

United States Department of Energy  
Office of Hearings and Appeals

Los Alamos National Security LLC )  
)  
Filing Dates: July 26, 2017 ) Case No.: WBZ-17-0003  
)  
)  
\_\_\_\_\_ )

**Issued:** August 25, 2017

**Interlocutory Decision  
Motion to Dismiss  
Order to Show Cause**

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 Dolores Gallegos against LANS under the DOE’s Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. For the reasons set forth below, I am granting LANS’s motion in part.

**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 (Mar. 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 retaliated 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 assigned by the Office of Hearings and Appeals (OHA), followed by a hearing by an OHA Administrative Judge, and an opportunity for review of the Administrative Judge's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

## **B. Procedural and Factual Background**

On June 13, 2016, Ms. Gallegos, an accountant, was hired by LANS to serve in its Budgeting Group, as the Standard Accounting and Reporting System (STARS) Team Lead. Declaration of Dolores Gallegos at 1. Ms. Gallegos reported to the General Accounting Team Leader, Frank Montoya, who in turn reported to Judy Dean, the General Accounting Group Leader. On October 27, 2016, Ms. Gallegos sent an email to Ms. Dean and Mr. Montoya, asserting:

In reviewing the procedures and other Authorized Leave with Pay submissions I realized that P761, 3.2.5 "Limitation on Hours Worked" (which is also a state statute) "No employee, other than a firefighter, law enforcement officer, standby employee, or farm or ranch hand may be required to work more than 16 hours in any one day, except during emergencies" (*NM Stat. Sec. 50-4-30*) was violated by members of the STARS Team. It is in our best interest to address this for future events that require this amount of hours.

Ex. A. LANS terminated Ms. Gallegos on November 1, 2016. On March 3, 2017, Ms. Gallegos filed a Part 708 Complaint against LANS with the DOE's Employee Concerns Program (ECP) Manager at the National Nuclear Security Administration (NNSA). The Complaint alleges that her termination occurred in retaliation for a number of protected disclosures, specifically:

- 1) "written notification to . . . Frank Montoya . . . [and] Judy Dean, of violation by the STARS Team of LANL Policy P761 and State Statute (Section 50-4-3-0) on October 27, 2016 at 9:22am."
- 2) "Prior to this date I had made several inquiries and disclosed concerns regarding possible violations of LANL Policies regarding leave, tardiness and requirements for recording such instances on submitted time sheets to the CFO-GA Team Lead and CFO-GA Group Lead. . . . Specific dates of discussion and disclosure of violations include but are not limited to July 26, 2016 (CFO-GA Team Lead), August 4, 2016 (CFO-GA Team Lead and CFO-GA Group Lead), and October 20, 2016 (Deputy Controller)."

Complaint at 1.

LANS filed a response to the Complaint on March 30, 2017 (Complaint Response). In this Complaint Response, LANS requested that the Manager dismiss the Complaint, asserting that “the disclosures themselves were not protected under Part 708 [and] even if they were protected, they had nothing to do with the decision to terminate Gallegos as an unsatisfactory probationary employee.” Complaint Response at 1. LANS further contended that it had no record of Ms. Gallegos alleged verbal disclosures, but argued that they would not have been protected under Part 708 since they would have concerned LANL’s internal personnel policies.<sup>1</sup> Complaint Response at 1-2. LANS further noted that Ms. Gallegos alleged verbal disclosures were not specifically described in her Complaint, and therefore “cannot form the basis of a claim under Part 708.” Complaint Response at 2. Turning to the allegations made by Ms. Gallegos in her October 27, 2016, email, the Complaint Response argued: “Gallegos's time sheet indicated that on one occasion during year-end closing she had worked 16 hours and 15 minutes on a single day. . . Gallegos is pointing out a potential one-time violation of a maximum hour statute amounting to about fifteen minutes of work. Even if true, this is not a *substantial* violation of law, but a one-time technical violation at most.” Complaint Response at 2. (emphasis in original). LANS further contended that it terminated Ms. Gallegos for legitimate business reasons. Complaint Response at 2-3.

