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Case No. LWA-0001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Ronald Sorri

Date of Filing: June 9, 1993

Case Number: LWA-0001

This Decision involves a whistleblower complaint filed by Ronald Sorri (Sorri) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. Sorri charged that reprisals were taken against him after he raised safety concerns with Sandia National Laboratories, DOE, and Congressman Leon Panetta. The alleged reprisals included removing him from his job as a maintenance technician in Sandia's Microelectronics Development Laboratory; giving him lowered performance ratings; reassigning him to a job as a technical writer; and finally, firing him. DOE's Office of Contractor Employee Protection (OCEP) investigated the complaint and found that the first three actions were reprisals for Sorri's disclosure of safety concerns. However, OCEP concluded that Sorri's termination did not constitute a reprisal. Neither Sandia, nor Sorri's employer, L&M Technologies, Inc., a Sandia subcontractor, requested a hearing to challenge OCEP's findings. Sorri requested a hearing before the Office of Hearings and Appeals (OHA) under ' 708.9(a), maintaining that his termination was also a reprisal for his safety disclosures. The hearing in this case was held on October 26 and 27, 1993, in Albuquerque, New Mexico.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE Contractor Employee Protection Program became effective on April 2, 1992. 57 Fed. Reg. 7533 (March 3, 1992). Its purpose is to encourage contractor employees at DOE's government-owned, contractor-operated (GOCO) facilities to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers. 10 C.F.R. Part 708.

Before Part 708 was promulgated in 1992, contractor employee protection at DOE's GOCO facilities was governed by DOE Order 5483.1A ("Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities"). However, no formal procedures existed under Order 5483.1A. The new regulations were adopted to improve the process of resolving complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary or her designee.

B. Facts

The following summary (and the chronology in the Appendix to this Decision) is based primarily on the investigation conducted by OCEP. Except as specifically noted below, the facts in this case are uncontroverted. From March 1990 until March 1992, Sorri was employed as a Senior Maintenance Technician by L&M Technologies (L&M), a subcontractor to Sandia National Laboratories (Sandia). Sorri was assigned to Sandia's Microelectronics Development Laboratory (MDL), which was engaged in the production of semiconductors. His job was to maintain the ion implanters, which are machines used in the manufacture of semiconductors. Sorri's tenure at the MDL was unremarkable until he raised a number of safety concerns to L&M and Sandia management officials.

In August 1990, Sorri verbally raised concerns to his MDL operational supervisor, Mike Nicholas, about the possible release of lethal gases that could result from overpressurized gas cylinders positioned inside the Varian 300 XP ion implanter. Sorri was uncomfortable with the gas cylinder pressures being too high, in excess of 400 pounds per square inch (psi). The gas in the cylinders was under a pressure of 800 psi. Nicholas told Sorri that industry allows for pressures over 400 psi, but agreed that after the gas in the cylinders was depleted, they would be replaced with cylinders specifically set at 400 psi. In mid-December 1990, Sorri wrote a memorandum to Nicholas in which he further detailed his concerns about the pressures in the gas cylinders. After a meeting between Sorri and several management officials representing both L&M and Sandia, an agreement was reached that new 400 psi cylinders would be ordered to replace the old cylinders.

On January 3, 1991, Sorri filed a safety complaint with the Sandia Safety Office after being told by the MDL purchasing office that the 400 psi cylinders had not yet been ordered. As a result, a meeting was held on January 18, 1991 with Sorri, Nicholas,

and his L&M administrative supervisor, John Doyle, to discuss the safety concerns and to formulate a plan to resolve them. Subsequently, there were a number of meetings attended by Sorri and various L&M and Sandia management officials, including Doug Weaver, the Sandia MDL Facility Manager, Ron Jones, Sandia MDL Division Supervisor, and Fil Martinez, L&M Contract Manager, to discuss Sorri's concerns. The outcome of these meetings was an agreement that Sorri's concerns about cylinder pressure would be remedied by ordering new 400 psi cylinders to replace the old ones. On January 25, 1991, a meeting was called at Sorri's request, in which he raised fears that reprisals would be taken against him for raising safety concerns.

In February 1991, Sorri was directed to vent some gas cylinders in order to reduce the cylinder pressures. He believed that using this procedure to vent arsine gas, a toxic substance, was dangerous and that this action was contrary to the plan to resolve his safety concerns previously agreed upon during the January 1991 meetings. Therefore, on February 14, 1991, Sorri filed a formal safety complaint with the DOE. According to the uncontested findings of the OCEP investigation, L&M and Sandia immediately took several reprisals against Sorri.

The first of these reprisals occurred on February 15, 1991. After L&M and Sandia management officials learned that Sorri had filed the safety complaint, he was told to remove personal items from his desk, his employee badge was taken from him, and then he was physically escorted out of the MDL. Sorri was placed in the L&M headquarters office building, where he was directed to write up his safety concerns about the ion implant area in more detail and submit them to Fil Martinez on February 25, 1991. Sorri was later placed on administrative leave with pay for approximately five weeks and was told to stay off the L&M and Sandia premises.

