain of command by reporting safety concerns directly to DOE in January 1997, instead of going first through the contractors. Alex Feldman, the GTS Safety Officer, thought Silva believed he was talking to the customer and not the regulator when he raised safety issues with DOE, and therefore "may not have recognized that he had short-cycled the GTS and Sandia safety mechanisms" that were in place by going directly to DOE. IG Report at 7; Tr. at 454-455. However, Feldman confirmed that going directly to DOE was not the preferred way of handling safety issues. Tr. at 455.

C. The Original Sexual Harassment Accusations–The First Act of Retaliation

In June 1996, Joe Albenze, SEG's Vice President of Human Resources (the SEG VP) informed Silva about "a complaint . . . received by management regarding inappropriate comments made by [Silva], and received by a female employee of the Company." Ex. 33 to IG Report. It was Forrester who brought Silva's allegedly inappropriate remarks to Albenze's attention. Tr. at 591. Albenze was referring to two separate incidents, described below, where Silva made remarks that Forrester deemed to be inappropriate.

"The yogurt incident" occurred on June 11, 1996 when Silva was eating lunch with two women, Vanessa Gasery and Kathy Babilon. The women were discussing homeopathic remedies. Babilon described an article she had read about the use of yogurt to cure urinary tract infections, and responded to a question from Silva that it was also good for yeast infections. Tr. at 752. Silva made some "distasteful comments about yeast infections," at which point Babilon told him "that's disgusting," and according to her, "that was the end of it." Id.

The "tuna fish incident" supposedly occurred at a training session when someone passed a paper to Silva, and he said, "it smells like tuna fish." Forrester is unsure when it occurred, but he thought it happened in the Waste Assessing Facility. He "perceived a comment regarding tuna fish– the smell of tuna fish on paper–and it was passed through Vanessa's hands." Tr. at 583. Silva has a different and more distinct recollection of the incident. According to Silva, it took place "in a RCRA training class at the Coronado Club in the lower level. I think it was in–may have been in ?96." Tr. at 988. Silva recalls that Vanessa Gasery was sitting several rows back from him, and he was sitting in the front row with Forrester to his right. There was another man to Silva's left. "He was popping a can of –of tuna fish with crackers, and he handed me the roll sheet to sign in, and that's when I got it, and I handed it to Tim Forrester, and I may have said, ?oop, I smell like tuna fish', which was–I considered to be a joke." Tr. at 989. Silva claims there were no other women in that front row, and that Vanessa Gasery was sitting "at least five or six rows behind us." Id. Silva denies that he ever intended to make any kind of sexual innuendo with his remark, and denies ever looking back at Vanessa Gasery after he said it. Id.

Albenze told Silva that "they had several charges of sexual harassment against me," and that Kathleen Babilon had filed sexual harassment charges against him. Tr. at 78. In fact, this was not true, and when Babilon learned of the accusation attributed to her, she became upset. Christine Seibel testified that she received an angry telephone call from Babilon "demanding a letter from SEG/Westinghouse that she could have in writing on our letterhead, stating that she did not make any sexual harassment charge, complaint, call or anything to the Human Resources Department or to the Management of our company regarding Mr. Silva." Tr. at 484. Shortly thereafter, Babilon wrote a memo stating that she had nothing to do with filing sexual harassment charges against Silva. Silva Exhibit 2. Her memo explained that "the conversation in which I was supposedly offended occurred on 6/11/96 at lunch. The nature of the comment was to do with yeast infections. While that was probably not an appetizing topic of conversation, I certainly did not find it offensive. I did not find it particularly sexual either–certainly not a sexual harassment complaint." Id. In addition, this memo stated that sometime after June 11, 1996, Forrester approached Babilon and asked, "out of the blue. . . if I had any problems with any of his employees,

specifically pointing out sexual harassment. . . ." Id. The memo went on to state that she told Forrester she had no problems with any of his employees, and concluded by denying ever having made "any complaints formally or informally against [Silva]." Id.

Forrester claims he was motivated to make an example of Silva's remarks because they were making the transition from a remote facility (the Interim Storage Site) to an office environment (the RMWMF) where more women would be present, and he "was concerned that there was some sort of a cultural–if that's the right word –problem." Tr. at 584. According to Forrester, "the technicians and the professionals, whoever were very loose with those kinds of comments and . . . it was going on out there more than I could see." Tr. at 585. Later, Vanessa Gasery called Albenze from Forrester's office, Tr. at 546, and told Albenze "the comments were not offensive." GTS Exhibit 38; Tr. at 547. Albenze, who would have had actual knowledge of the events in question, was not called as a witness at the hearing. Instead, GTS called Christine Seibel, who then worked in SEG's Tennessee office. Seibel's testimony was based on long distance conversations about these events, since she was not present in Albuquerque when they occurred. Her testimony relied heavily on contemporaneous notes she and others in Tennessee made of telephone conversations with Albenze, Forrester, and Gasery. Thus, I cannot give her testimony the same weight as testimony from people who were actually present at the RMWMF. Everything Seibel heard from the SEG people in Albuquerque had been influenced by Forrester, who first characterized Silva's remarks as offensive, and led Gasery to contact Albenze.

Seibel testified that Gasery was adamant about the fact that she did not file a sexual harassment charge against anyone at that time. What she was doing, as she stated it to me, was she was trying to be a good citizen of the company, frankly. She had heard some things that could be considered inappropriate and with a raised consciousness of sexual harassment in the whole country, you know, I mean frankly everybody wants to keep their job, do a good job and have a good working environment. And it is the responsibility of employees, especially Supervisors and Managers to make sure that we maintain that.

Tr. at 473. It is significant that before Gasery called Seibel and said she was "trying to be a good citizen of the company," Forrester had conducted an "investigation" of the workers at the RMWMF to discern if anyone had been offended by any unnamed employee's remarks, and nobody (including Gasery) reported they had been offended. Silva Ex. 3. Even though nobody on the scene was offended, and nobody made any charges against Silva, Tr. at 481, Seibel testified that Silva's remarks were "perceived as inappropriate" by the SEG people in Tennessee and Pittsburgh [at Westinghouse's corporate office] and "a matter that needed to be dealt with." Tr. at 475.

On July 15, 1996, reacting to what he felt were false accusations from SEG, Silva filed a discrimination charge with the EEOC. Ex. 26 to IG Report. According to Silva, he later learned from the EEOC during its investigation of his first discrimination charge that SEG claimed "it was Vanessa Gasery who had filed sexual harassment charges against" him. Tr. at 86. That claim was false, since Gasery never filed a sexual harassment complaint against Silva. Tr. at 473. I infer from GTS's failure to produce the written response SEG filed with the EEOC that the document contained "inaccuracies." Forrester disclaims any knowledge of it, even though he was the SEG-GTS RMWMF Project Manager, and "already had been named in an EEOC thing." Tr. at 602. Seibel admitted having read the response. She stated that "I believe her [Vanessa Gasery's] name is in it, but I am not positive." Tr. at 736. I observed the demeanor of these witnesses at the hearing, and their professed ignorance of the written response to the EEOC is not credible. Each of them was personally involved in the events, and each had a motive to hide the truth at the hearing. Moreover, they each also had a pecuniary motive, since at the time of the hearing, Forrester was still a GTS employee, and Seibel had been laid off and was hoping to be rehired by GTS. The glaring absence of this critical document undermines the overall credibility of GTS's claim that it did not retaliate against Silva, and would have fired him regardless of his protected conduct.

D. GTS's Failure to Resolve the Conflict Between Silva and Gasery–The Second Act of Reprisal

Silva testified that after he was told that Gasery filed a complaint against him, he "did nothing. I carried on as usual. And just tried to keep my–keep from offending anyone there, especially Vanessa Gasery." Tr. at 76. He indicated that his relationship was good with Gasery before this point, but admitted that it changed after he learned from EEOC that she had filed charges against him. According to Silva, he "did not joke around as much because I feared of getting in trouble with her for anything I did or said might be taken or perceived the wrong way." Tr. at 88. Silva also admitted telling others about Gasery after he was told she had filed a complaint against him. Tr. at 88-89. However, Silva claims he never confronted Gasery because he feared it would "blow up in our face," and he didn't want to "be perceived as being aggressive" or "come off wrong." Tr. at 89.

Even though Silva claims he was careful to do nothing that would cause problems with Vanessa Gasery, it is clear that her reputation among some of her coworkers suffered when the false information circulated that she had filed a sexual harassment complaint against Silva. While Silva played a role in spreading this false information when he told coworkers about Gasery, he had learned it from the EEOC, and he believed it was true. In late February 1997, Gasery called Seibel to complain about Silva's accusations, and asked SEG management's help in stopping the false information circulating about her. Tr. at 517.

On March 21, 1997, Silva filed a second EEOC charge against SEG, claiming that he was harassed by management after having filed the earlier charge. Exhibit 29 to IG Report. This second EEOC charge made SEG management uncertain about how to handle the growing tension between Silva and Vanessa Gasery. Seibel testified that in March 1997, she called Nep Sanchez, the EEOC investigator and discussed the Silva case with him, seeking guidance from the EEOC about what would happen if SEG took disciplinary action against Silva. GTS Exhibit 48. According to Seibel's notes of that conversation, Sanchez advised SEG to have Gasery "put it in writing, talk to others [and] document," write a memo to Silva telling him to stop talking to others immediately, and warn Silva that he faced further disciplinary action up to termination. Id.

On April 5, 1997, approximately one month after she first complained to SEG management about Silva, Gasery faxed a "Written Statement Regarding False Accusations" to Seibel. GTS Exhibit 49. In this memo, which is quoted extensively below, Gasery gave a clear picture of the problem:

Background

Since January of 1997, S.E.G. employee Luis Silva, has been and may be continuing to make accusations about me. Luis is telling people at Sandia National Laboratories, New Mexico that I meaning Vanessa Gasery, filed Sexual Harassment charges against him. Furthermore, he has told people that he knows this for a "fact." Luis's accusations upset me because they are not true. Furthermore, I am puzzled by Luis confidence with regards to his statement. I do not understand how he could come to such a strong conclusion without *what he considers proof* (i.e., discussions with or documentation from an attorney, discussions with or documentation from S.E.G. etc.) I would hope that S.E.G. never stated or documented that I filed Sexual Harassment charges against Luis, because this would be a false statement. Moreover, this would disappoint me greatly, because during a phone conversation with Joe Albenze in the presence of Tim Forrester, in the summer of 1996, I stated several times that I was not filing Sexual Harassment against Luis. Additionally, as I made clear during my discussion with Joe Albenze, I was only providing information regarding Luis out of concern for S.E.G.'s credibility and the contract at Sandia National Laboratories. Listed below are names of individuals who have stated to me, that they were present during one of Luis's conversations where by he has made the statement:

Doug Perry

Eric Staab

Dave Schweitzer

Conclusion

I feel my reputation and character have been damaged by the accusations made by Luis Silva. I am stressed by this ordeal and I am working in what I consider to be an hostile environment.

I need to share my feelings regarding how S.E.G. is handling this matter. I truly do not believe that S.E.G. Human Resources has my interest at heart. I was told this matter must be handled carefully because I understand that Luis has filed charges with the US Equal Employment Opportunity Commission (EEOC).

Request for action

I feel closure of this matter would create a more pleasant work environment and relieve unwarranted stress. Keeping in mind that the matter is serious, I am requesting action for closure. The action shall included by is not limited to the following:

1. Sending a human resources representative to Sandia National Laboratories to investigate and address my situation.
2. Disciplining Luis in accordance with company procedures and policies, if it is proven he made the false accusations.
3. Investigating the handling process used when recording/reporting the Luis issue with Joe Albenze during the summer of 1996.
4. Dealing with S.E.G. employees in accordance with company procedure and policies, if it is proven they made false accusations or misrepresented issues. Keeping in mind Federal, State and Local Laws.
5. Providing me with documentation regarding the Sexual Harassment matter specific to Luis and myself. This includes any documentation of which my name is mentioned and documentation distributed internally or externally of S.E.G.

Finally, timely and proper closure is critical and would be greatly appreciated.

GTS Exhibit 49.

The record indicates that neither SEG nor GTS ever took action to resolve the matters described in Gasery's memo to Seibel. During the period February - March 1997, when Westinghouse was engaged in the sale of SEG's RMWMF business operation to GTS, neither firm focused any attention on the travails of Gasery and Silva. Tr. at 517-18. Although Seibel visited the Sandia site in April 1997, she did not talk to Silva on that trip, and she did not interview the three people named in Gasery's memo (Perry, Staab and Schweitzer). Tr. at 519; 801.

The ownership transition was complete by April 1997. Seibel, GTS Duratek's CEO Bob Prince, and Vice President Don Neely visited the RMWMF in early June 1997. One of the things they looked into was the apparent problem between Gasery and Silva. Seibel testified that Prince was "not comfortable with charging ahead on anything on this until we had an opportunity to talk with both parties." Tr. at 521-522. According to Seibel, this trio met with Vanessa Gasery, and heard her "going through some of the things that she had already expressed to me verbally over the phone on February 28th and then also writing in the Memo [GTS Exhibit 49]. . . ." Tr. at 522. Neely and Prince also met with Silva to "give him an opportunity to talk about his side of the story." Tr. at 523. They gave him a memo originally entitled "Disciplinary Action," which Neely changed to "Counseling Action." Exhibit 33 to IG Report. The memo states, in pertinent part, that:

Previously, a complaint was received by management regarding inappropriate comments made by you, and received by a female employee of the Company. On June 17, 1996 you were counseled by SEG's Vice President of Human Resources concerning the fact that any type of harassment, both direct and indirect, on the job site is unacceptable conduct and should cease immediately. This counseling was documented and you received a copy of that documentation.

Regretfully, SEG, now GTS Duratek management has received an additional complaint that continued harassment exists in the workplace. Please be advised of the severity of this type of misconduct as indicated by this formal written warning. Should there be any reported incidents in the future of this nature, disciplinary action, up to and including termination of employment may be imposed immediately.

Exhibit 33 to IG Report.

The June 1997 "Counseling Action" memo shows that Prince and Neely, the new GTS managers, viewed the "false accusations" harassment reported by Gasery in 1997 as a continuation of Silva's so-called sexual harassment alleged in June 1996. Seibel and Forrester both knew that was not true, but they did nothing to stop their new GTS managers from getting the wrong impression. Tr. at 736. Addressing the questions raised in Gasery's April 1997 memo, and giving her the help she demanded would have required SEG/GTS to admit they had told the EEOC that Gasery filed a sexual harassment complaint against Silva, when she had not done so and was adamant about not wanting to do it. Instead of resolving the conflict, GTS took advantage of it, and played Gasery and Silva off against each other. In the end, GTS's inaction drove Gasery to resign. GTS's failure to address Gasery's complaint created a situation that formed the basis for Forrester's telling Sandia's Botsford that Silva was "harassing Gasery," and led Botsford to order Silva off the site.

The timing of these events is further evidence of retaliation by GTS against Silva for his protected conduct. Forrester and Seibel certainly knew how easy it would have been to make peace between Gasery and Silva, simply by telling Silva that Gasery had not filed a complaint against him. Their critical failure to correct the misunderstanding between Silva and Gasery happened soon after January 1997, when Silva had reported safety concerns to Gene Runkle and touched off a full-blown DOE safety investigation. See Exhibit 31 to IG Report; GTS Exhibit 10. As noted above, Alex Feldman admitted that in his view, going directly to the DOE was not the preferred way of reporting safety concerns for GTS employees. IG Report at 7; Tr. at 454- 455.

GTS management's negative attitude toward Silva's safety practices and disclosures was also evident in June 1997, when Don Neely and Forrester met with Silva to discuss several concerns between him and management. Among other things, they criticized Silva for his judgment about the "level of detail" in safety matters, citing his wiping water off drums of radioactive waste as "being too meticulous." Tr. at 217; GTS Exhibit 53 (Forrester's notes of "6-3-97 Discussion with Luis"). They also cited Silva's complaints to Forrester about people wasting time forming a "lottery ticket group" as an example of Silva's continued inability to get along with co-workers. Id. In this same meeting, Silva also complained to Neely that Forrester lost his temper and "blew up" at him. Id.; Tr. at 85.

The evidence shows that GTS "sacrificed" Vanessa Gasery, ignoring the complaints that she articulated so clearly in her April 5, 1997 memo to Seibel, in order to get rid of Silva. Gasery's letter of resignation, GTS Exhibit 55, shows that she was unhappy with GTS because they ignored her complaint. Eventually, Gasery filed her own EEOC charge against GTS, alleging that the firm had done nothing in response to her complaints. Gasery Deposition Exhibit 1.(4)

Although the evidence shows that GTS retaliated against him for his protected conduct, Silva was not blameless. There is evidence that Silva made nasty remarks to Vanessa Gasery, after he was told she had accused him of sexual harassment. According to Gasery, Silva muttered the "n word" to her under his breath on at least one occasion, and also called her "stupid," and a "bitch" when others could not overhear. Gasery Deposition at 14. Silva denies making these remarks. One witness, Carla Rellergert, testified about seeing Gasery looking upset after she and Silva walked past each other at the RMWMF. Tr. at 765. I cannot condone Silva's hurtful comments to Gasery, if they did occur. But in my view, by refusing to end the misunderstanding that it created between Silva and Gasery, and letting it fester instead, GTS placed Silva in a position where he was bound to fail. This was an act of retaliation against Silva. *See* *Ronald Sorri*, 23 DOE at 89,014 (retaliation includes putting whistleblower in a position where he was bound to fail). GTS's actions fueled Silva's anger toward Gasery, who he believed had wrongly accused him of

sexual harassment. GTS must bear the consequences of its actions, which drove Silva to lose control of his temper and make hostile remarks to Vanessa Gasery. Even though Silva's words sound bad in the retelling, they were ancillary to the main thrust of Gasery's 1997 memo, her 1998 EEOC charge against GTS, and her 1999 deposition in connection with this case, which was her frustration with GTS's failure to do anything to stop Silva from "falsely accusing" her of filing a sexual harassment complaint.

E. Silva's Termination–The Final Reprisal

Silva's termination was the inevitable result of the conflict that GTS diabolically nurtured between Silva and Gasery. The dénouement played out in a series of meetings with Sandia program manager Barbara Botsford. One meeting took place in late July 1997 between Forrester and Botsford. GTS's corporate office in Maryland had given Gasery a few weeks' medical leave of absence to recover from stress, and she was due to return to work shortly. Forrester testified that he gave Botsford a report about the ongoing problems between Silva and Gasery, which he characterized as being based on "a non-substantiated set of accusations from Vanessa" that GTS was investigating. He told her of the pending EEOC charges filed by Silva, and opined that GTS's home office was unlikely to act quickly. Tr. at 607-610; IG Report at 17.

The second meeting took place in a chance encounter between Botsford and Vanessa Gasery after Gasery returned from medical leave. Botsford described Gasery as looking "visibly shaken. She was not her normal self." Tr. at 863. Gasery told Botsford that "it was Mr. Silva who was causing her the stress," and mentioned Silva's nasty remarks. Id. Botsford accepted Gasery's side of the story without hearing from Silva, based on training she had received that "if a person believes they are being harassed, they are being harassed." Tr. at 882. According to Botsford, Gasery did not tell her that what she perceived as harassment initially was the fact that it was being claimed that she filed a sexual harassment complaint against Silva. Tr. at 887. Botsford was also aware that Gasery was frustrated by the lack of action by GTS. Tr. at 896.

After her impromptu meeting with Gasery, Botsford summoned Forrester. Forrester gave her "a lot of detail that I had never had before, explained to me on a– both sides, you know, what was happening in the case, in the situation, and he explained to me that he felt his hands were tied because it was now a corporate issue for their corporation." Tr. at 866. Botsford demanded that Forrester do something to resolve the problem with his employees, but realized that "it was my right under the contract to take some steps to resolve the issue of a hostile work environment." Tr. at 867. Botsford next called Gary Romero in Sandia Purchasing, asked what her options were, and was told under the terms of the GTS contract she could remove any person. Id. Then, according to Botsford,

I walked over to Sandia Legal, and I asked them if there was anything I should consider and what would they advise me if I wanted to remove someone from the contract, and the Sandia attorney just said–she asked me do you have–and I told her–I was intending to remove Mr. Silva because in my estimation, he was the one that was creating a hostile work environment, and he–she asked me do you have reason to believe he's a whistle-blower, and I asked her in response, it's not nice to answer a question with a question, but I asked her how would I know because I did not–I do not understand–I have never read the Whistle-Blower Protection Act, and I did not at that time have an understanding of how this type of process occurs.

And she–so, I asked her on how could I know, and her answer to me was, well, you wouldn't, and, so, I thought okay. I mean I wouldn't know. This is really not real relevant to that anyway. Whistle-blower was not what I was worried about. I was worried about Ms. Gasery's work environment, and . . . safety is so important at that facility, if you've got people that are nervous around each other, you're very likely to have a safety incident. You'd have people making mistakes when they're over-stressed.

Tr. at 867-868. Botsford also testified that Sandia has never provided her with any training concerning whistleblower protection, and that she has never provided training to any of her employees or contractors concerning whistleblower protection. Tr. at 898.

After consulting with Sandia's lawyer, Botsford drafted the letter ordering GTS to remove Silva from the Sandia site. Exhibit 45 to IG Report. Sandia delivered it to Forrester on August 4, 1997. Botsford claims the letter did not ask GTS to terminate Silva. Tr. at 870. She testified that it was her impression that GTS "thought they had work. They had contracts elsewhere. So, I assumed that he would be transferred some place else, but that really wasn't my concern, either." Id. Botsford also denied that the fact Silva had raised safety concerns entered her mind when writing the letter. "I think when–it might have been something that I thought of when–when Ms. Gallegos [the Sandia attorney] mentioned something about whistle-blower, but that was not why I was taking this action." Tr. at 871.

Botsford knew Silva had raised safety concerns with the DOE, and she also knew he "had a tendency not to report safety concerns on the day that he observed them." Botsford attributed this to Silva's "comfort level. He preferred to do it after the fact." Tr. at 901. Botsford also acknowledged that Forrester told her Silva would not do work if he observed something he felt was unsafe. Tr. at 904; Exhibit 5 to IG Report.(5) Botsford also heard, from Forrester and others, "everyone was concerned that if they did anything, they would be reported for some minor indiscretion in a day or two by Mr. Silva." Tr. at 901.

When Forrester received Sandia's memo ordering Silva off the contract, he faxed it to Seibel. She and Diane Leviski, GTS's Vice President for Human Resources, made a search to see if GTS had any jobs available for him on any of its other contracts. No other work was available for Silva, and GTS corporate managers Neely and Prince agreed they had no other choice but to lay him off. Since Sandia had requested Silva's removal from their contract, and GTS had nothing else available, they decided to give "lack of work" as the reason for the layoff. Tr. at 526-535. The layoff letter was then faxed to Forrester.(6)

Based on the foregoing discussion, I find that GTS has failed to prove by clear and convincing evidence that it would have laid off Silva for his "harassment" of Vanessa Gasery, even if he had not engaged in conduct protected under Part 708. The evidence shows that Forrester was unhappy with Silva's attitude toward safety, and that he engineered the original sexual harassment allegations against Silva, even though Forrester's own investigation showed there was no reasonable basis for the allegations. Although GTS introduced extensive evidence showing that it took no retaliatory action against other employees who reported safety concerns through contractor chain of command, only Silva reported safety concerns directly to DOE, and only Silva was subjected to retaliation. GTS's entire defense is defeated by its failure to end the conflict between Silva and Gasery simply by telling them both that Gasery never filed a sexual harassment complaint against Silva, and its failure to explain why it subjected Silva (and Vanessa Gasery) to such callous treatment. GTS has not convinced me that its "harassment" allegation against Silva was not a mere pretext for getting rid of him. In the end, GTS's actions pushed both Silva and Gasery over the edge. By August 5, 1997, they both were gone from GTS.

With respect to Sandia, I find that the firm has met its burden of proving by clear and convincing evidence that it would have ordered Silva off the GTS RMWMF subcontract, even if he had not engaged in protected conduct. It is a close call, but Sandia convinced me that Botsford acted in reliance on the information she received from Forrester. Botsford worked ten miles away, and she was not intimately familiar with the day-to-day interactions among the workers at the RMWMF. Forrester, not Botsford, was the animating force who launched the series of events that led to Silva's dismissal. However, I am troubled by Botsford's testimony about her statement recounting her interaction with Sandia's lawyer who asked her whether Silva was a whistleblower. Botsford declaimed any and all knowledge of the law on whistleblower protection. Ignorance of the law is not a defense, and Botsford's conduct at that critical juncture in this case borders on the negligent, even if it was not retaliation. Assuming Botsford's statements are truthful, Sandia should take steps to remedy the situation by giving Botsford and the rest of its own employees and its subcontractor workforce training in the law on whistleblower protection. The Sandia lawyer who advised Botsford on the Silva matter should have explained the applicable Federal statutes and regulations to her, including Part 708, and insisted that Botsford look into the situation to make sure any retaliation issues were resolved before ordering Silva off the contract. Nevertheless, I am persuaded that even if she had made a reasonable effort to look further into the allegations against Silva, Botsford would not have been able to discover that Forrester's characterization of Silva's alleged

harassment of Gasery was not true. Sandia has therefore convinced me that it would have taken the same action against Silva in the absence of his protected conduct.

F. Weston's Failure to Hire Silva

In addition to the allegations in the original complaint, the IG Report also found that when Weston was preparing to take over the RMWMF subcontract from GTS, Jeff Jarry of Sandia influenced the new Weston project manager, Miles Smith, to stop Weston from hiring Silva, in retaliation for protected disclosures Silva made before being laid off by GTS. The IG Report also attributed a comment to Smith, that after questioning several of his then-current employees about Silva, and learning that Silva would raise safety concerns with the DOE instead of working with the contractor staff to resolve them, Smith told the investigator "I wouldn't want anyone on my team like that." IG Report at 24. Based on the hearing testimony of Jarry, Doug Perry and Smith, I am convinced the IG investigator misinterpreted the facts, and that there is no basis for these findings in the IG Report.

Silva submitted a resume to Weston for a job as a Radiological Control Technician before Weston took over the RMWMF subcontract from GTS in March 1998. According to Silva, his friend Doug Perry, who worked for Weston, called him on March 9, 1998, and said that Smith showed Silva's resume to Jarry, and Jarry "put the kibosh on your resume." Tr. at 97; IG Report at 23. At the hearing, Perry initially denied having said that Jarry told Smith not to hire Silva. Tr. at 286. However, Perry asked to be recalled to the witness stand the next day because after reflecting on the events of March 1998, he thought it was possible that he might have told Silva something about Jarry telling Smith not to hire Silva. Tr. at 636-637. When asked what the reason might have been for making the statement, Perry testified that if he did say something to Silva, "it was . . . as a friend to try to cheer him up, I guess." Tr. at 638. Perry conceded that no one ever told him that Jarry had told Smith not to hire Silva, and he had never witnessed any such interchange between Jarry and Smith. Tr. at 637. The IG investigator relied on Silva's recollection of the phone call from Perry, but he never interviewed Perry. I believed Perry's hearing testimony, especially in view of his willingness to come back to correct his possibly erroneous recollection of a telephone message he may have left for Silva.

Jarry also denied that he ever told Smith not to hire Silva for the RMWMF contract. Tr. at 914. The only time Silva's name ever came up between Jarry and Smith was when Smith was reviewing resumes for a different contract, after the RMWMF staffing was complete. Tr. at 925. On that occasion, Smith showed Jarry Silva's resume, and asked if he knew Silva. According to Jarry, he said "Yeah, he used to work at the site," and handed the resume back to Smith. Tr. at 913-914.

Moreover, Smith testified that Weston never would have hired Silva under any circumstances because Silva lacked the minimum qualification and level of experience which Smith had established for the job. Tr. at 954. Smith culled Silva's resume from a pile of resumes he had received in response to an ad for a technician job on the RMWMF contract because Silva did not have the requisite Radiological Control Technician certification or an equivalent certification. Tr. at 940. Smith also denied that Jarry had ever told him not to hire Silva, and denied having any knowledge at the time that Silva had made safety complaints to the DOE. Tr. at 941.

Finally, Smith explained that the statement attributed to him in the IG Report was taken out of context, and gave the wrong impression. According to Smith, after the interview was completed, the investigator asked him a hypothetical question about whether he would hire someone like Silva. Smith testified that the investigator told him during the course of the interview that Silva had safety issues, whistleblower complaints, and alluded "to other issues that I in all honesty took to be sexual harassment." Tr. at 965. Smith says that his answer was "if these things are true . . . particularly the sexual harassment . . . I wouldn't want somebody like that on my team." Tr. at 966. Smith maintained that he did not have any personal knowledge of whether any of those issues were true, he was not represented by counsel during the interview, and that he really had no capacity to be able to answer that hypothetical. Id.

Based on the foregoing discussion, I find that Sandia and Weston have met their burden of proving by clear and convincing evidence that they took no actions in retaliation against Silva for his protected conduct, and that Weston would not have hired him in any event.

IV. Remedy

Since I have found that (1) Silva has met his burden under § 708.29 of proving by a preponderance of the evidence that he engaged in protected conduct, (2) Silva's conduct was a contributing factor to acts of retaliation against him by GTS, and (3) GTS failed to meet its burden of proving by clear and convincing evidence that it would have taken the same actions against Silva even if he had not engaged in protected conduct, I will order appropriate relief. 10 CFR § 708.36. Having found that Silva's layoff effective August 18, 1997 was the result of retaliation by GTS, I will order GTS to treat Silva as if he were reinstated from August 18, 1997 through the end of the GTS contract in March 1998, and to give Silva back pay for that period, including salary and all lost benefits (and interest on that amount), less any money that Silva earned from other employment during that period. Since the evidence shows that Silva would not have been hired by Weston, he is not eligible for reinstatement, and the back pay will terminate on the date the contract ended. I will also order GTS to pay Silva his reasonable legal expenses, including attorney fees, and the costs of bringing this action.

Although there is some evidence of Silva's earnings after he was laid off by GTS, that evidence is incomplete. I will direct Silva's attorney to submit a report showing the amount of Silva's monthly earnings after the layoff, the amount of back pay and benefits claimed for each month in the period noted above, including the proper termination date for the GTS RMWMF contract, and the amount of attorney fees and costs claimed, including the basis and justification for those legal expenses. *See* *Sorri*, 23 DOE at 89,016-89,021 (back pay and interest); *Ronald A. Sorri*, 24 DOE ¶ 87,508 (1994) (supplemental order on costs and attorney fees). This report should be submitted no later than 30 days after Silva's attorney receives this decision, and a copy shall be served on GTS's attorney. GTS will have 10 days after receiving the report to submit its comments, if any. I will then issue a supplemental order setting forth the amount of back pay and lost benefits (including interest), costs, and legal expenses awarded to Silva. I also encourage the parties to enter into settlement negotiations to resolve all issues related to remedies and any other issues remaining in this case.

It Is Therefore Ordered That:

(1) The complaint for relief under 10 C.F.R. Part 708 submitted by Luis P. Silva, OHA Case No. VWA-0039, is hereby granted with respect to GTS Duratek, as set forth in paragraphs (2), (3) and (4) below. The complaint for relief against Sandia Corporation and Roy F. Weston, Inc. is denied.

(2) Silva's attorney shall submit a detailed report as described in the remedy section of this decision, showing the amount of Silva's back pay and lost benefits claimed for the period noted above, including the proper termination date for the GTS RMWMF contract, the amount of Silva's earnings from other sources during that period, and the amount of attorney fees and costs claimed, including the basis and justification for those legal expenses. The report shall be due 30 days after receipt of this decision, and shall be served on the attorney for GTS.

(3) GTS shall be permitted to submit its comments, if any, on the report described in paragraph (2) above. The comments shall be due 10 days after receipt of the report.

(4) This is an initial agency decision, which shall become the final decision of the Department of Energy granting the complaint in part unless, within 15 days of the issuance of a Supplemental Order with regard to remedy in this case, a notice of appeal is filed with the Office of Hearings and Appeals Director, requesting review of the initial agency decision.

Thomas O. Mann

Hearing Officer

Office of Hearings and Appeals

Date: February 25, 2000

(1) Westinghouse owned SEG before it was sold to GTS Duratek in March 1997.

(2) A Final Rule, which made a few minor changes from the interim version, was published on February 9, 2000. 65 FR 6314 (effective March 10, 2000). A technical correction was published on February 24, 2000. 65 FR 9201. Since the Final Rule is not yet effective, it has not played any role in this case.

(3) Silva raised additional safety concerns with DOE after he was laid off by GTS. Hearing Transcript (Tr.) at 172.

(4) Gasery's EEO claim against GTS was settled. Silva's counsel requested a copy of the settlement agreement during discovery to see if it paid Gasery a large sum of money in exchange for her agreement to testify against Silva in this proceeding. GTS's counsel claimed the document was confidential and privileged. After an *in camera* inspection of the document, I ruled that its terms were confidential and the document was therefore privileged. While I did not order production of the document, I informed Silva's counsel that the dollar amount of the settlement seemed appropriate, and that the agreement contained no mention whatsoever of Silva or this case.

(5) Silva's rebuttal testimony about the so-called "light bulb incident" Forrester related to Botsford as an example of Silva's refusal to work in unsafe conditions is further evidence of how Forrester distorted the facts in order to undermine Silva's reputation with Botsford. Tr. 980-982.

(6) After the letter had been sent, Jim Snoddy, the GTS Field Service Safety Officer, brought up the fact that Silva had raised safety concerns, but by that time, according to Seibel, it was too late to consider the implications because the decision had already been made. Tr. at 536-538.

Case No. VWA-0040

December 13, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Rosie L. Beckham

Date of Filing: April 27, 1999

Case Number: VWA-0040

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

I. Background

A. The DOE's Contractor Employee Protection Program

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

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

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

B. Factual Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Procedural History

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

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

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

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

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

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

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

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

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

II. The Hearing

A. The Exhibits

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

B. The Complainant's Beliefs Concerning the Three Procurements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Analysis

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

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

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

protected under Part 708.

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

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

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

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

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

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

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

IV. Conclusion

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

It Is Therefore Ordered That:

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

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

Janet N. Freimuth

Hearing Officer

Office of Hearings and Appeals

Date: December 13, 1999

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

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

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

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

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

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

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

Case No. VWA-0041

July 11, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Lucy B. Smith

Date of Filing: May 5, 1999

Case Number: VWA-0041

This Decision involves a whistleblower complaint filed by Lucy B. Smith (Smith) under the Department of Energy's (DOE) Contractor Employee Protection Program. From September 1973 to March 1997, Smith was employed as a chemist at the DOE's Savannah River Site (SRS) by various contractors, the most recent of which was Westinghouse Savannah River Company (WSRC). At the time of her termination, Smith worked at WSRC's Waste Management Laboratory. Smith alleges that in retaliation for making a number of health and safety disclosures WSRC terminated her pursuant to a January 1997 Reduction-in-Force (1/97 Rif) and subsequently failed to rehire her.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor- operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

B. Procedural History

On March 26, 1997, Smith filed a complaint with the DOE's Office of Inspector General (IG). After making a preliminary determination that the complaint fell within the jurisdiction of Part 708, IG then conducted an investigation into Smith's allegations and issued a report on April 13, 1999 entitled "Report of Inquiry and Recommendations" (Report). The Report concluded that Smith had made several protected disclosures but that WSRC had shown by clear and convincing evidence that Smith would have been selected for termination absent the protected disclosures. On May 12, 1999, the Director of the Office of Hearings and Appeals (OHA) appointed me to be the hearing officer in this matter. 10 C.F.R. § 708.23(a), 708.25(a). Subsequently, the hearing was held at Aiken, South Carolina on April 11-12, 2000.

II. Analysis

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Smith establishes that a protected disclosure, participation, or refusal was a factor contributing to her termination or failure to be rehired, WSRC must convince me that it would have taken the action even if Smith had not engaged in any activity protected under Part 708. Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 at 89,034-35 (1994).

After considering the record established in the investigation by the Assistant Inspector General and OHA, the parties' submissions, and the testimony presented at the hearing, for the reasons stated below I have concluded that Smith has met her burden of proving by a preponderance of the evidence that she made protected disclosures concerning health or safety that contributed to her termination. I also find, however, that she has not met her burden to prove by a preponderance of the evidence that her disclosures were a contributing factor in her failure to be rehired. Lastly, I find that Smith's complaint must be denied because I conclude that WSRC has shown by clear and convincing evidence that it would have terminated Smith absent her disclosures.(1)

A. Whether Smith Engaged in Activities Protected Under 10 C.F.R. § 708.5 (2)

The Part 708 regulations prohibit discrimination by a DOE contractor "against any employee because the employee (or any person acting pursuant to a request of the employee) has,"

> (1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences--
>
> > (i) A violation of any law, rule, or regulation;
> >
> > (ii) A substantial and specific danger to employees or public health or safety; or
> >
> > (iii) Fraud, mismanagement, gross waste of funds, or abuse of authority;
>
> (2) Participated in a Congressional proceeding or in a proceeding conducted pursuant to this part; or
>
> (3) Refused to participate in an activity, policy, or practice when--
>
> > (i) Such participation--
> >
> > (A) Constitutes a violation of a Federal health or safety law; or
> >
> > (B) Causes the employee to have a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation, and the

> activity, policy, or practice causing the employee's apprehension of such injury--
>
> (1) Is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety resulting from participation in the activity, policy, or practice; and
>
> (2) The employee is not required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities;
>
> (ii) The employee, before refusing to participate in an activity, policy, or practice has sought from the contractor and has been unable to obtain a correction of the violation or dangerous activity, policy, or practice; and
>
> (iii) The employee, within 30 days following such refusal, discloses to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy, or practice, and explaining why he has refused to participate in the activity.

57 Fed. Reg. at 7542 (1992) (10 C.F.R. § 708.5(a)). Smith alleges that she engaged in a number of activities that are potentially protected under Part 708.

1. August 5, 1996 Report regarding unsanitary and unsafe conditions in the ladies restroom

First, Smith asserts that she conducted examinations of two ladies' restrooms (in Buildings 241-28H and 704-56H) that had been used to obtain bioassay samples and that had been previously identified as having potential problems. On August 5, 1996, Smith wrote a memorandum (August Memorandum) to her supervisor, Woodie Melton, pointing out that a required bioassay form was not available at the bioassay station in one of the restrooms and noting that both restrooms were unsanitary in some respects. See Report Exhibit B-1. Section 708.5(a) requires that for a disclosure to be protected the disclosure must reference a "substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5(a)(1)(ii). Smith's August Memorandum primarily discusses the unsanitary nature of the restrooms. While one can say that the August Memorandum discusses public health in a general sense, it does not describe a substantial and specific danger to employees or the public. Thus, I do not find Smith's August 5, 1996 memorandum to be protected under Part 708.

2. October 10, 1996 Disclosure concerning proper monitoring procedures in the ITP facility

Second, Smith claims that sometime in October 1996, she noticed that the red alert lights were flashing in the Stripper Building, and signs were posted indicating an asphyxiation hazard in that building. See Report Exhibit A-2 at 2-3. (3) The Personnel Contamination Monitor (PCM) that Smith used was located in a building next to the Stripper Building. Id. at 3; Report Exhibit A-4 at 2. Consequently, Smith used a PCM in another building and tried to ask Melton if the building containing the PCM had a ventilation system separate from the Stripper Building. Smith states that she was trying to determine if it was safe for her and other employees to use the PCM when the asphyxiation hazard alarm was activated in the Stripper Building. Report Exhibit A-2 at 3; Report Exhibit A-4 at 2. She did not find Melton but asked Annie Bell (Bell), her shift supervisor, who did not know the answer. Report Exhibit A-2 at 3. Smith contacted Wyatt Clark (Clark), the assistant manager of the ITP facility, who also did not know but stated he would try to find out. Id.; Report Exhibit A-4 at 2. WSRC has stipulated that the October 10, 1996 communication is a protected disclosure under Part 708. See February 9, 2000 Letter from Michael L. Wamsted, Senior Counsel, Westinghouse Savannah River Company, to Richard A. Cronin, Jr., Hearing Officer.

3. December 9, 1996 Disclosure regarding Rad-Con Permits

In a monthly report dated December 9, 1996, Smith identified three potential safety concerns regarding the Rad-Con Permits posted outside a laboratory in the Stripper Building. See Hearing Exhibit W-13 (December 9, 1996 memorandum from Smith to Melton); Report Exhibit A-2 at 3; Report Exhibit B-3 at 1-2. A Rad-Con Permit is a notice posted outside radiological areas that employees are required to read prior to entering in order to ensure that they are aware of hazards and safety requirements. Report Exhibit A-2 at 3. Smith reported that one Rad-Con Permit incorrectly read: "Possible Hazards: Benzene and/or Oxygen Deficiency." Because the laboratory had a ventilation system separate from the Stripper Building, there might not be a possibility of oxygen deficiency. If oxygen deficiency were possible, Smith recommended that monitors and warning lights should be installed. Smith reported that another Rad-Con Permit should have stated that personnel are required to wear safety glasses. Smith also suggested that the probe holders for the beta/gamma radiation detection should be redesigned to allow the probe to be held sideways to prevent contaminate particles from falling on the probe while an employee's hands were monitored. See Report Exhibit A-2 at 3; Hearing Exhibit W-13. Melton recalls that Smith's report referenced two issues concerning the Rad-Con Permit: the "Benzene and/or Oxygen Deficiency" notice and the desirability of including a requirement that safety glasses be worn. Report Exhibit A-3 at 4-5. WSRC has also stipulated that Smith's December 9, 1996 Report is a protected disclosure under Part 708. See February 9, 2000 Letter from Michael L. Wamsted, Senior Counsel, Westinghouse Savannah River Company, to Richard A. Cronin, Jr., Hearing Officer.

4. Smith's submission of January 13, 1997 "One" Form

Smith believed that no action had been taken by her supervisor regarding the safety items in her December 9, 1996 Report. Report Exhibit A-2 at 3-4; Report Exhibit A-4 at 2. Consequently, she contacted Clark to ask about how to proceed. Report Exhibit A-4 at 2. Clark suggested that Smith file a "One" Form describing the items discussed in her December 9 Report. Report Exhibit A-4 at 2; Report Exhibit B-3. According to Clark, he assured Smith that SRS senior management would look into her concerns. Smith then completed and submitted a "One" Form detailing the concerns she had listed in her December 9 Report. Report Exhibit A-4 at 2; Report Exhibit B-3.

The "One" Form details Smith's concerns about inaccurate labeling of hazards for lack of oxygen and benzene contamination, her opinion that personnel should be required to wear safety glasses for protection, and Smith's concerns over accurate measurement of individual beta and gamma radiation exposure to individuals. I find that the concerns listed in the "One" Form reference a substantial and specific danger to employee safety and thus are protected by Part 708.

B. Whether Smith's Protected Disclosures Were a Factor Contributing to Her Termination or Failure to be Rehired (4)

In prior decisions of the Office of Hearings and Appeals, we have established that,

> A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54 (1997) (quoting Ronald Sorri, 23 DOE ¶ 87,503 at 89,010 (1993)); Ronny J. Escamilla, 26 DOE ¶ 87,508 at 89,046 (1996).

Of the protected disclosures at issue in this case, WSRC has stipulated that Smith's October 10 and December 9 disclosures were a contributing factor with regard to the WSRC decision to terminate her. See February 9, 2000 Letter from Michael L. Wamsted, Senior Counsel, Westinghouse Savannah River Company, to Richard A. Cronin, Jr., Hearing Officer. With regard to the remaining protected disclosure,

there is clear temporal proximity between Smith's submission of the "One" Form on January 13, 1997 and her receipt of notice of termination on January 20, 1997. However, there is a lack of evidence in the record as to whether the WSRC managers responsible for Smith's selection for termination had actual or constructive knowledge of the "One" Form when they made their decision. Of the four WSRC managers who made the decision in a January 10, 1997 meeting to select Smith for termination, two, Melton and Pat Padezanin (Padezanin), denied at the hearing ever having any knowledge of the existence of the "One" Form until after Smith's termination. Hearing Transcript (Tr.) at 103, 183. The other two managers were not asked if they had any knowledge of the "One" Form. Given the lack of affirmative evidence on the issue of whether any of the responsible WSRC management officials had actual or constructive knowledge of the form, I conclude that Smith has failed to prove by a preponderance of the evidence that her submission of a "One" Form was a contributing factor in her selection for termination.

Despite finding that several of Smith's disclosures were contributing factors in her termination from WSRC, I find that none of Smith's disclosures was a contributing factor in her not being rehired by WSRC. Smith claims that, in retaliation for her protected disclosures, three chemists were hired instead of her during the period August 1998 through March 1999 despite Smith's superior qualifications. See September 1, 1999 Letter from Herbert Louthian, Counsel for Smith, to Michael Wamsted, Counsel for WSRC; see WSRC Reply to Complainant's Response to Motion to Dismiss, Case No. VWZ-0020, Exhibits 1 and 2 (November 15, 1999) (Response).

Employees terminated at WSRC become eligible for possible rehire after the employee files a WSRC form ("Statement of Interest in Maintaining Section 3161 Employment Eligibility"). Upon receipt of this form an employee's name and qualifications are placed in a database which is used to contact former employees for job opportunities. (5) See Tr. at 512-13; Hearing Exhibit S-4; WSRC Motion to Dismiss, Case No. VWZ-0020, Exhibit A (October 14, 1999) (Motion). The form states that the employee is required to complete a new form within one year of signing the current form. Hearing Exhibit W-21 at 1. After Smith received notice that she was going to be terminated, she filed this form with WSRC on January 20, 1997. Hearing Exhibit W-21. The record indicates that Smith was removed from the rehiring database in March 17, 1998 because she had failed to complete another form within the required one year period. Tr. at 503-04; Hearing Exhibit W-22 at 2. Smith did file another form on March 29, 1999. Hearing Exhibit W-22 at 3; Tr. at 503-04.

Each of the three of the chemists who were hired allegedly instead of Smith were hired when Smith was out of the rehiring database.(6) See Tr. at 501-04, 510-13. In addition, there is no evidence that Smith ever applied for any of these positions. As a result, WSRC was unaware that Smith might have been interested in the positions, and the review of the database performed by the WSRC personnel department did not show Smith as a candidate for these positions. See Tr. at 504, 512; Hearing Exhibit W-17. Based on these facts, I find that Smith's disclosures could not have been a contributing factor in her non-selection for these positions.

Smith's argues that WSRC should be held responsible for her failure to file the form within the required one year period. Smith claims that she did not know she had been removed from the database, and that she did not notice until 1999 the portion of the form that required former employees to submit new forms within one year. See November 29, 1999 Letter from Herbert Louthian, Counsel for Smith, to Richard A. Cronin, Jr., Hearing Officer (Case No. VWZ-0020). Smith further asserts that after her termination, she talked with Carol McClure (McClure) of the WSRC Personnel Department, who informed her that all retired employees, such as Smith, would be removed from the rehiring database. Id.; Tr. at 437-38. Smith testified that after her termination she received a copy of the WSRC Section 3161 Preference in Hiring Policy and claims that it states that retirees such as herself are not eligible for preference in hiring. Tr. at 438. Following her conversation with McClure, Smith also asserts that she attempted to talk to Lamar Cherry (Cherry) of the WSRC personnel department to ask that she be considered for reinstatement, but never received a return call from him. Tr. at 437, 468; November 29, 1999 Letter from Herbert Louthian, Counsel for Smith, to Richard A. Cronin, Jr., Hearing Officer. Smith also suggests that the portion of the preference-in-hiring form which sets forth the requirement that the form be resubmitted within a year was

in “fine print” and that it contributed to her failure to realize that she was under a duty to complete another form within one year. Tr. at 437. In sum, Smith cites a number of reasons purportedly excusing her failure to submit the required preference-in-hiring database form.

None of the reasons Smith gives attempting to excuse her failure to complete the preference-in-hiring form leads me to conclude that WSRC sought to retaliate against Smith by contriving to have her not complete the required form to remain in the preference-in-hiring database. Two of the reasons suggested by Smith, the type size of the language of the form and the allegedly confusing language in the WSRC preference in hiring policy by themselves, if true, only indicate that inadvertent confusion or error rather than WSRC scheming produced Smith’s absence in the database. Further, I find Smith’s testimony as to her conversations with McClure and Cherry to be vague and not very compelling. McClure’s testimony regarding her conversation with Smith was much more detailed. McClure specifically testified that Smith did not ask her about preference in hiring. Tr. at 484. In sum, I found McClure’s testimony on this issue to be more convincing than Smith’s.

Cherry testified that he did receive a letter from Smith in June of 1997 asking that various other skills be entered to the database. Tr. at 507; Hearing Exhibit W-24. However, Cherry did not remember calling Smith concerning the letter and stated that he would not normally have initiated a telephone conversation in response to such a letter. Tr. at 508. Cherry did remember calling Smith on October 1, 1997 and leaving a message on her answering machine concerning a temporary position at the facility. Tr. at 509; Hearing Exhibit W-24 at 2. Smith, in turn, left a message on Cherry’s voice mail later that day indicating that she was not interested in that position. Tr. at 509; Hearing Exhibit W-24 at 2. WSRC has also submitted Smith’s notes concerning these interactions. See Hearing Exhibit W-24. Given the evidence before me, I can not find that Smith, in fact, verbally informed McClure that she wanted to be in the preference-in-hiring database. In sum, Smith has not convinced me her protected disclosures were a contributing factor to her failure to be in included in the preference-in-hiring database during the period the three chemists were hired. Consequently, I find that Smith’s failure to be rehired for the three chemist positions was not attributable to any of her protected disclosures. The only act of retaliation on which Smith has prevailed in demonstrating a connection to any of her protected disclosures is her selection to be terminated in the 1/97 Rif.

C. Whether WSRC Would Have Selected Smith for Termination in the 1/97 Rif Absent Her Protected Disclosures

For the reasons set forth below, I find there is clear and convincing evidence that WSRC would have selected Smith for termination in the 1/97 Rif absent the protected disclosures described in section II.A above. This conclusion is based on compelling evidence indicating that of the four chemists considered for termination, Smith was least able to support the laboratory functions of the two WSRC labs.

To facilitate this analysis, I will describe Smith’s workplace organization and position duties. When Smith accepted a position at WSRC’s Waste Management Laboratory (WML), WML was organized into two separate laboratory organizations, the Effluent Treatment Facility laboratory (ETF lab) and the In-Tank Precipitation Facility laboratory (ITP lab). See Hearing Exhibit W-11. Each laboratory was staffed with one supervisor, two chemists and several technicians. Id. At the time of the 1/97 Rif, Smith and Kenneth Cheeks were the chemists working at the ITP lab. Thelma Hill-Foster and Linda Youmans were chemists at the ETF lab. Tr. at 78.

At the ITP lab, Smith was a process control chemist who supported the lab technicians by performing such tasks as establishing methods of chemical analysis, writing procedures and training technicians. Tr. at 34-35. The job also entailed troubleshooting and repairing problems with the analytical equipment as well as being able to operate the equipment and perform various chemical analyses. Tr. at 35, 303, 331. Before coming to WML, Smith had spent a number of years in the quality assurance field and in risk assessment positions, none of which could be considered the equivalent of a process control chemist position. Hearing Exhibit W-15; Tr. at 259-60, 171-72, 271, 352; Report Exhibit B-6.

Early in January 1997, Melton, the Manager of the WML, was notified that WSRC's High Level Waste Division (HLWD) planned to reduce WML's personnel staffing because of a $100,000 cut in funding for each lab. Tr. at 74-77; Hearing Exhibits W-11, W-16 (December 30, 1996 Baseline Change Proposal outlining budget reduction and WSRC divisions to be affected). On January 8, 1997, Melton was asked about the impact on WML if 4 positions were eliminated (including chemists) from the labs. Hearing Exhibit W-11 at 1. The next day, Melton was informed that Dave Amermine, the HLWD deputy manager, decided to reduce WML by four positions - three lab technicians and one chemist. Id. at 2. On January 10, 1997, Melton, along with his supervisor, Jim Collins (Collins), Padezanin and Lori Chandler (Chandler), Melton's previous supervisor in December 1996, met to discuss the issue of personnel cuts. Tr. at 76-77, 178, 195. After some discussion with other officials, Padezanin concluded that only two employees, a chemist and a laboratory technician, would have to be laid off from WML to meet the budget constraints. Tr. at 175-76. This reduction contemplated three chemists providing support to both labs rather than two chemists supporting each lab. See Hearing Exhibit W-11 (Proposal A); Tr. at 237, 325-27.

In the January 10 meeting, the four participants then discussed what criteria would be used to select the one chemist for termination. Tr. at 178. The criteria selected were: performance, current contribution to the organization, potential contribution to the organization and time in position.Id. The four managers then considered Smith, Cheeks, Hill-Foster and Youmans. Based on the criteria, they selected Smith for termination. Tr. at 179-80. Padezanin then instructed Melton to prepare a Certification of Non-Discrimination (CND Form) form which outlined the reasons for Smith's selection. Tr. at 177; Hearing Exhibit W-12. The CND Form stated that Smith's "overall contributions to effectiveness of the WML" were not as significant as those of the other three chemists. Hearing Exhibit W-12 at 2. Further, Cheeks, Hill-Foster and Youmans each had more time in position than Smith. Id.

