



Decision by the OHA Director. *Id.* §§ 708.22, 708.25, 708.32. Pursuant to 10 C.F.R. § 708.15, “[a] complaint must be filed by the 90th day after the date the employee knew, or reasonably should have known, of the alleged retaliation.”

An employee who files a timely complaint has the burden of establishing by a preponderance of the evidence that he or she made a protected disclosure, as described under 10 C.F.R. § 708.5, and that the disclosure was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor.<sup>1</sup> *Id.* § 708.29. If the employee meets that burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee’s disclosure. *Id.* If the complainant prevails, available relief includes reinstatement, back pay, reimbursement of the complainant’s reasonable costs and expenses, and such other relief as may be appropriate. *Id.* § 708.36(a).

## II. REGULATORY BACKGROUND

The disclosures at issue in this case pertain to alleged violations of safety regulations for auditory protection and respirable particulate safety procedures. DOE’s regulations applicable to contractors require contractors to comply with many health and safety regulations, particularly from the Occupational Safety and Health Administration (OSHA). 10 C.F.R. § 851.23. The relevant OSHA regulations for this case are found at 29 C.F.R. Part 1910 (Part 1910, Occupational Safety and Health Standards) and Part 1926 (Part 1926, Safety and Health Regulations for Construction). *Id.* § 851.23(a)(3), (7). Additionally, DOE’s regulations incorporate a private industry standard, the American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Values (TLV) for Chemical Substances and Physical Agents and Biological Exposure Indices (2016), by reference, which must be followed when more stringent than the corresponding OSHA regulations. *Id.* § 851.23(a)(9).

### A. Hearing Conservation

The OSHA noise exposure regulations covering construction sites require that a hearing conservation program (HCP) be maintained where there is an 8-hour Time Weighted Average (TWA) of 90 A-weighted Decibels (dBA). 29 C.F.R. § 1926.52. However, the ACGIH TLV is 85 dBA TWA. 10 C.F.R. § 851.23(a)(9); DOE Policy Clarification D20-10-003 at 1 (Sep. 29, 2020)

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<sup>1</sup> Respondent raises the argument that OHA should apply a “but for” test rather than a “contributing factor” test when evaluating whether the employee has met his or her burden because the definition of retaliation in § 708.2(a) states that it is an action that “would not have been taken but for the employee’s” protected conduct. Respondent’s (Res.) Closing Brief at 13–14 (Mar. 12, 2026); 10 C.F.R. § 708.2. Despite Respondent’s argument, I decline to alter the standard of proof applicable to employees, which is clearly stated in § 708.29 and has been used by OHA in Part 708 proceedings for decades, based on a definition that Respondent asserts to be “at odds” with it. *Compare* Res. Closing Brief at 14 with *Stephanie A. Ashburn*, OHA Case No. VBH-0023, 2000 EOHA LEXIS 50, \*1–2 (2000) and *Leslie Smith*, OHA Case No. WBH-20-0006; 2021 EOHA LEXIS 13, \*6 (2021). In any case, applying a “contributing factor” test to the employee does not mean that OHA would award relief to an employee who has met this standard without also evaluating whether the contractor has met its burden. As § 708.29 makes clear, OHA cannot rule in an employee’s favor unless the contractor fails to demonstrate that the retaliatory act would have occurred but for the protected conduct.

(stating that the 2016 ACGIH threshold limit value is 85 dBA TWA).<sup>2</sup> Therefore, because Part 851 requires the use of ACGIH TLVs when they are lower than the OSHA limits, an HCP must be maintained when there is an 85 dBA TWA, not accounting for hearing protection. *See* The Berkeley Lab Environment, Safety & Health Manual at Ch. 39.7(B) (Dec. 6, 2023), *available at* <https://ehs.lbl.gov/resource/esh-manual-pub-3000/ch39/>. (“The ACGIH-TLV for an eight-hour time-weighted average (TWA) sound level is 85 dBA. This is the maximum time-weighted average noise level that employees may be exposed to without hearing protection during an eight-hour work shift.”). The DOE regulations further state that when “ACGIH TLVs are used as exposure limits, contractors must comply with the other provisions of any applicable expanded health standard found in 29 C.F.R. parts 1910, 1915, and 1926.” 10 C.F.R. § 851.23(a)(9). Part 1926 states that when employees are subjected to sound levels exceeding the applicable TLV, “a continuing, effective hearing conservation program [(HCP)] shall be administered.” 29 C.F.R. § 1926.52(d)(1). The regulation does not describe the requirements of an appropriate HCP, but an OSHA letter of interpretation states that an effective HCP consists of:

- (1) Monitoring of employee noise exposures,
- (2) The institution of engineering, work practice, and administrative controls for excessive noise,
- (3) The provision of each overexposed employee with an individually fitted hearing protector with an adequate noise reduction rating,
- (4) Employee training and education regarding noise hazards and protection measures,
- (5) Baseline and annual audiometry,
- (6) Procedures for preventing further occupational hearing loss by an employee whenever such an event has been identified,
- (7) Recording Keeping.

Letter from Patricia K. Clark, Director, Directorate of Compliance Programs, OSHA, to F.W. Lundy (Aug. 4, 1992), *available at* <https://www.osha.gov/laws-regs/standardinterpretations/1992-08-04>; 1992 OSHA Stand. Interp. LEXIS 822.<sup>3</sup> The letter of interpretation also states that a construction employer’s HCP must incorporate as many of the elements as are feasible. *Id.* Records of noise exposure and employee medical records must be maintained for thirty years, except under certain specified conditions. 29 C.F.R. § 1910.1020; *id.* § 1926.33 (stating that “[t]he requirements applicable to construction work under this section are identical to those set forth at § 1910.1020 of this chapter.”).

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<sup>2</sup> While this policy clarification deals with the OSHA industry standards under 29 C.F.R. Part 1910, the applicability to the construction standards in Part 1926 is the same because Part 851 incorporates both in the same way. 10 C.F.R. § 851.23.

<sup>3</sup> The parties do not dispute that this is OSHA’s active interpretation letter on the matter.

## B. Respiratory Protection

The OSHA regulations for respiratory protection, including from respirable crystalline silica at construction sites, require that employers provide employees with a respirator that complies with 29 C.F.R. § 1910.134. 29 C.F.R. § 1926.1153(e); *id.* § 1926.103 (stating that “[t]he requirements applicable to construction work under this section are identical to those set forth at 29 CFR 1910.134 of this chapter”). Section 134 of Part 1910 states, in relevant part, the following:

(c)(1) In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with worksite-specific procedures. The program shall be updated as necessary to reflect those changes in workplace conditions that affect respirator use. The employer shall include in the program the following provisions of this section, as applicable:

- (i) Procedures for selecting respirators for use in the workplace;
- (ii) Medical evaluations of employees required to use respirators;
- (iii) Fit testing procedures for tight-fitting respirators;
- (iv) Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;
- (v) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators;
- (vi) Procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators;
- (vii) Training of employees in the respiratory hazards to which they are potentially exposed during routine and emergency situations;
- (viii) Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance; and
- (ix) Procedures for regularly evaluating the effectiveness of the program.

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- (m) **Recordkeeping.** This section requires the employer to establish and retain written information regarding medical evaluations, fit testing, and the respirator program. This information will facilitate employee involvement in the respirator program, assist the employer in auditing

the adequacy of the program, and provide a record for compliance determinations by OSHA.

- (1) **Medical evaluation.** Records of medical evaluations required by this section must be retained and made available in accordance with 29 CFR 1910.1020.
- (2) **Fit testing.**
  - (i) The employer shall establish a record of the qualitative and quantitative fit tests administered to an employee including:
    - (A) The name or identification of the employee tested;
    - (B) Type of fit test performed;
    - (C) Specific make, model, style, and size of respirator tested;
    - (D) Date of test; and
    - (E) The pass/fail results for QLFTs or the fit factor and strip chart recording or other recording of the test results for QNFTs.
  - (ii) Fit test records shall be retained for respirator users until the next fit test is administered.
- (3) A written copy of the current respirator program shall be retained by the employer.
- (4) Written materials required to be retained under this paragraph shall be made available upon request to affected employees and to the Assistant Secretary or designee for examination and copying.

29 C.F.R. § 1910.134.

### **III. PROCEDURAL BACKGROUND**

On May 27, 2025, Complainant filed a Part 708 whistleblower complaint with the Manager of the DOE Naval Reactors Laboratory Field Office, alleging that Respondent retaliated against him because he made multiple protected disclosures regarding noncompliance with federal safety and health regulations at a Kiewit Nuclear Solutions construction site. These disclosures concerned deficiencies in respiratory and hearing protection programs, among other issues.

Upon receipt of the complaint, the OHA initiated an investigation. An Investigator was appointed on July 14, 2025, to conduct an investigation and issue a Report of Investigation (ROI) pursuant to Part 708. Following the OHA's investigation and issuance of the ROI, the undersigned was

appointed as the Administrative Judge on November 5, 2025, to preside over the hearing in this matter.