The second reprisal, according to OCEP's investigation, occurred in March 1991, when Sorri was informed that he would be reassigned to work for Bill Lucy, Sandia Safety Supervisor, as a safety technician at the MDL. Sorri complained that he had no training as a safety technician and that this reassignment was a reprisal for his disclosure of safety problems. Within a few days, his old job title was restored, but he was assigned full time to writing maintenance procedures for the ion implanters. Sorri was a technician who worked with his hands, not a technical writer, and this job was difficult for him. During the next several months while Sorri had this new assignment, Nicholas and Jones complained that Sorri made errors and took too long to write the maintenance procedures.

The third reprisal found to exist by OCEP occurred when Sorri received a lowered performance evaluation for the period ending July 1, 1991. Sorri's rating was lower than his previous rating, and it was also lower than the average performance rating of other L&M employees for that period. As a result of this lower rating, Sorri received a salary enhancement lower than the amount which he would have received had he been given a rating at a level consistent with his previous performance evaluations.

In September 1991, Harry Weaver replaced Doug Weaver (no relation) as the Sandia MDL Facility Manager. According to Harry Weaver, the primary mission of the MDL was supposed to change from production of semiconductors to research and development. He claimed that as a result of the change in focus, the MDL needed employees with a wider range of experience so that they would have more flexibility to handle different task assignments.

In January 1992, Sandia sent L&M a Request for Quotation (RFQ) for a modification to L&M's contract with Sandia. According to its terms, the RFQ made one principal change: it reduced the number of "tasking areas," i.e. job descriptions, from approximately 100 that were very specific to three that were very general. In February 1992, L&M informed its MDL employees that it had received this RFQ and requested that they submit resumes based on their current jobs for transmittal to Sandia. At the time, Sorri believed the resumes were going to be used to group technicians into the three new tasking areas. No one at L&M was told that the resumes would be used to determine who would retain their jobs at the MDL, and who would be laid off.

Whether Sorri's termination was the final act of reprisal against him is the main issue addressed in the hearing and this Decision. The facts surrounding the termination are not in dispute. Sandia evaluated the resumes submitted by the L&M employees in response to the RFQ. Harry Weaver developed the criteria which were used to score the resumes while Jones did the actual resume scoring. Out of 100 possible points in Weaver's rating scheme, the "cross training" element was the most heavily weighted, at 30 percent of the total. Weaver claims that the emphasis was placed on cross training because employees with more diverse skills were needed for the changeover from a production-oriented MDL to one which was more oriented towards research and development. Sorri received 28 points out of 100, the lowest score of all L&M employees in his tasking area, scoring zero points in the critical cross training element. After the ratings had been completed, Weaver decided that the minimum acceptable score for Sorri's task group would be 40 points. Employees who had scores below 40 were either to be fired, or conditionally retained and given additional training. Sorri was not conditionally retained or offered additional training. On March 2, 1992, Weaver wrote a memo to his superior, Paul Peercy, which stated (in an attachment) that Sorri was to be terminated. Sandia informed L&M that it had no position in the MDL for Sorri, and on March 13, 1992, Sorri was fired by L&M president Antonio Montoya.

Sorri wrote letters expressing his concerns about the reprisals taken against him to Congressman Leon Panetta on two occasions, in March and November 1991. On December 3, 1991, Sorri also made a written safety complaint to Sandia about the mid-current ion implanter. In January 1992, Sorri's November 1991 letter to Panetta was forwarded by Bruce Twining, Manager of DOE's Albuquerque Field Office, to Sandia president Al Narath, who was asked to comment on Sorri's allegations. On February 12, 1992, before the L&M resumes had even been submitted, and more than two weeks before Weaver notified his superior that Sorri would not be retained, Narath wrote to Twining that Sorri would not be returned to his job in ion implant because the MDL's "new operation mode does not call for maintenance to support production." Narath denied that Sorri had been the victim of reprisals.

C. Procedural History of the Case

On July 23, 1992, Sorri filed a complaint with the DOE Albuquerque Field Office under Part 708. After an unsuccessful attempt to reach an informal resolution, Sorri's complaint was forwarded on September 29, 1992 to OCEP to institute a formal investigation. OCEP conducted an on-site investigation of Sorri's allegations of reprisal and issued a Report of Investigation and a Proposed Disposition on April 30, 1993. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that Sorri had made protected disclosures and that removal of Sorri from his job as an ion implant maintenance technician in the MDL, his reassignment to the job of writing maintenance procedures, and his downgraded performance evaluations, were all reprisals for his protected disclosures. However, the Proposed Disposition also concluded that Sorri's termination had not been a reprisal, but was justified by the change in mission at the MDL from production to research and development. OCEP proposed that Sorri be awarded $639.20 for salary enhancements lost as a result of his downgraded performance evaluation, plus attorney's fees.