On April 12, 2017, the ECP Manager wrote Ms. Gallegos’s Counsel informing him that she had accepted the Complaint, suggesting the possibility of mediation, and inquiring whether Ms. Gallegos wished to go forward with the Complaint.

On May 2, 2017, Ms. Gallegos’s Counsel wrote the Manager, requesting that the Complaint be referred to OHA for an investigation followed by a hearing. May 2, 2017, Letter from Timothy L. Butler to Michelle Rodriguez de Varela at 1. Mr. Butler’s letter further requested: “We would expect the scope of this investigation to cover Ms. Gallegos’s complaint which implicates a pattern and practice by LANS of violating New Mexico statutes governing excessive work hours [affecting public safety] as well as fraudulent time reporting by LANS STARS team on an ongoing basis, encompassing monthly and year end closings.” Letter from Timothy L. Butler to Michelle Rodriguez de Varela at 1.

The ECP Manager referred the Complaint to OHA along with Ms. Gallegos’s request for an investigation followed by a hearing. OHA received this request on May 3, 2017.

An OHA Attorney (the Investigator) conducted an investigation of the allegations set forth in the Complaint and issued a Report of Investigation (ROI) on June 30, 2017. The Investigator interviewed three witnesses: Ms. Gallegos, Ms. Dean, and Ms. Lori Hicks. ROI at 4-5. In addition, the Investigator collected and analyzed a total of 22 documents. ROI Index of Materials. The ROI also analyzed the alleged protected disclosure set forth in the October 27, 2016, email. After concluding that Ms. Gallegos had alleged a violation of a law, rule, or regulation under 10 C.F.R. § 708.5(a)(1), the Investigator opined that the evidence in the record did not support a conclusion

---

<sup>1</sup> In support of this assertion, LANS cited *Sherrie Walker*, Case No. WBA-13-0015 (2014), which held that a disclosure must relate to a violation of a requirement imposed on an individual or entity by an act of the government (such as a federal statute, a DOE order or policy or an executive order or directive), *citing Dennis Rehmeier*, Case No. TBU-0114 (March 1, 2011) (a contractor personnel policy is not a “law, rule or regulation” for 10 C.F.R. § 708.5(a)(1)).

that Ms. Gallegos *reasonably believed* that her allegation concerned a *substantial* violation of the rule in question, N.M. Stat. Ann. § 50-4-30, which states in pertinent part: “No employee ... shall be required to work ... more than sixteen hours in any one day ... except in emergency situations.” ROI at 7 FN 46. The Investigator reached this conclusion after finding that the only evidence supporting this allegation was a time sheet showing that Mr. Montoya worked 16.25 hours on one occasion, and Ms. Gallegos’s claim that Ms. Hicks “once told her that working longer hours during the year-end closing was normal.”<sup>2</sup> ROI at 7. The ROI neither analyzes Ms. Gallegos allegation that she made verbal disclosures of concerns regarding possible violations of LANL leave, tardiness, and leave recording policies, nor explains why those allegations were not addressed.<sup>3</sup>

OHA’s Director appointed me as Administrative Judge for this case on June 30, 2017. On July 5, 2017, I sent a letter to the parties, offering them the opportunity to address the specific issues in this case in written submissions. In this letter, I further required the parties to identify any disagreements with the ROI findings and the basis for the disagreements; and any areas of agreement within the ROI to which the parties were willing to stipulate.

