

August 25, 2010

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Arun K. Dutta

Dates of Filing: December 4, 2009

Case Number: TBH-0088

This Decision concerns a Complaint filed by Arun K. Dutta (hereinafter referred to as “Mr. Dutta” or “the Complainant”) against Parsons Infrastructure and Technology Group, Inc. (hereinafter referred to as “Parsons” or “the Respondent”), his former employer, under the Department of Energy’s (DOE) Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708. At all times relevant to this proceeding, Parsons was a DOE contractor operating in Aiken, South Carolina. It is the Complainant’s contention that during his employment with Parsons, he engaged in protected activity and, as a consequence, suffered reprisals by Parsons. Among the remedies that the Complainant seeks are reinstatement, back pay, and reimbursement for legal and other expenses. As discussed below, I have concluded that Mr. Dutta is not entitled to the relief that he seeks.

I. Background

A. Regulatory Background

The DOE 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. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). The Program’s 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 prohibit a DOE contractor from retaliating against its employee because the employee has engaged in certain protected activity, including:

(a) Disclosing to a DOE official, a member of Congress, . . . [the employee’s] employer, or any higher tier contractor, information that [the employee] reasonably believe[s] reveals—

(1) A substantial violation of any 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.

57 Fed. Reg. 7541, March 3, 1992, as amended at 65 FR 6319, February 9, 2000, codified at 10 C.F.R. § 708.5.

An employee who believes that he or she has suffered retaliation for making such disclosures may file a complaint with the DOE. It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, 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." 10 C.F.R. § 708.29. If the complainant meets this burden of proof, "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." *Id.*

B. Factual Background¹

The following facts are not in dispute. Parsons contracted with the DOE to construct a salt waste processing facility (SWPF) at the DOE's Savannah River Site. An SWPF processes nuclear waste. Mr. Dutta is a mechanical engineer with over 30 years of experience who was hired by Parsons as a Senior Pipe Stress Engineer in March 2007. He was assigned to the Engineering Mechanics Group (EMG). At all times relevant to this proceeding, the EMG was headed by Richard Stegan, P.E. Stegan reported to James Somma, P.E., Engineering and Design Manager for the SWPF. In the summer of 2007, the Complainant was assigned to work on two specifications, numbered 11818 and 11819. Specification 11818 detailed seismic qualification criteria for PC-3 vessels, and 11819 set forth seismic qualification criteria for PC-1 and PC-2 vessels. These documents had already been submitted for IDR review, and it was Mr. Dutta's job to review, and make a preliminary disposition

^{1/} The following terms will be used throughout this Decision.

- *Specification*: a document requiring that certain equipment meets statutory and regulatory safety requirements.
- *PC-1, PC-2, and PC-3*: classes of seismic regulatory requirements. PC-1 and PC-2 are very similar, while PC-3 is more stringent.
- *LDE*: Lead discipline engineer.
- *IDR Process*: (inter-disciplinary review): a review process for specifications and other documents. An engineer drafts or "initiates" a specification and sends it to a reviewer. If the reviewer "signs off" on the document, it is then sent to the IDR committee, along with an IDR form. The IDR committee returns comments on the form, and the initiator resolves the comments. The reviewer, the LDE, and the Engineering and Design Manager then review the form, and if they all sign off, the specification is then submitted to the document control system (DCS) operator, who verifies the signatures and dates on the specification and on the IDR form, and enters the data into the document control system.
- *Condition Report (CR)*: A pre-printed form that an initiator uses to identify issues and provide recommendations. An evaluator signs off on it, beginning an action plan. The last step verifies the action.
- *Job Shopper*: A contractor employee.

of, the IDR committee's comments. Mr. Dutta performed this duty, and then gave the specifications to Mr. Stegan, the LDE, for his review. However, instead of approving these documents and forwarding them to Mr. Somma, Mr. Stegan cancelled specification 11818 and assigned another engineer, Anthony Edwards, to revise specification 11819. Mr. Edwards incorporated elements from specification 11818, revised the specification given to him, and submitted the finished product, specification 11819, rev. 0, to Mr. Stegan. Stegan forwarded the specification to Mr. Somma, Somma approved it, and on October 31, 2007, specification 11819, rev. 0, was entered into Parsons' DCS.

In a letter to David Amerine, Senior Vice President/Project Manager, SWPF, dated November 13, 2007, the Complainant alleged that "an inferior quality document [the revised specification 11819, rev. 0] was slipped into our Document Control system using fraudulent means." Complainant's Exhibit (Comp. Ex.) 11. He further alleged that specification 11819, rev. 0 did not go through the IDR process, but was instead improperly substituted for specification 11819, which the Complainant worked on, and which did go through IDR. The IDR form that originally accompanied specification 11819 was passed on with specification 11819, rev. 0. "This is," the Complainant claimed, "a case of an intentional falsification of [a] safety document since these specs deal with design requirements for safety-related equipment." *Id.* Mr. Amerine said that it looked as if Mr. Dutta had identified a problem and that it should be fixed. He gave the letter to Mr. Somma.

In November 2007, the Respondent began a process that resulted in the EMG group being divided into two groups: the vessel design group, which would remain under the supervision of Mr. Stegan, and the pipe stress group, under the management of Calvin Hughes. This division became official as of January 2008. Mr. Dutta was placed in the pipe stress group.

On January 3, 2008, Mr. Somma met with Mr. Dutta, Mr. Stegan, and Mr. Edwards to discuss the Complainant's allegations. During the meeting, Mr. Somma suggested that Mr. Dutta initiate a CR, and the Complainant did so.

In November 2008, the Complainant discussed his concern with Mr. Hughes that, although design of the SWPF was 90% complete, the pipe support design had not been completed. On January 15, 2009, Parsons terminated the Complainant's employment.