On December 3, 2025, the Respondent filed a Motion to Dismiss the Complaint in its entirety. Complainant filed a Brief in Opposition to this motion on December 5, 2025. In a December 17, 2025, interlocutory decision, the motion was granted regarding one of Complainant's alleged retaliatory acts, but otherwise denied in all other respects. Interlocutory Order at 5–6 (Dec. 17, 2025).<sup>4</sup>

Discovery in this case commenced on November 19, 2025. Following a first round of discovery, a second round was ordered on January 7, 2026. This led to both parties filing Motions to Compel. On January 19, 2026, Complainant filed a Motion to Compel responses to a set of interrogatories and requests for production. The Respondent filed its own Motion to Compel on January 21, 2026, seeking responses to its requests for production. In an order, both motions were granted in part, with production deadlines moved to January 30, 2026, and the deadline for the submission of exhibits and witness lists moved to February 9, 2026. Order Granting In Part Motions to Compel (Jan. 23, 2026).

Following the resolution of preliminary motions and discovery disputes, a hearing in this matter was conducted via video conference from February 17 to February 19, 2026. The record for this proceeding includes all materials previously filed by the parties and accepted by OHA, including all materials submitted and accepted during the investigation; all filings, orders, and interlocutory decisions; the official transcript of the three-day hearing; and any additional exhibits submitted and permitted by the court during the hearing.<sup>5</sup>

Testimony was received from several witnesses. Complainant testified on his own behalf. Both parties presented testimony from multiple Kiewit employees, including:

- Mr. Michael Rinehart, President of Kiewit Nuclear Solutions
- Mr. Emmett Black, Sponsor Area Manager
- Mr. Rusty Brown, District Safety Manager
- Mr. Jerome Clark, Regional Safety Manager and District Industrial Hygienist
- Mr. Tyler Wheatley, Project Safety Manager
- Ms. Sara Lemoine, HR Business Partner<sup>6</sup>

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<sup>4</sup> Specifically, Complainant alleged that one of the ways in which Respondent retaliated against him was by denying him access to noise sampling reports. As stated in the Interlocutory Order, “[r]estriction of access to reports or information does not, on its own, affect the compensation, terms, conditions, or privileges of employment. Complainant does not allege that his inability to access the reports in question compromised his ability to do his job. Rather, he simply states that he was not allowed to read reports. This does not fall within the broad definition of retaliation listed in Part 708 because the terms, conditions, and privileges of Complainant’s employment, as well as his compensation, were not affected by the restriction.” Interlocutory Order at 5.

<sup>5</sup> Materials included in the Exhibit Notebook for the ROI are cited in this Initial Agency Decision by exhibit number and Bates stamp page number. Other exhibits are identified by name. The transcript of the hearing is cited as “Tr.” Interlocutory Orders are cited by name.

<sup>6</sup> Mr. Brown reported directly to Mr. Rinehart. Tr. at 294. Mr. Wheatley, who was Complainant’s direct supervisor, reported in some capacity to Mr. Brown. *Id.* at 348, 355. Mr. Clark was a management-level industrial hygienist

At the conclusion of the hearing, the parties were directed to submit post-hearing briefs in lieu of oral closing arguments. Complainant submitted his Closing Briefing on March 12, 2026. On the same date, the Respondent submitted its Post-Hearing Brief. With the submission of these briefs, the record was closed, and the matter was taken under advisement for a final determination on the merits of the complaint.

#### IV. FACTUAL FINDINGS

Respondent is subcontracted by Fluor Marine Propulsion, the Management and Operating Contractor for INL. Tr. at 175–76. Fluor hired Amentum as the construction manager for certain projects, including Kiewit’s projects at SFHP.<sup>7</sup> *Id.* Kiewit’s safety standards flow down from Fluor via 10 C.F.R. Part 851. *Id.* at 232.

Complainant was hired by Respondent in June 2024 and started working for Kiewit at INL as a Safety Manager in early September 2024. Ex. 21 at 289. He possessed a Bachelor of Science degree in Health Science and a Master of Public Health degree with a concentration in Environmental Health. *Id.* at 295. Since 2016, he had worked at DOE sites in the field of industrial hygiene. *Id.* at 294. Kiewit tasked him with creating and improving Part 851 compliant safety plans for craft workers in the upcoming project CS-113, a roofing and siding project for a new building, at the SFHP. Tr. at 20, 178, 311. While waiting for the project to start, Complainant was assigned to perform similar work on an in-progress project CS-107, which was the construction of the frame for the building to be worked on in CS-113. *Id.* at 178, 189–90, 311. Mr. Brown testified that Complainant “did a good job” with the tasks he had been hired to perform. *Id.* at 311. Kiewit was awarded the CS-113 contract in fall 2024. *Id.* at 180. CS-113 was originally scheduled to begin construction in December 2024, but in December 2024 or January 2025, Kiewit received a Technical Change Request (TCR) providing a new start date in December 2025.<sup>8</sup> *Id.* at 180; Ex. 15 at 166. Kiewit signed the TCR in March 2025, but the December start date appears to have been abandoned as work had not started on the project and a new start date for CS-113 had not been set as of the February 2026 hearing in this case. Ex. 15 at 166; Tr. at 183–84.

In addition to creating and improving safety plans, Complainant filled a role as an industrial hygiene technician and interpreter, collecting samples measuring hazards like silica, welding fumes, and noise exposure, which Mr. Clark described as “as needed industrial hygiene work in

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brought in from another Kiewit project to assist with noise sampling; he reported to Mr. Brown. Exhibit (Ex.) 10 at 149; Tr. at 320, 322, 329, 339. Complainant reported to Mr. Wheatley but worked with Messrs. Brown, Black, and Clark on some issues. *See, e.g.*, Ex. 2 at 28, 30.

<sup>7</sup> Amentum was formerly known as Jacobs. Tr. at 50. For clarity, references to this company in this decision will use the name Amentum, even if cited content in the record uses the name Jacobs.

<sup>8</sup> Kiewit’s president testified that the TCR was received around November 2024, but the signatures from the client are dated December 23, 2024. Ex. 15 at 166. Allowing for the holidays and potential employee absences, I find that the TCR was likely received between December 23, 2024, and January 3, 2025.

the field.”<sup>9</sup> Tr. at 340. Complainant spent time in the field and also excelled at research, collecting more data than other industrial hygienists and creating spreadsheets with complicated algorithms and references. *Id.* at 341–42.

Complainant’s duty station was in a trailer at the worksite for the SFHP. Ex. 21 at 289. He was a data driven industrial hygienist, and in addition to his office work, he went into the field most days to observe procedures and talk to the laborers.<sup>10</sup> *Id.* at 291; Tr. at 68, 70–71. He quickly noticed laborers wearing various kinds of respirators and attempted to confirm that the required medical authorizations for respirator use were on file. Tr. at 31–32; Ex. 2 at 28. He was unable to locate the records and elevated the issue to the safety manager at that time, David Denning. Ex. 2 at 28; Tr. at 482. He observed a worker wearing an APF-5 mask, which was not on the list of approved masks for the type of work being done. Tr. at 477. Complainant also detected high noise levels and took preliminary noise dosimetry samples. *Id.* at 22–24.

Complainant searched Kiewit’s online file repository for compliance and recordkeeping documents related to respirator use.<sup>11</sup> Tr. at 27–29. On October 29, 2024, Complainant contacted the office of Mountain View Hospital’s Occupational Health Services (MVHOHS), KNS’s occupational medicine provider, inquiring whether they had documentation of fit testing for KNS employees using respirators because he had been told MVHOHS had done the fit testing for KNS workers. Ex. 2 at 28; Tr. at 31. MVHOHS told him they did not offer that service. Ex. 2 at 28. On November 4, 2024, Complainant emailed Construction Manager Billy Ibison, Sponsor Area Manager Emmett Black, and District Safety Manager Rusty Brown with the following information:

- Complainant “intended to provide advanced notification of management that potential respiratory protection and hearing conservation issues may exist which, if verified and left unresolved, have the potential to lead to legal liabilities.” Ex. 2 at 28.
- Complainant had contacted MVHOHS seeking documentation of respirator fit testing and information about silica medical monitoring. He learned that fit testing was not offered by MVHOHS. He identified a company that could provide the testing and suggested that the testing could potentially be performed by Kiewit itself. *Id.*
- “Medical authorization, fit testing, pre-use and annual (re)training are required under OSHA standards prior to allowing workers to perform any respirator work. If evidence of fit testing is available, it is important it be located and securely maintained for each affected worker. If evidence of fit testing is not available, it is important it be (re)performed for all workers presently issued respirators.” *Id.*

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<sup>9</sup> Mr. Brown testified that taking samples in the field was separate from the work Complainant had been hired to do. Tr. at 311–12. He and Mr. Clark asked Complainant if he would be willing to take samples and Complainant agreed. *Id.*

<sup>10</sup> Mr. Wheatley testified that Complainant refused to go into the field. Tr. at 356. However, Mr. Clark, who worked with Complainant in the field, testified that Complainant spent adequate time in the field. *Id.* at 341. An interim performance review for Complainant listed “keep up field presence” as an action the Individual was doing that should be continued. Ex. 21 at 296. I find that Complainant’s field presence was adequate.

<sup>11</sup> Eventually, Kiewit sent employees to get new medical authorizations so they could have documentation on file. Tr. at 488.