I received Ms. Gallegos’s Brief (the Gallegos Brief) on July 25, 2017. The Gallegos Brief sets forth allegations concerning the STARS team’s alleged violation of LANS’s time keeping practices, and alleges that these timekeeping practices constitute “time fraud” and violate LANS internal rule P765, Section 3.5.1.b. Gallegos Brief at 1-3. The Gallegos Brief further asserts that Ms. Gallegos brought these allegations to Ms. Dean’s attention “days before her termination of employment.” Gallegos Brief at 2. In support of this contention, Gallegos cites the Gallegos Declaration. Gallegos Brief at 2. The Gallegos Brief further argues that any violation of N.M. Stat. Ann. § 50-4-30 is a substantial violation because it is classified as a criminal misdemeanor, and because the evidence in the record shows that at least two violations (involving Ms. Gallegos and Mr. Montoya) occurred. Gallegos Brief at 3. The Gallegos Brief further contends that evidence in the record shows that at least two violations of N.M. Stat. Ann. § 50-4-30 occurred and that further discovery should be allowed in order to determine whether there were any additional violations. Gallegos Brief at 5-6.

LANS submitted the present Motion to Dismiss (Motion) on July 26, 2017, contending that Ms. Gallegos has not met her burden of proving that she made a protected disclosure under 10 C.F.R. § 708.5(a)(1). Specifically, the Motion contends that: (1) Ms. Gallegos has presented no support for her allegation that some STARS team members had worked more than 16 hours on a given day; (2) Ms. Gallegos did not have a reasonable belief that some STARS team members had worked more than 16 hours on a given day, but rather her assertion was based upon pure conjecture; (3) Ms. Gallegos has not met her burden of proving that the violations of LANS Personnel Rules and New Mexico State Law were substantial; (4) the LANS Personnel Rule and New Mexico State Law cited by Ms. Gallegos were not laws, rules, or regulations; (5) Ms. Gallegos’s alleged protected disclosure was within her job duties, and therefore not protected; (6)

---

<sup>2</sup> During her interview with the Investigator, Ms. Dean reported that Ms. Gallegos indicated that she had worked more than 16 hours. Declaration of Judy Dean at 2.

<sup>3</sup> During her interview with the Investigator, Ms. Gallegos reported that she was concerned about some of LANS’s time monitoring and time reporting practices. Gallegos Declaration at 1. However, she did not report disclosing any of these concerns. Gallegos Declaration at 1.

Ms. Gallegos cannot demonstrate a violation of state law; and (7) Ms. Gallegos cannot retroactively make additional disclosures. Motion at 2-8, 10.

On August 8, 2017, Ms. Gallegos filed her Response to LANS' Brief and Motion to Dismiss (the Motion to Dismiss Response). In her Motion to Dismiss Response, Ms. Gallegos argued: (1) LANS Policy P761 is a law, rule, or regulation under Part 708; (2) Ms. Gallegos reasonably believed that her disclosure was protected; (3) Ms. Gallegos has alleged a substantial violation of state law; (4) Ms. Gallegos should be provided with an opportunity to proceed with discovery in order to show that she reasonably believed that LANS's employees were working in excess of 16 hours per day; and (5) Ms. Gallegos is not making retroactive disclosures. Motion to Dismiss Response at 2, 3, 4, 5.

LANS filed a response to Ms. Gallegos's Brief on August 8, 2017 (Response to Brief). In the Response to Brief, LANS noted that:

Gallegos had the opportunity in connection with this briefing to come forward with any evidence that she contends supports her claims and helps her meet her initial burden of showing that she made a protected disclosure. Yet [sic] has come forward with nothing more than *post hoc* re-characterizations of her 2016 statements and unsubstantiated after-the-fact claims about what discovery *might* yield, arguing that "anticipated testimony" and documents she hopes to obtain could potentially show something more than the *de minimis* violation she can presently conjure.

Response to Brief at 1. LANS's Response to Brief further contends that there is no evidence of more than one *potential* violation of N.M. Stat. Ann. § 50-4-30, and that Ms. Gallegos cannot show that instance is an *actual* violation of N.M. Stat. Ann. § 50-4-30. Response to Brief at 2. The Response to Brief characterizes Gallegos's allegations concerning improper time reporting practices in the Chief Financial Officer (CFO) office as "new." Response to Brief at 3. The Response to Brief further characterizes Gallegos's allegations concerning the CFO's time reporting practices as "vague assertions of discontent about not having been provided clear guidance on time reporting." Response to Brief at 3. The Response Brief further denies that Ms. Gallegos ever informed any "LANS employee that the practices for official time reporting, authorized leave with pay, or flextime violated any law, rule, or regulation," and denies that the CFO ever violated LANS timekeeping practices. Response to Brief at 3-5.

