Universities Research Association, Inc.

March 17, 1994

Initial Agency Decision

Name of Petitioner: Universities Research Association, Inc.

Date of Filing: November 4, 1993

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I. Introduction

Universities Research Association, Inc. (URA) manages and operates the Department of Energy's Superconducting Super Collider Laboratory (the Laboratory) in Waxahachie, Texas. On October 27, 1992, URA notified Dr. Naresh Mehta, a physicist at the Laboratory, that it was dismissing him from his employment. Mehta subsequently filed a complaint of reprisal under the provisions of the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (the Whistleblower Regulations). In his complaint, Mehta alleged that URA had dismissed him because he had charged URA with mismanaging the Laboratory's hypercube computer.

The Department of Energy (DOE) referred Mehta's complaint to its Office of Contractor Employee Protection (OCEP). After conducting an investigation, OCEP issued a Report of Investigation and Proposed Disposition on October 15, 1992. OCEP found that URA had violated the Whistleblower Regulations in dismissing Mehta, and proposed that Mehta be granted appropriate remedies.

In response to OCEP's Report and Proposed Disposition, URA filed a request for a hearing under 10 C.F.R. § 708.9(a). We conducted the hearing at the Laboratory site on January 5 and 6, 1994. After consideration of OCEP's Report of Investigation with the testimony given at the hearing and the briefs filed by both parties, we find that URA committed an act of reprisal prohibited under 10 C.F.R. §708.5.

II. Background

A. Mehta's employment at the Laboratory

Mehta was graduated from the University of California at San Diego with a doctorate in applied physics in 1978. After graduation, he worked as a physicist in several research and industrial positions. 1/ On October 22, 1990, Mehta was hired by URA for employment at the Laboratory in the grade of Scientist I. 2/ He was promoted to the grade of Scientist II by November 1991. 3/

When Mehta began work at the Laboratory, he was assigned to the Accelerator Physics Group. Initially, the Group Leader for the Accelerator Physics Group was Dr. Alex Chao. In June 1991, Dr. Michael Syphers replaced Chao as Group Leader. 4/ Mehta was working in Syphers' group at the time of his dismissal.

B. Mehta's concerns about the hypercube

In January, 1991, URA installed a hypercube computer in the Laboratory facility. Unlike a standard computer, the hypercube consists of processing nodes arranged in a parallel configuration. The arrangement facilitates the processing of scientific simulations. Funding for the purchase of the hypercube, which cost approximately $995,000, was obtained from the DOE capital equipment fund. 5/

In the summer of 1992, Mehta concluded that his scientific research would benefit from the use of the hypercube. Mehta discussed the guidelines for using the hypercube with Ravishankar, the Group Leader of the Project Computing Group. Ravishankar told Mehta that most users were restricted to using 16 of the hypercube's 64 processing nodes. In addition, users generally could run programs for only a few hours at a time on the hypercube. 6/

Ravishankar also told Mehta that certain users could run programs on the hypercube for a longer period of time and use all 64 nodes. 7/ Mehta also learned members of this group could run a program, known as "kick," that would terminate any other programs that were in process. 8/ Dr. George Bourianoff, group leader of the Machine Simulation and Corrections Group, controlled the scheduling of hypercube users desiring to use more than 16 nodes or a few hours of time. 9/

Mehta felt the procedures for using the hypercube were "unfair" and "insulting," and discouraged other scientists from using the hypercube, leading to low utilization of the machine. He occasionally discussed the usage procedures with Syphers, his group

leader, during the summer of 1992.

Executing programs on the hypercube requires special techniques. 10/ Between July and October 1992, Mehta logged onto the hypercube on several occasions to learn how to compile and run programs on it. Mehta says he made repeated attempts to log onto the hypercube over Labor Day weekend, September 4-7, 1992. He claimed he was unable to log on because all 64 nodes of the hypercube were in use for the entire weekend. Mehta says he continued to discuss the hypercube usage procedures with Syphers. He stated that usage statistics showed that one scientist, who worked in Bourianoff's group, was responsible for 60% to 90% of total hypercube usage. 11/

C. Mehta's dismissal

During the week of October 19, 1992, Mehta attended a workshop at the DOE's Brookhaven National Laboratory in Upton, New York. He returned to work at the Laboratory on Monday, October 26. That afternoon, he received a phone call from Syphers' secretary.

The secretary asked Mehta to see Syphers at 10 o'clock the next morning. When Mehta arrived, Syphers escorted him to a meeting in the office of Dr. Richard Briggs. As head of Accelerator Physics for the Laboratory, Briggs was Syphers' supervisor. Besides Mehta, Syphers, and Briggs, Merritt Wilkinson, an Employment Specialist at the Laboratory, was present at the meeting.

Thus far, Mehta had a record as a satisfactory employee at the Laboratory. That changed abruptly at the meeting. Briggs told Mehta that he had decided to dismiss him. The reason for dismissal given by Briggs was that Mehta had misused the Laboratory's computer by running programs connected with research unrelated to the Superconducting Super Collider project. Wilkinson instructed Mehta to turn in his keys and identification badge.

Later that day, Mehta requested a meeting with Steven Brumley, URA's general counsel at the Laboratory. The meeting was eventually held on November 3. Brumley arranged for Mehta to be placed on paid administrative leave pending an internal review of his dismissal. In a letter dated December 16, 1992, Douglas Kreitz, URA's personnel director at the Laboratory, informed Mehta that the review was complete and URA was going forward with his dismissal. Mehta filed his complaint of reprisal with OCEP on February 4, 1993.