Melton testified that Smith ranked last among the chemists in each of the four criteria. Tr. at 88-92. With regard to performance, Melton testified that Smith's performance had been subpar compared to the other three chemists and Melton had met with Smith several times about her inability to complete her assigned tasks. Tr. at 88. As to current and potential ability to contribute to the organization, Melton testified that Smith ranked last because she had not completed the training on the operation of all the equipment in the ITP lab, and did not understand the analytical processes as well as Cheeks. Tr. at 88-90. Melton testified that Smith had the least amount of time as a process control chemist. Tr. at 92. (7) Padezanin and Chandler's testimony concurred in the evaluation of Smith in comparison with the other three chemists. Tr. at 179-80, 277-280. (8)

WSRC has presented evidence documenting Melton's dissatisfaction with Smith for her alleged failures to complete assigned tasks, for withholding information from Melton and for making unauthorized sample swaps with another organization. See, e.g., Hearing Exhibits W-3, W-5, W-7, W-8; Tr. at 42-43, 45-46, 50-51. Smith maintains that these alleged performance problems were related to her safety disclosures. See, e.g., Tr. at 395-96, 408-12, 448; Hearing Exhibit W-8 (January 7, 1997 memo from Smith to Melton). However, there is no evidence in the record concerning what, if any, similar problems that the other three chemists, Cheeks, Youmans or Hill-Foster, may have experienced. In the absence of such other evidence regarding the other chemists, Smith's alleged performance problems are not sufficient to convince me that WSRC would have selected her for termination in the 1/97 Rif in the absence of her protected disclosures. Nevertheless, there is other evidence in the record, as discussed below, which leads me to find that Smith, because of her incomplete training, was not as capable of fully supporting the ITP or ETF labs as were the other three chemists. In light of this evidence, I find that WSRC has presented clear and convincing evidence that it would have selected Smith for inclusion in the 1/97 Rif regardless of her protected disclosures.

Cheeks had supported the ITP lab for several months by himself before Smith was brought over to the ITP lab. Tr. at 92, 301. As of January 1977, Cheeks had over two years of experience supporting the ITP lab. Tr. at 300. Youmans and Hill-Foster were currently supporting the ETF lab and had approximately two years of experience in those positions. Tr. at 277. In contrast, Smith had not completed all of the training

for the ITP lab nor had performed training for the ETF lab. (9) Given Youmans' and Hill-Foster's current experience, their ability to support the ETF lab would have been demonstrably superior to Smith's. Cheeks has significant experience supporting the ITP lab and had even been tasked with training Smith for the ITP lab. His knowledge of the ITP analytical procedures was clearly greater than Smith's. In sum, I find that WSRC has shown clear and convincing evidence that it would have selected Smith for termination in the 1/97 Rif regardless of Smith protected disclosures.

Smith's arguments to the contrary are unavailing. Smith has submitted evidence that both Cheeks' and Hill-Foster' college degrees were in biology and not in chemistry. Tr. at 129-30, 200, 250, 463. However, regardless of their formal education, the fact remains that Cheeks and Hill-Foster both were currently supporting the ITP and ETF labs respectively. As described earlier, Smith had not completed training on all the instrument systems in the ITP lab and had no training in the systems in the ETF lab. Smith asserts that she could do the job in the ETF lab since she had previously used most of the instruments. Tr. at 473-74. However, the record indicates that Smith's previous positions had not required much work as a hands-on chemist. (10) I am convinced that Smith could not have immediately stepped in and adequately supported the ETF lab in a manner equal or superior to Youmans or Hill-Foster. Further, Cheeks testified that the equipment in the ETF lab was different from the ITP lab equipment, and that it would take someone a longer training period to be able to support the ETF lab. Tr. at 325. Smith also points out that her current performance rating of 3 - performance meets or exceeds all management expectations for position and grade -was the same as Hill-Foster's. Tr. at 123, 287. That is not a determinative factor. The key issue is the then-current state of Smith's training in the ITP lab and her ability versus the other three chemists' ability to support the ETF and ITP labs.

Smith also alleges that the reason that she did not complete her training was that Melton gave Cheeks priorities that conflicted with Smith's training. Tr. at 473. However, there is simply no evidence that Melton or anyone else at WSRC deliberately tried to delay Smith's training because of her disclosures. Smith's training program schedule had been developed by Cheeks who then obtained Melton's approval. Tr. at 303. However, Cheeks also testified that because of other lab duties, he could not devote his time exclusively to training.(11) Tr. at 321. Cheeks testified that in his opinion that a person should be able to complete the training in seven to eight months.(12) Tr. at 322. By the time of the decision to include Smith in the 1/97 Rif, Smith had been at the ITP lab for approximately nine months. (13) Smith herself has testified that because the training had to be scheduled, some delay was to be expected. Tr. at 390. Given the relatively short time Smith had been at the ITP lab, the amount of time needed to complete the training and the lack of any other evidence to the contrary, I conclude that Smith's failure to complete the training was not due to any type of retaliation by WSRC.

Lastly, Smith has presented three co-worker witnesses attesting to her commitment to safety and her job performance. See Tr. at 351-61, 361-374, 374-382. I have no reason to doubt their testimony. However, while their testimony supports Smith's concern about safety issues, two of the witnesses' observations dealt with Smith's performance in Quality Assessment. Tr. at 353-54, 363-64. The third witness, Tom Shaw, testified that he had worked with Smith while she supervised three lab technicians at the Heavy Water Lab. Tr. at 375. Shaw testified that Smith had experience as a hands- on chemist and was a hard worker and aggressive. Tr. at 376. However, the last time Shaw could have observed Smith was in 1986, the year of his retirement. Tr. at 374. Shaw's observations are too remote in time to be very relevant on the issue of Smith's competence as a process support chemist at the time of the 1/97 Rif. Consequently, this testimony does not change my conclusion that because of Smith's failure to complete her ITP training or to receive any training for the ETF lab, WSRC has shown by clear and convincing evidence that it would have selected her for termination regardless of her protected disclosures.

IV. Conclusion

As set forth above, I have found that Smith has met her burden of proof of establishing by a preponderance of the evidence that she made several disclosures protected under 10 C.F.R. Part 708. I also

have determined that several of Smith's disclosures were contributing factors in her termination. However, I also find that WSRC has proven by clear and convincing evidence that it would have terminated Smith absent her disclosures. Accordingly, I conclude that Smith has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program regulations for which relief is warranted.

It Is Therefore Ordered That:

(1) The request for relief filed by Lucy B. Smith under 10 C.F.R. Part 708 is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after receipt of the decision.

Richard A. Cronin, Jr.

Staff Attorney

Office of Hearings and Appeals

Date: July 11, 2000

(1)The Report references another retaliatory act Smith allegedly experienced - that Smith received negative comments on her October 1996 Individual Assessment and Development Plan (IADP) for having raised various safety concerns. Report at 1-2. The Report goes on to find that Smith's claim of retaliation regarding her IADP was barred because she did not file a complaint concerning this incident within the 60 day deadline in the regulations. See 10 C.F.R. § 708.6(d); Report Exhibit A-1 (March 26, 1997 Complaint); Report Exhibit B-4 (October 23, 1996 IADP). At the hearing, Smith did not challenge this finding and I adopt IG's finding that Smith's claim of retaliation regarding the IADP is barred by the 60 day deadline set forth in 10 C.F.R. § 708.6(d). My review of Smith's original IG complaint does not indicate that Smith was complaining that she had received negative comments on her IADP but instead was complaining that her supervisor had made her remove specific language regarding a specific safety concern. See Report Exhibit A-2 at 2; April 11-12, 2000 Hearing Transcript (Tr.) at 397-400.

(2)This decision applies section 708.5 as it existed prior to the revisions of April 15, 1999. Linda D. Gass, 27 DOE ¶ 87,525 at 89,141 (1999) ("drafters of the revisions to Part 708 did not intend to apply the expansion in scope of 10 C.F.R. § 708.5 to cases pending on April 15, 1999").

(3)Smith's supervisor, Melton, identifies the date of this incident as October 10, 1996. See Report Exhibit A-3.

(4)WSRC made a Motion during the Hearing requesting that I dismiss the failure to rehire claims by Smith. Tr. at 448. WSRC cites Smith's testimony indicating that she was offered preference in hiring for several positions. See Tr. at 440-42. However, there is no evidence that Smith was offered preference in hiring regarding the three specific chemist positions (ultimately filled by John Anton, Jesse Leon Melton and Patrice Oakmon) at issue in this case. The mere fact that Smith was offered preference in hiring for some positions says nothing as to the issue of whether Smith's disclosures were a contributing factor in her failure to receive a preference in hiring for those three specific positions. For this reason and the reasons stated in my decision denying an earlier WSRC Motion to dismiss Smith's failure to rehire claims, I dismiss WSRC's motion. See Lucy B. Smith, 27 DOE ¶ _____, Case No. VWZ-0020 (February 3, 2000).

(5)WSRC established a database (preferential hiring database) containing the names of employees who had been terminated in the 1/97 Rif and who wished to be rehired if future job opportunities arose at WSRC. WSRC used the database to contact these employees so that they could be rehired for future job opportunities at WSRC. Whenever WSRC sought to hire non-WSRC personnel for a particular job

position, WSRC would be required to check the preferential hiring database to give a preference in hiring to the person most qualified in the preferential hiring database for the position. Tr. at 512-13; see Hearing Exhibit S-4 (WSRC Contractor Preference in Hiring Procedure). WSRC's preference in hiring procedures were prompted by Section 3161 of the National Defense Authorization Act of 1993 which mandated that, to the extent possible, eligible terminated employees at various defense nuclear facilities should receive preference in filling all prime and subcontractor vacancies. See Hearing Exhibit S-4. Consequently, this preference in hiring is also referred to as Section 3161 employment eligibility.

(6)WSRC management's request for the hiring of these chemist was dated April 20, 1998, within the period Smith was out of the hiring database. See Response Exhibit 1; Hearing Exhibits W-17, W-26.

(7)Smith had been employed at WSRC for approximately 23 years but her most recent experience prior to taking the position at WML was in areas other than process control chemistry. See supra.

(8)Collins testified that he didn't provide much input into the discussion since he had recently taken over for Chandler and that he did not know the ITP and ETF lab personnel as well as Melton, Padezarin and Chandler. Tr. at 245, 256. He did testify that, if choosing between Smith and Cheeks, he thought it was obvious that Smith would be the one to go given Cheeks' better performance. Tr. at 241.

(9)Because Smith had not had recent experience as a process control chemist, Melton and Cheeks decided that to best prepare Smith for her duties they would have Smith complete laboratory technician On-the-Job training packages (OTJ) involving the use and operation of the major instrument systems used in the ITP lab. Tr. at 35, 303-04. Cheeks developed a schedule for the OTJ training packages. Tr. at 303. The OTJ training packages included "hands on" instruction that required Cheeks or another lab technician to perform some of the training to demonstrate skills using various instruments and Smith would have to demonstrate competency on the instrument. Tr. at 37, 303. By December 1996, Smith had completed approximately 70-80 percent of this required training. Tr. at 38, 306. Smith had not begun instruction on the filtrate assay system, which required extensive training. Tr. at 307, 320. This training had been scheduled last because of its complexity. Tr. at 307. Smith admits that as of the date of her termination in January 1997 she had not completed the training for the ITP lab. Tr. at 451. Further she concedes that as of that date she had not received any official training for the ETF lab. Tr. at 449, 474.

(10)Smith testified that in the summer of 1995 she participated in "Expedited Site Characterization" project in which "she was heavily involved in laboratory work in that area, being the project manager there." Tr. at 450. She went to say that "we had basic pH meters and things like that in trailers" and that "It was a 12 hour-a-day, 7-day-a-week job with laboratories." Id. This testimony does not lead me to believe that Smith's current laboratory skills were equal to the other three chemists at WML. Her testimony is vague as to the exact laboratory skills and instruments she actually used in the project.

(11)Cheeks testified that Smith was not very diligent about completing the training. Tr. at 305, 331, 337. Chandler also testified that Melton had contacted her sometime in July or August 1996 concerning his concerns with Smith's lack of focus on the training aspects of her job. Tr. at 263.

(12)Chandler testified that in her opinion eight months would have been sufficient for Smith to have completed her training. Tr. at 285.

(13)Melton testified that Smith's first three weeks at ITP were taken up with preliminary facility-specific training. Tr. at 36. Thus, Smith had approximately eight months at ITP in which to train on ITP OTJ training packages when she was notified of her inclusion in the 1/97 Rif.

May 22, 2002

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Janet K. Benson

Date of Filing: June 2, 1999

Case Number: VWA-0044

This Initial Agency Decision concerns a whistleblower complaint filed in 1994 by Janet K. Benson (the Complainant) against Lawrence Livermore National Laboratory (LLNL) and the Regents of the University of California (UC) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). At all times relevant to this proceeding, UC managed and operated LLNL for the United States government under a contract between the Regents of UC and the DOE. It is the Complainant's contention that during her employment with LLNL she engaged in activity protected by Part 708 and, as a consequence, suffered repeated reprisals by LLNL. (1) As discussed below, I have determined that the Complainant is not entitled to relief.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated (GOCO) facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708.(2) The regulations offer employees of DOE contractors and subcontractors a mechanism for resolution of whistleblower complaints by providing for independent fact-finding, a hearing before a Hearing Officer from the Office of Hearings and Appeals (OHA), and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

The substantive regulations pertinent to this case provide, in relevant part, that a DOE contractor may not discharge or otherwise discriminate against an employee because that employee has disclosed to a DOE official or to a DOE contractor information that the employee in good faith believes evidences a violation of law, rule, or regulation; a substantial and specific danger to public health or safety; or fraud, mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a)(1)(i)-(iii). In addition, the regulations prohibit DOE contractors from engaging in acts of reprisal against an employee who, among other things, refuses to participate in an activity, policy, or practice when such participation causes the employee to have a reasonable apprehension of serious injury or serious impairment of health and safety resulting from participation in the activity, policy, or practice. 10 C.F.R. § 708.5(a)(3)(i)(B)(1).

The original Part 708 regulations were not self-executing. Rather, the DOE stated that the provisions of

Part 708 would become operative after they were incorporated into each prime contract that the DOE maintained to operate its GOCO facilities. In the case of health and safety disclosures, incorporation into the GOCO contracts was immediate, since all existing contracts required contractors to adhere to health and safety requirements that the DOE promulgated. *See Richard W. Gallegos* (Case No. VWA-0004), 26 DOE ¶ 87,502 (1996). However, in situations where the disclosures concerned waste, fraud and abuse, the Part 708 protections became operative only after the Part was incorporated by reference into the specific contract. *Id.*

B. Overview

This case began almost eight years ago when the Complainant first raised concerns to the DOE about possible waste, fraud, and abuse by LLNL. As detailed more fully below, the record in this case is quite substantial. The DOE's Inspector General's Office conducted a three-year investigation into the Complainant's allegations after which it issued a comprehensive report and several hundred pages of exhibits. Then, a Hearing Officer from the DOE's Office of Hearings and Appeals conducted a five-day administrative hearing in the matter during which 14 witnesses testified, some of them several times. The hearing testimony is memorialized in a 1400-page transcript (hereinafter cited as "Tr."). During the pendency of the case, each party also filed six lengthy legal briefs and hundreds of pages of documentary evidence.

C. Procedural Chronology

On May 3, 1994, the Complainant filed a Part 708 complaint with the DOE's Office of Contractor Employee Protection (OCEP). At the time of the filing, however, the contract between UC and DOE that governed UC's management and operation of LLNL did not contain a clause requiring UC to be subject to the Part 708 regulations. In July 1994, the Director of OCEP asked UC if it would voluntarily agree to be bound by the provisions of Part 708 with regard to the complaint filed by the Complainant. UC refused. Soon thereafter, OCEP dismissed the Complainant's complaint for lack of jurisdiction.

On September 23, 1994, the contract between UC and the DOE was modified to provide that UC would comply with the provisions of Part 708 prospectively. Shortly thereafter in October 1994, the Complainant refiled her Part 708 complaint, reiterating the charges set forth in the complaint that OCEP had dismissed, and alleging new acts of reprisal by LLNL against her.

Almost one year later, in September 1995, the Complainant wrote a letter to the Secretary of Energy in which she restated the charges set forth in her pending Part 708 complaint and requested the Secretary's assistance in shielding her from future reprisals.

In July 1996 the OCEP Director informed the parties that her office would commence an investigation into the issues raised by the Complainant in her Part 708 complaint. OCEP conducted an exhaustive investigation, interviewing 24 witnesses and gathering documentary evidence over a three-year period. On April 13, 1999, the DOE's Office of Inspector General (3) issued a 40-page Report of Inquiry and Recommendations (Report of Inquiry or ROI) with 74 exhibits appended. The Report of Inquiry found that the Complainant had failed to meet her evidentiary burden and, for this reason, determined that her request for relief pursuant to Part 708 should be denied.

On June 2, 1999, the Complainant requested that the Office of Hearings and Appeals convene a hearing to adjudicate the issues that she had raised in her Part 708 Complaint. (4) On June 7, 1999, the OHA Director appointed Linda Lazarus as Hearing Officer in this matter. LLNL filed a pre- hearing statement in the case on January 7, 2000; the Complainant tendered her pre-hearing statement on January 11, 2000. Hearing Officer Lazarus conducted a three-day administrative hearing in the case on February 1, 2, and 3, 2000. She subsequently requested that the parties submit briefs. Accordingly, LLNL and the Complainant submitted their post-hearing briefs on April 12, 2000 and April 17, 2000, respectively. LLNL also tendered

a Reply Brief on May 15, 2000, and the Complainant submitted a Reply Brief on May 16, 2000.

On July 11, 2000, Hearing Officer Lazarus requested that the parties file briefs addressing three additional issues not previously raised in the case. Accordingly, the Complainant tendered a Supplemental Brief on August 1, 2000, and LLNL filed a Supplemental Brief on August 7, 2000. LLNL then filed a Reply Brief on August 11, 2000, and the Complainant filed a Reply Brief on August 14, 2000.

On November 1, 2000, Hearing Officer Lazarus issued an Interlocutory Order concerning two Motions to Dismiss that LLNL had incorporated into its briefs. In the Order, Hearing Officer Lazarus granted LLNL's Motion to Dismiss insofar as it related to the Complainant's claims of reprisal that allegedly occurred prior to the date LLNL had agreed contractually to comply with Part 708. However, Hearing Officer Lazarus denied other portions of LLNL's Motions to Dismiss. Specifically, she found that the Complainant was not barred by the doctrine of collateral estoppel from litigating her claims under Part 708 even though the United States District Court for the Northern District of California had entered summary judgment in favor of LLNL on claims based on the same facts filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the ADA. She also held that OHA has jurisdiction to decide whether LLNL terminated the Complainant on March 22, 1996 in retaliation for making disclosures before September 23, 1994. Finally, Hearing Officer Lazarus determined that OHA has jurisdiction to consider the Complainant's claims that she made protected disclosures about an LLNL building and engaged in protected activity under 10 C.F.R. § 708.5(a)(3) when she refused to enter that building. Because the Complainant never specifically articulated her allegations under 10 C.F.R. § 708.5(a)(3) until the administrative hearing in 2000, Hearing Officer Lazarus decided that LLNL should be allowed to present a defense to the claims being raised under 10 C.F.R. § 708.5(a)(3).

On November 24, 2000, LLNL filed an appeal to the OHA Director of that portion of the November 1, 2000 Interlocutory Order that held that the Complainant could proceed with a new claim of reprisal based on her refusal to enter the building in question, Building 415. The OHA Director rejected the appeal on December 11, 2000, finding that the legal arguments advanced by LLNL in its appeal must wait for review on their merits until the Hearing Officer issues her Initial Agency Decision in the case.

Subsequently, the parties conducted discovery on the issue of damages. On March 21 and 22, 2001, Hearing Officer Lazarus conducted a supplemental hearing in the case, after which she requested the submission of post-hearing briefs. Hearing Officer Lazarus received the transcripts of the two-day supplemental hearing on April 18 and 26, 2001. LLNL and the Complainant both filed legal briefs on May 18, 2001. (5)

On February 12, 2002, the OHA Director transferred this case from Hearing Officer Lazarus to me and delegated me the responsibility for rendering an Initial Agency Decision in the matter.

II. Legal Standards Governing This Case

The regulations set forth at 10 C.F.R. Part 708 specifically describe the respective burdens imposed on the Complainant and the contractor with regard to their allegations and defenses and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

A. The Complainant's Burden

It is the burden of the Complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate as described in § 708.5, and that such act was a contributing factor to one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient

to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); McCormick on Evidence § 339 at 439 (4th Ed. 1992).

B. The Contractor's Burden

If the Complainant meets her burden as set forth above, the burden then shifts to LLNL to prove by "clear and convincing" evidence that the company would have taken the same actions about which the Complainant is complaining even if she had not made protected disclosures and/or engaged in protected activity. 10 C.F.R. § 708.29. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n.3.

III. Findings of Fact

The Complainant began her employment with LLNL as a Senior Human Resources Specialist in August 1986. Tr. at 69. According to the Complainant, her tenure at LLNL from 1987 to 1989 was a difficult one. During this time, she filed several internal grievances against her employer alleging race discrimination and contesting substandard performance evaluations. After the Complainant experienced problems working with one supervisor in 1987, LLNL transferred her to work for a second supervisor. *Id.* at 204. The second supervisor subsequently complained about the Complainant's performance, including her failure to meet deadlines. LLNL Ex. 3.

In September 1989, the Complainant was reassigned, at her own request, to work in LLNL's Education Program Division (Education Program) under the supervision of Dr. Manuel Perry, a biochemist who served as the Director of the Education Program. At the time, the Education Program was housed in a school building leased from the school district, commonly referred to as "The Almond School." During the first three to five months of the Complainant's tenure in the Education Program, Dr. Perry reports that the Complainant's performance was satisfactory. Tr. at 373. Because Dr. Perry had observed during that time that the Complainant's data analysis skills were weak, he sought other opportunities for her. *Id.* To this end, Dr. Perry appointed the Complainant as project coordinator for PROJECT STAR, a DOE summer education program that placed minority students from community colleges in research laboratories at LLNL. Ex. 10 to ROI. According to Dr. Perry, during the first year of PROJECT STAR, DOE personnel and a community college professor voiced their respective concerns regarding their difficulty working with the Complainant and her poor communication skills. Tr. at 374. Dr. Perry testified that during the second year of PROJECT STAR, tension mounted between the Complainant and the community college professor. *Id.* at 376. Dr. Perry finally resorted to counseling the Complainant about her poor performance on the project. *Id.* at 376. Ultimately, the community college decided not to continue its relationship with LLNL but found another laboratory in which to place its students. *Id.* at 379.

With the loss of PROJECT STAR to another laboratory, the Complainant had little work to do. In late 1990 or early 1991, Dr. Perry approved a proposal submitted by the Complainant to seek funding from the National Science Foundation (NSF) for a three-year program that would provide minority undergraduate students with the opportunity to work with laboratory researchers during the summer (The National Physics Education Program Collaboration (NPEPC)). Ex. 10 to the ROI at 2. Because restrictions prevented NSF from funding another federally funded, non-educational institution, such as LLNL, LLNL sought a collaborator. To this end, LLNL entered into a partnership with California State University, Hayward (CSU-H), an educational institution not affiliated with the federal government. Under the terms of the partnership, CSU-H was the recipient of NSF funds for NPEPC, and was responsible for the fiscal and logistical requirements of the program such as management, bookkeeping, student transportation, and dormitory facilities. For its part, LLNL handled all student activities, including the assignment of projects and mentors for each student, and the development of a system to evaluate the students. The Complainant

and Dr. Charlie Harper, the head of the Physics Department at CSU-H, were designated as the co-project investigators (co-PIs) for NPEPC.

In 1991, NSF approved funding for the first two years of NPEPC. Funding for the third year was conditional upon performance, and subject to review by NSF. Midway through the first year of the NPEPC, problems arose between the Complainant and Dr. Harper. Dr. Perry describes these problems between the co-PIs as "communication issues." Tr. at 303.

Sometime in early 1993, Dr. Harper suggested that the third year of NPEPC be modified to include a college course on laboratory research techniques because, in his opinion, some of the program participants lacked the requisite background or experience in scientific research or laboratory safety. *Id.* at 384. The Complainant objected to the modification, opining that the class was remedial in nature and demeaning to the students. The Complainant complained to Dr. Perry that Dr. Harper was trying "to steal her program." *Id.* at 388. She further claimed that she believed at the time that the suggested modification violated LLNL and NSF rules and regulations, and would result in the fraudulent diversion of funds to CSU-H. The Complainant first memorialized several concerns in this regard in a February 1993 memorandum to Dr. Perry. Ex. 58 to ROI. In her memorandum, the Complainant objected to the proposed changes on the basis that the changes would trigger the cancellation of NPEPC. *Id.* She further advised that she would not participate in something "unethical." *Id.*

As time went on, Dr. Perry stated that the problems between the Complainant and Dr. Harper escalated to such a level that the institutional relationship between LLNL and CSU-H was being jeopardized. Dr. Harper told Dr. Perry that he "can't work with that woman," referring to the Complainant. Ex. 10 to ROI at 4. Eventually Dr. Harper informed Dr. Perry that he would withdraw from participating further in NPEPC. Dr. Perry decided that he did not want to risk losing Dr. Harper as the program entered its third year, so he removed the Complainant as co-PI. Dr. Perry testified that the decision to remove the Complainant from NPEPC was his alone. He testified further that he based his decision solely on the fact that he perceived that NPEPC was at risk, in light of Dr. Harper's comments that he could not work with the Complainant and "wanted out of the program.(6)

On July 27, 1993, Perry replaced the Complainant with Eileen Vergino, a geophysicist. Tr. at 627. (7) LLNL had hired Ms. Vergino in early July 1993 as the Deputy Manager of LLNL's Education Program. According to Ms. Vergino, she did not know at the time of her appointment as co-PI that the Complainant had accused Dr. Perry of fraud, waste and abuse with regard to NPEPC. Tr. at 630. All Dr. Perry told her was that she was replacing the Complainant because of the "animus" between Dr. Harper and the Complainant.

In the early fall of 1993, Ms. Vergino essentially took over the Education Program because Dr. Perry announced his intention to retire. Perry retired in November 1993 at which time Vergino became Director of the Education Program.

In September 1993, the Complainant wrote to Ms. Vergino complaining about her removal as co-PI of NPEPC. Ex. 63 to the ROI. (8) Ms. Vergino responded by enumerating all the responsibilities the Complainant still had for many of the day-to-day administration of NPEPC. Ex. 64 to the ROI.

During the latter part of 1993, performance issues with the Complainant began to surface. According to Ms. Vergino, the Complainant was not completing her work on time, was only sporadically attending staff meetings, and was frequently not in the office during regular working hours. Tr. at 638-642.

On December 21, 1993, the Complainant wrote to the NSF complaining that she had been unjustly removed as co-PI from NPEPC, and that LLNL and CSU-H had engaged in fraud and mishandled federal funds. Ex. 1 to the ROI. NSF responded by informing the Complainant that her removal was proper and within CSU-H's discretion. Ex. 1 to ROI at 34. The Complainant continued to write to NSF in January and February 1994 requesting an investigation into her allegations. Finally, in February 1994, the Inspector General's (IG) Office at the NSF wrote to the Complainant reaffirming that her removal from NPEPC was

proper. With regard to the Complainant's allegations of fraud and mishandling of federal funds, the NSF's IG reminded the Complainant that she had told the IG that she "had no knowledge, or reason to believe, that actual fraud or criminal diversion of grant funds had occurred." *Id.* at 41-42.

In February 1994, Vergino asked the Complainant and another employee to account for time because of complaints that both were not working regular hours. Lab Ex. 11. In response, the Complainant could only account for 11 hours in a two month work period covering 160 hours. Tr. at 649; Lab Ex. 49.

In April 1994, Vergino hired Linda Dibble as Senior Administrator to handle all personnel issues in the Education Program. Tr. at 645-46. According to Dibble, within two weeks after she was hired, Vergino sought her assistance in dealing with personnel issues relating to the Complainant. *Id.* at 433. Specifically, Vergino was concerned that the Complainant seemed unproductive, appeared to be coming in late and leaving early, and was not participating in staff meetings. *Id.* at 650-51.

The next month, May 1994, the Complainant filed her first Part 708 complaint. As noted in Section I.C. above, the DOE subsequently dismissed the complaint for lack of jurisdiction.

From May through September 1994, personnel issues regarding the Complainant mounted. First, LLNL asked the Complainant to account for absenteeism not reflected on her time cards. Then, the Complainant's supervisor, Glenn Young, expressed dismay that the Complainant had failed to complete an assignment of finding mentors for students participating in NPEPC. In August 1994, Mr. Young provided a marginal performance appraisal for the Complainant. Mr. Young opined in a memorandum that the Complainant should be placed under a highly structured work environment with detailed tasking, reporting requirements, and frequent meetings. LLNL Ex. 23.

In the meantime, LLNL learned that the lease on The Almond School, the building that housed the Education Program, would be expiring. Accordingly, LLNL needed to find a new location for the program. A building outside LLNL's security perimeter, Building 415, was selected. However, the building required some remodeling and repainting.

In mid-September 1994, the Complainant was assigned to a new full-time position working for Mr. Young in LLNL's Apprentice Program, a program designed as an affirmative action outreach effort to train underprivileged youth, women, and minorities in the trades. Mr. Young provided a detailed job description to the Complainant. LLNL Ex. 26. Even though the responsibilities assigned to the Complainant appeared to be complementary to her previous experience in recruiting and placing students, and in affirmative action compliance, the Complainant objected to the assignment on the grounds that she was unfamiliar with these areas. Tr. at 268.

In late September 1994, the Complainant received her performance appraisal for the period 1993- 1994. It was "less than satisfactory." The appraisal cited the Complainant's failure to take initiative and the constant follow-up required by those who gave her assignments as reasons for her rating. Ex. 30 to the ROI.

On October 12, 1994, the Complainant filed her second Part 708 Complaint. In her complaint, she reiterated the allegations set forth in her first complaint and added that she has been demoted, reassigned and given unsatisfactory performance appraisals in retaliation for challenging the modification of the grant funding the NPEPC. Ex. 5 to the ROI.

By December 1994, plans were underway to move the Education Program to Building 415. Linda Dibble advised the staff in early December that carpet was being installed in the building on December 5, 1994, after which time the staff could visit their new offices. LLNL Ex. 28. The Complainant immediately responded that she would wait until after the holidays to see her office so that the fumes from the new carpeting could dissipate. *Id.* In late January 1995, the Complainant purportedly told Ms. Dibble that she had "life-threatening" reactions to "new carpet, paint fumes, windows painted close[d], and . . . asbestos." Complainant's Ex. 24. In early February, the Complainant spoke with Mr. Young about her concern

regarding the new carpet smell. *Id.* at 25. That concern was relayed from Mr. Young through his supervisor to Ms. Dibble. *Id.*

Immediately thereafter, Linda Dibble requested that LLNL's Hazards Control Department conduct an industrial hygiene "walk through" of Building 415 for guidance on addressing this issue. The Hazards Control Department instructed Dibble to "bake" the building by (1) closing all the windows and turning up the heat for two days and then (2) opening up all the windows to allow the new carpet smell to dissipate into the air. Dibble followed these instructions. Next, Dibble asked LLNL's Health Services Department (HSD) to evaluate the Complainant for purposes of determining whether she could occupy Building 415.

On February 14, 1995, Dr. Scott from LLNL's HSD evaluated the Complainant and determined that she could not work for the short term in Building 415 for health reasons. LLNL Ex. 42. Dr. Scott instructed the Complainant to consult her allergist, Dr. Kaufman, and bring a note from him stating how long it would be before she could enter Building 415. Also, Dr. Scott requested that Dr. Kaufman provide a list of chemicals to which the Complainant is sensitive so LLNL could test for them. Id. Dr. Scott also asked that the Complainant report to HSD on February 21, 1995, prior to going to work.

On February 21, 1995, the Education Program moved to Building 415. The Complainant was slated to occupy a second floor office in Building 415 with her colleagues from the Education Program. On that same day, the Complainant reported to HSD as previously instructed with a note from Dr. Kaufman stating that the Complainant was suffering from acute respiratory problems aggravated by "formaldehyde out-gassing" from the carpeting in her present area. LLNL Ex. 42.(9) At the time Dr. Kaufman wrote the note, he was unaware that the Complainant had never entered Building 415 where the new carpeting had been laid, and that no formaldehyde was used in the manufacture of the carpet installed in the offices in Building 415. *See* Tr. at 1169; LLNL Ex. 60. Dr. Scott then consulted with Ed Ochi of LLNL's Industrial Hazards Division about the Complainant's situation. Scott and Ochi decided that the Complainant could try to work in the first floor of Building 415 in an area that has not been repainted or carpeted. Dibble set up a temporary office for the Complainant on the first floor of Building 415 in furtherance of HSD's suggestion. Based on the information contained in Dr. Kaufman's February 16, 1995 letter, Dr. Scott issued a restriction barring the Complainant from working on the second floor only of Building 415 from February 21 to 28, 1995. Dr. Scott noted on the work restriction that he would re-evaluate the Complainant's situation in one week.

After the Complainant had presented Dr. Kaufman's note to Dr. Scott on February 21, 1995, she then proceeded to the first floor office in Building 415. After one hour, she felt ill and went home. She did not report to work the following two days, either. When the Complainant returned to work on February 24, she was placed in a Trailer 3156 which was located down the street from Building 415.

On February 28, 1995, the Complainant returned to HSD and told Dr. Scott that the previous day she had felt ill after entering another LLNL building, Building 571. Without explanation, Dr. Scott decided that the Complainant should not enter Building 415 for another four weeks but did not restrict the Complainant from entering Building 571. Accordingly, Dr. Scott executed a Work Assignment Restriction prohibiting the Complainant from entering Building 415 only from February 28 to March 28, 1995. LLNL Ex. 39.

On March 28, 1995, the Complainant met with Dr. Scott and reported that she was receiving weekly treatment from her allergist, and was experiencing no problems working in Trailer 3156. Dr. Scott extended the Complainant's work restriction in Building 415 another month, until April 25, 1995.

During this time, the Complainant was working with Glenn Young on the Apprentice Program. On March 31, 1995, Young requested that the Complainant relocate to Building 571 and assume the daily operation of the Apprentice Program. Complainant's Ex. 32. Three days later, the Complainant returned to HSD and asked Dr. Scott to revise her work restriction to include Building 571. Even though the Complainant had not entered Building 571 since she claimed that she felt ill when she entered that building in February 1995, Dr. Scott revised the Work Assignment Restriction to cover both Buildings 415 and 571.

Toward the end of March 1995, Dibble asked LLNL's Hazards Control department to perform an industrial hygiene evaluation of, among other places, Buildings 415 and 571. The evaluation concluded that any airborne contaminants present in the two buildings were at levels acceptable to the published workplace guidelines and standards. Ex. 60 to the ROI.

On April 12, 1995, Dr. Peter Lichty, M.D., examined the Complainant to determine whether her current health complaints arose out of, or were caused or aggravated by, her employment with LLNL. Dr. Lichty memorialized his findings in a Report dated April 28, 1995. In his Report, Dr. Lichty first pointed out that there are important environmental factors in the Complainant's home such as water damage, and mold and mushroom growth in the carpet of her home that might be contributing to the Complainant's symptoms. Dr. Lichty opined that the Complainant is beset with strong underlying anxiety and would benefit from anxiety medications on an empirical basis to see if anxiety is magnifying her underlying allergic symptoms.

On April 25, 1995, the Complainant visited HSD and expressed concern that if she were to enter Buildings 415 or 571, she would have problems. Dr. Scott agreed to extend her restrictions for another month until May 25, 1995 based only on the Complainant's articulated fears.

In the meantime, the Complainant's performance issues remained a concern for her supervisors. In April 1995, Mr. Young expressed dismay that the Complainant was having trouble completing her assignments without a step-by-step description of every task. LLNL Ex. 32. In May 1995, Young told Barry Goldman, the Team Leader of Student Programs in the Education Program, that the working relationship between the Complainant and him was not going well. Young told Goldman that part of the difficulty working with the Complainant was that she worked in an isolated location and he could not determine what she was doing. Because of performance issues, the Complainant was removed from Young's supervision and the Apprentice Program.(10) Tr. at 731. Goldman decided to assume direct supervision over the Complainant in May 1995.

On May 18, 1995, Goldman requested that the Complainant enter Building 415 for ten minutes to participate in a departmental review program. Complainant Ex. 40. Goldman claimed he could not move the location of the meeting because it involved the entire Education Program. Id. The Complainant refused to enter the building. Tr. at 786-87.

On May 25, 1995, the Complainant returned to HSD and told Dr. Scott that she was still reluctant to work in Buildings 415 and 571. This time, however, Dr. Scott decided that the Complainant could work in these two buildings "as tolerated" from May 25 to June 23, 1995. Scott stated that he had been in both buildings recently and knew from personal experience that the new carpet odor was gradually disappearing. He agreed to evaluate the Complainant again in one month.

The Complainant's work restrictions expired on June 23, 1995. At this point, Goldman determined that he could no longer accommodate the Complainant's desire to remain alone in the trailer because of programmatic needs. Goldman informed the Complainant that she must report to her office in Building 415 on June 26, 1995, unless she provided medical documentation outlining the restrictions LLNL needed to accommodate. LLNL Ex. 32. On June 26, 1995, the Complainant submitted a hand-written note from her allergist stating that the Complainant tests intolerant to petroleum products, paints, lacquers, varnishes, formaldehyde products, organic dusts, glue products, and fibers of many kinds, especially organic in origin. Ex. 33 to the ROI.

At this point, Goldman decided that LLNL could no longer accommodate the Complainant because of the universal nature of her restrictions. Goldman decided that LLNL would be liable if it required her to work in any environment at the facility. In addition, he decided he could no longer tolerate a situation in which an employee could not enter the building where all the program work was done. Tr. at 790-91. Goldman consulted with Vergino and a decision was made to send the Complainant home. *Id.* at 805-06. After she called LLNL's Affirmative Action Program and the DOE, the Complainant was subsequently placed on

paid administrative leave pending a review of her medical status and disability eligibility *Id.* at 679.

On August 3, 1995, the Complainant's allergist sent a medical note to LLNL stating that the Complainant "could function in an ordinary environment, [but] needed to avoid "a chamber heavily laden with vapors of formaldehyde coming from large yardage of new and never before aerated carpet." Ex. 38 to the ROI. The note further stated that all that the Complainant required was "clear, ambient room air." Id.

The Complainant returned to LLNL on August 9, 1995 after a six week hiatus. She and Dr. Scott went to Building 415 but the Complainant fell ill and went home. As a consequence, Dr. Scott issued another work restriction prohibiting the Complainant from working in Building 415 until September 17, 1995.

Following this incident, Gloria Kwei, the Manager of LLNL's Human Resources Department wrote the Complainant a letter informing her that she would be on unpaid leave until September 17. In the letter, Kwei stated that Trailer 3156 was no longer available to the Education Program and that the program no longer had assignments that could be performed outside Building 415. Kwei further stated that if the Complainant's work restrictions became permanent, a job search of other parts of LLNL would be performed and if no alternative assignment was found, the Complainant would be medically separated from her employment. Ex. 37 to the ROI.

On September 10, 1995, the Complainant wrote to the Secretary of Energy complaining that in July 22, 1993 she was fraudulently and illegally removed from her position as the Project Director for an education project funded by NSF. The Complainant further stated that LLNL had demanded that she work in an environment containing chemicals and toxins to which she is allergic. Ex. 7 to the ROI.

On September 17, 1995 the Complainant's work restriction expired again and she again entered Building 415 with Dr. Scott. The Complainant complained of not feeling well and she went home. Dr. Scott issued another work restriction for Building 415 until November 6, 1995. Ex. 39 to the ROI.

On November 20, 1995, LLNL decided to obtain an outside medical evaluation as to the Complainant's ability to work. The Complainant was subsequently evaluated by Dr. Abba Terr, an allergy and immunology specialist. Dr. Terr issued a report on December 27, 1995. Tr. at 294, Ex. 40 to the ROI. Dr. Terr did not find any objective evidence of a medical condition, but concluded that based on the Complainant's subjective beliefs, there was no reason to believe she could enter Building 415 without becoming "subjectively ill." Id.

Sometime in January 1996, Dr. Richard Watts, Dr. Scott's successor, met with the Complainant to discuss her return to work. Exs. 41 and 48 to the ROI. During this meeting the Complainant agreed that she should be permanently restricted from working in Building 415. Accordingly, Dr. Watts issued a permanent restriction prohibiting the Complainant from working in Building 415 and 571. *Id.* At this point, LLNL prepared the paperwork to medically separate the Complainant in view of her inability to perform the essential assigned functions of her position. Ex. 44 to the ROI.

Before separating the Complainant, Gene Dent, LLNL's Rehabilitation Representative, tried to contact the Complainant via certified mail and telephone in order to discuss vocational rehabilitation. Records show that the Complainant received the certified mail letter and signed for the same. Ex. 47 to the ROI. The Complainant never responded to the letter. At the hearing, the Complainant explained that she never contacted Mr. Dent because she "didn't feel [she] needed to be rehabilitated." Tr. at 1383.

On February 22, 1996, Robert Perko of LLNL's Staff Relations sent the Complainant a "Notice of Medical Separation" via certified mail. Ex. 48 to the ROI. In his letter to the Complainant, Perko stated that the Complainant had five calendar days to respond either orally or in writing to LLNL if she believed the action was improper. The Complainant did not respond.

On March 22, 1996, LLNL sent a second certified letter to the Complainant advising her that she was being medically terminated effective March 22, 1996. The letter informed the Complainant that her

separation was due to her inability to perform the essential functions of her job because of her health. The letter also advised that she could appeal the separation if she believed LLNL's policies or procedures had been improperly applied. The Complainant did not appeal.

IV. Analysis

A. The Complainant's Disclosures Regarding the NPEPC

The Part 708 regulations state in pertinent part that "a DOE contractor . . . may not discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, intimidate, or otherwise discriminate against any employee because the employee . . has (1) [d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences - (i) [a] violation of any law, rule, or regulation; (ii) [a] substantial and specific danger to employees or public health or safety; or (iii) [f]raud, mismanagement, gross waste of funds, of abuse or authority." 10 C.F.R. § 708.5(a)(1)(i),(ii),(iii).

As an initial matter, the disclosures that the Complainant made only to the NSF do not qualify as protected disclosures because NSF is not an official of the DOE, a member of Congress, or a DOE contractor. The other disclosures that the Complainant made regarding the NPEPC are the following: the Complainant's oral statements to Dr. Perry between January and July 1993; the Complainant's statements contained in a Memorandum dated February 1993 to Dr. Perry; the Complainant's statements contained in her May 1994 Whistleblower Complaint; the Complainant's statements contained in her October 1994 Whistleblower Complaint; and the Complainant's statements contained in her letter to the Secretary of Energy in September 1995.

The evidence in the record indicates that beginning in February 1994 the Complainant did not have a good faith belief that LLNL had engaged in fraud, waste, and abuse with regard to the NPEPC. In the letter from the NSF Inspector General to the Complainant explaining why that agency declined to take any action against LLNL based on the Complainant's allegations, the Inspector General recounted that the Complainant had told the NSF "she had no knowledge, or reason to believe, that actual fraud or criminal diversion of grant funds had occurred" with respect to NPEPC. *See* Ex. 1 to the ROI at 41-42. Hence, in view of the Complainant's admission to the NSF in February 1994, any disclosure that she made subsequent to that time regarding alleged fraud, waste, and abuse by LLNL with regard to the NPEPC will be rejected as having been made in bad faith. In addition, the Complainant admitted that as early as August 1993, she had knowledge that NSF had approved her removal as co-PI so her contention that LLNL was somehow violating NSF's rules or regulations because LLNL removed her from her position without NSF's permission is devoid of merit.

Accordingly, I find that the Complainant's statements about LLNL's alleged fraud, mismanagement and violation of rules as set forth in her Part 708 Complainants filed in May and October 1994, and in her 1995 letter to the Secretary of Energy are not protected disclosures because they were not made in good faith.

With respect to the Complainant's oral statements to Dr. Perry between January 1993 and July 1993 as well as the statements contained in her February 1993 memorandum, however, I find that these statements were protected under Part 708. At the time the Complainant made these statements, she had no knowledge that LLNL intended to seek NSF's approval to effectuate the changes about which the complainant expressed concern or that NSF would approve all the changes LLNL would request to the NPEPC. Therefore, the record indicates that between January and July 1993, the Complainant had a good faith belief that LLNL was (1) violating NSF and its own rules; (2) engaging in fraudulent activity; and (3) mismanaging the NPEPC grant money.

Having found that some of the Complainant's disclosures regarding the NPEPC were protected under Part 708, I will next examine whether any of the protected disclosures were a contributing factor to any of the alleged reprisals at issue in this case.

B. Contributing Factor

A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54 (1997), quoting *Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993); *Ronny J. Escamilla*, 26 DOE ¶ 87,508 at 89,046 (1996). In addition, "temporal proximity" between a protected disclosure and an alleged act of reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). In the present case, the Complainant claims that a series of retaliatory actions occurred to her, culminating with her medical termination in March 1996. The alleged retaliatory actions are analyzed below.(11)

1. Whether the Complainant's disclosures regarding the NPEPC Were a Contributing Factor to LLNL's Decision to Reassign the Complainant on September 23, 1994 to LLNL's Apprentice Program

The Complainant claims that LLNL's assignment of her to the Apprentice Program on September 23, 1994 was a demotion even though LLNL did not change her job classification or reduce her salary. Tr. at 156. It is the Complainant's contention that LLNL reassigned her to the Apprentice Program in retaliation for the disclosures that she had previously made regarding the NPEPC.

According to the record, it was Eileen Vergino who made the decision to assign the Complainant to the Apprentice Program. Tr. at 653. Ms. Vergino explained that Glenn Young had approached her with a request for assistance with the Apprentice Program. *Id.* At the time, Ms. Vergino was trying to create a situation where the Complainant could succeed because it was clear from the Complainant's previous work assignments that she was not succeeding in the workplace. *Id.*

After carefully reviewing the entire record, I find that there is no evidence showing that Ms. Vergino had either actual or constructive knowledge that the Complainant had made disclosures that LLNL had committed fraud, waste or mismanagement with regard to the NPEPC. Ms. Vergino testified that when she assumed her job at LLNL in July 1993, she had no knowledge of the reason why the Complainant had been removed as co-PI of the NPEPC, other than the "animus" that existed between Dr. Harper and her. Tr. at 630-631.(12) Further, Ms. Vergino testified that she had no knowledge that the Complainant had filed a Part 708 complaint until July 1995 when a DOE employee mentioned that fact during a meeting. Tr. at 681-683. Ms. Dibble was also present at the same July 1995 meeting. Ms. Dibble corroborated Ms. Vergino's statement that Ms. Vergino had expressed surprise at the meeting upon learning that the Complainant had previously filed a whistleblower complaint. Ms. Dibble testified that she, too, only acquired knowledge about the Complainant's disclosures at that July 1995 meeting. Tr. at 556. Finally, I note that in the memorandum that the Complainant wrote to Ms. Vergino on September 17, 1993 informing Ms. Vergino that she had been removed as the co-PI of NPEPC "without being given a valid reason," the Complainant did not mention her belief that her removal as co-PI constituted fraud and mismanagement. *See* Complainant's Ex. 63.

In the end, I find that the Complainant has not established the first element in a prima facie case that her disclosures regarding the NPEPC were a contributing factor to her reassignment to the Apprentice Programs.

Even assuming arguendo that the Complainant had met her evidentiary burden, I would have concluded that LLNL had provided clear and convincing evidence that it would have reassigned the Complainant in the absence of any of her disclosures. It is clear from the record that the Complainant was having difficulty meeting performance expectations and providing deliverables in her previous assignments. In an August 1994 performance appraisal, Glenn Young set forth concrete suggestions for assisting the Complainant in improving her performance, including his opinion that the Complainant should be placed under a highly structured work environment with detailing tasking, reporting requirements, and frequent meetings. LLNL Ex. 23. The memorandum that Mr. Young provided to the Complainant on September 13, 1994, appears to address the concerns he had articulated in the August 1994 performance appraisal. In addition to setting forth the Complainant's new job description, the September 13, 1994 memorandum also states:

> that "we will establish weekly communications and meet as often as necessary to maximize our effort and to maintain focus. Your timely input is important to my task of submitting a weekly status report of the LLNL Apprentice Program activities and projects. The overall goal for this assignment is to maximize the education effort in the LLNL Education Program, LLNL Apprenticeship Programs, and the AADPs to address duplication and to share resources. Attending staff meeting[s] of all three programs may be necessary."

LLNL Ex. 26. The clear and convincing evidence is that the Complainant's reassignment to the Apprentice Program was designed to provide her with an opportunity to utilize her extensive experience in recruiting and placing students and overseeing affirmative action compliance in a structured environment. It is also clear from the evidence that the Complainant was required to attend staff meetings and provide weekly reports on her assignments in an effort to improve the her performance, not as any retaliation for past disclosures she had made regarding the NPEPC.

2. Whether the Complainant's disclosures regarding the NPEPC Were a Contributing Factor to LLNL's Decision to the "less than satisfactory" Performance Appraisal that the Complainant Received on September 27, 1994

On or about September 27, 1994, the Complainant was given a performance appraisal for the prior year. Ex. 30 to the ROI. The appraisal indicated that the Complainant's performance was "less than satisfactory." *Id.* According to the Complainant, the performance appraisal was unfounded. Ex. 5 to ROI. The Complainant alleges that her performance rating was given in retaliation for her having made the disclosures about the NPEPC.

There is no evidence in the record to support the Complainant's contention. For the reasons set forth in Section IV.A. above, I find that the supervisor who completed the appraisal, Ms. Vergino, had neither constructive nor actual knowledge of the Complainant's previous disclosures regarding the NPEPC.(13) For this reason, I find that the Complainant has not met the first element of her prima facie case to establish the requisite nexus between any of her protected disclosures and the "less than satisfactory" performance appraisal that she received.

In addition, even had the Complainant met her burden of proving that her disclosures were a contributing factor to her September 1994 performance rating, the evidence in the record is overwhelming that LLNL would have provided the same rating to the Complainant in the absence of her disclosures. Between September 17, 1993, and May 3, 1994, Ms. Vergino and the Complainant exchanged seven memoranda regarding the Complainant's job description, poor job performance, and time and attendance problems. See Exs. 63, 64, 65, 66, 67, 68, and 69 to ROI. In addition, the performance appraisal in question highlighted the Complainant's performance problems, including her consistent failure to meet deadlines, her failure to complete assigned tasks, and the constant follow-up required after delegating assignments to her. By way of example, Vergino related that the Complainant had failed to complete her assignment of recruiting teachers for the Summer Research Internship Program. In this regard, the record shows that the

Complainant was informed at a meeting held on June 8, 1994, that she was to recruit mentors for the program in question. *See* LLNL Ex. 22. Notes from that meeting indicate that the Complainant resisted performing this assignment, insisting instead that it was not "her program" and that her supervisor should be responsible for completing the task. *Id.* The performance appraisal also reflects that the Complainant missed a deadline for the Internship Program for "Mission Valley ROP." In the appraisal, Vergino also recounts that the Complainant refused to cooperate, failed to demonstrate the initiative required by her position, and resisted suggestions to attend staff meetings until assigned to do so. At the hearing, Ms. Vergino reaffirmed under oath the litany of problems she had memorialized in the 1994 performance appraisal. Tr. at 637-651.

Moreover, the record reflects that Vergino and Dibble met with the Complainant on July 8, 1994 to discuss her work assignments and performance expectations. LLNL Ex. 18. During the meeting, the Complainant was informed that she was required to report about her work activities on a routine basis. The Complainant responded, "I will only report what I feel like." *Id.*

Finally, Glenn Young provided appraisal input into the Complainant's performance on August 18, 1994. LLNL Ex. 23. Young stated in a memorandum that he assumed that someone with the Complainant's length of service would be able to represent LLNL on most any assignment in the private sector. According to Young, the Complainant failed to meet LLNL's expectations in this regard. Young explained that the Complainant had previously made representations without checking first with an LLNL partner, thereby causing confusion and anxiety in the community organization and the LLNL partner. Young also related that the Complainant failed to inform him of her activities, as requested. In addition, Young stated that the Complainant tendered a summary of a particular program three months late. Moreover, according to Young, the summary in question did not even cover the topics the Complaint was to address. *Id.*

Given the facts outlined above, LLNL appears to have been completely justified in giving the Complainant a less-than-satisfactory performance evaluation in September 1994. In fact, in view of the circumstances, the Complainant should not have been surprised at her rating for the period in question.