## **II. Analysis**

### **A. The Applicable Law**

Regulation 10 C.F.R. § 708.28(b)(5) provides that "the Administrative Judge may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party. . ." However, 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)<sup>4</sup>; *Edward J. Seawalt*, Case No. VBZ-0047 (2000) (applying standards of Fed. R. Civ. P. 56 to motion for summary judgment). 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); see *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, 544, 570 (2007) (*Bell*). 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 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 complainant 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).

The Part 708 Regulations provide that: “The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . as described under §708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor.”<sup>5</sup> 10 C.F.R. § 708.29. Section 708.5 further provides, in pertinent part, that an “employee” may file a complaint against their employer alleging that they “have been subject to retaliation for: (a) Disclosing to . . . [their] employer information that [they] reasonably believe reveals — (1) A substantial violation of a law, rule, or regulation . . .” 10 C.F.R. § 708.5(a)(1). (emphasis supplied).

In order to determine whether an employee had the requisite reasonable belief, I must consider the employee’s intent at the time of the disclosure, and 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” the revelation of information that falls within one or more of those categories. *Eugene N. Kilmer*, Case No. TBH-0111 at 8 (2011) (citing *Heining v. General Serv. Admin.*, 116 M.S.P.R. 135, 143 (2011)).

---

<sup>4</sup> Decisions issued by OHA can be found at [www.energy.gov/oha](http://www.energy.gov/oha).

<sup>5</sup> “Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal.” 10 C.F.R. § 708.29.

**B. Alleged Protected Disclosures Concerning LANS's Alleged Violation of LANL Policy P761 and N.M. Stat. Ann. § 50-4-30**

In the present case, LANS asserts that Ms. Gallegos has not met her burden of proving that she reasonably believed that she was disclosing a substantial violation of LANL Policy P761 and/or N.M. Stat. Ann. § 50-4-30. As an initial matter, I note that, as discussed above, in order to survive this Motion to Dismiss, Ms. Gallegos need not meet her burden of proof, but rather must state a claim to relief that is plausible on its face. However, the factual record that has been developed in the present case clearly and convincingly shows that Ms. Gallegos could not have reasonably believed that LANS had substantially violated LANL Policy P761 and/or N.M. Stat. Ann. § 50-4-30. The evidence in the record from which Ms. Gallegos could have reasonably drawn an inference that LANS employees were working over 16 hours in a day could not reasonably support a conclusion that LANL Policy P761 and/or N.M. Stat. Ann. § 50-4-30 were substantially violated by LANS. The only such evidence arguably supporting this conclusion is: (1) Mr. Montoya's timesheet showing that he worked 16 and a quarter hours on one occasion; (2) Ms. Gallegos's alleged assertion that she had worked in excess of 16 hours; (3) Ms. Dean's recollection that Ms. Gallegos indicated that she had worked more than 16 hours; and (4) Ms. Hicks's vague recollection that "In the past, (prior to 2007) employees may have worked more than 16 hours during the year-end closing, however, now so much of the process is automated that it just does not happen anymore." Declaration of Lori Hicks at 1. This evidence is insufficient to meet Ms. Gallegos's burden of proving that she reasonably believed that LANS had substantially violated LANL Policy P761 and/or N.M. Stat. Ann. § 50-4-30.