III. URA's Motion to Dismiss

A. URA's claim that the Whistleblower Regulations were not applicable to Mehta's dismissal

At the outset of this case, URA moved to dismiss on the ground that the Whistleblower Regulations were not applicable to Mehta's complaint. We denied the motion. Universities Research Association, 23 DOE ¶ 87,504 (December 22, 1993)(the December 22 Decision and Order). Nevertheless, URA has renewed its claim that the Whistleblower Regulations were not effective when Mehta was dismissed.

URA first argues the application of the Whistleblower Regulations to Mehta's dismissal is an example of the retroactive application of an administrative regulation. URA cites numerous cases to show that the retroactive application of regulations is disfavored. This argument is irrelevant to the facts of Mehta's case. The Whistleblower Regulations became effective on April 2, 1992, eight months before Mehta was formally notified of his dismissal. Hence the application of the Whistleblower Regulations to Mehta's dismissal involves no retroactivity.

Nevertheless, URA continues to argue that the Whistleblower Regulations were not effective until after Mehta's dismissal. It bases this contention on a strained reading of the scope provision at 10 C.F.R. § 708.2(a), which provides that:

This part is applicable to complaints of reprisal filed after the effective date of this part that stem from disclosures, participations, or refusals involving health and safety matters, if the underlying procurement contract described in sec. 708.4 contains a clause requiring compliance with all applicable safety and health regulations and requirements of DOE (48 C.F.R. 970.5204-2). For all other complaints, this part is applicable to acts of reprisal occurring after the effective date of this part if the underlying procurement contract described in sec. 708.4 contains a clause requiring compliance with this part.

Mehta's complaint, which concerns a matter of mismanagement rather than health or safety, falls under the second sentence of the section. This sentence provides that the Whistleblower Regulations are applicable if the act of reprisal occurred after the effective date (April 2, 1992), and if the procurement contract between the contractor and DOE contains a clause requiring compliance with the Whistleblower Regulations.

URA interprets the second sentence, however, to mean that the Whistleblower Regulations are applicable only after the procurement contract is modified. URA's procurement contract with DOE was modified on March 31, 1993. As Mehta was formally notified of his dismissal on December 16, 1992, or three months before the procurement contract was modified, URA argues that the Whistleblower Regulations are not applicable to Mehta's dismissal.

We cannot agree with URA's interpretation of §708.2(a). In the first place, the DOE's authority to promulgate the Whistleblower Regulations was granted by the Congress of the United States, and the DOE does not require the approval of URA to put the Whistleblower Regulations into effect. 12/ The modification to URA's procurement contract was mandatory and not a subject of arm's-length bargaining between the DOE and URA. The DOE has not expressed any intent to further delegate its authority to URA by allowing it to choose the date when it would be subject to the Whistleblower Regulations.

In addition, URA's interpretation goes against the plain meaning of the words. If the intent of the section was to provide that the Whistleblower Regulations applied to acts occurring after the procurement contract was modified, it would have said so. Instead, the section provides that the Whistleblower Regulations apply to acts that occur after the effective date of the Regulations. This provision would be mere surplusage if URA's interpretation were to prevail.

The intent of the phrase, "if the underlying procurement contract contains a clause requiring compliance with this part," is clarified in an Acquisition Letter issued by the DOE's Office of Procurement on December 8, 1992:

Contracting officers shall modify existing contracts and purchase orders which fall within the scope of the clause prescription at DEAR 913.507, 922.7101, and 970.5204, to incorporate the Whistleblower Protection for Contractor Employees clause not later than March 31, 1993. However, the clause need not be incorporated into contracts and purchase orders that are due to expire by June 30, 1992.

As the Acquisition Letter makes clear, some contracts, such as those that were to expire by June 30, 1992, would not be modified. Section 708.2(a) exempts these contracts from coverage by the Whistleblower Regulations, by providing that the Regulations are applicable only if the contract is ever modified. This provision has nothing to do with when the Whistleblower Regulations are applicable for contracts that are modified. The effective date is stated earlier in the section to be the effective date of the Whistleblower Regulations. URA does not dispute that (1) the alleged act of reprisal against Mehta occurred after April 2, 1992; and (2) the underlying procurement contract was modified. It follows, therefore, that the Whistleblower Regulations apply to Mehta's dismissal. 13/

B. URA'S Mediation Agreement

In our December 22 Decision and Order, we also pointed out that URA had signed a Mediation Agreement on September 21, 1993. In the Mediation Agreement, URA agreed that Mehta's complaint would be processed under the Whistleblower Regulations if mediation was unsuccessful. Such an agreement, we found, estopped URA from now asserting that the Whistleblower Regulations did not apply to Mehta's dismissal.

URA has objected to our use of the Mediation Agreement, arguing that it is a privileged document relating to an attempt at settlement. The argument is frivolous. So that the ensuing discussion will be clear, we cite the Mediation Agreement in its entirety:

MEDIATION AGREEMENT

This certifies agreement by senior officials of Universities Research Association, Inc. and Dr. Naresh Mehta to attempt to resolve Complaint No. SSC-93-0001, filed pursuant to Part 708, title 10, Code of Federal Regulations, through mediation. At the mutual request of the above parties, Sandra L. Schneider, Director, Office of Contractor Employee Protection (OCEP), and Steven D. Dillingham, Supervisory Adjudicator, OCEP, will assist in the mediation of this complaint.

Both parties have agreed that if attempts to resolve this complaint are unsuccessful, the complaint will be processed further consistent with Part 708, and the Director, OCEP, will issue a Report of Investigation and Proposed Disposition in this case.

/s/ Ezra D. Heitowit, University Research Association, Inc.