C. Procedural Background

On April 6, 2009, Mr. Dutta filed a Part 708 Complaint with the Director of the DOE's Office of Civil Rights at the Department of Energy's Savannah River Operations Office. Parsons filed a response to this complaint. The Savannah River Employee Concerns Program attempted to mediate the Complaint on August 13, 2009, but those efforts failed. Mr. Dutta requested that his Complaint be forwarded to the Office of Hearings and Appeals (OHA) for an investigation and hearing. The Director forwarded the Complaint to OHA on October 7, 2009, and the OHA Director appointed an investigator. The OHA investigator interviewed Mr. Dutta and other current and past Parsons employees and contractor employees and reviewed a large number of documents before issuing a Report of Investigation (ROI) on December 4, 2009.

On that same day, the OHA Director appointed me as the Hearing Officer in this case. I conducted a three-day hearing in this case in Aiken, South Carolina, beginning on March 2, 2010. Because one of the Complainant's witnesses was unavailable during this period, his testimony was heard by video

teleconferencing on May 14, 2010.² Over the course of the hearing, 14 witnesses testified. The Complainant introduced 47 exhibits into the record, and the Respondent introduced 68 exhibits. On May 28, 2010, the Respondent and the Complainant submitted written closing arguments, at which time I closed the record in the case.

D. Mr. Dutta's Complaint and the Report of Investigation

Mr. Dutta alleges in his Complaint that he made two protected disclosures during his tenure with Parsons. First, he alleges that specification 11819, rev. 0 (the document prepared by Mr. Edwards), was entered into Parsons' DCS without first being subjected to IDR. According to Mr. Dutta, this action was fraudulent in that it involved taking the specification number and IDR form for a document that had gone through IDR, and applying them to a document that had not gone through that process. He further alleged that the action was a violation of the SWPF Project Procedure No. PP-EN-5006, Rev. 6, which sets forth Parsons' rules governing the IDR process. Respondent's Exhibit (Resp. Ex.) 4. According to Mr. Dutta, this also represented a substantial and specific danger to employees or to public health and safety. Second, the Complainant raised his concerns that, although the design of the SWPF had reached 90% completion, the piping support design had not yet been completed. He alleged that completing the piping support design during the construction phase of the project, as was planned by Parsons, constituted "a substantial violation of a law, rule, or regulation," "a substantial and specific danger to employees or to public health and safety," and "gross mismanagement" and a "gross waste of funds."

In retaliation for making these disclosures, Mr. Dutta alleges, the Respondent transferred him in January 2008 to the pipe stress group, after which he claimed to have received "no responsible task[s]," Comp. Ex. 11, and terminated his employment on January 15, 2009. As relief for these alleged retaliations, the Complainant requests reinstatement, back pay, compensation for loss of medical and other benefits and reimbursement of legal expenses. *Id.*

After reviewing this Complaint, interviewing Mr. Dutta and 10 other current and former employees and examining a large number of documents, the OHA investigator concluded that, regarding his first disclosure, "the evidence suggests that Mr. Dutta reasonably believed that he disclosed a substantial violation of a law, rule, or regulation." ROI at 17. The ROI further concluded that the evidence was not clear as to whether the Complainant's second disclosure revealed a substantial violation of a law, rule, or regulation, a substantial and specific danger to public health and safety, or a gross waste of funds. *Id.* The investigator also observed that Parsons apparently did have knowledge of the disclosures.

II. Analysis

As stated in Section I.A above, in order to prevail in a Part 708 proceeding, an employee must show, by a preponderance of the evidence, that he made a protected disclosure or engaged in protected behavior, and that this was a contributing factor to one or more alleged acts of retaliation by the contractor against the employee. For the reasons set forth below, I find that Mr. Dutta made two

^{2/} Citations to the transcript of the testimony that was taken from March 2 through March 4, 2010, will be abbreviated as "Tr." Citations to the supplemental transcript of the testimony of XXXXXXXXXX that was taken on May 14, 2010, will be abbreviated as "Sup. Tr."

protected disclosures, and that the second disclosure was a contributing factor in his termination. However, because Parsons would have taken the same action in the absence of any disclosures, I conclude that Mr. Dutta is not entitled to the compensation that he seeks.

A. The Protected Disclosures

As previously discussed, an employee of a DOE contractor makes a protected disclosure when he or she reveals to that employer, a higher-tier contractor, a DOE official, a member of Congress, or any other government official with oversight authority at a DOE site, information that the employee reasonably believes 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. 10 C.F.R. § 708.5(a). The test of “reasonableness” is an objective one, *i.e.*, whether a reasonable person in the Complainant’s position, with his level of experience, could believe that his disclosure met any of the three criteria set forth above. *Frank E. Isbill*, Case No. VWA-0034 (1999).

1. Parsons’ Failure To Send The Revised Specification 11819, Rev. 0 Through IDR

It is undisputed that the Complainant made this disclosure to SWPF Project Manager David Amerine in a letter dated November 13, 2007. Consequently, the issue to be decided is whether Mr. Dutta reasonably believed that this constituted (i) a substantial violation of any 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. The Complainant contends that all three criteria apply to this disclosure. Because I conclude that a reasonable person in Mr. Dutta’s position, with his level of experience, could have believed that Parson’s failure to send the revised document through IDR violated the company’s Procedure No. PP-EN-5006, Rev. 6 (IDR rules), I need not decide whether the Respondent’s action was fraudulent or constituted a substantial and specific danger to employees or to public health and safety.

Parsons argues that, under section 6, paragraph 4(b) of its IDR rules, Mr. Stegan, as LDE, did not need to submit specification 11819, rev. 0, for IDR. That paragraph states, in pertinent part, that “If the LDE determines that changes to the document are significant, the documents shall be rechecked in accordance with PP-EN-5005 and an additional IDR be performed in accordance with this PP.” Resp. Ex. 4 at pg. RES 05297. The implication that Parsons wishes me to draw from this provision is that if the LDE determines that the changes to the document are not significant, an additional IDR need not be performed. At the hearing, Stegan testified to that effect, stating that he did not resubmit the revised specification for IDR because “there was not a substantial technical change made to that document.” Tr. at 533-534. The Respondent contends that I should not substitute my judgement as to whether the document should have been submitted for IDR for that of a trained professional such as Mr. Stegan.