3. Whether the Complainant's Disclosures about the NPEPC or her filing of a Part 708 Complaint in October 1994 Were Contributing Factors in LLNL's Decision to Assign the Complainant to Work in Building 415

In a letter September 10, 1995, the Complainant informed the Secretary of Energy that she was a whistleblower because she had made disclosures about the NPEPC. Ex. 7 to ROI. The Complainant alleged further that LLNL was demanding that she work in "environments containing chemicals and toxins to which she is allergic." The Complainant explained that she was being required to work in Building 415 "even if it kills me . . ." *Id.*

The facts surrounding the Education Program's move to Building 415 and LLNL's multiple attempts to accommodate the Complainant are set forth in detail in the Findings of Facts above. As previously stated, the entire Education Program moved to Building 415 in February 1995 because the lease on The Almond School expired. Upon learning of the Complainant's possible sensitivity to new carpet, LLNL consulted its Hazards Control Department which conducted an industrial hygiene walk- through of Building 415. Upon the recommendation of the Hazards Control Department, Linda Dibble "baked" Building 415 for two days to eradicate the new carpet odor. Beginning in February 1995, LLNL's HSD monitored the Complainant, issuing several temporary work restrictions preventing her from entering Building 415 and later Building 571. LLNL also placed the Complainant in a temporary alternate worksite, Trailer 3156, beginning in February 1995. In May 1995, LLNL's Hazards Control Department conducted an industrial hygiene evaluation of Building 415 and concluded that any airborne contaminants present in the building were at acceptable levels.

The record reflects that Barry Goldman requested that the Complainant enter Building 415 for ten minutes

on May 18, 1995 to participate in a departmental review. Goldman explained that he could not move the location of the meeting because everyone in the Education Programs were participants. The Complainant has presented no evidence that Goldman had actual or constructive knowledge of the disclosures that she made regarding the NPEPC. According to the record, in May 1995 Goldman did not know that the Complainant had filed a whistleblower complaint. He only learned about her complaint filing in July 1995. Accordingly, the Complainant has not met her burden of establishing a nexus between any of her disclosures about NPEPC and the request in question.

Goldman next requested that the Complainant move to Building 415 after her work restrictions expired on June 23, 1995. As noted immediately above, there is no evidence in the record that Goldman had any actual or constructive knowledge of the Complainant's disclosures concerning the NPEPC until July 1995. Finally, it is well documented that the Education Program's move to Building 415 occurred because LLNL lost its lease on The Almond School Building. Building 415 was selected because it met LLNL's specifications that the Education Program reside outside the security perimeter to ease the ingress and egress of students without security clearances. Given the facts of this case, I find that no reasonable person could conclude that LLNL decided to move its entire Education Program to Building 415 solely to retaliate against the Complainant for her past "protected activity." The record demonstrates conclusively that LLNL's move to Building 415 had absolutely nothing to do with the Complainant, her alleged disclosures, or any other Part 708 activity she may have engaged in.

For all the reasons set forth above, I find that the Complainant's disclosures were not a contributing factor to LLNL's decision to move the Education Program to Building 415, Goldman's May 1995 request that the Complainant enter Building 415 for ten minutes, or Goldman's June 1995 request that the Complainant move permanently to Building 415. (14)

4. Whether the Complainant's Disclosures about the NPEPC or her filing of a Part 708 Complaint in October 1994 or her September 1995 Letter to the Secretary of Energy Were Contributing Factors in LLNL's Decision to Medically Separate the Complainant in March 1996

The Complainant argues that LLNL's decision to medically separate her was a ruse. May 16, 2000 Reply Brief at 22. It is her contention that LLNL removed her from her position in retaliation for her having made disclosures about the NPEPC and having filed Part 708 Complaints with the DOE. *See* Ex. 9 to the ROI.

As previously stated, the circumstances surrounding the Complainant's medical separation date back to February 1995 when the Education Program moved from The Almond School to Building 415. Ex. 8 to the ROI. The Complainant asserts that, in spite of her attempts to work in Building 415, she could not do so because of her allergies. The Health Services Department (HSD) at LLNL medically restricted the Complainant from working in Building 415 several times between February 1995 and June 23, 1995. From June 26, 1995 to August 9, 1995, LLNL released the Complainant from her duties and placed her on administrative leave with pay. LLNL's HSD extended the Complainant's work restrictions in Building 415 until November 1995, although it appears she was placed on leave without pay beginning on August 9, 1995.

While the Complainant was on administrative leave, Ms. Kwei, LLNL's Human Resources Department Manager, wrote two letters to the Complainant regarding her employment status. In the first letter dated July 27, 1995, Ms. Kwei explained that the Complainant was sent home because her treating physician, Dr. Kaufman, had described her allergies as so extensive and comprehensive that there was nowhere at LLNL where she could be placed without concern that she would be exposed to something that would trigger an allergic reaction. Ms. Kwei then advised the Complainant that Dr. Kaufman should consult with LLNL's HSD to address with greater specificity the restrictions Dr. Kaufman has proposed for the Complainant. Ms. Kwei's wrote a second letter to the Complainant on August 25, 1995. Between the two letters, Dr.

Kaufman had authorized the Complainant to return to any assignment in "customary, standard environs, devoid of exposure to heavy volumes of odors and gasses from sources listed." When the Complainant returned to work on August 9, 1995, however, she became ill after entering Building 415. Therefore, HSD issued another temporary work restriction prohibiting the Complainant from entering the building. In her second letter to the Complainant, Ms. Kwei advised the Complainant that she will be on leave without pay until September 17, 1995, because Ms. Vergino had decided that there were no assignments that she can perform outside Building 415 and that Trailer 3156 was no longer available. Ms. Kwei further advised that the Complainant should return to HSD for an evaluation of whether the work restrictions could be removed or would be continued. If the latter is the opinion of HSD, advised Ms. Kwei, LLNL will conduct an "accommodation review," which will include an exploration of alternative assignments at LLNL, and possible medical separation.

The record suggests that Mr. Goldman, with the concurrence of Ms. Vergino and the HSD, was the one who decided that the Complainant could no longer perform work outside Building 415. Tr. at 805-806. Both Goldman and Vergino had knowledge of the Complainant's past disclosures by July 1995.

Ms. Dibble and Ms. Kwei were two others who were administratively involved in the decision to medically separate the Complainant. Ms. Kwei did not testify so it is not clear whether she had knowledge of the Complainant's past disclosures. Ms. Dibble, however, knew about the Complainants disclosures by July 1995.

Notwithstanding the fact that some of the individuals involved in the decision to medically separate the Complainant from her job had actual knowledge of the Complainant's Part 708 filing, I find that there is no credible evidence of any nexus between the Complainant's protected disclosures and her termination.

Even if the Complainant had established by a preponderance of evidence that a relationship existed between her medical separation and her disclosures, there is clear and convincing evidence that LLNL medically separated the Complainant because her inability to work in Building 415 prevented her from performing the essential functions of her job. The Education Program was a team-intensive effort that required face-to-face interaction between employees in the groups, and between the employees and students in staff meetings, training programs, student workshops and program reviews. The record shows that the Education Program had no employees who telecommuted and no employees who did not have offices in Building 415. (15) The evidence indicates that due to the nature of the Complainant's job, she needed to be in proximity to her work files and support staff and to participate in staff meetings. She also needed to collaborate with her coworkers. Tr. at 498. In addition, testimonial evidence indicates that even if the Complainant did not need to perform her duties in Building 415, she was not suited to work in an isolated environment because of her past performance issues and attendance problems. *Id.* at 664-665.

There is also clear and convincing evidence that LLNL made extensive efforts to accommodate the Complainant prior to her termination. LLNL's HSD monitored the Complainant's health and issued multiple work restrictions to her. LLNL consulted their Hazards Control Division on two occasions and evaluated the work environment in Building in question. LLNL arranged for the Complainant to be evaluated by Dr. Terr in November 1995. It was Dr. Terr's opinion that the Complainant could never work in Building 415 without becoming "subjectively ill." Ex. 40 to the ROI.

Sometime in January 1996, Dr. Watts of LLNL's HSD met with the Complainant to discuss her ability to return to work. *See* LLNL Ex. 54; Tr. at 294-296. According to Dr. Watts' testimony, he obtained the Complainant's agreement that a permanent work restriction was appropriate given her circumstances. Tr. at 953-955. On January 29, 1996, Dr. Watts issued a permanent work restriction prohibiting the Complainant from entering Buildings 415 and 571. Ex. 41 to ROI. The reason stated on the work restriction is the following:

> Exposure to any of the following odorant compounds: paints, lacquers, varnishes, formalin, formaldehyde, glue products, pesticides, is likely to produce subjective symptoms that may

> preclude this employee from continued function in the workplace and therefore are to be avoided.

Id. On January 31, Ms. Vergino sent a memorandum to Robert Perko recommending that the Complainant be medically separated from her employment because of her permanent exclusion from Building 415. Ex. 44 to ROI. In accordance with LLNL's policies, LLNL requested that Gene Dent conduct a vocational rehabilitation review of the Complainant. Ex. 45 to ROI. On February 8, 1996, Dent sent the Complainant a certified letter requesting that she contact him to discuss vocational rehabilitation. The Complainant did not respond to the letter. On February 22, 1996, Perko sent a second certified letter to the Complainant informing her that she was being medically separated effective March 22, 1996. Ex. 49 to ROI. The letter informed the Complainant that she could appeal her medical separation. The Complainant did not appeal.

Finally, the record demonstrates that LLNL followed its policy and procedures regarding Medical Separation when it medically terminated the Complainant. *See* Ex. 56 to the ROI. Section K.VI. of LLNL's Personnel and Policies and Procedures Manual provided that "employees that become unable to perform the essential assigned functions fully, due to handicaps or other medical conditions, may be separated from employment." *Id.* LLNL's Manual also describes the vocational rehabilitation services provided to employees who cannot provide the essential functions of their positions, and the special consideration these employees enjoy for other opportunities at LLNL.

In the end, I find that LLNL has presented clear and convincing evidence that it would have medically discharged the Complainant in 1996 even had she not made disclosures about NPEPC in 1994 and 1995 or sent her letter to the Secretary of Energy in 1995. LLNL clearly had a legitimate business reason for medically separating the Complainant when, after providing accommodations to the Complainant for many months, it became clear that the Complainant could not work in Building 415 for the foreseeable future. In addition, LLNL followed its policies and procedures for Medical Separation when it determined that the Complainant could no longer perform her essential, assigned functions fully. Moreover, LLNL extended the Complainant the opportunity to explore other employment options at LLNL before her medical termination but the Complainant rebuffed LLNL's overtures.

B. Alleged Reprisals Stemming from the Complainant's Alleged Refusal to Participate

In July 2000, Hearing Officer Lazarus decided that two other possible protected disclosures or activities should be considered in this case and requested that the parties submit legal briefs addressing these issues.(16) Hearing Officer Lazarus also conducted a two-day supplemental hearing in the case that focused on the following issues:

> Whether the Complainant engaged in protected activity under Section 708.5(a)(3) by refusing to work in Building 415, and whether the Laboratory retaliated against the Complainant for engaging in this activity;
>
> Whether the Complainant made disclosures that were protected under Section 708 (a)(1) when she informed several DOE officials and Laboratory employees that she believed it was unsafe for her to enter certain buildings at the Laboratory, and whether the Laboratory retaliated against the Complainant for making these statements

1.Whether the Complainant engaged in protected activity under Section 708.5(a)(3) by refusing to work in Building 415, and whether the Laboratory retaliated against the Complainant for engaging in this activity?

Section 708.5(a)(3) of the original Part 708 regulations provided in relevant part that :

> (a) A DOE contractor covered by this part may not discharge . . . any employee because the employee . . .
>
> (3) refused to participate in an activity, policy, or practice when -
>
> (i) such participation-
>
> (B) causes the employee to have a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation, and the activity, policy, or practice causing the employee's apprehension of such injury -
>
> (1) is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a *bona fide* danger of an accident, injury or serious impairment of health or safety resulting from participating in the activity, policy or practice; and
>
> (2) The employee is not required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities;
>
> (3) The employee, before refusing to participate in an activity, policy, or practice has sought from the contractor and has been unable to obtain a correction of the violation or dangerous activity, policy, or practice; and
>
> (4) The employee, within 30 days following such refusal, disclosures to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy or practice, and explaining why he has refused to participate in the activity.

a. Applicability of § 708.5(a)(3) to the Facts in this Case

As an initial matter, I find that the regulatory provision cited above is inapplicable to the facts of this case. There is nothing in the preamble or the regulatory history to Part 708 that suggests the regulations were designed to protect employees with pre-existing disabilities or medical conditions who refuse to perform the job for which they were hired when their disability or medical condition becomes incompatible with a work environment that is considered safe and healthy under workplace guidelines. Rather, the regulations were designed to protect employees who had a reasonable belief that there was a bona fide danger inherent in the work site itself that may cause an accident, injury, or serious impairment of health and safety. While the Complainant appears to argue that the "dangerous condition" in Building 415 was the remodeled building with new carpets and paint, the evidence demonstrates that there was nothing inherently dangerous in Building 415 from an environmental standpoint. LLNL's Hazards Control Department conducted an industrial hygiene evaluation of the subject building in May 1995, two months after the new carpet had been installed in that building. The evaluation revealed that any airborne contaminants present in the building in question were at acceptable levels according to the published workplace guidelines and standards. There is no evidence in the record that any other employees working in Building 415 experienced health problems, including Ms. Vergino who testified that she suffers from asthma.

Even assuming arguendo that Part 708 is construed broadly to encompass the Complainant's situation, I find the Complainant's allegations to be devoid of merit for the following reasons.

b. Reasonableness of the Complainant's Apprehension

There are conflicting medical opinions in the record whether the Complainant suffered from allergies, whether her perceived allergies constituted a condition or a disease, whether her condition or disease had a subjective or objective basis, or whether the root problem stemmed from a multiple chemical sensitivity.

For purposes of this Decision, I find that the Complainant thought she suffered from some allergic condition that made it difficult or impossible for her to work in Building 415 while that building was undergoing renovation and while there remained a residue of paint or new carpet smell in the air. In my opinion, there is some question whether the Complainant's concerns about the alleged danger Building 415 posed to her health and safety were reasonable, or even made in good faith.

First, the Complainant's concerns about the danger Building 415 allegedly posed to her health and safety were initially based on her self-reported past exposure to new carpeting and paint fumes not in Building 415, but elsewhere. The record indicates that the Complainant was not candid with her physician, Dr. Kaufman, in mid-February 1996 when she asked him to provide a written statement to LLNL about the health ramifications of her entering Building 415. On February 16, 1995, the Complainant's physician, Dr. Kaufman, wrote a letter stating as follows:

> [The Complainant] is suffering with some acute respiratory problems made worse by the formaldehyde out-gassing from the carpeting in her present area. Can you please accommodate her needs by moving her work place to an area devoid of such noxious fumes?

LLNL Ex. 43. At the time Dr. Kaufman wrote the letter, he did not know that the Complainant had never entered Building 415, or that the new carpet in Building 415 did not contain formaldehyde. Tr. at 1159. At the hearing, Dr. Kaufman testified that he erroneously assumed formaldehyde out- gassing was the source of the Complainant's problem because the Complainant had told him "she'd been exposed to a room that [sp] there was a lot of new carpeting being put down." Tr. at 1110-1111. According to Dr. Kaufman, had he known on February 16, 1995 that the Complainant had not been exposed to new carpet, he would have looked for another cause of her illness. *Id.* at 1113. Dr. Kaufman stated that there was no question that she was ill, however, because when he examined the Complainant prior to writing the February 16, 1995 letter, he noted that the Complainant was "having a lot of difficulty getting over her underlying physical respiratory troubles . . . some nasal congestion, throat irritation, nasal discharge" *Id.* at 1110-1111.

It is clear from the record that the Complainant's symptoms as described by Dr. Kaufman were totally unrelated to any environmental element in Building 415 because at the time Dr. Kaufman saw the Complainant in mid February 1995, she had never been in Building 415. It is also clear to me that the Complainant was acting in bad faith when she misrepresented to her physician that she had experienced allergic symptoms from inhaling paint and carpet fumes when she either stated or implied that she had entered Building 415. Based on the record, it appears that LLNL provided accommodations to the Complainant based on the misinformation that the Complainant had communicated to Dr. Kaufman.

To be sure, the Complainant entered Building 415 on three occasions, February 21, 1995, August 9, 1995, and September 17, 1995, and repeatedly felt ill on each of those occasions. After the Complainant's first reported illness on February 21, 1995, the Complainant contacted Dr. Kaufman's office and on the advice of an office nurse stayed off work the next two days. It is significant, in my opinion, that no one examined the Complainant to determine whether anything in the workplace was causing or contributing to her pre-existing medical condition.

Then, in April 1995, LLNL asked Dr. Lichty to evaluate the Complainant to determine whether her current health complaints arose out of, or were caused or aggravated by, her employment with LLNL. Dr. Litchy concluded that while the Complainant has a life-long history of allergies, and daily fluctuating symptoms, there is insufficient objective evidence to confirm that an industrial illness or injury has occurred. Dr. Lichty also suggested that the Complainant is beset with strong underlying anxiety and would benefit from anxiety medications on an empirical basis to see if anxiety is magnifying her underlying allergic symptoms. It appears from the record that there is no objective evidence to support the Complainant's belief that something "dangerous" in Building 415 was negatively impacting her health and safety.

Further, Dr. Scott issued many of the temporary work restrictions to the Complainant based solely on the strength of the fears that Complainant voiced about entering Building 415, not on the fact that any

dangerous situation existed.

In August 1995, Dr. Kaufman wrote to Dr. Scott in an attempt "to provide some guidance to the Laboratory in determining how best to proceed in arranging [the Complainant's] work environment." In that letter, Dr. Kaufman noted that "all it took for [the Complainant] to recover from the noxious out gassing of some new carpeting when she became ill last spring was simply to enable her to achieve cessation of exposure to the out gassing of the new carpet, for as your company is aware, she had no respiratory problems when transferred to a new locale, i.e,. Trailer 3156." There could have been no objective evidence that out gassing from the carpet caused the Complainant's symptoms because no formaldehyde had been used to manufacture the carpet. Moreover, Dr. Kaufman testified that he was never able to determine that the source of the Complainant's problems was Building 415. Tr. at 1094.

Dr. Terr examined the Complainant in November 1995. He testified that he believes the pattern of symptoms exhibited by the Complainant is consistent with what many people experience under a state of anxiety. *Id.* at 1018. Dr. Terr further opined that the fact the Complainant entered Building 415 more than nine months after the carpet had been aired out and she still had problems indicates that her subjective belief that the building was making her sick would never be shaken. *Id.* at 1034. Terr concluded that while the Complainant actually believed that Building 415 was making her sick, her belief was unreasonable. *Id.* at 1077. According to Dr. Terr, there was simply no way of correcting this "irrational" situation.

On the basis of the foregoing, I find that the Complainant has not convinced me that a reasonable person, under the circumstances then confronting the Complainant, would have concluded that there was a *bona fide* danger of serious impairment of her health or safety resulting from her entering Building 415.

c. The Complainant Was Hired to Work in an Ordinary Office Environment

Under Section 708.5(a)(3)(i)(B)(2), an employee cannot bring a claim under Part 708 if the employee is required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities. This provision was intended to apply to situations where an employee was hired for the very purpose of working in dangerous conditions, such as cleaning up hazardous waste. In this case, the Complainant was hired to work in an ordinary work environment. LLNL has demonstrated that the exposure to airborne contaminants in Building 415 was not reasonably anticipated to approach or exceed published workplace standards and guidelines. Ex. 60 to the ROI. Hence, Building 415 can be accurately characterized as an "ordinary" office environment devoid of any health or safety hazards. Even though the Complainant believes that an ordinary work environment is "dangerous to her health and safety" because she thinks she is allergic to something in the workplace, her job responsibilities require her to work in that environment.

The Complainant also questions whether she needed to work in Building 415 to fulfill her work responsibilities. As discussed earlier in this Decision, however, LLNL has proven that it was essential for the Complainant to work in Building 415 with all the other Education Program employees. She needed to attend staff meetings, program reviews, and student workshops in that building. Moreover, the support staff was located in Building 415. Finally, the Complainant's poor performance and time and attendance irregularities required that she be under close supervision in Building 415. In the end, it seems reasonable under the circumstances that LLNL has the prerogative to determine what constitutes an "essential function" of employment at LLNL. In this case, it was an essential function of the Complainant's job that she work in Building 415 in close proximity to her colleagues in the Education Program.

Finally, it is clear to me from the record that the Complainant's focus during the time she refused to enter Building 415 was not on exposing a dangerous work environment but on obtaining an accommodation from LLNL to work alone in a trailer or alone at home. While LLNL attempted to accommodate the complainant by allowing her to work in Trailer 3156 until that situation not longer was feasible, it now appears based on the U.S. District Court's Decision that LLNL did not even have a legal obligation to accommodate the Complainant. *See* Order from the United States District Court for the Northern District

of California dated October 14, 1997 in the matter of *Benson v. Lawrence Livermore National Laboratory*.

Based on all the foregoing considerations, I find that the Complainant has failed to meet her burden of proving a claim under 10 C.F.R. § 708.5(a)(3).

2. Whether the Complainant made disclosures that were protected under Section 708 (a)(1) when she informed several DOE officials and Laboratory employees that she believed it was unsafe for her to enter certain buildings at the Laboratory, and whether the Laboratory retaliated against the Complainant for making these statements

The Complainant did not specifically articulate in any of her pleadings which of her statements regarding the safety of Building 415 rise to the level of "protected disclosures" under Part 708. Based on my review of the record, there are possibly two instances when the Complainant appears to have made disclosures that rise to the level of protected disclosures under Part 708. The first occurred in late January 1995 when the Complainant purportedly told Ms. Dibble that she had "life-threatening" reactions to "new carpet, paint fumes, windows painted close[d], and . . . asbestos." These statements were made in response to Dibble's announcement that the Education Department would be moving to Building 415. The second time when the Complainant stated her belief(17) that her entry into Building 415 would constitute a substantial and specific danger to her as an employee occurred when the Complainant wrote a letter to the Secretary of Energy dated September 10, 1995. In the letter, the Complainant claimed that LLNL had demanded that she work in an environment containing chemicals and toxins to which she is allergic and that LLNL was insisting that she work in Building 415 "even if it kills me." Ex. 7 to ROI.

Even though the managers who made the decision to medically separate the Complainant had actual knowledge that the Complainant had written to the Energy Secretary at the time they terminated the Complainant, there is no temporal proximity between the letter to the Secretary of Energy and the Complainant's termination. Moreover, even if I were to consider the Complainant's termination as part of an ongoing serious of reprisals, I could not conclude that the Complainant had met her burden in this case. Under the facts of this case, it is simply unreasonable for me to infer a nexus between any of the Complainant's protected disclosures and any act of reprisal claimed by the Complainant. Hence, it is my determination that the Complainant's disclosures in January and September 1995 regarding her belief that Building 415 was unsafe for her to work in were not a contributing factor in LLNL's decision to medically separate her from her employment in March 1996.

Assuming arguendo that the Complainant had established the requisite nexus between her disclosures and her termination, I would have found, for the reasons discussed in other parts of this Decision, that LLNL has provided clear and convincing evidence that the Complainant would have medically separated her anyway. LLNL has demonstrated clearly and convincingly that the Complainant, an employee with a history of performance and time and attendance problems, needed to work in Building 415 with her colleagues, and could not be accommodated elsewhere on site. Moreover, the Complainant bears some responsibility for her medical termination. She never responded to efforts by LLNL's vocational rehabilitation counselor to assist her in finding another assignment at LLNL. Had she done so, she may not have been medically separated from her employment.

It should also be noted that the Complainant was medically restricted from working in Building 415 for over a year before she was terminated. While the Complainant would have preferred to work at home or in Trailer 3156, for the reasons discussed earlier in this Decision, neither of these options were viable.

V. Summary

In conclusion, after carefully considering the voluminous record before me, I find that the Complainant has failed to meet her evidentiary burden in this case. Specifically, she has not proven by a preponderance of evidence that any of her Part 708 disclosures or activities were contributing factors to any of the alleged reprisals taken by LLNL against her, including her termination. Accordingly, it is my determination that the Complainant is not entitled to any relief.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Janet K. Benson under 10 C.F.R. Part 708, OHA Case No. VWA-0044, be and hereby is denied.

(2) This is an Initial Agency Decision that shall become the Final Decision of the Department of Energy denying the complaint, unless a party files a notice of appeal within fifteen days after receipt of this Initial Agency Decision.

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: May 22, 2002

(1) For purposes of this Decision, all references to LLNL will include UC and UC Regents.

(2) The DOE amended 10 C.F.R. 708 in an Interim Final Rule effective April 14, 1999. 64 Fed. Reg. 12,862 (March 15, 1999). The revised regulations provide that the procedures in the new Part 708 apply prospectively in any complaint pending on the effective date of the revisions, *i.e*, April 14, 1999. However, the substantive changes reflected in the revised regulations will not be applied in this case because to do so would affect the substantive rights of the parties. Therefore, this case will be adjudicated in accordance with the substantive standards set forth in the original version of Part 708. *See Linda D. Gass*, 27 DOE ¶ 87,525 (1999).

(3) During the pendency of the investigation, OCEP was abolished and its functions transferred to the Office of Inspections in the DOE's Office of Inspector General.

(4) The Complainant also utilized other fora to voice her complaints against LLNL and her supervisors for their actions. She first filed an internal grievance against her LLNL supervisor on February 7, 1994, alleging race discrimination. Complaint's Ex. 51; Ex. 1 to the ROI at 9. LLNL's Staff Relations Office denied the grievance on February 11, 1994. *Id.*; Ex. 1 to the ROI at 15. The Complainant appealed the denial to UC on February 18, 1994. *Ex. 1 to ROI at 16.* UC denied the appeal on March 1, 1994. *Id. at 17.*

Within two weeks, the Complainant filed a race discrimination complaint against LLNL with the Equal Employment Opportunity Commission (EEOC). *Id.* Before the EEOC had ruled on the Complainant's complaint, the Complainant also filed internal complaints on May 5, 1994, September 21, 1994, and October 12, 1994. *Id.* On May 5, 1995, the EEOC issued a determination finding no merit to the Complainant's complaint. LLNL's April 12, 2000 Post-Hearing Brief at 28, Ex. 55 to the ROI.

On July 28, 1995, the Complainant filed a Complaint for Employment Discrimination with the United States District Court for the Northern District of California, alleging wrongful termination by LLNL, race discrimination, and failure to accommodate her disability. *Id.* On March 6, 1996, the Complainant filed a complaint in State Court alleging, *inter alia*, discrimination based on physical disability and unlawful discrimination in violation of the Americans with Disabilities Act (ADA). LLNL removed the State Court action to federal court. The two actions were subsequently consolidated in the United States District Court for the Northern District of California. The District Court awarded summary judgment in favor on LLNL on October 14, 1997, finding that the Complainant's "ADA claim fails as a matter of law because she does not have a ?disability' as defined by the statute." *See* Attachment 3 to LLNL's April 12, 2000 Post

Hearing Brief.

(5) On August 28, 2001, Hearing Officer Lazarus convened a telephone conference call with the parties at which she sought permission to appoint a technical advisor on the issue of multiple chemical sensitivity. See Record of Telephone Conversation among Hearing Officer Lazarus; Aileen Anderson, Counsel for Janet Benson, and Gabriella Odell, Counsel for LLNL (August 28, 2001). The Complainant raised no objection to Hearing Officer Lazarus' request but LLNL objected to any consultation between Hearing Officer Lazarus and the technical advisor identified by the Hearing Officer. See Letter from Aileen Anderson, Counsel for Janet Benson to the Hearing Officer (August 29, 2001); Letter from Gabriella Odell, Counsel for LLNL to Hearing Officer Lazarus (August 29, 2001). Hearing Officer Lazarus raised the matter again on September 21, 2001 in a transcribed telephone status call. See Transcript of September 21, 2001 Status Teleconference (September 2001 Tr.). Ultimately, Hearing Officer Lazarus decided to rest on the record without consulting with a technical advisor. September 2001 Tr. at 8-9.

(6) "In a Memorandum dated June 21, 1993, the NSF Program Director for the Research Careers for Minority Scholars Program, Dr. William E. McHenry, stated that the co-PIs of the NPEPC "have not coordinated their activities to the extent necessary to institutionalize the activities of this project." Ex. 54 to the ROI at 8. According to Dr. McHenry's Memorandum, because of the poor communications between the parties involved in the project, the co-PIs were told to address the issue of leadership in the project before NSF would consider funding for the third year of the program. *Id.* The Provost and Vice President for Academic Affairs at CSU-H and the LLNL Director of Education each recommended replacing the Complainant as co-PI. *Id.*

(7) On August 21, 1993, the NSF approved the modifications to the NPEPC that had been requested by the two institutions, including the replacement of the Complainant as co-PI with Ms. Vergino. Ex. 54 to the ROI at 6.

(8) The Complainant testified that she learned "four to six weeks after July 23, 1993," that NSF had approved the modification to the NPEPC. Tr. at 233.

(9) On the date that Dr. Kaufman wrote the letter, the Complainant was still working in The Almond School building, an old building that did not have new carpeting.

(10) When Young submitted input into the Complainant's performance appraisal for the period September 1994 to June 1995, he rated her as "marginal." Complainant's Ex. 45.

(11) In the Interlocutory Order issued on November 1, 2000 in this case, Hearing Officer Lazarus held that no acts of reprisal that allegedly occurred prior to September 23, 1994, would be adjudicated. The rationale for this ruling is that LLNL cannot be held retroactively liable for acts of reprisal occurring before September 23, 1994, the date it agreed to become contractually bound by Part 708. Since Hearing Officer Lazarus did not specifically enumerate the alleged acts of reprisal that cannot be considered as a matter of law in this case, I am setting them forth below to clarify the record. The purported acts of reprisals that will not be considered in this Decision are the following: (1) LLNL's removal of the Complainant as co-PI for the NPEPC; (2) LLNL's alleged denial of the Complainant's request for a transfer or reassignment sometime between 1993 and July 1993; (3) LLNL's alleged assignment of clerical duties to the Complainant at sometime prior to September 23, 1994; (4) LLNL's alleged harassment of the Complainant at any time prior to September 23, 1994; and (5) LLNL's alleged disparate treatment of the Complainant with regard to time and attendance records that allegedly occurred prior to September 23, 1994.

(12) The Complainant argues in one of her briefs that Ms. Vergino had knowledge of her past disclosures because she was in regular contact with two people in LLNL's Human Resources Department who knew about the Complainant's Part 708 filing. May 16, 2000 Brief at 17. Those two persons are identified as Mr. Smith and Mr. Cain. However, the Complainant did not produce either Mr. Smith or Mr. Cain to support her position on this matter. Nor did the Complainant elicit testimony at the hearing from Ms. Vergino indicating that she had acquired knowledge from Messrs. Smith or Cain about the disclosures at the time

she decided to reassign the Complainant to the Apprentice Program. Moreover, to the extent the Complainant implies in her brief that Mr. Young had knowledge of her past disclosures and somehow orchestrated her assignment to the Apprentice Program by suggesting the Complainant's reassignment to his program, I find that there is no evidence to support this implication. The Complainant did not call Mr. Young as a witness so there is no evidence on this matter.

(13) To the extent that either Ms. Dibble or Mr. Young had input into the performance appraisal in question, I find nothing in the record to suggest that either of them had actual or constructive knowledge of the disclosures in question.

(14) To the extent the Complainant is arguing that LLNL failed to accommodate her allergies because she had made disclosures about the NPEPC, I find no merit to this contention. The record documents the numerous attempts that LLNL took to provide accommodations for the Complainant in accordance with Section M.IV. of its Personnel Policies and Procedures Manual. *See* Ex. 56 to the ROI.

(15) The Complainant pointed out that Glenn Young had his office in Building 571. However, LLNL explained that Mr. Young was a full time employee who worked part-time for the Education Program and part time for another LLNL organization that housed his office.

(16) Hearing Officer Lazarus also asked the parties to address a third matter, i.e., whether the Complainant was time- barred from raising the two issues because she had failed to raise them in the preceding six years that her complaint had been pending. On November 1, 2000, the Hearing Officer, over the objections of LLNL, ruled that OHA could entertain the two new issues, finding that the Complainant was not time-barred from raising the issues at this late date.

(17) It is difficult for me to determine from the record whether the Complainant made these statements in good faith. Even though there appears to be no objective evidence to support the Complainant's fear that something in the environment in Building 415 would make her gravely ill, for purposes of this Decision I have concluded that the Complainant subjectively believed that she would become ill if she entered Building 415. I need not address whether the Complainant's subjective belief was reasonable under the circumstances. The original version of the Part 708 regulations only required that a disclosure be made in good faith.

Case Nos. VWC-0001 and VWC-0002

April 27, 1998

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Agency Decision

Names of Petitioners: Daniel L. Holsinger

K-Ray Security, Inc.

Date of Filing: January 13, 1997

Case Numbers: VWC-0001

VWC-0002

This case involves a complaint filed by Daniel Holsinger (Holsinger) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The matter comes before me pursuant to a decision by the Deputy Secretary of Energy. In a December 17, 1996 Decision Reversing and Remanding Initial Agency Decision, the Deputy Secretary instructed the Office of Hearings and Appeals (OHA) to conduct a full assessment of the equities involved concerning the reinstatement of Holsinger to a position of security guard at the DOE Federal Energy Technology Center (FETC), located in Morgantown, West Virginia. (1) Following that directive, I have held a hearing to take evidence and have considered the issues raised by the Deputy Secretary in light of that evidence. I am issuing a new Agency Decision set out below.

I. Background

The procedural and factual background of this case is fully set forth in Daniel L. Holsinger, 25 DOE ¶ 87,503 (1996)(Holsinger). I will not reiterate all the details of this case here. For purposes of this Decision, the relevant facts are as follows.

In January 1990, Mr. Holsinger began to work as a part time security officer for the security contractor at FETC. He was retained in that status when Watkins Security Agency (WSA) began

performance of the contract in March 1990.

On October 7, 1994, Holsinger filed a complaint pursuant to Part 708 with the Office of Contractor Employee Protection (OCEP). In the complaint Holsinger alleged that reprisals were taken against him by management officials of WSA as a consequence of his making disclosures concerning the possible theft of government property by a member of the WSA security force. According to Holsinger, the reprisals included suspensions and his ultimate dismissal by WSA.

After conducting an investigation into the matters raised by Holsinger, OCEP issued a proposed disposition, concluding that Holsinger had shown by a preponderance of evidence that he had written an anonymous letter to the Director of DOE-FETC stating that a member of the guard force had removed buckets covered with rags from the facility. OCEP found that this letter constituted a protected disclosure

under Part 708. OCEP also found that Holsinger had shown by a preponderance of evidence that a three-day suspension that he received and his eventual dismissal by WSA occurred as a result of the protected disclosure. Finally, OCEP concluded that WSA failed to establish by clear and convincing evidence that the adverse personnel actions would have occurred absent Holsinger's protected disclosure. The relief recommended by OCEP included a proposal that Holsinger be awarded back pay by WSA, and that K-Ray Security, Inc. (K-Ray), the current FETC security contractor, reinstate Holsinger.

A hearing on the Holsinger complaint, conducted by an OHA hearing officer, was convened at the request of Holsinger, WSA and K-Ray. However, at the hearing it was announced that Holsinger and WSA had settled all issues between them, and WSA was ultimately dismissed from the proceeding. Thus, at the hearing, the only issues raised concerned whether K-Ray should be required to reinstate Holsinger. In an Opinion issued on May 16, 1996, the OHA hearing officer determined that K-Ray should be required to do so. Holsinger, 25 DOE at 89,020.

K-Ray appealed that determination to the Deputy Secretary of Energy. In his opinion regarding that appeal, the Deputy Secretary considered K-Ray's position that reinstatement was not an appropriate remedy, since the firm was not involved in any of the WSA adverse personnel actions. The Deputy Secretary agreed with the OHA hearing officer that reinstatement, even by a successor employer, may be ordered if the circumstances warrant it. However, he found that the OHA hearing officer failed to conduct a full assessment of the equities involved in the reinstatement of Holsinger. Based on testimony at the hearing, the Deputy Secretary expressed a concern that reinstatement might cause substantial hardship to both K-Ray and K-Ray employees who might have to be terminated if Holsinger were reinstated. Accordingly, the Deputy Secretary remanded this matter to the OHA for a full assessment of the equities involved in connection with Holsinger's reinstatement.

II. Hearing of September 17, 1997

After reviewing the complete record in this matter, I determined that it would be useful to pursue the important issues raised by the Deputy Secretary's Opinion through further fact-finding, conducted by means of an evidentiary hearing. I therefore convened a hearing at the FETC facility on September 17, 1997. The purpose of the hearing was to take testimony on the issue of the impact on K-Ray's operations of reinstating Holsinger.

Eleven witnesses testified at the hearing. They included Randolph Cooper, the DOE contracting officer, whose responsibility it is to solicit, negotiate and administer the security contracts at FETC Morgantown. Deborah Purkey, the contracting officer's representative (COR), also testified. As liaison between the DOE and K-Ray, she is responsible for overseeing the technical aspects of the performance of the contract. Testimony was given by five K- Ray security guards: John Kisner, Linda Lawson, Robert Bryan, Scott Lowe and Kent Garvin, as well as by the K-Ray security guard captain, Fred Munz. Richard Panico gave testimony as Holsinger's supervisor in connection with Holsinger's full time position as a security guard at the University of West Virginia. Diane Lewis, contract administrator for K-Ray testified, as did Holsinger himself.

At the hearing K-Ray continued to oppose the reinstatement of Holsinger. In this regard, the firm has not altered the position it adopted before the prior Hearing Officer in this case. K-Ray maintained that since it had no role in any of the retaliatory actions taken by WSA, it is inequitable to require it to bear any responsibility in redressing the harm caused to Holsinger. It also asserted that reinstatement would cause a hardship to the firm and its FETC guards.

In his testimony at the hearing, Holsinger clarified his position regarding reinstatement. He indicated that he is available to work at FETC on the midnight shift every night of the week and fully available every third week on his days off, Friday, Saturday, Sunday and Monday. On the weeks that he did not have weekends off, he would be available on Tuesday and Wednesday. He stated that he would accept

reinstatement on an "as needed basis," such as in cases where other guards were sick, on vacation or for other reasons could not appear for their shifts. Transcript of September 17, 1997 Hearing (hereinafter Tr.) at 213. He further testified that he would be willing to accept a midnight shift on a regular basis for one or two nights a week. Tr. at 198.

III. Analysis

As an initial matter, I am not persuaded by K-Ray's legal position in this proceeding that it should be relieved of all obligations with respect to Holsinger because it had no relationship to WSA and because it merely assumed the security contract that was formerly performed by WSA. As the Deputy Secretary stated in his Opinion, reinstatement of a whistleblower, even by a successor employer, may be ordered if the circumstances warrant it. 10 C.F.R. § 708.10(c)(3). See Boeing Petroleum Services, Inc.; Dyn McDermot Petroleum Operations Co., 24 DOE ¶ 87,501 (1994)(Boeing). As I stated above, our endeavor here is to determine if the circumstances warrant such reinstatement in this case.

Moreover, as a general matter, K-Ray's overall position here does not withstand close scrutiny. The K-Ray contract currently in effect specifically provides at Part II, Section I.118 that K-Ray shall comply with the requirements of the DOE Contractor Employee Protection Program set forth at 10 C.F.R. Part 708. Thus, K-Ray was clearly on notice that pursuant to the terms of its agreement with the DOE, it would be subject to all of the requirements of Part 708. These regulations provide that the DOE may direct contractor firms to take actions necessary to restore to a prior position an employee who has been adversely affected by improper acts of reprisal. 10 C.F.R. § 708.11(c). Among such actions is the reinstatement by a subsequent contractor, if such reinstatement is necessary to restore the employee to the position he would otherwise have occupied absent the acts of reprisal by a former contractor. See Boeing, 24 DOE at 89,007.

It is true that a new DOE contractor may not have actual knowledge that the responsibilities it assumes by agreeing to be bound by the provisions of Part 708 include having to reinstate an employee of a previous contractor. However, the importance to the DOE of the goals of Part 708, and the protection to employees it provides, have been stated frequently, and reaffirmed recently. 63 Fed. Reg. 374 (January 5, 1998). Moreover, in the typical case, any possible unfairness to the new contractor can be mitigated by allowing it to charge the DOE for any additional costs associated with rehiring the employee.

The record indicates that it is highly probable that if Holsinger still had been employed by WSA at the time that K-Ray took over the contract, he would have been re-hired as a routine matter, along with all the other guards at that time. Transcript of February 28, 1996 Hearing at 76-77. I do not believe that it would be equitable to excuse K-Ray from its contractual duties under Part 708 simply because it had no connection with WSA. In fact, the unfairness runs the other way. If Holsinger were to miss out on the opportunity to continue to work as a guard at the FETC facility simply because the prohibited reprisals, including his dismissal, occurred while he worked for the previous contractor, this would be inequitable to him and substantially weaken the protections offered by the Part 708 Contractor Employee Protection Program. By entering into the contract with the DOE to provide security guard services, K-Ray implicitly and explicitly agreed to participate in that program. Absent some unusual inequity or other serious reason to excuse it from participation, I am not inclined to except it from the program in this case simply because it is the successor contractor.

In this regard, during the hearing, K-Ray appeared to argue that it is a small enterprise, with only 25 employees working in the security area. K-Ray drew our attention to what it believes would be inevitably unfair and disruptive effects if Holsinger were rehired even for as little as 16 hours per week. Tr. at 307-310. K-Ray seems to contend that in light of these factors, and as a small contractor operation, it should not be saddled with the burden of rehiring a whistleblower. See, e.g., Tr. at 315-317.

We cannot accept that position, since the Department has already rejected it. An option to include a small size exception, or a minimum threshold for subjecting contractors to the requirements of the Contractor

Employee Protection Program was available to the Department in 1992, when it promulgated the final rule. That rule, as set forth in Part 708, does not include a small size exception, and these regulations cover all DOE contractors, large and small.

K-Ray next argues that in this case it should be excepted from the rule, because it would be unfair to the firm to require it to reinstate Holsinger in this case. K-Ray cites the following specific inequities as a basis for such an exception: (i) it claims that reinstatement of Holsinger will place an undue hardship on K-Ray's employees at the FETC site; (ii) it contends that reinstatement would cause financial hardship to the firm; and (iii) it maintains that reinstatement will create undue burdens in scheduling work shifts for Holsinger. After fully exploring each of these claims at the hearing, I do not find them to be supported by the record in this case.

A. Hardship to K-Ray Employees

K-Ray claims that reinstating Holsinger will hurt its other employees in several ways. The firm contends that if Holsinger is reinstated, it will be forced to terminate another employee, or reduce the hours of other members of the guard force. This claim is not borne out by testimony at the hearing. Mr. Cooper, the senior DOE contracting officer, clearly indicated that there is no DOE requirement limiting the number of employees that K-Ray may use to fulfill its obligation to supply security services under its contract with the DOE. Tr. at 94-5. See also testimony of Deborah Purkey, Tr. at 32. Accordingly, K-Ray would not be automatically required to terminate another employee upon reinstating Holsinger.

K-Ray argues however, that in order to provide Holsinger with hours as a security guard, it would necessarily have to take those hours from another guard or guards and this would mean either termination of those guards or a reduction in their normal hours. Again, K- Ray's assumption is not supported by the record. At the hearing there was considerable testimony to the effect that schedules of security guards were regularly adjusted when other guards were on vacation, took sick leave or for personal reasons could not appear for their regularly scheduled shifts. Tr. at 109, 138-9, 145, 159, 162, 175, 185-189.

In this regard, K-Ray submitted work schedules for its second quarter of 1997. These schedules show a significant number of regularly occurring vacation hours, sick leave and other leave requiring adjustment of the preset guard schedules. The testimony and the schedules indicate that there are a number of hours of available time that Holsinger could be offered without affecting the preset work schedules of any guards. As indicated above, Holsinger testified that he is willing to work on an "as needed" basis. He is available on all midnight shifts. Further he has a number of full days each week that he is free to work at FETC. Tr. at 191. Thus, K-Ray could certainly offer Holsinger the opportunity to work shifts in place of employees who cannot work their scheduled hours. This would not adversely affect the regular schedules of other FETC security guards.

There was some testimony by Ms. Lewis, contract administrator of K- Ray, that there are two part time workers who are particularly willing to work extra hours to fill in for security guards on vacation or sick leave. Tr. at 292. Thus, it is possible that offering Holsinger the shifts of employees who are on vacation or sick leave could reduce the extra time now made available to these two part-time guards. I recognize that these two employees might appreciate this extra time and accompanying compensation. However, these two part-time employees were hired after K-Ray assumed the security contract in June of 1995. Tr. at 274-77. Therefore, any "right" to additional overtime that they may have is certainly subordinate to that of Holsinger, who had worked previously and should be viewed as a pre-existing employee.

Moreover, it does not appear that these two new employees were hired with any promise or expectation of receiving these extra shifts. They were given no guarantee as to the number of hours they would be assigned to work. Tr. at 276. On the other hand, Holsinger clearly has important interests under Part 708 that must be recognized and protected. The fact that two or more part-time employees might in some instances not receive all the extra shift duty that could conceivably become available does not in my opinion overcome Holsinger's interests.

K-Ray also argues that reinstating Holsinger would adversely affect the morale of other employees who would have to work with him. K- Ray believes that Holsinger was not well-liked or respected by other K-Ray employees, and that they would be unhappy if they had to work with him. Although there is some evidence supporting this argument, on balance, the record as a whole does not support this view.

At the hearing six security guards testified about their views of Holsinger. Captain Munz believed that improvement was needed in Mr. Holsinger's performance. Tr. at 170. He thought that Holsinger used the telephone excessively while on the job in 1994. Holsinger's inappropriate use of the telephone was the subject of earlier discipline. However, this issue is now well in the past and should certainly not create an overall problem for the entire work force.

Captain Munz also testified that Holsinger's overall reputation was that he did not "fulfill his duties." Tr. at 172. However, Captain Munz offered no specifics of why rehiring Holsinger would have a negative effect, or what duties he did not fulfill. This general testimony was not particularly convincing, and testimony by other guards did not bear out Captain Munz' view.

For example, Officer Kisner stated that for the most part Holsinger was liked by other guards. He had no opinion on the overall effect on morale if Holsinger were rehired. Tr. at 115. He also pointed out that only 9 out of the current work force of 12 have met Holsinger, since three employees have been hired after Holsinger's termination.

Officer Lawson stated that more than half of the other officers always liked Holsinger, and that she would not have any problem if he were reinstated. Tr. at 140. She indicated that "a couple" of other officers did not like him and that reinstatement could pose a problem for those individuals. Tr. at 141. She further testified that she did not have an opinion about the effect on general morale if Holsinger were reinstated. Tr. at 140. Officer Bryan stated that he had "never had any trouble" with Holsinger. Tr. at 144.

Officer Lowe's testimony was more hesitant and ambiguous. He testified that Holsinger got along with some people, and did not get along with others. He said that he had heard from other guards that Holsinger was "not performing up to standard." Tr. at 224. He did not indicate who these employees were or provide any details on this point. He stated that morale would not be as high if Holsinger were reinstated. However, when asked if Holsinger's reinstatement would "drive a wedge between the work force," Officer Lowe testified: "I can't really say. I'm not sure." Office Lowe did not indicate that he personally would have any problem working with Holsinger, and, in fact, had had very little contact with him. Tr. at 228. In his most straightforward statement on the issue, Officer Lowe indicated that he would be troubled by Holsinger's reinstatement if it adversely affected the number of hours he worked or caused a change in his own schedule. Tr. at 226.

Officer Garvin testified that Holsinger's reputation was that "he did his job as needed." Tr. at 232. He was not aware of any personal conflicts that Holsinger may have had. He stated that Holsinger's reinstatement would cause difficulty for him only if his own hours were reduced or his work days changed. Tr. at 233.

From this testimony it was evident to me that reinstatement of Holsinger in and of itself would not create any unusual or wide- spread morale problem for the current guard staff. Of the nine individuals in the guard force who know Holsinger, six testified at the hearing. Only one of those individuals, Captain Munz, stated that he personally thought Holsinger did not fulfill his responsibilities, although he did not state that he could not work with him. Officer Lowe could provide only vague evidence of a hearsay nature on this point. Although questioned on this point, neither Captain Munz nor Officer Lowe could indicate in any detail why or how Holsinger's reinstatement could cause a morale problem. Thus, I was not especially convinced by their testimony, particularly in light of the testimony of other members of the security force who indicated that they did not think that there would be a problem.

Apart from Captain Munz, the five security guards who testified were themselves either neutral with respect to working with Holsinger, or would not mind working with him. Thus, there are at most three

other guards, who did not testify, who might not wish to work with Holsinger. This does not seem to be a major obstacle, even assuming that their testimony on this issue would be adverse to Holsinger. Moreover, in any work force there will be some individuals who do not get along with each other. This, in and of itself, is not a basis for not reinstating Holsinger. In any event, there was no convincing testimony to the effect that a force-wide morale problem would be created if Holsinger were reinstated.

The only problem specifically raised by the guards and K-Ray's Ms. Lewis was a fear that Holsinger's reinstatement might cause significant changes in the guards' work schedules. Tr. at 259, 261, 263. This is a completely understandable concern. K-Ray is relatively small, employing about 25 security guards. Tr. at 248. Only twelve guards are assigned to the FETC facility. Tr. at 284. Accordingly, adding or reinstating an employee is not as straightforward or simple as it would be with a much larger entity. Nevertheless, I am able to ensure that no changes in regular work schedules occur. Given the factual setting, I can order a limited reinstatement that will alleviate their concerns. Such a reinstatement plan, in which Holsinger would be called to service on an as-needed basis, should not create any hardship on any current member of the guard force, since no guard's regularly- scheduled hours will be shifted or reduced. I therefore conclude that the record does not support K-Ray's claim that the reinstatement of Holsinger would necessarily cause any overall morale problem for the rest of the K-Ray guard force.

B. Financial Hardship to K-Ray

K-Ray further argues that if it were required to reinstate Holsinger it would be subjected to a financial hardship. The record in this case provides no support for this allegation. According to testimony at the hearing, there are two base pay rates for security guards at FETC. Newly hired guards receive $6.24 per hour. Those who were formerly guards with WSA, and are thus longer term employees, receive $10.92 per hour. K-Ray Hearing Exhibit 1 (hereinafter Exh. 1). Officers in the K-Ray guard force at FETC (e.g. a captain) are paid somewhat more. Tr. at 252. Overtime is paid at the rate of one and one half times a guard's regular rate. Tr. at 77.

According to Exh. 1, which was presented at the hearing, K-Ray would incur additional salary and other related expenses of approximately $4,500, if it were required to reinstate Holsinger.(2) However, this figure is based on several unsupported assumptions. First, K-Ray presumes that if it reinstated Holsinger at its long- term guard hourly rate of $10.92 per hour, it would necessarily be replacing a less costly short-term employee whose pay rate is $6.24 per hour. K-Ray therefore calculates that it would incur additional costs of $4.68 an hour by reinstating Holsinger.

As a general rule, in making substitutions for guards who are on vacation or sick leave, K-Ray usually turns to its part time employees. K-Ray currently has five such employees, only two of whom are paid at the lower rate. Thus, if Holsinger were reinstated and, for example, asked to substitute for an employee who was on vacation, had called in sick or for some other reason was unable to appear for his shift, it is not at all certain that he would be called instead of one of the two lower paid part-time guards. He might well take the place of one of the three higher- paid part-time guards, at no additional cost to K-Ray. (3)

Moreover, in reaching its $4,500 lost revenue figure, K-Ray has also assumed that Holsinger would be reinstated at the rate of 16 hours per week for 52 weeks per year. As discussed above, Holsinger is not necessarily requesting this level of re- employment. He has indicated that he would be satisfied with being called to serve on an as needed basis. Tr. at 198-99.

Further, K-Ray's current contract will expire on May 31, 1998. The firm would thus not be able to employ Holsinger for 52 weeks before the expiration of its current contract. According to the prior record in this case, K-Ray took over the WSA contract in June 1995. Report of Investigation and Proposed Disposition at 2. The contract has a one-year base and four one year options. Tr. at 51. Thus, there is only approximately one month remaining on the current K-Ray one year option. Provided there is sufficient time between the issuance of this Decision and the May 31 contract expiration date, K-Ray can certainly include in its next one year option proposal any increased costs attributable to reinstating Holsinger. Tr. at

128. In any event, at this time there is no evidence that the additional salary cost projections for reinstatement of Holsinger would approach $4,500.