- “Under 10 CFR 851, construction employers are obligated to enroll affected workers in a hearing conservation program [HCP] when their noise exposures meet or exceed 85 dBA 8-hours Time Weighted Average [TWA8] and to acquire initial baseline audiograms within 6 months of exposure which must then be repeated annually.” *Id.* He further wrote that if an employer knew or should have known that workers may be overexposed, the affected workers needed to be enrolled in an HCP until their actual exposure risk was determined. *Id.*
- Complainant advised management that they needed to enroll in an HCP all laborers, ironworkers, insulators, carpenters, and other trade workers with the potential for “> 85 dBA TWA8,” unless union locals provided audiometric baselines for their members. *Id.* He stated that he could provide industry studies supporting his position if requested. *Id.*
- Complainant advised, without further information, the Price Anderson Amendments Act (PAAA) might apply to the situation. *Id.* at 29.

Mr. Brown testified that his subordinates were “very concerned and were listening to what [Complainant] was saying, because, again, we hired him to be an expert in regulatory compliance on DOE sites.” Tr. at 299. On November 24, 2024, District Industrial Hygienist Jerome Clark, who was brought in to help work on the issues Complainant raised in his November 4, 2024, email, sent the following email to Mr. Brown:

There is one particularly sticky issue to be resolved. Addam at INL has raised the opinion that audiograms are required for construction workers exposed to ambient noise conditions > 85dBA, without taking credit for hearing protection worn. I have an opposing opinion.

I’ve suggested that Addam and I submit independent position papers to you explaining our opinions and then send these up to Kiewit Corporate Safety for an official interpretation. The annual cost implications are *very significant* and will have consequences across not only KNS, but all of Kiewit’s construction activities.

Ex. 10 at 149 (emphasis in original); Tr. at 339.

On November 26, 2024, Amentum informed Mr. Wheatley and Complainant that it would be conducting an audit regarding Kiewit’s health hazard evaluation program and requested “the sampling data (or defensible ‘rationale’ in the absence of quantifiable data) which sufficiently proves that your employees are not overexposed to various health hazards.” Ex. 11 at 152. The request sought “official documented sampling data (or other defensible rationale)” for Respirable Crystalline Silica, Welding Fumes, and Hazardous Noise. *Id.*

On November 29, 2024, Complainant emailed Mr. Wheatley (his direct supervisor) and Mr. Clark advising that some noise exposure data was available in the Industrial Hygiene files and that required safety documentation for silica work and respirator protection were not on file with the safety team. Ex. 1 at 30. Mr. Brown told Complainant that these were the kinds of issues he had been hired to raise. Tr. at 293. He escalated the concern to Mr. Rinehart, Mr. Black, and the area manager. *Id.* at 294. Senior management, including Mr. Rinehart, wanted “action on this immediately.” *Id.* at 194–95, 294. Mr. Brown, relying on Complainant’s experience as an industrial

hygienist, instructed Complainant to take more noise dosimetry samples. *Id.* at 294–95. Complainant worked with Mr. Wheatley to identify similar exposure groups<sup>12</sup> and tasks likely to be performed by those groups so they could take representative noise samples. *Id.* at 105–06, 506–07. Complainant took eight more samples using rented dosimeters before being instructed to return the dosimeters.<sup>13</sup> Ex. 4 at 105; Tr. at 503–05. Some of the samples had to be discarded due to improper calibration or broken equipment. Tr. at 305. In the end, Complainant was not able to gather enough data for a representative sample of the hundreds of workers on site. *Id.* at 305. Mr. Clark testified that Complainant’s spreadsheets were complicated and that he had to redo the sampling after Complainant’s termination because he did not understand how to use them. *Id.* at 342. Mr. Clark also testified that they were too complex for his purpose. *Id.* at 343.

On or around November 24, 2024, Mr. Clark contacted Complainant and invited him to submit a position paper to Mr. Brown so he could explain why he believed the 85 dBA unattenuated ACGIH threshold for noise exposure applied for CS-107. Ex. 10 at 149; Ex. 12 at 154. Complainant responded that DOE Policy Clarifications and OSHA Letters of Interpretation he submitted were clear about the legal requirements and should “cover everything needed for a compliance determination.” Ex. 12 at 154. Complainant asked if the question had been posed to Respondent’s legal team for interpretation. *Id.* Mr. Clark submitted a position paper of his own on December 13, 2024, arguing that OSHA’s standards for construction sites allowed consideration of noise attenuation (through headphones or other measures) when calculating exposure.<sup>14</sup> Ex. 4 at 110; Ex. 13 at 159–61. Citing an OSHA interpretation of 29 C.F.R. Part 1926, Mr. Clark asserted that Kiewit was required to engage in hearing loss prevention, which excluded audiograms, and that the standard required the HCP to include “as many of the [standard’s] elements as are feasible.” Ex. 13 at 160–61. Mr. Clark described his position as being an “opposing position” to Complainant’s position. Ex. 10 at 149. Complainant did not submit an opposing position paper, but submitted a DOE Policy Clarification confirming flow down of ACGIH TLVs through Part 851. Ex. 2 at 46; Ex. 12 at 154.

Complainant continued searching for respiratory safety documentation (*e.g.* documentation of fit testing, medical authorizations). Tr. at 30. He asked the training manager and training recordkeeper for documentation, but did not receive it. *Id.* at 479, 482–83. He searched within Kiewit’s internal records but did not find the documentation. Tr. at 480. He elevated the issue to Messrs. Ibison and Clark. *Id.* at 482. He had silica workers sign medical records requests so he could obtain documentation from Sterling Urgent Care, a provider he had been told conducted the medical authorizations. *Id.* at 30, 486. However, Sterling did not have any of the documentation. Ex. 2 at

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<sup>12</sup> Similar exposure groups are created by identifying certain types of work and the individual workers most likely to perform them. Tr. at 105, 507.

<sup>13</sup> There was significant disagreement about Complainant’s diligence in taking dosimetry readings after the initial four readings were obtained. Respondent alleged that Complainant “drug his feet” and did not complete the sampling. Tr. at 295. Complainant alleged that he was instructed to return the rented dosimeters prior to gathering all the necessary data and was unable to continue gathering data without the equipment. Tr. at 56. Mr. Clark testified that Complainant was data oriented and created spreadsheets with dizzying amounts of data so complex that he did not understand them. Tr. at 341–44. Given the amount of data Complainant appears to have been working with and his data-driven work style, I find it more likely than not that Complainant was diligent in his data gathering efforts.

<sup>14</sup> The position paper noted that the ACGIH limits applied and used that 85 dBA standard. Ex. 4 at 159. However, it did not take into account that the ACGIH limit is for unattenuated noise levels. *See supra* at 3.

36; Tr. at 483. Complainant described his attempts at getting the records from Kiewit employees as a “shell game” in which he was sent to many different places for records that, ultimately, were not at those locations. Tr. at 486–87. Complainant believed that regulations required the records to be kept. *Id.* at 487 (“If asked by the client, if asked by a regulator, if asked by the general contractor, if asked by anybody, it’s anticipated that I would be able to prove compliance of my program. The standard requires I have medical authorization for people who are wearing one because they have to.”). Complainant began keeping a local file for required documentation. *Id.*

On December 5, 2024, Complainant emailed Messrs. Clark, Ibison, and Wheatley to disclose what he later termed “Complete Respiratory Program Failure Confirmed at SFHP.” Ex. 2 at 15, 36. In his email, Complainant confirmed that Kiewit did not have records of compliant medical authorization, fit testing, or training on file for any of its workers related to respirator use. *Id.* at 36. He attached correspondence from Sterling Urgent Care confirming his search for records. *Id.* at 37–41. He recommended that all respirator use at SFHP be suspended and all respirators in the field be returned to safety until the respiratory protection program was in compliance. *Id.* at 36. In a follow-up email responding to questions from Mr. Clark, Complainant stated that exposure monitoring data for non-silica work required under 10 C.F.R. Part 851 was also missing. *Id.* at 34. At the hearing, when asked if he knew if any Kiewit employee was actually overexposed, Complainant answered:

I was observing [a worker] wearing, you know, the lowest rated mask I’ve ever seen in my career, was he overexposed? I can’t be certain.

...

If you don’t have any records regarding the anticipated level of exposure, was there an overexposure? The world will never know. So I guess it’s -- I can’t say he wasn’t injured, I can only say he didn’t pass out that day as a result of it.

Tr. at 497–98. In describing the medical testing required as part of the respirator safety program, Complainant testified that one of the tests helped identify whether later symptoms were from tuberculosis or silicosis, demonstrating the gravity of the potential health hazards of silica overexposure. *Id.* at 92. *See also Silica, Crystalline Health Effects*, OSHA, <https://www.osha.gov/silica-crystalline/health-effects> (last visited Apr. 9, 2026) (“Breathing in very small (‘respirable’) crystalline silica particles, causes multiple diseases, including silicosis, an incurable lung disease that leads to disability and death. Respirable crystalline silica also causes lung cancer, chronic obstructive pulmonary disease (COPD), and kidney disease. Exposure to respirable crystalline silica is related to the development of autoimmune disorders and cardiovascular impairment. These occupational diseases are life-altering and debilitating disorders that annually affect thousands of workers across the United States.”)

