April 28, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motion to Dismiss
Initial Agency Decision

Names of Petitioner:	Eugene N. Kilmer Los Alamos National Security, LLC
Dates of Filings:	March 1, 2010 March 24, 2011
Case Numbers:	TBH-0111 TBZ-0111

This Decision will consider a Motion to Dismiss filed by Los Alamos National Security, LLC (LANS), the Management and Operating Contractor for the Department of Energy's (DOE) Los Alamos National Laboratory (LANL), in connection with the pending Complaint of Retaliation filed by Eugene N. Kilmer against LANS under the DOE's 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 Kilmer's Part 708 Complaint proceeding, Case No. TBH-0111, and LANS's Motion to Dismiss, Case No. TBZ-0111. For the reasons set forth below, I will grant LANS's Motion and dismiss Kilmer's Complaint.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established 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, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1)-(3). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower Complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), 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

Kilmer filed a Part 708 Complaint on September 17, 2010, with the Employee Concerns Program (ECP) at the National Nuclear Security Administration's Service Center (NNSA/SC) in Albuquerque, New Mexico. In his Complaint, Kilmer alleged that, over the period 2006 through 2010, he made protected disclosures and refused to engage in improper activities. As a result, the complainant alleges, he suffered harassment by his supervisors and ultimately was constructively discharged by LANS. LANS filed a response to the Part 708 Complaint on October 18, 2010, in which it contended that nothing "in the complaint describes or even suggests that Mr. Kilmer engaged in any actions that meet the requirements of" Part 708. Letter from Christine Chandler, Practice Group Leader, LANS, to Eva Glow Brownlow, ECP Manager, NNSA/SC. The ECP Manager transmitted the Complaint to OHA for an investigation, to be followed by a hearing, stating that LANS did not wish to pursue an informal resolution of the complaint.

On November 22, 2010, the OHA Director appointed an Investigator (OHA Investigator), who conducted an investigation into the allegations contained in Kilmer's Complaint. The OHA Investigator issued a Report of Investigation (ROI) on March 1, 2011. In the ROI, the OHA Investigator noted that the complainant alleged that his disclosures revealed violations of DOE standard STD 1073-2003 and LANL Procedures P1020 and P1020-2. The Investigator found it uncertain whether violation of a "standard" would constitute a violation of a "rule" for purposes of Part 708. ROI at 10 (citing *Rusin v, U.S. Dep't of Treasury*, 92 M.S.P.R. 298 (2002)). Assuming that it would for purposes of the report, the Investigator found that there remained a significant question as to whether the alleged disclosures sought to inform management officials that a standard was being broken, let alone that there was a "substantial" violation of a standard. *Id.* at 10-11. With regard to Kilmer's allegations that he refused to engage in certain activities, the Investigator found that, in the absence of additional evidence, the refusals alleged would not be protected under Part 708. *Id.* at 12.

Immediately after the Investigator issued his report, the OHA Director appointed me as Hearing Officer in this case. On March 14, 2010, I sent a letter to the parties and asked them to submit briefs addressing specific issues in the case. Kilmer submitted his brief on March 21, 2011. On March 23, 2011, LANS submitted its brief, in which it requested that the Complaint be dismissed. I then provided the parties an opportunity to submit replies to the briefs and the Motion to Dismiss. The complainant submitted replies on March 27 and 29, 2011, and LANS tendered its reply brief on April 1, 2011.

C. Factual Overview[1]

[1] This overview includes many facts set forth in the ROI, but does not restate the facts therein that are not relevant to the issues I address in ruling on the present Motion to Dismiss.

Kilmer, prior to resigning his position in September 2010, was employed by LANS as a mechanical designer. His first alleged protected activity occurred in 2006, when he told his manager that making certain changes to a drawing would violate applicable DOE standards. Kilmer was assigned to "W-11" (a work group at the Los Alamos facility) and was working on changes to a drawing, which then had to be reviewed by a "checker." Peggy Volz, the checker for this drawing, requested various additional changes. Kilmer refused, stating that the changes were not authorized. Ultimately, Kilmer's direct supervisor, Christopher Scully, Group Leader, W-11, directed Kilmer to make Volz's changes and Kilmer complied.