I have calculated a more realistic projection of K-Ray's possible increased salary costs as follows. If K-Ray provided Holsinger with one eight-hour shift for four weeks, through the end of the current contract option of May 31, 1998, its total salary outlay for him would be $349.44 (4 weeks x 8 hours x $10.92 = $349.44).(4) The additional hourly cost to K-Ray of employing Holsinger, rather than a lower cost guard would be $4.68 ($10.92-$6.24 = $4.68). Even assuming that all of Holsinger's hours would have been performed by a guard at the lower salary rate, an assumption that, as discussed above, would in all likelihood overstate K-Ray's costs, the total additional salary attributable to reinstating Holsinger would be $149.76 (4 x 8 x $4.68 = $149.76).

Moreover, the actual percentage increase in its costs that K-Ray is likely to experience as a result of reinstating Holsinger is minimal. On July 31, 1997, K-Ray submitted sample rosters showing work schedules for its FETC guards for the second quarter of 1997. I have computed an approximate total K-Ray salary cost for a typical week using the roster for the week of June 22. The roster shows that there are three eight-hour shifts each day. In that week, there were between two and four guards on each shift, for a total of 48 guard shifts, or a total of 384 guard hours (48 x 8= 384). In that same week there was only one guard paid at the lower rate, and this guard worked a total of 40 hours. (5) In this week there were 344 hours paid at the higher rate (384-40), for a total of $3,756 (344 x $10.92), and 40 hours paid at the lower rate for a total of $250 (40 hours x $6.24) . Thus, in this week, K-Ray paid total wages of approximately $4,006 ($3,756 + $250 = $4,006). If K-Ray were to reinstate Holsinger for one shift per week, the additional cost in salary to pay Holsinger, rather than a lower cost guard, would be $37 ($4.68 x 8 = $37). This is less than one percent of its total salary cost in a week, and an amount that certainly appears to be a most minimal increase.

There has been no showing that this additional cost level would place an excessive burden on K-Ray. Nevertheless, if upon reviewing its salary outlays after reinstating Holsinger, K-Ray believes that it is experiencing an unmanageable level of increased labor costs due to that reinstatement, it has a remedy available to it. K-Ray may certainly request that Mr. Cooper and the DOE provide relief by adjusting the contract. Tr. at 132. Mr. Cooper, the DOE contracting officer, should consider that type of request in light of the fact that reinstatement of Holsinger furthers the goals of Part 708.

K-Ray also claims that it would experience additional costs of approximately $1,800 associated with reinstatement of Holsinger. These are costs attributable to uniform expenses, and additional training. These costs are not inconsiderable. Some of the costs, such as uniforms and training for newly hired employees, appear to be start-up costs that would be incurred with hiring any new employee. Other costs represent expenses for ongoing training that all K-Ray guards would have to undergo. According to Mr. Cooper, K-Ray could certainly include these extra costs in its option proposal for next year. Tr. at 128. Further, as Mr. Cooper testified, K-Ray's contract for the current year would in all likelihood already include reimbursement for items such as training for new employees. Tr. at 68-9. Thus, I cannot conclude that the $543 uniform cost and the $1300 in training costs could not ultimately be recouped by K-Ray, or that these amounts have not already been included in its current operating costs.

In this regard, I note that since Holsinger's termination, K-Ray has hired five new part-time guards. Tr. at 110. Several of those new guards were employed only briefly. Tr. at 110, 256. K-Ray certainly incurred training and uniform costs in connection with these hirings. Nevertheless, K-Ray has not appeared to contend that the training and uniform costs associated with hiring those additional personnel, even for brief periods, resulted in any hardship to it. However, if the up-front training and uniform costs prove to be an unusual burden on its operations, the firm could, as I indicated above, certainly apply to Mr. Cooper or to the DOE for relief.

C. Scheduling Burdens

K-Ray also maintains that trying to include Holsinger in its current guard operations would create unusual and significant scheduling difficulties. I do not believe that this concern is borne out by the testimony at the hearing. Holsinger's testimony is that he is regularly available only for a K-Ray nighttime shift, which runs from midnight to 8 a.m. K-Ray's assertion of unusual scheduling difficulty is based on its assumption that it would be required to provide Holsinger with a regular two-day a week nighttime shift.

I do not foresee imposing this requirement on K-Ray. As I stated above, the firm would be required only to offer Holsinger fill-in time on an as needed basis. Holsinger could present K-Ray each month with a schedule showing his hours and days of availability. K-Ray will be required to offer Holsinger a minimum of two shifts per week, which become available due to vacation, sick leave, or other employee leave, and which coincide with Holsinger's own available hours. (6) However, the firm will not be required to employ Holsinger for more than one shift per week. I see no reason that this procedure should present any unusual or significant difficulties to the firm. In fact, the availability of an additional part-time guard to fill in on an as-needed basis should provide additional flexibility to the firm, and lessen the possibility of expensive overtime pay.

D. Holsinger's Disclosure

In his remand determination, the Deputy Secretary also directed the Office of Hearings and Appeals to give consideration to an additional issue. That issue involves the underlying dispute between Holsinger and WSA. As the Deputy Secretary pointed out, due to the settlement between WSA and Holsinger, the OHA was prevented from reviewing the merits of that underlying dispute. However, the Deputy Secretary's Decision, citing Universities Research Association (LWZ-0023), 24 DOE ¶ 87,514 (1995), requested that the OHA make an "assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect,. . .granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork." Id. at 89,065.

In the Universities Research Association case, the disclosure involved an allegation of mismanagement of a laboratory hypercube computer. The whistleblower was dissatisfied with the general procedures adopted by the group leader who controlled scheduling of hypercube users. Universities Research Association (LWA-0003), 23 DOE ¶ 87,506 (1994). Thus, the disclosure in this case involved a pure management issue.

The instant case is quite different. It encompasses two types of disclosures involved in a single incident. First, according to the record, Holsinger revealed in an anonymous letter to the DOE that stealing at a DOE facility had taken place. This constitutes a protected disclosure under 10 C.F.R. § 708.5(a)(1)(i). That provision protects employees who disclose a violation of any law, rule or regulation. Clearly, Holsinger's disclosure of what he reasonably believed to be theft of DOE property fell within the purview of that regulation. Tr. at 211. He testified that as a security guard whose job it was to enforce the law, he was required to report information regarding a theft, and it would be against the law for him not to do so. Tr. at 212. In this respect, then, Holsinger's disclosure was unlike that involved in the Universities Research Association case.

The other aspect of Holsinger's disclosure was in the nature of a disclosure of alleged mismanagement. Holsinger asserted that WSA, the contractor at FETC that employed him, had not acted upon the earlier revelations of theft made by WSA employees. With respect to this aspect of the Holsinger disclosure, I agree with the Deputy Secretary that this is a management issue. Differences of opinion may well have formed the basis for this disclosure, and WSA and DOE could well have decided that further pursuit of the matter was unwarranted. In this regard, as the testimony of Mr. Cooper indicated, the DOE may have determined that a certain level of theft at FETC is de minimus. Tr. at 91-92.

In the present case, the theft reported by Holsinger involved buckets covered with rags, so that he was unable to discern whether any objects of significant value were being removed from the DOE. I therefore

conclude that the disclosure of the possible theft itself was protected, since Holsinger reasonably believed that an employee may well have been removing items of value from the premises. (7) On the other hand, I find that alerting the DOE that WSA was failing to take any action regarding that thievery does not necessarily constitute a disclosure of mismanagement within the scope of Part 708, since WSA could properly have determined in this case that the incident was de minimus.

IV. Conclusion

As is evident from the above discussion, I have found that K-Ray will experience little detriment if it is required to reinstate Holsinger on an as-needed basis for one shift per week. The shifts offered to Mr. Holsinger should be those of other employees who are on vacation or sick leave, or who, for other reasons are unable to appear for their shifts. I recognize that this reinstatement may result in a reduction of hours to the current K-Ray employees who might otherwise be offered those hours. However, the imposition on them will be minor, and the effects should be spread among all part-time employees. The Holsinger reinstatement need not involve more than eight hours per week of shift time.

It Is Therefore Ordered That:

(1) K-Ray shall reinstate Daniel Holsinger to a position as part- time security guard on an “as-needed” basis at the FETC facility.

(2) Holsinger shall, on a monthly basis, provide K-Ray with a schedule of his available hours for security guard work at FETC.

(3) K-Ray shall offer Holsinger a minimum of two shifts per week, which become available due to vacation, sick leave or other employee leave, and which coincide with the schedule provided by Holsinger.

(4) K-Ray shall not be required to employ Holsinger for more than one shift per week.

(5) This decision shall become the Final Decision of the Department of Energy unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments, IG-44, Office of the Inspector General, Department of Energy, 1000 Independence Avenue, S.W. Washington, D.C. 20585-0102.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 27, 1998

(1)FETC was formerly known as the Morgantown Energy Technology Center (METC). For the sake of simplicity, in this Decision I will consistently refer to this facility as FETC.

(2)K-Ray has also included in this figure 16 percent, or $623, for indirect costs. Some of these are costs associated with items such as rent, telephone, and salary of the firm’s principals. However, it is clear that this item represents an allocation of pre-existing out-of-pocket expenses for K-Ray. K-Ray would not incur any additional indirect costs of this nature, simply by virtue of being required to reinstate Holsinger. Tr. at 102. Ms. Lewis indicated that this 16 percent figure covers employer taxes on wages. Tr. at 253. Costs of this nature would constitute additional expenses for K-Ray. However, as discussed below, I do not believe the $4,500 figure is realistic. I believe a more realistic amount at this time would be approximately $149.76. Even including the entire 16 percent on that lower amount would increase the total salary costs for reinstating Holsinger by only $24 for the one-month remaining in the current contractual

period. This de minimus amount should not impose a significant hardship on K-Ray's operations.

(3)It is also worth noting that any savings made by K-Ray by virtue of hiring a lower paid employee upon the departure of a higher-paid one, inure to the DOE and not to K-Ray. Tr. at 63, 96.

(4)As I indicated above, Holsinger testified that he would be satisfied with one or two regular midnight shifts per week. Tr. at 198. I therefore believe that it would be reasonable to expect K-Ray to employ Holsinger for a minimum of one shift per week, when hours that become available fall within his scheduled free time.

(5)I am aware that since the time that this roster was prepared, a new part time security guard was hired at the lower rate. Thus, K-Ray's total current salary outlay may be slightly less than during the week of June 22. On the other hand, I have not included in this calculation the fact that several officers, such as Captain Munz, also assume guard duty, and these officers earn somewhat more than ordinary guards.

(6)If K-Ray offers Holsinger a shift at a time when only one suitable shift is available, and Holsinger accepts that duty, the firm will not be required to offer Holsinger a second shift for that same week if one should subsequently become available.

(7)The record contains no clear evidence on what the items stolen may have been.

Case No. VWD-0002

May 21, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Supplemental Order

Name of Petitioner:Frank E. Isbill

Date of Filing: May 4, 1999

Case Number: VWD-0002

This determination will consider two requests for discovery filed with the Office of Hearings and Appeals (OHA) on May 4, 1999, by Frank E. Isbill (the complainant). These requests (which have been grouped together as one Motion for Discovery, Case No. VWD-0002) concern the hearing requested by the complainant under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). He requested this hearing on March 29, 1999 (Case No. VWA-0034) in connection with the Part 708 complaint he filed against NCI Communications, Inc. (the contractor). The DOE recently issued revised Part 708 regulations. The regulations were published in the Federal Register on March 15, 1999. See 64 Fed. Reg. 12,862 (March 15, 1999) and by their terms, apply to all cases which were pending as of the date they became effective, April 14, 1999, including the instant case. 10 C.F.R. § 708.8. I was appointed the Hearing Officer in this matter on March 30, 1999.

Requests for Discovery

The issuance of discovery orders in proceedings under Part 708 is within the discretion of the Hearing Officer. 10 C.F.R. § 708.28(b)(1). The newly revised regulations more specifically lay out the types of discovery that can be ordered. See 10 C.F.R. § 708.28(b). The regulations grant the Hearing Officer authority to arrange for the issuance of subpoenas for witnesses to attend the hearing

on behalf of either party, or for the production of specific documents or other physical evidence, provided a showing that the requested discovery is "designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint." 10 C.F.R. § 708.28(b)(1).

It is within the spirit of the DOE Contractor Employee Protection Program regulations that arrangements for pre-hearing discovery be worked out between the parties, without the need of a formal discovery order from the OHA Hearing Officer. However, the OHA is prepared to issue a discovery order if necessary to ensure compliance with any reasonable discovery request. Since there are material disputes regarding the complainant's discovery requests, this Supplemental Order is necessary.

In email sent on April 30, 1999 and May 2, 1999, and received by OHA on May 4, 1999, the complainant requested twelve items of discovery, six in each email. The contractor responded to these requests on May 12, 1999 (contractor's response).

Factual Background

The complainant was an employee of the contractor's abstracting and indexing group. This group aided in the processing of various types of scientific reports for inputting into DOE databases. The complainant has made many allegations of protected disclosures, including that the contractor fraudulently reduced employees' sick and vacation leave and that cost-recovery monies were not allocated properly either to the contractor by DOE or the complainant's work group by the contractor. The contractor alleges that when a DOE office decided to no longer fund the contractor's abstracting and indexing task (and to contract that work to a different firm), the contractor had no choice but to lay off the three employees remaining in the work group, including the complainant.

A. Request sent April 30, 1999

Item 1. The complainant requested that a search be performed of one of the DOE databases he had worked on. Three separate contractors inputted reports into this database during the time period of the request, June 1996 through April 1997. The complainant wishes to know how many reports each of the three contractors inputted during that time period, and to have these totals broken down by subject matter category. The purpose of this discovery is to gather information regarding the DOE decision to shift the abstracting and indexing function to another contractor.

I find that the motivations of DOE actions are beyond the scope of this Part 708 complaint. Part 708 is designed to protect contractor employees against retaliation by their employers, not DOE. See 10 C.F.R. § 708.1. Assuming that the contractor can demonstrate that the layoffs occurred on the basis of DOE direction, the contractor will have met its burden. In that situation, the complainant may try to prove the contractor should have offered him another position within the company. I therefore will deny this particular item of the discovery request.

Item 2. The complainant requested information from the 1995 and 1998 versions of the contractor's employee handbook concerning the definition of a full-time employee, part-time employee and salaried and exempt employees, in order that he could determine how benefits were supposed to be granted to each of these groups. The contractor responded that the issue of benefits for each of these categories is irrelevant to the Part 708 complaint filed in the instant case since benefits in the private sector are not mandated by law and it treated all its employees the same with respect to benefits. Further, it says that the complainant has not alleged any reprisal regarding his benefits, making the request irrelevant.

I find that the request with respect to the 1995 handbook is relevant. The complainant is claiming as one of his protected disclosures that the contractor fraudulently reduced employees' vacation and sick leave. An allegation of fraud made in good faith and reasonably is a protected disclosure under 10 C.F.R. § 708.5(a)(3). Under Part 708, the complainant has a duty to show that he had a reasonable, good faith belief that he was revealing fraud, regardless of whether fraud actually occurred. The reasonableness portion of this test is objective, and I believe the way to define this portion is to ask whether a logical person with the characteristics of the complainant, including his knowledge and position, would have come to this conclusion regarding fraud. One way for the complainant to demonstrate his knowledge of the facts surrounding his disclosure is to review the 1995 handbook (which I assume all employees received unless demonstrated otherwise). However, I do not see that the 1998 handbook has any relevance to this case, as it was issued after the complainant's firing. I will therefore order the contractor to comply with this item of the discovery request with respect to the 1995 handbook but deny the portion of the request for the 1998 handbook.(1)

Item 3. The complainant requested an Inspector General (IG) report which he believes resulted from his complaints of mismanagement (separate from his Part 708 complaint), as well as other portions of that IG case file. However, Jackie Becker, counsel for the IG, informed me that no report was issued in this matter. In addition, the complainant already received all documents in the IG case file, with a few redactions, in

response to a Freedom of Information Act request that he filed. See Record of Telephone Conversation between Jackie Becker, Counsel, IG, and Dawn L. Goldstein, Hearing Officer, OHA (May 12, 1999). Therefore, no documents that he has not already received exist that are responsive to this request.

Item 4. The complainant requested a transmittal slip within that IG file mentioning Ken Williams, an employee of the DOE's Office of Scientific and Technical Information. Jackie Becker informed me that there was no such slip within the IG files, and moreover, the IG office never spoke with Mr. Williams in this matter. Id. Therefore, no documents exist which are responsive to this item of the request.

Item 5. The complainant sought information regarding a warning he received from his supervisor via email. His supervisor had received information from a DOE employee that the complainant had been seen in "non-productive conversations." See Ex. B-34. The complainant noted that he views this incident as an example of DOE management attempting to "build a case" for his termination.(2) I find this request to be irrelevant because the contractor is not alleging that complainant was discharged as a result of alleged "unproductive conversations" and further, any evidence going to DOE animus is beyond the scope of this proceeding, as explained above. Therefore, I will deny this item of the discovery request.

Item 6. The complainant sought information relating to when the contractor was made aware that the complainant had filed his Part 708 complaint. I find that this information is not relevant. The complainant filed his complaint in March 1997 and was laid off in May 1997. The closeness in time between the filing and the personnel action is sufficient to demonstrate that the filing was a contributing factor to the action. (I would most likely impute the DOE's knowledge of the filing to the contractor). I will therefore order this item of the discovery request to be denied.

B. Request sent May 2, 1999

Item 1. The complainant disagrees with the answer of one of the complainant's employees to one of his written interrogatories. The remedy for this issue is for the complainant to examine or cross- examine the employee on this point at the hearing (most likely by telephone since she is located in another state). I will therefore deny this item of the request.

Item 2. The complainant sought information regarding whether a survey taken by the contractor in August 1996 regarding whether employees would prefer reduced hours to layoffs was "binding." The contractor responded that this request is irrelevant. The complainant then explained that this survey was used to justify lower hours which then led to the allegedly fraudulent reduction of sick leave and vacation leave. Whether or not the survey was "binding," the issue in this instance is the reasonableness of the complainant's assertion of fraud. As explained above, he can only demonstrate reasonableness based on his knowledge at the time of the disclosure; information as to whether the survey was "binding" does not go to that issue. I will therefore deny this item of the request.

There is no dispute as to items 3 and 4.

Items 5 and 6. The complainant sought budget figures for his work group within the contractor broken down by normal support task work and cost-recovery monies. The complainant is seeking to support his disclosure that cost-recovery monies were not allocated properly either to the contractor by DOE or to his work group by the contractor. The contractor responded that it does not receive budget figures from DOE in this level of detail.

I will deny this request for discovery because it is seeking information concerning an issue which I consider irrelevant. The complainant is essentially seeking evidence regarding either a contract issue between the DOE and the contractor or an internal contractor management issue. I do not believe that this type of contract issue or management issue can be the subject of a protected disclosure under 10 C.F.R. § 708.5. I do not think that the potential breach of a contract is the type of substantial violation of a "law" referred to in Section 708.5(a)(1), or that a reasonable person could conclude that any of the items listed in

Section 708.5(a)(3) had occurred. I will therefore deny these items of the request.

In conclusion, I will order that the contractor produce the relevant pages of the 1995 handbook above no later than May 28, 1999.

It Is Therefore Ordered That:

(1) The Motion for Discovery filed by Frank E. Isbill Case No. VWD-0002, is hereby granted as set forth in Paragraph (2) below and denied in all other respects.

(2) NCI Communications, Inc. shall submit to Frank E. Isbill, no later than May 28, 1999, the information requested in Item 2 (with respect only to the 1995 handbook) of his April 30, 1999 discovery request.

Dawn L. Goldstein

Hearing Officer

Office of Hearings and Appeals

Date: May 21, 1999

(1)If the contractor were to concede that the complainant's disclosure of this alleged fraud was reasonable and in good faith, this discovery order would be rescinded.

(2)The complainant does not view this as a retaliatory personnel action since no reprimand was placed in his file. See email message from complainant to Hearing Officer (April 21, 1999).

Case Nos. VWD-0003 and VWD-0005

July 8, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Supplemental Order

Name of Petitioner: David M. Turner

Date of Filings: June 8, 1999

Case Numbers: VWD-0003

VWD-0005

This decision will consider two Motions for Discovery filed by David M Turner with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on June 8, 1999, as amended on June 22, 1999. The discovery motions relate to a hearing requested by Mr. Turner under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). The OHA has assigned Mr. Turner's hearing request Case No. VWA-0038, and the discovery requests under consideration Case Nos. VWD-0003 and VWD-0005.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor- operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. The Part 708 regulations were revised effective April 14, 1999, and by their terms, apply to all cases which were pending as of the date they became effective, including Mr. Turner's case. See 64 Fed. Reg. 12,862 (March 15, 1999); 10 C.F.R. §§ 708.8, 708.22.

B. Factual Background

From 1991 to 1995, Mr. Turner was employed as a Tritium Shift Supervisor by GPC at Princeton University Plasma Physics Laboratory's (PPPL) Tokamak Fusion Test Reactor in Princeton, New

Jersey. At the time, GPC operated as a subcontractor to Princeton, the DOE Management and Operating Contractor at PPPL.

Mr. Turner claims that in April 1995, he disclosed to PPPL and GPC 24 serious inaccuracies in a Final Safety Analysis Report for PPPL's Tritium Regeneration System. Turner also alleges that during this same period, he was instructed to declare PPPL's Tritium Regeneration System operable, despite his having voiced safety concerns about the system. The next month, May 1995, GPC and Princeton removed Mr. Turner from his position, contending that Mr. Turner was no longer physically able to perform his duties as a Tritium Shift Supervisor due to a pre-existing medical condition, i.e., a spinal nerve injury. In June 1995, GPC terminated Turner from its employ.

C. Procedural Background

In August 1995, Mr. Turner filed a complaint under Part 708 with the DOE's Office of the Inspector General (IG) alleging that GPC and Princeton had fired him in retaliation for his having made safety and health disclosures relating to PPPL's Tritium Regeneration System. After making a preliminary determination that the complaint fell within the jurisdiction of Part 708, the IG referred the complaint to the DOE's Chicago Operations Office for informal resolution. After efforts at informal resolution failed, the IG began its investigation into the allegations set forth in Mr. Turner's complaint. (1) On May 26, 1999, the IG issued its Report of Inquiry and Recommendations on Turner's complaint in which it concluded that the available evidence indicated that GPC and PU would have terminated Turner's employment even if he had not made the disclosures about the Tritium Regeneration System.

Mr. Turner filed a timely request with the IG for an administrative hearing on his Part 708 complaint. Shortly after the IG transmitted Turner's hearing request to the OHA Director on April 26, 1999, I was appointed the hearing officer in this case. I have scheduled a hearing in this matter for July 27 and 28, 1999 in Princeton, New Jersey.

II. Motions for Discovery

The Hearing Officer determines, on a case-by-case basis, the necessity and appropriate scope of discovery under the recently revised Part 708 regulations. See 64 Fed. Reg. 12862, 12867 (March 15, 1999). According to the regulations, a Hearing Officer may order discovery at the request of a party if that party shows that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the whistleblower complaint. See 10 C.F.R. § 708.28(b)(1).

In some cases under Part 708, OHA Hearing Officers have requested that the parties work out discovery matters among themselves, only involving the Hearing Officer if a material dispute arises. See Frank E. Isbill, Case No. VWD-0002, 27 DOE ¶ ____(May 21, 1999); L&M Technologies, Inc., Case No. LWD-0009, 23 DOE ¶ 87,502 (1993). In this case, I decided after my first telephone conference with all the parties that a different course of action was warranted because Mr. Turner is not represented by legal counsel. It was evident to me that Mr. Turner could easily be overwhelmed with the discovery process due to his unfamiliarity and inexperience with this or any other court or administrative proceeding. In contrast, the contractors in this case are represented by two highly skilled litigators, one a partner in a major Washington, D.C. law firm and the other a lawyer in Princeton's Office of General Counsel. Both of the contractors' lawyers are well versed in all the nuances of civil litigation, including discovery, and are representing their respective clients with great zeal.

To ensure the integrity of the process, and prevent Mr. Turner from feeling intimidated by the opposing parties, I instructed all parties in writing on June 4, 1999 that any motions for discovery must be submitted to me for my evaluation and approval or denial. See Letter from Ann S. Augustyn, Hearing Officer, to David M. Turner, Charles Wayne, Esq. and Katherine Buttolph (June 4, 1999) (June 4 Letter). (2) I also advised the parties at that time that administrative proceedings under Part 708 are intended to be informal in nature and are not intended to emulate formal trial proceedings. 57 Fed. Reg. 7533, 7537-38 (March 3, 1992). Hence, I noted that the discovery requirements, notices, and procedures that are embodied in the Federal Rules of Civil Procedure do not govern discovery in Part 708 proceedings.

On June 8, 1999, I received the Motions for Discovery under consideration, one seeking discovery from Princeton and the other seeking discovery from GPC. Mr. Turner amended these discovery requests on July 22, 1999. I convened a conference call on July 1, 1999 to discuss, and rule on, the specific discovery requests of the motion. On the same date, I issued a discovery order regarding the joint discovery motion filed by Princeton and GPC. Princeton University/General Physics Corporation, Case No. VWD-0004, 27 DOE ¶ ____ (July 1, 1999). In that order, I memorialized my earlier oral decision to bifurcate this proceeding into two phases: a liability and remedial phase. Id. The significance of that ruling is that all discovery regarding damages in this case will not be entertained during the liability phase of this case.

A. Turner's Motion for Discovery from GPC (Case No. VWD-0003)

In his Amended Motion for Discovery, Case No. VWD-0003), Mr. Turner seeks 16 documents from GPC, and requests that GPC respond to four interrogatories. With the exception of Document Request No. 8 and Interrogatory No. 1, GPC objects to the remainder of Turner's discovery requests. GPC has agreed, however, in the spirit of cooperative discovery to produce non-privileged documents or affirmatively state there are no responsive documents with regard to Document Request Nos. 1, 2, 4, 5, 7, 9, 10, 11, 12, 13, 15 and a portion of 16. There is clearly no need for discussion of these discovery requests as there is now no material dispute about these matters. I will therefore grant all the requests where there is agreement between GPC and Mr. Turner.

The first discovery item about which there is a material dispute is Document Request No. 3. In this request, Turner seeks "[t]he GPC policies on handling ADA claims and short and long term disability claims that were in effect on May 25, 1996." Turner seeks this material to discern GPC's policy regarding its treatment of employees who were "not physically capable" of performing their jobs during the period of his employment with GPC at PPPL, 1990 until June 22, 1995. GPC objects to producing these documents on several grounds. First, GPC states that Turner did not raise in his Part 708 Complaint an allegation that GPC violated the Americans with Disabilities Act (ADA) or any other state or federal law. Further, argues GPC, OHA does not have jurisdiction over such claims even had Turner raised them. Lastly, GPC states that Turner has failed to allege that he requested and GPC refused to grant short or long term disability leave.

I find that GPC's policies regarding the manner in which it handles employees who are no longer physically able to perform their job is relevant to Turner's Part 708 Complaint. The record reflects that GPC and Princeton removed Turner from his position of Tritium Shift Supervisor because they apparently believed he could not physically perform his job duties. See Exhibits 4, 6, 8, 11 and 16. In other Part 708 cases, Hearing Officers have looked at the manner in which contractors have adhered to, or departed from, their own policies to determine whether the contractor has proven that it would have taken the same action absent the protected disclosure. E.g. Thomas T. Tiller, 27 DOE ¶ 87,504 (1998), aff'd, 27 DOE ¶ 87,509 (1999) (corporate policy followed regarding the handling of a management employee who borrowed money from a union representative during collective bargaining negotiations); Ronny J. Escamilla, 26 DOE ¶ 87,508 (1996), aff'd, 27 DOE ¶ 87,508 (1997) (contractor followed corporate policy regarding handling of employees who falsify documents); Charles Barry DeLoach, 26 DOE ¶ 87,509 (1997) (corporate policy followed in terminating employees in cases of proven theft); Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994)(contractor followed its personnel procedure of not making a promotion permanent until the job position is posted); Ronald Sorri, 23 DOE ¶ 87,503 (1993)(the contractor did not follow normal business practices or its internal procedural guidelines in laying off the whistleblower). For the foregoing reasons, I will grant Mr. Turner's request that GPC produce its corporate policy regarding the manner in which it routinely handles situations where an employee is no longer physically able to perform his/her functions. In this regard, if GPC does not have an Employee Handbook or specific policy pertaining to its operations at the PPPL, then it should produce its handbooks or other policy guidance that govern other DOE facilities where it operates in a contractor or subcontractor capacity.

The next contested discovery item is Document Request No. 6 in which Turner seeks the following: "[a]ll

job postings GPC had during the time period May 25, 1995 through September 1, 1996 and the contract numbers and names of the people who filled the positions." GPC responds that Turner never alleged that GPC refused to locate alternative employment for him in retaliation for his making a protected disclosure. Moreover, GPC states that Turner's request is overly broad and unduly burdensome. In addition, GPC claims that Turner was terminated in June 1995, implying that a search through September 1996 is not relevant. Finally, GPC maintains that Turner would not have been qualified to perform all jobs for which GPC had openings, noting also that Turner refused to consider positions that, in his opinion, did not pay a high enough salary.

The record reflects that GPC advised Mr. Turner that it had actively sought work for him, was unable to secure that work, and hence was forced to terminate him for lack of work. Exhibit 1, Attachment 4. The record also shows that on May 26, 1995, GPC sent an interoffice memorandum to its Tritium Shift Supervisors announcing that Mr. Turner would no longer be assigned to the PPPL and that GPC would be looking for a reassignment for Mr. Turner to a position which accommodates his needs and qualifications, should such a position become available. Exhibit 1, Attachment 6. Since Mr. Turner's removal from his Tritium Shift Supervisor position and his subsequent termination are central issues in this case, it is certainly relevant to explore GPC's representations that it attempted to locate other positions for Turner prior to its decision to terminate him. I find therefore that job postings within GPC for the period May 24, 1995, the date GPC removed Mr. Turner from his position, through June 22, 1995, the date GPC terminated Mr. Turner from their employ, are the proper subject of discovery. For the foregoing reasons, I will grant Document Request No. 6 in part, limiting the time period for which GPC must produce its job listings.

Document Request No. 14 that asks GPC to produce "[a]ll documents, memos, e-mail or other communications(s), whether written or oral, to or from any agency, commission, board, attorney, individual or other public body that relate to any claim asserted by any other party of claims including, but not limited to, those of any inappropriate action on the part of General Physics in their hiring and/or release of any employee or employee candidate from January 1, 1990 until the present day. I will deny this discovery request. Without question, GPC's hiring practices are not at issue in this proceeding. Moreover, I agree with GPC that unsubstantiated allegations of third parties concerning possible unlawful employment actions on GPC's part are unlikely to lead to any relevant or material information for purposes of this proceeding.

There are two parts to Document Request No. 16. GPC has agreed, in the spirit of cooperative discovery, to turn over all non-privileged documents that relate to that portion of Document Request No.16 that requests non-privileged documents prepared by certain enumerated GPC employees that relate in any way to Mr. Turner's employment with GPC, Mr. Turner's dismissal from PPPL, and Mr. Turner's termination from GPC's employ. The portion of the subject discovery request that GPC objects to asks GPC to describe the "day-to-day" relationship of several GPC employees with "General Physic's contract with Princeton." When I asked Mr. Turner during our telephone conference on July 1, 1999 to describe the relevancy of this portion of the request to an issue in the proceeding, he was unable to do so satisfactorily. I must therefore deny that portion of Mr. Turner's request for documents which asks for an enumeration of the day-to-day relationship of certain GPC employees to Princeton.

With respect to Document Request No. 17 and Interrogatory Nos. 2 and 3, all of which seeks information about and documentation from lay and expert witnesses that GPC intends to call at the hearing, I will require GPC to provide the requested information to me, Mr. Turner, and Princeton no later than July 16, 1999. I had previously requested all parties to furnish me with a number of items by July 12, 1999. See Letter from Ann S. Augustyn, Hearing Officer, to David Turner, Charles Wayne, and Katherine Buttolph (June 4, 1999). Those items included: (1) a list of witnesses each party intends to call at the hearing, together with a short summary of the testimony each expects to elicit from the witnesses, (2) all exhibits each party intends to refer to at the hearing, or intends to enter into the record of this proceeding, and (3) any requests for the issuance of subpoenas to secure the appearance of witnesses at the hearing. During the discovery status telephone conference on July 1, 1999, I informed the parties that the items enumerated

above will now be due on July 16, 1999. Since Document Request No. 17 and Interrogatory Nos. 2 and 3 duplicates the request I made of the parties in my June 4, 1999 letter, those discovery requests are granted. GPC will turn over responsive materials related to those three discovery requests no than July 16, 1999.

The final discovery request about which there is disagreement is Interrogatory No. 4 that asks the following question:

During the past 10 years, if you have been accused of any wrongful employment practices, violations of any disability laws, whether federal, state or local, list the date and the specifics of the complaint and the outcome of such complaint whether culminating in a court hearing or settled out of court or in any other way, shape or form.

I have carefully considered GPC's numerous objections to this discovery request (i.e. Turner did not allege he suffered unlawful retaliation (sic) with respect to any and all employment practices; Turner did not allege any unlawful employment practice by GPC; Turner did not allege GPC violated any state or federal disability law; OHA does not have jurisdiction over claims brought under state or federal disability laws) and the comments submitted by the parties at the July 1, 1999 status telephone conference. After due deliberation, I have decided to grant limited discovery on a discrete issue that is subsumed in Interrogatory No. 4.

OHA Hearing Officers have found it extremely helpful in evaluating Part 708 claims to examine how a company has treated employees similarly situated to the whistleblower. See Ronald Sorri, 23 DOE ¶ 87,503 (1993); Ronny J. Escamilla, 26 DOE ¶ 87,508 (1996), aff'd, 27 DOE ¶ 87,508 (1997). Courts have also examined the treatment of similarly situated employees in determining whether ostensibly legitimate bases for adverse personnel actions are pretexts for punishing or getting rid of a whistleblower. See e.g. Kansas Gas & Electric Co. V. Brock, 780 F.2d 1505 (10th Cir. 1985)(requiring whistleblower to document his educational requirements while not applying similar requirements to other employees). To this end, I will require GPC to respond to the following re- phrased interrogatory:

During the last five years, describe how GPC has handled situations at DOE-owned contractor-operated facilities when one of GPC's employees has become physically unable to perform his/her job responsibilities. For each situation, identify the employee, his/her location, the nature of the physical disability, the reason why the physical disability impeded the employee's job functioning; what efforts GPC undertook to accomodate the employee; whether the employee filed any state, federal or administrative action against GPC and the disposition of any such action.

For all the discovery I have granted in whole or in part, GPC will tender responsive documents or respond to the interrogatories no later than July 16, 1999.

B. Turner's Motion for Discovery from Princeton (Case No. VWD-0005)

In his Motion for Discovery, as amended, Case No. VWD-0005, Turner seeks 21 documents from Princeton and requests that Princeton respond to four interrogatories. There appears to be no material dispute about any of the document production requests at issue. Princeton has agreed to furnish Mr. Turner with documents responsive to Document Request Nos. 1, 5, 6, 7, and 8. While objecting to discovery with respect to Document Request Nos. 14 through 20, Princeton has agreed, in the spirit of cooperative discovery, to turn over non-privileged responsive documents. For Document Request Nos. 2 through 4, 9, and 10, Princeton has provided adequate responses to the document requests. As for Document Request Nos. 11-13 which seek the last known address and telephone number for three former PPPL employees, Counsel for Princeton has agreed to facilitate Mr. Turner's contact with the former employees. Finally, with respect to Document Request No. 21 which seeks documents relating to the findings or opinions of any expert who is expected to testify at the hearing, Princeton responds that the request is premature. On this matter, I will direct Princeton to furnish information responsive to Document Request No. 21 to Mr. Turner, me and GPC no later than July 16, 1999, the same date Princeton's witness

list and exhibits are due.

Princeton has adequately responded to Interrogatory No. 1 in its July 1, 1999 submission commenting on the subject discovery motion. Regarding Interrogatory No. 2, Princeton will advise me and all other parties by July 16, 1999 of the identity of all witnesses and experts who are expected to testify, and otherwise comply with the instructions contained in my June 4, 1999 letter.

Interrogatory No. 4 is identical in substance to Interrogatory No. 4 posed by Mr. Turner to GPC. In short, the interrogatory seeks information about accusations of wrongful employment practices against Princeton over the last ten years as well as accusations that Princeton violated state and federal disability laws over the last ten years.

Princeton objects to this discovery request, arguing it is overbroad and unduly burdensome. In my opinion, it is not relevant to this proceeding whether Princeton in the past violated state and federal disability laws or wrongfully terminated employees. It is relevant, however, to learn how Princeton dealt with its subcontractors whose employees became physically unable to perform their job responsibilites. As stated in Section II.A. above, the manner in which companies treat similarly situated employees or, in this case, oversee its subcontractors handling of this issue is relevant to a Part 708 analysis. Therefore, Princeton will respond to the Interrogatory No. 4, as rephrased below:

During the last five years, describe how Princeton has handled situations at PPPL when an employee of one of its subcontactors has become physically unable to perform his/her job responsibilities. For each situation, identify the subcontractor, the nature of the subcontractor employee's physical disability, the reason why the physical disability impeded the subcontractor employee's job functioning; and what ultimately happened to the employee, if known.

Princeton will furnish its response to the interrogatory set forth above no later than July 16, 1999.

It Is Therefore Ordered That:

(1) The Motion for Discovery filed by David M. Turner on June 8, 1999, as amended on June 22, 1999, Case No. VWD-0003, be and hereby is granted as set forth in paragraph (2) below, and denied as set forth in paragraph (3) below;

(2) General Physics Corporation shall submit to Mr. Turner no later than July 16, 1999 non- privileged documents responsive to Document Request Nos. 1, 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 15, and that portion of 16 that requests non-privileged documents prepared by certain enumerated employees of General Physics Corporation that relate in any way to Mr. Turner's employment with General Physics Corporation, Mr. Turner's dismissal from Princeton University, and Mr. Turner's termination from the employ of General Physics Corporation. General Physics Corporation shall also furnish Mr. Turner no later that July 16, 1999 with responses to Interrogatories Nos. 1, 2, and 3. No later than July 16, 1999, General Physics Corporation will also furnish Mr. Turner with documents responsive to revised Document Request Nos. 3 and 6, and a response to revised Interrogatory No. 4, only to the extent set forth in the foregoing Decision and Order.

(3) Mr. Turner's Request for Production of Document No. 14, and that portion of Document Request No. 16 which seeks the day-to-day relationship of certain employees of General Physics Corporation to Princeton University, are denied.

(4) The Motion for Discovery filed by David M. Turner on June 8, 1999, as amended on June 22, 1999, Case No. VWD-0005) be and hereby is granted as set forth in paragraph (5) below and denied in all other respects.

(5) No later than July 16, 1999, Princeton University shall furnish Mr. Turner, consistent with the terms of the foregoing Decision and Order, non-privileged documents responsive to Document Request Nos. 1

through 21. By that same date, Princeton University will respond to Interrogatory Nos. 1, 2, and 3. With respect to Interrogatory No. 4, Princeton University shall respond, no later than July 16, 1999, to the re-phrased interrogatory set forth in the foregoing Decision and Order.

(6) This is a final Order of the Department of Energy.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: July 8, 1999

(1)In the interim, the DOE's Office of Nuclear Safety Enforcement initiated a separate investigation into the safety issues raised by Turner as they related to the Tokamak Fusion Reactor project at PPPL. During its investigation, the Nuclear Safety Enforcement investigators conducted a five-hour deposition of Mr. Turner. In May 1996, the Office of Nuclear Safety advised the IG of its conclusion that Mr. Turner had some valid observations regarding the need for clarification and enhanced descriptive language in the Final Safety Analysis Report for the Tokamak Fusion Test Reactor. See Memorandum dated May 29, 1996 from R. Keith Christopher, Director, Enforcement and Investigation Staff, to James E. Sheldon, III, Investigation Team Leader, Office of Employee Protection.

(2)This situation exemplifies the wisdom of the DOE's decision not to mandate discovery in all situations as suggested by one of the commenters to the proposed interim final rule revising the Part 708 regulations. See 64 Fed. Reg. 12862 at 12867 (March 15, 1999). To do so in this case might have, in my opinion, unduly burdened the whistleblower, and delayed this proceeding beyond reason.

Case No. VWD-0004

July 1, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Supplemental Order

Names of Petitioners:Princeton University

General Physics Corporation

Date of Filing: June 10, 1999

Case Number: VWD-0004

This decision will consider a Motion for Discovery filed jointly by Princeton University (Princeton) and General Physics Corporation (GPC) on June 10, 1999 with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The discovery motion relates to a hearing requested by David Turner under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). The OHA has assigned Mr. Turner's hearing request Case No. VWA-0038, and the discovery request under consideration Case No. VWD-0004.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor- operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. The Part 708 regulations were revised effective April 14, 1999, and by their terms, apply to all cases which were pending as of the date they became effective, including Mr. Turner's case. See 64 Fed. Reg. 12,862 (March 15, 1999); 10 C.F.R. §§ 708.8, 708.22.

B. Factual Background

From 1991 to 1995, Mr. Turner was employed as a Tritium Shift Supervisor by GPC at Princeton University Plasma Physics Laboratory's (PPPL) Tokamak Fusion Test Reactor in Princeton, New Jersey. At the time, GPC operated as a subcontractor to Princeton, the DOE Management and Operating Contractor at PPPL.

Mr. Turner claims that in April 1995, he disclosed to PPPL and GPC 24 serious inaccuracies in a Final Safety Analysis Report for PPPL's Tritium Regeneration System. Turner also alleges that during this same period, he was instructed to declare PPPL's Tritium Regeneration System operable, despite his having voiced safety concerns about the system. The next month, May 1995, GPC and Princeton removed Mr. Turner from his position, contending that Mr. Turner was no longer physically able to perform his duties as a Tritium Shift Supervisor due to a pre-existing medical condition, i.e., a spinal nerve injury. In June 1995, GPC terminated Turner from its employ.

C. Procedural Background

In August 1995, Mr. Turner filed a complaint under Part 708 with the DOE's Office of the Inspector General (IG) alleging that GPC and Princeton had fired him in retaliation for his having made safety and health disclosures relating to PPPL's Tritium Regeneration System. After making a preliminary determination that the complaint fell within the jurisdiction of Part 708, the IG referred the complaint to the DOE's Chicago Operations Office for informal resolution. After efforts at informal resolution failed, the IG began its investigation into the allegations set forth in Mr. Turner's complaint. (1) On May 26, 1999, the IG issued its Report of Inquiry and Recommendations on Turner's complaint in which it concluded that the available evidence indicated that GPC and PU would have terminated Turner's employment even if he had not made the disclosures about the Tritium Regeneration System.

Mr. Turner filed a timely request with the IG for an administrative hearing on his Part 708 complaint. Shortly after the IG transmitted Turner's hearing request to the OHA Director on April 26, 1999, I was appointed the hearing officer in this case. I have scheduled a hearing in this matter for July 27 and 28, 1999 in Princeton, New Jersey.

II. Motion for Discovery

The Hearing Officer determines, on a case-by-case basis, the necessity and appropriate scope of discovery under the recently revised Part 708 regulations. See 64 Fed. Reg. 12862, 12867 (March 15, 1999). According to the regulations, a Hearing Officer may order discovery at the request of a party if that party shows that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the whistleblower complaint. See 10 C.F.R. § 708.28(b)(1).

In some cases under Part 708, OHA Hearing Officers have requested that the parties work out discovery matters among themselves, only involving the Hearing Officer if a material dispute arises. See Frank E. Isbill, Case No. VWD-0002, 27 DOE ¶ ____(May 21, 1999); L&M Technologies, Inc., Case No. LWD-0009, 23 DOE ¶ 87,502 (1993). In this case, I decided after my first telephone conference with all the parties that a different course of action was warranted because Mr. Turner is not represented by legal counsel. It was evident to me that Mr. Turner could easily be overwhelmed with the discovery process due to his unfamiliarity and inexperience with this or any other court or administrative proceeding. In contrast, the contractors in this case are represented by two highly skilled litigators, one a partner in a major Washington, D.C. law firm and the other a lawyer in Princeton's Office of General Counsel. Both of the contractors' lawyers are well versed in all the nuances of civil litigation, including discovery, and are representing their respective clients with great zeal.

To ensure the integrity of the process, and prevent Mr. Turner from feeling intimidated by the opposing parties, I instructed all parties in writing on June 4, 1999 that any motions for discovery must be submitted to me for my evaluation and approval or denial. See Letter from Ann S. Augustyn, Hearing Officer, to David M. Turner, Charles Wayne, Esq. and Katherine Buttolph (June 4, 1999) (June 4 Letter). (2) I also advised the parties at that time that administrative proceedings under Part 708 are intended to be informal in nature and are not intended to emulate formal trial proceedings. 57 Fed. Reg. 7533, 7537-38 (March 3, 1992). Hence, I noted that the discovery requirements, notices, and procedures that are embodied in the Federal Rules of Civil Procedure do not govern discovery in Part 708 proceedings.

On June 10, 1999, I received the Motion for Discovery under consideration consisting of 16 extensive requests for the production of documents, 11 multi-part interrogatories, and a request to depose Mr. Turner. I convened a conference call on June 11, 1999 to discuss, and rule on, the specific discovery requests of the motion. (3) During the conference, I first advised the parties of my decision to bifurcate this proceeding into two phases, a liability phase and a remedial phase. I then announced that all discovery regarding the issue of potential damages will be deferred, reasoning that Mr. Turner should not be burdened with extensive discovery requests regarding damages when it is unclear whether any liability will be found against the contractors in this case. If I issue an initial agency decision in favor of Mr. Turner, at that time I will determine the most appropriate mechanism to ascertain the extent of Mr. Turner's damages. For now, Mr. Turner has complied with my request that he furnish me and the contractors with an approximate amount of monetary damages he is seeking so the parties can add this factor to their assessment of potential exposure in this case, and decide whether to pursue mediation, settlement, or none of the aforementioned options.

A. Request for Production of Documents and Interrogatories

The following discovery requests, all of which relate to the remedial phase of this proceeding, are deferred in their entirety for the reasons set forth above:

- Document Request No. 7 requesting "[a]ll documents that relate to any suits, complaints, bankruptcy petitions, charges or claims, including but not limited to, any claim for loss of income, any workers' compensation claims, unemployment compensation claims, disability benefits claims and claims for monetary damages to which you have been a party or witness, including any such actions against Princeton and General Physics other than the instant case."
- Document Request No. 12 requesting "[p]ay stubs, payroll records, earnings records, and all other documents relating to any and all sources of income or earnings for the period from 1990 to the present, including, but not limited to, your state, federal, and local income tax returns, W-2 and 1099 forms, documents pertaining to retirement benefits and plans, health insurance, wage, salary and any other compensation from any source whatsoever."
- Document Request No. 16 requesting "[a]ll documents that support or otherwise relate to the amount of damages claimed to have been suffered by you and the method of computation used to determine that amount."
- Interrogatory No. 2 which asks Mr. Turner to "[i]dentify each person by whom you have been employed or performed services since the end of your employment with General Physics and describe the nature of your employment, including, but not limited to, the position(s) held, the dates each position was held, job duties and responsibilities in each position, the identity of your supervisor(s), and the compensation (including salary, bonuses and fringe benefits) received by you, including the date and amount of any raises."
- Interrogatory No. 6 which asks Mr. Turner to "[s]tate and itemize the precise amount of damages claimed to have been suffered by you, describe in detail the factual basis and method of computation used to determine that amount, and identify all documents that support, were relied on or otherwise relate to such computation."
- Interrogatory No. 7 which asks Mr. Turner to "[d]escribe in detail all income or other earnings, including, but not limited to, all salaries, bonuses, and fringe benefits, that you have received since your employment with General Physics ended and state the precise amount, nature and source of all such income or earnings."

Portions of other discovery requests are deferred in part to the extent they relate to the issue of damages. Those discovery items are the following:

- That portion of Request for Production of Documents No. 1 that seeks documents pertaining to Mr. Turner's claim for damages.
- That portion of Interrogatory No. 5 that seeks the identity of each person having personal knowledge

of any facts that support Mr. Turner's claim for damages.
- That portion of Interrogatory No. 10 that seeks the identity of health care providers who have knowledge about Mr. Turner's claim for damages.

In addition, I have decided that two of the contractors' discovery requests are too broad and must be limited in scope, i.e., Request for Production of Document No. 13 and Interrogatory No. 11. Request for Production of Document No. 13 relates, in general, to Mr. Turner's medical records. I am restricting discovery on this matter to the time period beginning when Mr. Turner commenced his employment with GPC in Princeton, New Jersey until June 11, 1999, the date of the telephone conference regarding discovery. In addition, I will limit the documents Mr. Turner must produce in response to Request for Production of Document No. 13 to those documents he has in his possession, or can reasonably obtain from his numerous health care providers. Mr. Turner has advised that he has had scores of doctors in four states during the last decade and may not be able to locate them all. In addition, Mr. Turner has expressed concern that he may not have the financial resources to pay for the photocopying of the relevant documents. I have instructed Mr. Turner to determine from his health care providers the cost of reproducing the subject documents. Mr. Turner will immediately notify me if he is unable to bear the financial cost associated with complying with this discovery request.

Interrogatory No. 11 seeks information regarding Mr. Turner's medical care. I will restrict discovery in this respect as follows: the first clause in of Interrogatory 11 which reads, "During the past ten (10) years" is deleted. Inserted in its place is the following language, "From the date of your employment with GPC in Princeton, New Jersey, until June 11, 1999."

The remaining interrogatories and production of document requests will be granted in their entirety. Those include Document Production Request Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11, 14, 15; and Interrogatory Nos. 1, 3, 4, 8 and 9.

Summary

To summarize the disposition of all the discovery requests, except request deposition request, I make the following rulings:

Document Production Request No. 1 Granted in part; deferred as to damages.

Document Production Request No. 2 Granted

Document Production Request No. 3 Granted

Document Production Request No. 4Granted

Document Production Request No. 5 Granted

Document Production Request No. 6 Granted

Document Production Request No. 7 Deferred in its entirety

Document Production Request No. 8 Granted

Document Production Request No. 9 Granted

Document Production Request No. 10Granted

Document Production Request No. 11Granted

Document Production Request No. 12Deferred in its entirety

Document Production Request No. 13Granted in part

Document Production Request No. 14Granted

Document Production Request No. 15Granted

Document Production Request No. 16Deferred in its entirety

Interrogatory No. 1 Granted

Interrogatory No. 2 Deferred in its entirety

Interrogatory No. 3 Granted

Interrogatory No. 4 Granted

Interrogatory No. 5 Granted in part; deferred as to damages

Interrogatory No. 6 Deferred in its entirety

Interrogatory No. 7 Deferred in its entirety

Interrogatory No. 8 Granted

Interrogatory No. 9 Granted

Interrogatory No. 10 Granted in part; deferred as to damages

Interrogatory No. 11 Granted in part

Mr. Turner will respond to the interrogatories I have granted in whole or in part, and provide the documents responsive to the Document Production Requests I have granted in whole or in part no later than July 12, 1999.

B. Request for Deposition

GPC and Princeton also seek to depose Mr. Turner in this proceeding. Prior to the submission of the discovery request under consideration, I advised the parties of my concern that any deposition of Mr. Turner not yield cumulative or duplicative information. See June 4 Letter. I pointed out that Mr. Turner has already provided five hours of testimony to the DOE's Office of Nuclear Safety Enforcement and that a copy of the transcript containing Mr. Turner's sworn testimony is included as a part of the record in this case.

In their joint discovery request, GPC and Princeton claim that the earlier examination of Mr. Turner by the DOE's Office of Nuclear Safety Enforcement did not explore, or adequately explore, the following subject areas:

1. The exact nature of Mr. Turner's allegations of unlawful reprisal or retaliation by Princeton and General Physics respectively;
2. The factual basis for each claim of unlawful reprisal or retaliation made by Mr. Turner against Princeton and General Physics respectively;
3. The damages claimed by Mr. Turner, including, but not limited to, each item of damages, the amount of each item, the components of each item, the calculation of each item or component, and the causal connection between each items and the alleged unlawful actions of Princeton and General Physics;

4. The steps taken, if any, by Mr. Turner to mitigate damages following his removal from the position of Tritium Shift Supervisor at Princeton University Plasma Physics Laboratory.

As a preliminary matter, I will not permit Mr. Turner to be deposed regarding the issue of damages for the same reasons I articulated above. Unlike the Requests for Production of Documents and Interrogatories relating to damages, however, I am denying, not deferring, the request to depose Mr. Turner on the issue of damages. If a remedial phase of this case is necessary, I believe any information regarding Mr. Turner's damages can be documented in writing without the need for deposition testimony. I will, of course, permit GPC and Princeton to provide comments to me regarding any documentation Mr. Turner might submit to support his claim for damages during the remedial phase of this proceeding, if there is one.