On May 14, 1993, Sorri submitted his request for a hearing pursuant to ' 708.9 to OCEP. On June 9, 1993, OCEP transmitted that request, together with the complaint file, to the OHA. The OHA Director appointed a Hearing Officer, who promptly, on June 16, 1993, established a prehearing briefing schedule under ' 708.9(b).

On August 11, 1993, Sandia filed a Motion to Dismiss the proceeding. Sandia asserted that the requirement in ' 708.6(d) that a complaint be filed within 60 days after an alleged reprisal occurred, or within 60 days after the complainant "knew or reasonably should have known" of it, is jurisdictional in nature. According to Sandia, DOE may not accept any whistleblower complaint where that time limit is exceeded. Sandia stated that even if the 60 days were counted from the effective date of Part 708 on April 2, 1992, Sorri's complaint, filed on July 23, 1992, was still untimely. L&M filed a similar Motion to Dismiss on August 17, 1993.

On August 20, 1993, the Motions to Dismiss were denied. See Sandia National Laboratories, 23 DOE & 82,502 (1993) (Sandia). The Hearing Officer concluded that the acceptance of Sorri's complaint was a reasonable exercise of discretionary authority under Part 708 by the OCEP Director. Citing the preamble to Part 708, the decision found that there was no evidence that the policy considerations underlying the 60-day time limit had been contravened by the acceptance of Sorri's complaint. The decision also noted that neither Sandia nor L&M had even suggested that it had been prejudiced by the brief delay between Sorri's termination and the filing of his complaint under Part 708. Id. *

On September 24 and 27, 1993, two Motions for Discovery were filed by Sorri and L&M, respectively. I found that both discovery requests were reasonable and granted the Motions in a decision issued on October 15, 1993. In addition to ruling on the discovery requests, the decision established procedures for the submission of exhibits before the hearing, and set the order of witnesses. Ronald A. Sorri; L&M Technologies, Inc., 23 DOE & 84,002 (1993).

As a practical matter, a hearing before OHA under Part 708 is equivalent to an appeal from the conclusions reached by OCEP in the Report of Investigation and Proposed Disposition. This Decision addresses the two issues covered at the hearing: (1) whether Sorri's termination was a retaliatory action which would not have occurred absent his disclosure of safety concerns; and (2) the amount of attorney's fees Sorri is entitled to recover in connection with processing his complaint. By not requesting a hearing themselves, Sandia and L&M have waived their rights to challenge any other findings in the Proposed Disposition.

The Part 708 regulations do not specify what is to be included in the record for purposes of a DOE contractor employee whistleblower protection proceeding. To resolve this ambiguity, I defined the "record" in this proceeding to include OCEP's complaint file, all papers filed by the parties with the OHA, all interlocutory decisions and orders and letter rulings issued by the OHA on procedural matters, the transcript of hearing testimony, and any exhibits submitted by the parties at the hearing. Transcript of October 26-27, 1993 Hearing (hereinafter cited as "Tr."), Vol. I at 6.

II. Analysis

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under ' 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. ' 708.9(d). The parties in this case have stipulated to the fact that there were disclosures by Sorri protected under ' 708.5. See Tr., Vol. I at 20, 21. Thus, in order to meet his burden, Sorri must prove by a preponderance of the evidence, i.e. that it is more probable than not, that his protected activity was a "contributing factor" in his termination. See McCormick on Evidence ' 339 at 439 (4th ed. 1992) ("The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof . . . that the existence of the contested fact is more probable than its nonexistence.").

Although this is the first case to come before an OHA Hearing Officer under Part 708, similar standards of proof have been applied by the federal courts and administrative agencies to whistleblower complaints filed under ' 210 of the Energy Reorganization Act of 1974 and the Whistleblower Protection Act of 1989. For example, in Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993), a DEA employee's complaints of mismanagement prompted an investigation, and the agency decided on the basis of the investigation that the complainant should be reassigned to another city. In that case, the court found direct evidence that the whistleblower's complaint had been a contributing factor to his reassignment. Id.

In most cases, however, it is impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Thus, the complainant must meet his burden of proof through circumstantial evidence. A protected disclosure has been found to be a "contributing factor" in a personnel action where "the official taking the action has actual or constructive knowledge of the 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." McDaid v. Dep't of Hous. and Urban Dev., 90 FMSR & 5551 (1990) (McDaid). See Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989).

In its post-hearing brief, Sandia argues that Sorri must prove that there was a "causal connection" between his protected activity and his termination, and that "it would be entirely illogical to presume that the disconnected events [in this case] rise to the level of causative nexus." Post-Hearing Brief of Sandia at 5, 7. As authority for its position, Sandia relies on McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991), a retaliatory discharge case decided under Title VII of the Civil Rights Act of 1964. However, the "contributing factor" standard which governs the complainant's burden in this whistleblower case under Part 708 is different from the burden of proof imposed on the plaintiff in McNairn and the other Title VII cases cited by Sandia.

