

October 16, 2006

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: S.R. Davis  
Date of Filing: May 19, 2004  
Case Number: VBA-0083

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on April 21, 2004, involving a complaint filed by S.R. Davis (also referred to as the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, the Complainant claims that her former employer, Fluor Fernald, Inc. (the Contractor), retaliated against her for engaging in activity that is protected by Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that the Contractor met its burden of demonstrating, by clear and convincing evidence, that it would have taken the same action in the absence of the protected activity. The Complainant appeals that determination. As set forth in this Decision, I have concluded that the determination is correct.

**I. Background**

**A. The DOE Contractor Employee Protection Program**

The Department of Energy'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 or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure, or participating in a related proceeding, will be directed by the DOE to provide relief to the complainant.

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by the Complainant in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

## **B. History of the Complaint Proceeding and General Background**

The events leading to the filing of the Complaint are fully set forth in the IAD. *S. R. Davis* (Case No. VBH-0083), 28 DOE ¶ 87,044 (2004) (hereinafter IAD). For the purposes of the instant appeal, the relevant facts are as follows.

The Complainant worked in the Contractor's Information Management (IM) department. In June 2001, the Complainant filed a Complaint under Part 708, alleging that she made protected disclosures and that the Contractor retaliated against her by issuing her two disciplinary actions and transferring her to a different job. In June 2002, the local employee concerns office referred the matter to OHA for an investigation and hearing, and the OHA Director appointed an investigator (the Investigator). However, in July 2003, as the Investigator was preparing his report, the Contractor terminated the Complainant as part of an involuntary separation program.

After completion of an investigation pursuant to 10 C.F.R. § 708.22, the Complainant requested and received a hearing on this matter before an Office of Hearings and Appeals (OHA) Hearing Officer.<sup>1</sup> Before the hearing, the Hearing Officer tentatively determined that the Complainant had alleged four Part 708 retaliations: the two disciplinary actions, the job transfer, and the involuntary separation.<sup>2</sup> The Hearing Officer also tentatively determined that the Complainant had met her burden with respect to all four of the alleged Part 708 retaliations. Therefore, she limited the hearing to the issue of whether the Contractor would have taken the same actions in the absence of the protected activity.

The hearing lasted four days. The Contractor presented a wide range of witnesses which included the Complainant's management chain, human resources (HR) and employee relations officials and staff, and various co-workers. Likewise, the Complainant's counsel presented witnesses, including a co-worker and a worker in another department, to testify about the Complainant's performance and conduct. The Complainant also testified on her own behalf.

After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

In order to more fully understand the issues of this appeal it is important to outline the general background. The general background facts in this case are as follows. Due to the planned closure of its Fernald site, the Contractor implemented a series of voluntary and involuntary separation programs, commonly referred to as VSPs and ISPs. As stated earlier, the Complainant worked in the Contractor's Information Management (IM) department. Prior to a June 2003 ISP, the IM department

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<sup>1</sup> The Complainant requested that the alleged retaliations to be considered in this case include this July 2003 involuntary separation. The Hearing Officer granted this request.

<sup>2</sup> The Complainant objected to this determination, alleging that over the course of her employment she had made protected disclosures that resulted in the Contractor's failure to promote her and that the Contractor's current refusal to correct this situation was itself a retaliation. Before the hearing, the Hearing Officer ruled that these allegations were untimely and were not part of the complaint.

consisted of five managers: the department head and four division managers. Two of the divisions were “network” divisions and two were “programmer” divisions. As part of the July 2003 ISP, the Contractor separated the IM head and a programmer division manager. The Contractor then promoted one of the programmer managers to be department head, thus leaving two divisions - a network division and a programmer division. The remaining network manager is referred to as the Network Manager; the remaining programmer manager is referred to as the Programmer Manager.