As for GPC and Princeton's request to depose Mr. Turner regarding the factual underpinnings of Mr. Turner's alleged protected disclosures and the alleged unlawful reprisals and retaliation he experienced, I have carefully considered the request and have decided to deny it for several reasons. First, GPC and Princeton's assertion that they need the deposition to explore "other pertinent issues" not adequately examined by the DOE's Office of Nuclear Safety Enforcement is simply too broad a justification. That explanation does not satisfy my instruction to the parties that any discovery request "explain . . . how . . . information [sought] is germane to the issues raised in the Turner's whistleblower complaint." See June 4 Letter at 2. Second, Mr. Turner has already tendered a pre- hearing submission in response to my request in which he has clarified, among other things, what the protected disclosures at issue are, and to whom he made those disclosures. See Letter from David M. Turner to Ann S. Augustyn, Hearing Officer (June 1, 1999). Third, Mr. Turner is already providing GPC and Princeton with extensive materials pursuant to this discovery order. At a minimum, those materials should allow GPC and Princeton to isolate, gather evidence and develop the key factual issues in this proceeding. Lastly, I remind GPC and Princeton that Mr. Turner will be available for examination under oath at the hearing. At that time, the parties will have sufficient opportunity to direct any relevant questions to Mr. Turner.

It Is Therefore Ordered That:

(1) The Motion for Discovery filed jointly by General Physics Corporation and Princeton University on June 10, 1999, Case No. VWD-0004, be and hereby is granted as set forth in paragraph (2) below; be and hereby is deferred as set forth in paragraph (3) below; and be and hereby is denied as set forth in paragraph (4) below;

(2) David Turner shall submit to General Physics Corporation and Princeton University no later than July 12, 1999 documents responsive to the General Physics Corporation and Princeton University Request for Production of Documents Nos. 1 (except as to damages), 2, 3, 4, 5, 6, 8, 9, 10, 11, 13 (only for the time period set forth in the foregoing Decision), 14 and 15. Mr. Turner shall also respond to Interrogatories Nos. 1, 3, 4, 5 (except as to damages), 8, 9, 10 (except as to damages), and 11 (as amended in the foregoing Decision).

(3) Discovery is deferred with respect to that portion of Document Production Request No. 1 relating to damages; Document Production Requests Nos. 7, 12 and 16 in their entirety; Interrogatory Nos. 2, 6, and 7 in their entirety, and those portions of Interrogatories Nos. 5 and 10 that relate to damages.

(4) The Request to Depose Mr. Turner filed jointly by General Physics Corporation and Princeton University is denied.

(5) This is a final Order of the Department of Energy.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: July 1, 1999

(1)In the interim, the DOE's Office of Nuclear Safety Enforcement initiated a separate investigation into the safety issues raised by Turner as they related to the Tokamak Fusion Reactor project at PPPL. During its investigation, the Nuclear Safety Enforcement investigators conducted a five-hour deposition of Mr. Turner. In May 1996, the Office of Nuclear Safety advised the IG of its conclusion that Mr. Turner had some valid observations regarding the need for clarification and enhanced descriptive language in the Final Safety Analysis Report for the Tokamak Fusion Test Reactor. See Memorandum dated May 29, 1996 from R. Keith Christopher, Director, Enforcement and Investigation Staff, to James E. Sheldon, III, Investigation Team Leader, Office of Employee Protection.

(2)This situation exemplifies the wisdom of the DOE's decision not to mandate discovery in all situations as suggested by one of the commenters to the proposed interim final rule revising the Part 708 regulations. See 64 Fed. Reg. 12862 at 12867 (March 15, 1999). To do so in this case might have, in my opinion, unduly burdened the whistleblower, and delayed this proceeding beyond reason.

(3)The attorney for Princeton, Ms. Buttolph, did not participate in the conference call. Rather, she permitted GPC's attorney to act in her stead. I later informed Ms. Buttolph of all my rulings, as did Mr. Wayne, the attorney for GPC.

Case No. VWD-0006

August 10, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Name of Petitioner:Lucy B. Smith

Date of Filing: August 2, 1999

Case Number: VWD-0006

This determination will consider a Motion for Discovery filed with the Office of Hearings and Appeals (OHA) by Lucy B. Smith. This Motion, dated July 20, 1999, concerns the hearing requested by Ms. Smith under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). She requested this hearing on May 5, 1999 (Case No. VWA-0041) in connection with the Part 708 complaint she filed against Westinghouse Savannah River Company (WSRC).

I. Factual Background

Ms. Smith's Part 708 complaint arises from her employment as a chemist with WSRC at DOE's Savannah River Site. Ms. Smith alleges that she was selected for termination by a Reduction-in- Force (RIF) as a result of making three protected disclosures involving alleged health and safety concerns to WSRC officials during the last half of 1996. On March 26, 1997, Ms. Smith filed the present Part 708 complaint. On April 1, 1997, Ms. Smith retired from WSRC.

After conducting an investigation, the Department of Energy's Office of the Inspector General issued a document entitled Report of Inquiry and Recommendations (Report) regarding Ms. Smith's Part 708 complaint. The Report concluded that Ms. Smith had made protected disclosures to WSRC officials and makes the assumption that the disclosures contributed to Ms. Smith's selection for termination. However, the Report also concluded that WSRC had proved by clear and convincing evidence that Ms. Smith would have been selected for termination by RIF absent the protected disclosures.

II. Request for Discovery

In a letter dated July 8, 1999, Ms. Smith requested the following three items pursuant to discovery in the pending hearing on her Part 708 complaint:

1. A copy of the Westinghouse Savannah River Site Policy regarding rehire of personnel who have been selected for layoff, as the policy relates to salaried exempt employees.
2. Provide the names, positions, dates of hire, and summary of qualifications for each chemist hired at the Savannah River Site since January 1, 1997.
3. Identify by name, position, date of hire, date of layoff, and date of rehire of all chemists, at the Westinghouse Savannah River Site for the period January 1, 1995, to date.

July 8, 1999 Letter from Herbert W. Louthian, Esq., Counsel for Lucy B. Smith, to Michael L. Wamsted, Esq., Counsel, WSRC. In a letter dated July 14,1999, WSRC replied that it was formally objecting to this discovery request since the requested material was not relevant to the subject matter of the complaint. See July 14, 1999 letter from Michael Wamsted, Esq., Counsel, WSRC, to Herbert Louthian, Esq., Counsel for Lucy B. Smith.

Ms. Smith submitted a Motion for Discovery dated July 20, 1999. In her Motion, Ms. Smith argues that she was selected for layoff for raising safety related issues to her manager. Further, Ms. Smith contends that because she was the best qualified and most experienced chemist in her work area, she would be eligible for rehire. With regard to Item No. 1, Ms. Smith argues that since she was selected for layoff pursuant to this policy, it would be relevant to the hearing. The requested items would indicate if WSRC rehired lesser qualified chemists instead of Ms. Smith. Item Nos. 2 and 3 are needed so that Ms. Smith can compare the qualifications of any chemists rehired by WSRC with Ms. Smith's qualifications to see if chemists with lesser qualifications were rehired over Ms. Smith.

WSRC argues that none of the requested items are relevant to Ms. Smith's Part 708 hearing. Ms. Smith's complaint alleges that the sole reprisal she suffered for her disclosure was her termination by RIF. Nowhere in her Part 708 complaint does she allege retaliation stemming from "preference in hire" or "rehire" policies. WSRC argues that 10 C.F.R. § 708.6(c) of the rules in effect require that the complainant be specific as to the nature of the retaliatory act. WSRC also notes that Ms. Smith failed to raise the issue of failure to rehire when questioned by the Office of the Inspector General (OIG) or when she submitted her typewritten statement to the OIG. Finally, WSRC argues that to comply with the discovery request would unduly burdensome.

III. Analysis

The issuance of discovery orders in proceedings under Part 708 is within the discretion of the Hearing Officer. 10 C.F.R. § 708.28(b)(1). The newly revised regulations more specifically lay out the types of discovery that can be ordered. See 10 C.F.R. § 708.28(b). The regulations grant the Hearing Officer authority to arrange for the issuance of subpoenas for witnesses to attend the hearing

on behalf of either party, or for the production of specific documents or other physical evidence, provided a showing that the requested discovery is “designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint.” 10 C.F.R. § 708.28(b)(1).

It is within the spirit of the DOE Contractor Employee Protection Program regulations that arrangements for pre-hearing discovery be worked out between the parties, without the need of a formal discovery order from the OHA Hearing Officer. However, the OHA is prepared to issue a discovery order if necessary to ensure compliance with any reasonable discovery request. Since there are material disputes regarding Ms. Smith’s discovery request, this Discovery Order is necessary.

The fundamental question raised by this Motion is whether discovery related to whether Ms. Smith was improperly not rehired by WSRC is relevant to the allegations contained in her Part 708 complaint. Each of the discovery items at issue here could lead to the discovery of information regarding rehiring policies or the identities of chemists who were rehired by WSRC. However, Ms. Smith's Part 708 complaint only alleges one retaliatory action - being selected for termination by RIF. There is no mention in her complaint or the Report alleging that Ms. Smith was not rehired in retaliation for her protected complaints. Thus, I do not find any of the three discovery items to be relevant to Ms. Smith's Part 708 complaint.

In the normal course, Ms. Smith's Motion for Discovery would be denied. However, I note that while Ms. Smith did not allege retaliation by virtue of not being rehired in her complaint, she could seek to amend her Part 708 complaint or file another complaint with DOE alleging this type of reprisal. See 10 C.F.R. §§ 708.10-708.14. At the time she filed her Part 708 complaint, Ms. Smith could not have known about future WSRC actions regarding a failure to rehire. To avoid piecemeal administrative litigation regarding Ms.

Smith's Part 708 complaint and to further the purpose of the Part 708 regulations to provide a venue to deal with allegations of retaliation against contractor employees, I have decided to grant Ms. Smith's Motion for Discovery so that the issue of whether Ms. Smith suffered a reprisal by not being rehired can be litigated in the current proceeding.(1) WSRC shall submit to Ms. Smith, no later than two weeks from the date of this Supplemental Order the information requested in Ms. Smith's July 8, 1999 discovery request. Within two weeks of receiving the requested discovery materials from WSRC, Ms. Smith shall submit a statement to WSRC and to OHA specifically alleging what, if any, reprisals Ms. Smith experienced by reason of not being rehired by WSRC. WSRC will then have an opportunity to respond to these allegations and to conduct discovery concerning these allegations. Additionally, since this order potentially expands the scope of the requested hearing on this matter, I will consider any request to delay the scheduled start of the hearing. In light of the above discussion, Ms. Smith's Motion for Discovery should be granted.

It Is Therefore Ordered That:

(1) The Motion for Discovery filed by Lucy B. Smith, Case No. VWD-0006, is hereby granted.

(2) Westinghouse Savannah River Company (WSRC) shall submit to Lucy B. Smith, no later than two weeks from the date of this Order, the information requested in Ms. Smith's July 8, 1999 discovery request.

(3) Within two weeks of receiving from WSRC the requested materials specified in Ms. Smith's July 8, 1999 discovery request, Ms. Smith shall submit to WSRC and OHA a statement specifically alleging what, if any, reprisals Ms. Smith experienced by reason of not being rehired by WSRC.

(4) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Richard A. Cronin, Jr.

Hearing Officer

Office of Hearings and Appeals

Date: August 10, 1999

(1)While WSRC has stated that complying with this request would be unduly burdensome, it has not provided any facts where I could conclude that, in fact, complying with the discovery request would produce undue delay in this matter or otherwise prejudice WSRC.

Case No. VWD-0007

August 24, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Name of Petitioner:Linda D. Gass

Date of Filing: August 11, 1999

Case Number: VWD-0007

This determination will consider a Motion for Discovery filed with the Office of Hearings and Appeals (OHA) by Linda D. Gass. This Motion, dated August 10, 1999, concerns the hearing requested by Ms. Gass under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). She requested this hearing on January 12, 1999 (Case No. VWA- 0041) in connection with the Part 708 complaint she filed against Lockheed Martin Energy Systems, Inc. (LMES).

I. Background

Ms. Gass began working for LMES in March 1982. In her Complaint, Ms. Gass alleged that in 1991 she raised health and safety concerns with the DOE and its contractors regarding the environmental site characterization of a proposed industrial park, and also made disclosures to LMES officials regarding alleged retaliation for activity protected under Part 708.(1) The Complainant alleged that she suffered retaliation as a result of her disclosures.

On December 16, 1998, the DOE Office of Inspector General (IG) issued a Report of Investigation on Ms. Gass' Complaint. The report found that the Complainant failed to establish by a preponderance of the evidence that she had made disclosures protected under Part 708 regarding the

proposed industrial park that are protected under Part 708. The report made no findings regarding the other disclosures included in Ms. Gass' Complaint.

In a letter dated June 22, 1999, Ms. Gass requested from LMES 39 items pursuant to discovery in the pending hearing on her Part 708 complaint. Ms. Gass requested an additional 7 items of discovery on July 9, 1999. LMES provided an initial response to Ms. Gass' discovery requests on July 26, 1999, and a second response on August 4, 1999. LMES responded at least in part to 8 of the 46 items requested by the Complainant, stated that it did not have in its possession of documents responsive to 12 of the items, responded to 15 of the 46 items with objections on various grounds, and stated that the remaining items would be forthcoming.

Based upon LMES's failure to fully respond to the Complainant's discovery requests, on August 9, 1999, the Complainant filed a Motion to Continue the present matter, a hearing in which had been scheduled to begin on August 24, 1999. On August 10, 1999, I informed the parties that I would withhold a ruling on the Motion for Continuance pending my receipt, no later than 5:30 p.m. on Thursday, August 12, 1999, of a Motion to Compel Discovery. The complainant filed a Motion for Discovery on August 11, 1999, to

which LMES responded, and I held telephone conferences on August 16 and 17, 1999, to discuss the complainant's two motions. Attached at Appendix A to this Decision and Order is a copy of the Complainant's two discovery requests.

II. Analysis

The Part 708 regulations state that the "Hearing Officer may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint." 10 C.F.R. § 708.28(b)(1). After considering the arguments of both parties on the present Motion for Discovery, I have decided to grant the Motion in part. With respect to most of the items of requested discovery, I find that the Complainant has made the showing required by the regulations and I will therefore order the Respondent to provide the Complainant the items listed at Appendix B to this Decision and Order.(2)

As an initial matter, I will address two specific grounds for objections raised by the Respondent. First, the Respondent objected to two items of discovery as protected by the attorney-client privilege. These items (numbers 8 and 9 on page 2 of Complaint's initial request) seek names and other information regarding individuals interviewed by the DOE Office of Inspector General in its investigation of the present matter. Names provided in response to these items would almost certainly include those of LMES officials, and the content of communications between counsel for LMES and company officials may be protected by the attorney-client privilege. Such privileged material would not be discoverable under the Part 708 regulations. See 10 C.F.R. § 708.28(b)(1) (allowing discovery of materials "not privileged"). However, to the extent that a response to these two items will only reveal the identity of a client of respondent, the information would not be privileged. See, e.g., Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129-30 (9th Cir. 1992); United States v. Leventhal, 961 F.2d 936, 940 (11th Cir. 1992); United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 505 (2d Cir. 1991); In re Grand Jury Subpoena, 913 F.2d 1118, 1123 (5th Cir. 1990); In re Grand Jury Subpoena, 906 F.2d 1485, 1488 (10th Cir. 1990); In re Grand Jury Subpoenas, 803 F.2d 493, 496-98 (9th Cir.1986); In re Shargel, 742 F.2d 61, 62 (2d Cir.1984); In re Grand Jury Investigation, 723 F.2d 447, 451 (6th Cir.1983).

Second, the Respondent objected to a number of items on the grounds that they were "so over- reaching as to not be capable of being answered." Other than certain items in Complainant's request that I find below to be overly broad, I disagree that it is beyond the capability of the Respondent to answer the Complainant's discovery requests. As of yet, the Respondent has not provided evidence that would lead me to conclude that "complying with the discovery request would produce undue delay in this matter or otherwise prejudice" the Respondent. Lucy B. Smith, Case No. VWD-0006 (August 10, 1999).

However, I find that certain of the items listed in the Complainant's discovery request are broad beyond the scope of that which would be "designed to produce" evidence relevant to the present matter. Thus,

(1) I have narrowed the scope of items 4 through 7 on pages 1 and 2 of Complainant's initial request and item 6 on page 2 of Complainant's second request to refer only to documents related to the specific environmental site characterization of a proposed industrial park relevant to the Complainant's alleged protected disclosures. See infra note 1.

(2) I have narrowed the scope of item 14 on page 4 of Complainant's initial request to exclude information requested on the age and sex of employees of the Respondent. While this item and others are designed to produce evidence regarding employees similarly situated to the Complainant, and are thus reasonable items of discovery,(3) I do not find that the age or sex of other employees of the Respondent is relevant in this proceeding, where alleged age or sex discrimination is not at issue. See 10 C.F.R. 708.4(a) (excluding from coverage claims "based on race, color, religion, sex, age, national origin, or other similar basis").

(3) I have narrowed the scope of items 18 through 24 on pages 4 and 5 of Complainant's initial request. These items reference the process used to review the Complainant's eligibility for a DOE security

clearance. Decisions as to eligibility for DOE security clearances are made by the DOE, not the Respondent. See 10 C.F.R. Part 710. I will nonetheless allow limited discovery on this subject, because it "is possible that retaliation as so defined [in the Part 708 regulations] could include actions by the contractor that cause the questioning, suspension, or termination of a security clearance." Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12,862 (March 15, 1999) (preamble to revision of Part 708 regulations).

(4) I have narrowed the scope of item 33 on page 7 of the Complainant's initial request to refer only to complaints or lawsuits alleging retaliation for protected activity.

(5) I have narrowed the scope of item 7 on page 2 of the Complainant's second request to include only communications that in any way refer to the Complainant.

Further, two items requested by the Complainant (items 4 and 5 on pages 1 and 2 of the second request) would be relevant to the issue of damages, should the Respondent be found liable for violations under Part 708. However, I have decided to bifurcate this matter into a liability phase and a remedy phase. Thus, discovery regarding the issue of potential damages will be deferred pending a decision on liability. If I issue an initial agency decision in favor of the Complainant, at that time I will determine the most appropriate mechanism to ascertain the extent of the Complainant's damages and the appropriate remedy. See Princeton University, Case No. VWD-0004 (July 1, 1999).

Finally, regarding those instances where the Respondent stated that it did not locate information responsive to the discovery requests, the Complainant has questioned whether the attorney for the Respondent has properly certified his response. The Federal Rules of Civil Procedure require the signature of an attorney on a discovery response. Fed. R. Civ. P. 26(g). This signature constitutes a certification by the attorney. Id. "The Advisory Committee's Notes to the 1983 amendments to Rule 26 spell out the obvious: a certifying lawyer must make 'a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand.'" Legault v. Zambarano, 105 F.3d 24, 27 (1st Cir. 1997). Because the Federal Rules of Civil Procedure do not apply to the present proceeding, but may be used as a guide, I will require that the attorney for the respondent submit a signed statement that he has made a reasonable effort to assure that his client has provided all the information and documents available that are responsive to the Complainant's discovery requests.

For the reasons stated above, I will order the Respondent to provide to the Complainant, no later than September 9, 1999, the items listed at Appendix B to this Decision and Order. In addition, I will order that discovery in this matter be completed by September 30, 1999, and that I receive all witness lists, exhibits, and pre-hearing statements from the parties no later than October 3, 1999. While the Complainant's Motion for Discovery requests that I additionally draw "adverse inferences against Respondent," I find no basis in the Part 708 regulations for doing so at this time. However, after the present order is issued, both parties should bear in mind that a Hearing Officer in a Part 708 proceeding "may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Hearing Officer." 10 C.F.R. § 708.28(b)(5).

It Is Therefore Ordered That:

(1) The Motion for Discovery filed by Linda D. Gass, Case No. VWD-0007, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) Lockheed Martin Energy Systems, Inc., shall submit to Linda D. Gass, no later than September 9, 1990, the items of requested discovery set forth at Appendix B to this Decision and Order, along with a statement signed by an attorney for Lockheed Martin Energy Systems, Inc., that the attorney has made a reasonable effort to assure that his client has provided all the information and documents available that are responsive to the Complainant's discovery requests.

(3) Linda D. Gass and Lockheed Martin Energy Systems, Inc. shall complete discovery in the present proceeding no later than September 30, 1999.

(4) Linda D. Gass shall submit a list of witnesses that she intends to call to testify at the hearing in the present matter, the exhibits she intends to rely upon, and any pre-hearing statement, to be received by the Hearing Officer no later than October 3, 1999.

(5) Lockheed Martin Energy Systems, Inc. shall submit a list of witnesses that it intends to call to testify at the hearing in the present matter, the exhibits it intends to rely upon, and any pre- hearing statement, to be received by the Hearing Officer no later than October 3, 1999.

(6) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Steven J. Goering

Hearing Officer

Office of Hearings and Appeals

Date: August 24, 1999

(Appendix A not available electronically)

Appendix B - Case No. VWD-0007

1. With respect to the interrogatory items below, provide the name, title, and length of time in current position of the individual answering these questions on behalf of the Respondent.
2. With respect to the interrogatory items below, identify all documents referred to by any individual in answering these requests. For each document listed, state:

a. Date each document was written;

b. Name and address of the author of the document;

c. Recipient of the document; and

d. Summary of contents of the document.

3. Name, title, and length of employment of all individuals with whom any employee of the Respondent has discussed the subject matter of this hearing. For each individual, state:

a. His or her name, residential address, and business address; and

b. His or her title or position with the Respondent.

4. Describe completely all policies or formalized procedures which the Respondent had or maintained between 1990 and 1997 with reference to:

a. Employee protections from retaliation for protected activity;

b. Layoff procedures, specifically, any policies regarding how layoff decisions are made.

For each policy or procedure, state when and where posted, and when and how otherwise disseminated to employees.

5. Provide copies of occurrence reports of the Respondent created between 1990 and 1997.

6. With respect to any geotechnical reports related to Elza Gate, please state the beginning and ending dates for said documents that are currently in the possession of the Respondent.

7. For any geotechnical reports related to Elza Gate not currently in the possession of the Respondent, please indicate:

a. The current location of these documents;

b. Date upon which these documents were last in the possession of the Respondent; and

c. Why the Respondent no longer has possession of these documents.

8. With respect to survey books related to Elza Gate containing coordinates of burial trenches, please state beginning and ending dates for said documents that are currently in the possession of the Respondent.

9. For any survey books related to Elza Gate containing coordinates of burial trenches, not currently in the possession of the Respondent, please indicate:

a. The current location of these documents;

b. Date upon which these documents were last in the possession of the Respondent; and

c. Why the Respondent no longer has possession of these documents.

10. Name, title, and dates of employment of any and all persons known to Respondent to have been interviewed by any person associated with the Inspector General's office in connection with the investigation of the complaint filed by the Complainant.

a. Specifically, were either Jill Freeman of Anthony Wylie interviewed?

11. Name, title and length of time in position of all individuals in Respondent's employ who provided signed or recorded statements concerning Complainant's complaint.

a. Attach hereto a copy of any such statement that was not included in the IG Report.

12. Provide a copy of all documents created between May 1, 1990 and November 30, 1996, related to layoffs, which documents contain the name of the Complainant, or otherwise make reference to the Complainant.

13. With respect to computer operations, please state:

a. How old e-mail files and/or records are stored since 1990; and

b. Name and position of person(s) responsible for handling the disposition and/or maintenance of such files.

14. Has the Respondent at any time employed an individual by the name of Mike Pung. If so, please state:

a. Dates of employment and position; and

b. Whether he at any time in the past dealt with the disposition and/or maintenance of employee E-mail files.

15. List all work assignments given to Complainant during Fiscal Years 1990 through 1992. For each

assignment, please state:

a. Name and position of person who assigned tasks;

b. Specific duties performed by Complainant in completing tasks;

c. Number of hours charged by Complainant on said task;

d. Whether Complainant was accountable for a specified number or percentage of billable hours per week, month, or project; if so, specify the terms of accountability; and

e. Name and position of individual who supervised Complainant's performance of said task.

16. Please provide the following information for all individuals employed by Respondent who performed duties under the direction of Bill Manrod between May 1990 and November 1996:

a. Name;

b. Job Title;

c. Salary Grade;

d. Job Function Skills;

e. Time in position(s);

f. Education level and field; and

g. Any certification and or specialized training.

17. For each individual listed in response to the preceding request, please list all assignments made and tasks performed while the individual worked under the direction of Bill Manrod. Please identify the assignments and/or tasks by:

a. Nature of task(s) assigned;

b. Name and position of person who assigned task(s);

c. Number of hours spent by each individual on said task(s);

d. Name and position of individual who supervised each individual's performance of said task; and

e. Overtime records, including:

1. Number of overtime hours worked;
2. Assignment(s) for which overtime was worked.

18. With regard to James Moore, Chris Rogers, Ronnie Brewer, and Kathy Lett, if not included as part of Respondent's response to the previous request, please state:

a. Dates of employment;

b. Positions held, including dates of each; and

c. Records of overtime.

19. List all persons either hired into Bill Manrod's department as direct employees, or employed as subcontractors performing work for his department, between May 1, 1990 and November 30, 1996. For each individual or subcontractor, please include:

a. Reason for hiring or employing as subcontractor; and

b. Projects/work assigned, including dates and number of hours worked on each.

20. Please provide a copy of any and all written policies and/or procedures of the Respondent regarding investigation for security clearance that were in effect between January 1985 and November 1996.

21. Please provide a copy of all forms utilized by the Respondent in security clearance review between January 1985 and November 1996.

22. Please provide any and all records in the possession of the Respondent pertaining to Complainant's security clearance and/or review between January 1985 and November 1996. Include all writings (memos, notes, letters, forms, etc.), as well as tape recordings.

23. Please list any and all individuals employed by Respondent who participated in the investigation of Complainant for security clearance purposes. For each individual, please include:

a. Name, position, and dates of employment; and

b. Nature of participation in the investigation

24. List any and all individuals employed by Respondent who were contacted by any person involved in the investigation of Complainant regarding her security clearance. For each individual, please state:

a. Name, position, and dates of employment of said individual; and

b. Information requested of and/or provided by said individual.

25. List the names of any and all individuals employed by Respondent from 1990 to the present that have filed a complaint (formal or informal) or lawsuit against the Respondent alleging retaliation for protected activity. For each such individual, state:

a. Nature of complaint or lawsuit, i.e. allegation(s) and relief sought;

b. Date filed; and

c. Disposition of complaint or lawsuit, i.e. settlement, judgment, pending, etc.

26. List all witnesses the Respondent proposes to call in this action. For each individual listed, please state:

a. Name, title or position, and address; and

b. Nature of the testimony anticipated from the witness.

27. Identify any person whom you intend to call as an expert witness at the time of hearing of this action, including in your answer with respect to each such person:

a. Subject matter upon which the expert is expected to testify;

b. Substance of the facts and opinions to which the expert is expected to testify; and

c. Summary of the grounds for each such opinion of the expert.

28. Explain how Gail Sewell calculated Complainant's attendance records in her (Sewell's) response to the Complainant's EEOC complaint;

29. List any position openings of the Respondent during the period May 1991 through November 1997, the existence of which position opening was not otherwise made known to all employees of the Respondent.

30. Any and all communication regarding Elza Gate between LMES (and/or predecessors) and any agency with environmental regulatory/oversight functions, including, but not limited to:

a. EPA, Region IV;

b. Tennessee Oversight Agreement;

c. Tennessee Department of Environment and Conservation (TDEC); and

d. Ohio EPA.

31. Any and all notes, documents or other communications regarding the departure of Anthony Wylie from employment with Respondent, if such communications in any way refer to the Complainant.

32. Name all persons, not heretofore mentioned, having personal knowledge of facts material to this case, and provide their current position held with Respondent, dates of employment with Respondent, and their last known residential address.

(1)Although the Complainant originally alleged that she made additional disclosures protected under Part 708, I found that these other disclosures were not so protected, and on March 12, 1999, ordered that the Complaint "be dismissed as to all but (1) the alleged disclosures to the DOE and its contractors regarding the environmental site characterization of a proposed industrial park and (2) the alleged disclosures to LMES officials regarding alleged retaliation for activity protected under Part 708." Lockheed Martin Energy Systems, 27 DOE ¶ 87,510 (1999).

(2)Several of the items of the Complainant's initial discovery request (item 10, page 2; item 13, page 3; item 15, page 4; item 16, page 4) have been modified as discussed in the August 16, 1999 telephone conference.

(3)See David M. Turner, Case No. VWD-0003 (July 8, 1999) (ruling on Motion for Discovery) ("OHA Hearing Officers have found it extremely helpful in evaluating Part 708 claims to examine how a company has treated employees similarly situated to the whistleblower. See Ronald Sorri, 23 DOE ¶ 87,503 (1993); Ronny J. Escamilla, 26 DOE ¶ 87,508 (1996), aff'd, 27 DOE ¶ 87,508 (1997). Courts have also examined the treatment of similarly situated employees in determining whether ostensibly legitimate bases for adverse personnel actions are pretexts for punishing or getting rid of a whistleblower. See, e.g., Kansas Gas & Electric Co. V. Brock, 780 F.2d 1505 (10th Cir. 1985) (requiring whistleblower to document his educational requirements while not applying similar requirements to other employees).")

Case No. VWJ-0001

June 29, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Protective Order

Name of Petitioner:Nicholas Dominguez

Date of Filing: June 25, 1999

Case Number:VWJ-0001

On April 20, 1999, Nicholas Dominguez filed a request for hearing under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Case No. LWA- 0006). Dominguez alleges that his former employer, Lockheed Martin Energy Research Corporation (Lockheed Martin), retaliated against him for disclosing information concerning possible safety issues.

Dominguez seeks discovery of Lockheed Martin documents that the firm claims are confidential business documents. Lockheed Martin has agreed to provide these documents pursuant to the attached Protective Order that has been agreed to by counsel for Dominguez. The parties ask that the attached Agreed Protective Order be issued as an Order by the Department of Energy. The Agreed Protective Order states, inter alia, that counsel for Dominguez shall not make use of or disclose any information in the documents except for purposes related to the present proceeding, and that upon the termination of the proceeding shall destroy the documents.

I have reviewed the attached Agreed Protective Order and have concluded that it should be issued as an Order of the Department of Energy.

It Is Therefore Ordered That:

The attached Agreed Protective Order is hereby issued as an Order of the Department of Energy.

Bryan F. MacPherson

Hearing Officer

Office of Hearings and Appeals

Date: June 29, 1999

Case No. VWR-0003

September 20, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Linda D. Gass

Date of Filing: September 3, 1999

Case Number: VWR-0003

This decision will consider a “Motion to Revive Disclosures Dismissed Prior to the Enactment of Revisions to Part 708” Linda D. Gass filed on March 8, 1999. In her Motion, Ms. Gass requests that I reconsider an order issued on March 12, 1999, in which I dismissed in part her Complaint filed under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Lockheed Martin Energy Systems, 27 DOE ¶ 87,510 (1999).

I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations provide “procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities.” 10 C.F.R. § 708.1.

Ms. Gass has worked for LMES since March 1982. In her Complaint, Ms. Gass alleged that in 1991 she raised concerns with the DOE and its contractors regarding the environmental site characterization of a proposed industrial park. The Complainant also alleged that she made additional disclosures to LMES officials and the DOE, as well as to other federal agencies, including the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), and the Office of Federal Contract Compliance Programs (OFCCP). Some of the disclosures concerned alleged gender discrimination and alleged violations of the Americans with Disabilities Act (ADA). The Complainant alleged that she suffered retaliation as a result of her disclosures.

At a telephone conference conducted on March 3, 1999, counsel for the Respondent LMES requested that the Complainant identify the specific disclosures that form the basis of her Complaint of reprisal. After a discussion, the Complainant agreed that her allegations were limited to the alleged disclosures regarding the proposed industrial park and five other disclosures. On March 8, 1999, the Respondent moved to strike from consideration the five other disclosures enumerated at the March 3, 1999 pre-hearing conference. I granted the motion in part on March 12, 1999, dismissing the complaint to the extent it was based upon (1)

alleged disclosures stemming from, or relating to, gender discrimination or discrimination in violation of the Americans with Disabilities Act; or (2) alleged disclosures not made to an official of DOE, to a member of Congress, or to the contractor. Lockheed Martin Energy Systems, 27 DOE at 89,078.

On September 3, 1999, Ms. Gass filed the present Motion, in which the Complainant requests that I reconsider the portion of her complaint dismissed on March 12, 1999, in light of revisions to the Part 708 regulations that took effect on April 15, 1999. The Complainant specifically points to the fact that the intervening revisions "expand[ed] coverage of disclosures to include those made to other government officials, . . ." Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862, 12863 (March 15, 1999).

II. Analysis

Before the revisions of April 15, 1999, the Part 708 regulations prohibited "discrimination" by a DOE contractor against an employee, which the regulations defined as an action taken against an employee "as a result of" certain "protected" acts of the employee. 10 C.F.R. §§ 708.4, 708.5, revised by 64 Fed. Reg. 12862, 12870-71 (March 15, 1999). The revised Part 708 regulations, though calling the prohibited conduct "retaliation" instead of "discrimination," do essentially the same thing. 10 C.F.R. § 708.2. As noted by the Complainant, however, the scope of conduct prohibited by Part 708 was expanded by the recent revisions. Specifically, disclosures to "any other government official who has responsibility for the oversight of the conduct of operations at a DOE site" were added to the list of types of disclosures protected from retaliation. 10 C.F.R. § 708.5.

It is undisputed that the retaliatory conduct alleged by the Complainant occurred prior to April 15, 1999. The issue before me therefore is whether alleged conduct that occurred prior to the revisions to Part 708, and not prohibited prior to the revisions, may now be found to be "retaliatory" based upon the expanded scope of prohibited conduct found in the revised Part 708. The Complainant cites 10 C.F.R. § 708.8, which states that the "procedures in this regulation apply prospectively in any complaint proceeding pending on the effective date of this regulation," and there is no question that Ms. Gass' complaint was pending on April 15, 1999. The Respondent argues that section 708.8 applies only to "procedures," not "substantive law."

The Supreme Court has "frequently noted" that there is a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence," and the Court applies "this time-honored presumption against retroactive legislation unless Congress has clearly manifested its intent to the contrary." Hughes Aircraft Co. v. United States, 520 U.S. 939, 946 (1997) (citing Landgraf v. USI Film Products, 511 U.S. 244, 265, 268 (1994)). Applying this presumption by analogy to the present case requires an examination of the intent of the DOE, the author of the relevant revisions to Part 708. The regulatory preamble to the revisions is quite helpful in this regard.

It is well established in the law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. DOE will apply the revised procedures to pending cases consistent with the case law.

64 Fed. Reg. 12862, 12865 (citing Landgraf, 511 U.S. at 275; Lindh v. Murphy, 117 S. Ct. 2059, 2063-64 (1997); Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 810, 817 n.17 (D.C. Cir. 1982) (citing Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966))).

The preamble's reference to "procedural rules" supports the position of the Respondent that the procedural provisions of the revised Part 708 apply to pending cases, while the substantive provisions do not. The case law to which the preamble refers also supports the Respondent's position. The Supreme Court distinguishes between "rules of procedure," which "regulate secondary rather than primary conduct," Landgraf, 511 U.S. at 275, and rules that "speak[] not just to the power of a particular court but to the substantive rights of the parties as well," and which are "therefore subject to the presumption against

retroactivity." Hughes, 520 U.S. at 951.

In the present case, to the extent that 10 C.F.R. § 708.5 defines the scope of employee disclosures that are protected from contractor retaliation, Part 708 clearly regulates the "primary conduct" and affects the "substantive rights" of the parties, and is thus subject to the presumption against retroactivity under well-established case law. Prior to the April 15 revision, the Respondent could not have know that a disclosure to a non-DOE government official would later be protected under Part 708, and it would be unfair to impose adverse consequences on the Respondent based on conduct not then prohibited.

Thus, I find that the drafters of the revisions to Part 708 did not intend to apply the expansion in scope of 10 C.F.R. § 708.5 to cases pending on April 15, 1999. Other than the change in the scope of the regulations, the Complainant cites no other intervening change in the facts or law relevant to the present Complaint that would warrant reconsideration of my March 12, 1999 order. Accordingly, the Motion for Reconsideration will be denied.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by filed by Linda D. Gass, Case No. VWR-0003, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Steven Goering

Hearing Officer

Office of Hearings and Appeals

Date: September 20, 1999

David Ramirez

Case No. VWX-0001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: David Ramirez

Date of Filing: January 17, 1995

Case Number: VWX-0001

On December 2, 1994, the Deputy Secretary of Energy issued a Final Decision and Order in a case involving a "whistleblower" complaint filed by David Ramirez ("Ramirez") under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. David Ramirez, 24 DOE 87,510 (1994). In that Decision, the Deputy Secretary affirmed, and adopted as a Final Agency Decision, an Initial Agency Decision and a Supplemental Order issued by the undersigned Hearing Officer in the Ramirez case. The present Supplemental Order is a final determination of the amount of attorney fees and disbursements awarded to Mr. Ramirez under 10 C.F.R. 708.11(c).

Background

In the Initial Agency Decision, dated March 17, 1994, I found that Brookhaven National Laboratory/Associated Universities, Inc. (BNL), a DOE contractor, had violated the provisions of 10 C.F.R. 708.5 by directing the termination of Ramirez' employment as a BNL subcontractor employee in reprisal for his making protected safety disclosures. David Ramirez, 23 DOE 87,505 (1994) ("the March 17 Decision"). The March 17 Decision further determined that Ramirez should be awarded back pay and reimbursement for all costs and expenses reasonably incurred by him in bringing his complaint.

In a Supplemental Order dated June 8, 1994, I determined that Ramirez was entitled to back pay of $96,463.41 1/ This included interest on the back pay of $9,278 as of June 30, 1994. As of December 31, 1994, the cumulative interest amount is $12,929. and reimbursement of (i) $24,740 for attorney fees,2/ The attorney's fee award was based on 140 hours of work by Ramirez' attorney at $175 per hour and 24 hours of work by the attorney's law clerk at $10 per hour. (ii) $87.35 for attorney disbursements, and (iii) $797.42 for other reasonable costs and expenses reasonably incurred by Ramirez in this proceeding. David

Ramirez, 24 DOE 87,504 (1994) ("the June 8 Decision"). I denied the request of Claire Tierney, Ramirez' attorney, for a specific amount of additional attorney fees for work that had not been documented. However, since BNL had requested that the Secretary of Energy or her designee review the March 17 Decision, I did approve an unspecified additional amount at the rate of $175 per hour for each hour in excess of the 140 hours reasonably spent by Ms. Tierney in representing Ramirez during the review phase of the proceeding. Id. at Ordering Paragraph (1)(e). I also approved an additional amount as reimbursement for documented, reasonable disbursements incurred by Ms. Tierney subsequent to April 15, 1994, the date that she had prepared her statement of costs and expenses in the proceeding which resulted in the Supplemental Order. Id. at Ordering Paragraph (1)(f).

The Deputy Secretary upheld the June 8 Decision in its entirety. In order to implement the Deputy

Secretary's determination in accordance with the provisions of 10 C.F.R. 708.11(c), the Director of the DOE Office of Contractor Employee Protection (OCEP) provided Ms. Tierney with an opportunity to submit a final accounting of allowable costs and attorney fees. In a submission to OCEP dated December 12, 1994 (December 12 Letter), Ms. Tierney stated that she had spent 80.5 hours representing Mr. Ramirez during the review phase of this proceeding and, on the basis of an hourly rate of $175, requested an additional award of $14,087.50. She also requested $27.90 as reimbursement for postage expenses that were incurred after April 15, 1994. When added to the initial attorney fee award of $24,740, the total amount of Ms. Tierney's revised fee request is $38,855.40.3/ This amount does not include the $87.35 for attorney disbursements approved in the June 8 Decision.

The December 12 Letter also included four exhibits which I have considered in evaluating Ms. Tierney's fee request: (i) a copy of Ms. Tierney's Attorney's Affirmation in support of her initial fee request ("Attorney's Affirmation"), (ii) a copy of a June 30, 1994 letter from Andrea S. Christensen, attorney for BNL, to OCEP ("June 30 Letter"), in which Ms. Christensen argued that an additional fee request made by Ms. Tierney should be denied in its entirety,4/ That request was made in a June 22, 1994 letter from Ms. Tierney to OCEP ("June 22 Letter"). A copy of that letter has been provided to me by OCEP and is a part of the record presently before me. In the letter, Ms. Tierney had requested additional legal fees to compensate her for the time she spent in connection with a reply brief that she submitted on June 9, 1994. No determination has previously been made on that request, and it is therefore included in the request made in the December 12 Letter.(iii) a copy of Ms. Tierney's July 28, 1994 letter in response to the June 30 Letter ("July 28 Letter"), and (iv) a statement of services rendered by Ms. Tierney on the Ramirez case from September 1993 through July 1994 ("Statement of Services").

Ms. Christensen was provided an opportunity to respond to the December 12 Letter, but declined to do so. See January 12, 1995 Memorandum from Sandra L. Schneider, OCEP Director, to Ted Hochstadt, Hearing Officer.

Discussion

The only issue before me is the reasonableness of the amount of hours that Ms. Tierney claims to have spent performing legal services during the review phase of this case. Ms. Tierney has documented that she spent 80.5 hours on office interviews, research, and the preparation of a reply brief and two legal issue letters during the two-month period from May 20, 1994 to July 29, 1994. This expenditure of time appears disproportionately high when compared to the approximately 140 hours that she spent during the seven months from September 14, 1993 through April 15, 1994, a period of time that included the preparation of three written submissions (a preliminary statement, a closing statement, and a statement of damages) and the preparation for, and appearance at, a two-day hearing.5/ The amount of hours claimed by Ms. Tierney is not, however, as disproportionately high as asserted by Ms. Christensen in her June 30 Letter. Ms. Christensen erroneously asserts that Ms. Tierney claimed that she spent 138 hours preparing her reply brief in the review stage of the proceeding and 81 hours in performing legal services in the hearing phase of the proceeding. In fact, in the June 22 Letter to which Ms. Christensen was responding, Ms. Tierney documents 138.5 hours spent on the hearing phase and only 64.5 hours spent in the preparation of the reply brief. For this reason, I have scrutinized very closely Ms. Tierney's description of the legal services that she performed during the review phase of this proceeding, the documents that she prepared during this period, and the BNL submissions that she was responding to. On the basis of that review, I have concluded that the award that she has requested is, for the most part, reasonable.

The bulk of the additional attorney fee claim requested by Ms. Tierney involves the 64.5 hours spent in connection with her June 9, 1994 reply brief to BNL's May 16, 1994 Appeal to the Secretary of Energy. Ms. Tierney claims that her time was spent as follows: office interviews, 5 hours; review of case, 9 hours; research, 9 hours; drafting and modifying the reply brief, 40 hours; copying, binding and mailing the brief, 1.5 hours.

In her June 30 Letter, Ms. Christensen argued that all of these time charges are excessive, particularly the

amount of time claimed for client interviews, research, and copying, binding and mailing the reply brief. Ms. Tierney disputed Ms. Christensen's contentions in her July 28 and December 12 Letters. With respect to the number of hours spent on research and in writing the reply brief, Ms. Tierney, who is a solo practitioner, stated that her law student law clerk, who had assisted her during the hearing phase of this proceeding, was not available to assist her with the reply brief.

With one exception, I accept as reasonable Ms. Tierney's claimed hours in connection with the reply brief. To understand the basis for this determination, it is necessary to review what transpired procedurally in this case subsequent to the March 17 Decision. The Part 708 regulations do not provide for the filing of a legal brief in connection with a request for review of an initial agency determination. However, in this case, Ms. Christensen requested permission to file a brief, and that request was granted by OCEP. See April 7, 1994 Letter from Sandra L. Schneider, OCEP Director, to Ms. Christensen. Accordingly, on May 16, 1994, Ms. Christensen filed a skillfully-drafted 35-page brief which contested the findings of fact and conclusions of law in the March 17 Decision. See Appeal to the Secretary of the Department of Energy of the Office of Hearings and Appeals Initial Agency Decision ("May 16 Appeal"). This document had numerous references to the 560-page transcript of the hearing held in December 1993, including the extensive testimony by Ramirez. There was also discussion of federal court and administrative decisions regarding the issues of retaliatory termination of employment in whistleblower and NLRB cases and damages.

In view of the arguments presented in the May 16 Appeal, it was essential for Ms. Tierney to confer with her client, Mr. Ramirez, and to perform legal research. For her to simply rely on the findings in the March 17 and June 8 Decisions would have been irresponsible, if not outright malpractice. Thus, Ms. Tierney responded to the May 16 Appeal with a generally cogent 38-page reply brief that also referred extensively to the hearing transcript and discussed judicial and administrative decisions. Granted, the research of the issues and preparation of the brief might have been performed more efficiently, as Ms. Tierney herself acknowledges in her July 28 Letter. I am unwilling, however, to find that the amount of time that she spent was unreasonably excessive, particularly since this is one of the first cases arising under the DOE's Contractor Employee Protection Program. I am also unwilling to find excessive the five hours Ms. Tierney spent in two office interviews with her client. From the record of this case it is clear that Mr. Ramirez was actively involved in assisting his attorney to understand and deal with the factual issues in this case.

I reject, however, Ms. Tierney's claim with respect to the 90 minutes spent copying, binding and mailing the reply brief. While I do not doubt that performing this work consumed the amount of time claimed, I find it unreasonable to compensate her for these clerical tasks at the rate of $175 per hour. That hourly rate was approved as reasonable since it appeared to be commensurate with the value of the legal services that she stated that she had spent or would spend on this case. In her initial request for attorney fees, Ms. Tierney described these legal services as "office interviews and telephone conferences ..., interviewing witnesses, research, preparing [legal documents], the Computation of Damages and reviewing the entire record...." Attorney's Affirmation at 2. Since she did not initially indicate that she was requesting compensation for clerical tasks at the rate of $175 per hour, and since such a request would not have been approved, I will not approve it at the present time. However, since time was actually spent on these necessary tasks, I will approve compensation at the rate of $10 per hour, the rate of payment of Ms. Tierney's law clerk.

Finally, I find reasonable Ms. Tierney's legal fee claim for 16 hours spent in July 1994 on research and drafting two substantive letters. In the June 8 Decision, I increased Ramirez' requested back pay award by $17,700, the amount of unemployment benefits that he had received and had deducted from his claim for lost wages. In opposition to that determination, Ms. Christensen submitted letters to OCEP on June 21 and June 22, 1994, raising various legal arguments and citing a number of federal court cases in support of her position. In her Statement of Services, Ms. Tierney documents that she spent ten hours researching this issue and four hours preparing a substantive letter to OCEP discussing relevant court decisions. A copy of this July 29, 1994 letter to OCEP has been furnished to me and is part of the record. Ms. Christensen has not objected to this portion of Ms. Tierney's fee claim. Since I raised this contentious issue sua sponte in

the June 8 Decision, it had not been briefed previously. I therefore find that the 14 hours of research and writing claimed by Ms. Tierney is reasonable. In support of this finding I also note that in his decision the Deputy Secretary expressly considered and affirmed this aspect of the June 8 Decision.

The final two hours of the revised fee claim pertain to the preparation of the July 28 Letter to OCEP. In that letter, Ms. Tierney supported her legal fee claim with respect to the preparation of the reply brief and responded to the objections raised in Ms. Christensen's June 30 Letter. As the present Supplemental Order demonstrates, that portion of the fee claim raised a number of issues. The July 28 Letter assisted me in my consideration of those issues. Accordingly, I find that the amount of time claimed for the preparation of that letter is reasonable.

In sum, I am approving reimbursement to Ms. Tierney of $13,825 for 79 additional hours of work at $175 per hour and $15 for an hour and a half of work at $10 per hour.6/ At the time the June 8 Decision was issued, not all of the approved 140 hours had been fully documented. However, the updated Statement of Services attached to the December 12 Letter satisfactorily accounts for the small amount of time not previously documented. Accordingly, the 80.5 hours approved in this Decision are over and above the initial 140 hours. Thus, the revised award for attorney fees is $38,580 ($24,740 granted in the June 8 Decision and $13,840 approved in this Decision). In addition, Ms. Tierney shall receive $115.25 for disbursements ($87.35 granted in the June 8 Decision plus $27.90 approved in this Decision.) Thus the total reimbursement amount approved in the present Decision is $38,695.25.

It Is Therefore Ordered That:

(1) Brookhaven National Laboratory/Associated Universities, Inc. shall pay Claire C. Tierney, Esq., $38,695.25 for legal services rendered and disbursements incurred in her representation of David Ramirez.

(2) This is a final Order of the Department of Energy.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date:

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner:Howard W. Spaletta

Date of Filing: August 31, 1995

Case Number: VWX-0004

This Decision supplements an Initial Agency Decision involving a "whistleblower protection" complaint filed by Howard W. Spaletta (Spaletta) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. *See Howard W. Spaletta*, 24 DOE & 87,511 (1995) (*Spaletta* or "the January 4 Decision. <1> In that Decision, I found that EG&G Idaho, Inc. ("the Contractor") had violated the provisions of 10 C.F.R. ' 708.5 by referring fewer and less important work assignments to Spaletta and by lowering his annual merit pay increases in reprisal for his making protected safety disclosures. I further determined that Spaletta should be awarded back pay corresponding to the difference between the annual merit pay increases that he should have received for work performed during the years 1989 through 1991 and the annual merit pay increases that he actually did receive, plus interest, and reimbursement for all costs and expenses reasonably incurred by him in bringing his complaint. My Decision required both Mr. Spaletta and the Contractor to submit information to facilitate my computation of damages. Mr. Spaletta submitted his information on August 21, 1995. The Contractor submitted its response to the August 21 submission on September 11, 1995. This Supplemental Order awards Spaletta $12,321.05.

I. Back Pay

For the work performed during the years 1989, 1990 and 1991, the Contractor based percentage merit pay increases on the employee's evaluation and the salary quintile of his work group into which his base salary fell. During this time period, Spaletta's salary was in the second highest salary quintile of his work group. Utilizing information submitted by the Contractor, I have identified the name of each employee in Spaletta=s work group, his or her annual salary, and the annual merit pay increase received. I have then divided the salaries of the employees into quintiles. This has allowed me to identify the individuals who comprised the second salary quintile for each of the three years. Since it is safe to assume that within a salary quintile, those individuals who had received the best performance evaluations would have also received the highest merit pay increases, Spaletta should have received annual merit pay increases equal to the highest merit pay increases given to the other members of the second highest salary quintiles for each year. These increases would have become effective in March of the succeeding year.

Accordingly, I find that Spaletta should have received an annual merit pay increase of 5.7 percent in 1990 instead of the 3 percent increase that he actually received. In 1991, Spaletta should have received an annual merit increase of 7.99 percent instead of the 2.48 percent that he actually received. In 1992, Spaletta should have received an annual merit increase of 5.48 percent instead of the 2.87 percent increase he actually received. The total amount of back pay I will award Spaletta is $6,336.

In addition, Mr. Spaletta should receive pre-judgment interest on this back pay award. *David Ramirez*, 24 DOE ¶ 87,504 at 89,015, *affirmed*, 24 DOE ¶ 87,510 (1994). Interest in whistleblower protection cases is based upon the "overpayment rate," as established by the Secretary of the Treasury pursuant to 26 U.S.C. ' 6621. The appendix to this decision shows the quarterly overpayment rate, the quarterly interest amount, and the cumulative back pay and interest award. The total amount of interest that has accrued on the back pay award is $2,569. That amount will be added to the back pay award, provided that payment is made

within 30 days of the date of this order. Thus, the total amount of back pay, including interest, that I will award Mr. Spaletta is $8,905.

II. Attorneys' Fees

Spaletta requests legal fees for the services rendered by John M. Ohman, Esq. and Stephen A. Meikle, Esq. As I stated in the January 4 Decision, legal fees will be calculated by the use of the Alodestar@ approach described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989), and generally applied by OHA Hearing Officers to proceedings under 10 C.F.R. Part 708. *See, e.g., Ronald A. Sorri*, 23 DOE & 87,503 (1993), *affirmed as modified*, 24 DOE ¶ 87,509 (1994). Under the lodestar approach, reasonable legal fees are calculated as the product of reasonable hours multiplied by reasonable rates. The fee applicant has the burden of producing satisfactory evidence that his requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Blum v. Stenson*, 465 U.S. 886, 888 (1984).