Congress made the meaning of this standard clear when it adopted the "contributing factor" test in the 1989 Whistleblower Protection Act (WPA). Prior to the enactment of the WPA, the courts had interpreted federal whistleblower law "as requiring the whistleblower to carry a considerable burden of proof in order to establish his case. The whistleblower was required to establish, inter alia, that the disclosure constituted a 'significant' or 'motivating' factor in the agency's decision to take the personnel action." Marano, at 1140 (footnote omitted). One of the purposes of the WPA was to reduce this "excessively heavy burden imposed on the employee" and thus make it "easier for an individual . . . to prove that a whistleblower reprisal has taken place." 135 Cong. Rec S2780, S2784 (daily ed. Mar. 16, 1989) (statement of Sen. Levin). In explaining the "contributing factor" standard, the House and Senate floor managers of the legislation stated:

One of the many possible ways to show that the whistleblowing was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) of the 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.

135 Cong. Rec. H749 (daily ed. Mar. 21, 1989). After the enactment of the WPA, this same standard was adopted by Congress in 1992 when it amended the whistleblower provisions in ' 210 of the Energy Reorganization Act in the Energy Policy Act of 1992, Pub. L. No. 102-486, Title XXIX, ' 2902, 106 Stat. 3123-24 (1992). The DOE adopted the same standard when it issued the Part 708 regulations. See 57 Fed. Reg. 7533 at 7538 (March 3, 1992) (Preamble to Part 708).

I therefore reject Sandia's argument that a more stringent burden of proof be required of complainants under Part 708 than that which DOE clearly intended by adopting the "contributing factor" standard. Next, I consider whether Sorri has met his burden of proving by a preponderance of the evidence that his protected conduct was a contributing factor in the decision by Sandia and L&M to terminate his employment.

During the period August 1990 through December 1991, Sorri made a number of disclosures which are protected under ' 708.5. In August 1990, Sorri verbally raised safety concerns to his MDL operations supervisor, Mike Nicholas, and again made those concerns known in a memorandum to Nicholas in December 1990. On January 3 and December 3, 1991, Sorri filed safety complaints with Sandia, and on February 14, 1991, Sorri filed a formal safety complaint with the DOE. Finally, Sorri wrote letters disclosing his concerns to Congressman Leon Panetta in March and November 1991.

Neither Sandia nor L&M disputes that it had actual knowledge of Sorri's disclosures prior to his termination. Sorri's initial disclosures prompted several meetings in December 1990 and January 1991 attended by the supervisors and managers of both contractors (John Doyle and Fil Martinez of L&M; Doug Weaver, Dale Blankenship, Ron Jones, and Bill Lucy of Sandia). See Report of Investigation at 6. The record also shows that Sandia and L&M took the first of several reprisals immediately after Sorri's February 14, 1991 complaint to the DOE. See Proposed Disposition at 6. In addition, Sorri's November 26, 1991 letter to Congressman Panetta prompted a response from the president of Sandia, and Sorri's December 3, 1991 health and safety complaint was filed directly with Sandia. See Hearing Exhibit (Ex.) 106; Tr., Vol. II at 91. L&M's evaluation of Sorri's performance for the last six months of 1991, which was given on March 27, 1992, states that Sorri was pursuing "trivial issues to the highest levels of Sandia management," and confirms L&M's awareness of Sorri's continuing complaints. See Hearing Ex.104.

The record indicates that the decision had been reached to terminate Sorri by March 2, 1992, when Harry Weaver wrote a memo advising his superior at Sandia, Paul Peercy, of this fact. See Hearing Exs. 106, 123, 137. This was less than three months after Sorri filed his December 3, 1991 safety complaint with Sandia, and little more than a month after the president of Sandia learned of Sorri's November 26, 1991 letter to Congressman Panetta. See Hearing Ex. 106. This short time period between Sorri's latest disclosures and his termination leads us to conclude that the disclosures were a contributing factor in Sorri's termination. This conclusion is further supported by the fact that the termination was only the last in a series of adverse actions taken against Sorri, each of which followed closely on the heels of Sorri's disclosures of safety problems. The present record easily satisfies the complainant's burden under Part 708 of proving by a preponderance of the evidence that his protected conduct was a contributing factor in his termination. As noted in McDaid, supra, at 1023, the Merit System Protection Board (MSPB) reviewed the legislative history of the 1989 Whistleblower Protection Act, and held that this requirement is satisfied by circumstantial evidence showing that there was a protected disclosure followed by an adverse personnel action which occurred reasonably close in time. Id., quoting S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988). For the reasons explained below, I find that the record is sufficient to shift the burden under ' 708.9(d) to Sandia and L&M to prove by clear and convincing evidence that they would have taken the same action absent Sorri's protected disclosures.