The complainant alleges that he made a second protected disclosure in 2007. Kilmer Interview at 1-2; Complaint at 3. Kilmer was assigned to develop training materials for a new software called "Windchill," a document management program that would store drawings and documents, as well as track changes to the documents. Scully instructed Kilmer to incorporate into the training materials the new design definition release procedures used by W-11. *Id.* The complainant alleges that he "protested the implementation of a new drawing release procedure that specified that document handlers routinely modify released documents without authorization." Brief attached to E-mail from Eugene Kilmer to Steven Goering, OHA (March 21, 2011) ("Complainant's Pre-Hearing Brief") at 3.

Kilmer asserts that he made another alleged protected disclosure in 2007 when he was working as a liaison between two separate LANS groups, "W-11" and "DX-1." Letter from Eugene Kilmer to Richard Cronin, OHA Investigator (November 27, 2010) at 1. The complainant states that, at a meeting, he pointed out to the group leader of DX-1, Daniel Montoya, that DX-1's current practice of storing drawings and configuration management information on an Excel spreadsheet, instead of using the Project Data Management computer system, was a dangerous practice, *id.* at 1, and that the DX-1/Excel system was "no good." Kilmer Interview at 2.

In 2008, Kilmer was tasked to make a drawing for a LANS department headed by William Bearden, which required approval by a checker, in this case Volz. Kilmer Interview at 3. Kilmer requested Volz's approval four or five times, but she rejected his approval requests and asked for changes. While Kilmer concedes that some of Volz's comments were valid, he viewed the process as taking too much time. *Id.* Kilmer released the drawing without Volz's changes, *id.*, and contends that doing so was an action protected under Part 708. Complainant's Pre-Hearing Brief at 3.

Kilmer alleges that he also made a protected disclosure in April 2010. Kilmer received a copy of a proposed document control procedures document from Jan Redding. Letter from Eugene Kilmer to Richard Cronin, OHA Investigator (November 27, 2010) at 2; Kilmer Interview at 4. Kilmer believed that the proposed procedures were poorly written and conceived, in part, because the procedures would allow unauthorized changes to a document and "violated basic configuration management precepts." Letter from Eugene Kilmer to Richard Cronin, OHA Investigator (November 27, 2010) at 2; Kilmer Interview at 4. Kilmer complained to Brandon Gabel and Manuel Garcia, Scully's deputy, in an attempt to stop implementation of the proposed procedures. Kilmer sent the entire Weapons Department an E-mail with a marked up version of the procedures. Kilmer Interview at 4.

In the summer of 2010, Kilmer was supporting the "W-7" group at LANL as a designer, documenting procedures, and producing drawings of gas transfer components. Kilmer Interview at 5. The complainant alleges that, in connection with this work, he told Scully in August 2010 that, "despite his directions, I would have to make some required changes to a drawing on which I was working." Complainant's Pre-Hearing Brief at 4. On August 25, 2010, when he arrived at his office,

Kilmer discovered that he had been removed from the Windchill system he was using for the drawing. Kilmer Interview at 6.

According to Kilmer, in a subsequent meeting that day, after learning that he was removed from the Windchill system because of the changes he had made to the drawing, Kilmer told Scully that his changes were necessary to avoid others making unauthorized changes to the document after its release. Kilmer also alleges telling Scully that W-11 practices such as stamping a "released" document with "Preliminary Version" or "Not for Use in Manufacturing" had been "obviated" by a product data management system like Windchill. Kilmer Interview at 7. Kilmer alleged that such practices would allow "anyone to change a document" with or without authorization. Kilmer Interview at 7. Kilmer further asserts that, during their August 25, 2010, meeting, he told Scully that he was going to inform Scully's superiors as to what was being done to "released" documents. Kilmer Interview at 7. According to Kilmer, Scully responded that he was free to speak to anyone he wanted. Kilmer Interview at 7.

After the meeting, Kilmer went to speak with John Benner, the Weapons Division Leader. Benner and Steve Renfro, the Weapons Division Deputy Leader, were in Renfro's office. Benner invited Kilmer inside Renfro's office and asked if he could do anything for Kilmer. Kilmer asked Benner, "Do you think it's right for a released drawing to be checked out and back in three more times with approximately 25 modifications being made to it along the way?" Kilmer Interview at 7.