On December 11, 2024, Mr. Clark emailed Mr. Wheatley and Complainant stating that KNS would not provide raw sound data to Amentum as part of its health hazard evaluation program audit. Ex. 4 at 106. He wrote that Amentum had accepted summary reports in the past, so “it’s not going to be a discussion.” *Id.*

On December 14, 2024, Complainant emailed Messrs. Clark, Brown, Black, and Wheatley regarding the arguments set forth in Mr. Clark’s position paper. Ex. 4 at 108. He explained that

“SFHP is an NR/DOE project site that implements 10 CFR 851, not an OSHA site. Therefore, the DOE’s implementation of the regulations and the consensus standards it incorporates by reference are what matters.” *Id.* He noted that Mr. Clark’s opinion was in direct contravention of a DOE Policy Clarification regarding 29 C.F.R. 1926 and 10 C.F.R. Part 851, which he quoted in the email:

Per 10 CFR 851.23 and 29 CFR 1926.52(d)(1), when construction workers are exposed to noise levels at or above the ACGIH TLV 8-hour TWA of 85 dBA, they must be enrolled in an HCP.

While 29 CFR 1926.52 does not provide guidance on what is included in an HCP, contractors (and subcontractors) must comply with the ACGIH 2016 TLVs, which state that an HCP with all of its program elements, including audiometric testing, is necessary when workers are exposed to noise at or above the TLV.

*Id.* at 108–09. *See also* DOE Policy Clarification D-19-03-003 (2019), available at [https://pcportal.doe.gov/PCPortalFiles/Answers/D19-03-003\\_D19-03003\\_Noise%20Requirement\\_Flow-down\\_for\\_Subcontractors\\_14MAR2022.pdf](https://pcportal.doe.gov/PCPortalFiles/Answers/D19-03-003_D19-03003_Noise%20Requirement_Flow-down_for_Subcontractors_14MAR2022.pdf).<sup>15</sup> In his email, Complainant stated that professional opinions not aligned with DOE Policy Clarifications are “both categorically and factually incorrect,” and emphasized that DOE contractors are not “afforded the latitude of self-determining DOE standard feasibility as a basis for the decision to disregard those standards.” Ex. 4 at 109.

Later that day, Mr. Brown responded to Complainant, stating:

Addam,

I’m not sure why you think we are in some sort of debate. Multiple times you have been told what we are following on the site and you continue to argue. You need to stop arguing and start listening. This site is not following 851. This is an industrial site and we have been told multiple times that we follow osha [sic] not 851. Stop debating and start following Jerry’s direction.

No more debate. Start following direction.

Ex. 4 at 108. Mr. Brown later described Complainant’s disagreement about which law governed the SFHP as an “argu[ment] about semantics.” Tr. at 296. Believing that “whatever we decided to choose was irrelevant,” Mr. Brown suspended Complainant’s involvement in collecting audiometric dosimetry samples and, in consultation with Mr. Black, decided to bring in a consultant to collect the samples. *Id.* Early in 2025, Kiewit hired a third-party, Eastern Idaho Safety Consultants, to take samples. *Id.* at 37–38. Complainant was denied access to the data. Ex. 16 at 169. Soon after asking for the data and being denied access, Complainant was instructed to relocate to a different office at the INL site. Tr. at 39. He began to suspect that he was at risk of termination

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<sup>15</sup> The Policy Clarification noted that an OSHA interpretation letter included baseline and annual audiometric testing as part of an effective HCP. DOE Policy Clarification D-19-03-003.

for his disclosures and decided to submit his concerns to Kiewit’s third-party safety hotline, known as Syntrio or Lighthouse.<sup>16</sup> *Id.* at 39–40, 292.

Between March 21 and 24, 2025, Complainant made the following oral and written disclosures to Syntrio, the third party Respondent had hired to handle intake of safety concerns:<sup>17</sup>

- He reported noncompliance with respiratory protection and hearing conservation requirements.
- He reported the debate that followed his initial disclosure regarding HCP requirements and stated that “[s]ince then, additional actions have been taken by the Project Safety Man[a]ger in coordination with the Regional and District Manager to exclude myself from the collection of data.”
- He reported that he had twice been asked if he would be leaving Kiewit.
- He reported that he had notified DOE of the HCP and respiratory protection issues<sup>18</sup> and that he had been told by Kiewit that it was not feasible for Kiewit to enroll its employees in an HCP.
- He alleged that Mr. Clark was attempting to cover up the hearing conservation hazards at the SFHP.
- He alleged that he had a “heated exchange” with Mr. Wheatley after receiving Mr. Brown’s December 14, 2025, email, in which Mr. Wheatley allegedly made a “threat” that he and Complainant would discuss the HCP issue with the Project Manager and Complainant allegedly responded that if he was fired for reporting noncompliance, he would “elevate the issue as reprisal for reporting to DOE.”<sup>19</sup>
- He reported experiencing a chilled working environment and believed that Respondent had demonstrated “both willful noncompliance and an unacceptable disregard for the worker health and safety laws.”
- He submitted copies of the DOE Policy Clarification and Mr. Clark’s position paper.
- He submitted an email from Mr. Clark regarding the third-party sampling data, which stated, “If they ask for more information, we’ll decide what level of detail can be transferred. In general, we never transmit the raw data to the client, only summary reports. Jacobs [the client] has accepted summary reports in the past, so it’s not going to be a discussion.”

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<sup>16</sup> Respondent met with Complainant in early March 2025 to inform him that he would receive a raise as part of the regular performance assessment process. Tr. at 365–67. Mr. Brown testified that he told Complainant “you’ve earned a raise and you deserve a raise,” and testified that Complainant “received a meets expectation, and therefore he was—his right was to receive a compensation adjustment.” *Id.* at 311. Mr. Brown also testified that Complainant told him in that meeting that he thought Mr. Brown was calling to “fire him.” *Id.* at 292. Complainant was terminated before he was eligible for a formal performance review. *Id.* at 225–26, 391–92.

<sup>17</sup> Posters encouraging staff to report concerns to Syntrio were prominently displayed around the SFHP site. Tr. at 333.

<sup>18</sup> This refers to an alleged February 10, 2025, call that Complainant made to OHA, discussed in more detail *infra*.

<sup>19</sup> There was insufficient evidence in the record to confirm that the “heated exchange” happened or, if it did, what was actually said.

Ex. 2 at 48–58; Tr. at 333. HR Manager Sarah Lemoine was made aware of Complainant’s Syntrio complaints by Mr. Brown. Tr. at 376. Kiewit President Michael Rinehart was aware of the complaints as well, as all serious safety issues are routed through him. *Id.* at 194–95. Kiewit’s corporate compliance and legal teams were aware of the Syntrio complaints and that Complainant had submitted them. Ex. 18 at 215–16.

At the end of March or beginning of April 2025, during a discussion about the CS-113 delay at a monthly operations reporting meeting, staffing questions were raised, and the attendees—who included Messrs. Rinehart, Brown, and Black—began discussing where to assign employees who had been expected to work on CS-113. Tr. at 190–91. Messrs. Black and Brown told Mr. Rinehart that Complainant had refused a training position and non-managerial industrial hygiene position with CS-107—the project on which, unbeknownst to Mr. Rinehart, Complainant was working at that time<sup>20</sup>—and on a Kiewit project at DOE’s Savannah River site in South Carolina.<sup>21</sup> *Id.* at 191–

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<sup>20</sup> At one point, Mr. Brown gave conflicting testimony that Complainant was in training from his hire date through March 2025 and there was no more work for him on CS-107 because “his training was complete.” Tr. at 314–15. He then testified that not all of Complainant’s work was training. *Id.* at 315. Mr. Clark testified that Complainant was not merely being trained, but was “filling a role” on CS-107. *Id.* at 340. Given the conflicting statements and previously cited exhibits and testimony reflecting that the Individual had obligations to perform work product, I find that he was not in training for the entirety of his tenure at KNS.

<sup>21</sup> Respondent alleged that Mr. Brown offered Complainant temporary positions within Kiewit in February 2025 when it became clear that CS-113 would be significantly delayed. Tr. at 288, 307. These alleged positions were located in South Carolina, Tennessee, Oregon, or, for non-supervisory positions, in Idaho. *Id.* at 308–09. Mr. Brown testified that he offered Complainant these jobs with no change in compensation. *Id.* at 287–89. Mr. Black testified that he believed Mr. Brown had looked for positions outside CS-113 for Complainant. *Id.* at 253. Ms. Lemoine testified that it was her understanding that Mr. Brown discussed other positions with Complainant. *Id.* at 371. Neither Mr. Black nor Ms. Lemoine testified that they observed Mr. Brown making job offers to Complainant. Complainant did not recall ever being offered other positions. *Id.* at 140–42. Because Respondent relies largely on Mr. Brown’s representation that Complainant was given job offers, and because Mr. Brown’s credibility is lacking for the reasons I describe below, I would typically look to contemporaneous documentation of job offers. Mr. Brown testified that internal job offers for new positions at INL would have been handled by word of mouth only. *Id.* at 309. He further testified that a cross-country move, such as for the job in South Carolina, would have “a full notice of assignment and an actual piece of paper.” *Id.* However, no such document was entered into evidence.