It is unquestioned that Sandia was aware of Sorri's disclosures and that its managers participated in the reprisals that were taken against Sorri after his safety complaints to DOE and Congressman Panetta. Sandia supervisory employees participated in the decisions to remove Sorri from the MDL one day after his complaint to DOE, and to reassign him to the job of writing maintenance specifications for the ion implanters. These same Sandia personnel also furnished information used by L&M's MDL contract manager Fil Martinez to prepare Sorri's performance evaluations. Thereafter, Harry Weaver and Ron Jones of Sandia were the principal actors in the resume rating process and the decision to terminate Sorri from the MDL without offering

an opportunity for conditional retention and cross training. Finally, Sandia president Narath's February 12, 1992 letter to Bruce Twining of DOE's Albuquerque Office strongly suggests that the prime contractor had decided to get rid of Sorri well before the resume rating process was even carried out. For a whistleblower case where circumstantial evidence is normally expected, the Narath letter (Hearing Ex.106) is a virtual "smoking gun," because it supports Sorri's claim that the resume rating process was a sham. For these reasons, I conclude that the complainant has met his burden of showing by a preponderance of the evidence that his protected conduct was a contributing factor in Sandia's decision to terminate him.

L&M maintains that it should have been dismissed from the case without being required to submit any exculpatory evidence under ' 708.9(d) because Sandia alone was responsible for Sorri's termination. Tr., Vol. II at 6, 7. I disagree. Despite L&M's limited discretion under its contract with Sandia, L&M retained administrative supervision over Sorri, and L&M principals Montoya and Jim Martinez exercised that authority when they made the ultimate decision to fire him. Tr., Vol. I at 104. Moreover, Sorri's termination was not an isolated event, but merely the end of a chain of reprisals in which Sandia's and L&M's actions were inextricably intertwined. From the time of Sorri's initial disclosures, L&M management willingly participated in decisions which were part of this pattern of reprisal, including the removal of Sorri from the MDL one day after he filed a safety complaint with DOE, and his later reassignment as a technical writer responsible for drafting maintenance procedures for the ion implanters. See Report of Investigation at 7-8. In addition, L&M Contract Manager Fil Martinez was responsible for Sorri's July 1, 1991 performance evaluation, which OCEP found was lowered as "a result of his whistleblowing activities," as well as his final March 27, 1992 evaluation, which was even lower than the previous one. See Report of Investigation at 11; Hearing Ex. 104. I therefore find that the complainant has met his burden of showing by a preponderance of the evidence that his protected disclosures were a contributing factor in L&M's decision to fire him. I turn now to a consideration of whether the contractors have met their respective burdens of proof under Part 708.

C. The Contractors' Burden

Part 708 provides that, once the complainant has met his burden of proof under ' 708.9(d), "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure...." 10 C.F.R. ' 708.9(d). The standard of proof by "clear and convincing evidence" is more stringent than the "preponderance of the evidence" standard applied to complainants under Part 708, but not as high as the "beyond a reasonable doubt" standard used in criminal cases. See McCormick on Evidence, ' 340 at 442. It has been described as that evidence sufficient to persuade a trier of fact that the truth of a contested fact is "highly probable." Id. For the reasons set forth below, I have concluded that neither contractor has met this burden.

Before he filed his safety complaints with Sandia and DOE, Sorri was a highly rated employee who received an above average performance evaluation for the period ending July 1, 1990. According to this evaluation, Sorri had "no problems" in the area of "Judgement and Stability," and in the category of "Cooperation," Sorri was characterized as "very good, no problem, gets along well, a team player." In "Versatility," Sorri was rated as "very experienced on job, goes beyond job description." Sorri received ratings of 4.5 out of 5 points in each of these categories. One year later--after his disclosures--Sorri's average score in these three areas had plummeted to 2.5 out of 5, with supervisor's comments such as "ability to function in a team environment need to be improved," "has resisted efforts to be utilized outside of implant," and "sound judgement, tact lacking." OCEP Complaint File, Book I, Item 11.

Sandia's defense rests on the assertion that Sorri was terminated because the mission of the MDL shifted from production to research and development, and his skills were not suited to the new environment. According to Sandia, the shift in mission was reflected in the January 12, 1992 RFQ, and the implementation of the new job descriptions proposed in the RFQ resulted in Sorri's dismissal. The OCEP investigation accepted Sandia's justification for firing Sorri, without probing any further. However, the testimony and demeanor of the witnesses at the hearing and the additional documentary evidence added to the record since the OCEP investigation has undercut Sandia's position. The present record leads to the inescapable conclusion that the contractors have failed to show by clear and convincing evidence that Sorri would have been fired if he were not a whistleblower.