/s/ Norman Landa, attorney for Dr. Naresh Mehta

/s/ Sandra L. Schneider

URA asserts that the Mediation Agreement is "similar" to settlement discussions which are inadmissible as evidence under Federal Rule of Evidence 408. That Rule provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed at to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.... This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

(Emphasis added). It is clear that Rule 408 provides for the exclusion of certain specific matters, and that the Mediation Agreement is not one of them. The Mediation Agreement is not an offer or promise, but an executed agreement. It makes no mention of valuable consideration. It was not cited by us in the December 22 Decision and Order to prove URA's liability for Mehta's dismissal or the amount due to Mehta. Contrary to URA's assertion, the Mediation Agreement does not constitute settlement negotiations that are protected by Rule 408. It is merely an agreement to enter into negotiations, and as such is not privileged. Cf. Hanson v. Waller, 888 F.2d 806, 813 (11th Cir. 1989) (letter from counsel asking opposing counsel to discuss the case held not excluded under Rule 408). In short, there is nothing in URA's arguments that refutes our earlier finding that Mehta's dismissal is subject to the Whistleblower Regulations.

IV. The inclusion of OCEP's Report of Investigation in the

record

A. URA's claim that the Proposed Disposition is not contemplated by the Whistleblower Regulations

URA argues that the Proposed Disposition issued by OCEP should be stricken from the record. URA first contends that the Proposed Disposition "is not a document permitted, recognized, or prescribed by Part 708." 14/

In making this argument, URA has ignored the clear language of the Whistleblower Regulations. Section 708.9(f) provides that:

The investigator, within 60 days of appointment, shall submit a Report of Investigation to the Director. The Report of Investigation shall become a part of the record and shall state specifically a finding, and the factual basis for such finding, with respect to each alleged discriminatory act.

The Report of Investigation issued by OCEP on October 15, 1992 consists of two parts. The first part, not separately titled, consists of a narration of the facts in the case and a summary of the testimony obtained by the OCEP investigators. This first part of the Report draws no conclusions and states no findings.

The second part of the Report is the subject of URA's objection. This part contains the OCEP's finding, as required in the Whistleblower Regulations. In issuing the Proposed Disposition, the Director of OCEP is merely carrying out the duty to make and report a finding that is delegated to her in § 708.9(f) of the Whistleblower Regulations. Furthermore, since it is a part of the Report of Investigation, § 708.9(f) of the Whistleblower Regulations directs us to make it a part of the record.

B. URA's claim that the Proposed Disposition is inadmissible as opinion or hearsay

URA also objects to the Proposed Disposition section of the Report on the grounds that it "contains views and opinions" and is "composed, in its entirety, of inadmissible hearsay." 15/ There is no reason, however, why rules excluding opinion and hearsay evidence, formulated to protect juries, should be binding in administrative proceedings, because

One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received, and, since he will base his findings upon the evidence which he regards as competent, material, and convincing, he cannot be injured by the presence in the record of material which he does not consider competent or material.

Donnelly Garment Co. v. NLRB, 123 F.2d 215, 224 (8th Cir. 1942).

It is well-settled, therefore, that administrative agencies like the Office of Hearings and Appeals are not bound by the technical rules of evidence that control judicial proceedings. FTC v. Cement Inst., 333 U.S. 683 (1948); reh'g denied, 334 U.S. 839 (1948). The guiding principle in administrative proceedings is to admit "all evidence which can conceivably throw any light upon the controversy." Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (3rd Cir. 1945), cert. denied, 326 U.S. 734 (1945), reh'g denied, 326 U.S. 809 (1945), motion denied, 155 F.2d 1016 (2d Cir. 1946).

Thus, neither of the judicial rules excluding opinion evidence or hearsay evidence is mandatory in an administrative proceeding. Brockton Taunton Gas Co. v. SEC, 396 F.2d 717 (C.A.Mass 1968) (opinion evidence); Martin- Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974), cert. denied, 419 U.S. 1113 (1975), reh'g denied, 420 U.S. 984 (1975) (hearsay).

We will therefore deny URA's argument to exclude the Proposed Disposition section of the Report of Investigation. In so doing, we will follow the provision of the Whistleblower Regulations that we "may rely upon, but shall not be bound by, the findings contained in the Report of Investigation." 10 C.F.R. § 708.10(b).

V. Mehta's prima facie case

A. The protected status of Mehta's disclosure

The Whistleblower Regulations require a complainant in a whistleblower case to establish by a preponderance of the evidence: 1) that there was a protected disclosure, participation, or refusal; and (2) that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant. 10 C.F.R. § 708.9(d).

URA argues that Mehta has failed to meet the first requirement, claiming Mehta's expressions of dissatisfaction about the hypercube usage procedures are not protected under the Whistleblower Regulations. According to URA, Mehta simply complained that the priorities for using the hypercube were "unfair and insulting." By URA's reasoning, Mehta cannot claim the protection of the Whistleblower Regulations because he made his disclosures merely to "further his own private interests." 16/

The record does not support URA's characterization of Mehta's complaints. Mehta testified that he discussed with Syphers an alternate plan for scheduling on the hypercube. 17/ Syphers confirmed this in his testimony, stating that Mehta "started telling me about how he felt the ... allocation on the hypercube could be done better. And he was concerned about it and wanted to know if there was anything we could do to improve that." 18/ Furthermore, Mehta asserted in an electronic mail message, "If a user cannot get even ONE node on our 64-node Hypercube for three days, there is something wrong with the way the Hypercube resources are managed." 19/

The record thus indicates that Mehta was concerned about the general procedures for use of the hypercube, and not merely his own use of the machine. Furthermore, if he had been concerned only about mismanagement as it applied to his personal use of the hypercube, we fail to see why that invalidates the protected status of his complaints. 20/ As the Whistleblower Regulations specifically protect disclosures relating to mismanagement, we find that Mehta's criticism of the hypercube management forms a protected disclosure under the Whistleblower Regulations. 10 C.F.R. §§ 708.1; 708.3; 708.5 (a)(1)(iii).