I agree. However, the relevant question is not whether Parsons’ IDR rules required Stegan to submit the document in question for IDR, it is whether Dutta *could reasonably have believed* that the rules required Stegan to do so. I find that such a belief was reasonable.

Contrary to Parsons’ contentions, the wording of the IDR rules does not preclude this finding. Section 2.0 of the rules states that the IDR requirements are applicable “to all SWPF design and technical output documentation such as drawings, specifications, and other technical design documents, with the exception of . . . design calculations.” Resp. Ex. 4 at pg. RES 05292. Section

6, paragraph 4 of the IDR rules sets forth the LDE's duties after the document has gone through IDR. Paragraph 4(a) states, in pertinent part, that the LDE shall "Review and disposition all comments identified on the Comment Review Form . . . and coordinate all proposed responses and document changes with the reviewer(s). The LDE is responsible for getting the reviewers' concurrence to proposed responses and document changes." *Id.* at RES 05297. The "document changes" referred to could reasonably be interpreted as being changes made in response to comments on the Comment Review Form. Therefore, the LDE's implied discretion in paragraph 4(b) to not send a revised document back through IDR could reasonably be interpreted as applying to revisions made in response to those comments, and not to revisions made by the LDE.

Moreover, even if the LDE's discretion under paragraph 4(b) does extend to documents that were changed at his request, the Complainant could reasonably have concluded that those changes were sufficiently significant to require re-submission for IDR. As previously stated, Stegan testified that he did not submit the revised specification for IDR because there were no "substantial *technical* change[s]." Tr. at 534 (Italics added). However, paragraph 4(b) does not refer to technical changes, but only to significant changes, implying that the changes need not be technical in nature to require an additional IDR. The revised specification was essentially a combination of two earlier specifications, and included over four pages worth of changes from the previous iteration of specification 11819, including changes to the Quality Assurance requirements in the specification. Comp. Ex. 17. Mr. Dutta could reasonably have believed that those changes were significant enough to have required Mr. Stegan to resubmit specification 11819, rev. 0 for IDR.

2. Parsons' Failure To Complete The Pipe Support Design Before The Construction Phase Of The SWPF

Mr. Dutta's second alleged disclosure is that Parsons did not complete the piping support design for the SWPF before the construction phase of the SWPF project. Some explanation of this allegation is necessary.

As described by Mr. Stegan during his testimony, the SWPF project was to proceed in three phases. The first phase was the design phase. During this phase, a "conceptual design" was created, which establishes an overall scope, or framework, of the project. Tr. at 508. The second was the detailed design phase, which included the creation of the actual design document specifications, the data sheets, the calculations, and the drawings. *Id.* In phase three, the actual construction was to take place. Equipment is purchased, and once construction is completed, individual systems are tested to make sure that they are functioning in accordance with the design documents. *Id.*

According to the Complainant, the design and location of the pipe supports should have been completed concurrently with the pipe stress calculations, before the beginning of phase three. This is because, Mr. Dutta claims, the accuracy of the stress calculations depended in part on knowing where the supports would be placed. Proceeding according to Parsons' plans, he contends, would mean that the stress calculations would likely have to be redone after the piping support design had been completed, at the cost of a great deal of wasted time and effort. This would, he alleges, constitute a gross waste of funds. Tr. at 82. The Complainant testified that he made this second disclosure to Mr. Hughes and to Mr. Somma in November of 2008, prior to Parsons entering into phase three of the SWPF construction in December 2008. Tr. at 174. Mr. Hughes confirmed that the Complainant raised this issue with him. Tr. at 739.

Parsons argues that Mr. Dutta could not have had a reasonable belief that its failure to complete the pipe support design before entering into the construction phase constituted a gross waste of funds. As an initial matter, Mr. Hughes testified that it was not necessary to do pipe support work concurrently with pipe stress work, and that it was “pretty much a typical industry standard” that some design work be completed during the construction phase of a project of this kind. Tr. at 737. Furthermore, Hughes testified that the DOE had been informed that pipe support design would be completed during phase three, Tr. at 739, Resp. Ex. 15, and SWPF Project Manager Robert Breor testified that the DOE approved the inception of phase three after having received that information. Tr. at 662; Resp. Ex. 30 and 31.

Nevertheless, I find that the Complainant reasonably believed that Parsons’ failure to complete the pipe support design prior to phase three would result in a gross waste of funds. Mr. Dutta’s testimony in this regard is amply supported by that of XXXXXXXXX, and two of the Respondent’s witnesses, Mr. Breor and Ted Niedbalski. XXXXXXXX, who worked in the pipe stress group with Mr. Dutta at Parsons, and who testified that he has more than 25 years of pipe stress experience, indicated that stress calculations were affected by pipe support design, and that it was very important that the two be done concurrently. Sup. Tr. at 28. Mr. Breor testified that Parsons had to rehire some pipe stress analysts that it had laid off in January 2009 because of design changes, Tr. at 674, and that some of those changes might have been avoided if the support work had been done concurrently with the pipe stress analysis. Tr. at 677. Mr. Niedbalski, who has over 40 years of pipe stress and support experience, served as the “lead” for the pipe stress group during Mr. Dutta’s tenure with Parsons. He testified that the support design has to be completed before construction. Tr. at 813. Furthermore, Mr. Dutta’s testimony indicates that, at the time of his disclosure, he was not aware of any agreement between Parsons and the DOE about the timing of the completion of the pipe support design. Tr. at 232-237. Thus, the evidence supports the conclusion that the Complainant’s belief was reasonable.