From 1998 to June 2001, the Complainant reported to the Network Manager. During this time, the Complainant held the title of “Supervisor Information Management” and was one of three team leaders. However, in late June 2001, the IM department head reassigned the Complainant to the Programmer Manager. The Complainant reported to the Programmer Manager for the next two years, until she was separated in the July 2003 ISP. While reporting to the Programmer Manager, the IM department eliminated the title of “Supervisor Information Management.” The seven employees who held that title, including the Complainant, had their title downgraded to “Information Management Analyst III.” Another employee’s title was downgraded from “Manager Information Management” to “Senior Information Management Analyst.” *See* IAD at 89,317.

During the Complainant’s tenure with the Network Manager, the Complainant received two disciplinary actions and was transferred to another job. On March 21, 2001, the Complainant received a Written Reminder from the Network Manager which cited her inconsistent work hours, her failure to follow management direction, and her unprofessional communication style. The second action involved a May 31, 2001 “decision-making leave,” which cited the Complainant’s failure to establish and maintain backups and unprofessional communication style. <sup>3</sup> On June 25, 2001, the Complainant received notice of a job transfer to the Programmer Manager. This notice cited the Programmer Manager’s need for the Complainant’s skills.

## **II. The Initial Agency Decision**

The IAD sets forth the burdens of proof in cases brought under Part 708. It is the burden of the Complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation. *See* 10 C.F.R. §§ 708.5 and 29. If the Complainant 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 Complainant’s disclosure. 10 C.F.R. § 708.29. The IAD considered the application of these elements to this proceeding.

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<sup>3</sup> In a “decision-making leave,” the Contractor places an employee on administrative leave for the rest of the day so that the employee can make a decision about whether or not the employee wishes to remain employed.

### **A. Protected Activity and Contributing Factor**

Prior to the hearing, the Hearing Officer identified two alleged protected disclosures. The Contractor did not dispute that the Complainant made these disclosures or that they were protected. The Hearing Officer also found that the circumstances permitted a reasonable inference that the disclosures contributed to the alleged actions. She therefore found that the Complainant satisfied her burden of proof with respect to the two disciplinary actions, the job transfer and the involuntary separation.

### **B. Whether the Contractor Would Have Taken the Same Actions In the Absence of the Protected Activity**

The IAD found that the Contractor presented clear and convincing evidence that it would have taken the same actions involving the Complainant in the absence of the protected disclosures. Over the course of her tenure with the Network Manager, the Complainant “had a number of conflicts with subordinates, co-workers, and managers, in which the Complainant made inflammatory and disrespectful statements to, and about, others.” IAD at 89,317. The IAD found that the Contractor provided extensive documentary and testimonial evidence to support its actions and further that the Complainant did not cast doubt on the Contractor’s strong showing. In the IAD, the Hearing Officer found that the Complainant’s testimony was not reliable, particularly that the Complainant’s testimony was contradictory and that her version of events conflicted with her contemporaneous e-mails of those events. Moreover, she found, in general, that the Complainant’s version of events did not justify her conduct, i.e., failure to take direction from her managers and communicate in a professional manner.

With respect to the first disciplinary action, the March 27, 2001 Written Reminder, the Complainant was cited for “failing to maintain a regular work schedule, failure to follow management direction, and communicating unprofessionally with [her] management and peers.” Contractor Ex. 28. Although the Complainant testified that she sometimes had to work after hours or adjust her hours, she also testified that she always notified her supervisor. IAD at 89,322. The IAD found that the record supported the Complainant’s position that IM staff members sometimes had to work after hours and were required to notify their supervisor if they wanted to offset their time against their regularly scheduled hours. However, the IAD found that the Complainant abused her flexibility and that the Complainant’s managers had objected to her late arrivals. The IAD pointed to evidence that management disapproved of the Complainant’s “inconsistent work schedule,” and that the Complainant did not maintain a proper work schedule. *Id.* Although the Complainant attributed her conflicts with her managers to the fact that she made disclosures about personnel and managers in the IM department, the IAD found that the evidence in the record was contrary to her claim. The IAD cited as examples: 1) that the Complainant stated her opinion that her supervisors did not have the authority to reverse her decision limiting a subordinate’s computer access; 2) the Complainant’s failure to follow management direction to restore the subordinate’s access; and 3) the Complainant’s failure to comply with her managers’ requests that she establish and maintain backups. IAD at 89,322, 89,323. Further, the IAD found that the Complainant’s communication style was unprofessional and created a tension-filled atmosphere. The IAD cited the Complainant’s own e-

mails as examples of her communication style. Finally, with respect to the March 27, 2001 Written Reminder, the IAD concluded that the Contractor demonstrated that there were non-retaliatory reasons for this action.