Finally, we note that we need not reach the question of whether Mehta was right in claiming the hypercube was mismanaged. The Whistleblower Regulations provide protection for the whistleblower who makes his disclosure in good faith, but do not require that he be correct. 10 C.F.R. 708.5(a)(1).

B. URA's managers' awareness of Mehta's whistleblowing

URA claims that "Mehta was not terminated because he voiced complaints about the hypercube's user priorities. Briggs, the supervisor responsible for terminating Mehta, was unaware of Mehta's concerns. Briggs based Mehta's termination on the fact that most of the work he performed was not relevant to [Laboratory] work." 21/

URA, in other words, believes that Mehta's dismissal could not be retaliatory if Briggs did not know about his complaints. We disagree. Syphers and Bourianoff, managers who were directly below Briggs, were aware of Mehta's complaints. Though Briggs was formally responsible for the decision to dismiss Mehta, his decision was not based on his personal assessment of Mehta's work. Briggs testified that he was not familiar with Mehta's work at the Laboratory until July 1992. Even after July 1992, his assessment of Mehta's work was not based primarily on first-hand knowledge, but on his discussions with Syphers and Bourianoff. 22/

Briggs' testimony shows that Syphers' advice was instrumental in his decision to dismiss Mehta. 23/ In addition, it appears that Bourianoff played a part in Mehta's dismissal. Bourianoff testified that Briggs, before Mehta's dismissal, said in a meeting with Syphers and Bourianoff, "I'm getting ready to terminate Dr. Mehta. Do either of you have a problem with that?" Bourianoff told him he had no problem with dismissing Mehta. 24/

More importantly, Bourianoff assumed responsibility for reporting to Syphers that Mehta's computer file directory contained material unrelated to the Laboratory's mission. 25/ The record indicates that this report played a significant part in Syphers' finding that Mehta misused government property and his decision to recommend to Briggs that Mehta be dismissed.

It is difficult to explain Bourianoff's involvement in Mehta's dismissal except as his reaction to Mehta's complaints about his management of the hypercube. Bourianoff's key role here is consistent with the fact that he was instrumental in the Laboratory's acquisition of the hypercube. 26/ During Mehta's employment at the Laboratory, Bourianoff was personally responsible for managing the hypercube and scheduling users on it. 27/

Syphers admitted that Mehta disclosed to him his dissatisfaction with the hypercube management. 28/ Bourianoff, however, testified that no one ever complained to him about lack of access to the hypercube. 29/ The evidence contradicts Bourianoff's assertion.

An indication that Bourianoff was aware of complaints is found in an electronic mail message he sent to David Pan on August 20, 1992:

I am responsible [sic] for allocating time on the cube according to my evaluation of the relevant urgency of production jobs. This is NOT your or Ravi's responsibility. You are supposed to provide system support and have absolutely [sic] no responsibility or authority to allocate time. I take full responsibility for my decision and if you receive any complaints, please direct them to me. If the content of this message is unclear in any way, I will be happy to discuss it in person. 30/

It is difficult to conceive of such a message, significantly titled by Bourianoff "Cube Usage Contention," being sent unless some dispute had arisen over allocating time on the hypercube. In addition, the vehement tone of the message evidences annoyance on the part of Bourianoff in response to a challenge to his management of the hypercube.

Bourianoff also testified that he knew nothing about Mehta's difficulties logging onto the hypercube over the Labor Day weekend. 31/ This assertion is also contradicted by the evidence. Pan testified that he told Bourianoff about Mehta's problems logging on over the Labor Day weekend, specifying that it was Mehta who was making the complaint. 32/ In doing so, Pan would have been following the instructions of Bourianoff in the electronic mail message cited above, which had been sent less than three weeks earlier.

Bourianoff, in carefully chosen words, denies Pan's claim that Pan told him that Mehta had complained about hypercube scheduling. He concedes that Pan and Ravishankar, Pan's supervisor, came to him on several occasions, saying that "they wanted the ability to allocate time. And they said that people were putting pressure on them. They refused to name the people." 33/ Bourianoff also concedes that Syphers came to him to discuss a problem Mehta had with the hypercube. Bourianoff characterized Syphers' discussion with him as "more of a request for information" than a complaint. 34/ It is apparent from his testimony that Bourianoff's claim that he knew of no complaints about the management of the hypercube is plausible only by using a very restricted definition of "complaint." During his testimony on the issue it was clear from Bourianoff's demeanor that he was answering questions by using carefully chosen words and was not being candid.

Even if Pan or Syphers did not name Mehta in relaying his complaints to Bourianoff, it would not have been difficult for Bourianoff to figure out that Mehta was the source of the complaints. Only about ten to fifteen people were using the hypercube at any one time. 35/ The majority of the users apparently came from Bourianoff's own group, which consisted of twelve people. 36/ Bourianoff could have easily, by process of elimination, determined that it was Mehta who took issue with the hypercube usage procedures.

Further evidence that Bourianoff knew of Mehta's complaints, is found in a memorandum Bourianoff issued for general

distribution on September 9, 1992, the day after Mehta complained to Pan. The memorandum stated:

The current policy regarding access to the cube is to encourage the widest possible utilization within the laboratory.... For short runs ... just log onto Sycamore and do it. The machine is available on a first come first serve basis. In order to get larger blocks of time for production runs, it is necessary to check with me so I can coordinate the work load. Up to the present time, it has been possible to fill all such requests promptly. When and if competing demands for time exceed the available resources, the mechanism exists to convene a committee of interested parties to help set priorities. Until such time however, I would like to handle the scheduling on an informal basis. 37/

Bourianoff's memorandum does not announce a new policy about the hypercube; it merely restates and, to some extent, defends the existing policy. It is difficult to see why Bourianoff would issue such a memorandum unless he was aware that was some dissatisfaction with the scheduling of the hypercube. The fact that the memorandum was issued the day after Mehta complained to Pan raises the strong inference that Bourianoff was aware of Mehta's complaint.