Spaletta seeks reimbursement of $473.60 for legal services rendered by John M. Ohman, Esq. According to the information submitted by Spaletta, Ohman provided 2.364 hours of legal services to Mr. Spaletta for which he charged $473.60. Spaletta is therefore effectively seeking reimbursement for fees at the rate of $200 per hour, a rate which the Contractor asserts is excessive. In support of this assertion, the Contractor has submitted the affidavit of Edward W. Pike, a local attorney, who states that under the customary attorney billing practices in Idaho Falls, the maximum hourly rate is $125 per hour. Even though Spaletta has submitted the affidavit of Steve Hart, Esq. who states that @the regular hourly billing rates . . . for John M. Ohman . . . are reasonable and comparable to the hourly billing rates prevailing in Idaho Falls . . .,@ I find that Spaletta has not met his burden of producing satisfactory evidence that his requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. The Hart Affidavit is ambiguous and does not squarely support Spaletta=s request for $200 per hour since it only states that the *regular* hourly billing rates for Ohman are reasonable. The billing statements submitted by Spaletta actually indicate that Ohman=s *regular* hourly rate is $120 per hour rather than the $200 per hour he charged Spaletta. In light of the affidavit submitted by the Contractor, the statement about Mr. Ohman's regular hourly rate, and the contrast between the hourly rate claimed for Ohman=s services and the hourly rate claimed by Spaletta for legal services provided by Meikle (at $100 per hour), I find that Spaletta has failed to meet his burden of showing that $200 per hour is a reasonable rate for John Ohman=s services. Accordingly, I will award Spaletta $295.50 for the services of Ohman, representing 2.364 hours multiplied by $125 per hour, the rate which I find to be the maximum reasonable hourly rate for the Idaho Falls community.

Stephen A. Meikle, Esq. also performed legal services for Mr. Spaletta. Spaletta seeks $2,350 in fees, representing 23.5 hours multiplied by an hourly rate of $100. Most of that time was associated with Mr. Meikle's presence at the two-day hearing that I held in this matter. The Contractor does not challenge the claimed hourly rate, but has challenged the reasonableness of the number of hours sought by Spaletta. Specifically, the Contractor contends:

(1) Since the January 4 Decision did not award any additional relief for Spaletta over that which was already awarded to him in the Office of Contractor Employee Protection=s Proposed Disposition, Spaletta should not be reimbursed for his prosecution of the case before the Office of Hearings and Appeals;

(2) Since Spaletta=s Appeal before the Deputy Secretary was unsuccessful, he should not be compensated for bringing it; and,

(3) Spaletta=s demands that a report be retracted have unduly prolonged the proceeding.

The position advanced by the Contractor is untenable. If adopted, it would make a person who seeks protection under the DOE whistleblower protection program assume the risk of success in challenging reprisals at each stage of the administrative process. If he were unsuccessful in obtaining additional relief at a particular stage of the process, the Contractor would have us refuse to reimburse fees and costs. This

policy would likely have a chilling effect on the pursuit of these remedies. The DOE program is clearly designed to reimburse someone who has been reprised against for all damages and expenses, including legal fees. "It is important as a matter of Departmental policy to recognize the public interest nature of representing an alleged whistleblower under Part 708, and to award a reasonable fee to encourage attorneys to take these cases." *Ronald A Sorri*, 24 DOE ¶ 87,508 at 89,045 (1994).

Moreover, the Contractor's contention that Spaletta did not obtain any additional relief at the hearing stage of this proceeding is incorrect. The proposed disposition found that Spaletta should receive back pay for work performed in 1990 and 1991. I expanded that proposed relief to include work performed in 1989. *Spaletta* at 89,058. Thus, the Initial Agency Determination increased the amount of lost wages to be awarded to Spaletta by lengthening the period for which Spaletta was found to have received unduly small annual merit pay increases from February 1991 through April 1992 to February 1990 through April 1992.

Similarly, the Contractor urges that Mr. Spaletta should not be compensated for legal fees spent in pursuing an appeal of my initial determination to then Deputy Secretary, William H. White. For the reasons stated above, I do not agree. Accordingly, I will award Mr. Spaletta the one hour of legal fees he claims for revision to his brief on appeal on February 27, 1995.

I now turn to the third of the Contractor=s contentions concerning the reasonableness of the number of hours claimed. While it may be true that Spaletta=s attempts to have a report retracted may have prolonged the present proceeding, Spaletta=s pursuit of this remedy does not warrant a reduction in the legal fees claimed by him. First I am unable to quantify the time by which these proceedings were unduly prolonged, if in fact that were the case. More importantly, I am concerned that reducing Spaletta=s fees for pursuing a remedy that ultimately proved to be outside the jurisdiction of this proceeding might have a chilling effect upon other whistleblower claimants= seeking novel relief. In view of the lack of precedents interpreting the Part 708 regulations, I will not exercise my discretion to reduce the number of hours awarded.

In summary, Spaletta seeks reimbursement for 23.5 hours of legal services at $100 per hour for Meikle=s services. I find that amount to be reasonable. I am therefore awarding Spaletta $2,350 of legal fees for the services of Stephen A. Meikle, Esq. To that I will add $295.50, the fees I will award for work performed by Mr. Ohman. Thus, the total legal fees I will award Spaletta are $2,645.50.

III. Other Expenses

Spaletta also requests reimbursement for a number of other miscellaneous expenses related to his whistleblower claim. These expenses include 13 hours of secretarial services provided by Meikle=s office staff at $50 per hour, $30.89 in postage costs, and $30.20 of other miscellaneous costs charged to him by Meikle=s office.

The Contractor contends that these expenses are excessive because (1) separate billings by attorneys in Idaho Falls for secretarial services are neither customary nor reasonable; (2) the number of hours charged for secretarial services used to complete two separate statements of Aattorney=s fees and client costs@ are excessive; (3) Spaletta was charged an excessive rate for photocopying services provided by Meikle=s Office; and, (4) Spaletta has not substantiated that all of the reproduction costs claimed by him were incurred in connection with his whistleblower claim.

The regulations governing the award of expenses provide for "reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was issued." 10 C.F.R. § 708.10(c). This section, by its reference to "costs and expenses," is by its very terms broader than FRCP Rule 54(d), which refers only to "costs."2<1> Thus, Initial Agency Decisions under the DOE whistleblower regulations have interpreted the "costs and expenses" covered by § 708.10(c) more expansively than the way the word "costs" is generally interpreted under FRCP Rule 54(d). Compare

Ronald A. Sorri, 23 DOE & 87,503 at 89,016-89,018 (1993) (Sorri), with 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure ' 2677 at 370-372 (1983).

The Contractor first challenges Spaletta's request for reimbursement for secretarial services performed at his attorney's office. While I am convinced that the customary practice in the Idaho Falls legal community is to include secretarial services in the hourly fee charged by attorneys, it is also apparent that Spaletta had a unique arrangement with Meikle under which Spaletta actually drafted some of the letters and pleadings supporting his whistleblower claim and then had Meikle=s office staff prepare them. This practice resulted in smaller legal fees. However, I find that Spaletta has not met his burden of showing that $50 an hour is a reasonable fee for secretarial services. It seems unlikely that secretarial services would customarily command this hourly rate, which rate is half that of Mr. Meikle. Moreover, Spaletta has not supported his request for secretarial services with evidence indicating that $50 per hour is comparable to the prevailing rate in Idaho Falls for similar services. I will therefore reduce the hourly rate for secretarial services to $25 per hour.

After reviewing copies of statements of legal fees and client costs in the record, I also agree with the Contractor=s contention that two hours is an excessive amount of time to be awarded for the preparation of statements of Aattorney=s fees and client costs,@ especially in the case of the second statement for which a great deal of the preparation had already occurred when the first statement was prepared. Accordingly, I will reduce the number of hours of secretarial service for preparation of these statements by one hour. I will therefore award Spaletta a total of $300 in secretarial fees, representing 12 hours at $25 per hour.

Finally, the Contractor contends that Spaletta has failed to substantiate that all of the reproduction costs claimed by Spaletta were incurred in connection with his whistleblower claim. Having reviewed the numerous and voluminous documents submitted by Spaletta during the course of this proceeding, I am convinced that Spaletta incurred substantial photocopying costs in pursuing his whistleblower claim. I therefore find that his claim of $409.46 in reproduction costs is entirely reasonable.

For the reasons set forth above, I will award Spaletta the following expenses or costs:

Secretarial Services $300.00

Photocopying Services $409.46

Postage $ 30.89

Other Miscellaneous costs $ 30.20

Subtotal $770.55

IV. Conclusion

For the reasons set forth above, Spaletta shall be awarded the following amounts of back pay and reimbursement for costs and expenses in accordance with the provisions of 10 C.F.R. ' 708.10(c):

Back Pay, including interest $8,905.00

Legal Fees $2,645.50

Expenses and Costs $ 770.55

Total $12,321.05

It is Therefore Ordered That:

(1) Lockheed Idaho Technologies Company shall pay to Howard W. Spaletta $12,321.05 within 30 days of the date of this order.

(2) This is a final order of the Department of Energy.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: April 19, 1996

Appendix - Case No. VWX-0004

Calculation of Back Pay and Interest

Quarter	Quarterly Back Pay	Interest Rate (per annum)	Interest	Cumulative Back Pay + Interest
1st Quarter 1990	$0	10%	$0	$0
2nd Quarter 1990	$363	10%	$5	$368
3rd Quarter 1990	$363	10%	$14	$745
4th Quarter 1990	$363	10%	$23	$1,131
1st Quarter 1991	$363	10%	$33	$1,527
2nd Quarter 1991	$795	9%	$43	$2,365
3rd Quarter 1991	$795	9%	$62	$3,222
4th Quarter 1991	$795	9%	$81	$4,098
1st Quarter 1992	$795	8%	$90	$4,983
2nd Quarter 1992	$426	7%	$91	$5,500
3rd Quarter 1992	$426	7%	$100	$6,026
4th Quarter 1992	$426	6%	$94	$6,546
1st Quarter 1993	$426	6%	$101	$7,073
2nd Quarter 1993	$0	6%	$106	$7,179
3rd Quarter 1993	$0	6%	$108	$7,287
4th Quarter 1993	$0	6%	$109	$7,396
1st Quarter 1994	$0	6%	$111	$7,507
2nd Quarter 1994	$0	6%	$113	$7,620
3rd Quarter 1994	$0	7%	$133	$7,753
4th Quarter 1994	$0	8%	$155	$7,908
1st Quarter 1995	$0	8%	$158	$8,066
2nd Quarter 1995	$0	9%	$181	$8,247
3rd Quarter 1995	$0	8%	$165	$8,412
4th Quarter 1995	$0	8%	$168	$8,580
1st Quarter 1996	$0	8%	$172	$8,752

2nd Quarter 1996	$0	7%	$153	$8,905
Total Back Pay Plus Interest				**$8,905**

<1>/ The OHA case number for the *Spaletta* Decision is LWA-0010. As indicated above, the OHA case number for this Supplemental Order is VWX-0004.

<1>/ In Crawford Fitting Co. v. J.J. Gibbons, Inc., 482 U.S. 437 (1987), the Supreme Court held that costs awarded under Rule 54(d) are limited to the items set forth in 28 U.S.C. ' 1920 and other related statutes.

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Order to Show Cause

Name of Petitioner: C. Lawrence Cornett

Date of Filing: June 10, 1996

Case Number: VWX-0009

This Order to Show Cause is issued with regard to a Motion to Dismiss filed by Maria Elena Torano Associates, Inc. (META) on May 21, 1996. In its Motion, META seeks the dismissal of the underlying complaint and hearing request filed by C. Lawrence Cornett (Cornett) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708.

I. Background

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[ ] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers.

In November 1992, Cornett was hired as a Senior Environmental Scientist by META. At the time of Cornett's hiring, META was under contract to the DOE to provide services regarding the development of a Programmatic Environmental Impact Statement (PEIS). <1> In October 1993, the University of Chicago (UC), the contractor which operates Argonne National Laboratory (ANL), a DOE facility, contracted with META to continue to provide technical support regarding the development of the PEIS. The ANL contract described three technical areas where META was to provide support: (1) reviewing and revising draft materials for the PEIS including the performance of data analysis; (2) assisting in the National Environmental Policy Act process to develop a Final PEIS; and (3) providing general administrative support relating to the development of the PEIS. See

ANL Contract No. 34006426 Article I, Section A and Appendix B at 2-3. The ANL contract's stated goal was for META to produce, under ANL direction and with input from other national laboratories, a highly refined, publicly and legally defensible document that clearly explained the policy and direction of the DOE Office of Environmental Restoration and Waste Management. Id. Appendix B at 2.

Cornett worked on the PEIS project until March 1994, when his employment with META was terminated. Cornett alleges that his employment was terminated by META due to his disclosures to management officials of META and its subcontractor, Louis A. Berger Associates (Berger), of his concerns about the PEIS's deficiencies in addressing potential human health risks as a result of inadequacies in its risk assessment methodologies. He further alleges that he made these and other disclosures throughout the period of his employment, and that beginning in the fall of 1993, he suffered from various acts of reprisal such as: (1) being excluded from various meetings; (2) having various work-related information withheld from him; (3) having his duties change to more marginal tasks and being threatened with reassignment; and, finally and most importantly, (4) being terminated from META and not being subsequently rehired when META later filled other positions.

On March 9, 1994, Cornett filed a complaint pursuant to 10 C.F.R. Part 708. The Office of Contractor Employee Protection (OCEP) conducted an investigation of Cornett's allegations and issued a Report of Investigation and Proposed Order (Report) on April 17, 1996. OCEP, in the Report, concluded that Cornett had made protected disclosures regarding health and safety issues and that it had jurisdiction over Cornett's complaint. Further, OCEP concluded that a preponderance of the evidence supported a finding that Cornett's protected disclosures contributed to his selection by META to be terminated and that META had failed to show by clear and convincing evidence that Cornett would have been terminated absent his protected disclosures.

In a submission to OCEP dated April 30, 1996, Cornett asked for a hearing under 10 C.F.R. § 708.9. On May 1, 1996, META also submitted a submission to OCEP requesting a hearing pursuant to Section 708.9. On May 9, 1996, OCEP transmitted these requests to the Office of Hearings and Appeals (OHA) together with the Report, the complaint file, and its request that a hearing officer be appointed. On May 13, 1996, I was appointed hearing officer in this matter.<2>

On May 21, 1996, META submitted a Motion to Dismiss the proceeding. In its Motion, META argues that neither OCEP nor OHA has jurisdiction to hear Cornett's complaint since Part 708 applies only to employees of DOE contractors who perform work at DOE-owned or DOE-leased facilities.<3> META asserts that it did not perform any work under the PEIS contract at a DOE site other than a relatively small number of employee visits regarding matters ancillary to the contract. Specifically, META asserts that almost all of the substantive work done on the PEIS was performed at its Gaithersburg, Maryland facility, a facility neither owned nor leased by the DOE. In support of its Motion, META has submitted an affidavit from Eric V. Tanner, a senior budget analyst at META's Gaithersburg facility, in which he states that META personnel traveled only sporadically to DOE facilities to perform work "ancillary" to the main object of the contract. Consequently, META argues that Part 708 does not apply to META and that OHA and OCEP lack jurisdiction over Cornett's complaint.

Cornett submitted a Reply to META's Motion on May 24, 1996, in which he argues that META is subject to Part 708 since META employees did in fact perform work at DOE sites. In support of this argument, Cornett draws our attention to the ANL contract provision which specifically authorizes META employees to travel to DOE sites to obtain information necessary to perform analysis and attend meetings. Further, Cornett asserts that while the ANL contract provision refers to only "occasional" travel by employees to DOE sites, META employees in fact traveled on a regular and frequent basis to those sites. Cornett also alleges that this travel was necessary to obtain information for analysis integral to the performance of the PEIS contract. In support of this assertion Cornett has submitted affidavits from himself and three Berger employees, Dr. Jane Rose, Dr. Thomas Hale and Susan Panzitta, stating that they and other META and Berger employees regularly traveled to evaluate DOE site conditions, participate in decision making meetings and determine the scope, substance and implementation of the PEIS at DOE sites. These employees assert that their visits were integral to the completion of the PEIS. Consequently, Cornett argues that META in fact performed work at DOE sites and thus is subject to Part 708.

On June 3, 1996, META filed a Reply to Cornett's May 24 Reply. In its submission, META asserts that the primary purpose of its contracts with DOE and ANL was to produce drafts of the PEIS and perform analysis on data provided by DOE, and that this was performed at META's Gaithersburg facility. Further, META asserts that its records indicate that over 99% of the "man-days" of work charged to the ANL contract took place at that facility, and that none of the Cornett Reply affiants traveled to a DOE site during the ANL contract period. META also asserts that any work which was performed on-site was only for the purposes of resolving data reporting/scheduling problems or to familiarize META employees with DOE sites. In support of these assertions, META submitted an affidavit from Albert N. Tardiff (Tardiff), the META Program Manager of the ANL contract.

Cornett filed a Response to META's Reply on June 4, 1996. In his response, Cornett asserts that, while he does not accept META's figures regarding the percentage of "man-days" performed by META employees at DOE sites, all of the META visits were essential to the ANL contract because the contract itself

required travel to DOE sites to obtain information and participate in meetings. Cornett also argues that META could not produce a complex four-volume draft environmental statement assessing the condition of DOE sites without ever sending staff members to those sites. Although he argues that Part 708 does not define a contractor's work on-site as "ancillary" by reference to any minimum time requirement, he also asserts that META's estimate of the amount of time spent by META employees at DOE sites is faulty since it is limited to the time period of the ANL contract and does not take into consideration that PEIS work was performed by META under two predecessor DOE contracts. Finally, Cornett requests that if I am unable to find jurisdiction based on the facts presented, discovery should be allowed on travel records, work orders and task orders for all META/Berger employees from 1991 to 1994, and that an evidentiary hearing be held.

II. Analysis

Section 708.9(j) states that in any case where a dismissal of a claim is sought, "the Hearing Officer shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order." 10 C.F.R. § 708.9(j). For the following reasons, I have determined that it is appropriate to issue an Order to Show Cause in this matter.

There is no indication in the record that the jurisdictional issue raised by META's Motion to Dismiss was presented by META to OCEP or was considered by OCEP when it determined that it had jurisdiction to consider Cornett's complaint. See Report at 2-3. Nor has this issue been considered before by an OHA Hearing Officer. Therefore, I must initially look to the purpose and scope of the DOE Contractor Employee Protection Program, as set forth in the Part 708 Regulations, to determine whether Cornett's complaint falls within the jurisdictional parameters of this Program. It is clear from the text of Part 708, as well as the preamble to these regulations, that the Contractor Employee Protection Program is intended to encourage employees of DOE contractors and subcontractors to disclose concerns about health, safety, mismanagement and unlawful or fraudulent practices without fear of employer reprisal, and that employees who believe that they are subject to a reprisal should feel that they are able to seek protection from the DOE. See Sandia National Laboratories, 23 DOE ¶ 87,501 at 89,003 (1993) (denying Motion to Dismiss) .

However, Part 708 does not cover all contractor employee disclosures. In order for OCEP and OHA properly to consider a complaint by a contractor employee, the contractor must be covered by the specific regulatory provisions of Part 708. See Mehta v. Universities Research Association, 24 DOE ¶ 87,514 (1995) (Final Agency Decision and Order dismissing complaint). Those regulations in four separate places indicate that the important protections afforded under Part 708 are limited to employees of contractors that perform work at DOE sites. See Sections 708.1 ("Purpose") ("complaints by employees of contractors performing work at sites owned or leased by the Department of Energy"), 708.2(b) ("Scope") (Part 708 is applicable to employees of contractors performing work on-site at DOE-owned or -leased facilities), 708.3 ("Policy") ("employees of contractors at DOE facilities"); 708.4 (Definition of "Contractor") (Part 708 applies to a non- Management and Operating Contractor "only with respect to work performed at a DOE-owned or -leased facility").

With respect to contractors, Section 708.4 defines "work performed on site" as:

work performed within the boundaries of a DOE-owned or -leased facility. However, work will not be considered to be performed "on-site" when pursuant to the contract it is the only work performed within the boundaries of a DOE-owned or -leased facility, and it is ancillary to the primary purpose of the contract (*e.g.*, on-site delivery of goods produced off-site).

10 C.F.R. § 708.4. An employee of a contractor covered by Part 708 does not, however, have to perform work on site in order to be protected by the prohibition against reprisals set forth in Section 708.5.<4>

META acknowledges that its employees performed some work within the physical boundaries of DOE sites. <5> Therefore, in order to be excluded from coverage under Part 708, META must show that this

work was "ancillary" to the primary purpose of the ANL contract.

The primary purposes of the ANL contract were for META to revise draft materials for the PEIS, perform needed data analyses for the Draft PEIS and ultimately to prepare under ANL direction the Final PEIS. META alleges that its employees visited DOE sites only for administrative purposes such as familiarizing themselves with DOE sites or resolving data reporting or scheduling problems. Such visits may have been ancillary to the primary purposes of the ANL contract. As indicated above, however, Cornett and his three affiants assert that META employees "regularly" and "consistently" travelled to DOE sites, where they evaluated site conditions and determined the scope, substance and implementation of the PEIS. These assertions, if accurate, would clearly bring META and its employees on the PEIS contracts within Part 708. However, these assertions are strongly disputed by Tardiff, who asserts that META employees did not conduct evaluation or inspection of site conditions. Based upon META's records and his personal knowledge of the firm's operations, Tardiff states that META employee visits to DOE sites constituted a very minimal portion of the total time spent on the ANL contract, and that the work done there was not related to the primary contractual purposes of data review and drafting of the PEIS.

Given the record before me, particularly the conflicting statements in the affidavits concerning the type of work done at DOE sites, I am unable to find that the work performed within the physical boundaries of DOE sites was ancillary to the primary purposes of the ANL contract. However, in view of the arguments presented by META and the provisions of Section 708.9(j), I am issuing this Order to Show Cause. In addition, because of the factual disputes concerning the nature of the work performed by META employees at DOE sites, I will convene a hearing on July 31, 1996 to afford both parties the opportunity to present evidence and oral argument relevant to the Motion to Dismiss.<6> Specifically, the parties may present testimony and other evidence relating the nature and extent of the work performed by META employees within the physical boundaries of DOE sites. <7>I agree with Cornett that activities should not be be declared ancillary to the primary purpose of a contract solely on the basis of time spent at a DOE site. However, time spent on work activities on DOE sites may provide some evidence as to whether the work activities do not qualify as ancillary to the primary purpose of a contract. Consequently, I will permit discovery of META/Berger employee travel records that pertain to the three contracts involving the PEIS as well as work orders and task orders related to the travel covered by those records.<8>

It Is Therefore Ordered That:

(1) The Office of Hearings and Appeals of the Department of Energy shall convene a hearing regarding the META Motion to Dismiss and to permit C. Lawrence Cornett to show cause why his Complaint to the Office of Contractor Employee Protection and Request for a Hearing pursuant to 10 C.F.R. Part 708 should not be dismissed. The hearing will be convened at 9 a.m. on July 31, 1996 at 1000 Independence Avenue, SW, Washington, DC, Room 1E-250. The views, statements and testimony shall relate to the nature and extent of META and Berger employee work performed within the boundaries of DOE-owned and -leased facilities under META's PEIS contracts.

(2) META shall submit to counsel for C. Lawrence Cornett by June 28, 1996, travel records for META and Berger employees pertaining to DOE Contracts No. DE-AC01-91EM4002, and DE- AC01-93EW40411 and ANL Contract No. 34006426 during the period from the onset of the first contract to the conclusion of the third contract as well as all work orders and travel orders related to the travel covered by those records.

(3) Cornett and META shall submit to the Office of Hearings and Appeals and to each other, no later than July 17, 1996, a numbered list, and one numbered set, of any exhibits that the party intends to submit at the hearing together with a list of witnesses.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date:

<1>The purpose of the PEIS was, *inter alia*, to evaluate alternatives for DOE environmental restoration and waste management activities and explain the policy of the DOE's Office of Environmental Restoration and Waste Management. See ANL Contract No. 34006426 Appendix B at 1-2.

<2>Cornett's hearing request was assigned OHA Case No. VWA-0007 and META's request was assigned Case No. VWA-0008.

<3>In this Decision, I will also refer to DOE-owned or -leased facilities as "DOE sites."

<4>The definition of "employee" in Section 708.4 states, in pertinent part, that "[t]he determination of whether a person has standing as an employee shall be made without regard to the on- or off-site locale of the person's work performance."

<5>References to META employees in this discussion include employees of META's subcontractor, Berger. From the record before me, it appears that Berger employees performed essentially the same types of work as META employees under the ANL and predecessor DOE contracts.

<6>Pursuant to a telephone conference call with the attorneys for the parties, procedures and a briefing schedule were set regarding the underlying hearing in this matter. See Letter from Ted Hochstadt, Assistant Director (Hearing Officer), OHA, to A. Alene Anderson, Counsel for C. Lawrence Cornett and Jose Otero, Counsel for META (May 22, 1996). I originally scheduled a hearing on the merits of Cornett's complaint for July 31, 1996. In light of this Order to Show Cause, I now postpone this hearing until the resolution of META's Motion to Dismiss.

<7> The affidavits submitted by Cornett, and Tardiff's response to them, indicate that there may have been differences in the nature or extent of the on-site work performed under the two predecessor DOE contracts and that performed under the ANL contract. Since the work performed under the ANL contract was a continuation of the work under the DOE contracts, see, e.g., META Motion to Dismiss at 2, the evidence to be submitted at the hearing may include the time period encompassed by the DOE contracts.

<8>The travel records subject to this discovery will be those records of trips taken under the ANL contract reviewed by Tardiff in connection with his affidavit and the same type of records under the predecessor DOE contracts.

April 24, 1997

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Case:C. Lawrence Cornett

Date of Filing:February 3, 1997

Case Number: VWX-0010

This Decision supplements an Initial Agency Decision, dated December 19, 1996, issued by the undersigned Hearing Officer of the Office of Hearings and Appeals (OHA) of the Department of Energy in a case involving a "whistleblower" complaint. The complaint was filed by C. Lawrence Cornett (Cornett) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. See C. Lawrence Cornett, 26 DOE ¶ 87,507 (1996) (Cornett). (1) In Cornett, I found that Maria Elena Torano Associates, Inc. (META), a DOE contractor, had violated the provisions of 10 C.F.R. § 708.5 by terminating Cornett's employment in reprisal for his making protected disclosures related to public health and safety. The Decision further determined that Cornett should be awarded back pay and reimbursement for all costs and expenses reasonably incurred by him in bringing his complaint. Cornett was directed to supplement the record by providing certain specified information regarding back pay and expenses. Cornett submitted this information on January 30, 1997, along with a sworn declaration by his lead attorney, Robert Seldon (the "Seldon Declaration"). META submitted a response to the January 30 submission on March 17, 1997 (Response). This Supplemental Order awards Cornett a total of $280,600 in back pay (including interest) and costs and expenses (including attorney fees). (2)

I. Cornett's Claim

A. Back Pay

Cornett calculates that his lost pay (including fringe benefits) during the period from the date his retaliatory discharge from META was effective, March 22, 1994, through December 31, 1995 (back pay period), the date he would have been terminated absent the retaliatory discharge, was $162,138.21. From this amount, Cornett subtracted $275 in earnings during the 4th quarter of 1994 to arrive at a net lost pay of $161,863.21. Cornett then calculated that the interest accrued on this amount through January 31, 1997 was $25,992.02. Thus, Cornett's claim through January 31, 1997 for back wages (including interest) totals $187,855.23. Moreover, Cornett asserts that contrary to the instructions in the Initial Agency Decision, META had not provided him with any information pertaining to firm-wide cost of living or merit increases during the back pay period. Consequently, Cornett requests that he be permitted to amend this claim for back pay upon the receipt of this information from META.

B. Attorney Fees

In this proceeding, Cornett is represented by attorneys from the Government Accountability Project (GAP), Robert Seldon (Seldon), A. Alene Anderson (Anderson) and Eric Nelson (Nelson). (3) The Seldon Declaration describes the legal experience of the three attorneys who participated in the representation of

Cornett. Seldon states in the Declaration that in calculating the attorney fees claim he used a rate of $265 per hour for his services, $150 per hour for Anderson's services and $75 per hour for Nelson's services. Seldon arrived at these rates after drawing upon his experience in both private and government practice and by referencing the Leffey matrix, a U.S. Attorney Office fee matrix which has been used by U.S. District Courts to determine the appropriateness of "lodestar" hourly rates for attorney fees requests in the District of Columbia. (4) In the Declaration, Seldon further states that Anderson worked 223.3 billable hours on the Cornett matter, Nelson worked 161.25 billable hours and that he worked 136.60 billable hours. Seldon calculated the total attorney fee claim by multiplying each attorney's per hour rate by the number of billable hours that attorney worked. Thus, for his services Seldon assessed $36,199 (136.60 hours x $265 per hour). For Anderson's services, Seldon assessed $33,480 (223.3 hours x $150 per hour) and for Nelson's services, Seldon assessed $12,093.75 (161.25 hours x $75 per hour). The total attorney fee claim for Cornett is $81,772.75.

C. Other Costs and Expenses

Cornett also requests that he be reimbursed for costs he and GAP incurred in bringing his whistleblower complaint. Cornett alleges that he incurred expenses of $6,350.48 and that GAP incurred $2,299.14 in expenses. Additionally, Cornett requests reimbursement for $435.67 of telephone calls which were charged to his home telephone account. In total, Cornett requests reimbursement of $9,085.29 of expenses that he alleges were incurred in bringing his whistleblower complaint.

II. META's Response and Cornett's Reply

In its Response, META asserts that the number of attorney hours billed is unreasonable in light of the relatively limited amount of back pay that is at issue in this case. META argues that no client would agree to pay such large fees to recover such a back pay award. META also asserts that given the vague descriptions of the time billing summaries provided by Cornett's attorneys, it is impossible to determine the reasonableness of the time expended in the case. META also argues that the number of billable hours claimed was unnecessarily increased by the inefficient use of three attorneys for Cornett.

META also challenges other components of Cornett's claim. Specifically, META argues that Cornett's unemployment benefits should be subtracted from his back pay claim. META also challenges the compound daily interest calculation employed by Cornett. META asserts that OHA has previously held that interest on back pay should be compounded on a quarterly basis. META also contests various costs listed by Cornett that it asserts are not directly related to the litigation in the present case. (5)

On March 14, 1997, Cornett submitted his reply (Reply) to the Response. In an attached declaration ("the Second Declaration"), Seldon asserts that the documentation in the Seldon Declaration is sufficient for an award of attorney fees since it detailed the billing practices used, the hourly rates employed, the time actually recorded and the method of billing judgement exercised. Seldon further argues that the total amount of attorney fees is not unreasonable since this litigation dealt with complex subject matter and involved two hearings, two dispositive motions for dismissal, and various depositions and written submissions. With regard to the utilization of personnel, Seldon asserts that Anderson and Nelson were used to the maximum extent possible to minimize costs and that the activities he personally performed were absolutely necessary for effective trial advocacy. In response to META's argument about the high attorney fees vis a vis the back pay award, Seldon points out that the proceeding was not just about back pay but was an attempt by Cornett to vindicate himself and to increase his chances of obtaining further employment in his field of expertise. (6)

In the Reply, Cornett also reasserts his request for information regarding merit increases awarded by META during the time period specified in the Initial Agency Decision. As evidence that such increases may have been granted, Cornett has submitted several pages from the META business proposal for the

Programmatic Environmental Impact Statement (PEIS) contract that contain references to various types of employee pay raises. Cornett asserts that since he would have received such an increase, it should be considered in the final determination of back pay. Alternatively, Cornett argues that his back pay award should be adjusted by the total of the increase in the Consumer Price Index (CPI) during the back pay period plus an additional 5% for experience and merit. Cornett also argues that unemployment insurance should not be considered in determining back pay and notes that the "collateral source rule" would bar such consideration. With regard to the challenge to his interest calculation, Cornett argues that the Initial Agency Decision directed that interest calculation be calculated pursuant to 5 C.F.R. § 550.806, and that provision specifies calculation of interest on a daily basis. Finally, Cornett asserts that the cost items challenged by META were in fact related to the litigation and are recoverable costs.

III. Discussion

I have considered the submissions of the parties in accordance with the provisions of 10 C.F.R. § 708.10(c). This section states that an Initial Agency Decision may include back pay and "reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was issued." By its reference to "costs and expenses," this section is by its very terms broader than Rule 54(d) of the Federal Rules of Civil Procedure, which refers only to "costs."(7) Thus, the first Initial Agency Decision issued under the DOE whistleblower regulations properly interpreted the "costs and expenses" covered by section 708.10(c) more expansively than the way "costs" have been interpreted under Rule 54(d). Compare Ronald A. Sorri, 23 DOE ¶ 87,503 at 89,016-18 (1993) (Sorri), with 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2677 at 370-72 (1983). Consequently, I will follow the standards outlined in Sorri. With these considerations in mind, I now turn to the remedy requested by Cornett.

A. Back Pay

After considering the submissions by Cornett and META, I have decided to approve Cornett's request for back pay plus interest subject to the modification described below.

In Cornett, I noted that META had stated that Cornett earned $91,000 per year in salary and benefits. 26 DOE at 89,036. Cornett has calculated back wages for each quarter of the back pay period by prorating the $91,000 per year salary and benefit figure. As indicated above, the only amount Cornett has subtracted from these figures is $275 in earnings during the 4th quarter of 1994. Cornett has submitted income tax returns to substantiate that he did not earn more than this amount. Cornett asserts that, in accordance with the Initial Agency Decision, he calculated interest on the back pay using the method specified in 5 C.F.R. § 550.806(d) and (e). (8) Cornett also asserts that this award should be adjusted upward to reflect merit pay or cost of living increases given by META.

META does not challenge the methodology by which Cornett calculated his back pay. Therefore, I will accept Cornett's requested back pay amount. However, META asserts that Cornett improperly calculated the interest on the back pay by compounding it on a daily basis, and argues than Cornett's employment insurance benefits should be subtracted from the back pay award.

META's argument regarding the calculation of interest is well founded. In Cornett, only paragraph (d) of section 550.806 is cited, and it is cited for the purpose of determining the "overpayment rate" interest figure that will be used in calculating interest. Nowhere in the Initial Agency Decision did I refer to paragraph (e) of section 550.806 or adopt the daily compound interest calculation method specified in that paragraph. (9) Consequently, in the Appendix to this Order, I have recalculated the interest on Cornett's back pay using quarterly compounding as has been done in prior DOE cases under Part 708. See Sorri; David Ramirez, 24 DOE ¶ 87,504 (1994), aff'd, 24 DOE ¶ 87,510 (1994) (Ramirez); Howard W. Spaletta,

25 DOE ¶ 87,502 (1996). Compound interest was calculated by multiplying the aggregate net amount of lost wages and benefits by the quarterly "overpayment rate" for that quarter.(10) The "overpayment rate," as established by the Secretary of Treasury pursuant to 26 U.S.C. § 6621, is the Federal short-term rate, plus two percentage points. The Federal short- term rate for a particular quarter is the short term rate for the first month of the preceding calendar quarter, rounded to the nearest whole percent See Rev. Rul. 97-12, 1997-11 I.R.B. 5.

META's argument regarding unemployment insurance is unavailing. META argues that awarding back pay without subtracting the unemployment insurance he received would place Cornett in a better position than he would have been absent his termination from employment from META. However, under the generally accepted "collateral source rule," unemployment compensation is not deducted from back pay awards. See Sorri, 23 DOE at 89,016 (citing NRLB v. Gullet Gin Co., 340 U.S. 361 (1951)); see also Ramirez, 24 DOE at 89,015. META has brought forth no considerations which would mandate a change in these OHA precedents regarding this issue.

With regard to Cornett's request for an adjustment to his back pay award to reflect a merit pay or cost of living increases, I find that such an adjustment is not merited given the facts before me. META has certified that during the back pay period it did not give its employees any firm wide cost of living pay increases and Cornett has not produced any evidence to the contrary. With respect to merit pay, there is no evidence in the record that Cornett received such an increase during the time that he was employed by META. Nor did Cornett allege that he had been denied a merit pay increase as a reprisal for his disclosures. Accordingly, I find that it would be too speculative to adjust Cornett's back pay to reflect any merit pay increase.

Consequently, after considering the parties' submissions, I will award Cornett back pay of $161,864 plus $33,543 in interest through June 30, 1997. (11)

B. Attorney Fees

I have decided to approve Cornett's request for attorney fees subject to the reduction described below.

As described above, Cornett has submitted a claim for attorney fees totalling $83,190.25 together with supporting declarations. (12) META has not challenged the hourly rates charged for Cornett's attorneys. Therefore, I will accept these hourly rates and will utilize them to calculate the amount of attorney fees to be awarded. (13) However, META has vigorously disputed the number of billable hours claimed by Cornett. META argues that the total claim for attorney fees is excessive and unreasonable since it is equal to approximately one-half of the total back pay award. Further, META argues that the description given for the work performed is inadequate and that the number of hours claimed is inflated due to inefficient and duplicative use of counsel by Cornett.

META's argument regarding the relative amounts of the back pay claim and the attorney fee claim is unconvincing and unsupported by any cited authority. There is no basis for setting an attorney fee award in proportion to the amount of back pay awarded in a case. No provision of Part 708 requires this and I am aware of no case law supporting META's position. Cf. City of Riverside v. Rivera, 477 U.S. 561 (1986) (Supreme Court plurality refused to adopt a strict rule in a civil rights action under 42 U.S.C. § 1988 that attorney's fees must be proportional to damages). As Cornett has pointed out in his Reply, whistleblower actions typically seek more than just back pay. For example, attorneys for whistleblowers also seek vindication of reputations that have been impugned by employers. The actual value of having one's reputation restored goes beyond the actual monetary award in a whistleblower case. Consequently, I reject META's argument that attorney fees should be proportional to recovered back pay.

META's argument regarding the descriptions of Cornett's attorneys' activities is also unavailing. After reviewing the two declarations and the schedules of billable hours, I find that Cornett has provided sufficient detail to support an award of attorney fees. In addition, I do not find that the attorney fee claim

for Seldon's work is suspect merely because a significant portion of the claimed time spent is rounded off to the nearest hour. Seldon has asserted that he rounded off figures in an exercise of his billing judgement and that this rounding off actually reduced the number of hours claimed. I find this explanation to be sufficient. Counsel should be encouraged to reduce billable hour claims which he or she believes may not be commercially reasonable. Further, there is no other evidence before me indicating that the number of hours claimed by Seldon is otherwise irregular.

However, I find there is merit to META's argument regarding the number of hours billed. An examination of the billable hour schedules suggests that some duplication of effort and inefficiencies are reflected in Cornett's attorney fee claim. Cornett defends the claimed attorney fees by asserting that META's own litigation tactics increased the cost of the litigation by its initial challenge of jurisdiction before a hearing on the merits, thus forcing two hearings to be conducted with associated briefs. Cornett also asserts that costs were driven upward in this case by the recanting of statements made by a key witness and META's insistence on challenging the initial factual findings of the Office of Contractor Employee Protection (OCEP). With regard to the utilization of personnel, Seldon, in the Seldon Declaration, asserts that he reduced the claim for Nelson's billable hours by one-third and personally reviewed Anderson's billing on a item-by-item basis. Seldon also argues that the activities he personally performed were absolutely necessary for effective trial advocacy and that these functions could not have been delegated to anyone else. Some of these arguments are surely correct. Nevertheless, Seldon's arguments fail to convince me of the necessity of all of the billed hours. Even recognizing the nature of the litigation between the parties, the novel issues presented, and the fact that this hearing ultimately resulted in a record of approximately 5,000 pages, I find that the number of hours billed by Anderson and Seldon for services up to the issuance of the Initial Agency Decision are still somewhat excessive.

Consequently, I will reduce Anderson's and Seldon's pre-Initial Agency Decision billable hours by 10 percent. Thus, in calculating the attorney fee award I will reduce Seldon's billable hours to 127.4 hours (136.60 hours x .9 + 4.5 hours for the Reply) and Anderson's billable hours to 202.5 hours (223.30 x 0.9 + 1.5 hours for the Reply). I will award Cornett $33,761 (127.4 hours x $265 per hour) for Seldon's services, $30,375 (202.5 hours x $150 per hour) for Anderson's services and $12,094 (161.25 hours x $75 per hour) for Nelson's services. The total attorney fees awarded is $76,230.

C. Other Expenses

The bulk of the remaining costs and expenses for which Cornett requests reimbursement relate to various photocopying, telephone, postage and delivery, travel and deposition expenses incurred during the litigation of this case. With the exceptions noted below I will approve reimbursement of these expenses.

META claims that some of the telephone calls listed by Cornett do not appear to be eligible for reimbursement. Specifically, META refers to the telephone calls made to D. Hancock, "MPN" and T. Connor, who are not identified in Cornett's submission. Cornett argues that he made these calls prior to retaining counsel to seek advice as to how to proceed before OCEP. However, given the record before me, it is not apparent that the cost of those calls was reasonably incurred by Cornett in bringing his whistleblower complaint. Consequently, the $99.34 incurred in connection with those calls will not be reimbursed.

Similarly, I accept META's argument with respect to Cornett's requested reimbursement for $23.00 of costs associated with a meeting he had with then Secretary Hazel O'Leary. Cornett alleges that this meeting was in connection with his whistleblower complaint. However, he does not provide any specific information about the meeting from which I can find that the costs associated with it were reasonably incurred in bringing the whistleblower complaint. Consequently I will deny reimbursement for those costs.

META also challenges Cornett's request for $1,059.50 for the cost of purchasing a copy of the transcript of the hearing on the merits. META argues that Cornett's counsel does not need a copy of the transcript since he is located in Washington, DC and could have access to the transcript at DOE Headquarters. I find

this argument to be without merit. The obtaining of a hearing transcript clearly was reasonably incurred in bringing the complaint especially since counsel had to respond to META's appeal of the Initial Agency Decision. (14) The fact that a copy of the transcript is available to the public during specified hours at DOE Headquarters does not make the transcript an "unreasonable cost." Consequently, I will approve the $1,059.50 incurred to obtain a transcript of the hearing on the merits.

I will also approve the remainder of the costs submitted by Cornett. Consequently, Cornett will be awarded $8,963 in reimbursement for expenses incurred by him in bringing his complaint.

IV. Conclusion

For the reasons set forth above, Cornett shall be awarded the following amounts of back pay and reimbursement for costs and expenses in accordance with the provisions of 10 C.F.R. § 708.10(c):

Back Pay: $161,864

Interest on Back Pay $ 33,543

(through June 30, 1997)

Attorney Fees $ 76,230

Costs $ 8,963

It Is Therefore Ordered That:

(1) Maria Elena Torano Associates shall pay C. Lawrence Cornett the following amounts in compensation for actions taken against him in violation of 10 C.F.R. § 708.5:

(a) $161,864 for lost salary and fringe benefits for the period March 22, 1994, through December 31, 1995.

(b) $33,543 in interest on the lost salary and fringe benefits as of June 30, 1997 plus additional interest from July 1, 1997 until the date of payment calculated by multiplying the cumulative amount of unpaid back pay plus interest each calendar quarter by the quarterly "overpayment rate" for that quarter.

(c) $8,963 for reimbursement for expenses and costs incurred by C. Lawrence Cornett in bringing his complaint under 10 C.F.R. Part 708.

(d) $76,230 in attorney fees incurred in this proceeding with respect to his attorneys, Robert Seldon, Esq., A. Alene Anderson, Esq. and Eric Nelson of the Government Accountability Project.

(2) This is a Supplemental Order to the Initial Agency Decision issued on December 19, 1996, and shall be subject to review by the Secretary of Energy or his designee pursuant to the request for review that Maria Elena Torano Associates, Inc. submitted to the Assistant Inspector General for Assessments on January 3, 1997.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date: April 24, 1997

Appendix

Cumulative

Quarterly Interest Rate Interest Back Pay

Quarter Back Pay (per annum) + Interest

2nd Quarter, 1994$25,639* 6% $ 192 $ 25,831

3rd Quarter, 1994$23,111 7% $ 654 $ 49,596

4th Quarter, 1994$22,114 8% $1,213 $ 72,923

1st Quarter, 1995$22,659 8% $1,685 $ 97,267

2nd Quarter, 1995$23,389 9% $2,452 $123,108

3rd Quarter, 1995$22,659 8% $2,689 $148,456

4th Quarter, 1995$22,293 8% $3,192 $173,941

1st Quarter, 1996 $ 08% $3,479 $177,420

2nd Quarter, 1996$ 0 7% $3,105 $180,525

3rd Quarter, 1996$ 0 8% $3,611 $184,136

4th Quarter, 1996$ 0 8% $3,683 $187,819

1st Quarter, 1997$ 0 8% $3,756 $191,575

2nd Quarter, 1997$ 0 8% $3,832 $195,407

* Includes back pay for the period March 22, 1994 to March 31, 1994.

(1)The OHA case number for the Cornett Decision is VWA-0007. As indicated above, the OHA case number for this Supplemental Order is VWX-0010. I will also refer to the Cornett Decision as the Initial Agency Decision.

(2)On January 3, 1997, META submitted a request for review of the Cornett Decision pursuant to 10 C.F.R. § 708.10(c). That request is currently pending. This Supplemental Order will be transmitted to the Assistant Inspector General for Assessments with the expectation that it will be forwarded to the Secretary or his designee so that it may be reviewed together with the Initial Agency Decision. See David Ramirez, 24 DOE ¶ 87,504 (1994). Compare David Ramirez, 24 DOE ¶ 87,512 (1994) (Supplemental Order implementing Final Agency Decision issued as a final Order of the DOE).

(3)The Seldon Declaration describes the effort of a fourth attorney, Thomas Carpenter, who participated in representing Cornett but for whom no compensation is requested. During the pendency of this case, Nelson was a legal intern who performed some of his services as an attorney pursuant to Washington (State) Admission to Practice Rule 9. Nelson's participation in this case ended shortly before the hearing on the merits in this matter in late October 1996. For purposes of this Supplemental Order, I will refer to Nelson as an attorney.

(4)The Leffey matrix was developed in Leffey v. Northwest Air Lines, Inc., 572 F. Supp 354, 371-75 (D.D.C. 1983). An updated Leffey matrix is found in Brown v. Pro Football, Inc., 846 F. Supp 108, 120 (D.D.C. 1994). In Cornett, I stated that I would utilize the "lodestar approach" to determine the amount of attorney fees. 26 DOE at 89,037. Under this approach, a reasonable attorney fee is the product of reasonable hours times a reasonable rate.

(5)In a letter dated February 3, 1997, META responded to Cornett's assertions regarding the issue of firm-wide cost of living or merit increases. In the letter, META asserted that during the relevant period it did not give any firm-wide, cost of living increases and that any raises in salary it provided were merit-based and employee-specific. META further contended that the Initial Agency Decision does not provide for Cornett to recover back pay for speculative, merit-based salary increases.

(6)Seldon also states that he spent 4.5 hours and Anderson spent 1.5 hours in preparing the Reply. Using the "lodestar" rates utilized in the Seldon Declaration, Cornett claims an additional $1,417.50 in attorney fees for this work.

(7)In Crawford Fitting Co. v. J.J. Gibbons, Inc., 482 U.S. 437 (1987), the Supreme Court held that costs awarded under Rule 54(d) are limited to the items set forth in 28 U.S.C. § 1920 and other related statutes.

(8)Section 550.806(d) calculates the overpayment rate by rounding the federal short term rate for the first month of the "last quarter" and adding two percentage points. Cornett determined the federal short term interest rate (5.64%) for the first month (October 1996) of the quarter in which the Initial Agency Decision was issued. Rounding that figure up to 6% and adding 2% produces an interest rate of 8% which Cornett used for each quarter in calculating interest on the back pay amount through January 1997. In accordance with section 550.806(e), Cornett compounded the interest on a daily basis.

(9)Cornett's interest calculation was also flawed by his failure to calculate an interest rate for each quarter based on each quarter's specific overpayment rate as determined by the Secretary of the Treasury.

(10) In calculating the interest for each quarter of the back pay period, the back pay amount for each quarter was divided by two and added to the prior quarter's cumulative back pay and interest amount. This sum was then multiplied by the per annum "overpayment rate" and divided by four to determine that quarter's interest.

(11)All of the sums awarded in this Supplemental Order have been rounded to the next whole dollar.

(12)This total includes the claim for attorney fees for preparation of Cornett's Reply to META's Response.

(13)Since two of Cornett's attorneys practiced primarily in Seattle, Washington, I was initially concerned as to the reasonableness of basing their hourly rates on those applicable in the District of Columbia. However, since there is authority for determining rates by reference to the location of the litigation, my concern has been resolved. See Martin v. Mabus, 734 F. Supp. 1216 at 1226-27 (S.D. Miss. 1990) (relevant legal community for determining attorney fees is the judicial district where the litigation occurred, rather than the attorney's primary location of practice).

(14)OHA usually provides a free copy of the transcript to the parties in whistleblower cases. This was not done in this case. If a copy had been provided, Cornett would not have had to incur that cost.

Case No. VWX-0014

November 29, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Case:Frank E. Isbill

Date of Filing:November 4, 1999

Case Number: VWX-0014

This Decision supplements an Initial Agency Decision, dated September 27, 1999, issued by the undersigned Hearing Officer of the Office of Hearings and Appeals (OHA) of the Department of Energy in a case involving a "whistleblower" complaint filed by Frank E. Isbill (the complainant) under 10 C.F.R. Part 708. See Frank E. Isbill, 27 DOE ¶ 87,529 (1999). In the Decision, I found that NCI Information Systems, Inc. (the contractor), a DOE contractor, had violated the provisions of 10 C.F.R. § 708.5 by removing the complainant's supervisory duties in reprisal for his making protected disclosures related to a possible abuse of authority. The Decision further determined that the complainant should be awarded reimbursement for all costs and expenses reasonably incurred by him in bringing his complaint. The complainant submitted a request for reimbursement of these costs and expenses on November 4, 1999. The contractor submitted a response to the November 4 submission on November 15, 1999. This Supplemental Order awards the complainant a total of $546 in costs and expenses.

In the complainant's request, he seeks reimbursement for the contractor for the work he did representing himself, totaling $6,061. I reject these charges because it is well-settled that a pro se litigant is not entitled to attorney's fees. See Kay v. Ehrler, 499 U.S. 432, 435 (1991) (civil rights case); Wolfel v. United States, 711 F.2d 66, 68 (6th Cir. 1983) (Freedom of Information Act case). The complainant also requests that he be reimbursed for telephone and fax charges, process service charges (since he had subpoenas served on two of the witnesses) and a consultation fee with an attorney, totaling $358. I have examined these expenses and in the context of this case, these charges seem reasonable and are specified in sufficient detail. I will therefore order the contractor to pay all of these charges. The complainant also requests reimbursement for mileage incurred in traveling both to the Office of the Inspector General (OIG) and to the hearing, at the rate of 30 cents a mile. Since Section 708.36 provides for reimbursement of essentially all reasonable costs and expenses, it is appropriate for the contractor to pay charges incurred in connection with the OIG investigation of the complaint filed under Part 708. However, the mileage rate used by the complainant was incorrect, as the government generally only permits mileage to be reimbursed at the rate of 23.5 cents a mile. See 41 C.F.R. § 301-10.310. I have therefore reduced the mileage reimbursement total from $240 to $188. For these reasons, the contractor must pay to the complainant $546 in reimbursement for costs and expenses in accordance with the provisions of 10 C.F.R. § 708.36.

It Is Therefore Ordered That:

(1) NCI Communications, Inc. shall pay Frank E. Isbill $546 in reimbursement for expenses and costs incurred by him in bringing his complaint under 10 C.F.R. Part 708, in compensation for actions taken against him in violation of 10 C.F.R. § 708.5.

(2) This is a Supplemental Order to the Initial Agency Decision issued on September 27, 1999, which shall become a Final Decision of the Department of Energy unless, within 15 days of its receipt, a Notice of Appeal is filed requesting review of this Supplemental Order by the Director of the Office of Hearings and Appeals with the Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0107, telephone number (202) 426-1566, fax number (202) 426-1415.

Dawn L. Goldstein

Hearing Officer

Office of Hearings and Appeals

Date: November 29, 1999

Case No. VWZ-0006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: META, Inc.

Date of Filing: May 21, 1996

Case Number: VWZ-0006

This Decision considers a Motion to Dismiss filed by Maria Elena Torano Associates, Inc. (META) on May 21, 1996. In its Motion, META seeks the dismissal on jurisdictional grounds of the underlying complaint and hearing request filed by its former employee C. Lawrence Cornett under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. <1>On July 31, 1996, I conducted a hearing to receive evidence regarding the jurisdictional issues raised by META's Motion to Dismiss.

META argues that DOE does not have jurisdiction to hear Mr. Cornett's complaint since Part 708 applies only to employees of DOE contractors who perform work at DOE-owned or DOE-leased facilities.<2> META asserts that, with the exception of a limited number of visits to perform work ancillary to the primary purposes of the PEIS contracts, it did not perform work at DOE sites.