D. LANS's Motion to Dismiss

In its pre-hearing brief, LANS argues that Kilmer's Complaint "fail[s] to meet the threshold requirements of Part 708," and requests that the Complaint be dismissed. Memorandum attached to E-mail from Ariel A. Ramirez to Steven Goering, OHA (March 23, 2011) ("Respondent's Pre-Hearing Brief") at 1, 2. More specifically, LANS contends that none of the actions described in Kilmer's Complaint are protected under Part 708. *Id.* at 7.[2]

The Part 708 regulations do not include procedures and standards governing motions to dismiss. In the absence of such standards, the Federal Rules of Civil Procedure, though not governing this proceeding, may be used for analogous support. *See, e.g., Billy Joe Baptist*, Case No. TBH-0080 (2009); *Edward J. Seawalt*, Case No. VBZ-0047 (2000) (applying standards of Fed. R. Civ. P. 56 to Motion for Summary Judgment).[3] The motion to dismiss filed by LANS in the present case is most analogous to what would, under the Federal Rules, be a motion to dismiss for "failure to state a claim upon which relief can be granted . . . ." Fed. R. Civ. P. 12(b)(6); s*ee Hansford F. Johnson,* Case No. TBZ-0104 (2010) (applying standards of Fed. R. Civ. P. 12(b)(6) to Motion to Dismiss).
The Supreme Court has held that, to survive a Rule 12(b)(6) motion, a Complaint must plead "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While the Complaint "does not need detailed factual allegations, . . . [f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption

[2] The Respondent's Pre-Hearing Brief also argues that Kilmer has not alleged actions that rise to the level of retaliation under the Part 708 regulations, *id.* at 7-10, but I do not address those arguments in this Decision, as I find below that the complainant has not made a plausible claim of conduct that is protected from retaliation under Part 708.

[3] Decisions issued by the OHA are available at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

that all of the Complaint's allegations are true (even if doubtful in fact), ..." *Id.* at 555 (citations omitted).

In addition, prior cases of this office instruct that such a motion should be granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact on a more complete record. *Curtis Broaddus,* Case No. TBH-0030 (2006); *Henry T. Greene*, Case No. TBU-0010 (2003) (decision of OHA Director characterizing this standard as "well-settled"); *see also David K. Isham*, Case No. TBH-0046 (2007) (complaint may be dismissed where it fails to allege facts which, if established, would constitute a protected disclosure); *accord Ingram v. Dep't of the Army*, 114 M.S.P.R. 43, 47 (2010) (finding Merit Systems Protection Board jurisdiction under federal Whistleblower Protection Act where complaint makes non-frivolous allegation that he engaged in whistleblowing activity by making a protected disclosure, and the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action).

Applying the relevant standards, for the reasons explained below, I will dismiss the present Complaint. Even assuming that the relevant facts alleged by the complainant are true, those facts do not support a plausible claim for relief under Part 708.

II. Analysis

The Part 708 regulations provide that a contractor employee 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, your employer, or any higher tier contractor, information that you reasonably believe reveals--
>
>> (1) A substantial violation of a law, rule, or regulation;
>>
>> (2) A substantial and specific danger to employees or to public health or safety; or
>>
>> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --
>
>> (1) Constitute a violation of a federal health or safety law; or
>>
>> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5. In directing the parties to brief certain issues in this case, I asked the complainant to identify which of the above provisions of section 708.5 he believed applies to each of his alleged

protected actions, and why. Letter from Steven Goering to Christine Chandler, Office of Laboratory Counsel, LANL, and Eugene Kilmer (March 14, 2011). In his brief, the complainant alleged that his actions were protected by sections 708.5(a)(1), (a)(3), and (c)(1). I address each section in turn below.

A. The Actions Alleged by the Complainant are Not Protected by Section 708.5(a)(1)

Section 708.5(a)(1) protects the disclosure of information that a complainant reasonably believes "reveals . . . a substantial violation of a law, rule, or regulation." In his Complaint, and in response to a request from the OHA Investigator for a concise lists of Kilmer's protected disclosures and why they are protected, the complainant references DOE standard STD 1073-2003 and LANL Procedures P1020 and P1020-2. Complaint at 1, 4; Letter from Eugene Kilmer to Richard Cronin, OHA Investigator (November 27, 2010). As noted above, the ROI questions whether violation of a "standard" would constitute a violation of a "rule" for purposes of Part 708. ROI at 10.