Retaliatory intent can be inferred not only from knowledge of whistleblowing activity by the official who effectuates the dismissal, but also from knowledge by an official who advises dismissal. Warren v. Department of Army, 804 F.2d 654 at 658 (Fed. Cir. 1986). If this were not the case, a contractor could easily evade the Whistleblower Regulations by delegating all dismissal decisions to an official who was insulated from day-to-day contact with the whistleblower. It is therefore immaterial whether Briggs knew about Mehta's complaints, because Syphers and Bourianoff knew and were instrumental in influencing Briggs to dismiss Mehta.

C. Mehta's disclosure as a contributing factor in his dismissal

URA also argues that "to state a claim under [the Whistleblower Regulations], an employee must suffer a reprisal or retaliation because of his or her disclosure.... In other words, [the Whistleblower Regulations require] a 'nexus' between the employees actionable disclosure and his or her termination." 38/ URA questions whether Mehta has established the "nexus" between his complaints and his dismissal.

Contrary to URA's assertion, the Whistleblower Regulations do not require the showing of a "nexus." Instead, they require that the complainant show that the protected disclosure was a contributing factor in a personnel action taken against him. 10 C.F.R. § 708.9 (d).

In order to clarify the meaning of "contributing factor," we look to a corresponding provision in the Whistleblower Protection Act (WPA) (Pub.L. No. 101-12, 103 Stat. 16, codified at various sections of 5 U.S.C.). The WPA protects employees of the federal government from reprisals for whistleblowing. The legislative history reveals that Congress intended the term "contributing factor" to have an expansive definition:

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

135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20).

Thus, the "contributing factor" test means that:

a personnel action, taken "because of" a protected disclosure, or "as a result of " a prohibited personnel practice ... may be taken "because of" or "as a result of" many different factors, only one of which must be a protected disclosure and a contributing factor to the personnel action in order for the [the whistleblower's] protection to take effect. Indeed, ... "any" weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the "contributing factor" test. It is thus evident ... that ... a whistleblower need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action....

Marano v. Department of Justice, 2 F.3d 1137 at 1140-41 (Fed. Cir. 1993) (emphasis in the original). Mehta has shown that the two principal figures in his dismissal, Bourianoff and Syphers, were aware of his disclosures and acted to have him dismissed only after they learned of the disclosures. We find that Mehta has therefore met the burden of showing that his disclosures were a contributing factor in his dismissal.

Mehta has shown that he made a protected disclosure about perceived mismanagement of the hypercube, and that he was dismissed from his employment. 39/ He has further shown that the disclosure was a contributing factor in his dismissal. We find therefore that Mehta has made prima facie case of retaliatory dismissal for whistleblowing.

VI. URA's defense that the dismissal was not retaliatory

A. URA's allegation that Mehta misused government property

The burden now shifts to URA to prove by clear and convincing evidence that it would have dismissed Mehta absent his whistleblowing. 10 C.F.R. 708.9(d). Throughout the proceeding, URA has advanced several different reasons for dismissing Mehta. None of them is credible.

URA first claimed that Mehta had misused government property. According to URA, Mehta's misuse consisted of running programs of personal interest in adaptive optics that were not relevant to the Laboratory's work. 40/ We find that the evidence does not support a credible claim of misuse by Mehta.

URA bases this charge on two incidents that occurred shortly before Mehta's dismissal. In the first incident, Syphers observed some materials that Mehta was printing on a Laboratory printer. Syphers noticed that the materials related to adaptive optics. 41/ In the second incident, Syphers, at Bourianoff's instigation, examined the directory of the computer at Mehta's work station. 42/ Syphers found that 86% of the disk space on Mehta's hard disk that contained files was occupied by files relating to adaptive optics. 43/

It is not clear whether, by misuse of "government property" URA refers to Mehta's computer work station or the hypercube. As to Mehta's work station, we are not at all persuaded that his activities constitute misuse of government property. We believe that the costs of storing files on Mehta's hard disk were de minimis. In addition, we do not believe the storage of the adaptive optics program files was an improper use of government property.

URA never established that Mehta's programs in adaptive optics could be fully differentiated from his work for the Laboratory. Mehta's primary function at the Laboratory was to produce computer codes. 44/ Mehta believed that he could modify codes from the field of adaptive optics, which he was familiar with, for use in accelerator physics. 45/ His belief is supported by the testimony of Frank Guy, a physicist at the Laboratory. Mehta gave Guy a program routine that he had originally developed for adaptive optics, but which Guy used in making calculations for the Laboratory's linear accelerator. 46/

Dr. Harvey Lynch, a physicist at the Laboratory, is another witness who testified that Mehta's programs were potentially relevant to the Laboratory's mission. Lynch had been assigned by URA to conduct an independent review of Mehta's dismissal. Lynch reported:

It is [Mehta's] position that [his computations on adaptive optics were] a platform to study a more general problem of dynamic control, and he believes that such control algorithms are of value to the [Superconducting Super Collider].... The fundamental problem is whether or not the work on dynamic control is applicable to the machine. I am not in a position to evaluate this question... On the face of it, the idea makes sense. I have a great deal of difficulty with the fact that Mehta apparently worked on such things for quite a while under the impression that it was useful, if in fact they are not useful. Apparently, no one told him they were not useful to the machine. If that is the case how is he supposed to know? He was hired at [the Laboratory] for his computing skills; he is not an accelerator physicist. 47/

Therefore, in view of the low cost and possible uses to the government, we do not believe the storage of Mehta's adaptive optics programs on his hard disk can be considered a misuse of government property.