With regard to the second disciplinary action, the May 31, 2001 decision-making leave, the Complainant was cited by management for her failure to establish and to maintain backups and an “unacceptable communication style” in e-mails to the Network Manager, who was her supervisor at the time. Although the Complainant asserts that she had backups and that she was in the process of complying with a May 24, 2001 request from the Network Manager to train others, the IAD found that the May 31, 2001 decision-making leave was accurately supported. Again, the IAD cited examples of the Complainant’s own e-mails as persuasive evidence in the record.

With respect to the third alleged retaliatory action, the job transfer, management cited the Complainant’s “withdrawal of her VSP application, the training of individuals to take her place, and the need for the Employee’s skills in the Programmer Manager’s area” as reasons for the transfer. Contractor Ex. 57. Although, the Complainant argued that other IM employees who rescinded their VSP application were able to stay in the same jobs, the IAD found that the Contractor “had strong reasons for the transfer” and that the facts cited in the transfer letter were accurate in that “there were individuals trained to take the Employee’s place and the Programmer Manager had a need for the Employee’s skills.” IAD at 89,323. The IAD concluded that the Contractor would have transferred the Complainant to a different position in the absence of her protected disclosures and “that the designated position accommodated both the Employee’s refusal to be on call and her desire not to work with the Network Manager.” *Id.* at 89,324. Finally, the IAD concluded, and the record strongly supports the Contractor’s position, that it had non-retaliatory reasons for transferring the Complainant.

Lastly, with respect to the July 2003 Involuntary Separation, the IAD found that it was clear that the Contractor’s decision to conduct this involuntary separation was not related to the Complainant, but was rather one of a series of voluntary and involuntary separation programs associated with the upcoming site closure. In addition, “the Contractor’s determination that it had an excess number of employees in the IM department had nothing to do with the Employee,” nor did the Contractor’s decision “to create two groups for IM staff members.” *Id.* at 89,325. In regard to this alleged retaliatory action, the Complainant argued that she should have been evaluated according to the network group criteria and that her rating in the programmer group was too low. The IAD analyzed extensive evidence on this matter, first analyzing whether the Complainant was properly evaluated in the programmer group. During the hearing, the Complainant cited notes of manager discussions which recognized that some employees had skills in both the network and the programmer area. She further maintained that she would not have been evaluated in the programmer group if she had not been transferred as a result of her protected activity. The IAD, however, found that the diversity of the Complainant’s skills did not affect whether she was evaluated in the network group or in the programmer group, and that the Contractor’s treatment of the Complainant was consistent with its treatment of the other IM employees who had been separated.<sup>4</sup>

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<sup>4</sup> The network group consisted of the staff members in the two network divisions, and the  
(continued...)

Also, with respect to the July 2003 Involuntary Separation, the IAD analyzed whether the Complainant merited a higher rating in the programmer group. At the hearing, the Programmer Manager testified as to how she assigned the ratings that she did. She explained in detail and provided examples of how she evaluated the employees against certain rating factors and relative to each other. The Hearing Officer believed the Programmer Manager's testimony was highly credible, finding that many of her "comments and examples were corroborated by documents, including e-mails from the Employee and the testimony of others." *Id.* at 89,326. During the course of the hearing, the Complainant objected to her rating by the Programmer Manager, arguing that it was inconsistent with the Complainant's November 2002 performance appraisal and that the written comments on her evaluation underestimated her skills. After the evaluation of extensive testimony on this issue, the IAD concluded that the Complainant's evidence did not cast doubt on the accuracy of her rating and further that the Programmer Manager evaluated the Complainant against the "relevant specified criteria honestly and fairly, notwithstanding the employee's objections." *Id.* at 89,329.