In a analogous case decided under the Whistleblower Protection Act (WPA), upon which Part 708 is modeled, the Merit Systems Protection Board addressed the question of whether certain agency documents constituted "rules" for purposes of the WPA. *Rusin v. U.S. Dep't of Treasury*, 92 M.S.P.R. 298, 305 (2002). The Board stated that resolution of this issue "cannot be based merely" on the titles of the documents in question, and that a "more substantive examination of these documents is required." *Id.*

One of the documents at issue in *Rusin*, a Procurement Instruction Memorandum (PIM), contained a "Don't Buy List" consisting of "17 sections, each entitled a 'rule,' which prohibited the purchase of various items." *Id.* The other, regarding the Government Commercial Credit Card Program (GCCCP) described "in detail the conditions and responsibilities governing the proper use of the government credit card, . . . and the criminal and civil penalties for improper use of the card." *Id.* Though not adopting a "a specific definition of a 'rule' here," *id.* at 306, the Board found that "the content and purpose of the PIM List and the GCCCP strongly support a finding that these documents were rules," within the meaning of the WPA. *Id.* at 305.

Though LANS does not cite *Rusin* in its pre-hearing brief, I find the analysis of the Board in that case lends support to LANS's contention that a "law, rule, or regulation equates to a requirement." Respondent's Pre-Hearing Brief at 2; *see Arun K. Dutta*, Case No. TBH-0088 (2009) (considering as within scope of section 708.5(a)(1) an internal company rule regarding when documents "shall be" rechecked and submitted for further review). Conversely, as in *Rusin*, these terms could equally equate to a prohibition of an action. Thus, it would certainly be more difficult to find that a document not containing mandatory language, either requiring (e.g., "shall") or prohibiting (e.g., "shall not") an action, is a "law, rule, or regulation" as those terms are used in 10 C.F.R. § 708.5.

1. As Applied to Activities at LANL, DOE Standard STD 1073-2003 is not a "Law, Rule, or Regulation" Under Section 708.5(a)(1)

With the above in mind, I note that STD 1073-2003 contains the following passage:

> The verbs "should," "may," and "must" are used throughout this standard. While our intent is that the purpose of this standard is to provide guidance, not requirements, some organizations may agree to have this standard included in the contract or in other commitments as a requirement. If this standard is listed as a requirement for a specific facility or activity or set of facilities or activities, the DOE contractor or other organization required to meet this standard must comply with all of the applicable provisions that include the word "must."

STD 1073-2003 at 1-5.

There is nothing in the record to support a finding that LANS, W division, or W-11, has ever agreed to have STD 1073-2003 "included in the contract or in other commitments as a requirement." *See also* E-mail from Christine Chandler, LANS, to Steven Goering (April 18, 2011) (forwarding e-mail from employee of LANL's contract office stating that there is "no record that the subject DOE STD has been in the LANS prime contract"). As such, I cannot find that DOE standard STD 1073-2003 is a "law, rule, or regulation" as those terms are used in Part 708, at least as applied to the parties in the present case.

2. LANL Procedures P1020 and P1020-2 Can Be Considered "Rules" Within the Scope of Section 708.5(a)(1)

LANL Procedures P1020 and P1020-2, in contrast to STD 1073-2003, appear to apply to all LANL organizations, P1020 stating that it "applies to all LANL employees and subcontractors," P1020 at 1, while the stated purpose of P1020-2 "is to provide Document Control Program (DCP) and implementation requirements to Laboratory organizations." P1020-2 at 1. LANS does not contend that these two policies do not apply to the employees of LANL's W Division, whose activities are the subject of the present complaint. Rather, LANS argues that the "LANL Procedures are broad, general procedures whose purpose is to impose institutional requirements. They are not legal requirements." Respondent's Pre-Hearing Brief at 3.

Though LANS does not explain what it believes would distinguish a mere "requirement" from a "legal requirement," or why that is relevant in this case, both P1020 and P1020-2 are replete with mandatory language. When asked by the OHA Investigator to identify the specific sections of these procedures that were allegedly violated, the complainant cited a number of examples of such language. He referenced a passage from P1020 providing that the "receipt or preparation, issue, and change of documents . . . must be controlled to assure that the most current documents are being used." P1020 at 2. In P1020-2, Kilmer highlighted statements that certain documents "must be placed under formal change control," P1020-2 at 1, and that organizations "must establish a process for preparing, reviewing, approving, distributing, using, and revising documents that specify requirements or prescribe activities important to the implementation and execution of work; and provide evidence of the acceptability of the items used or produced in the execution of work." *Id.* at 3. Based on their actual text, I find that at least these portions of both P1020 and P1020-2 can reasonably be considered "rules" for purposes of Part 708. *See Dutta, supra.*