B. The Alleged Retaliations

In order to prevail, the Complainant must next demonstrate, by a preponderance of the evidence, that his protected disclosures were a contributing factor to one or more alleged acts of retaliation taken against him by Parsons. Under the Part 708 regulations, “retaliation” means “an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to the employee’s compensation, terms, conditions or privileges of employment as a result of the employee’s disclosure of information” or participation in protected conduct as described in 10 C.F.R. § 708.5.

Mr. Dutta alleges two instances of retaliation. First, he claims that his assignment to the pipe stress group, under the supervision of Mr. Hughes, was in retaliation for his first protected disclosure, which he made in his November 13, 2007 letter to Mr. Amerine. While working under Mr. Hughes, he indicated, he was not given work that was commensurate with his abilities and level of experience. Tr. at 268-269. The second alleged retaliation was his termination in January 2009.

In determining whether protected disclosures were a contributing factor to allegedly retaliatory acts, OHA Hearing Officers have noted that there is rarely a “smoking gun” that establishes such a nexus. *See, e.g., Ronald Sorri*, Case No. LWA-0001 (1993). Consequently, we have consistently held that retaliatory intent can be established through circumstantial evidence. Specifically, a Complainant can demonstrate that a protected disclosure was a contributing factor to an alleged retaliatory act if

he can show that the acting official had actual or constructive knowledge of the protected disclosure, and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. *Id.* Since there is no direct evidence of retaliation in the record, Mr. Dutta must demonstrate that the Parsons employees responsible for the alleged retaliatory acts had actual or constructive knowledge of Dutta's protected disclosures, and must also show temporal proximity between the disclosures and the retaliation.

1. The Complainant's Assignment To The Pipe Stress Group

Mr. Dutta testified that after his November 13, 2007 letter to David Amerine, he was transferred to the pipe stress group "at the end of December or [early] January," and that, whereas under Stegan the Complainant was involved in the designing of pressure vessels, checking vessel design calculations, and writing specifications, after his assignment to the pipe stress group, Hughes assigned Mr. Dutta pipe stress calculations, and little else. Tr. at 88, 107-109. In his statement to the OHA Investigator, he further alleged that Hughes "ignored" him and never discussed his assignments with him. Resp. Ex. 53.

A preponderance of the evidence indicates that the Complainant's November 13, 2007 disclosure to Mr. Amerine was not a contributing factor to this re-assignment and to Mr. Hughes' subsequent treatment of the Complainant. According to Mr. Stegan, he and Mr. Somma made the decision as to whom to place in the pipe stress group and whom to place in the vessel design group. Tr. at 558. However, it appears that Mr. Somma essentially delegated this task to Stegan. Tr. at 961. Mr. Stegan further indicated that, although Mr. Dutta's re-assignment was not formalized until February 2008, Tr. at 555, he made the decision to place the Complainant in Hughes' pipe stress group sometime in October 2007. Tr. at 557-558, 566. This testimony is amply supported by Respondent's Exhibits 16 and 32.

Respondent's Exhibit 16 consists of three e-mails, two of which were authored by Mr. Stegan. The first of Mr. Stegan's e-mails, dated November 2, 2007, is addressed to 15 employees, including Mr. Dutta, and concerns the subject "Near-Term Deadlines and Commitments - *Piping Stress*" (italics added). Stegan testified that he wrote this e-mail to identify the near-term activities that the pipe stress group needed to perform, Tr. at 559, and that he had identified the individuals to whom the e-mail was sent, for the most part, as being the employees who would serve in the pipe stress group. Tr. at 560. Mr. Hughes was copied on that e-mail because, Stegan testified, according to the plan that was "in place . . . he would be taking over supervisory responsibilities for the pipe stress group." Tr. at 559. Mr. Stegan's second e-mail, dated November 14, 2010, was on the subject of "Near Term Actions - Vessels," and was addressed to eight employees whom Stegan saw as serving in the vessel design group. Mr. Dutta was not a recipient of this e-mail.

Respondent's Exhibit 32 is a print-out from Parsons' time card entry tracking system. Using this document, Mr. Stegan was able to track all of the Complainant's time that had been charged to the vessel design group and all the time that was charged to the pipe stress group. According to this Exhibit, the last time that Mr. Dutta did any work that was charged to the vessel design group was during the week ending October 12, 2007, more than one month prior to his November 13 letter to Mr. Amerine. Since Stegan made the decision to place Mr. Dutta in the pipe stress group before November 13, 2007, Dutta's protected disclosure on that date could not have been a contributing factor to this personnel action.

Regarding Mr. Hughes' alleged treatment of the Complainant, there is no evidence in the record that Mr. Hughes had actual or constructive knowledge of the Complainant's first disclosure until after he had filed the Complaint at issue here. Mr. Dutta was not reporting to Hughes, either directly or indirectly, at the time of the disclosure. There is no evidence that Stegan or Somma informed Hughes of the disclosure, or that it was widely known at Parsons that Mr. Dutta had made a protected disclosure or initiated a CR. In fact, Mr. Somma testified that he did not discuss the CR with Mr. Hughes prior to it being resolved, Tr. at 1042, and Mr. Hughes testified that he did not know that the Complainant had initiated a CR until after the Complaint had been filed. Tr. at 745. Consequently, I cannot conclude that Mr. Dutta's first disclosure was a contributing factor to Hughes' alleged ignoring of the Complainant or his assigning tasks to the Complainant that Mr. Dutta believed to be not commensurate with his skills and experience.

2. The Complainant's Termination

The Complainant's employment with Parsons was terminated on January 15, 2009. Mr. Somma made the decision to lay off the Complainant, with input from Mr. Hughes and Mr. Niedbalski. Tr. at 664, 743, 1038. As previously explained, if the Complainant can demonstrate that either of his disclosures was a contributing factor to his termination, Parsons must then demonstrate, by clear and convincing evidence, that it would have laid off Mr. Dutta even in the absence of any protected disclosures. For the reasons set forth below, I find that the Complainant's second disclosure was a contributing factor to Parson's decision to terminate his employment. I therefore need not consider whether the Complainant's first disclosure, which occurred 14 months prior to the termination, was a contributing factor.