Furthermore, we cannot agree that Mehta misused the hypercube. Mehta's use of the hypercube was minimal. The evidence shows that Mehta logged on to the hypercube five times in order to familiarize himself with how to compile, link, and run programs on it. 48/ Apparently, he was logged on for a very brief time and never used more than one node. 49/ Mehta is a highly- educated, experienced computational physicist who would have a legitimate interest in learning how to run programs on the hypercube. Even if the programs he ran were not directly related to the Laboratory's work, Mehta's effort to familiarize himself with parallel processing by running simple programs he had written in the past seems a valid and reasonable use of the hypercube. Bourianoff conceded that there were "legitimate things such as linking and computing" that one could learn by logging on to one node of the hypercube. 50/

We note also that the hypercube was available to persons outside the Laboratory; Bourianoff testified that a Professor Sugar of the University of Santa Barbara "ran extensively" on the hypercube. 51/ If someone outside the Laboratory could run programs unrelated to the Laboratory's mission, it is unclear why a scientist at the Laboratory should not have the same privilege.

There are two final circumstances supporting the conclusion that Mehta did not misuse government property. First, URA recognized that it is under a contractual obligation to report significant instances of misuse of government property to the DOE Inspector General. Steven Brumley, URA's general counsel at the Laboratory, admitted in January, 1993 that URA had not found grounds at that time to report Mehta to the Inspector General. 52/ At the hearing, Brumley conceded that URA has never reported Mehta's alleged misuse to the Inspector General. 53/

Second, the record shows that Mehta's work on adaptive optics was generally known to URA managers and that Mehta was never given any specific guidance regarding his use of government computers. 54/ It is simply not credible that URA had evidence of misuse that would warrant dismissing Mehta on the spot, but not enough information to discuss the matter with him prior to the dismissal, nor enough to fulfill its contractual obligation to submit a report to the Inspector General.

B. URA's allegation that Mehta was an unproductive employee

URA next purports to have dismissed Mehta because he was an unproductive or incompetent employee. 55/ At the hearing, both Briggs and Syphers testified to the inadequacy of Mehta's work. 56/ There is no corroboration in the evidence to support their testimony.

Mehta's performance was formally evaluated twice by URA. Both evaluations were written by Syphers. In the first evaluation, dated June 30, 1991, Mehta's overall performance was rated "fully satisfactory." 57/ The evaluation noted that Mehta had attended weekly accelerator physics classes. 58/

Syphers claimed at the hearing that he had little knowledge of Mehta's performance when he wrote the first evaluation because he had just moved to the Accelerator Theory Group. 59/ He said that he based the evaluation on nothing more than his 25 days as group leader, and did not consult with Chao, his predecessor as group leader. 60/ Chao, however, stated that he provided Syphers with input for Mehta's first evaluation. 61/ As Chao had merely moved to another position at the Laboratory, it seems improbable that Syphers would have been unable to get his evaluations of the group members. We see no reason, therefore, to question that Mehta's first evaluation accurately reflects his performance as jointly appraised at the time by Chao and Syphers.

Mehta's second evaluation, dated July 22, 1992, was written by Syphers only three months before the dismissal. The rating scale on this form differed from the one used in Mehta's first evaluation; Syphers gave Mehta an overall rating of "meets expectations." On the evaluation form, Syphers wrote "Naresh produces quality work in a timely manner. He brings new insights to accelerator physics and operational issues with his experience in optimization and control algorithms; creative and resourceful." 62/

Syphers attempted to downplay this evaluation at the hearing by relating that he had originally prepared an evaluation rating Mehta as less than satisfactory. No copy exists of the purported original evaluation. Syphers said that he had to go over the evaluation with Mehta right after Mehta's return from a vacation. Syphers claimed that he felt it was not right to give someone a less-than-satisfactory evaluation immediately after a vacation, so he tore up the original evaluation and wrote the satisfactory evaluation. We do not believe that Syphers could be so derelict in carrying out his supervisory responsibilities.

We find that Syphers' attempt to explain away Mehta's positive performance appraisals completely lacks credibility. Except for rationalizing statements made by URA managers after the dismissal, the evidence shows that Mehta held a satisfactory employment record. Even as late as August 1993, ten months after Mehta's dismissal, Syphers commented that, "Dr. Mehta's output from his work was to produce codes and papers. The codes developed by him were unique and original. They were not an extension or add-on to a previously produced code. Many of the codes ... take a long time to develop." 63/ In addition, two of Mehta's colleagues in the Accelerator Physics Group -- Drs. Kenneth Kauffmann and Theodore Garravaglia -- testified that the quality of his work was on a par with the work of other physicists at the Laboratory. 64/

Here again, we have a situation in which URA management alleges that Mehta's performance was a basis for immediate dismissal, but the record shows that management did not deem his performance unsatisfactory enough to discuss with him before the dismissal. We find URA's assertions unreasonable, and conclude that there is no evidence to support URA's allegation that Mehta was dismissed because of poor performance. The record clearly shows that the issue of the quality of Mehta's work was raised only after URA realized that the evidence would not sustain a charge of misuse of government property.