3. The Complainant Did Not Disclose Information That He Could Have Reasonably Believed Revealed a Substantial Violation of P1020 or P1020-2

Having found that P1020 and P1020-2 can be considered "rules" under section 708.5(a)(1), I now must consider whether any of the alleged actions of the complainant constitute a disclosure of

information that he reasonably believed revealed a substantial violation of P1020 or P1020-2. Of the seven protected actions alleged by Kilmer, and described in section I.C above, the following five are alleged disclosures of violations of P1020 and P1020-2:[4]

> (1) In 2006, Kilmer contended, in response to the direction of Volz, that making changes to a drawing not listed on the Engineering Authorization constituted unauthorized changes to a document.
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> (2) In 2007, Kilmer protested the implementation of drawing release procedures specifying that document handlers would make unauthorized changes to documents.
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> (3) In April 2010, Kilmer criticized a proposed document control procedure.
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> (4) In August 2010, Kilmer told Scully that, despite Scully's directions, he would have to make changes to a drawing that were necessary to avoid having to make unauthorized changes to documents.
>
> (5) Also in August 2010, Kilmer told Scully that he was going to inform Scully's superiors about unauthorized changes to documents, and in a subsequent meeting with Weapons Division Leader John Benner, Kilmer asked Benner whether he thought it was right for a released drawing to be checked out and back in three times during which approximately 25 modifications are made to the drawing.

Because a complainant's belief underlying an alleged protected disclosure must be held "reasonably" in order for the disclosure to be protected under section 708.5, I must consider the complainant's disclosures from the perspective of a disinterested person. *See Mark D. Siciliano*, Case No. TBH-0098 (2010) (finding disclosure not protected where not communicated in a way that a "disinterested person" would have construed complainant's comments as alleging an abuse of authority); *accord Heining v. General Serv. Admin.*, 116 M.S.P.R. 135, 143 (2011) ("proper test for determining whether an employee had a reasonable belief that his disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, . . .").

In the present case, for several reasons, I cannot find that a disinterested person would have construed that any of the complainant's five disclosures listed above revealed a substantial violation of P1020 or P1020-2.

First, in his original September 2010 Complaint, Kilmer describes the five disclosures at issue, but gives very little indication that he believed his disclosures revealed a violation of P1020 or P1020-2. In fact, the Complaint never mentions P1020, and refers to P1020-2 only once, in reference to the third disclosure listed above, Kilmer's criticism of a proposed document control procedure. Moreover, even as to that disclosure, his Complaint simply states *his present opinion* that the

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[4] One of the remaining two alleged protected actions (in 2007) is identified by the complainant as a disclosure of information revealing a violation of STD 1073-2003. Complainant's Post-Hearing Brief at 3. I cannot find this disclosure to be protected, as I have found above that STD 1073-2003, as applied to the present case, is not a "law, rule, or regulation" as those terms are used in Part 708. The other remaining action, the release of a drawing in 2008, is not a disclosure and so is not addressed here, but I consider below whether it would be protected under other provisions of section 708.5.

proposed procedure violated P1020-2, not that he conveyed this opinion *at the time he criticized the procedure in April 2010*. Indeed, Kilmer's April 2010 e-mail criticizing the procedure neither states, nor implies, an opinion that the procedure violated any law, rule, or regulation. E-mail from Eugene Kilmer to "w-all@lanl.gov" (April 19, 2010) (submitted as attachment to Respondent's Pre-Hearing Brief).

Second, as noted above, in response to a request from the OHA Investigator for a concise lists of Kilmer's protected disclosures and why they are protected, the complainant references P1020 and P1020-2. Letter from Eugene Kilmer to Richard Cronin, OHA Investigator (November 27, 2010). However, he does so only in the context of stating his present opinion that certain practices violated P1020 and P1020-2. *Id.* at 1-2. He never states that he related this opinion contemporaneously with any of his alleged disclosures, or even that he held the opinion at the time of the disclosures. Neither do the notes of the OHA Investigator's interview with Kilmer, which were reviewed and edited by the complainant after the interview, describe disclosures that reference violations of P1020 or P1020-2. Kilmer Interview at 1-8. Finally, the complainant's Pre-Hearing Brief, similar to his earlier response to the OHA Investigator, again states his present opinion that "unauthorized document changes" violate P1020 and P1020-2, but does not allege that he expressed this opinion as part of any alleged disclosures. Complainant's Pre-Hearing Brief at 3-4.