As an initial matter, it is evident that Mr. Somma had either actual or constructive knowledge of Mr. Dutta's disclosure regarding the timing of the pipe support work. During his interview with the DOE Investigator, the Complainant said that he raised this issue in August or September 2008 at the weekly status meetings that Mr. Hughes had with the pipe stress group. Resp. Ex 56. Mr. Somma attended these meetings. Tr. at 962. Mr. Dutta also told the Investigator that he went to Mr. Somma's office in October or early November 2008 to discuss his concern. Resp. Ex. 56. At the hearing, the Complainant testified that he raised the issue "a couple of times, maybe" in status meetings in June or July, and in one-on-one encounters with Somma and Hughes in November. Tr. at 174. Mr. Hughes and Mr. Somma both testified that they have no recollection of the Complainant raising the issue during the status meetings. Tr. at 722; 1084. However, Hughes admitted that Dutta discussed the matter with him in his office, Tr. at 723, and Parsons presented no evidence to refute the Complainant's claim that he discussed this disclosure with Mr. Somma in his office.

Moreover, even if Mr. Somma did not have actual knowledge of this protected disclosure, it is clear that he had constructive knowledge of it. In previous cases, OHA Hearing Officers have held that a Complainant can establish constructive knowledge by showing that the person taking the alleged retaliatory action was influenced by the negative opinions of those with knowledge of the protected conduct. *See, e.g., Jagdish Laul*, Case No. VBH-0010 (2000). In this case, Mr. Somma compiled a list of eight employees in the pipe stress group, and a rating of those employees' skills in six areas that Somma and his managers believed to be important. Mr. Somma consulted with Mr. Hughes in rating the employees in the six skill areas. Tr. at 1038. Hughes believed that Mr. Dutta's performance was "below average" as compared to the rest of the pipe stress group. Tr. at 744. The Complainant's cumulative score in the six skill areas was the lowest of the employees ranked. Furthermore, this

November 2008 disclosure was sufficiently close in time to the January 2009 termination such that a reasonable person could conclude that the disclosure was a contributing factor to the termination.

C. Whether Parsons Would Have Terminated The Complainant's Employment In The Absence Of His Protected Disclosures

Section 708.29 states that once a complaining employee has met the burden of demonstrating that conduct protected under § 708.5 was a contributing factor in the contractor's retaliation, "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. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See Casey von Borgen*, Case No. TBH-0034 (2007). If the contractor meets this heavy burden, the allegation of retaliation for whistleblowing is defeated despite evidence that the retaliation may have been in response to the complainant's protected conduct.

It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against a whistleblower in the absence of the whistleblower's protected conduct. The Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, has identified several factors that may be considered, including "(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 for the non-whistleblowing aspect alone." *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007) (citing *Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006)).

1. The Strength Of Parsons' Stated Reasons For Terminating Mr. Dutta's Employment

It is essentially undisputed that after the SWPF project moved from the design stages into the construction stages, layoffs of substantial numbers of Parsons employees and contractors who were involved in design-related activities were necessary. Mr. Breor testified that a Reduction in Force (RIF) was necessary because Parsons was only given limited funds to complete the project and needed to stay within budget. He added that the RIFs in December 2008 and January 2009 affected employees throughout the company. Tr. at 663. According to Mr. Hughes, 17 of the 22 employees in the pipe stress group were terminated, with 14 being RIFed in December 2008 and the remaining three, including the Complainant, leaving in January 2009. Tr. at 741-742. Mr. Somma testified that the RIFs were needed at the onset of the construction phase because Parsons would be shifting into construction support activity. Tr. at 1029. It is also undisputed that layoffs are common in projects of this type. XXXXXX testified to that effect, Sup. Tr. at 37, and Mr. Dutta testified that he himself had been laid off at least six times over the course of his career as a mechanical engineer. Tr. at 188.

Mr. Dutta claims, however, that the circumstances surrounding this RIF suggest that he was terminated because of his protected disclosures. He specifically argues that he was more qualified than some of the five pipe stress analysts who were retained, and that the fact that he, a Parsons employee, was fired while job shoppers were retained is evidence of retaliatory intent.

In assessing the validity of these claims, it is useful to examine the manner in which the five employees who were retained were selected from the eight pipe stress engineers left after the

December 2008 RIF. The record indicates that the Parsons employees involved in these determinations were, in descending order of importance, Mr. Somma, Mr. Hughes, and Mr. Niedbalski.

Mr. Somma testified that, over the course of the prior year, he would attend meetings, review documents and discuss personnel with the project “leads” to determine who the best performers were, with the knowledge that he would have to terminate employees at the beginning of the construction phase. Tr. at 1032. After gathering this information, Somma prepared a Group Assessment Summary. Tr. at 1032; Resp. Ex. 12, p. 05375. This summary consisted of the names of the eight remaining engineers in Hughes’ pipe stress group, and ratings of each engineer in five separate skill areas.³ Somma arrived at these skill areas after talking with some of his managers and their “leads” about “the skill set that we needed to bring into the next phase of the project.” Tr. at 1033. Each engineer received a rating of between 1 and 5 for each skill area. A rating of “1” denoted “minimal to no skills” in that area, a rating of “3” meant that the individual had “marginal skills,” and a “5” meant that the engineer “meets future needs” in that particular area. The Complainant had the lowest cumulative score of the eight engineers. Of the two next lowest-scoring engineers, XXXXXX was scheduled to be laid off but found another job with Parsons outside of the pipe stress group and XXXXXXXX, who was also a Parsons employee, was also terminated.

Mr. Dutta challenges the validity of this summary. Specifically, he claims that his low rating in that document is inconsistent with his February 2008 performance evaluation. In that evaluation, the Complainant received an overall rating of “Meets Expectations,” and received that same rating in six of the seven performance categories for which he was evaluated. In the seventh category, “Quality Work, Technical Competence/Job Knowledge,” he received a higher rating of “Very Good.” Comp. Ex. 10.