The IAD therefore found clear and convincing evidence existed to show that the Contractor would have taken the same action in the absence of the protected disclosures. In sum, the IAD concluded that the Complainant was not entitled to relief.

### III. Analysis

The Complainant filed a statement identifying the issues that she wished the Director of the OHA to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). The Contractor filed a Response to the Statement. <sup>5</sup> 10 C.F.R. § 708.33.

After fully reviewing the voluminous record in this case, in light of the arguments raised in the Complainant's Statement of Issues, I find that there is no basis for overturning the result in this case.

#### A. The March 27 Written Reminder

The Complainant first asserts that the Hearing Officer failed to require the Contractor to show by clear and convincing evidence that it would have issued the March 27, 2001 Written Reminder in the absence of the Complainant's protected disclosures. In this regard, the Complainant argues that "Fluor Fernald provided no clear and convincing evidence that Ms. Davis' work schedule was inappropriate . . . of Ms. Davis's failure to follow management direction and of her insubordinate conduct and that Ms. Davis's communications were inappropriate." Statement at 4-12. In her

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<sup>4</sup>(...continued)

programmer group consisted of the staff members in the two programmer divisions. The Complainant, who was in the programmer division, was evaluated by the manager in this group.

<sup>5</sup> There is no need in the instant case to set out the specifics of the contractor's response, some of which are incorporated into my analysis below.

statement, the Complainant asserts, *inter alia*, that the Hearing Officer “reverses the burden of proof, requiring Ms. Davis to establish her notification of [her supervisor] and selectively using emails that present Flour Fernald’s version of Ms. Davis’s insubordination, her inappropriate comments and her failure to follow management direction.” *Id.* at 3. The Complainant further asserts that the Contractor did not submit any documentation that she failed to notify her manager or that she missed any assignment deadline. *Id.* at 4.

This assertion is incorrect. In fact, the Complainant misstates the burden of proof. She states that the Contractor provided no clear and convincing evidence that the Complainant’s work schedule was inappropriate. However, the Contractor’s burden is to prove by clear and convincing evidence that it would have issued the Complainant the March 27<sup>th</sup> Written Reminder without her protected disclosures. The Hearing Officer correctly evaluated the testimony and other evidence before her and correctly concluded that the Contractor had met its burden with respect to this issue.

With regard to the issue of whether the Complainant properly notified her manager about changes in her work schedule, the Complainant testified that she left notes, voice mails or emails when she intended to alter her work schedule. However, the Hearing Officer took note of the fact that she could not find any of these notifications to offer as evidence during the hearing. In addition, the Complainant argues that the Contractor failed to submit evidence of “similar treatment of similarly situated employees.” Statement at 5. The issue, however, is not whether other employees were permitted to adjust their schedules, but whether other employees gave appropriate notification to their supervisors. The Contractor’s position, which it asserted during the hearing and on this Appeal in its Response, is that no other employees received similar disciplinary action “because no one else in the department failed to provide the required notifications” to their managers. Further, the Complainant asserts that the Contractor provided no clear and convincing evidence of her failure to follow management direction and of her insubordinate conduct. Statement at 6. She claims that the Hearing Officer ignored pertinent testimony and overlooked the refusal of the Contractor “to follow up on Ms. Davis’ very serious complaint that Mr. Arnett [supervisor] had used the Performance Review process as a weapon.” Statement at 7. I do not agree with her contention. The Hearing Officer noted this issue in her Decision and decided the appropriate weight she would accord to it. She evaluated a voluminous amount of documents provided by both parties as well as the testimony of various witnesses to arrive at her factual conclusion that the Complainant failed to follow management direction and behaved in an insubordinate manner. The record well supports these Hearing Officer factual determinations. Finally, the Complainant asserts that the Contractor provided no clear and convincing evidence that her communications were inappropriate. Statement at 8. However, the record reflects that the Hearing Officer reviewed numerous e-mail messages, memos and testimonial evidence which led her to conclude, correctly in my view, that the Complainant engaged in unprofessional and inappropriate communications with her managers, subordinates and peers. Again, the wealth of evidence in the record well supports the Hearing Officer’s factual determination on this issue.