C. URA's allegation that Mehta's work was irrelevant

Finally, URA alleges that Mehta's work was not "relevant" to the work of the Laboratory. 65/ This allegation has the same defects as charges of Mehta's poor performance -- there is simply no evidence to support it, it was not considered important enough to have been discussed with Mehta before his dismissal, and it was developed only after Mehta was dismissed. In the 1992 performance evaluation, Syphers set a goal for Mehta to "continue present studies." URA now claims that, only 90 days later, these same studies were found unrelated to the Laboratory's mission. URA made no attempt to show that the Laboratory's mission had undergone such a rapid change.

VII. Conclusion

After considering all the testimony, we have arrived at several conclusions concerning the witnesses. We believe the leading figure in Mehta's dismissal was Bourianoff. Despite his assertion that he did not know about Mehta's complaints, we believe that Bourianoff knew, or could infer, that Mehta was critical of the management of the hypercube. The evidence indicates that Bourianoff allowed outside users to access substantial blocks of time on the hypercube and was very sensitive to criticism of his management of the machine. Realizing that Mehta was critical of his management, and that the outside use of hypercube would be difficult to explain to an investigator, Bourianoff decided to look at Mehta's file directory. He then reported to Syphers a series of half-truths that implied Mehta was misusing the hypercube. Mehta's dismissal soon followed.

After Mehta had been dismissed and it was apparent that the original charge of misuse of government property was untenable, URA managers tried to rationalize the dismissal with charges of poor performance and lack of productivity. These charges are unsupported by any evidence. We find that the real motive, therefore, was reprisal for Mehta's criticism of Bourianoff's management of the hypercube.

URA's testimony in defense of its treatment of Mehta is glaringly inconsistent. URA's managers assert that they dismissed Mehta because of the inadequacy or irrelevancy of his work. These managers would have us believe that Mehta had performed so poorly that they should dismiss him without bothering to hear his side of the matter. 66/ Yet these same managers worked with Mehta for two years without finding it necessary to talk with him about any deficiencies. We do not believe that URA's managers would have operated in such a self-contradictory manner.

Far from being clear and convincing, URA's evidence to establish a legitimate motive for dismissing Mehta is muddled and incredible. The inability of URA to set out a consistent account of the dismissal confirms our belief that the reasons it adduces for dismissing Mehta are pretexts. We find that URA has failed to meet its burden of showing by clear and convincing evidence that it would have dismissed Mehta absent his complaints about the management of the hypercube. We conclude therefore that URA violated the provisions of 10 C.F.R. Part 708 in dismissing Mehta.

It is Therefore Ordered That:

(1) Universities Research Association, Inc. (URA) shall reinstate Dr. Naresh Mehta (Mehta) to his former position as Scientist II or a comparable position.

(2) URA shall award Mehta all pay and benefits, including medical insurance payments, withheld from him due to the adverse actions taken against him by URA, retroactive to December 16, 1992, and all costs and expenses reasonably incurred by him in bringing Complaint No. SSC-93-0001 under 10 C.F.R. Part 708.

(3) Yona Rozen, attorney for Mehta, shall, no later than 30 days after the date of this Decision, submit to the Hearing Officer and to URA a full accounting of her hourly charges for attorney fees and any costs, expenses, and expert witness fees incurred in representing Mehta, including documentary evidence that the rates requested are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. URA shall reimburse Rozen for all such fees.

(4) URA shall remove from Mehta's personnel records all information that indicates that Mehta's employment with URA was terminated for cause.

(5) Within thirty days of the date of this Decision, and notwithstanding any appeal or request for review, URA shall submit to the Hearing Officer a schedule listing the amount or description of each item of restitution it proposes to render to Mehta in accordance with Paragraph 2 above, together with the manner in which it proposes to provide the restitution. If Mehta objects to the amount, description, or manner of provision of any of the items of restitution proposed by URA, or requests any item not proposed by URA, he shall submit a statement explaining such objection or request to the Office of Hearings and Appeals within 15 days of the receipt of the schedule from URA. The Office of Hearings and Appeals will then determine the proper amount and manner of provision.

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

Thomas L. Wieker

Deputy Director

Office of Hearings and Appeals

Date: March 17, 1994

Notes:

1/ Hearing Exhibit Mehta-1.

2/ Report of Investigation at 3.

3/ Hearing Exhibit Mehta-2.

4/ Report of Investigation at 3.

5/ "Acquisition Plan, Research Computer for the Superconducting Super Collider Laboratory, Accelerator Systems Division," Hearing Exhibit URA-8 at 10.

6/ Tr. at 343-44.

7/ Statement of Mehta, Exhibit 20 to Report of Investigation.

8/ See electronic mail message from Ben Cole to David Pan, dated July 29, 1991 (Exhibit 31 to Report of Investigation). The message provides that members of I&D, or the Instrumentation and Diagnostics Group, have priority in use of the hypercube over all other users. Bourianoff was head of a section within the I&D Group. Statement of Kauffmann, Exhibit 17 to Report of Investigation. After a reorganization, the I&D Group was dissolved and priority use of the hypercube was apparently assumed by members of Bourianoff's Machine Simulations and Corrections Group. Tr. at 132; cf. Hearing Exhibit URA-2 (Laboratory organization in October 1990) with Hearing Exhibit URA-3 (Laboratory organization in February 1993). All hypercube users at the Laboratory, including Mehta, had access to a version of "kick" that would terminate programs run by users outside the Laboratory. Tr. at 129.

9/ Tr. at 123; 125; 137; 154.

10/ Tr. at 117; 128; 159.

11/ Statement of Mehta, Exhibit 20 to Report of Investigation.

12/ See 42 U.S.C. 2201(b), 2201(c), 2201(i), and 2201(p); 42 U.S.C. 5814 and 5815; 42 U.S.C. 7251, 7254, 7255, and 7256.