In its Closing Brief, Respondent also argues that Complainant’s testimony that he did not remember being offered a job was not credible because he previously testified to rejecting an offer to transfer to Savannah River, SC. Res. Closing Brief at 29. This is a misrepresentation of the record. The portion of the transcript Respondent cites to in support of its position does not state that Complainant rejected an offer to transfer to South Carolina, but it does include the Complainant stating “Yeah, if I said that in deposition, and if I didn’t say it then —” followed by Respondent’s attorney verifying that the deposition testimony did say that Complainant rejected the offer. Tr. at 140–42. The deposition testimony in question does not support that, however. Complainant only stated that he did not recall being offered or rejecting another role at KNS (except prior to commencing his employment there). Res. Exhibit List and Exhibits at 532–34 (exhibits submitted during discovery for the hearing). He also stated that he would have rejected a position in South Carolina if it had been offered to him. *Id.* This hypothetical language does not mean Complainant in fact refused such a position.

With respect to Mr. Brown’s credibility, it was damaged by conflicting testimony at the hearing. As an initial matter, in stark contrast to his email to Complainant stating “we follow osha [sic] not 851,” Mr. Brown testified at the hearing that 10 C.F.R. Part 851 applied at SFHP. Tr. at 324. Mr. Brown’s testimony conflicted with other testimony and evidence in several instances. For example, Mr. Brown testified that he was only involved in the decision to terminate Complainant on April 4, 2025, after the decision to terminate was made. *Id.* at 291. However, Mr. Rinehart testified

92, 214–16. Complainant could not recall being offered other jobs, and no record of the offers was entered into evidence. *Id.* at 141–42. Mr. Rinehart was asked to decide whether to terminate Complainant’s employment. *Id.* at 190. Mr. Rinehart held an informal meeting with Ms. Lemoine and a member of Kiewit’s legal team to discuss what to do with Complainant, and, ultimately, he decided to terminate Complainant’s employment. *Id.* at 190–92, 383–84. Respondent did not create any documents relating to the termination, which was, while not entirely unheard of, a deviation from Respondent’s typical practice.<sup>22</sup> *Id.* at 383–85. Mr. Rinehart testified that all of the other employees who were taken off of the CS-113 project were moved to other projects, but no contemporaneous evidence to support that assertion—or to show that other employees were terminated—was submitted. *Id.* at 187. Though this group of employees would have been appropriate comparator employees, Kiewit instead submitted as comparators one senior safety and training specialist and one intern that converted to a safety specialist that were hired after Complainant’s termination. Ex. 20 at 220, 225. Kiewit did not explain, and it is not clear from the submission, how these two employees are relevant comparators.

On April 4, 2025, Ms. Lemoine, Mr. Brown, and Mr. Clark met with Complainant and told him he was being terminated for lack of work. Res. Discovery Responses at 21 (Jan. 28, 2026); Tr. at 306. Complainant stated that his termination was retaliation for his disclosures and that he would sue Respondent. Tr. at 306, 388–89. Complainant was presented with a Separation Agreement, authorized by Mr. Rinehart, pursuant to which he would receive \$5,540.00 in exchange for releasing Respondent from

[A]ll claims that were or could have been asserted in any lawsuit, any tort or statutory claim or contractual restriction relating to my prior employment with the

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that at an earlier meeting during which Complainant’s employment future was discussed, Mr. Brown told Mr. Rinehart that Complainant had refused to work on other projects. *Id.* at 191–92. Mr. Brown also testified that he had told Mr. Rinehart that Complainant refused to work on other projects. *Id.* at 306. In another example, Mr. Brown testified that Complainant refused to do what was asked of him. *Id.* at 295 (stating that Complainant “continued to not do” the sampling he had been instructed to do). However, Mr. Clark testified that Complainant took samples as requested and that the “systems and processes and programs” Complainant set up were “probably a lot beyond what the average construction project needs.” *Id.* at 340–42. He described Complainant as a “data collection guru” and testified that they collected lots of data together. *Id.* at 343–44. Mr. Brown testified that Complainant only took four samples, but the documentation of the samples clearly shows eight samples taken. *Id.* at 310; Ex. 4 at 105.

In summary, I am left with only uncorroborated testimony to rely on for the notion that Complainant was offered another job with Kiewit, much of which is hearsay or from a witness whose credibility is in question. Therefore, I do not have enough evidence to find that Complainant was actually offered any other position within KNS.

<sup>22</sup> Ms. Lemoine testified that when someone is terminated for lack of work, there may not be any contemporaneous paperwork memorializing the decisions that led to the termination. Tr. at 385. However, her credibility was compromised at the hearing. She testified that Complainant made no statements at his termination meeting implying that he viewed his termination as reprisal or retaliation. *Id.* at 368, 380 (“I was at that meeting and I did not observe an allegation of retaliation at that meeting.”). However, she later confirmed that she sent the following text message to Mr. Rinehart after the meeting: “FYI – During the separation, he stated that this was reprisal, he is going to make a DOE claim, and mentioned whistleblower blowback. I let Jeremy know as well.” *Id.* at 388–89. *See also* Res. Discovery Responses at 20 (Jan. 28, 2026). Given the overt nature of the discrepancies in her testimony, I give little weight to her testimony regarding the regularity of terminations without a paper trail. Even if Respondent truly does not keep records of some terminations, the fact that records were not made does not relieve Respondent of its burden provide evidence to support its assertions.

Released Parties, the discontinuation of such employment, any post-employment conduct, any claim of wrongful discharge, and all rights under federal, state or local law prohibiting retaliation or discrimination based on race, sex, age, religion, national origin, handicap, disability, worker's compensation claim, or other forms of discrimination, harassment or retaliation. . . .

Ex. 21 at 298. Complainant did not qualify for a severance agreement under Respondent's policies. *Id.* at 285. At the hearing, when asked why Complainant was offered the agreement if he did not qualify for severance, Respondent asserted that separation agreements are distinct from severance agreements, but acknowledged that it has no policy in place regarding the use of separation agreements. Tr. at 397–98. Ms. Lemoine explained in her testimony:

I would say severance is part of that corporate policy and separation is something different. I don't think or I am not well versed enough probably to say the explicit difference, but I would say the severance is more related to our corporate policy and providing that for employees that have worked for us for a longer time period, due to like lack of work or reorganization, and separation is something different.

*Id.* at 397. Complainant did not sign the agreement. *Id.* at 521. The Separation Agreement also stated that Complainant's employment was ending due to lack of work. Ex. 21 at 298. At 3:58 PM that day, Complainant received a text message, which he later alleged was sent by a general contractor employee, stating "FYI, Ty just told our group that you were terminated for 'not doing your job and refusing to go out in the field.'"<sup>23</sup> Ex. 4 at 61, 65.

## V. THE COMPLAINT

### A. Alleged Protected Disclosures

Complainant alleges that he engaged in multiple protected activities under 10 C.F.R. § 708.5 by disclosing information he reasonably believed revealed substantial violations of law, rule, or regulation. Ex. 2 at 14–16. The primary disclosures cited in the record allege the following:

1. **November 4, 2024 (Email):** Complainant notified project management (Mr. Ibison, Mr. Black) and corporate safety management (Mr. Brown) of suspected noncompliance with DOE and OSHA standards for respiratory protection and hearing conservation. Ex. 2 at 14. He reported that if fit-testing records were unavailable, they must be re-performed for all workers. *Id.* He further explained that under 10 C.F.R. Part 851, workers with anticipated noise exposures  $\geq 85$  dBA TWA must be enrolled in a Hearing Conservation Program. *Id.* He included a disclaimer regarding PAAA applicability, indicating his belief that the noncompliance was potentially serious. *Id.*
2. **November 11–15, 2024 (Verbal):** Complainant discussed ongoing respirator and hearing-related program noncompliance with Mr. Clark during a site visit. *Id.* Complainant states

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<sup>23</sup> Complainant submitted a screenshot of the message, but the sender's name was not included. Ex. 4 at 65. At the hearing, Complainant struggled to remember who may have sent the text. Tr. at 60–62.

he informed Mr. Clark of the requirement to implement interim controls and report noncompliance under 10 C.F.R. Part 851, Appendix A. *Id.*

3. **November 28, 2024 (Email):** Complainant notified Mr. Clark and Mr. Wheatley that many trade workers had not had audiometric assessments done and that there were significant deficiencies in the respiratory safety program. *Id.* at 15–16, 30–31.
4. **December 5, 2024 (Email):** Complainant notified Mr. Clark and Mr. Wheatley of deficiencies in the respirator safety program. *Id.* at 15. Citing a lack of compliance with OSHA and DOE requirements, he advised the suspension of all respirator use at the SFHP and the return of all issued units, again noting that PAAA reporting obligations may apply. *Id.*
5. **February 10, 2025 (Verbal):** Complainant called OHA and alleged contractor noncompliance with safety and health obligations under 10 C.F.R. Part 851. *Id.*
6. **March 21–24, 2025 (Verbal and Online):** Complainant submitted a complaint through Kiewit’s internal corporate compliance hotline, Syntrio. *Id.* at 15–16. In a verbal report and subsequent detailed written submissions, he reiterated the previously unresolved safety violations and disclosed the retaliatory treatment he had experienced. He also “notified [the company] of [his] DOE whistleblower complaint to ensure [his] protection from retaliation.”<sup>24</sup> *Id.*
7. **March 25, 2025, through April 3, 2025 (Verbal):** Complainant identified himself to a Kiewit legal representative as the “DOE whistleblower” and informed the representative of the need to review the information provided in his Syntrio filing. *Id.* at 16.