The record reflects that the Hearing Officer analyzed all the testimony relating to the March 27<sup>th</sup> Written Reminder, and concluded that the Contractor’s testimony relating to the disciplinary action was more persuasive and credible. She also determined that much of the Complainant’s evidence not only failed to support but was contrary to her claims. In doing so she was fully engaged in the role

of the Hearing Officer: to listen to the testimony of witnesses, observe their demeanor, and make a judgment as to their credibility in light of the evidence. I see no error in the judgment of the Hearing Officer in reaching her conclusion that the Contractor met its burden on this issue.

### **B. The Decision-Making Leave**

The Complainant next asserts that the Hearing Officer failed to require the Contractor to show by clear and convincing evidence that it would have issued the May 31, 2001 Decision-Making Leave in the absence of her protected disclosures. Statement at 12. According to the record, the circumstances leading up to this disciplinary action began on May 3, 2001 when the Complainant signed an application to participate in a Voluntary Separation Program (VSP) that was being offered by the Contractor. The Complainant requested a separation date of June 29, 2001, although she ultimately withdrew her VSP application. After accepting the Complainant's separation date, the Contractor found it necessary to plan for her departure by seeking to identify other employees to assume the duties she had performed. During the hearing, the Complainant did not dispute the necessity of the Contractor to plan for her departure and the necessary training of other employees. She also understood the importance of her personal participation in the training process. In a May 23, 2001 e-mail message, the Complainant's supervisor specifically directed the Complainant to train another employee in a specific type of Internet security software used by the Contractor. Strict deadlines were imposed on the Complainant due to the limited time remaining before her anticipated separation. The decision-making leave also cited the Complainant's failure to establish and maintain personnel backups. IAD at 89,323. In her Statement, the Complainant generally, asserts as she did during the hearing, that she had personnel backups and that she was in the process of complying with the Network Manager's May 24, 2001 direction to train others. However, the record is to the contrary. It indicates that she had a cavalier and insubordinate attitude about the managerial direction she was receiving. She ultimately did not follow these instructions. *Id.* Moreover, the Complainant sent a number of "inappropriate" and "unprofessional" e-mails in response to her manager's request to provide backups although she denies these e-mails had an unacceptable communication style. Based on her evaluation of the evidence in the record, the Hearing Officer correctly determined that the Contractor had non-retaliatory reasons for issuing the Decision-Making Leave in light of its legitimate need to plan for the Complainant's anticipated separation. Again, I see no error in the judgment of the Hearing Officer in reaching her conclusion that the Contractor met its burden in issuing this disciplinary action to the Complainant.

### **C. Job Transfer/Change of Duties**

Next, the Complainant asserts that the Contractor failed to show by clear and convincing evidence that it would have issued the Complainant's Change of Duties in the absence of her protected disclosures. Specifically, the Complainant argues, *inter alia*, that the Contractor "failed to explain why it selected a reassignment option for Ms. Davis that resulted in a demotion when others were available and requested by Ms. Davis." Statement at 17. In addition, the Complainant asserts that the Contractor failed to justify her reassignment based on immediate need. Finally, the Complainant asserts that the Hearing Officer improperly considered her "refusal to continue managerial on-call" as a basis for the decision to reassign her. She refers to the Contractor's decision to transfer her job, which cited the Complainant's withdrawal of her VSP application, the need to train other individuals to take her place

and the need for the Complainant's skills in the Programmer Manager's area. The Hearing Officer found that "the job transfer was largely the result of the Employee's ongoing conflict with the Network Manager, including her repeated statements that she did not want to report to him, and her stated refusal to work after hours." IAD at 89,323. The record amply supports the fact that there was an ongoing conflict between the Complainant and the Network Manager. The record also supports the Programmer Manager's need for the Complainant's skills. It further indicates that neither the Complainant's pay nor her benefits were reduced as a result of the job transfer. Finally, the record indicates that the Complainant's April 2001 refusal to work after hours prompted the employee relations department head to conclude that the Complainant "should be moved to a job that did not require her to be on call." Id. at 89,324. The record strongly supports the Hearing Officer's conclusion on this issue – that the Contractor would have transferred the Complainant to a different position in the absence of her protected disclosures. I see no Hearing Officer error here.