Thus, based on the complainant's own description of his disclosures, I cannot find that a disinterested person could reasonably conclude that any of the Kilmer's five alleged disclosures listed above would have revealed a substantial violation of P1020 or P1020-2.[5]

Moreover, even if the individual had, with each of these alleged disclosures, explicitly stated that the practice with which he took issue violated a rule, I note that the substance of what he disclosed was not the practices themselves, but merely his opinion that those practices facilitated "unauthorized document changes."

Analyzing a similar issue under the WPA, the U.S. Court of Appeals for the Federal Circuit concluded that the term "disclose" means "to reveal something that was hidden and not known." *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1349-50 (Fed. Cir. 2001). The court also found it "quite significant that Congress in the WPA did not use a word with a broader connotation such as 'report' or 'state.'" *Id.* at 1350. Thus the court held that reporting to a wrongdoer that "there has been misconduct by the wrongdoer . . . is not making a 'disclosure' of misconduct. If the misconduct occurred, the wrongdoer necessarily knew of the conduct already because he is the one that engaged in the misconduct." *Id.*

In a footnote to the above text, the court adds a point that is directly relevant to the present case:

> To be sure, there may be situations where a government employee reports to the wrongdoer that the conduct of the wrongdoer is unlawful or improper, and the wrongdoer, though aware of the conduct, was unaware that it was unlawful or

[5] On March 29, 2011, Kilmer sent me an email stating that he had "researched and attached several more requirements documents describing LANL's responsibilities in the functional areas of document change control and configuration management." Email from Eugene Kilmer to Steven Goering (March 29, 2011). However, the relevant question here must be the reasonableness of the complainant's belief *at the time he alleges to have disclosed information*. If the complainant had no reasonable basis for believing that there was violation of a rule at the time of his disclosure, he certainly cannot remedy that by finding a basis for his belief after the fact.

> improper. Nonetheless, the report would not be a protected disclosure. It is clear from the statute, 5 U.S.C. § 2302(b)(8)(A), that the disclosure must pertain to the underlying conduct, rather than to the asserted fact of its unlawfulness or impropriety, in order for the disclosure to be protected by the WPA.

Id. n.2.

In the present case, for example, the complainant criticized W Division's Design Definition Release Process, W-11-SE-0003U (formerly W-SE-0014). This process became effective on February 14, 2007, states that it applies to all employees within W Division, and bears written initials indicating approval of the process by both Group Leader Scully and Weapons Division Leader Benner. The complainant identifies certain steps in this process, as set forth in the document, and states that "[i]n order to comply with this procedure, all designers have been granted the administrative privileges required to bypass the product data management's built in prohibition against allowing released documents to be modified." Complainant's Pre-Hearing Brief at 2-3.

Thus, what the complainant's disclosures amount to is pointing to established procedures of W Division (in the case of the second, fourth, and fifth disclosures listed above), or proposed procedures (in the case of the third disclosure), and registering his disagreement with those procedures.[6] For the same reasons noted by the court in *Huffman,* even if the complainant had couched his disagreement by stating that the procedures violated a law, rule, or regulation, the mere expression of this opinion would not be a "disclosure" under Part 708.

In sum, as I discuss above, I find that STD 1073-2003 is not, as to LANL, a "law, rule, or regulation" as those terms are used in Part 708, and that the complainant did not disclose information that he could have reasonably believed revealed a substantial violation of LANL Procedures P1020 or P1020-2. I therefore conclude that the actions alleged by the complainant are not protected under section 708.5(a)(1).

B. The Actions Alleged by the Complainant are Not Protected by Section 708.5(a)(3)

Section 708.5(a)(3) protects the disclosure of information that a complainant reasonably believes "reveals . . . fraud, gross mismanagement, gross waste of funds, or abuse of authority." In his Pre-Hearing Brief, responding to my request that he identify the specific provisions of 10 C.F.R. § 708.5 that apply to his alleged protected actions, the complainant, for the first time, uses the words "fraud" and "gross mismanagement" to describe the practices of his former employer, and contends that his disclosures were therefore protected under section 708.5(a)(3). Complainant's Pre-Hearing Brief at 1-3.