It is undisputed that Part 708 protections are limited to employees of contractors and subcontractors that perform work at contractor-operated DOE sites. See 10 C.F.R. §§ 708.1-708.4. The issue before me is whether META performed work at DOE sites within the meaning of Part 708. Section 708.4 defines "work performed on site" as:

work performed within the boundaries of a DOE-owned or -leased facility. However, work will not be considered to be performed "on-site" when pursuant to the contract it is the only work performed within the boundaries of a DOE-owned or -leased facility, and it is ancillary to the primary purpose of the contract (*e.g.*, on-site delivery of goods produced off-site).

10 C.F.R. § 708.4. Consequently, if all of the work META performed at DOE sites was ancillary to the primary purposes of the PEIS contracts, then META would not be subject to 10 C.F.R. Part 708 and its Motion should be granted. Given the somewhat unclear regulatory language above, it is apparent that there is no "bright line" test that can be employed in making a determination as to whether performed work is ancillary to the primary purposes of a contract. The determination as to whether work is ancillary is a subjective judgement which relies on facts of each individual case. After considering all of the testimony and exhibits presented by both parties during this proceeding, I find that META has performed work at DOE sites within the meaning of Part 708.

META has failed to persuade me that all of the work performed at DOE sites by META employees was ancillary to the primary purposes of its PEIS contracts with DOE.<3> After examining the three contracts META and DOE entered into regarding the PEIS, it is apparent that the primary purposes of the PEIS contracts were for META to revise draft materials for the PEIS, perform needed data analyses for the Draft PEIS and ultimately to prepare under DOE direction the Final PEIS. None of the witnesses or exhibits presented by either META or Mr. Cornett indicates that META employees performed data analysis at a DOE site or prepared written materials in connection with the PEIS at a DOE site. However,

there is substantial evidence before me to indicate that there was important work performed by META employees at DOE sites and that it was directly related to the primary purposes of the PEIS contracts.<4>

Testimony before me establishes that site visits made by META employees accomplished important mission-related purposes. They resulted in the obtaining of data generated at DOE nuclear sites and facilitated the gathering of necessary data by establishing relationships with employees at those sites. Dr. Phil Sczerzenie, the META impacts team leader, testified that the primary purposes of the site visits were to set up lines of communication for data from individuals at various DOE sites and to discover what types of data were available. Transcript of July 31, 1996 Hearing (Tr.) at 113, 115-16, 124. Further, Dr. Sczerzenie testified that META personnel obtained information needed in PEIS analysis during their visits to DOE sites. Tr. at 113, 115-17, 148. Dr. Sczerzenie's testimony is corroborated by the testimony of Dr. Thomas Hale, an economist on the META impacts team, who testified that one of the purposes of the site visits was to establish personal relationships with individuals at DOE sites in order to facilitate the transfer of needed data for analysis, to discover what data was available and to bring back data from the sites. Tr. at 166, 168. Further, Dr. Jane Rose, a member of the META impacts team, testified that she gathered data at the DOE sites. Deposition of Dr. Jane Rose (Rose Deposition) at 15. This testimony is supported by several of the META employee trip reports which have been submitted into the record. See Exhibits 13, 19 and 21. In my opinion, these activities involving data gathering and the facilitation of data gathering cannot be considered ancillary to the primary purposes of the PEIS contracts since they were directly related the primary purposes of those contracts. I accept META's contention that most of the data that it obtained from the sites was not collected on site by META personnel. However, as indicated by the testimony referred to above, data collection was greatly facilitated by site visits by META personnel. I also agree that data that was collected on site by META employees could have been transmitted by mail or electronic media. However, this does not change the fact that important data collection activities occurred at DOE sites. Section 708.4 does not require that work performed at DOE sites be of a nature that it must always be physically performed at a DOE site.

Further, I find that META employee tours of DOE sites significantly assisted those on the trip and other META employees with whom they shared information in preparing the PEIS. Granted, the information META employees obtained from site tours does not appear to be "data" of the type that META was contracted to obtain or analyze under the PEIS contracts. <5> See Tr. at 117, 120, 126-27 (Dr. Sczerzenie). META personnel did not go to DOE sites to make physical measurements or conduct specific validation of the data they obtained. Nevertheless, the testimony of Drs. Hale and Rose shows that on the site tours they obtained information that they utilized in the analyses they performed for the PEIS.<6> Specifically, Dr. Hale testified that through site tours he was better able to understand the nature and scale of potential environmental hazards and that this assisted him in his analysis for the PEIS. Tr. at 170-71, 178. Dr. Rose testified that she was able to obtain information and make observations that were essential for her to properly perform her PEIS work. Rose Deposition at 7-8, 12-15, 22-23, 28-29. In addition, the testimony of Mr. Cornett and the trip report exhibits he has submitted support the conclusion that information and observations from the DOE site tours were communicated to META personnel at the firm's Gaithersburg facility, Tr. at 214-15, 224; Exhibits 13, 19, who used it in the analyses that they performed for the PEIS. Tr. at 218-20. This information sensitized those employees to site conditions that could require particular data analysis or provided some general verification of conditions at the site. As a result of the use

of this type of information in the PEIS analysis, I believe that the site tours were too important to be deemed ancillary to the primary purposes of the PEIS contracts.

I recognize that a very small percentage of the time spent by META employees on the PEIS project involved travel to DOE sites, and that only a small percentage of the firm's employees actually travelled to those sites. See Affidavit from Albert N. Tardiff at ¶ 6. I also recognize that not all of the time spent on the trips was spent on site. See Tr. at 72-74, 131, 270. Nevertheless, as indicated above, there were activities engaged in by META personnel on site that were not ancillary to the primary purposes of the PEIS contracts, but were intimately related to such primary purposes as revising draft materials for the

draft PEIS and performing needed data analysis. In view of the importance of the work performed at DOE sites, and the fact that the sites visited were some of the major nuclear facilities involved in the PEIS, the relatively little amount of time spent there, while a relevant factor, is not dispositive of the jurisdictional issue in this case.

Since the meaning of the expression "ancillary to the primary purpose of the contract" is not crystal clear, in reaching a determination on the jurisdictional issue raised by META, I have also taken into consideration the purpose of Part 708. The Part 708 preamble states that "a fundamental purpose of this rule is to encourage individuals to feel free to disclose to the DOE information relative to health and safety problems at DOE-owned or -leased facilities...." 57 Fed. Reg. 7533 at 7535 (March 3, 1992). The PEIS that META employees worked on was directly related to the issues of waste management and environmental restoration at DOE's government-owned, contractor-operated sites and Mr. Cornett has alleged that there were deficiencies in the PEIS analysis of human health risks. While META has correctly pointed out that its work is less directly involved with on-site work than that of the management and operating contractors and subcontractors involved in prior cases under Part 708, META's on-site contact was much more significant than that of the deliverer of goods referenced in the example in the Section 708.4 definition of "work performed on site." <7> Thus, META is one type of contractor or subcontractor that DOE intended to cover by the Part 708 regulations.

Because I find that META employees performed work at DOE sites that cannot be considered ancillary to the primary purpose of the PEIS contracts, I conclude that META is a contractor that performed work on site as defined in Section 708.4, and thus is subject to the Part 708 regulations.<8> Consequently, I shall deny META's Motion to Dismiss.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by META, Inc. on May 21, 1996 is denied.

(2) This is an Interlocutory Order of the Department of Energy.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date: August 22, 1996

<1>Beginning in 1991, DOE entered into the first of three contracts with META to obtain its services to help DOE produce a draft Programmatic Environmental Impact Statement (PEIS). Mr. Cornett's Part 708 complaint arises from his employment with META on the PEIS and alleges that because of disclosures he made regarding health and safety risks he experienced various forms of reprisal culminating with his termination from employment with META. For a procedural history of this matter, see C. Lawrence Cornett, 25 DOE ¶ 87,504 (1996) (Order to Show Cause) (Cornett).

<2>In this Decision, I will refer to DOE-owned or DOE-leased facilities as "DOE sites."

<3>As in my Order to Show Cause, references to META employees include employees of META's subcontractor, Louis A. Berger Associates (Berger). From the record before me Berger employees performed essentially the same types of work as META employees on the PEIS contracts. See Cornett, 25 DOE at 89,023 n.5.

<4>I reject, however, Cornett's argument that because META certified that its employees' DOE site visits were necessary, the work performed at the sites should be automatically deemed integral to the purposes of the PEIS contracts. Nevertheless, the fact that META chose to send its personnel to DOE sites provides

some evidence that it considered the visits important.

<5>The parties disagree on the definition of the word "data." Dr. Hale's testimony sums up this dispute: "Data sort of has lots of different meanings. In talking to people . . . .about high level waste and understanding, for instance, what vitrification is, and what processes are necessary. That's data, in my mind. . . . In other peoples minds it's rows and columns of numbers." Tr. at 178.

<6>During cross examination at her deposition, Dr. Rose took issue with the word "tour," referring instead to her activities on site as "field work." Rose Deposition at 51-52.

<7>There are many such contractors that deliver supplies and equipment for offices, building maintenance, cafeterias and vending machines. For this reason, I do not accept META's argument that finding Part 708 jurisdiction in this case would extend Part 708 jurisdiction to almost all DOE contractors and make the ancillary work exception meaningless.

<8>While META has correctly pointed out that Cornett did not work at any DOE site, the definition of "employee" in Section 708.4 clearly states that the determination of whether a person has standing as an employee shall be made without regard to the on- or off-site locale of the employee's work performance. 10 C.F.R. § 708.4 (definition of "employee").

Case No. VWZ-0007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: META, Inc.

Date of Filing: October 4, 1996

Case Number: VWZ-0007

This determination will consider a Motion to Dismiss filed by Maria Elena Torano Associates, Inc. (META) on October 4, 1996. In its Motion, META seeks the dismissal of the underlying complaint and hearing request filed by C. Lawrence Cornett (Cornett) under the Department of Energy's Contractor Employment Program 10 C.F.R. Part 708.

Beginning in 1991, DOE entered into the first of three contracts with META to obtain its services to help DOE produce a Programmatic Environmental Impact Statement (PEIS). Mr. Cornett's Part 708 complaint arises from his employment with META on the PEIS and alleges that because of disclosures he made regarding the PEIS's deficiencies in risk assessment methodologies he experienced various forms of reprisal culminating with his termination from employment with META. On March 9, 1994, Cornett filed a complaint pursuant to 10 C.F.R. Part 708. The Office of Contractor Employee Protection (OCEP) conducted an investigation of Cornett's allegations and issued a Report of Investigation and Proposed Order (Report) on April 17, 1996. OCEP, in the Report, concluded that Cornett had made protected disclosures regarding health and safety issues and that it had jurisdiction over Cornett's complaint. Further, OCEP concluded that a preponderance of the evidence supported a finding that Cornett's protected disclosures contributed to his selection by META to be terminated and that META had failed to show by clear and convincing evidence that Cornett would have been terminated absent his protected disclosures.(1)

In its Motion, META asks that Cornett's complaint be dismissed for failure to state an actionable claim. Specifically, META argues that Cornett did not make a disclosure protected by Part 708. META asserts that the word "disclose[d]," as used in Part 708, implies that the information communicated must be of a type which is not known by the recipient. META goes on to claim that "[i]n many of his alleged 'protected disclosures,'" Cornett did not disclose anything that the DOE or its contractors did not already know. Consequently, META argues that Cornett failed to make a disclosure under Part 708.

In the Motion, META also argues that Cornett's alleged disclosures did not involve any substantial and specific threat to any person's health or safety as required by Part 708. META points out that Cornett's allegations regarding use of alternative risk assessment methodologies and data would not themselves have revealed dangerous physical conditions at DOE sites and that data regarding these sites were already generally available to the public. Further, META asserts that because of the nature of the methodological drafting concerns raised by Cornett they would have no direct impact on the health and safety of anyone. META notes that the draft versions of the PEIS were subject to peer and public review before the official Draft PEIS was published and that any alleged methodological weaknesses would have been fully reviewed. Further, according to META, the theoretical subject matter of Cornett's alleged disclosures, such as whether a particular risk assessment model should or should not be used in the official Draft PEIS,

does not implicate a substantial and specific risk to anyone as contemplated in Part 708.

After considering the arguments raised by META regarding its Motion, I deny it for the following reasons. Initially, I decline to adopt the META interpretation of the term "disclosed" in Part 708. (2) While Part 708 provides no definition of the word "disclosed," it is clear to me that the agency never intended the word to be construed as narrowly as that proposed by META. An examination of the preamble to the Part 708 regulations finds that the words "allege" and "report" are used synonymously with "disclose." See 57 Fed. Reg. 7533, 7534 (March 3, 1992). The use of the words "allege" and "report" indicates that the drafters of Part 708 never meant to require that the information disclosed had to be unknown to the recipient of the information. Further, the use of the general expression "provides information" in Section 708.3 argues against creating a requirement that a disclosure must contain unique information not known to the recipient.

Adoption of META's interpretation of the word "disclosed" would, in addition, not further the policies behind the Part 708 regulations. It is clear from the text of Part 708, as well as the preamble to these regulations, that the Contractor Employee Protection Program is intended to encourage employees of DOE contractors and subcontractors to make their employers or the DOE aware of concerns about health, safety, mismanagement and unlawful or fraudulent practices without fear of employer reprisal. See Sandia National Laboratories, 23 DOE ¶ 87,501 at 89,003 (1993) (denying Motion to Dismiss) (Sandia). Imposing the interpretation META suggests would require an employee to first ascertain whether his or her information is unknown to DOE or the contractor in order to assure his or her protected status and that process could be an elaborate and difficult one. In any case, it would tend to inhibit employees from freely coming forward with sensitive information and concerns. Consequently, META's interpretation of "disclosed" would be detrimental to employees being able to take advantage of the benefits to be obtained from Part 708. Part 708 is intended to encourage employee concerns regarding substantial and specific dangers to health and safety. Simply because someone employed by DOE or a contractor has knowledge of an employee's information does not in fact mean that the responsible officials involved in a project or at a site are aware of the information and are giving it appropriate consideration. Knowledge at one level in an organization may not translate into appropriate action at the right moment.

I also reject META's argument that, as a matter of law, Cornett's assertions do not involve substantial and specific dangers to public health and safety. In its Motion, META has misconstrued Section 708.5(a)(1). An employee need not establish that a disclosure in fact involved a substantial and specific danger; he or she is protected from reprisal if he or she in good faith believes the disclosure concerns a substantial and specific danger to employees or public health and safety. 10 C.F.R. § 708.5(a)(1)(ii). Thus, a determination as to whether Cornett's disclosures did in fact concern a substantial and specific danger is not dispositive of his Part 708 claim. Further, the question as to Cornett's beliefs regarding his disclosures is a factual issue which OCEP resolved in Cornett's favor in the Proposed Order it issued on April 17, 1996. In the absence of further inquiry and receipt of evidence on this factual issue, granting META's Motion would be inappropriate. See Sandia, 23 DOE at 89,003 ("A motion to dismiss is appropriate where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving issues of fact or law on a more complete record."). Consequently, META's Motion to Dismiss should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by META, Inc. on October 4, 1996, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date:

(1) This is the second Motion to Dismiss that META has submitted with regard to Mr. Cornett's Part 708 complaint. I denied META's prior Motion to Dismiss. See C. Lawrence Cornett, 25 DOE ¶ 87,504 (1996) (Order to Show Cause); META, Inc., 26 DOE ¶ 87,501 (1996) (Motion to Dismiss).

(2)The pertinent portion of Part 708 cited by META, Section 708.5(a)(1)(ii), states that a contractor employer may not discharge or retaliate against an employee who has:

(1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences

****

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

July 11, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: EG&G Rocky Flats, Inc.

Date of Filing: June 13, 1997

Case Number: VWZ-0008

This decision will consider a Motion for Partial Dismissal and Limitation on Scope of Complainant's Claims filed by EG&G Rocky Flats, Inc. (EG&G) on June 13, 1997. In its motion, EG&G seeks partial dismissal of the underlying complaint and hearing request filed by Arthur Murfin (Murfin) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Murfin's request for a hearing under 10 C.F.R. § 708.9 was filed on January 27, 1997, and it has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0016.

I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

On September 27, 1982, Murfin was hired as a machinist by Rockwell Rocky Flats (Rockwell), then the management and operating (M&O) contractor at DOE's Rocky Flats Field Office. On November 20, 1987, while employed in the Future Systems Department, Murfin provided information to a Congressional investigator about possible misappropriation of government funds occurring in the Future Systems Department. In February 1988, Murfin was transferred from Future Systems to the Special Assembly Group. He initially agreed to the transfer, but then reconsidered because of the possibility of adverse physical consequences the new position would have on an existing medical condition, dermatitis. Despite this, he was reassigned and on February 29, 1988, he filed a complaint with Rockwell's Employee Relations Office stating that he was transferred against his will. He alleged

in his complaint that this transfer was an act of reprisal against him for disclosing information to the investigator in 1987.

Shortly after the February 1988 transfer, Murfin allegedly reported to his Special Assembly supervisor, Mr. Brown, that certain equipment was being improperly used or serviced. Murfin contends that this was an "employee health and safety" disclosure as set forth in the whistleblower regulations. In June 1988, Murfin experienced severe dermatitis on his hands and arms and on June 23, 1988, was temporarily reassigned to work for Mr. Reed Hodgin in Atmospheric Sciences. On September 15, 1988, the Rockwell staff physician wrote to Mr. Brown, instructing him that Murfin should not be assigned to work that would aggravate his medical condition.

On September 28, 1988, Murfin wrote to Congressman David E. Skaggs (R.-Colorado) and stated that he

felt his transfer to Special Assembly was punishment for his participation in the Congressional investigation the prior year. On October 8, 1988, Congressman Skaggs informed Murfin that he had requested that DOE review Murfin's case.

On November 14, 1988, Murfin received a performance rating of "needs improvement," the lowest rating in a three-tiered system. On November 21, 1988, Mr. Albert Whiteman, DOE Rocky Flats Area Manager, informed Congressman Skaggs that Murfin would be transferred from his current position, where he was dissatisfied, and would be provided training for a new position. The letter also stated that retaliation against Murfin would not be tolerated. On December 1, 1988, Murfin was reassigned to the position of Technical Writer, a position for which he maintains he did not have the proper skills, training, or background. On January 23, 1989, Murfin was reassigned within the Program Management department from Technical Writer to the W82 Program, a job that Rockwell management felt better suited his background. On October 12, 1989, Murfin's 1989 performance was evaluated at a "needs improvement" level. On December 31, 1989, Rockwell discontinued its management and operation of Rocky Flats and EG&G assumed operation of the facility on January 1, 1990. On May 31, 1990, Murfin was evaluated in an interim performance evaluation, and received an overall rating of "meets or exceeds job requirements." On August 24, 1990, the November 1988 letter from Whiteman to Congressman Skaggs was placed in Murfin's personnel file. In October 1990, Murfin was reassigned from the W82 Program to the 440/460 facilities. In February 1991, Murfin's 1990 performance was evaluated as "effective." This was his first full year appraisal under EG&G management. In January 1992, Murfin received his 1991 evaluation; this time he was rated as "highly effective."

On September 8, 1992, the EG&G General Counsel requested the cooperation of 26 employees, including Murfin, in searching for documents relevant to Rockwell's litigation relating to its prior operation of Future Systems at Rocky Flats. Murfin responded later that month, indicating that he had some documents in his possession and could locate others. On December 9, 1992, Murfin was evaluated as "effective" for 1992. On February 15, 1994, Murfin filed a complaint pursuant to Part 708 with DOE Rocky Flats Office. On April 5, 1994, Murfin was evaluated as "effective" for 1993. On December 10, 1994, Murfin amended his complaint to include additional allegations of reprisal including management's failure to consider him for promotion and allegedly marked differences in pay between Murfin and a named co-worker with similar responsibilities. On March 16, 1995, Murfin again amended his complaint to add allegations of reprisal consisting of the cancellation of a training course for which he had enrolled and his termination through a Reduction-in-Force (RIF) in March 1995. Later in 1995, Kaiser-Hill assumed management of the facility from EG&G, and continues to operate Rocky Flats today.

In summary, Murfin alleges six actions of reprisal by his employers: (1) an involuntary transfer in February 1988 from Future Systems Department to the Special Assembly Engineering Group, (2) unfavorable performance evaluations in 1988, 1989, and 1990, (3) non-selection by management for other positions within his department, (4) disparate salary enhancements compared to his co-workers, (5) denial of training, and (6) termination through a RIF in March 1995.

On January 3, 1997, the now-defunct DOE Office of Contractor Employee Protection (OCEP) finalized its Report of Investigation and Proposed Order (ROI). OCEP found, inter alia, that several of the alleged incidents of retaliation were not covered under Part 708, were not timely filed, or were not subject to relief. In general, OCEP concluded that a preponderance of the available evidence did not support a finding that Murfin's protected disclosures contributed to his limited salary enhancements, termination through a RIF, or failure to be promoted. OCEP found no prohibited retaliation. On January 21, 1997, Murfin submitted a request for a hearing to OCEP, and the OHA received that request on January 27, 1997.

On June 13, 1997, EG&G filed the motion under discussion. In its motion, EG&G argues that two of Murfin's claims of reprisal should be dismissed. These are the alleged reprisals based on Murfin's transfer in 1988 and on his 1988, 1989, and 1990 performance appraisals. Further, EG&G argues that two other claims should either be stated with more specificity or be dismissed. These are the alleged reprisals based

on Murfin's claim of "non-selection" for other positions and on his limited salary enhancements. On June 23, 1997, Murfin filed a response to EG&G's motion, and on June 26, 1997, EG&G filed a reply to Murfin's response. For the reasons stated below, I will grant EG&G's motion in part, and deny the motion in part.

II. Analysis

A. EG&G's Liability for Alleged Reprisals That Occurred in 1988, 1989 and 1990

EG&G argues that because it did not become the Rocky Flats M&O contractor until January 1, 1990, it has no liability for any alleged reprisals that occurred prior to that date. These alleged reprisals are the February 1988 involuntary transfer and the unfavorable 1988 and 1989 appraisals, which occurred while Rockwell was managing the site. It also argues that the 1990 performance appraisal of Murfin, though it was issued after EG&G had assumed management of Rocky Flats on January 1, 1990, creates no liability because it was in fact not a reprisal. For the reasons set forth below, I will dismiss Murfin's claims that are based on these alleged reprisals.

In its motion, EG&G submits, among other contentions, that the whistleblower regulations at 10 C.F.R. Part 708 do not apply to the alleged reprisals that occurred in 1988, 1989 and 1990. I agree with EG&G. 10 C.F.R. § 708.2 gives this proceeding jurisdiction over complaints of reprisal that were filed after the effective date of Part 708 (April 2, 1992), where the acts of reprisal occurred after that date, if the reprisal stems from health and safety matters. All other complaints, for example, those that stem from disclosures of fraud or mismanagement or participation in a congressional proceeding, must relate to acts of reprisal that occurred after both the effective date of the regulations and the date on which the underlying procurement contract contains a clause requiring compliance with the whistleblower regulations. 10 C.F.R. § 708.2(a). EG&G amended its contract to incorporate the provisions of 10 C.F.R. Part 708, effective April 2, 1992. Report of Investigation at 2. Under these circumstances, the whistleblower regulations apply to EG&G reprisals that occurred after April 2, 1992, regardless of the nature of the disclosure from which they stem. Conversely, the whistleblower regulations do not apply to any reprisals that Murfin has alleged to have occurred before April 2, 1992, which include the 1988 involuntary transfer and the performance appraisals issued in 1988, 1989 and 1990. See Mehta v. Universities Research Ass'n, 24 DOE ¶ 87,514 at 89,064 (1995) (Mehta) (Deputy Secretary decision); Richard W. Gallegos, 26 DOE ¶ 87,502 at 89,004 (1996) (application of regulations to reprisals stemming from non-health and safety matters limited to those that occurred after adoption of contractual provision). (1)

EG&G has argued that "no evidence related to this disclosure or purported act of retaliation should be permitted at the hearing in support of Complainant's claim." Motion at 3. With respect to timeliness, the regulations governing this proceeding consider the scope of coverage in terms of reprisals, not disclosures. 10 C.F.R. § 708.2(a). Therefore, although the whistleblower regulations are limited in their application to acts of reprisal that occur after April 2, 1992, those reprisals may stem from protected disclosures made before that date. Consequently, although I will exclude from this proceeding any evidence related to the alleged reprisals that occurred in 1988, 1989 and 1990, I will nevertheless accept evidence concerning the 1987 and 1988 disclosures themselves, provided it relates to an alleged act of reprisal that occurred after April 2, 1992.

B. The Sufficiency of Two Allegations of Reprisal

The balance of EG&G's Motion argues that two of Murfin's allegations of reprisal are stated so broadly and generally that they "should be stated with more particularity, or in the alternative, dismissed." Motion at 7-8. EG&G contends that in order to meet his burden, Murfin must set forth more details in order to provide EG&G the chance to focus its defense on specific transactions. In his complaint, Murfin alleges (1) that he was not selected for vacant positions within his department and (2) that he did not receive salary enhancements in line with colleagues of similar seniority and position. EG&G submits that without knowing, for example, which positions Murfin applied for and was denied, EG&G bears the heavy burden

of justifying each personnel decision made in every department that employed the complainant. Motion at 7. Further, EG&G argues that Murfin has provided only anecdotal evidence to support his view that he received lower raises than others in comparable positions at Rocky Flats, and even if this allegation were true, the complainant has not provided any evidence that his allegedly below average pay raises reflect a retaliatory act. Id.

A motion to dismiss is appropriate only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. See M&M Minerals Corp., 10 DOE ¶ 84,021 (1982). The Office of Hearings and Appeals considers dismissal "the most severe sanction that we may apply," and has stated that it will be used sparingly. See Boeing, 24 DOE at 89,005. Based upon this standard, I am not persuaded that Murfin's claim should be dismissed at this point in the proceeding. Instead I will direct that Murfin be permitted to supplement the record concerning non-selection for specific positions and that EG&G provide compensation histories for employees who fall within the parameters described below.

In previous cases, the Office of Hearings and Appeals has found that in order to achieve the purpose of the whistleblower protection program, i.e., encouraging employees to come forth with protected disclosures, it is important not to hold these employees to the strictest standards of technical pleading. See Westinghouse Hanford Company, 24 DOE ¶ 87,502 at 89,011 (1994) (Westinghouse). As EG&G points out, however, the regulations state that a complaint must contain a "statement setting forth specifically the nature of the alleged discriminatory act." 10 C.F. R. § 708.6 (c) (emphasis added). Nevertheless, I note that the Director of OCEP accepted for processing all of the claims that Murfin raised in his complaint and his subsequent modifications.

Murfin argues in his response that general claims of reprisal are sufficient to meet his burden of establishing whistleblower retaliation, and relies on the Spaletta decision for support of that position. Spaletta, 24 DOE at 89,052. Contrary to Murfin's contention, the complainant in Spaletta did not make "general accusations of reprisal." In fact, the hearing officer consistently held the complainant to the standards of specificity established in previous cases. Spaletta's allegation that he received fewer work assignments after making protected disclosures was easily verifiable, and by no means a "general accusation of reprisal." He was assigned jobs by referral from other groups, and when these referrals declined it was not difficult to quantify the decreased demand for his particular services in the years following his disclosures. Id. at 89,052-54. As for the "general accusation" that Spaletta received minimal raises, Spaletta submitted uncontroverted evidence of a "precipitous decrease" in his pay raises in the years following his protected disclosures. Id. at 89,055. The hearing officer used this evidence to "meet [complainant's] burden of showing that his disclosures were a contributing factor in those merit increases." Id. The final alleged "general accusation" that Murfin describes in his response, Spaletta's constructive termination, was not accepted as an act of reprisal because Spaletta could not prove this claim. Id. at 89,057. Therefore, we will hold Murfin to the standards of specificity required of all whistleblower complainants.

The purpose of the requirement that a complaint be specific is to avoid unfairness to the contractor. Westinghouse at 89,011. In this case, EG&G has persuasively argued that two allegations contained in the current complaint, as they now stand, would unfairly cause EG&G to expend an inordinate amount of time trying to respond to very broad allegations.

With respect to the allegation of non-selection, Murfin should be able to provide information about specific positions for which his not being selected were acts of reprisal. In his May 18, 1997 submission and in a telephone conference on June 6, 1997, Murfin clarified that he wishes to limit his claim of reprisal concerning non-selection to those positions in the department in which he was employed. I will direct him to produce a list of all positions, not later than July 21, 1997, with approximate titles and dates, for which it is his contention that his non-selection was an act of reprisal. In the event Murfin fails to produce this list, I will dismiss this portion of his claim.

As for the allegation of inadequate pay raises, I agree with Murfin's contention that the data which would permit comparison of his compensation history with those of others similarly situated more likely lies within the control of EG&G than within his own. I also agree with EG&G that union wages, such as those Murfin earned as a machinist, are not easily compared to non-union wages, such as those Murfin earned after his 1988 transfer. As stated above, I find that the whistleblower protections provided in 10 C.F.R. Part 708 do not apply to that transfer or to any other alleged reprisal that occurred before April 2, 1992. Therefore, no remedy is available under these regulations for any adverse effects of those alleged reprisals. Any comparison of Murfin's compensation should be made to others who had positions similar to his immediately before the first act of alleged reprisal that is covered by the regulations. See Daniel L. Holsinger, 25 DOE ¶ 87,503 at 89,015 (1996); Spaletta, 24 DOE at 89,058. Because it appears that performance appraisals affected pay raises, I will direct EG&G to produce, not later than July 25, 1997, compensation histories (with personal identifiers deleted) for employees who held positions similar to that of Murfin as of April 2, 1992, beginning with the period for which such employees were rated in their first performance appraisal issued after that date and ending with the date of Murfin's termination from EG&G. I reiterate that EG&G will not be required to produce documents that do not exist, nor perform involved analysis to meet this demand. Because EG&G is the party more likely to be able to produce the data necessary to support this claim, I will not dismiss this claim at this time. I again encourage the parties to cooperate with each other to determine the type of information, readily available to EG&G, that would satisfy Murfin's needs yet not be a burden upon EG&G to produce.

D. Other Matters

In his response to EG&G's motion, Murfin raises two additional matters. First, based on the language of 10 C.F.R. § 708.2(c), Murfin argues that his complaint should be processed even if it extends beyond the scope of the regulations. Second, he contends that he need not produce all his evidence before the hearing itself, but rather may present it at that time. I will address each in this section.

Section 708.2(c) of the whistleblower protection regulations states

For complaints not covered by § 708.5(a) [which provides that DOE contractors may not take adverse action against employees who make specified disclosures], the Director, at his discretion and for good cause shown, may accept a complaint for processing under this part. . . . A determination by the Director not to accept a complaint pursuant to this subsection may be appealed to the Secretary or designee.

10 C.F.R. § 708.2(c). The regulations define "Director" as the Director of the Office of Contractor Employee Protection (OCEP), now a part of the Office of the Inspector General. 10 C.F.R. § 708.4. Murfin argues that even if parts of his complaint are not covered by section 708.5(a), the Director or the Secretary of Energy may, for good cause shown, process his complaint. He contends that good cause is established in a letter from the Rocky Flats Manager to Congressman Skaggs, in which the Manager states that Rockwell "will not tolerate retaliation or discrimination against Murfin or any other Rocky Flats employee." Letter from Albert E. Whiteman, Area Manager, to Representative David E. Skaggs, November 21, 1988. This provision confers discretion upon the Director of OCEP to accept complaints that are not strictly covered by section 708.5(a). In this case, OCEP accepted for processing, investigated and reached a proposed determination for each of the allegations of reprisal that Murfin raised in his complaint. That OCEP ultimately concluded that Murfin's complaint lacked merit does not alter the fact that OCEP accepted the entire complaint for processing, which is the subject of the provision under discussion here. Therefore, this provision will not be considered in this proceeding. Moreover, if Murfin desired to challenge OCEP's failure to exercise its discretion to accept his complaint, this section dictates that he raise that appeal to the Secretary of Energy, not to the OHA.

Murfin's remaining contention is that he may present documentary evidence at the time of the hearing even if he has not provided it to me and to EG&G in advance. This, of course, is generally true. (2) The reasons for exchanging information in advance of the hearing are many. First, it eliminates the element of surprise by allowing each party to prepare fully for the arguments that the other party or parties will present.

Second, it speeds and smooths the flow of the hearing by eliminating the need to establish the authenticity of evidence during the hearing itself. Third, it permits the parties to discuss the relevance and necessity of the evidence, which in turn may lead to stipulations or other forms of agreement regarding matters that are not in dispute. Finally, it eliminates the possibility that a document may be successfully challenged at the hearing and possibly excluded from the record and thus from my consideration. Therefore, although the parties may, if necessary, introduce documents at the hearing itself, I will continue to encourage them to prepare for full disclosure before the hearing of all documents and witnesses they intend to rely upon at the hearing.

It Is Therefore Ordered That:

(1) The Partial Motion to Dismiss and Limitation on Scope of Complainant's Claims filed by EG&G Rocky Flats, Inc. on June 13, 1997, is granted in part and denied in part as set forth in Paragraphs 2 through 5 below.

(2) The allegation of reprisal resulting from the alleged February 1988 involuntary transfer is dismissed with prejudice.

(3) The allegations of reprisal resulting from the 1988, 1989 and 1990 performance appraisals are dismissed with prejudice, insofar as the allegation is against EG&G Rocky Flats, Inc.

(4) Not later than July 21, 1997, the Complainant shall provide EG&G with additional documentation on any positions within his department for which it is his contention that his non- selection was an act of reprisal.

(5) Not later than July 25, 1997, EG&G shall produce compensation histories (with personal identifiers deleted) for employees who held positions similar to that of Murfin as of April 2, 1992, as set forth in the above Decision.

(6) This is an Interlocutory Order of the Department of Energy.

William Schwartz

Hearing Officer

Office of Hearings and Appeals

Date: July 11, 1997

(1)Murfin contends that the whistleblower regulations apply to reprisals that predate the April 2, 1992 effective date of the regulations, provided they stem from health and safety disclosures. See Howard W. Spaletta, 24 DOE ¶ 87,511 at 89,055 (1995) (Spaletta). Although Spaletta considered a claim that the contractor retaliated against the complainant by reducing his annual merit pay increases for the years 1989 through 1991, events have overtaken this decision. The agency's position now is that the whistleblower regulations do not apply to reprisals that occurred before their effective date, April 2, 1992. See Mehta.

(2)Nevertheless, the hearing officer may establish deadlines for the production and exchange of documentary evidence. If necessary to ensure justice and prevent unfairness to one or more of the parties, the hearing officer may exclude such evidence that is produced after the deadlines.

Case No. VWZ-0009

March 12, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: Lockheed Martin Energy Systems, Inc.

Date of Filing: March 8, 1999

Case Number: VWZ-0009

This decision will consider a “Motion to Strike Alleged Disclosures from Consideration” Lockheed Martin Energy Systems, Inc. (LMES) filed on March 8, 1999. In its Motion, LMES objects to the consideration of a number of alleged disclosures contained in a Complaint filed by Linda D. Gass under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Ms. Gass requested a hearing on her Complaint under 10 C.F.R. § 708.9 on January 12, 1999, and it has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0028.

I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against its employee on the basis of certain activities by the employee, including certain disclosures by the “to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), . . .” 10 C.F.R. § 708.5(a)(1).

Ms. Gass has worked for LMES since March 1982. In her Complaint, Ms. Gass alleged that in 1991 she raised concerns with the DOE and its contractors regarding the environmental site characterization of a proposed industrial park. The Complainant also alleged that she made additional disclosures to LMES officials and the DOE, as well as to other federal agencies, including the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), and the Office of Federal Contract Compliance Programs (OFCCP). Some of the disclosures concerned alleged sexual discrimination and alleged violations of the Americans with Disabilities Act (ADA). The Complainant alleged that she suffered retaliation as a result of her disclosures.

On December 16, 1998, the DOE Office of Inspector General (IG) issued a Report of Investigation on Ms. Gass' Complaint. The report found that the Complainant failed to establish by a preponderance of the evidence that she had made disclosures protected under Part 708 regarding the proposed industrial park that are protected under Part 708. The report made no findings regarding the other disclosures included in Ms. Gass' Complaint. As stated above, Ms. Gass requested a hearing on her Complaint and a hearing in this matter is scheduled to start on March 23, 1999.

At a pre-hearing conference conducted on March 3, 1999, counsel for the Respondent LMES requested that the Complainant identify the specific disclosures that form the basis of her Complaint of reprisal. After a discussion, the Complainant agreed that her allegations were limited to the alleged disclosures regarding the proposed industrial park and five other disclosures. On March 8, 1999, the Respondent LMES submitted the present Motion. In it, the Respondent moves to strike from consideration the five other disclosures enumerated at the March 3, 1999 pre-hearing conference. In a March 8, 1999 pre-hearing conference, I informed the parties that I would allow arguments on the Motion to be submitted to me no later than March 10, 1999, and that I would issue a written ruling on the Motion no later than March 12, 1999.(1) I further informed the parties that I was also particularly interested in arguments on the applicability of two sections of the Part 708 regulations to the disclosures alleged by the Complainant. The first section, 10 C.F.R. § 708.2(b), states in part that "The procedures of this part 708 do not apply to . . . complaints of reprisal stemming from, or relating to, discrimination by contractors on a basis such as race, color, religion, sex, age, national origin, or other similar basis not specifically discussed herein." The second section, 10 C.F.R. § 708.5(a)(1), prohibits reprisals because of disclosures "to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), . . ." On March 10, 1999, the Complainant submitted arguments to me on the Motion and the specific issues I identified.

II. Analysis

A. Standard of Proof

Though the present Motion is styled as a "Motion to Strike Alleged Disclosures from Consideration," it is in effect a Motion to Dismiss the present Complaint in part. A Motion to Dismiss should only be granted where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. See M&M Minerals Corp., 10 DOE ¶ 84,021 (1982). The OHA considers dismissal "the most severe sanction that we may apply," and has stated that it will be used sparingly. See Boeing Petroleum Services, 24 DOE ¶ 87,501 at 89,005 (1994).

B. Application of 10 C.F.R. § 708.2(b) to the Alleged Disclosures

In its Motion, the Respondent first contends that under 10 C.F.R. 708.2(b), "the EEOC Complaint disclosure, claimed to be on the basis of sex discrimination, may not be considered in a Part 708 proceeding; . . ." The Complainant responds that this section of the regulations "merely states that an employee cannot pursue an employment discrimination claim under Part 708." On this point, I agree with the Respondent. Section 708.2(b) clearly excludes from coverage not only claims of sexual discrimination, but also any "complaints of reprisal stemming from, or relating to" a sexual discrimination claim. Thus, if it is the Complainant's contention that she suffered reprisals because of her disclosure of allegations of sexual discrimination, these "complaints of reprisal" clearly "stem[] from, or relat[e] to," discrimination on the basis of sex, and thus are explicitly excluded from coverage by the plain language of Part 708. Additionally, to the extent the Complainant alleges that she suffered reprisals as a result of her disclosures of allegations of discrimination in violation of the Americans with Disabilities Act, these complaints of reprisals also fall outside the intended scope of Part 708, because such discrimination is on a "similar basis" to those specifically enumerated in Section 708.2(b). Accordingly, to the extent that the present Complaint is based upon alleged disclosures "stemming from, or relating to," sexual discrimination or discrimination in violation of the Americans with Disabilities Act, the Complaint will be dismissed.

C. Application of 10 C.F.R. § 708.5(a)(1) to the Alleged Disclosures

Regarding the application of Part 708 to disclosures made by the Complainant to other Federal agencies, the Complainant states,

We acknowledge that [10 C.F.R. § 708.5(a)(1)] requires disclosure to "an official of DOE, to a member of Congress, or to the contractor." We further acknowledge that in at least two disclosures, *e.g.*, the EEOC and Department of Labor ("DOL") complaints, there was not a direct disclosure by Ms. Gass to the contractor. However, the regulations are silent on this issue and to interpret Part 708 to require direct disclosure would be inappropriate.

I disagree. Section 708.5(a)(1) is unambiguous as to whom a disclosure must be made to be protected. If the intent of Part 708 was to include within its protection disclosures to other federal agencies, such intent could have be explicitly expressed. Indeed, recently issued revisions to Part 708, to take effect on April 15, 1999, "expand[] coverage of disclosures to include those made to other government officials," making it clear that Part 708, as currently in effect, does not cover such disclosures. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. (1999). Thus, to the extent that the present Complaint is based upon alleged disclosures not made "to an official of DOE, to a member of Congress, or to the contractor," the Complaint will be dismissed.

D. Other Bases Cited in the Respondent's Motion

The Respondent argues further in its Motion that the five other disclosures may not be considered in the present proceeding because the Complaint as to these disclosures does not meet the procedural requirements of 10 C.F.R. § 708.6(c). "[S]pecifically, the claim is to be made under oath, and a statement is required that the remedy is not being pursued under other available law, as well as requiring a Complaint to contain such rudimentary items as facts and relief, neither of which has been advanced on these five (5) lately-raised claims; . . ." Finally, LMES contends that I may not consider the five disclosures because there has been no investigation or Report of Investigation issued on those disclosures. I do not agree.

The Respondent's characterization of any of the identified disclosures as "lately-raised" is inaccurate. Each of the disclosures was included in a letter from the Complainant's counsel to the DOE's Office of Contractor Employee Protection (OCEP) dated April 8, 1996. This letter, along with a March 26, 1996 affirmation signed by the Complainant, is referred to in the IG's Report of Investigation as the Complaint. See Report of Investigation at 8. I find, as apparently did OCEP and later the IG, that this letter and affirmation meet the procedural requirements of 10 C.F.R. 708.6(c).

Moreover, the Respondent is incorrect when it suggests that because the IG's Report of Investigation made no findings on some of these disclosures I am barred from considering them in the present proceeding. First, the Respondent incorrectly cites 10 C.F.R. 708.5(a)(5) as requiring that a Report of Investigation "be made on any claimed disclosure, . . ." In fact, this section of the regulations speaks only of an "investigation of the complaint[,]" and there is no dispute that the IG investigated Ms. Gass' Complaint. Second, while the Respondent is correct in pointing out that the Report of Investigation becomes a part of the record of this proceeding, the regulations are quite explicit that "the Hearing Officer may rely upon, but shall not be bound by, the findings contained in the Report of Investigation." 10 C.F.R. 708.10(b). Thus, I find no basis for narrowing the scope of the Complaint solely upon the contents of the IG's Report of Investigation.

III. Conclusion

Applying the above principles to the six alleged disclosures identified by the Complainant in the March 3, 1999 pre-hearing conference, the present Complaint will be dismissed as to all but (1) the alleged disclosures to the DOE and its contractors regarding the environmental site characterization of a proposed industrial park and (2) the alleged disclosures to LMES officials regarding alleged retaliation for activity protected under Part 708.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Lockheed Martin Energy Systems, Inc., on March 8, 1999, Case No. VWZ-0009, is granted in part and denied in part as set forth in Paragraphs 2 and 3 below. In all other respects, the Motion is denied.

(2) To the extent that the present Complaint, on which a hearing has been requested in Case No. VWA-0028, is based upon alleged disclosures stemming from, or relating to, sexual discrimination or discrimination in violation of the Americans with Disabilities Act, the Complaint is hereby dismissed.

(3) To the extent that the present Complaint, on which a hearing has been requested in Case No. VWA-0028, is based upon alleged disclosures not made to an official of DOE, to a member of Congress, or to the contractor, the Complaint is hereby dismissed.

(4) This is an Interlocutory Order of the Department of Energy.

Steven Goering

Staff Attorney

Office of Hearings and Appeals

Date: March 12, 1999

(1)These pre-hearing rulings are consistent with the Part 708 regulatory requirement that, “where a dismissal of a claim, defense, or party is sought,” I must provide all parties an opportunity to “show cause why the dismissal should not be granted and afford all parties a reasonable time to respond . . . .” 10 C.F.R. § 708.9(j).

Case No. VWZ-0010

May 12, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: West Valley Nuclear Services Co., Inc.

Date of Filing: April 27, 1999

Case Number: VWZ-0010

This decision considers a “Motion to Dismiss” filed by West Valley Nuclear Services, Inc. (West Valley) on April 27, 1999. In its Motion, West Valley seeks the dismissal of a Complaint filed by John L. Gretencord (Gretencord) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. Mr. Gretencord requested a hearing on his Complaint under 10 C.F.R. Part 708 on March 19, 1999, and it has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0033. The present Motion has been assigned Case No. VWZ-0010.

I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The criteria and procedures for Part 708 were amended in an Interim Final Rule effective April 14, 1999. 64 F. R. 12862. The Interim Final Rule provides that its amended procedures will apply to any proceeding pending on April 14, 1999. Part 708's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against an employee on the basis of certain activities by the employee, including certain disclosures by the employee to "a DOE official, a member of Congress, any other government official who has responsibility or oversight of the conduct of operations at a DOE site, [an] employer or any higher tier contractor, . . .” 10 C.F.R. § 708.5(a).

Gretencord was employed by West Valley as a Senior Quality Control/Quality Assurance Engineer from January 15, 1990 to March 18, 1997. On March 26, 1997, Gretencord filed a complaint under 10 C.F.R. Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In this complaint, Gretencord alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement.

After conducting an investigation of Gretencord's allegations, the IG issued a Report of Investigation (the Report) on February 11, 1999. The Report found that: "[A] preponderance of the available evidence supports a finding that during his employment and work in quality assurance, [Gretencord] disclosed various concerns to [West Valley] officials and to DOE about possible safety violations and incidents of possible rule infractions." Report at 5. However, the Report further found that: "[A] preponderance of the

available evidence does not indicate that the substance of [Gretencord's] 'good faith' concerns contributed to actions that were taken against him." *Id.* at 6. The Report further states: "It is the conclusion of this inquiry, based upon information obtained through interviews of [West Valley] employees and supporting documents, that the evidence is clear and convincing that [Gretencord] was terminated for reasons other than his protected disclosures." *Id.* at 8. On March 8, 1999, DOE received Gretencord's request for a hearing.

On April 1, 1999, I ordered Mr. Gretencord to submit a written statement specifically listing: (1) the protected disclosures that he is alleging resulted in retaliatory acts against him, (2) the retaliatory acts allegedly conducted against him, and (3) the remedies he is requesting. OHA received Gretencord's response to this order on April 16, 1999. On April 27, 1999, OHA received the present Motion to Dismiss. West Valley's Motion to Dismiss contends that Gretencord has failed to (1) state a claim for which relief can be granted, and (2) comply with my order. OHA received Gretencord's Rebuttal of West Valley's Motion to Dismiss on May 7, 1999.

II. Analysis

A. Whether Gretencord Failed to Comply with My Order of April 1, 1999

West Valley contends that Mr. Gretencord has refused to comply with my order because he has failed to specifically describe any protected disclosures or retaliatory actions. Attorney's Affidavit in Support of Motion to Dismiss at 2. West Valley correctly notes that 10 C.F.R. § 708.28(b)(5) allows the Hearing Officer to "dismiss a claim . . . and make adverse findings upon the failure of a party . . . to comply with a lawful order of the Hearing Officer." However, it is well settled that a Motion to Dismiss in a 10 C.F.R. Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. *Lockheed Martin Energy Systems, Inc.*, 27 DOE ¶ 87,510 (1999); *EG&G Rocky Flats*, 26 DOE ¶ 82,502 (1997)(*EG&G*). The OHA considers dismissal "the most severe sanction that we may apply," and will rarely use it. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994). Moreover, this Office has found that, in order to further the purposes of the whistleblower protection program, which include encouraging employees to come forth with protected disclosures, it is important not to hold parties to proceedings under 10 C.F.R. Part 708 to the strictest standards of technical pleading. *EG&G*, *supra*; *Westinghouse Hanford Company*, 24 DOE ¶ 87,502 at 89,011 (1994) (*Westinghouse*). Accordingly, in ruling on the motion before me, I must balance West Valley's right to have sufficient notice of and respond to Gretencord's whistleblower allegations against the necessity of providing Gretencord with a fair opportunity to make his case.

Gretencord's response to the first portion of my April 1, 1999 Order was vague, poorly organized and difficult to follow. Instead of specifically listing each and every protected disclosure, as I had expected when issuing the order, Gretencord attempts to incorporate his original complaint by reference. However, I had previously informed Gretencord that merely referring to his previous submission to the IG would not suffice to meet the requirements of my order. The 46 page hand- written Complaint that Gretencord had filed with the IG was too long and too general in scope for the purposes of the present proceeding. By failing to provide a sufficient response to my order, Gretencord has waived his opportunity to provide the trier of fact with his itemization of protected disclosures. Accordingly, I am granting, in part, West Valley's Motion to Dismiss. Specifically, I am dismissing all allegations of protected disclosure that are not among the 15 alleged protected disclosures that I found in my review of the Report of Investigation. Since many of these alleged protected disclosures are well documented and clearly articulated in the Report, they provide West Valley with sufficient notice of Gretencord's allegations of protected disclosures. Specifically, the Report and its accompanying documentation contain the following protected disclosure allegations:

Protected Disclosure Allegation No. 1

Mr. David Crouthamel indicates that Gretencord "wrote several requests for corrective action (RCA) and non-conformance reports (NR) . . . [i]ncluding one report 93-N-117, which involved the labeling of electrical junction boxes in the 'tank farm.'" Exhibit 5 to Report of Investigation. Several other references to this protected disclosure are contained in the Report and its accompanying documentation.

Protected Disclosure Allegation No. 2

Gretencord alleges to several West Valley employees that an engineer had "penciled" down electrical leads with a knife to get them to fit a small terminal. Exhibit 7 to Report of Investigation.

Protected Disclosure Allegation No. 3

Mr. Dave Dempster indicates that Gretencord made a disclosure involving a faulty fire hydrant and sprinkler system with an incorrectly installed valve. Exhibit 8 to Report of Investigation.

Protected Disclosure Allegation No. 4

Gretencord reports alleged violation of the National Electrical Code in the Natural Gas Treatment Building to Dave Dempster. *Id.*

Protected Disclosure Allegation No. 5

Gretencord expresses concerns about alleged vitrification training deficiencies. Exhibit 9 to Report of Investigation.

Protected Disclosure Allegation No. 6

Gretencord expresses concern about installation of a camera in the vitrification facility, as reported to Mr. Timothy Jackson on February 20, 1997. Exhibit 10 to Report of Investigation.

Protected Disclosure Allegation No. 7

Timothy Jackson indicates that during April 1993, Gretencord expressed a concern about the allegedly improper calibration of torque wrenches. *Id.*

Protected Disclosure Allegation No. 8

Timothy Jackson indicates that Gretencord filed a Quality Clarification Report on January 1, 1993. *Id.*

Protected Disclosure Allegation No. 9

Gretencord reports to Timothy Jackson his concern about the replacement of crane bolts with a different grade of bolt than required. *Id.*

Protected Disclosure Allegation No. 10

Timothy Jackson reports that Gretencord made a formal Employee Concerns Disclosure to him on July 25-26, 1995. *Id.*

Protected Disclosure Allegation No. 11

Gretencord files an Employee Concern about an engineer drinking alcohol at lunch. Exhibit 15 to Report of Investigation.

Protected Disclosure Allegation No. 12

Gretencord alleges time sheet fraud. *Id.*

Protected Disclosure Allegation No. 13

Mr. John Volpe reports that in 1995-96 Gretencord alleged that records pertaining to the purchase of defective punches had been falsified. Exhibit 16 to Report of Investigation.

Protected Disclosure Allegation No. 14

Mr. Volpe recalls that in late 1996, Gretencord disclosed a concern about radiation exposure recordings. *Id.*

Protected Disclosure Allegation No. 15

Memo to file from D.L. Dempster, dated 2-21-97, indicates that Gretencord planned to take an Employee Concern to DOE.

These factual disputes should be resolved through further development of the record. Therefore, Gretencord will be afforded an opportunity to develop these allegations during discovery. However, since Gretencord's other allegations of protected disclosures are too vague and not documented well enough to enable West Valley to formulate its defense they are dismissed with prejudice.

Gretencord's response to the second portion of my order, which required him to specifically list "the retaliatory acts allegedly conducted against him," is much clearer. Gretencord clearly alleges that he was threatened, slapped, screamed at, personally and professionally discredited, cursed, unfairly reviewed, denied appropriate pay raises, suspended and then fired in retaliation for his protected disclosures. Gretencord's Response at pages 1 and 2. These allegations provide a sufficient basis for further development during discovery. Accordingly, I reject West Valley's claim that Gretencord failed to respond to the second portion of my order.

Similarly, I conclude that Gretencord has provided an adequate response to the third portion of my order, which required him to specifically list "the remedies he is requesting." Gretencord's Response requests that all personally derogatory statements be removed from his personnel records, and further requests compensation for lost wages, compensation for lost benefits, compensation for lost earnings potential and compensation for relocation expenses. *Id.* at 2. Accordingly, I reject West Valley's claim that Gretencord failed to respond to the third portion of my order.

