January 13, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision
Motion to Dismiss

Names of Petitioners: Vinod C. Chudgar
Savannah River Remediation, LLC

Dates of Filing: September 27, 2010
December 8, 2010

Case Numbers: TBH-0100
TBZ-0100

This Decision will consider a Motion to Dismiss filed by Savannah River Remediation, LLC ("SRR" or "Respondent"), the Management and Operating Contractor for the Department of Energy's (DOE) Savannah River Site (SRS), in connection with the pending Complaint of Retaliation filed by Vinod Chudgar ("Complainant" or "the complainant") against SRR under the Department of Energy's (DOE) Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The Office of Hearings and Appeals (OHA) assigned the hearing component of Mr. Chudgar's Part 708 Complaint proceeding, Case No. TBH-0100, and SRR's Motion to Dismiss, Case No. TBZ-0100. For the reasons set forth below, I have determined that SRR's Motion should be granted and that Mr. Chudgar's Complaint of Retaliation should be dismissed.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862, 12863 (1999). Its primary purpose is to encourage contractor employees to disclose information that they

believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations provide procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for, among others:

> II. 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 [the employee] reasonably believe[s] reveals--
>
> (i) A substantial violation of a law, rule, or regulation;
>
> (ii) A substantial and specific danger to employees or to public health or safety; or
>
> (iii) Fraud, gross mismanagement, gross waste of funds, or abuse of authority. . . .

65 Fed. Reg. 6319 (2000).

Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with DOE and are entitled to an investigation by an OHA investigator, an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

The complainant is a Principal Process Computer Analyst at SRR. On July 13, 2009, Mr. Chudgar filed a complaint with the Office of Civil Rights of the DOE Savannah River Operations Office (DOE/SR). In the complaint, Mr.Chudgar alleged that in April 2009, while employed by the predecessor contractor Washington Savannah River Company (WSRC), he engaged in protected conduct under 10 C.F.R. Part 708 and, as a result, was transferred to a non-engineering position in July 2009 when SRR won the contract. As a remedy for the alleged act of retaliation, the complainant sought reinstatement to an engineering position, disciplinary action against individuals who intimidated him, a copy of an investigation report, and the correction of a procedure. *See* Complaint (July 13, 2009) at 2. SRR filed its response to the Part 708 Complaint on October 9, 2009, arguing that Mr. Chudgar had not made a protected disclosure as defined by Part 708, that none of the decision makers had any constructive or actual knowledge of his complaint, and that his reassignment was not retaliatory and did not result in a materially adverse change in his employment.[1] The parties attempted mediation of the dispute, but mediation was not successful. The Employee Concerns Manager of the Savannah River Operations Office then forwarded the complaint to OHA in May 2010 for an investigation followed by a hearing.

[1] SRR also argued that it was improperly joined as a party, but DOE/SR rejected that argument and found that SRR was a proper party to this action. Letter from OCR to SRR (December 9, 2009).

The OHA Director appointed an Investigator who conducted an investigation into the allegations in Mr. Chudgar's complaint. On September 27, 2010, the investigator issued the Report of Investigation (ROI) in this case. In the ROI, the investigator identified two disclosures. First, Mr. Chudgar complained that a software change he was asked to archive was incomplete and could have put a worker in danger. With regard to the first disclosure, the investigator could not conclude from the evidence that the complainant reasonably believed that there was a substantial danger to employees or the public. As for the second disclosure, Mr. Chudgar complained that SRR violated a procedure because a safety committee had not approved the changes recommended in the software design package and thus it was not implemented according to approved procedure. He said that the Process Control Operation Support engineers were not following instructions to supersede the previous revisions when "baselining" the files.[2] The investigator concluded that the evidence suggested that there was no danger to employees or the plant from proceeding to baseline the files. The investigator also found that there was a factual dispute as to whether the complainant's reassignment to Principal Process Computer Analyst during the transition resulted in an adverse material change in his employment conditions that could be considered an act of retaliation. The investigator was not able to determine from the evidence that Mr. Chudgar reasonably believed that the software change posed a "substantial and specific danger" to public health or safety. When addressing the issue of whether the SRR decision makers had actual or constructive knowledge of Mr. Chudgar's complaint, the investigator found that it was likely that they did not. Moreover, the investigator concluded that it is likely that SRR would be able to offer "compelling evidence" that it would have reassigned Mr. Chudgar in the absence of any protected disclosure.