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[6] The first disclosure listed above related to making changes to a drawing "not listed on the Engineering Authorization . . . ." Complainant's Pre-Hearing Brief at 3. In his interview with the OHA Investigator, Christopher Scully explained that changes not listed on an Engineering Authorization, such as a Advanced Change Order (ACO), could be made and then documented by issuing a revised ACO or by incorporating those changes into the Final Changes Order by which the ACO is closed. Scully stated that it was routine for designers in his group (W-11) to work with engineers to properly document such changes in a revised ACO or FCO. Scully Interview at 1-2. Clearly, the complainant disagreed with this procedure, and Scully appears to confirm that the complainant felt that the procedure violated certain standards, but registering a disagreement with a procedure is not the same as making a disclosure.

First, as for the recently raised allegations of fraud, LANS argues in reply to Kilmer's Pre-Hearing Brief that "[f]raud is generally described as an act of deceit. In none of Kilmer's papers does he articulate facts with sufficient specificity to conclude that he was alleging fraudulent acts." Memorandum attached to E-mail from Christine Chandler to Steven Goering (March 23, 2011) ("Respondent's Pre-Hearing Reply Brief") at 2.

I agree. The complainant alleges that his disclosures revealed "fraud in the sense that the American public relies heavily upon LANL and the other Nuclear Complex laboratories to exercise due diligence . . . ." Complainant's Pre-Hearing Brief at 1. While Part 708 does not contain a specific definition of "fraud," what Kilmer is alleging is clearly not "fraud" as that term is generally understood in the law. *See Black's Law Dictionary* (9th ed. 2009) (defining "fraud" as a **"**knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment").

Neither do the actions alleged by the complainant rise to the level of "gross mismanagement." In his pre-hearing brief, Kilmer states that it "only follows that violating" STD-1073-2003, P1020, or P1020-2, constitutes gross mismanagement. Complainant's Pre-Hearing Brief at 1. More specifically, he claims that W division officials engaged in gross mismanagement both by intentionally directing employees to "make unauthorized changes to released documents," *id.* at 2, and by adopting procedures that "open the door to accidental and unaccountable modifications to these documents." *Id.* at 3.

I have already found, above, no evidence that STD-1073-2003 imposes binding requirements on LANL, and that the complainant did not disclose information that he could have reasonably believed revealed a substantial violation of LANL Procedures P1020 or P1020-2. Thus, even if I were to agree that any violation of the standard and procedures would necessarily equate to gross mismanagement, which I do not, I would not find based on this alone that Kilmer disclosed information that he reasonably believed revealed gross mismanagement.

More importantly, mere differences of opinion between an employee and his supervisors as to the proper approach to a particular problem or the most appropriate course of action do not rise to the level of gross mismanagement. *See White v. Dept. of the Air Force*, 391 F.3d 1377 (Fed. Cir. 2004). The Deputy Secretary of Energy in *Mehta v. Universities Ass'n*, 24 DOE ¶ 87,514 (1995) held that:

> Equating a particular type of disagreement to "mismanagement" as contemplated by the "whistleblower" regulations demands a careful balancing lest the term encompass all disagreements between a contractor and its employees . . .[t]here must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, at the same time granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork.

Id. at 89,065.[7] OHA has followed the Deputy Secretary's holding in other cases. *See Siciliano, supra; Ronny J. Escamilla*, Case No. VWA-0012 (1997).

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[7] Significantly, the Deputy Secretary's opinion in *Mehta* "was decided under an earlier version of the Part 708 regulations, one that allowed disclosures of mere mismanagement, as opposed to gross mismanagement, to proceed under Part 708." *Siciliano, supra.*

Indeed, prior OHA decisions have found that gross mismanagement is

> more than de minimis wrongdoing or negligence. It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. Therefore, gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission.

Fred B. Hua, Case No. TBU-0078 (2008) (quoting *Roger Hardwick*, Case No. VBA-0032, 27 DOE ¶ 87,539 (1999)); *see also Carolyn v. Dep't of the Interior*, 63 M.S.P.R. 684 (1994).

By this standard, the complainant's disclosures in this case, as he describes them, and as they are documented contemporaneously in the record, do not reveal gross mismanagement. There *are* allegations of management directing "unauthorized changes" to documents, though this seems internally contradictory since, by directing certain changes to documents or adopting procedures that allow changes, management has in fact authorized those changes. In essence, what Kilmer appears to object to is a system that allows changes to be made without what he sees as sufficient oversight or accountability.