A cloud of suspicion hangs over the entire process that was used to justify Sorri's termination. First, there is no mention in the January 1992 RFQ of a change in mission at the MDL, or any statement in the RFQ that it was issued to implement this change. Tr., Vol II at 48. Sandia submitted no evidence at all about the actual impact in the workplace of the purported change in mission. By contrast, Sorri testified that the ion implanters in the MDL would still need intensive maintenance regardless of whether they were used in a normal production cycle. Tr., Vol II at 83-4. Second, while the RFQ proposed to reduce the number of job descriptions at the MDL, there is no indication in the document that this was to result in the termination of any employees. Harry Weaver, who played a major role in the process, testified that "[t]he idea was not to layoff people, okay, the idea was to change the way we did business. . . . I certainly had no instructions from anybody at Sandia that I had to change the number of people or who was working out there." Tr., Vol. I at 222. Weaver did not recall when it was decided that the resumes submitted in response to the RFQ would be used as the basis for layoff decisions. Id. at 195. He testified that when the RFQ was issued, he had envisioned a resume evaluation process, but not as part of a layoff plan. Id. at 187. Fil Martinez, the L&M contract manager, submitted the resumes with the understanding that they would be used "for reevaluation of everyone's position," but Martinez had "no knowledge whatsoever" that the resumes would be used in layoff decisions. Tr., Vol. I at 116.

The use of resumes as the basis for conducting a layoff was an unusual practice in the business community, and without precedent in the experience of the Sandia officials involved. Organizational development consultant Kelli Livermore, the expert witness called by the complainant, testified about standard practices in the personnel management field for structuring layoffs. Tr., Vol. I, at 58-72. She stated that she had never in her experience seen resumes used as the sole basis for making layoff determinations. Id. at 60. While both Sandia and L&M raised objections to the qualifications of this witness, the testimony of Sandia employees only confirmed her opinion. Harry Weaver stated that in his 15 years as a Sandia manager he had never before used resumes as the basis for layoffs. Tr., Vol. I at 208. Both Weaver and Ron Jones stated in their testimony that there

were written Sandia Laboratories management guidelines which prescribed standard procedures for layoffs, but admitted that these guidelines were never consulted in conducting the layoff that resulted in Sorri's termination. Tr., Vol. I at 174 (Jones) and 210 (Weaver).

The evidence also shows that the process used by Sandia was unfair, and not designed to "build out" subjective factors. Tr., Vol. I at 62-3. First, the employees were given no notice that the resumes would be used to determine who would be retained and who would be fired. Tr., Vol. II at 88. Nor were they ever given copies of the Weaver rating sheet described below. This deprived them of any meaningful opportunity to tailor their resumes to the situation. Second, the resumes submitted were not in any standard format and, according to Ron Jones, they varied in length and style. Tr., Vol I. at 153. Jones was given a rating sheet by Harry Weaver to score the resumes in nine categories, with a maximum point value that varied depending on the category. However, Jones was given no oral instructions or written criteria by Weaver for determining how the contents of the resumes were to be translated into point values. Thus, Jones depended on his "feel for what I considered to be the maximum capability within an area or experience level within that area," though he admitted that this method was subjective and "somewhat arbitrary." Id. at 154. Finally, Harry Weaver admitted that Sorri's status as a whistleblower "had to be a subconscious factor" in the rating process. Id. at 221.

The scores that came out of this process were then used in an arbitrary fashion to determine who would be laid off and who would be retained. Since Sandia was not required to eliminate any jobs, it is conceivable that all of the MDL employees could have been found qualified to continue their employment if their scores met some independent standard of minimum qualification. We find it significant that the cutoff score of 40 out of a possible 100 points was not determined beforehand as representative of a minimum skill level needed by workers in the MDL. According to Harry Weaver, the cutoff point was selected "after the fact" by looking at how the employees scored in the ratings and finding a "natural break[ ]" in the scores. Tr., Vol I at 211. Yet, any natural break in the scores would not show how the employees rated in relation to a predefined minimum standard. If, for example, the entire group of employees was so outstanding that each employee scored exactly twice as high in the ratings, there would have been a natural break in the scores around 80. This obviously would not support a conclusion that those scoring below 80 would not be qualified enough to keep their jobs. Thus, even if the rating process that Jones used to arrive at the individual scores had been objective, there is no rational basis in the record for Sandia's determination that those employees who scored below a "natural break" had to be terminated. That determination was an arbitrary one. As Harry Weaver admitted, the process provided "an opportunity" to eliminate Sorri. Tr., Vol. I at 211.

Harry Weaver testified that Sorri, despite a score of 28, could have been retained by Sandia and cross-trained to work in other areas of the MDL. Tr., Vol. II at 65. Weaver tried to justify his decision not to cross-train Sorri on the grounds that "there has to be some motivation" on the part of an employee for the training to be successful, and that Sorri had "given no evidence in his resume, in his dealings with people, not just management people, but with employees at Sandia, that he would be . . . willing to work in areas other than ion implantation." Tr., Vol. II at 66. This stated reason does not form a proper basis for terminating Sorri.