On December 8, 2010, SRR filed a Motion to Dismiss. *See* Motion to Dismiss (December 8, 2010). Mr. Chudgar filed a Response to the Motion on December 21, 2010. *See* Complainant's Response to Motion to Dismiss (December 21, 2010) (Response). SRR filed an additional affidavit on January 6, 2011. *See* Affidavit of Kim Cassara (January 6, 2011).

C. Factual Overview

Mr. Chudgar, who holds a masters degree in chemical engineering, has been employed at the Savannah River Site (SRS) since 1988. At SRS he held various jobs and, according to Mr. Chudgar, he was a design engineer earlier during his employment at SRS. In April 2009, he was a Senior Engineer A for Washington Savannah River Company (WSRC), then the prime contractor at SRS. Mr. Chudgar's job was to electronically file software and software revisions as they were created. This software was written and tested by design engineers, implementing engineers and software end users who are tasked with designing, implementing, critiquing and trouble-shooting the software. Mr. Chudgar acknowledged that he did not use his chemical engineering background to perform his duties as a Senior Engineer A, and other employees described his duties as clerical.

[2] Baselining is adding software revisions to the existing software in the library, thereby establishing a new baseline for the software or hardware.

In July 2009, SRR became the prime contractor for nuclear clean-up at SRS. During the transition from WSRC to SRR, a management team was selected to evaluate all applicants for employment under the new contract. The team members were SRR managers and other managers chosen based on their expertise in the various functional areas that had vacancies. From this team, "functional evaluation panels" were created to evaluate each applicant in a functional area. Each panel had three members: (1) a SRR functional lead; (2) a WSRC employee; and (3) an independent human resources contractor not employed by SRR or WSRC. All exempt WSRC employees had to apply for employment under the new SRR contract and each employee could apply for three jobs. SRR offered forms and assistance to employees through a resume resource center and also created a video that explained the application process. Applicants were asked to answer eight competency-based questions, and could also add supplemental information to their application. The panel restricted its evaluation to the application package—they did not review or accept performance evaluations, nor did they interview or solicit information from the applicant's managers or colleagues. The panel that evaluated Mr. Chudgar's application found it was not well-prepared and the responses were poorly written and difficult to understand. They rated the application very low and recommended that SRR not hire Mr. Chudgar. However, SRR hired all of the applicants. Over 500 applicants were offered engineering positions and 12 were placed in non-engineering positions. The twelve employees who were not offered engineering positions, including Mr. Chudgar, were offered other opportunities. The complainant was offered and accepted his current position as a Principal Process Computer Analyst.

II. The Legal Standard

The Part 708 regulations provide an administrative mechanism for resolving whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the complainant and the contractor with regard to their allegations and defenses, and prescribe the criteria for reviewing and analyzing the allegations and defenses.

A. The Complainant's Burden

It is the burden of the Complainant under Part 708 to establish, by a preponderance of the evidence, that he or she made a protected disclosure, participated in a proceeding, or refused to participate as described in 10 C.F.R, § 708.5, and that such act was a contributing factor to a retaliatory action 10 C.F.R. §708.9. [3] If Mr. Chudgar meets this threshold showing with regard to any of his alleged protected disclosures, he must then prove that at least one of his disclosures was a contributing factor to his reassignment to a non-engineering position or any other alleged act of retaliation. One way a complainant can meet this evidentiary burden is to provide evidence that "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of

[3] The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua Lucero*, Case No. TBH-0039 (2007), *citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990).

time that a reasonable person could conclude that the disclosure was a factor in a personnel action." *See David Moses*, Case No. TBH-0066 (2008): *Mark D. Siciliano*, Case No. TBH-0098 (2010).