I do not agree with the Complainant that an inconsistency exists. Mr. Dutta had only been working in Mr. Hughes’ pipe stress group for approximately one month when the performance evaluation was issued. It therefore appears that Mr. Stegan was evaluating the Complainant based primarily on his work prior to that re-assignment. As previously stated, Mr Dutta testified that when he worked under Stegan, he was largely engaged in writing specifications, designing pressure vessels, and checking vessel design calculations. Tr. at 107-109. However, Somma’s assessment of Mr. Dutta was based, at least in part, on input from Mr. Hughes and Mr. Niedbalski based on work that was done after the Complainant joined the pipe stress group. According to Mr. Dutta, that work consisted primarily of pipe stress calculations. As the performance evaluation and Mr. Somma’s ranking of the Complainant were based on Mr. Dutta’s performance in different kinds of work, I see no inconsistency between the two.

^{3/} These skill areas are (1) Safety Conscious Work Environment (the ability to work safely each day, understand the hazards associated with work prior to performance, and to raise all safety issues to management for appropriate actions), (2) Discipline Knowledge, Skills and Abilities, (3) CADD (PDS model or 2D) and/or software skills (as appropriate), (4) Multi-discipline versatility, (5) Real-time design and field support solutions-oriented resolution attitude and capability. There was a sixth skill area, “Specialized Skills or Knowledge.” However, only one of the eight analysts received a rating in this area.

Mr. Dutta also testified that he was more highly qualified than at least three of the five pipe stress analysts who were retained. Tr. at 155-158. He contended that he should have been kept over Alan Helton because Helton reviewed and approved allegedly faulty pipe stress calculations that were performed by DMJM, a contractor that Parsons retained to assist with pipe stress calculations. In a November 24, 2008, e-mail from XXXXX to Mr. Hughes, XXXX complained that one of the DMJM calculations approved by Helton was “faulty,” and would result in “unrealistic loads,” or stresses, for the pipes involved. Comp. Ex. 47.

However, it appears that Mr. Helton was aware of this issue and accounted for it prior to approving the calculation in question. In a May 27, 2008, e-mail to Hughes, Helton said that “After reviewing the first two calcs [including the one in question], I’ve noticed high loads . . .” Comp. Ex. 47. He went on to recommend that four measures be taken “before finalizing supports for these calcs.” *Id.* Mr. Hughes testified that there was no more of a problem with the quality of DMJM’s calculations than there was with any of their other engineers. Tr. at 766. He added that the measures suggested by Mr. Helton were “issues . . . that we had to go back and review again” in order to address XXXXX concerns. Tr. at 769. Mr. Helton had the highest cumulative score in Mr. Somma’s ranking of the eight remaining pipe stress engineers. Resp. Ex. 12. Based on the information before me, I cannot conclude that Parsons’ would have retained Mr. Dutta instead of Mr. Helton in the absence of Mr. Dutta’s protected disclosures.

The Complainant also testified that he was far more experienced than Jihad Al-Soudi and Charles Abbot, two other engineers whom the Respondent retained. While it is true that Mr. Dutta had over 30 years of experience in mechanical engineering and pipe stress analysis, while Mr. Abbot had 2 years’ experience and Mr. Al-Soudi, 10 years, Parsons could reasonably have considered factors other than the relative experience of the pipe stress engineers in deciding whom to lay off and whom to retain.

For example, Mr. Hughes testified that the Complainant was not able to complete as many calculations during his tenure with Parsons as other engineers in the pipe stress group. Tr. at 729. Respondent’s Exhibit 21 is a listing of calculations done by analysts in the pipe stress group from the date that the analyst began working for the Respondent through January 15, 2009. It shows that although Mr. Abbot joined Parsons almost one year after the Complainant, and Mr. Al-Soudi’s tenure started approximately one month later than Mr. Dutta’s, Mr. Abbot completed 26 calculations and Mr. Al-Soudi completed 37 calculations, while the Complainant completed 11 calculations during his 22 months at Parsons. Resp. Ex. 21.

Mr. Dutta attempted to address this apparent disparity by presenting evidence that the calculations assigned to him were more complicated than those assigned to Mr. Al-Soudi and Mr. Abbott. Specifically, he testified that he was performing PC-3 calculations, “which require[] a dynamic analysis,” Tr. at 166, while Abbott and Al-Soudi were doing mostly PC-1 calculations. Tr. at 166-167. XXXXX also testified that Mr. Dutta did PC-3 calculations, and that these took longer to do than PC-1 calculations. Sup. Tr. at 15. He added that, as a result of his duties as a “checker,” he had an opportunity to evaluate the work of almost all of the other pipe stress analysts in Mr. Hughes’ group, and that the Complainant was “far better than the other guys.” Sup. Tr. at 10.

There is other testimony in the record indicating, however, that Mr. Dutta’s calculations were not more difficult than those performed by other pipe stress engineers, and that he was an average, or

below average, performer. As a “lead” for the pipe stress group, Mr. Niedbalski assigned work and provided technical guidance for the group. Tr. at 791. He testified that he assigned calculations to the Complainant and the other engineers on a random basis, and that most of them did both PC-1 and PC-3 calculations. Tr. at 794. He stated that PC-1 calculations were not easier than PC-3 calculations, nor did they take a shorter amount of time to perform. Tr. at 803. He added that, while PC-3 calculations did involve dynamic analysis, this did not make them more complicated. In fact, he said that, “Once it’s set up, it’s easier to do a dynamic [analysis] than it is a static [analysis].” Tr. at 804. PC-1 calculations involve static analysis. Regarding the quality of Mr. Dutta’s technical skills and of his work in the pipe stress group, Mr. Niedbalski characterized them both as being “average,” but said that the number of calculations that he produced was “below average.” Tr. at 795.