As implied by the discussion above in ¶II.A., in most circumstances, it would be premature to require that a party meet its burden of proof prior to the completion of discovery. However, in the present case, it is clear that on October 27, 2016, when she made her disclosure concerning LANL Policy P761 and N.M. Stat. Ann. § 50-4-30, Ms. Gallegos did not have sufficient cause to reasonably believe that LANS had substantially violated those provisions. Ms. Gallegos clearly had a reasonable belief that LANL Policy P761 and N.M. Stat. Ann. § 50-4-30 was apparently violated on at least one occasion. However the record shows that she was unable to articulate any reason for believing that LANS had violated LANL Policy P761 and/or N.M. Stat. Ann. § 50-4-30 on more than two occasions: once for a maximum of 15 minutes, and one more time for an unspecified duration. Two short duration violations of LANL Policy P761 and/or N.M. Stat. Ann. § 50-4-30 would not constitute a *substantial* violation.<sup>6</sup>

Ms. Gallegos contends that even one fifteen-minute violation would constitute a substantial violation. First, she contends that that N.M. Stat. Ann. § 50-4-30 is a substantive statutory restriction or requirement, rather than a non-substantive technical or procedural requirement, noting that New Mexico has made violation of this statute a criminal offense. Motion to Dismiss Response at 4. Ms. Gallegos cites no precedent in support of her contention that *any* violation of a criminal statute is per se substantial. I note that in at least one case, *Ravage v Medcor, Inc.*, Case No. *TBH-0102* (2011) (*Ravage*), OHA has found that a minor criminal violation was not sufficiently substantial to constitute a protected disclosure under 10 C.F.R. § 708.5(a)(1). As DOE

---

<sup>6</sup> Had Ms. Gallegos been able to cite a plausible reason to believe that LANS was systematically or more extensively violating N.M. Stat. Ann. § 50-4-30, a material issue of fact would have been raised, and dismissal would have been inappropriate.

noted in the preamble to the interim final rule, DOE adopted the requirement that a disclosure of a violation of a law, rule, or regulation must be “substantial” in order to qualify for protection under § 708(a)(1). 65 FR 6314, 6317 (February 9, 2000). The interim final rule adopted this standard in order to implement a balanced approach ensuring that minor, insubstantial issues do not waste limited resources, so whistleblower protection is available to those workers who legitimately need it. 65 FR 6314, 6317 (February 9, 2000).

Ms. Gallegos has had an ample opportunity to either more fully articulate her reason to conclude that a substantial violation of LANL Policy P761 and/or N.M. Stat. Ann. § 50-4-30 had occurred or have come forward with additional evidence showing that she reasonably believed, when making her disclosure, that LANS had substantially violated LANL Policy P761 and/or N.M. Stat. Ann. § 50-4-30. She did not do so. Further discovery on this issue is unnecessary, since Ms. Gallegos should be well aware of any information or reasoning that led her to reasonably conclude that any additional violations had occurred.<sup>7</sup> Any new information revealed by discovery showing additional violations of LANL Policy P761 and/or N.M. Stat. Ann. § 50-4-30, would be irrelevant, because Ms. Gallegos would not have been relying upon it when making her disclosure. Accordingly, no further purpose will be served by allowing Ms. Gallegos an additional opportunity to develop a more complete record.

Therefore, the record clearly and convincingly shows that Ms. Gallegos could not have reasonably believed that LANS had substantially violated LANL Policy P761 and/or N.M. Stat. Ann. § 50-4-30. Accordingly, I am dismissing that part of Ms. Gallegos’s request based upon this alleged protected disclosure. However, for the reasons discussed below, I am not dismissing Ms. Gallegos’s Complaint in its entirety.

### **C. Alleged Protected Disclosures Concerning Alleged Violations of LANL Policies Regarding Leave, Tardiness, and Leave Recording Requirements**

In her Complaint, Ms. Gallegos alleges that she “disclosed concerns regarding possible violations of LANL Policies regarding leave, tardiness and requirements for recording such instances on submitted time sheets to the CFO-GA Team Lead and CFO-GA Group Lead. Upon each inquiry I was informed that the CFO Section was given “flexibility” to deviate from LANL polices due to CFO requirements.” The Complaint further states: “Specific dates of discussion and disclosure of violations include but are not limited to July 26, 2016 (CFO-GA Team Lead), August 4, 2016 (CFO-GA Team Lead and CFO-GA Group Lead), and October 20, 2016 (Deputy Controller).” Complaint at 1.<sup>8</sup>

---

<sup>7</sup> Indeed, in her Declaration, Ms. Gallegos states: “I do not have access to other employees' worksheets so I am not sure if anyone else worked more than 16 hours during this period.” Gallegos Declaration at 2.