B. The Contractor's Burden

If the complainant satisfies his evidentiary burden, the burden then shifts to the Contractor to show, by clear and convincing evidence, that it would have taken the same action absent any protected disclosures. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See Mark D. Siciliano*, Case No TBH-0098 (2010); *Casey von Bargen*, Case No. TBH-0034 (2007). OHA Hearing Officers have relied on the Federal Circuit for guidance in evaluating whether the contractor has met its evidentiary burden in a Part 708 case. *See David Moses*, Case No. TBH-0066 (2008); *Dennis Patterson*, Case No. TBH-0047 (2008). The Federal Circuit, in cases interpreting the federal Whistleblower Protection Act, which is the model for Part 708, examines: (1) the strength of the employer's reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees . . ." *See Kalil v. Dept. of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007).

III. The Contractor's Motion to Dismiss

In its Motion, the contractor argues that Mr. Chudgar's complaint should be dismissed for the following reasons:

1. Complainant has no evidence that he engaged in protected conduct; and

2. The officials taking the alleged retaliatory action did not have actual or constructive knowledge of Mr. Chudgar's complaint.

Motion to Dismiss at 1.

Under the Part 708 regulations, dismissal of a complaint for lack of jurisdiction or other good cause is appropriate if (1) the complaint is untimely; or (2) if the facts, as alleged in the complaint, do not present issues for which relief can be granted under Part 708, or (3) the complainant filed a complaint under state or other applicable law concerning the same facts that are alleged in the Part 708 complaint, or (4) the complaint is frivolous on its face, or (5) the complaint has been rendered moot by subsequent events; or (6) the Respondent has made a formal offer of relief that is equivalent to what could be provided as a remedy under Part 708. 10 C.F.R. § 708.17 (c). Our previous cases state that such a motion should only be granted if it is supported by "clear and convincing" evidence. *See also Fluor Daniel Fernald*, 27 DOE ¶ 87,532 at 89,163 (1999) (motion to dismiss should only be granted where there are clear and convincing grounds for dismissal); *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994) (describing dismissal as "the

most severe sanction that we may apply" and thus should be used sparingly). For the reasons discussed below, I will grant the contractor's motion to dismiss.

A. Whether There is Evidence of Protected Conduct

SRR alleges that Chudgar could not have reasonably believed that his disclosures concerned a substantial risk of harm to employees or the public or a substantial violation of law or regulation. In support of this argument, SRR explains that Chudgar's job was merely to act as a librarian for engineering software—i.e., to archive existing software and revisions to that software. He did not, according to SRR, have the background necessary to critique the software that he was tasked to file and he lacked the expertise to make an accurate assessment of the safety implications, if any, of the software changes.

1. Disclosure 1

According to the record, on April 8, 2009, Mr. Jim Coleman, Production Lead Engineer at WSRC, brought Mr. Chudgar a revision to enter into the library. That revision was titled CMT-0133. The revision contained schematics showing a software change (that complainant needed to record) and a hardware change that was implemented using a separate document.[4] This software change was intended to change the function of the pump used to move liquid from one storage tank to another. The software had been tested and accepted on April 7-8, 2009, and was actually in use prior to Mr. Coleman asking Mr. Chudgar to file the software. Little Affidavit at 4. Complainant knew that the software had been tested and accepted by two systems engineers. *Id*. Mr. Coleman had to make additional changes, but could not continue with his work until the changes in the software package were archived, thereby establishing a "baseline." Mr. Chudgar examined the schematics and realized that they depicted a hardware change but there was no documentation about the hardware change in the package. Since the documentation did not contain an explanation of the hardware change, Mr. Chudgar refused to archive the software. Mr. Chudgar refused because he believed that the documentation should contain an explanation of the hardware change in the package. Mr. Coleman explained that the hardware change was controlled by another document. However, Complainant refused to archive the software package and the men argued.

At this point, the facts are in dispute. SRR claims that Chudgar did not elevate the issue to management nor did he call for a "time out" or a "stop work."[5] Motion to Dismiss at 3. According to SRR, management was unaware of the dispute until Chudgar filed his complaint on April 13, 2009. However, Mr. Chudgar contends that on April 8, 2009, he called the Quality Assurance Manager, who advised Mr. Coleman to file a Non-Conformance Report (NCR) and enter his concern into the Site Tracking, Analysis and

[4] Significant software and hardware changes are controlled by a Design Change Form (DCF). Software changes are tracked using a Computer Program Modification Traveller (CMT).

[5] A "time out" is an informal process used to address safety concerns where an employee (1) feels uncomfortable in performing a task or (2) observes an unsafe condition that they want to correct.