Mr. Hughes testified that Mr. Dutta was not given more difficult work than the rest of the engineers, Tr. at 752, and that PC-3 calculations were not necessarily more difficult than PC-1 calculations. Tr. at 758. He characterized Mr. Dutta’s performance as “below average,” and said that he sometimes required multiple “iterations,” or attempts, to complete relatively simple calculations. Tr. at 733.

XXXXXXXXX testified that he reviewed more of Mr. Dutta’s calculations (four) than XXXXXX (two) did, and he concluded that Mr. Dutta’s work was “average.” Tr. at 901-903. He further testified that Jack Shen and Mr. Al-Soudi were the best performers in the group. Tr. at 903.

Given the foregoing testimony, I cannot conclude that the wide disparity between the number of calculations performed by Mr. Dutta and the number performed by Mr. Al-Soudi and Mr. Abbott can fully be explained by a variation in the difficulty of the calculations assigned to the three analysts. The evidence further indicates that Mr. Niedbalski and XXXXXXXX had a greater opportunity to observe the quality of Mr. Dutta’s work than did XXXXXXXX. I therefore attribute more weight to their testimony as to the Complainant’s performance than I do to XXXXXX testimony.⁴

Finally, the Complainant claims that Parsons employees should have been given preference over job-shoppers in determining who should have been laid off. Mr. Dutta cites Parsons’ Global Talent Initiative (GTI) in support of this contention, and contends that the fact that his employment was terminated while job-shoppers Helton, Niedbalski and Shen were retained is also evidence of retaliatory intent.⁵

I do not agree. Mr. Breor and Mr. Somma testified that there is no Parsons policy giving a preference to Parsons employees over job-shoppers in determining the identity of people to be laid off. Tr. at 665, 1038. Travis Gordon, a Parsons Human Resources Manager, testified that the GTI program

^{4/} I note that Mr. Helton was retained despite having completed only four calculations during the period from his January 14, 2008, hiring through January 15, 2009. Resp. Ex. 21. However, the record indicates that doing these calculations was not his primary responsibility. Helton testified that he operated as an interface between DMJM and Parsons, and that, after DMJM’s work for Parsons ended in July 2008, he was more involved in pipe support work. Tr. at 922-923. Mr. Hughes testified that Helton “wasn’t doing calcs.” Tr. at 761.

^{5/} The stated objectives of the GTI are “to recruit, retain, develop and deploy our people efficiently and effectively.” Comp. Ex. 23.

contained no requirement that Parsons lay off job shoppers before regular employees. Tr. at 941. Moreover, two other Parsons employees, XXXXXXXX and XXXXXXXX, were selected for layoff with Mr. Dutta.

The record indicates that Parsons had substantial reasons for terminating Mr. Dutta's employment. The company was entering the construction phase of the SWPF project, a phase in which it reasonably believed that it would require substantially fewer employees in the Complainant's pipe stress group. The RIF was conducted using facially-neutral standards. The quality of the Complainant's work in the pipe stress group was average at best, and the number of calculations that he completed was below average. These factors suggest that Parsons would have terminated Mr. Dutta in the absence of his protected disclosures.

2. The Strength Of Any Motive To Retaliate For The Whistleblowing

The next factor to be examined is the strength of any motive on the part of Mr. Somma, Mr. Hughes, and Mr. Niedbalski to retaliate against Mr. Dutta. For the reasons that follow, I find there to be insufficient evidence of any motive to retaliate on the part of Mr. Hughes and Mr. Niedbalski, and limited evidence of a motive to retaliate on the part of Mr. Somma.

There is simply no evidence in the record that either of Mr. Dutta's disclosures impacted Mr. Niedbalski or Mr. Hughes in such a way as to provide a motive to retaliate. There is no connection between these two and the Complainant's first disclosure, and the record is unclear as to who made the decision for Parsons that the pipe support work would be finished during the construction phase of the project. In view of this uncertainty, I cannot conclude that either Mr. Hughes or Mr. Niedbalski had an incentive to retaliate because of the second disclosure.

There is some evidence of a motive to retaliate on the part of Mr. Somma, who made the final decision to terminate the Complainant. He did sign off on a document (specification 11819, rev. 0) that the Complainant called "fraudulent." Furthermore, he did testify, perhaps somewhat euphemistically, that he was "a little disappointed" when Mr. Dutta presented his concerns directly to Mr. Amerine, rather than coming to Mr. Somma first. Tr. at 1000.

However, it was Mr. Stegan, and not Mr. Somma, who was the primary actor in the series of events that led to Mr. Dutta's first disclosure. It was Stegan who took the version of this specification that had gone through IDR and gave it to Mr. Edwards with the directions to, in effect, combine it with specification 11818. It was Stegan who got the revised specification back from Mr. Edwards, found it to be to his liking, and forwarded it, with the IDR form from the original specification 11819, to Mr. Somma and to document control, rather than sending the revised specification back through IDR. Therefore, if anyone had a motive to retaliate against Mr. Dutta, it would have been Mr. Stegan.

However, it is undisputed that, after this disclosure, Mr. Dutta received a "meets expectations" personnel evaluation in February 2008 that he found to be fair, Tr. at 210, and two pay increases, only one of which was company-wide.⁶ Given these facts, Mr. Somma's motive to retaliate against Mr. Dutta does not appear to have been particularly strong.

^{6/} Moreover, Mr. Stegan continued to give Mr. Dutta work as a "checker," which the Complainant indicated that he preferred over pipe stress calculations, for several months after he joined the pipe stress group. Tr. at 108.

Mr. Dutta contends that the events that transpired during a January 2009 meeting with Mr. Breor, Mr. Gordon and Mr. Somma indicate that Mr. Somma had a strong motive to retaliate against him. After the Complainant was informed in January 2009 that he would be laid off, he wrote a memo to Parsons' human resources department alleging that his termination was in violation of the GTI, and was likely the result of age discrimination. Comp. Ex. 19. After allegedly not receiving a response from human resources, Mr. Dutta went to see Mr. Breor. Mr. Gordon was also present, and Mr. Somma came in after the meeting had already begun. Mr. Dutta complained to Mr. Breor that he had been laid off while job-shoppers had been retained, in contravention of what he believed to be Parsons policy. At that point, the Complainant testified, Mr. Somma came into the room, and Mr. Breor said, "If I give you a job, will you accept it?" Mr. Dutta replied "Yes," but, allegedly, Mr. Somma very strongly opposed that decision, and Mr. Breor "backed off." Tr. at 161-162.