<sup>8</sup> I note that in the request for investigation and hearing, counsel for Ms. Gallegos claims that she allegedly disclosed “fraudulent time reporting by LANS STARS team on an ongoing basis.” Letter from Timothy L. Butler to Michelle Rodriguez at 1. However, nowhere in her Complaint does Ms. Gallegos allege that she disclosed “fraud” with regard to the LANS CFO-STARS Team timekeeping practices, only vaguely that she “made several inquiries and disclosed concerns regarding possible violations of LANL policies.”



However, evidence presented in the investigation record, and particularly Ms. Gallegos's own statements, indicate that her concerns about possible violations that she allegedly raised on August 4, 2016, and October 20, 2016, relating to CFO timekeeping "flexibility," were later resolved to the satisfaction of Ms. Gallegos. According to the ROI and supporting documents, Mr. Montoya and Ms. Dean were confused by the manner in which Ms. Gallegos reported the number of extended hours she worked, and how much authorized leave she should be afforded, because she did not use the timekeeping format requested by Mr. Montoya. During their meeting on October 25, 2016, Ms. Dean provided Ms. Gallegos with three LANL policies to help her better understand LANS CFO-Stars timekeeping practices in an attempt to resolve the confusion. ROI at 3-4 (citations omitted). After reviewing the LANL policies, Ms. Gallegos sent an email to Mr. Montoya and Ms. Dean on October 27, 2016, in which she first identified the "Limitation of Hours Worked" issue discussed in the foregoing section of this decision, and then stated the following regarding the "flexibility" issue:

In discussion with [Mr. Montoya] yesterday he clarified that he will only except [sic] modification to our work schedule during the work week. In other words extra hours can only be used during the work schedule during the week they are worked with prior approval and the understanding that LANL required assignments must not be impacted. I will share this information with the Team as they have been requesting clarification since **I inquired back on July 26<sup>th</sup> (from Frank) and again on August 4<sup>th</sup> (from both Frank and Judy). I apologize that I accepted the reply of "flexibility" without a clear definition.**

ROI Exhibit 4 (emphasis added). Consistent with this email, Ms. Gallegos acknowledged in her Statement to the Investigator that she was confused by the LANL time monitoring and reporting methodology since it is inconsistent with her prior work experience. ROI Exhibit 1 at 1. Ms. Gallegos further states in her Statement that during her meeting with Mr. Montoya and Ms. Dean: "for the first time, I was told that 'flexibility' we had applied to the pay period we worked longer hours, not to the entire 6-week closing period. Ms. Dean and Mr. Montoya instructed me to revise my worksheet, which I did, changing some of my 'make up' hours to annual leave." *Id.* at 2. Ms. Gallegos's statement on this matter is corroborated by her personal contemporaneous notes of the October 25, 2016, meeting and her October 27, 2016, email ("[Ms. Dean and Mr. Montoya] provided three Policies for me to review . . . After actually reviewing Policies I made the determination that it was best to change my timesheet entries."). ROI Exhibit 18 at 2. Thus, it is evident from the ROI record that rather than disclosing a reasonable belief that any actual violation of LANL time keeping policies had occurred, Ms. Gallegos only made, as stated in her Complaint, "inquiries and disclosed concerns" regarding the timekeeping practices of the LANS CFO-STARS Team. Indeed, it is further evident that those concerns were resolved by Ms. Gallegos's review of the LANL policies provided to her by Ms. Dean at their meeting on October 25, 2016. Thus, based upon the cited evidence, there appears to be ample basis to also dismiss this portion of Ms. Gallegos's Complaint.