Under the circumstances of this case, I find it perfectly understandable that Sorri expressed a strong desire to return to work in ion implant and a reluctance to accept a change when it was forced upon him. He had been summarily "run out of the building" on February 15, 1991, one day after he filed a safety complaint with the DOE, and never allowed to return to his job. Tr., Vol II at 96. Neither contractor has contested OCEP's finding that this constituted a reprisal for Sorri's safety complaint to DOE. After that experience, Sorri testified, "all I wanted to do was to have my . . . regular assignment back in ion implant." Id. Instead, Sorri was reassigned to the job of writing maintenance procedures for the ion implanters, a task which he found difficult since he was not qualified to do it. As the Report of Investigation and Proposed Disposition concluded, reassignment to this job was clearly a reprisal against Sorri, who by his own admission "was not a technical writer," but someone who worked with his hands. Tr., Vol. II at 82, 100. Offering Sorri a choice between being cross-trained and losing his job certainly would have provided the motivation necessary to successfully cross-train him, but Harry Weaver and the contractors never gave Sorri this opportunity.

L&M maintains that Sandia alone was responsible for Sorri's termination. The firm claims that as a second-tier subcontractor, it had "no rational alternative but to terminate [Sorri]" once Sandia determined he would not retained at the MDL. Tr., Vol. II at 6-7. Simply by showing that it was unable to offer Sorri other employment after he was rejected by Sandia, L&M asserts that it has met its burden of showing by clear and convincing evidence that it would have fired Sorri in the absence of his protected conduct. This limited view of liability under Part 708 runs contrary to the whistleblower protection policy underlying the program and cannot be endorsed here. The legislative history of Part 708 makes it clear why DOE decided to extend the protection of the regulations to employees of all subcontractors:

The DOE believes that the health and safety of all contractor employees is of utmost importance and overrides enforcement and administrative difficulties that could be incurred in extending the rule to second- and lower-tier subcontractors.

57 Fed. Reg. 7533 at 7535. L&M's conduct was inextricably intertwined with that of Sandia throughout the events chronicled in this record. L&M actively participated in the pattern of reprisal against Sorri for his whistleblowing activities. Even though there is no direct evidence in the present record linking L&M to Sandia's decision not to retain him in the MDL, L&M was solely responsible for Sorri's administrative supervision and its president made the ultimate decision to fire him. Thus, there is enough evidence in the present record to warrant rejection of L&M's argument that it was not "responsible" for Sorri's termination. Moroever, even if L&M were not involved at all in rating or supervising Sorri, but only in formally terminating him, it still could conceivably be liable under Part 6708 for a reprisal. The protections afforded whistleblowers under Part 708 would be eviscerated if subcontractors could escape liability for actions adverse to whistleblowers simply because they merely "carried out" a reprisal contrived by someone else.

In light of the foregoing analysis, I have concluded that there is not even a preponderance of evidence, and certainly not clear and convincing evidence, that Sandia and L&M would have terminated Sorri if he had not engaged in protected activities.

This conclusion is consistent with the findings of the federal courts under similar circumstances in other whistleblower cases. For example, in DeFord v. Sec'y of Labor, 700 F.2d 281 (6th Cir. 1983), a case decided under ' 210 of the Energy Reorganization Act, a Tennessee Valley Authority (TVA) employee was transferred from his position and demoted shortly after participating in a Nuclear Regulatory Commission (NRC) investigation. The United States Court of Appeals for the Sixth Circuit explained its basis for upholding the determination of the Secretary of Labor:

The Secretary found "that DeFord's transfer was a deliberate retaliation for his cooperation with NRC and his attempts to get his Quality Assurance Engineering section recognized by management." There was evidence that TVA did not follow its normal procedure in transferring DeFord, but rather unceremoniously dumped him from the quality assurance section shortly after the NRC investigation. There was evidence that DeFord had received superior performance ratings prior to the NRC investigation, although TVA claimed in defense of the transfer that he had performed badly in his job. There was evidence that DeFord worked well with his immediate supervisors and had not developed personality conflicts that would interfere with effective performance of his job. There was evidence that DeFord was singled out, in what was admittedly intended to be a negative remark, as a "very strong individual . . . who is instrumental in influencing the opinion and operation of the staff and input to management" and that such criticism of DeFord as a "strong individual" did not arise until TVA conducted its internal audit of the NRC's findings. Quite simply, there was substantial evidence to support the Secretary's conclusion that DeFord was demoted solely because he participated in an NRC proceeding.