B. Whether Gretencord Has Failed to State a Claim for Which Relief Can Be Granted.

West Valley also contends that Gretencord has failed to state a claim for which relief can be granted. I disagree. Under the DOE's Whistleblower Protection Regulations:

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

10 C.F.R. § 708.29. Gretencord claims and the IG found that he made a number of protected disclosures. The Report of Investigation cites more than enough evidence to create several disputed issues of fact concerning protected disclosures.

Moreover, Gretencord alleges numerous retaliatory acts. The record shows that a number of negative personal actions occurred during Gretencord's tenure with West Valley. These negative personal actions include several letters of remand, poor performance evaluations and a suspension and eventually an involuntary termination.

In most Whistleblower cases, it is difficult or impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Therefore, Congress and the Courts, recognizing this difficulty, have found that a protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993) *citing McDaid v. Department of Hous. and Urban Dev*., 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, the Courts have found that "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F. 2d at 148 (8th Cir. 1989).

Applying the above principles to the present case, I find that since the record contains evidence supporting an inference that Gretencord made numerous protected disclosures during his tenure at West Valley, and since a large number of negative personal actions also occurred during this time period, the closeness between the protected disclosures and the negative personnel actions is sufficient to establish a *prima facie* case. I therefore find that West Valley has not shown that Gretencord has failed to state a claim for which relief can be granted. Accordingly, this aspect of West Valley's motion shall be denied.

III. Conclusion

For the reasons set forth above, I have granted in part the Motion to Dismiss filed by West Valley Nuclear Services Co., Inc. on April 27, 1999. The Motion, is however, denied in all other aspects.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by West Valley Nuclear Services Co., Inc., on April 27, 1999, Case No. VWZ-0010, is granted in part as set forth in Paragraph 2 below. In all other respects, the Motion is denied.

(2) To the extent that the present Complaint, on which a hearing has been requested in Case No. VWA-0033, is based upon alleged protected disclosures that are not among the 15 alleged protected disclosures enumerated above, it is dismissed with prejudice.

(3) This is an Interlocutory Order of the Department of Energy.

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: May 12, 1999

Case No. VWZ-0011

May 19, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: West Valley Nuclear Services Co., Inc.

Date of Filing: May 18, 1999

Case Number: VWZ-0011

This decision considers a “Motion to Dismiss” filed by West Valley Nuclear Services, Inc. (West Valley) on May 18, 1999. In its Motion, West Valley seeks the partial dismissal of a Complaint filed by John L. Gretencord (Gretencord) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. Mr. Gretencord requested a hearing on his Complaint under 10 C.F.R. Part 708 on March 19, 1999, and it has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0033. The present Motion has been assigned Case No. VWZ-0011.

I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The criteria and procedures for Part 708 were amended in an Interim Final Rule effective April 14, 1999. 64 F. R. 12862. The Interim Final Rule provides that its amended procedures will apply prospectively to any complaint pending on April 14, 1999. Part 708's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against an employee on the basis of certain activities by the employee, including certain disclosures by the employee to "a DOE official, a member of Congress, any other government official who has responsibility or oversight of the conduct of operations at a DOE site, [an] employer or any higher tier contractor, . . .” 10 C.F.R. § 708.5(a).

Gretencord was employed by West Valley as a Senior Quality Control/Quality Assurance Engineer from January 15, 1990 to March 18, 1997. On March 26, 1997, Gretencord filed a complaint under 10 C.F.R. Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In this complaint, Gretencord alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement.

After conducting an investigation of Gretencord's allegations, the IG issued a Report of Investigation (the Report) on February 11, 1999. The Report found that: "[A] preponderance of the available evidence supports a finding that during his employment and work in quality assurance, [Gretencord] disclosed various concerns to [West Valley] officials and to DOE about possible safety violations and incidents of possible rule infractions." Report at 5. However, the Report further found that: "[A] preponderance of the

available evidence does not indicate that the substance of [Gretencord's] 'good faith' concerns contributed to actions that were taken against him." *Id.* at 6. The Report further states: "It is the conclusion of this inquiry, based upon information obtained through interviews of [West Valley] employees and supporting documents, that the evidence is clear and convincing that [Gretencord] was terminated for reasons other than his protected disclosures." *Id.* at 8. On March 8, 1999, DOE received Gretencord's request for a hearing.

On May 18, 1999, OHA received the present Motion to Dismiss. If the motion were granted, Gretencord would be barred from asserting any claims based upon alleged retaliatory acts that occurred more than 90 days before filing the Complaint.

II. Analysis

10 C.F.R. § 708.14 currently provides that a complaint should be filed "by the 90th day after the date [that the employee] knew or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a). West Valley asserts that the portion of Gretencord's Complaint based upon retaliatory acts that allegedly occurred prior to December 17, 1996, which is 90 days before March 19, 1997, the date on which Gretencord filed his Part 708 Complaint with DOE's Office of Inspector General is time-barred because it was filed more that 90 days after the discriminatory acts alleged by the complainant. Affidavit in Support of Motion to Dismiss at 2.

The Report of Investigation (the Report) in this matter was issued on February 11, 1999, by the Assistant Inspector General for Inspections. DOE had not yet issued the Interim Final Rule when Gretencord filed his Complaint and when the IG issued the Report. (1) The regulations in place when the Report was issued provided that the IG could accept the Complaint, unless it determined that the Complaint was untimely. Former 10 C.F.R. § 708.8(a)(2). (2) While it is true that the former Section 708.6(d) stated that a complaint must be filed within 60 days after the alleged discriminatory act occurred, an appropriate DOE official, could extend "all time frames" set forth in the Former Part 708. (3) It is therefore clear that under the previous regulations, the decision to accept a complaint filed after the 60-day period in 708.6(d) was within the discretion of the IG. In the present case, the IG did not dismiss any portion of the complaint as untimely, and there is nothing in the record to suggest that it abused its discretion.

In its Motion to Dismiss, West Valley attempts to avoid this conclusion by characterizing the 60-day time period in 708.6(d) as jurisdictional. In *Sandia National Laboratories*, 23 DOE 87,501 (1993) (*Sandia*), we considered, and ultimately rejected, the same argument. There is nothing in the former Part 708 that would indicate that the 60-day period was meant to be jurisdictional in nature. (4)

West Valley tries to analogize the Part 708 proceedings to the employee protection schemes administered by the Department of Labor (DOL), where, West Valley correctly notes, the courts have strictly enforced a limitations period imposed by Statute. Affidavit in Support of Motion to Dismiss at 4. However, as pointed out by West Valley, the time limits imposed in DOL proceedings are expressly prescribed by statute. *See* Solid Waste Disposal Act, 42 U.S.C. 6971; Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Comprehensive Environmental Response, Compensation and Liability Act of 1974, 42 U.S.C. 9610; Toxic Substances Control Act, 15 U.S.C. 2622; Energy Reorganization Act, 42 U.S.C. 5851; Federal Water Pollution Control Act, 33 U.S.C. 1367; Clean Air Act, 42 U.S.C. 7622. By contrast, the more flexible time frames governing this proceeding originated in the Part 708 regulations, which were not mandated by a specific statute, but were issued pursuant to the broad authority granted the DOE to manage the Government Operated- Company Owned facilities in its nuclear weapons complex by the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201, the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5814 and 5815, and the Department of Energy Organization Act, as amended, 42 U.S.C. 7251, 7254, 7255, and 7256. Indeed, there are a number of reasons why 708.6(d) should not be read as barring the investigation of a complaint that is filed more than 60 days after the alleged discriminatory act occurred or should reasonably have been discovered. *See Sandia*, 23 DOE at 89,002-03.

First, the DOE Contractor Employee Protection Program is intended to encourage contractor employees to come forward "with information that in good faith they believe evidences unsafe, unlawful, fraudulent, or wasteful practices." 57 Fed. Reg. at 7533 (March 3, 1992). Employees of DOE contractors and subcontractors should be able to disclose safety concerns without fear of reprisal, and employees who believe they have been subject to a reprisal should feel they are able to seek protection from the DOE. The regulations should be construed in a manner which furthers this policy. It is clear from the regulatory history of Part 708 that the 60-day time limitation for the submission of complaints was never intended as an ironclad technical requirement. *Id*.; *see also* *Sandia*, *supra*.

Second, the preamble to Part 708 states that the reason for adopting a time limit for the filing of a complaint of discrimination was to ensure the investigation of complaints would not be rendered "more difficult as memories grow dimmer with the passage of time." 57 Fed. Reg. at 7537 (March 3, 1992). That is surely a legitimate concern. However, West Valley's argument that fading memories may hamper its defense in this case, given its posture, is purely speculative at this time. At this stage in the proceeding there is no evidence that any delay in the filing of the complaint is hampering West Valley's ability to present its defense. Moreover, I fail to see how any delay conceivably worked to the detriment of West Valley, since the Report found in favor of the company with regard to the complainant's allegations.

III. Conclusion

It is well settled that a Motion to Dismiss in a 10 C.F.R. Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. *Lockheed Martin Energy Systems, Inc*., 27 DOE ¶ 87,510 (1999); *EG&G Rocky Flats*, 26 DOE ¶ 82,502 (1997)(*EG&G*). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely used it. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994). Moreover, this Office has found that, in order to further the purposes of the whistleblower protection program, which include encouraging employees to come forth with protected disclosures, it is important not to hold parties to proceedings under 10 C.F.R. Part 708 to the strictest standards of technical pleading. *EG&G*, *supra*; *Westinghouse Hanford Company*, 24 DOE ¶ 87,502 at 89,011 (1994) (*Westinghouse*). Accordingly, the Motion to Dismiss filed by West Valley Nuclear Services Co., Inc. on May 18, 1999 should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by West Valley Nuclear Services Co., Inc., on May 18, 1999, Case No. VWZ-0011, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy.

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: May 19, 1999

(1)I have conducted my review of the IG's determination under the regulations in place at the time of the determination. However, the results and the reasoning would not be different under the Interim Final Rule.

(2)The Interim Final Rule moves the responsibility for initial jurisdictional determinations from the IG to the Head of Field Element or Employee Concerns Director (as applicable). 10 C.F.R. § 708.17.

(3)The Interim Final Rule clearly provides the Head of Field Element or Employee Concerns Director

with the discretion to accept a complaint filed after the 90 day period set forth in 10 C.F.R. § 708.14(a). 10 C.F.R. § 708.14(d).

(4)10 C.F.R. § 708.14(d) of the Interim Final Rule clearly indicates that the 90-day period set forth in 10 C.F.R. § 708.14(a) was not intended to be jurisdictional in nature

Case No. VWZ-0012

August 6, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Case: Lucy B. Smith

Date of Filing: June 30, 1999

Case Number: VWZ-0012

This determination will consider a Motion to Dismiss filed by Westinghouse Savannah River Company (WSRC) on June 30, 1999. WSRC seeks dismissal of the underlying complaint filed by Lucy B. Smith under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708.

I. Background

Ms. Smith's Part 708 complaint arises from her employment as a chemist with WSRC at DOE's Savannah River Site. Ms. Smith alleges that she made three protected disclosures involving health and safety concerns to WSRC officials during the last half of 1996. Subsequently, on January 20, 1997, Ms. Smith received a Reduction in Force notice from WSRC. Ms. Smith then filed a complaint with the United States Equal Opportunity Commission (EEOC) and the State of South Carolina Human Affairs Commission (SCHAC) on February 18, 1997. In these complaints Ms. Smith alleges that she was selected for termination by reason of her age and that her termination would violate the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et. seq. On March 26, 1997, Ms. Smith filed her Part 708 complaint. Ms. Smith retired from WSRC on April 1, 1997. On April 20, 1997, Ms. Smith again formally complained about her selection for termination to the EEOC and SCHAC. In these complaints, Ms. Smith asserted that she had been subject to age discrimination in her selection for termination.

In its Motion, WSRC asserts that Ms. Smith's Part 708 complaint should be dismissed on two grounds: First, Ms. Smith's Part 708 complaint was filed after the 60 day deadline specified in the provision of 10 C.F.R. Part 708 in effect at the time she filed her complaint, 10 C.F.R. § 708.6(d)(1)/ ; second, Ms. Smith pursued a remedy for her termination under "State or other applicable law"

and thus is barred from pursuing a complaint under Part 708 under 10 C.F.R. § 708.6(a) of the previous version of Part 708 or 10 C.F.R. §§ 708.4(c)(3) and 708.15(a) of the current version of Part 708.

In her response, Ms. Smith asserts that the 60 day deadline was tolled pursuant to section 708.14(b) of the current version of the regulations by her attempts to resolve her whistleblower complaint through an internal company grievance procedure. With respect to WSRC's argument regarding the filing of a complaint with the EEOC and SCHAC, Ms. Smith argues that the complaints filed with those agencies were two separate causes of action. The EEOC and SCHAC complaints were based on a cause of action for age discrimination. The Part 708 complaint is based on a cause of action for reprisals resulting from making protected disclosures. Additionally, Ms. Smith asserts that the bar in section 708.14(b) applies only if the "State or other applicable law" complaint is based upon the same facts. Ms. Smith argues that

the facts in her EEOC and SCHAC complaints are different from those in her Part 708 complaint. Specifically, Ms. Smith points out that the EEOC and SCHAC claims are based upon the fact that she was terminated as a result of her age whereas her Part 708 complaint is based on the fact that she was terminated due to her protected disclosures to WSRC officials.

II. Analysis

A. Timeliness of Ms. Smith's Part 708 Complaint

In its Motion, WSRC asserts that the controlling version of Part 708 with regard to the timeliness of the filing of Ms. Smith's Part 708 complaint is the version of Part 708 in effect at the time of the filing of her complaint. Ms. Smith cites only the current version of Part 708 in her response regarding this issue. I will assume, without deciding, that the previous version of the Part 708 regulations is controlling on this issue. (2)/

Section 708.6(d) of the previous version of Part 708 mandates that a complainant file a Part 708 complaint "within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew or reasonably should have known, of the alleged discriminatory act, whichever is later." 10 C.F.R. § 708.6(d). This section also provides that the 60-day period for filing a complaint is tolled where the employee has attempted resolution through internal company grievance procedures. Id.

Ms. Smith's Part 708 complaint was filed 65 days after she received her reduction in force notice. However, the record indicates that Ms. Smith did try to avail herself of WSRC's Employee Concerns program by filing a WSRC "Notice of Employee Concern" form dated January 23, 1997, in which she complains that she had been terminated because of her identification of safety concerns. See "Notice of Employee Concern" (January 23, 1997). While it is not apparent from the record when WSRC responded to this concern, the record contains a February 19, 1997 WSRC memo from Ms. Smith's supervisor to a WSRC official responding to Ms. Smith's January 23 Notice of Employee Concern. I find that Ms. Smith's attempt to resolve her complaint through filing the Notice of Employee Concern would have tolled the 60-day filing period, at a minimum, from January 23 to February 19, 1997, or for a period of 27 days. Consequently, I find that Ms. Smith's complaint was filed in a timely manner.

B. Preclusive effect of Ms. Smith's EEOC and SCHAC Complaints

Both the previous and current versions of Part 708 contain similar prohibitions barring the filing of a Part 708 claim in the event a complainant files a complaint for a remedy under "State or other applicable law" based upon the same facts. Section 708.6(a) (previous version) states "An employee who believes that he or she has been discriminated against . . . and who has not, with respect to the same facts, pursued a remedy available under State or other applicable law, may file a complaint . . . ." 10 C.F.R. § 708.6(a) (previous version). See also 10 C.F.R § 708.15(a) (current regulation) ("You may not file a complaint under this part if, with respect to the same facts, you choose to pursue a remedy under State or other applicable law").

I will assume, for purposes of this analysis only, that a complaint under the ADEA may be considered as "other applicable law" under section 708.6(a) (previous version) or 708.15(a). (3)/ Under this assumption, section 708.6(a)(previous version) or 708.15(a) would require dismissal of Ms. Smith's Part 708 complaint if her ADEA complaints were based on the same facts. While both complaints cite Ms. Smith's termination as the adverse action she experienced, the complaints differ significantly as to the cause for the termination. In order to establish a prima facie case for age discrimination under the ADEA, a discharged employee must prove that: (1) he or she is within the protected class; (2) he or she was discharged; (3) he or she was qualified for the employment position; (4) he or she was replaced with someone outside the protected class; or (5) by someone younger; or (6) show otherwise that his or her discharge was because of age. Elliot v. Group Medical & Surgical Serv., 714 F.2d 556, 562 (5th Cir.

1983), reh'g denied, 721 F. 2d. 819 (5th Cir. 1983). The pleading and underlying facts that would support this type of claim are different from those that would underlie a complaint filed under Part 708, the DOE contractor employee whistleblower protection program. For Ms. Smith's Part 708 complaint to prevail, her termination must have been motivated by her disclosures to WSRC officials. See 10 C.F.R. § 708.5 (Part 708 complaint may be filed if individual has been "subject to retaliation for: (a) Disclosing to . . . your employer . . . information that you reasonably and in good faith believe reveals - . . . (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority"); 10 C.F.R. § 708.5(a) (previous rule). Because the necessary factual prerequisites differ in the Part 708 and ADEA complaints, I find the complaints are not based upon the "same facts" for section 708.6(a) (previous version) or 708.15(a) purposes. See Carl J. Blier, 27 DOE ¶ , Case No. VBZ-0003 (June 21, 1999) (Americans with Disabilities Act and Rehabilitation Act (ADA/RA) complaints do not bar Part 708 complaint since ADA/RA complaints require different factual motivation for employer's adverse personnel action). Consequently, WSRC's Motion to Dismiss should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Westinghouse Savannah River Corporation on June 30, 1999 is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Richard A. Cronin, Jr.

Hearing Officer

Office of Hearings and Appeals

Date: August 6, 1999

(1) 1/ The DOE revised 10 C.F.R. Part 708 on March 15, 1999. The version of 10 C.F.R. Part 708 in effect prior to the March 15 revision will be referred to as the "previous version" of 10 C.F.R. Part 708.

(2)Ms. Smith's filing of her Part 708 complaint would be timely under the current Part 708 regulations, which gives a party 90 days to file a complaint. See 10 C.F.R. § 708.14.

(3)My belief is that the prohibitions contained in sections 708.6(a) (previous version) and 708.15(a) were meant to bar an individual from filing Part 708 complaints when the individual has already pursued a remedy under State or other applicable whistleblower law in order to prevent him or her from arguing whistleblower claims in multiple forums. The introduction to the current Part 708 regulations indicates that Part 708 was designed specifically "to deal with allegations or retaliation against contractor employees and to provide relief where appropriate." 64 Fed. Reg. 12,862 (March 15, 1999). This purpose would not be furthered by barring Part 708 actions which share similar facts with other non- whistleblower causes of actions. In its Motion, WSRC argues that an individual must make an election of remedies between Part 708 and other causes of action when both causes of action are based on similar facts. In support of its position, WSRC cites the comments to the previous rules: "when redress is available under State or other applicable law, the employee must make an exclusive election of remedies." WSRC Motion to Dismiss at 5 (quoting 57 Fed. Reg. 7,533 at 7,538). However, this quotation is contained in the section of the comments discussing the interaction of the proposed regulations with "'whistleblower' programs implemented pursuant to State or other applicable law." 57 Fed. Reg. at 7,538. The comments to the previous rule, in my opinion, provide additional support for the proposition that Sections 708.6(a) and 708.15(a) were not meant to bar non-whistleblower causes of action.

Case No. VWZ-0016

November 8, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: Charles Montaño

Date of Filing: October 4, 1999

Case Number: VWZ-0016

This decision considers a Motion to Dismiss filed by Charles Montaño (Montaño) on October 4, 1999. In his Motion, Montaño seeks dismissal of the hearing scheduled to begin on November 16, 1999 and judgment on the existing record for the Whistleblower Complaint that he filed against the University of California (the University) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. His Complaint under 10 C.F.R. Part 708 has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0042. The present Motion has been assigned Case No. VWZ-0016.

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The DOE Contractor Employee Protection Program is intended to encourage contractor employees to come forward "with information that in good faith they believe evidences unsafe, unlawful, fraudulent, or wasteful practices." 57 Fed. Reg. at 7533 (March 3, 1992). Employees of DOE contractors and subcontractors should be able to disclose safety concerns without fear of reprisal, and employees who believe they have been subject to a reprisal should feel they are able to seek protection from the DOE. The regulations should be construed in a manner that furthers this policy.

Montaño has been employed by the University as a Senior Auditor from June 12, 1987 to the present. On February 14, 1996, Montaño filed a complaint under 10 C.F.R. Part 708 with the DOE's Albuquerque Operations Office (Albuquerque). In this complaint, Montaño alleged that he was retaliated against for disclosures of possible fraud and mismanagement. On April 4, 1996, Montaño filed a second complaint under 10 C.F.R. § 708 alleging further retaliation.

After conducting an investigation of Montaño's allegations, the DOE's Office of Inspector General (the IG) issued a Report of Investigation (the Report) on April 14, 1999. The Report found that: "The evidence in the record indicates that [Montaño] made protected disclosures to Los Alamos National Laboratory Management (LAND) at public forums, to members of Congress, the DOE, and [the IG] regarding possible violations of law, rule, or regulation related to non-compliance with the terms and conditions of the LANL contract." Report at 31. The Report further found that: "[Montaño] has established by a preponderance of the available evidence that his protected disclosures contributed to the alleged retaliatory actions taken against him." *Id.* The Report further states: "We also find that [the UC] has failed to show by clear and convincing evidence that the adverse actions taken against [Montaño] would have occurred absent his protected disclosures." *Id.*

In its present motion, Montaño claims that the University failed to file its request for a hearing in a timely manner. Specifically, Montaño, citing the former 10 C.F.R. § 708.9(a), claims that the University received a copy of the Report on April 19, 1999, but failed to file its request for a hearing until May 6, 1999, which in Montaño's view, is two days later than allowed by the former 10 C.F.R. § 708.9(a).

If Montaño's motion were granted, the University's Request for a Hearing would be dismissed and my decision would be based upon the existing record, which consists of the investigatory file compiled by the Office of Inspector General (the IG) in the course of its initial investigation of Montaño's Whistleblower complaints. In effect, the University would be deprived of an opportunity to conduct discovery and to present relevant testimony under oath at a hearing.

It is well settled that a Motion to Dismiss in a 10 C.F.R. Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. *Lockheed Martin Energy Systems, Inc.*, 27 DOE ¶ 87,510 (1999); *EG&G Rocky Flats*, 26 DOE ¶ 82,502 (1997) (*E.G.&G*). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely used it. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994).

Moreover, this Office has held that, in order to further the purposes of the Whistleblower protection program, which include encouraging employees to come forth with protected disclosures, it is important not to hold parties to proceedings under 10 C.F.R. Part 708 to the strictest standards of technical pleading. *EG&G*, *supra*; *Westinghouse Hanford Company*, 24 DOE ¶ 87,502 at 89,011 (1994) (*Westinghouse*).

Most importantly, the criteria and procedures for Part 708 were amended in an Interim Final Rule effective April 14, 1999. 64 Fed. Reg. 12862. The Interim Final Rule provides that its amended procedures will apply prospectively to any complaint pending on April 14, 1999. Accordingly, the purely procedural regulation cited by Montaño was superseded by the Interim Final Rule which took effect on the very same day that the IG issued the Report. Under the Interim Final Rule, the matter proceeds to a hearing automatically without any requirement for a party to file a request for a hearing. Since the University did not need to file a request for hearing under the controlling regulations, Montaño's contentions are without merit. Accordingly, the Motion to Dismiss filed by Charles Montaño on October 4, 1999, is denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Charles Montaño, on October 4, 1999, Case No. VWZ-0016, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy.

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: November 8, 1999

Case No. VWZ-0017

November 10, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: University of California

Date of Filing: October 6, 1999

Case Number: VWZ-0017

This decision considers a Motion to Dismiss filed by the University of California (the University) on October 6, 1999. In its Motion, the University seeks dismissal of the complaint filed against it by Charles Montaño under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. Montaño's complaint under Part 708 has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0042. The present Motion has been assigned Case No. VWZ-0017.

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The DOE Contractor Employee Protection Program is intended to encourage contractor employees to come forward "with information that in good faith they believe evidences unsafe, unlawful, fraudulent, or wasteful practices." 57 Fed. Reg. at 7533 (March 3, 1992). Employees of DOE contractors and subcontractors should be able to disclose safety concerns without fear of reprisal, and employees who believe they have been subject to a reprisal should feel they are able to seek protection from the DOE. The regulations should be construed in a manner that furthers this policy.

Montaño has been employed by the University as a Senior Auditor from June 12, 1987 to the present. On February 14, 1996, Montaño filed a complaint under Part 708 with the DOE's Albuquerque Operations Office (Albuquerque). In this complaint, Montaño alleged that he was retaliated against for disclosures of possible fraud and mismanagement. On April 4, 1996, Montaño filed a second complaint under Part 708 alleging further retaliation.

After conducting an investigation of Montaño's allegations, the DOE's Office of Inspector General (the IG) issued a Report of Investigation (the Report) on April 14, 1999. The Report found that: "The evidence in the record indicates that [Montaño] made protected disclosures to Los Alamos National Laboratory Management (LANL) at public forums, to members of Congress, the DOE, and [the IG] regarding possible violations of law, rule, or regulation related to non-compliance with the terms and conditions of the LANL contract." Report at 31. The Report further found that: "[Montaño] has established by a preponderance of the available evidence that his protected disclosures contributed to the alleged retaliatory actions taken against him." *Id.* The Report further states: "We also find that [the University] has failed to show by clear and convincing evidence that the adverse actions taken against [Montaño] would have occurred absent his protected disclosures." *Id.*

In its present motion, the University claims it has made Montaño a formal offer to provide him with remedies that are substantially equivalent to or exceed those set forth in the Report of Investigation (the

Report) issued by the DOE's Office of Inspector General (the IG).

On August 27, 1999, the University submitted a document captioned as an "Offer of Judgment." In an order dated August 31, 1999, I found:

This Offer of Judgment appears to be an attempt to moot the issues at bar in the present case by agreeing to provide the remedies requested by [Montaño]. If [the University's] Offer of Judgment provides each of the remedies requested in Mr. Montaño's complaint, the issued raised in the complaint are mooted. 10 C.F.R. § 708.17(c)(6).

* * *

Accordingly, [Montaño] is hereby directed to show cause as to why I should not dismiss the present case on the grounds of mootness.

August 31, 1999 Order. On September 7, 1999, I received Montaño's response to my order. On September 8, 1999, I wrote the parties stating in pertinent part:

After careful consideration of [Montaño's response to my order of August 31, 1999,] as well as the [University's] Offer of Judgment, it is apparent that substantial differences remain between the parties. Therefore, I am of the opinion that the present case should not be dismissed at this time.

September 8, 1999 letter from Hearing Officer Fine to Merit Bennett and Ellen Castille.

It is well settled that a Motion to Dismiss in a Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. *Lockheed Martin Energy Systems, Inc.*, 27 DOE ¶ 87,510 (1999); *EG&G Rocky Flats*, 26 DOE ¶ 82,502 (1997) (*EG&G*). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely used it. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994).

The University has not set forth any argument or evidence convincing me that my previous ruling was in error. (1) Accordingly, the Motion to Dismiss filed by the University of California on October 6, 1999, should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by the University of California on October 6, 1999, Case No. VWZ-0017, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy.

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: November 10, 1999

(1)10 C.F.R. § 708.17(c)(6) states that : "Dismissal [of a complaint] for lack of jurisdiction or other good cause is appropriate if: . . . Your employer has made a formal offer to provide the remedy that you request in your complaint or a remedy that DOE considers to be the equivalent to what could be provided as a remedy under this part." My review of the record indicates that there are several legal and factual issues concerning remedies which remain to be resolved.

Case No. VWZ-0020

February 3, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Case: Lucy B. Smith

Date of Filing: October 14, 1999

Case Number: VWZ-0020

This determination will consider a Motion to Dismiss filed by Westinghouse Savannah River Company (WSRC) on October 14, 1999. WSRC seeks dismissal of three allegations of retaliation by reason of failure to rehire submitted by Lucy B. Smith under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. In a submission dated December 6, 1999, WSRC further requests dismissal of a discovery request made by Ms. Smith regarding hiring by subcontractors of WSRC.

I. Background

Ms. Smith's Part 708 complaint arises from her employment as a chemist with WSRC at DOE's Savannah River Site. Ms. Smith alleges that she made three protected disclosures involving health and safety concerns to WSRC officials during the last half of 1996. On January 20, 1997, Ms. Smith received a Reduction in Force notice from WSRC. Ms. Smith subsequently elected to retire from WSRC on April 1, 1997. In her complaint, Ms. Smith alleged that she was selected for termination because of her disclosures.

Pursuant to a Motion for Discovery, I permitted Ms. Smith to engage in discovery pertaining to potential WSRC retaliation by virtue of its failure to rehire Ms. Smith for various job openings. See Lucy B. Smith, 27 DOE ¶ 87,521 (1999). As part of this decision, I ordered that after discovery, Ms. Smith must submit to me and WSRC any specific formal allegation of WSRC retaliation by failure to rehire which she sought to have considered at the hearing in this matter. In a letter dated September 1, 1999, Ms. Smith seeks to amend her Part 708 complaint by alleging that WSRC retaliated against her by failing to hire her for two chemist positions filled in August and October of 1998 and one filled on March 23, 1999. Regarding these hirings, Ms. Smith asserts that she was "subject" to preferential hiring eligibility under Section 3161 of the Defense Authorization Act, 42 U.S.C. § 7274 (h), (j).

In its Motion, WSRC argues that any allegations regarding a failure to rehire should not be considered at the hearing. Specifically, WSRC argues that Section 3161 of the Defense Authorization Act confers no private cause of action to Ms. Smith for failure to be rehired by WSRC. Specifically, WSRC points out that Section 3161 requires that the Secretary of Energy prepare a "workforce restructuring plan" for each defense nuclear facility. Further, Section 3161 uses only permissive language ('to the extent practicable") in its directive to give rehiring preference to terminated employees at such facilities. WSRC cites Pawlick v. O'Leary, No. 1:95-3300-6 (D.S.C. Sept. 23, 1997), aff'd, Pawlick v. O'Leary. No. 97-2459 (4th Cir. June 26, 1988) (per curiam) (Pawlick), for the proposition that Section 3161 does not confer a private right of action upon an individual. WSRC also argues that neither the provisions of the DOE-WSRC contract nor the two forms entitled "Statement of Interest in Maintaining Section 3161 Employment Eligibility"

(described below) that Ms. Smith signed contain language which would mandate her rehiring by WSRC. Consequently, WSRC maintains that her failure to be rehired for any of the three positions described by Ms. Smith can not be considered retaliatory. Because WSRC believes that failure to rehire can not be a retaliation, WSRC requests that Ms. Smith's discovery request regarding hiring by WSRC subcontractors at the DOE Savannah River facilities be dismissed.

WSRC also argues that, as a practical matter, it did not retaliate against Ms. Smith because during the time the three chemists were hired, her name was not active in WSRC's Preferential Hiring Database. This database contains information on previously terminated employees who wish to be considered for future job positions. WSRC states that on January 20, 1997, Ms. Smith completed a form entitled "Statement of Interest in Maintaining Section 3161 Employment Eligibility" ("Statement of Interest" form). This form enables an individual to be placed on the Preferential Hiring Database for the Savannah River Site. The form also states that an individual must complete a new "Statement of Interest" form prior to one year from the date the individual signs the form. Because Ms. Smith had not submitted another "Statement of Interest" form within the one year period, Ms. Smith's name was moved from the active list to inactive status on March 17, 1998. WSRC asserts that Ms. Smith did not submit another "Statement of Interest" form until March 29, 1999. Thus, from March 17, 1998 to March 29, 1999, Ms. Smith's name was not active in the database, and consequently, she would not have been considered for any available position, including the three chemist positions at issue here, during that period.

In response, Ms. Smith argues that she is not asserting any rights under Section 3161. Instead, she states that her claim with regard to the allegations concerning her failure to be rehired is based upon 10 C.F.R. Part 708. Specifically, she asserts that the definition of "retaliation" in 10 C.F.R. § 708.2 refers to "an action . . .taken by a contractor against an employee with respect to employment . . . as a result of the employee's disclosure of information." Thus, Ms. Smith argues that this definition would encompass a failure to be rehired when the employee had a preference in rehiring.

II. Analysis

A. Allegations Concerning Failure to Rehire

WSRC asks that I dismiss Ms. Smith's request to amend her complaint regarding the allegation of failure to rehire her for one of the three chemist positions identified in her September 1 letter.

As an initial matter, I find that Section 3161 of the Defense Authorization Act, 42 U.S.C. § 7274 (h), (j), does not create for Ms. Smith any entitlement to one of the three chemist positions at issue here. I find the Court's reasoning in Pawlick persuasive. Section 3161 requires the Secretary of Energy to prepare a plan for the restructuring of Department of Energy nuclear weapons facilities which includes a provision that "[E]mployees whose employment . . . is terminated shall, to the extent practicable, receive preference in any hiring of the Department of Energy." 42 U.S.C. §7274(h). The Pawlick court held that there is no mention of a private cause of action in the statute nor legislative history to support the creation of such a cause of action. Pawlick, slip op. at 3. Further, the court held that the use of discretionary language ("shall, to the extent possible") in the section was inconsistent with a finding that the statute confers a right that can be enforced through private litigation. Consequently, the Court concluded that Congress did not intend to confer a privately enforceable federal right to sue pursuant to Section 3161. Id. Additionally, neither of the two "Statement of Interest" forms signed by Ms. Smith or the DOE-WSRC contract provisions submitted by WSRC include language that would mandate rehiring of Ms. Smith. However, even if Ms. Smith does not have an enforceable right under Section 3161, the DOE-WSRC contract or the "Statement of Interest" forms, I also find that if, as a result of a protected disclosure, she was denied reemployment, such action could be retaliation cognizable under Part 708.

Section 708.2 defines retaliation as "an action . . . .taken by a contractor against an employee with respect to employment (e.g. discharge, demotion, or other negative action with respect to the employee's

compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart." 10 C.F.R. § 708.2. In the present case, I believe that Ms. Smith's eligibility for preference in hiring is a privilege of her former employment at WSRC. While Section 3161 does not in itself require that previously terminated employees be automatically rehired, the fact remains that WSRC established a database so that it could consider former employees for possible rehiring. Given these facts, I find that inclusion in the WSRC database and subsequent consideration for rehiring is a privilege of Ms. Smith's former employment at WSRC. Thus, if WSRC failed to rehire her as a result of her protected disclosures such action could be considered retaliation under Part 708.

In its Motion, WSRC has presented substantial evidence indicating that it would have not considered her for the three positions at issue notwithstanding her alleged disclosures because of her failure to complete another “Statement of Interest” form within the one year period specified on the form. Because of her failure to complete another "Statement of Interest" form, it appears that Ms. Smith's name was not active in the Preferential Hiring Database during the period when the three chemist positions were filled. The language in the "Statement of Interest" form Ms. Smith signed clearly states that a new form must be completed within one year of the date an individual completes the last form. Specifically, the form states "I also understand that to retain preference in hiring status, I am required to complete a new form prior to one (1) year from the date of my signature below." See Exhibit A to October 14, 1999 WSRC Motion to Dismiss. In response, Ms. Smith asserts that following the WSRC lay off, she had contacted a Ms. Carol McClure of the WSRC personnel department who informed her that all retired people would be removed from the database. Sometime after that conversation, Ms. Smith asserts that she tried to telephone a Mr. Lamar Cherry in the WSRC personnel department but that he did not return her telephone call. Several months later, Ms. Smith states she received a form letter asking whether she would want to be considered for rehire, to which she responded in the affirmative.

OHA has held that Motions to Dismiss should only be granted where there is clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. See, e.g., Lockheed Martin Energy Systems, Inc., 27 DOE ¶ 87,510 (1999). Given Ms. Smith’s assertions in her response, which for the purposes of this motion I will assume are true, I will not dismiss Ms. Smith’s allegations of retaliation since it is conceivable that WSRC could have given Ms. Smith incorrect information about the “Statement of Interest” form in retaliation for her alleged disclosures. Additional material presented at the hearing might substantiate this allegation.

B. Discovery

WSRC also requests that I dismiss Ms. Smith's September 1, 1999 discovery request. In this request Ms. Smith asks for: a list of chemists, engineers, project managers and risk management personnel (both safety and human health) who were hired by Bechtel, Babcock and Wilcox, BNFL and other subcontractors at the Savannah River site. This request asks for material which is not relevant to the current proceeding. The current proceeding has at issue allegations that WSRC retaliated against Ms. Smith for alleged protected disclosures. From the record before me, it appears that Ms. Smith was not an employee of any contractor or subcontractor other than WSRC when she made her disclosures or was terminated from employment. Thus, I do not see how the information sought in this discovery request would shed any light on allegations that WSRC retaliated against Ms. Smith. WSRC need not respond to Ms. Smith’s September 1, 1999 discovery request.

In sum, I will grant WSRC's Motion in part. I will not dismiss Ms. Smith’s allegations as to her failure to be rehired described in her September 1, 1999 letter. However, I will deny Ms. Smith’s request for discovery contained in the September 1 letter.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Westinghouse Savannah River Corporation on October 14, 1999, Case

No. VWZ-0020, is hereby granted in part as described in the foregoing decision.

(2) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Richard A. Cronin, Jr.

Hearing Officer

Office of Hearings and Appeals

Date: February 3, 2000

United States Department of Energy
Office of Hearings and Appeals

In the matter of John Robertson	)	
	)	
Filing Date: September 12, 2012	)	Case No.: WBJ-12-0001
	)	
_____	)	

Issued: September 12, 2012

Protective Order

Steven J. Goering, Hearing Officer:

This Decision and Order involves a Complaint of Retaliation filed by John Robertson against KQ Services under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. I have scheduled a hearing in this matter to begin on September 19, 2012. The Part 708 regulations provide that the Hearing Officer "may permit parties to obtain discovery by any appropriate method, including . . . production of documents," and may "direct that documentary evidence be served upon other parties (under protective order if such evidence is deemed confidential)." 10 C.F.R. § 708.28(b).

During the process of pre-hearing discovery in this matter, counsel for KQ Services requested that the DOE Savannah River Operations Office (DOE-SR) Employee Concerns Program (ECP), produce certain documents in its possession. On September 12, 2012, DOE-SR submitted a Stipulated Protective Order, attached hereto, to which DOE-SR, Mr. Robertson, and counsel for KQ Services have agreed to be bound. The Order states, *inter alia*, that the names or any other identifying information of certain individuals named in the documents shall remain confidential.

I have reviewed the attached Stipulated Protective Order and have concluded that it should be issued as an Order of the Department of Energy.

It Is Therefore Ordered That:

The attached Stipulated Protective Order is hereby issued as a final Order of the Department of Energy.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: September 12, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Jeffrey S. Derrick	)	
		)	
Filing Date:	September 24, 2012	)	
		)	Case No.: WBZ-12-0005
		)	

Issued: October 2, 2012

Motion to Dismiss
Interlocutory Order

Richard A. Cronin, Jr., Hearing Officer:

This Decision will consider a Motion to Dismiss submitted by Shaw AREVA MOX Services, LLC (Shaw), regarding a complaint submitted by Jeffrey S. Derrick under the Department of Energy's (DOE) Contractor Employee Protection Program, set forth at 10 C.F.R. Part 708. For the reasons set forth below, I have determined that the Motion should be denied.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 2, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The Part 708 regulations prohibit retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including "disclosing to a DOE official … information that [the employee] reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include a "statement specifically describing the alleged retaliation" and "the disclosure, participation, or refusal that [the complainant believes] gave rise to the retaliation." 10 C.F.R. § 708.12.

B. Factual Background

Derrick was hired by Shaw in October 2011 as a Mechanical Site Superintendent as part of Shaw's effort in designing, licensing, building, and operating the Mixed-Oxide Fuel Fabrication Facility (MFFF) located at the DOE's Savannah River site. Complaint filed by Jeffrey S. Derrick (Complaint) with Michelle Rodriguez de Varela, Whistleblower Complaint Manager, National Nuclear Security Administration (NNSA), (April 12, 2012) at 1; Letter (enclosing Shaw's response to the Complaint) from Timothy P. Matthews, Counsel, Shaw, to Michelle Rodriguez de Varela, NNSA (June 4, 2012) at 1 n.1. Derrick's immediate supervisor was Tim W. Sheppard (Sheppard), Area Superintendent, Shaw. Shaw Response (Response) to Complaint (June 4, 2012) at 1.

Beginning in December 2011, Derrick sent E-mails to Sheppard and other Shaw officials complaining about the tolerances and installation of pipes and pipe supports in the MFFF. Derrick also alleges that he sent E-mails in March 2012 to DOE Officials and the Vice President for Construction at the MFFF outlining his concerns with "installation practice" regarding the installation of pipes at the MFFF. Derrick alleges that, because of his attempts to bring this issue to the attention of his superiors, other Shaw officials, and the DOE, he was terminated from his position on March 21, 2012. Complaint at 3; Response at 11.

C. Procedural Background

On April 12, 2012, Derrick filed a Part 708 complaint with the Whistleblower Complaint Manager. Upon receiving a copy of the Complaint, Shaw filed a response in which it argued that Derrick's complaint should be dismissed because the facts alleged in the Complaint would not support an action under Part 708. Response at 11. On June 22, 2012, the Whistleblower Complaint Manager forwarded Derrick's complaint for a hearing to OHA.[1] I was appointed by the OHA Director to be the Hearing Officer in this matter.

After reviewing the Complaint and Response, I requested briefs from both parties on the issue of the sufficiency of Derrick's complaint to support an action under Part 708. Letter from Richard A. Cronin, Jr., Hearing Officer, OHA to Jeffrey S. Derrick, Complainant, and Timothy P. Matthews, Counsel, Shaw (June 27, 2012). After both parties submitted briefs, Derrick requested permission to file an amended brief. Pursuant to an agreement by the parties, Derrick filed an

[1] In her transmittal letter OHA, the Whistleblower Complaint Manager did not respond to Shaw's request for dismissal as contained in its Response. The letter also contained a June 22, 2012, E-mail from Derrick requesting an OHA hearing without an investigation. Memorandum from Michelle Rodriguez de Varela, Whistleblower Complaint Manager, NNSA to Poli A. Marmolejos, Director, Office of Hearings and Appeals (June 22, 2012).

Amended Brief on July 25, 2012. Shaw submitted a response to the Amended Complaint on August 6, 2012.

II. ANALYSIS

A. The Applicable Legal Standards

Under Part 708, a contractor employee may not be subject to retaliation for disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, the employee's employer, or any higher tier contractor, information that the employee *reasonably believes* reveals: (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 705(a).

The Part 708 regulations do not specify procedures or standards for motions to dismiss. Accordingly, we look to the Federal Rules of Civil Procedure, which, though they do not govern this proceeding, may be used as a guide. *See, e.g.*, *Hansford F. Johnson*, Case No. TBZ-0104 (November 24, 2010); *Billy Joe Baptist*, Case No. TBH-0080 (May 7, 2009); *Edward J. Seawalt*, Case No. VBZ-0047 (August 20, 2000) (applying standards of Fed. R. Civ. P. 56 to Motion for Summary Judgment).[2] At this preliminary point of the case, the Motions to Dismiss are most analogous to what would, under the Federal Rules, be a motion to dismiss for "failure to state a claim upon which relief can be granted . . . ." Fed. R. Civ. P. 12(b)(6). The Supreme Court has held that, to survive a Rule 12(b)(6) motion to dismiss, a complaint must plead "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While the complaint "does not need detailed factual allegations, . . . [f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the complaint's allegations are true (even if doubtful in fact)." *Id.* at 555 (citations omitted).

In addition, prior cases of this office instruct that such a motion should be granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact on a more complete record. *Curtis Broaddus*, Case No. TBH-0030 (2006); *Henry T. Greene*, Case No. TBU-0010 (2003) (decision of OHA Director characterizing this standard as "well-settled"); *see also David K. Isham*, Case No. TBH-0046 (2007) (complaint may be dismissed where it fails to allege facts which, if established, would constitute a protected disclosure); *accord Ingram v. Dep't of the Army*, 114 M.S.P.R. 43, 47 (2010) (finding Merit Systems Protection Board jurisdiction under federal Whistleblower Protection Act where complaint makes non-frivolous allegation that he engaged in whistleblowing activity by making a protected disclosure, and the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action).

[2] Decisions issued by OHA are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

Using the above standards, I find that Shaw's Motion to Dismiss should be denied.

B. Whether Derrick's Allegations Regarding his Disclosure Contained in the Complaint and Response are Sufficient to Support a Part 708 Complaint

In his complaint, Derrick alleges that he made protected disclosures in four E-mails: (1) December 21, 2011, E-mail message from Jeffrey Derrick to Timothy Sheppard, Derrick's supervisor; (2) February 22, 2012, E-mail from Derrick to Ed Najmola (Najmola), Vice President of Construction, Shaw; (3) March 15, 2012, E-mail from Derrick to Najmola (3/15 E-mail); and (4) March 19, 2012, E-mail from Derrick to Ed Najmola, Vice President of Construction, Shaw, copies of which were sent to Kevin Buchanon, DOE/NNSA Engineer, Timothy Sheppard, Derrick's supervisor, and Charles Schmidt, Sheppard's supervisor (3/19 E-mail). Derrick alleges that his disclosures concerned pipe "installation practice." July 25, 2012, Amended Brief at 1. Derrick asserts that his concerns with installation practice refer to conflicting "notes" and "specs" regarding pipe installation and the non-existence of piping tolerances. *Id.* He also alleges that his disclosures alleged gross mismanagement regarding Shaw's decision to continue to install piping notwithstanding the alleged problems in installation practice. *Id.*

1. Applicability of Kilmer and Huffman to Derrick's Part 708 Complaint

As the initial argument in its briefs, Shaw cites *Eugene M. Kilmer*, Case No. TBH-0111 (April 28, 2011) (*Kilmer*). In *Kilmer*, we cited *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1349-50 (Fed. Cir. 2001) for the proposition that where an individual reveals information that is already known to the wrongdoer, it cannot be a "disclosure" since the definition of "disclose" means to "reveal something that was hidden and not known." *Kilmer* at *9*. Consequently, Shaw argues that the complaint should be dismissed because Derrick's alleged disclosures concern pipe and pipe support location issues raised in a December 1, 2011, report entitled "MOX NNSA Construction and Startup Team Daily Activity Report" (NNSA Report), of which Shaw's management already had notice prior to Derrick's alleged disclosures. Response Attachment at 5.

After examining the NNSA Report and the alleged disclosures contained in the 3/19 E-mail (that also contains a copy of the 3/15 E-mail), I cannot find, based on the information currently before me, that Derrick's disclosures are identical to the issues raised in the NNSA Report. The 3/19 E-mail describes problems with "inaccurate" databases, tracking tables, packages, and "material and coordination." 3/15 E-mail (attached to 3/19 E-mail). None of these problems are explicitly mentioned in the NNSA Report nor, without additional information, can I conclude that Derrick's concerns are subsumed under the issues raised in the NNSA Report. For the sole purpose of deciding this Motion, I cannot find that Derrick's disclosures are identical to the issues raised in the NNSA Report and thus, *Huffman* and *Kilmer* do not operate as a bar to Derrick's complaint at this stage of the proceeding.[3]

[3] In making this finding, I limit my opinion to apply only in deciding the Motion before me. If this matter goes to a hearing, Shaw may offer additional evidence as to the issue of whether Derrick's alleged disclosures were already known to Shaw management and DOE and whether *Huffman* and *Kilmer* apply to Derrick's complaint.

2. Whether Derrick's Alleged Disclosures Adequately Describe a Gross Waste of Funds or Gross Mismanagement

Shaw also argues that the content of Derrick's alleged protected disclosures, as described in his complaint and briefs, do not meet the requirements of Part 708, i.e., they do not sufficiently describe gross mismanagement or a gross waste of funds. *See* 10 C.F.R. § 708.5. For Part 708 purposes, "gross mismanagement" means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. Similarly, a "gross waste of funds" constitutes a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *Fred Hua*, Case No. TBU-0078 at 2-3 (May 2, 2008) (*Hua*).

After reviewing the disclosures referenced by Derrick in his complaint and supporting briefs, I find that one alleged disclosure, Derrick's 3/19 E-mail, contains sufficient factual allegations, assuming that Derrick reasonably believed that the allegations in the 3/19 E-mail were true, to conclude that the message is complaining about a gross waste of funds and is thus potentially protected under Part 708. Specifically, the pertinent portion of the E-mail states:

> Beginning 26 March 2012, I will no longer direct installation of supports (unless directed by Ed or Kelly) in my area (BMP) without piping packages being a precursor to all support packages. At the direction of Tim and myself, last few weeks we have chosen to install with random and no U bolt location but this decision was ours without support from management. This will help with some of the issues but not all. We need constructive answers on how to proceed with issues we have described. This has not been formally addressed by Ed, Steve, or Charlie. This issue has been brought to everyone's attention including engineering. Design and Engineering have established installation guide lines based on piping location. I have sent numerous emails to the proper and qualified persons for an answer. I want an answer and I want that answer to be confirmed, and agreed with all involved. 90% of all packages are built, support packages, then piping packages, with a time lag time of weeks. This is making installation difficult, time consuming, inaccurate, and virtually impossible (check the data base. I have multiple copies). I have been trying to address this issue for months. We cannot continue to install without the proper and the correct way design has intended. Piping has to come first, and in such a way, it allows for the tolerance to be confirmed. To date, as I have advised, this is not happening. Your cooperation is needed to resolve the issue. I have contacted Kevin for his help in resolving this ongoing issue. Ed has emails of this concern. Estimated cut out of already installed conservatively is 50%.
>
> We all need to reach a resolution, and we need to reach it promptly.

3/19 E-mail. The 3/19 E-mail also contained a copy of Derrick's 3/15 E-mail. The 3/15 E-mail states in pertinent part:

> I have, on many occasions, tried to address the improper installations of supports. This will be costly and time consuming. You have to address this problem. This issue could result in 50% rework. This too, was addressed months ago in unanswered emails. We can not [sic] continue to ignore this issue.

3/15 E-mail.

Assuming that Derrick is correct, as required by an analysis of his complaint for the purposes of a Motion to Dismiss, with regard to his allegation about the pipe supports that would have to be replaced on a project such as the MFFF, I find that the message alleges sufficient information about waste (a 50 percent replacement of all pipe supports for 80 miles of pipe[4]) to be considered as a "gross" waste of funds as required under Part 708. Thus, I find that Derrick's March 19, 2012, E-mail, contains sufficient factual allegations, if true, that could refer to a gross waste of funds and thus support a Part 708 complaint. Consequently, I must reject Shaw's argument that none of Derrick's alleged disclosures alleges a cause of action, by law, under Part 708.[5]

3. Whether Shaw Would Have Terminated Derrick Notwithstanding his Disclosures

Shaw also argues that the weight of evidence clearly supports a finding that, even if Derrick made a protected disclosure, Shaw would have terminated him from his position notwithstanding his protected disclosure. Shaw's argument invites me to weigh the evidence to reach a factual finding regarding the sufficiency of the reasons for which Shaw terminated Derrick. However, I find such an evaluation inappropriate in the consideration of a Motion to Dismiss since the gravamen of such a motion is the legal sufficiency of Derrick's Part 708 complaint. *See supra.* Both parties assert that Derrick was terminated a few days after the March 19, 2012, E-mail. Consequently, I find that Derrick's complaint alleges sufficient temporal proximity between the alleged protected disclosure and Derrick's termination such that a *rebuttable* presumption can be made that the alleged disclosure was a substantial factor in the termination. *See, e.g., Curtis Hall*, Case No. TBA-0042 (February 13, 2008). Therefore, I conclude that Derrick has alleged sufficient facts to indicating a claim that his alleged protected disclosures were a factor in his termination.

In sum, after considering Derrick's complaint and all of the submitted briefs, I find that Derrick's Part 708 complaint, on its face, alleges sufficient facts to support a Part 708 complaint. Consequently, Shaw's Motion to Dismiss is denied.

---

[4] *See* Response at 1 (MFFF encompassing 80 miles of piping).

[5] In making this finding, I offer no opinion as to whether any of Derrick's alleged disclosures, including the 3/15 E-mail or the 3/19 E-mail, are sufficient with regard to the determination of the final merits of his Part 708 cause of action. To prevail in a Part 708 action, Derrick, at the hearing, must show by a preponderance of the evidence that he made a protected disclosure as described under 10 C.F.R. §708.5, and that the disclosure was a contributing factor in one or more alleged acts of retaliation against him by Shaw. If Derrick makes this showing, the burden shifts to the contractor, Shaw, to prove by clear and convincing evidence that it would have taken the same action without the Derrick's disclosure. See 10 C.F.R. § 708.29.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Shaw AREVA MOX Services, LLC, Case No. WBZ-12-0005, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy. This order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: October 2, 2012