The fact that Complainant made the disclosures alleged in Disclosures 1, 2, 3, 4, and 6 is well-supported by the evidentiary record. However, there is no evidentiary support beyond Complainant’s testimony that he made a disclosure to a Kiewit legal representative, as described in Disclosure 7. Regarding Complainant’s allegation that he called OHA to allege contractor noncompliance with Part 851 requirements in February 2025, no record of this call exists in the official record of this proceeding. For the foregoing reasons, I find that Complainant has not met his burden to prove that he made Disclosures 5 and 7 and that they are protected under Part 708.

## **B. Alleged Acts of Retaliation**

Complainant alleges he was subjected to a series of escalating retaliatory actions by Kiewit management, primarily carried out by Mr. Brown, Mr. Clark, and Mr. Wheatley, in response to his protected disclosures. Ex. 2 at 17–18. These alleged acts, other than the one that was dismissed in the December 17, 2025, Interlocutory Order, include:

- **Threats and Intimidation (December 14, 2024):** In response to Complainant’s email refuting the HCP position paper, Mr. Brown sent a reply stating, “I’m not sure why you think we are in some sort of debate,” and ordered him to “Stop debating and start following

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<sup>24</sup> This likely refers to Complainant’s alleged phone call to OHA.

Jerry's direction." Ex. 4 at 108. Complainant alleges a subsequent heated exchange occurred with Mr. Wheatley, during which he felt his job was being threatened. Ex. 2 at 50–51.

- **Termination (April 4, 2025):** Kiewit terminated Complainant's employment on April 4, 2025. Ex. 21 at 298.
- **Slandorous Justification for Termination (April 4, 2025):** On the same day as his termination, Complainant received a text message that he alleged was sent from a general contractor employee stating, "FYI, Ty just told our group that you were terminated for 'not doing your job and refusing to go out in the field.'" Ex. 4 at 65. Complainant asserts this statement is slanderous, directly contradicts the official "lack of work" justification, and was intended to mischaracterize the basis of his termination. Ex. 2 at 18.

Complainant's allegation of "Threats and Intimidation" as a retaliatory action is not well-pled. While threats and intimidation *can* be acts of retaliation, they are not in this situation for multiple reasons. Regarding Mr. Brown's email, it did not affect Complainant's compensation or the terms, conditions, or privileges of his employment. *See* 10 C.F.R. § 708.2(a). Indeed, Complainant received a raise even after the December 14, 2024, email from Mr. Brown. While that email has evidentiary value in this case, it cannot, in itself, be considered a retaliatory act. Furthermore, Complainant's allegation that he felt his job was threatened by Mr. Wheatley is not well-supported by the evidentiary record. This claim of retaliation is, therefore, denied.

The only evidence in the record to support the allegation of "Slandorous Justification for Termination" is a screenshot of a text message from an unidentified sender stating "FYI, Ty just told our group that you were terminated for 'not doing your job and refusing to go out in the field.'" Ex. 2 at 65. At the hearing, Complainant struggled to identify the sender, the identity of whom was never conclusively established. Tr. at 60–62. The nature of the text message is hearsay which, while not necessarily prohibited in Part 708 proceedings, has limited evidentiary value even when the source is authenticated, which it is not in this instance. Based on the record, I cannot find that Complainant has established that the alleged slander occurred. This claim of retaliation is, therefore, denied.

## VI. ANALYSIS

### A. The WPA and WPEA are not controlling precedent

In its Motion to Dismiss and again in its Closing Brief, Respondent argued that Complainant's disclosures were part of his job duties and, therefore, are not protected by Part 708. Res. Motion to Dismiss (MTD) at 2–5 (Dec. 3, 2025); Res. Closing Brief at 14–20. The argument failed when asserted in the Motion to Dismiss and, for the same reasons, fails now as well.

Respondent argues that federal case law for the Whistleblower Protection Act (WPA) is binding on OHA's Part 708 cases.<sup>25</sup> Res. Closing Brief at 19. Respondent supports its argument by stating

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<sup>25</sup> More specifically, Respondent argues that case law interpreting the WPA, which prior to passage of the WPA amendments in 2012 established that a disclosure made during the normal course of an employee's duties is not

that the “language from the original 1992 and subsequent 2019 versions of 10 C.F.R. § 708.5(a) are remarkably similar to (but not based upon) the original operable WPA language.” *Id.* at 18. It further states that because OHA did not change that language in its 2019 revision of Part 708 to include language from the Whistleblower Protection Enhancement Act (WPEA),<sup>26</sup> which Congress passed in 2012 to amend the WPA, OHA must still be bound by case law interpreting the WPA. *Id.* at 19.

As discussed in the December 17, 2025, Interlocutory Order, Respondent’s argument fails to take into account that Part 708 is not a part of the WPA, does not incorporate the WPA, and does not draw its authority from the WPA. *See, e.g., Edward Gallrein*, OHA Case No. WBA-13-0017, 2014 EOHA LEXIS 98 \*13 (2014).<sup>27</sup> Federal courts agree that Part 708 is the relevant authority for these proceedings and have declined to impose the requirements of the WPA on the program. *See Whitestone Grp., Inc. v. United States DOE*, No. 2:15-cv-3039, 2017 U.S. Dist. LEXIS 50656, \*22 (S.D. Ohio 2017) (“Whitestone, however, does not point to any authority suggesting that this standard [that disclosures made in the scope of the employee’s job duties are not protected disclosures] applies to claims brought under the DOE’s Contractor Employee Protection Program (i.e., Part 708). Nor does Whitestone point to authority suggesting that this standard should apply to any claims outside of those brought under the WPA. . . . Consequently, even if the Court were to conclude that [the complainant’s] job duties include reporting theft, given the dearth of authority to suggest that the standard identified in *Kahn [v. DOJ]*, 618 F.3d 1306 (Fed. Cir. 2010)] applies to Part 708, the Court could not conclude that the DOE erred.”) Moreover, there is no support for the argument that OHA is bound by federal court precedents to a law Congress updated because the precedents were contrary to its intent.<sup>28</sup> *See S. Rept. 112-155 (2012)* (“In *Willis v. Department of*

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protected, should apply here, and, therefore, Complainant’s disclosures cannot be protected because part of his job was to identify safety concerns. Res. Closing Brief at 19.

<sup>26</sup> In the WPEA, Congress specified that disclosures made as part of an employee’s normal duties were not excluded from protection. 112 Pub. L. 199 § 101(b)(2)(C); 5 U.S.C. § 2303(f)(2).

<sup>27</sup> As stated in *Gallrein*,

Both the WPA and the WPEA apply only to whistleblower complaints brought by federal employees. Neither statute has any direct applicability to Part 708 proceedings, which involve only DOE contractor employees. Nonetheless, because Part 708 was modeled after the WPA and similar issues are often raised in both types of proceedings, our Part 708 decisions sometimes cite cases brought under federal whistleblower protection laws for guidance or analogous support. *Gallrein* appears to allege on appeal that, due to our practice of citing comparable cases litigated in other fora as persuasive authority, the Administrative Judge should have also applied what *Gallrein* refers to as the ‘loosened WPEA standards which are now required to be used’ in federal whistleblower cases to his evaluation of *Gallrein*’s complaint. We disagree. Regardless of any sources that we may cite in Part 708 proceedings, we rely, in the first instance, on the express language of the regulation itself.

*Gallrein*, 2014 EOHA LEXIS 98 \*13.

<sup>28</sup> Respondent argues in its closing brief that OHA has relied on federal precedents in “WPA cases” for guidance in the past, citing to *Dean P. Dennis*, OHA Case No. TBH-0072, 2009 EOHA LEXIS 33 (2009). Res. Closing Brief at 14. Federal court case law can provide valuable guidance, and OHA, of course, regularly considers it in deciding Part 708 matters. However, the WPA authority to which respondent points is simply inapposite, and here there is ample OHA case law under Part 708 specifically addressing the very question at issue.

*Agriculture*, the court stated that a disclosure made as part of an employee’s normal job duties is not protected. . . . These holdings are contrary to congressional intent for the WPA. The court wrongly focused on whether or not disclosures of wrongdoing were protected, instead of applying the very broad protection required by the plain language of the WPA. . . . Section 101 of S. 743 amends the WPA to overturn decisions narrowing the scope of protected disclosures by clarifying that a whistleblower is not deprived of protection just because . . . the employee made the disclosure in the normal course of the employee’s duties. . . .”).

Respondent has not cited to any cases in which OHA previously held that disclosures made pursuant to job duties were not protected under Part 708. I decline to do so now.

## **B. Complainant’s Burden**

### **1. Protected Disclosures**

Part 708 describes, in relevant part, what disclosures it protects:

An employee of a contractor may file a complaint against his employer alleging that he has been subject to retaliation for:

(a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, the employer, or any higher tier contractor, information that he reasonably believes reveals—

(1) A substantial violation of a law, rule, or regulation;. . . .

10 C.F.R. § 708.5. Complainant’s surviving disclosures were made to Complainant’s employer directly or through a third-party service that employer retained for the purpose of collecting safety concerns and relaying them back to Respondent. I find that these disclosures were made to a covered person.