Mr. Breor, Mr. Gordon and Mr. Somma all testified that no offer or mention of a job for the Complainant with Parsons was made during the meeting. Tr. at 668, 940, 1046. Furthermore, Mr. Gordon's undated and unsigned notes from that meeting contained no mention of such an offer. Resp. Ex. 34. Based on this evidence, I find that Mr. Breor did not offer Mr. Dutta another job with Parsons during this meeting. However, even if I was to conclude that Breor made such an offer, and that Somma strongly objected, it would not necessarily be evidence of the existence of a motive to retaliate on Mr. Somma's part. Such an objection could have been caused by a belief that offering a job to someone to head off a potential age discrimination complaint would set a bad precedent, or a belief that the process by which the Complainant was chosen for termination was fair and well-thought out, and that it should not be overturned simply because the Complainant objected to it. I find no evidence of a motive to retaliate on the part of Mr. Niedbalski and Mr. Hughes, and no evidence of a strong motive to retaliate on the part of Mr. Somma.

3. Treatment Of Similarly-Situated Employees

As previously indicated, all of the analysts in the pipe stress group except for five, were originally selected to be laid off. Consequently, most, if not all, of the analysts who were in situations that were analogous to that of the Complainant were also terminated. However, unlike Mr. Dutta, a substantial number of analysts who were chosen to be laid off were either able to locate another job within Parsons, or were laid off and then subsequently rehired by the Respondent. Nevertheless, I find that there are credible non-retaliatory explanations for this apparent disparity.

XXXXXXX was originally scheduled to be laid off, but was able to obtain another position with Parsons. XXXXXXXX testified that his background was in Quality Assurance (QA), and that he was looking for a QA job when he came to Parsons. Tr. at 932-933. Artis Reynolds, a former Parsons QA Manager, also testified. He stated that he interviewed XXXXXXXX when XXXXXX first applied for a job with Parsons, and had an interest in him. However, because he did not have a position open at that time, he referred XXXXXXXX to Parsons' engineering group, and XXXXXXXX was hired as an engineer. At a later date, XXXXXXXX informed Mr. Reynolds that he still had an interest in QA, and that he believed that he would soon be laid off from his engineering position. Mr. Reynolds contacted Mr. Hughes, and XXXXXXXX was eventually transferred to QA. Mr. Reynolds indicated that XXXXXXXX was hired because his "background supported" QA functions. Tr. at 854-856. He further testified that Mr. Dutta approached him and gave him a resume, but that he did not have a position available at that time. He added that no one told him not to hire Mr. Dutta, and that he would have resigned from Parsons if some one had. Tr. at 857. I found Mr. Reynolds' testimony to

be credible, and I have no reason to doubt his testimony that he did not have a position available when the Complainant gave Reynolds his resume, or to doubt his testimony that, unlike Mr. Dutta, Reynolds had had a previous contact with XXXXXXXX, and an on-going interest in XXXXXXXX services based upon that previous contact.

Mr. Breor testified that as many as ten pipe stress engineers who were laid off in December 2008 were subsequently re-hired by Parsons. Tr. at 670. Mr. Breor and Mr. Somma testified that this was due to design changes and to changes in the Construction Execution Plan. Tr. at 674, 957-958. Somma testified that these engineers were rehired beginning in September 2009, and that this future need for more engineers than the five who were retained was not anticipated at the time of the layoffs. Tr. at 957. He added that when this need was realized, a request for more pipe stress engineers was made to the Human Resources department. The jobs were posted on the Parsons website and applicants, including the engineers who had been laid off earlier, submitted resumes either directly to Parsons or to System One, a contractor who helped them find engineers. To his knowledge, none of the laid off engineers were recalled. Tr. at 1050. Mr. Gordon testified that Parsons had no policy concerning recalling laid off employees. Tr. at 942. He added that Mr. Dutta had not applied for another position with Parsons since his termination, and Mr. Somma stated that the Complainant has not applied for another pipe stress position since that time. Tr. at 1051.

XXXXXXXXXX, who was laid off by Parsons in December 2008, largely confirmed this testimony about how laid off engineers were re-hired. He testified that, through his contact with another engineer who had been laid off, and through monitoring internet job sites, he knew that pipe engineering work at Parsons was picking up again. Tr. at 914. He informed System One that he wanted to return to work at Parsons, and he was eventually re-hired. Tr. at 915.

The record in this matter indicates that the engineers who either were able to avoid termination by finding another job with Parsons, or were subsequently re-hired, either had a previous contact with the Parsons employee who sought their services, or re-applied to Parsons or to a Parsons contractor after their termination. Neither of these circumstances have been shown to apply to Mr. Dutta.

Based on the forgoing, I conclude that Parsons would have terminated the Complainant's employment even in the absence of his protected disclosures. The Respondent's reasons for the termination are convincing, the motive for retaliation is limited, at best, and although some of the pipe stress analysts who were similarly situated to Mr. Dutta were re-hired, the record indicates that they re-applied for their positions, whereas Mr. Dutta did not.

III. Conclusion

I conclude that Mr. Dutta made two protected disclosures, and that at least the second of those disclosures was a contributing factor to his termination. However, I find that Parsons has shown, by clear and convincing evidence, that it would have taken the same action even in the absence of the disclosures. Consequently, I conclude that Mr. Dutta is not entitled to the remedies that he seeks.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Arun K. Dutta under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

Robert B. Palmer
Senior Hearing Officer
Office of Hearings and Appeals

Date: August 25, 2010