#### **D. Involuntary Separation**

Finally and perhaps most significantly, the Complainant challenges the Hearing Officer's conclusion that the Contractor met its burden with respect to the Involuntary Separation. The Complainant asserts numerous arguments in support of this contention.<sup>6</sup> In asserting these arguments, the Complainant attempts to raise various factual matters in seeking to rebut the findings reached by the Hearing Officer after evaluating voluminous evidence including testimony subject to cross examination. The Complainant's contentions on appeal are not new but were addressed by the Hearing Officer in the IAD. It is well settled that the factual findings of the Hearing Officer are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to weigh evidence and to judge the credibility of witnesses. *Eugene J. Dreger*, 27 DOE ¶ 87,564 at 89,351-52 (2000), citing *Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,501, 89,001 (1995); *O'Laughlin v. Boeing Petroleum Services, Inc.*, 24 DOE ¶ 87,513, 89,064 (1995). For the reasons below, I have determined that the Complainant has failed to show that the Hearing Officer's findings were erroneous as a matter of fact or law, and the IAD must therefore be sustained.

At the outset of the hearing, the Hearing Officer found that neither the Contractor's decision to conduct the July 2003 ISP nor the Contractor's determination that it had an excess number of employees in the IM department had anything to do with the Complainant. During the course of the hearing, the Complainant never challenged these findings, but rather challenged the fact that she was evaluated according to the Programmer Group criteria instead of the Network Group criteria. The Hearing

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<sup>6</sup> Those arguments include the following: (1) the Contractor failed to explain why the Complainant was not evaluated on a Network Individual Skills Rating Form instead of a Programmer Individual Skills Rating Form; (2) the Contractor failed to explain why none of the Complainant's network skills were considered even though she used them within the prior two years; (3) the Contractor failed to explain why it selected a reassignment for the Complainant to the Programmer Group when a continuing need for the Complainant's skills was not ascertained before the reassignment; (4) the Contractor failed to explain why it did not consider other reassignment options that were favored by the Complainant; and (5) the Contractor failed to explain inconsistencies in the testimony of an [IM Supervisor] as to her knowledge of the Complainant's Part 708 complaint when the supervisor was both a crucial member of the FRT [Function Review Team] and SRT [Senior Management Team].

Officer evaluated extensive documentary evidence and testimony, including evidence on whether the Complainant belonged in the Programmer Group and deserved a higher rating, and concluded (1) that the Contractor had a legitimate business reason for its ISP and (2) that it would have selected the Complainant for the ISP in the absence of her protected disclosures. Again, the Complainant presents no new evidence that indicates that the Hearing Officer's conclusions should be overturned.

In her Statement, the Complainant reasserts an argument she made during the hearing that "(1) Ms. Davis was the only IM employee whose primary job assignment was not within the group to which she reported; and (2) Ms. Davis was the only IM employee to cross over from the Network to the Programmer arena (or the reverse) within the last two years. Application of the two year rule only affected Ms. Davis." Statement at 18-19. The Complainant further asserts that the Contractor "never showed, by clear and convincing evidence, why Ms. Davis was evaluated as a Programmer when her primary assignment was as a Network Analyst." *Id.* at 19. As stated earlier, the record supports the Hearing Officer's finding, that the Complainant was properly evaluated as a member of the Programmer Group based on her primary assignment. I see no clear error. This is not the appropriate forum to conduct new fact-finding.

Further, I find no basis for the Complainant's assertion that she was the only employee affected by application of the "two year rule." According to the record, the "two year rule" relates to an employee's "skills transferability" where employees who have been selected for involuntary separation are eligible to transfer to available positions in other sub-groups "if they have demonstrated current skills for that position." Thus, to be eligible to transfer under this rule, an employee must have had actual experience in the other skill area within the last two years. It was determined and the record supports the fact that the Contractor applied this rule to all employees who were being considered for an ISP, not only the Complainant. Although the Hearing Officer did not discuss this "two year rule" in detail, she found, through her evaluation of the evidence in the record, that the "recognition of diverse skills, either in management discussions or on the evaluation form, did not affect whether an employee was evaluated in the network group or the programmer group." IAD at 89,325.