Reporting (STAR) system.[6] The QA manager was not willing to provide further direction to Mr. Coleman and Mr. Chudgar without viewing the actual documents in question. The QA manager did not meet or speak with either man after the incident. There is no evidence that Mr. Chudgar or Mr. Coleman filed a NCR. In fact, Mr. Chudgar left the office for the weekend, assuming that Mr. Coleman would not continue with the changes. [7] Mr. Chudgar did not make any further report until April 13, 2009, when he filed his complaint. The Office of Employee Concerns then contacted WSRC management about the complaint, and the staff began an investigation of the concern. They also issued a timeout. Motion to Dismiss at 5. The investigation concluded that there was no safety concern and that the engineers could file an "as found" document in the library.[8] According to WSRC management, DOE also conducted an independent investigation and concluded that there was no safety concern. *See* Little Affidavit at 5.

Whether Chudgar reasonably believed that his disclosure revealed a substantial and specific danger to employees or the public can be decided after consideration of the available facts. There is evidence that he escalated the concern to the QA Manager. According to Mr. Chudgar, he believed that Mr. Coleman would not go forward with the changes after the conversation with the QA Manager and Mr. Chudgar then went home for the weekend. However, it is not clear why Mr. Chudgar did not file an NCR if he thought that someone could be hurt if the software package was archived as presented to him. This situation seems to be the type of event that merits a NCR—significant enough to report to management, but not urgent enough to call a time out. Further, even though Mr. Chudgar argues that the QA manager directed Mr. Coleman to file the report, it is not logical that Mr. Coleman, who did not believe there was any problem, would file such a report. Further, it is customary that the software packages presented to Mr. Chudgar for archiving have been tested by the design engineers prior to their transfer to the library for archiving. Thus, the evidence before me indicates that Mr. Chudgar's actions on that day do not reflect the actions of an individual who believed that archiving the software package would result in a substantial and specific danger to employees at SRR or to public health or safety. As a 20-year employee of the plant, he was familiar with the "time out" procedure available to any employee with a safety concern, yet he did not avail himself of this alternative. He did not identify a specific danger to the employees but rather alluded to a possible danger to anyone who may work on the hardware in the future. After Mr. Chudgar reported his concerns when he returned to work the following week, SRR management did call a time out to investigate his concern. Little Affidavit at 5. WSRC management determined that the software was functioning correctly but that the DCF needed a drawing reflecting a hardware change, as Mr. Chudgar had stated in his complaint. DOE also investigated the issue and concurred with the WSRC conclusion that there was no safety issue but that an "as found" drawing should be added to the DCF. Little Affidavit at 5.

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[6] A NCR is required when an item fails to satisfy required technical, design or quality requirements, is of indeterminate quality, is found to be suspect (counterfeit), has documentation deficiencies which render the item indeterminate, or meets one or more of the previous conditions but its continued use is required. The STAR system is available to all employees to identify and report safety concerns.

[7] Another engineer entered the changes in to the library after Mr. Chudgar left for the weekend.

[8] An "as found" document is an existing design document that defines and reflects what the field condition should be. It is placed into a DCF as a convenience for the user.

To sum up, no reasonable trier of fact could conclude that Mr. Chudgar had established by a preponderance of the evidence that the missing documentation at issue rose to the level of "a substantial and specific danger to employees or to public health or safety" under Part 708. Accordingly, I will dismiss Disclosure 1 from this proceeding.

2. Disclosure 2

On April 23, 2009, Mr. Chudgar amended his complaint arguing that WSRC had violated its procedure when it changed to a new operating system on its computers. The change involved approximately 500 files, much larger than the typical software update that Mr. Chudgar was assigned to catalog and record. Mr. Chudgar reviewed the change documentation and alleged that it violated WSRC procedure because it was lacking the proper approvals by the Facility Operations Safety Committee (FOSC). Although the software changes associated with the concern had been tested successfully off line and were scheduled for online test on April 27, 2009, WSRC management asked a team of engineers ("the investigation team") to review the changes in response to Mr. Chudgar's amended complaint.