13/ The Acquisition Letter also answers another argument that URA makes. URA claims that "following the [December 22 Decision and Order's] logic to its absurd end, URA's contract could have been modified today -- more than a year after URA's alleged acts of reprisal -- and Mehta would still be able to access its procedures. The drafters of 10 C.F.R. Part 708 could not have intended this sort of far-reaching retroactive effect." Post-Hearing Brief at 19. As the Acquisition Letter shows, the modification of all contracts that were going to be modified had to be completed by March 31, 1993, avoiding the "far-reaching retroactivity" that concerns URA.

14/ Pre-hearing Brief at 4.

15/ Pre-hearing Brief at 4.

16/ Pre-hearing Brief at 10

17/Tr. at 357-58.

18/ Tr. at 210.

19/ Electronic Mail Message from Mehta to David Pan, leader of the Laboratory's Programming and Analysis Section, dated September 8, 1992; Exhibit 2 to Report of Investigation (emphasis in the original).

20/ URA discusses at some length whether Mehta's complaints would have been protected by the public policy exception to the common-law right of an employer to terminate employment at will. Pre-hearing Brief at 7-10. Since this case arises under a federal regulation that specifically includes disclosures relating to mismanagement, we do not see how the analysis of a more restrictive common-law doctrine sheds any light on the issues. We note further that Mehta's allegations about the hypercube did not merely involve matters of URA's internal management. The hypercube cost nearly $1 million of federal funds, and the potential mismanagement of it is a legitimate concern of the DOE.

21/ Pre-hearing Brief at 13.

22/ Tr. at 35-40.

23/ Tr. at 112-115.

24/ Tr. at 146.

25/ Tr. at 158-59.

26/ Tr. at 122.

27/ Tr. at 123-25.

28/ Statement of Syphers, Exhibit 27 to Report of Investigation.

29/ Tr. at 126.

30/ Exhibit 30 to Report of Investigation (emphasis in the original).

31/ Tr. at 133.

32/ Sworn statement of David Pan submitted to the Office of Hearings and Appeals, February 25, 1994. Pan was out of the country during the hearing.

33/ Tr. at 138.

34/ Tr. at 149.

35/ Tr. at 128.

36/ Tr. at 112; 135.

37/ Exhibit 3 to Report of Investigation.

38/ Pre-hearing Brief at 11 (emphasis in the original).

39/ In fact, there is nothing in the record that indicates Mehta's employment has been formally terminated. It appears that he has been in a permanent leave-without-pay status since December, 1992. We find, however, that placement in such a status is the practical equivalent of dismissal for purposes of this proceeding.

40/ Report of Lynch, Exhibit 4 to Report of Investigation; Statement of Brumley, Exhibit 14 to Report of Investigation; Statement

of Chao, Exhibit 15 to Report of Investigation; Statement of Syphers, Exhibit 27 to Report of Investigation.

41/ Tr. at 181-83.

42/ Tr. at 182-83.

43/ Tr. at 184. It was never made clear what this 86% represented. Briggs testified that he did not even know what the 86% meant, although he considered it a factor in his decision to dismiss Mehta. Tr. at 56; 109.

44/ Statement of Syphers, Exhibit 27 to Report of Investigation.

45/ Report of Lynch, Exhibit 4 to Report of Investigation.

46/ Tr. at 415-17.

47/ Exhibit 4 to Report of Investigation. Lynch was requested to make his report after the October incident in Briggs' office and he completed it before Kreitz notified Mehta that the decision to dismiss was final. Lynch's report is critical of both the ground for dismissing Mehta and the procedures that URA took in dismissing him. Apparently, the report was ignored by URA's management. Lynch was asked to give an oral report at a meeting of URA managers, but stated that "my feeling coming out of the meeting was that Dr. Mehta was to be fired regardless of the results of my findings." Exhibit 19 to Report of Investigation.

48/ Tr. at 134; Statement of Bourianoff, Exhibit 13 to Report of Investigation.

49/ Tr. at 352.

50/ Tr. at 159-61

51/ Tr. at 129.

52/ Letter from Brumley to Yona Rozen, counsel for Mehta, dated January 19, 1993, Exhibit 8 to Report of Investigation.

53/ Tr. at 543.

54/ Tr. at 178-80

55/ Report of Lynch, Exhibit 4 to Report of Investigation; Letter of Brumley to Rozen, Exhibit 8 to Report of Investigation; Statement of Briggs, Exhibit 13 to Report of Investigation; Statement of Brumley, Exhibit 14 to Report of Investigation; Statement of Syphers, Exhibit 27 to Report of Investigation.

56/ Tr. at 38; 173. Briggs testified that his perception of Mehta's work was obtained from conversations with Syphers. Tr. at 39.

57/ Hearing Exhibit URA-13.

58/ In his testimony at the hearing, Syphers claimed that Mehta attended only a few of the accelerator classes in attempting to show that Mehta was an unmotivated employee. Syphers' testimony would seem to be contradicted by his words in the evaluation. Tr. at 174.

59/ Tr. at 169-70.

60/ Tr. at 217.

61/ Statement of Chao, Exhibit 15 to Report of Investigation.

62/ Hearing Exhibit URA-14.

63/ Statement of Syphers, Exhibit 27 to Report of Investigation.

64/ Statement of Kauffmann, Exhibit 17 to Report of Investigation and Tr. at 475 (Kauffmann); Tr. at 502 (Garravaglia).

65/ Letter from Douglas P. Kreitz, URA Personnel Director at the Laboratory, to Mehta, dated December 16, 1992, Exhibit 5 to Report of Investigation; Letter from Brumley to Rozen dated January 19, 1993, Exhibit 8 to Report of Investigation.

66/ Tr. at 78.