With respect to the Complainant's assertions that the Contractor failed to consider other reassignment options she favored, failed to explain why it selected a reassignment for the Complainant when a continuing need for the Complainant's skills was not ascertained, and finally that there were inconsistencies in the testimony of an IM Supervisor. The Complainant is wrong again. The Complainant has misstated the Contractor's burden of proof. The Contractor is not required to prove why it did not choose a variety of other possible options for the Complainant instead of the particular action it ultimately took. Rather, the Contractor's burden is to prove by clear and convincing evidence that it would have taken the same action absent the Complainant's protected disclosures. I agree with the Hearing Officer that the Contractor has met its burden here by persuasively demonstrating that it evaluated its employees properly, according to their demonstration of "core skills and the essential job-specific skills for their job classification or sub-classification." Further, I am equally persuaded by the strength of the testimony in the record, and I agree with the Hearing Officer, that the Programmer Manager evaluated the Complainant "against the relevant specified criteria honestly and fairly." IAD at 89,329.

### **E. Refusal to Consider Job Level/Title Change (Demotion) in Part 708 Complaint**

Finally, the Complainant argues that the Contractor demoted her sometime in the mid-1990's and that she did not become aware of this "demotion" until August 2003 when she received the Contractor's personnel and employee relations files from the OHA Investigator in connection with her Part 708 complaint. The Complainant contends that this issue of "job level/title" change is part of the Contractor's "pattern of continuing retaliation against her, and should be considered with the other four retaliations." Statement at 22.

On November 12, 2003, the Hearing Officer issued a letter denying the Complainant's request to include the "job level/title" change as an additional issue to be a subject of the hearing. The Hearing Officer stated that the "mid-nineties job level/title change is beyond the scope of the proceeding." She further stated that the complaint "does not identify the mid-nineties job level/title change, and the investigator did not investigate it." Thus, the Hearing Officer concluded that the request should be denied. She declined to exercise her discretion to include "the alleged retaliation . . . , given its nature and age." Therefore, she ruled that the hearing proceeding was limited to the four alleged retaliations addressed in the IAD. The Part 708 regulations provide that a complaint must be filed by the 90<sup>th</sup> day after the employee knew, or reasonably should have known of the alleged retaliation in order to be timely. *See* 10 C.F.R. § 708.14(a). Although, as mentioned above, the Complainant asserts that she did not become aware of this alleged retaliation until she received documents from her personnel file in August 2003, there is no evidence in the record to support this assertion. Therefore, I find that the Hearing Officer correctly determined that this allegation, which the Complainant alleged occurred approximately eight years earlier, should not be included in the proceeding based on its untimeliness.

### **IV. Conclusion**

As is evident from the above description of the IAD, this case involves factual issues which are strongly disputed. Ultimately, however, it was the role of the Hearing Officer to make findings of fact based on her assessment of the witnesses and their testimony, as well as the documentary evidence presented during the proceeding. The Hearing Officer did so, and after reviewing the entire record, I find no error. Complainant's attempt to reargue these factual matters is unavailing. As previously stated, there is deference given to the trier of fact to weigh evidence and to judge the credibility of witnesses, and unless the factual findings are deemed clearly erroneous they should not be overturned. In the interest of efficiency, it is inappropriate to relitigate the same matters that came before the Hearing Officer. Again, I see nothing in the Complainant's Statement of Issues that would cause me

to overturn the IAD in this case. Accordingly, the instant appeal should be denied and the IAD affirmed.

It Is Therefore Ordered That:

(1) The Appeal filed by S.R. Davis on May 19, 2004, Case No. VBA-0083, of the Initial Agency Decision issued on April 24, 2004 be and hereby is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: October 16, 2006