Somewhat ironically, in offering an example of the system's failings in his pre-hearing brief, Kilmer undermines his own argument. He cites the "official record" as showing that a particular document was modified three times after being "released" and that the record shows the name of the person who made the modification. Complainant's Pre-Hearing Brief at 1-2. What the complainant allegedly revealed, then, is a tracking system that, despite its alleged shortcomings, allowed Kilmer to determine how many times a document had been modified, and by whom, with Kilmer's only real complaint being that "only way to determine what" changes were made "is to examine all four released versions of this document and carefully compare them." *Id.* at 2.

Assuming the truth of the complainant's allegations, one can see where there might be legitimate debate as to how changes to documents are authorized or what checks must be in place to monitor changes after they are made. But viewed from the perspective of a disinterested person, the complainant has not alleged "a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission."

It is true that, in one of his contemporaneously documented disclosures, Kilmer criticized a proposed document control procedure in April 2010, and in so doing stated that misuse of the Windchill product data management system "very well may bring disastrous consequences for the laboratory as a whole." E-mail from Eugene Kilmer to "w-all@lanl.gov" (April 19, 2010). And in 2007, the complainant alleges that he "pointed out to DX-1 management" that a certain practice was "dangerous." Complainant's Pre-Hearing Brief at 4. However, in addition to not specifying what those consequences or that danger may have been, the complainant's disclosures did not reveal any actual mismanagement. The only thing being revealed is Kilmer's opinion on procedures being openly discussed, and for reasons stated in the previous section of this Decision, simply expressing an opinion without revealing any underlying conduct does not qualify as a disclosure under section 708.5. *See Huffman, supra* at n.2.

As I cannot find that the complainant disclosed information that he could have reasonably believed revealed either fraud or gross mismanagement,[8] the disclosures alleged by the complainant are not protected under section 708.5(a)(3).

C. The Actions Alleged by the Complainant are Not Protected by Section 708.5(c)(1)

Section 708.5(c)(1) protects from retaliation the refusal to "participate in an activity, policy, or practice if you believe participation would [c]onstitute a violation of a federal health or safety law; . . . ." The complainant cites this section for the first time in his pre-hearing brief, and does so without specifying to which of his actions he believes it applies. Complainant's Pre-Hearing Brief at 3-4. Of the protected actions specified by Kilmer, the only one that could conceivably be construed as such a refusal is his February 2008 release of a drawing without making changes as directed by Peggy Volz, which he alleges was necessary to avoid "having to modify a released drawing without authorization as specified in Mr. Scully's new drawing release procedure." *Id.* at 4. Aside from the fact that this stretches the common understanding of the term "refusal," the individual has made no specific allegation as to what federal health or safety law would be violated by the "unauthorized" modification of a drawing. In short, there is no action alleged by the complainant that I could find would be protected by section 708.5(c)(1).

III. Conclusion

I have found above that, even assuming the truth of the complainant's allegations as to the relevant facts of this case, those allegations do not support a plausible claim that Kilmer disclosed information that he reasonably believed revealed fraud, gross mismanagement, or a substantial violation of a law, rule or regulation. Nor do the allegations support a plausible claim that he refused to participate in an activity, policy, or practice, which participation he believed would constitute a violation of a federal health or safety law. For these reasons, I will grant the Motion to Dismiss.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Los Alamos National Security, LLC, on March 24, 2011, Case No. TBZ-0111, be and hereby is granted as set forth in paragraph (2) below, and denied in all other respects.

(2) The Complaint filed by Eugene N. Kilmer against Los Alamos National Security, LLC on September 17, 2010, Case No. TBH-0111, be and hereby is dismissed.

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[8] In his Pre-Hearing Brief, the complainant alleges that he has "eyewitness evidence" of gross mismanagement occurring on March 2, 2011, and has a "witness to the consequences" of that mismanagement. Here and elsewhere in his statements, Kilmer does not appear to appreciate the fact that the purpose of this proceeding is not to investigate the substance of his allegations, but rather to determine whether prior disclosures he allegedly made are protected under Part 708 and, if so, whether he experienced retaliation as a result. The complainant's current allegations of gross mismanagement are clearly not relevant to that purpose.

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

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: April 28, 2011