#### **a. Substantial Violation of a Law, Rule, or Regulation**

Whether a violation of law, rule, or regulation is substantial is a question of law, the answer to which is highly influenced by factual context. “Substantial” is defined, in relevant part, to mean (1) consisting of or relating to substance, or (2) important or essential. SUBSTANTIAL, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/substantial> (last accessed April 2, 2026). Considering the first definition, it is clear that a substantial violation will be material or consequential, rather than a de minimis mistake or gossamer aura of noncompliance. Considering the second definition, it is reasonable to infer that a substantial violation could be a violation with important consequences or outcomes. It is also reasonable to infer that a substantial violation could be a violation of an important or essential component of a law, rule, or regulation. Without opining on the universal limits of what may be termed “substantial,” it is reasonable to infer that failure to comply with an entire component of a regulatory scheme, whether by failing to retain required the form of documentation or failing to establish a required safety program required, could be substantial.

Disclosures 1–4 and 6 report alleged violations of regulations, specifically 10 C.F.R. Part 851 and, as incorporated by 10 C.F.R. § 851.23 (safety standards for contractors), 29 C.F.R. Parts 1910 and 1926 (OSHA respiratory protection and noise exposure standards), alleging that Kiewit did not have the documentation required by OSHA’s respiratory protection programs and that Kiewit did not have an adequate HCP in place.<sup>29</sup> Ex. 2 at 28–36, 48–58.

Recordkeeping and having an HCP once an 85 dBA TWA is detected are essential requirements of OSHA’s safety regulations, as incorporated by Part 851. The failure to comply with these requirements could have profound consequences for KNS, in a legal sense, and for KNS’s employees, in a physical safety sense. Therefore, I find that violations of those requirements would be substantial. Substantiality has certainly been found for violations that are less systemic and fundamental to regulatory functioning and worker safety. *Cf. Denise Hunter*, OHA Case No. WBH-12-0004, 2013 EOHA LEXIS 11, \*20 (2013) (finding that failing to run one employee’s pre-employment background check was a substantial violation); *Richard R. Sena*, OHA Case No. VBH-0042, 2001 EOHA LEXIS 26, \*15 (2001) (finding that contractor employees’ unauthorized use of their employer’s internet to send sexually explicit content was a substantial violation of a law, rule, or regulation).

#### **b. Reasonable Belief**

Part 708 does not require a disclosure’s content to be true for it to be protected. It simply requires that the person making it holds a reasonable belief that the content is true. *See Himadri K. Das*, OHA Case No. TBH-0089, 2010 EOHA LEXIS 46, \*21 (2010) (“[T]he good faith clause is intended to relieve complainants of the burden of proving that their allegations are correct or accurate. Under 10 C.F.R. § 708.5(a)(1), complainants must show only that they had a *reasonable belief* that their allegations were accurate.”) (citing *Howard W. Spaletta*, 24 DOE P87,511 at 89,501 (1995)). *See also id.* at \*20 (“[W]hether the Complainant was motivated to protect his reputation is irrelevant to the question whether the disclosures come within the ambit of Part 708 protection.”). The test for reasonability is “whether a reasonable person in the complainant’s position, with his or her level of experience, could believe that his or her disclosure” met any of the bases for a protected disclosure under 10 C.F.R. § 708.5(a). *Hunter*, 2013 EOHA LEXIS 11, \*17. I examine the reasonableness of Complainant’s belief regarding violations of HCP requirements first before turning to the reasonableness of his belief regarding violations of respiratory protection recordkeeping requirements.

While much of the correspondence in the record regarding the HCP focused on whether annual audiograms were required, Mr. Clark’s position paper, which was adopted by Kiewit, stated that a Part 1926 HCP was not required because Complainant’s noise samples over 85 dBA TWA were unattenuated. Without further examination of the underlying ACGIH TLVs, which were not

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<sup>29</sup> Respondent argues that Complainant only reported potential violations and was not absolutely certain that the violations existed. Res. Closing Brief at 23. This argument is unconvincing. Part 708 does not require absolute certainty or proof of wrongdoing, just a reasonable belief. 10 C.F.R. § 708.5. *See also David L. Moses*, OHA Case No. TBH-0066, 2008 EOHA LEXIS 43 \*31 (2008) (Where the respondent argued that the complainant’s disclosure was merely a question, OHA found that “the Part 708 regulations do not require that an employee make an affirmative declaration” for it to be a disclosure.).

entered into evidence, I find that reasonable minds may be able to disagree as to whether the TLV is for attenuated or unattenuated readings, though parole evidence from DOE's Berkely National Lab indicates that unattenuated is the intended standard. That said, reasonable belief, not absolute correctness, is all that Part 708 requires, and the plain language of the regulations and ACGIH TLV supports Complainant's position on the need for an HCP.

In addition to pushing for annual audiograms, Complainant identified that several elements of an OSHA-compliant HCP were not in place, including ongoing monitoring of noise exposure, issuance of individually fitted hearing protection, and recordkeeping. While employers are only required to have in place the HCP elements that are feasible, it is reasonable for one to believe that monitoring and recordkeeping are feasible for even the barest bones operation. Given the lack of attention Kiewit had previously paid to noise exposure—indeed, it did not even have noise samples available to Complainant as a safety manager prior to his taking samples of his own—a person with Complainant's background could reasonably have believed that Kiewit was not in compliance with the regulatory requirements related to noise exposure.

Part 1910 has explicit recordkeeping requirements and, after significant efforts to locate records, Complainant was unable to find them and reported that to his employer. Even though Complainant did not always name Part 1910 explicitly in his disclosures, he did name 10 C.F.R. Part 851, which is the regulation from which Respondent's requirements functionally arise.<sup>30</sup> Kiewit's President also confirmed in his testimony that the requirements of 10 C.F.R. Part 851 flow down to Respondent; confirmation by someone at that level of the company shows that the belief that Part 851 applied was reasonable. *See, e.g., Das*, 2010 EOHA LEXIS 45, \*18–19 (finding of reasonable belief supported by testimony from a manager that the complainant had been correct about the way a procedure was typically done when making his disclosure). A plain reading of the regulations supports Complainant's view that documentation of fit testing and medical authorization was required to be kept on file. Moreover, Respondent does not appear to have disputed that these documents were required.

Complainant observed respirator use in the field, took noise measurements, attempted to locate records required by regulation, and, using the industrial hygiene expertise for which he was hired, identified deficiencies in the respirator protection and HCPs that could lead to legal liabilities if not addressed. Ex. 2 at 28–29. For these reasons, I find that Complainant's belief that he was reporting substantial violations of law, rule, or regulation was reasonable.

Based on the above, I find that Complainant's Disclosures 1–4 and 6 are protected under Part 708.

## 2. Contributing Factor

Absent an explicit admission that a protected disclosure contributed to an alleged act of retaliation, a complainant may show that connection through circumstantial evidence, typically temporal proximity and actual or constructive knowledge of the disclosures by the person who decided to

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<sup>30</sup> Furthermore, OHA does not require the specific law, rule, or regulation that was allegedly violated to be named. *Misti Wall*, OHA Case No. TBU-0061, 2007 EOHA LEXIS 24, \*6 (2007). *See also Frederick L. Higgs*, OHA Case No. TBH-0057, 2007 EOHA LEXIS 37 \*23 (2007) (Complainant's inability to cite a specific, law, rule, or regulation by name was not insufficient because he testified to seeing the requirement in question on posters in the workplace.).

take the adverse personnel action. *Leslie Smith*, OHA Case No. WBH-20-0006, 2021 EOHA LEXIS 13, \*28 (2021) (“There is rarely a “smoking gun” that establishes a nexus between a complainant’s protected conduct and the alleged acts of retaliation. . . . Consequently, retaliatory intent can be established through circumstantial evidence . . . if they can establish that the acting official had actual or constructive knowledge of the protected conduct, and acted within such a period of time (temporal proximity) that a reasonable person could conclude that the conduct was a factor in the personnel action.”) (citing *Ronald Sorri*, OHA Case No. LWA-0001 at 3-4 (1993)).

In the past, OHA has found temporal proximity when as long as nine months passed between a disclosure and adverse personnel action. *Smith*, 2021 EOHA LEXIS 13, \*28–29 (citing to OHA cases in which seven, eight, and nine months were sufficient to find temporal proximity, but one year was too long). Complainant made his first protected disclosure on November 4, 2024, and was terminated on April 4, 2025. The five months between the two events is sufficiently short that a reasonable person could conclude that the disclosures, which continued through late March 2025, were a factor in the decision to terminate Complainant’s employment.