According to WSRC, the FOSC must approve only changes which are "Safety Significant," and only 20 pages of the 500 page package were safety significant. Little Affidavit at 6. Those pages had indeed been approved. Mr. Chudgar's manager, Mr. Tipton, asked Mr. Chudgar to identify his concerns and notify the appropriate manager if modifications were made but had not been captured in the change document. However, Mr. Chudgar did not identify any safety concerns and, according to Mr. Tipton, stated that he was satisfied with the package. The fact that Mr. Chudgar could not articulate his concerns when asked undermines the reasonableness of any belief he may have held about the new system violating company procedures.

The investigation team could not determine Complainant's concern and contacted him for clarification. Mr. Chudgar complained that WSRC had not followed proper procedure, which was to record the final software product after multiple software revisions, and not catalog every revision to the software. For the hardware changes, Mr. Chudgar complained that they should be revised every time there was a design change instead of only adding drawings that depicted the change. He also stated that the WSRC engineers did not follow WSRC procedures as set forth in Manual 2s, Procedure 1.3. Nonetheless, Mr. Chudgar did not provide any additional technical information or clarification of a safety issue, and the team still did not understand his concern. Little Affidavit at 6.

Based on the evidence, I conclude that Mr. Chudgar's second disclosure was actually a dispute with management over proper procedure and does not rise to the level of a "substantial violation of a law, rule, or regulation." Mr. Chudgar complained that FOSC had not approved the change and that the method of cataloguing software was not correct. However, FOSC had approved that portion of the change package that was "safety significant." Thus, his concern was not reasonable since the contractor's safety committee had examined and approved the documents in question and he knew that the

software changes had been successfully tested. Complainant also alleged that WSRC did not follow its own procedures. However, WSRC contends that Manual 2s, Procedure 1.3 was not applicable to the engineering procedures that Mr. Chudgar catalogued but actually set forth administrative procedures for Operations and Maintenance Activities. Further, Mr. Chudgar could not articulate to the investigation team any safety problem he found with the new changes. Thus, I cannot find that the disclosures by Mr. Chudgar rise to the level of protected disclosures. There is no evidence that they reveal a substantial violation of law, rule or regulation.[9] Accordingly, I will dismiss Disclosure 2 from this proceeding. [10]

IV. Conclusion

I find that the two disclosures set forth in Mr. Chudgar's Complaint of Retaliation do not rise to the level of a protected disclosure under 10 CFR 708.5(a). Accordingly, I conclude that SRR's Motion to Dismiss should be granted and Mr. Chudgar's Complaint of Retaliation should be dismissed.

It Is Therefore ORDERED That:

(1) The Motion to Dismiss filed by Savannah River Remediation, LLC on December 8, 2010, Case No. TBZ-0100, be and hereby is granted.

(2) The Complaint filed by Vinod C. Chudgar against Savannah River Remediation, LLC, on July 13, 2009, Case No. TBH-0100, be and hereby is dismissed.

(3) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the

[9] According to Albert Zaharia, an engineer who does the same job as Complainant, the files do not need to be opened except to compare the software version to the paperwork. Reviewing the electronic files is not part of the CM process.

[10] Even assuming, *arguendo*, that either of the two disclosures could be considered protected under Part 708, I find that neither was a contributing factor to an act of retaliation. Mr. Chudgar was unable to show that (1) the person taking the adverse action had actual or constructive knowledge of the protected disclosure and (2) the alleged retaliatory act occurred sufficiently soon after the protected disclosure to permit a reasonable inference that the protected disclosure was a contributing factor. *See generally, Dean P. Dennis*, TBA-0072 at 4 (2009). SRR submitted affidavits from two of the three panel members who evaluated Mr. Chudgar's application, and both stated that they did not know that he had filed a Part 708 complaint. The third panel member was an independent contractor who did not work for either SRR or WSRC. Furthermore, Mr. Chudgar's reassignment to a non-engineering position is not an act of retaliation under Part 708. An employment action is not "retaliation" unless it results in a materially adverse change in employment conditions comparable to a termination of employment, a demotion evidenced by decrease in wages or other negative action with respect to the compensation, terms, condition or privileges of employment. *See Dennis Patterson*, Case No. TBH-0047 (2008). There was no negative effect on the terms and conditions of the complainant's employment because his new position maintained his salary and grade level.

decision in accordance with 10 C.F.R. § 708.32.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: January 13, 2011