Notwithstanding, I have determined that it may be possible that Ms. Gallegos is claiming that she disclosed other possible violations of LANL policies regarding leave, tardiness and timekeeping that were not resolved by her meeting on October 25, 2016, and her subsequent review of LANL policies. Accordingly, rather than dismissing Ms. Gallegos's Complaint in its entirety at this

junction, I will give Ms. Gallegos an opportunity to show cause why her Complaint should not be dismissed with regard to alleged disclosures she claims to have made “regarding possible violations of LANL policies regarding leave, tardiness and requirements for recording such instances”. In this regard, I am ordering that Ms. Gallegos:

- 1) Specifically state the substance of each alleged protected disclosure she made regarding possible violations of LANL policies or other laws or regulations regarding leave, tardiness and requirements for recording;
- 2) For each alleged protected disclosure, provide a specific and thorough explanation of why that protected disclosure qualifies for protection under 10 C.F.R. § 708.5. This explanation should indicate the basis of her “reasonable belief” for each alleged disclosure;
- 3) For each alleged protected disclosure, indicate the date on which that disclosure occurred, to whom it was made, and who else was present when the alleged protected disclosure was made; and
- 4) Supply copies of any documents that corroborate her assertions that she made protected disclosures regarding possible violations of LANL policies or other laws or regulations regarding leave, tardiness and requirements for recording.

Ms. Gallegos must serve a written submission upon LANS and me electronically by no later than September 1, 2017. LANS may respond to Ms. Gallegos’s submission, should it elect to do so, by serving a written submission upon Ms. Gallegos and me electronically by no later than September 8, 2017. Any submission intended for me should be sent by e-mail to oha.filings@hq.doe.gov and should clearly indicate the case number assigned to this proceeding, WBH-17-0003.

### **III. Conclusion**

I have found above that, even assuming the truth of all of Ms. Gallegos’s claims concerning her allegations that she disclosed violations of LANL Policy P761 and N.M. Stat. Ann. § 50-4-30, those allegations do not support a plausible claim that this disclosure was protected under 10 C.F.R. § 708(a)(1) since, even when viewing all the evidence in the record in the light most favorable to her, she cannot have reasonably believed that she was disclosing a substantial violation of a law, rule, or regulation. For these reasons, I will grant the Motion to Dismiss in part, insofar as it pertains to Ms. Gallegos’s allegations that she disclosed violations of LANL Policy P761 and N.M. Stat. Ann. § 50-4-30. However, I have further determined that the allegations set forth in the Complaint concerning possible violations of LANL policies regarding leave, tardiness and time-keeping records should not be dismissed, at this time. While the ROI record presents a plausible basis for also dismissing this portion of Ms. Gallegos’s Complaint, I have concluded that Ms. Gallegos should be afforded an opportunity to show cause why these allegations should not be dismissed.

It Is Therefore Ordered That:

- 1) The Motion to Dismiss filed by Los Alamos National Security, on July 26, 2017, Case No. WBZ-17-0003, is hereby granted in part, as set forth in Paragraph (2) and denied in all other aspects.

- 2) That part of the Complaint filed by Dolores Gallegos concerning her allegations that she disclosed violations of LANL Policy P761 and N.M. Stat. Ann. § 50-4-30, is hereby dismissed.
- 3) That part of the Complaint filed by Dolores Gallegos concerning her allegations that she disclosed possible violations of LANL Policies regarding leave, tardiness and requirements for time-keeping records, is not dismissed.
- 4) Ms. Gallegos must comply with the show cause order and instructions set forth above by no later than September 1, 2017.
- 5) This is an Interlocutory Decision of an Administrative Judge which can be appealed upon the issuance of an initial agency decision of the Department of Energy.

Steven L. Fine  
Administrative Judge  
Office of Hearings and Appeals

Date: August 25, 2017