It is not uncommon for final decisions on personnel actions, particularly terminations, to come from a level of the corporate hierarchy that is not deeply engaged with the day-to-day conduct and performance of the employees at a DOE site. Typically, a decision-maker is advised by others who have that granular knowledge, thereby imparting their actual knowledge to the decision-maker constructively. *Hunter*, 2013 EOHA LEXIS 11, \*32–33 (finding that the terminating official had constructive knowledge of a disclosure because he had been advised on the matter by someone with actual knowledge, even though the actual disclosure was never discussed). Mr. Rinehart testified that he made the decision to terminate Complainant’s employment. He had actual knowledge of Complainant’s Syntrio disclosures but, while Complainant testified that his name and contact information were included in the Syntrio filings, there is insufficient evidence to find that Mr. Rinehart knew who made the Syntrio disclosures. However, Mr. Rinehart based his termination decision on information and advice imparted to him by Messrs. Brown and Black, both of whom were intimately familiar with Complainant’s Disclosures A–C, and Ms. Lemoine, who had actual knowledge of the Syntrio disclosures. As Mr. Brown informed Ms. Lemoine of the Syntrio disclosures, I find that it is more likely than not that he also knew Complainant had made those disclosures. I further find that Mr. Rinehart had constructive knowledge of Disclosures 1–4 and 6 after being provided information and advice regarding Complainant’s termination by Messrs. Brown and Black and Ms. Lemoine.

For the foregoing reasons, I find that Complainant has established, by a preponderance of the evidence that:

- He made five protected disclosures between November 4, 2024, and March 23, 2025;
- He was terminated from his employment on April 4, 2025;
- Temporal proximity exists between his disclosures and his termination; and
- The decision-maker had constructive knowledge of Complainant’s disclosures when he decided to terminate Complainant’s employment.

Therefore, I conclude that Complainant’s protected disclosures were a contributing factor in his termination.

### C. Respondent's Burden

The burden of proof now shifts to Respondent to show by clear and convincing evidence that, Complainant's disclosures notwithstanding, it would have terminated his employment anyway. OHA has long used a three factor test to answer this question, weighing (1) the strength of the employer's evidence in support of its stated reason for termination, (2) the existence and strength of any motive for retaliation on the part of officials involved in the termination decision, and (3) what action the employer has taken against similarly situated employees. *Eugene J. Dreger*, OHA Case No. VBH-0021, 2000 EOHA Lexis 49, \*9 (2000). *See also Krisna Johnson*, OHA Case No. WBH-22-0002, 2022 EOHA LEXIS 102, \*6 (2022).

#### 1. Respondent's evidence in support of its stated reasons for termination

In the Separation Agreement presented to Complainant, Respondent wrote that his at-will employment would end due to lack of work.<sup>31</sup> Ex. 21 at 298. At the time of his termination, Complainant was performing work for the CS-107 project, which was still ongoing at the time of the February 2026 hearing. Tr. at 177. While Respondent claims to have offered Complainant other positions within CS-107 and other positions with the company outside INL, it submitted no documentary evidence to support that claim, and the credibility of its primary witness testifying on the issue is compromised. Complainant asserts that he was never offered other positions. There is no evidence of why he could not continue the work he had been performing. In fact, Mr. Clark confirmed that the sampling and monitoring Complainant started continued after his termination. Mr. Brown testified that the work Complainant had been doing was split into two positions, indicating that there may have been more work than one person could handle. The weight of the evidence shows that even if Complainant refused other positions, which there is not enough evidence to support, he could have continued performing the same work on CS-107. I do not find Respondent's stated rationale for termination to be strong.

#### 2. Comparator employees

Apart from testimony from Kiewit employees, there is no evidence in the record that any other employee was terminated for lack of work, or even moved to a different project, due to CS-113's delay. The relevant testimony is insufficient to show that anyone else was moved because it did not include any specifics about who was moved, to what projects they were moved, or what jobs they were performing prior to or after the move. There is no record of what happened to the other employees who were similarly situated. There is no evidence from which to conclude that Respondent treated Complainant the way it treated employees who did not make protected disclosures. The absence of a true comparator makes this factor neutral. *Jon B. Sharpe*, OHA Case

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<sup>31</sup> While Mr. Wheatley testified that Complainant was not meeting expectations for performance and there is unauthenticated evidence purporting to show that he believed Complainant was fired for performance issues, Respondent's position throughout this litigation has been that lack of work was the only reason why Complainant was terminated. Accordingly, I need not consider the strength of a performance-based motive for the termination. However, I note that actions such as giving Complainant a raise based on his meeting expectations and testimony stating that Complainant did good work, run contrary to the notion that there would have been a strong basis to terminate Complainant's employment for poor performance.

No. WBA-23-0002, 2024 EOHA LEXIS 109 \*21 (2024). Therefore, I am unable to weigh this factor for or against Respondent.

### 3. The existence and strength of any motive for retaliation

In his November 24, 2024, email to Mr. Brown regarding Complainant’s disclosure about the need for an HCP that included annual audiograms, Mr. Clark stated that “[t]he annual cost implications are *very significant* and will have consequences across not only KNS, but all of Kiewit’s construction activities.” Ex. 10 at 149 (emphasis in original). The medical examinations and fit testing Complainant stated needed to be done also represented an added expense for Respondent. A cost incentive existed for Kiewit to operate without annual audiograms and without redoing (or doing for the first time) the required testing for a compliant respirator safety program, and Complainant refused to let the issue go. I find that a motive existed for Respondent to retaliate against Complainant and that the motive was strong due to the significant financial implications of Complainant’s disclosures.

Respondent did not provide sufficient evidence that there was a lack of work necessitating Complainant’s termination. It did not provide evidence that other employees hired for CS-113 were terminated if they chose not to transfer to a different project. The record indicates that Respondent had a financial motive with “*very significant*” implications company-wide to get Complainant to stop pushing for the HCP and respiratory safety testing and recordkeeping measures. For the foregoing reasons, I find that Respondent has not shown by clear and convincing evidence that it would have terminated Complainant’s employment in the absence of his protected activity.

### D. Requested Remedies

In his Complaint, Complainant requested the following relief if he were to prevail in his case:

- Appoint a Culture Officer, with DOE experience who had not worked for Kiewit in the preceding five years, empowered to “implement an effective nuclear safety culture across KNS” and “oversee the separation and independence of whistleblower and compliance reporting processes.” Ex. 2 at 19.
- Remove from safety and compliance roles at KNS any individual involved in retaliation against Complainant or, if that is out of OHA’s power to order, refer those individuals’ names to DOE for debarment. *Id.* at 19–20.
- Prohibit project management interference with Health, Safety, Environment and Quality (HSEQ) compliance or whistleblower staff, and require them to “report the applicable HSEQ top management . . . to the Culture Officer” above them, or, if this is outside OHA’s power to order, OHA should refer structural concerns to the Employee Concerns Program Director. *Id.* at 20.
- Remove any reference to his termination or protected disclosures from Complainant’s personnel file as permitted by law. *Id.*
- Reinstatement or Front-Pay (one of the following options):
  - “Tier 1—conditional reinstatement with a request for full corporate Safe-Harbor;”
  - “Tier 2—conditional front-pay with a request for partial corporate Safe-Harbor;”
 or

- “Tier 3—litigation with maximum accountability requested.” *Id.*

Part 708 limits the remedies OHA may order in these cases. Several are enumerated: reinstatement, transfer preference, back pay, and reimbursement of reasonable costs and expenses (including reasonable attorney fees and other litigation expenses). 10 C.F.R. § 708.36. OHA may also order “[s]uch other remedies as are deemed necessary to abate the violation and provide the complainant with relief.” *Id.* Part 708’s remedies are intended to make a complainant whole—no more and no less. *Tony P. Quillen*, OHA Case No. WBU-14-0009, 2014 EOHA LEXIS 110, \*6 (2014); *Frederick Abbott*, OHA Case No. TBU-0062, 2007 EOHA LEXIS 25, \*7 (2007). Much of the relief Complainant requested goes well beyond making him whole and is, therefore, beyond OHA’s authority to award in this case.

## VII. CONCLUSION

In the foregoing Decision, I have found that Addam Pack has established by a preponderance of the evidence that he engaged in protected conduct when he made his disclosures regarding hearing conservation and respiratory safety programs at Kiewit and that these disclosures were a contributing factor to an act of retaliation: his termination. I have further found that Kiewit has not presented clear and convincing evidence that it would have taken the same action absent the protected conduct. Therefore, I find that Mr. Pack is entitled to relief under Part 708.

It Is Therefore Ordered That:

- (1) The relief sought by Addam Pack in the Complaint he filed under 10 C.F.R. Part 708 is hereby granted in part, as set forth below.
- (2) Within 15 days of receipt of this Initial Agency Decision, Mr. Pack shall submit to Kiewit and to the Administrative Judge a report, limited to ten pages in length, containing a detailed calculation of and support for his claim for back pay, as well as any other claims for costs and expenses associated with his termination and this proceeding. He shall also, within 15 days of receipt of this Initial Agency Decision, submit to Kiewit and to the Administrative Judge responses to Interrogatories 2, 3, and 4 and Requests for Production 1 and 2 from Respondent’s January 9, 2026, Discovery Request.
- (3) Within 15 days of its receipt of the materials described in paragraph (2) above, Kiewit shall submit a responsive document to Mr. Pack and to the Administrative Judge, which shall be limited to ten pages in length. The response must include supporting documentation limited to an additional 10 pages in length unless otherwise authorized by this court.
- (4) Each party shall brief the issue whether and to what extent reinstatement or front pay are appropriate in this case. A claim for front pay must be accompanied by a detailed calculation of and support for the claim. Each party’s respective brief shall be limited to ten pages in length and shall be submitted to the other party and the Administrative Judge at the same time as those submissions described in paragraphs (2) and (3) above.

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

Kristin L. Martin  
Administrative Judge  
Office of Hearings and Appeals