Id. at 287 [emphasis in original]. The facts in the present case are strikingly similar, and the burden of proof for a whistleblower under Part 708 is less stringent than it was under the earlier version of ' 210 that the Sixth Circuit applied in DeFord. Sorri received above average performance ratings prior to his disclosures, including high marks in judgement and stability, cooperation, and versatility. Sorri was seen by his supervisors as "a team player" who "gets along well." Only after filing safety complaints did Sorri's rating for judgement and stability drop to 2 out of 5 (from a high of 4.5) because he pursued "trivial issues to the highest levels of Sandia management . . . ." Hearing Ex. 104. It was not until after Sorri's complaints and a series of reprisals that he was singled out for criticism by Ron Jones for "causing problems within the contract force, with negative statements during meetings and while talking to peers." Finally, like TVA in the DeFord case, Sandia did not follow normal business practices or its internal procedural guidelines in laying off Sorri.

In other cases where an employee's protected conduct is followed by the type of adverse actions taken against Sorri, and the employer cannot provide a reasonable alternative basis for its actions, the federal courts have readily concluded that the actions were taken in retaliation for the protected conduct. See Hathaway v. Merit Sys. Protection Bd., 981 F.2d 1237, 1243-44 (Fed. Cir. 1992); Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980). The courts have found even ostensibly legitimate bases for adverse personnel actions to be pretexts for punishing or getting rid of a whistleblower, based on the circumstances surrounding the action. See, e.g., Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505 (10th Cir. 1985) (requiring whistleblower to document his educational credentials while not applying similar requirement to other employees). As analyzed above, Sandia's attempt to justify its decision to fire Sorri on the basis of a purported change in mission at the MDL was not supported by the evidence in the record. Sandia failed to dispel the concrete impression that the resume process was seized upon as a pretext for getting rid of Sorri. Moreover, an employee cannot be terminated for reasons which are rooted in the employee's experience as a whistleblower, like Sorri's understandable desire to return to work in the ion implant area after he was improperly removed from his regular job there. See Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1163 (9th Cir. 1984) (discussing the need to differentiate between protected and unprotected manifestations of "bad attitude").

As in DeFord, the evidence in this case as set forth above amply supports the conclusion that Sorri's disclosures to Sandia, the DOE, and the Congress, protected under Part 708, were a contributing factor in Sandia and L&M's termination of Sorri, and that neither Sandia nor L&M have proven by clear and convincing evidence that his termination would have taken place absent these disclosures. Accordingly, I find that Sorri's termination violated ' 708.5.

III. Remedy

Having concluded that Sandia and L&M failed to meet their burden of showing by clear and convincing evidence that they would have taken the same personnel action against Sorri absent his disclosure of safety problems, and that a violation of the prohibitions set forth in Part 708 has occurred, I now turn to the remedy.

For those cases in which discrimination against an employee in reprisal for a protected disclosure is found to have occurred, the goal of the DOE regulations is to restore the employee to the position in which he or she would otherwise have been, absent the act(s) of reprisal, in a manner similar to other whistleblower protection schemes. See, e.g., Energy Reorganization Act of 1974, 42 U.S.C. ' 5851; Whistleblower Protection Act of 1989, 5 U.S.C. ' 1214(b)(4)(B). The initial agency decision may include an award of reinstatement, transfer preference, back pay, and all reasonable costs and expenses (including attorney and expert witness fees) "reasonably incurred" by the complainant in bringing the complaint. 10 C.F.R. ' 708.10(c). Sorri does not seek reinstatement.

An award of back pay is clearly appropriate in this case. Back pay is intended to restore the complainant to his proper position by providing compensation for the tangible economic loss suffered and by acting as a deterrent to employers. See United States v. N.L. Indus, Inc., 479 F.2d 354, 379 (8th Cir. 1973). It is evident that Sorri has suffered an economic loss from his termination on March 13, 1992. After he was fired by L&M, it took Sorri seven weeks to find a new job. He states that he lost gross income totalling $3,812, an amount which does not include approximately $1,000 in unemployment compensation benefits that he received. Tr., Vol I at 228. Sandia and L&M concede in their respective post-hearing briefs that the amount of unemployment compensation received should not be subtracted from the amount of back pay awarded to Sorri if a violation of ' 708.5 is found to exist. This result is consistent with the generally accepted "collateral source rule," which holds that unemployment compensation benefits should not be deducted from back pay awards. See, e.g., NLRB v. Gullett Gin Co., 340 U.S. 361 (1951).

In addition, the OCEP Report of Investigation found that as a result of his downgraded performance evaluation, Sorri lost $639.20 in salary enhancements he should have received. Sorri testified that he also lost $128.22 which would have been the approximate value of L&M's company contribution to a 401(k) program. Tr., Vol. I at 227. The amount of the lost 401(k) contribution is uncontested, but L&M claims that the Report of Investigation erred in the calculation of Sorri's lost salary enhancement. Tr., Vol II at 139. According to L&M, Sorri's overall performance rating for the period ending December 31, 1990 was 4.33 and not 4.375 as stated on page 11 of the Report. In the hearing, L&M's counsel also claimed that since the firm generally lowered the ratings for all employees by an average of .54 points, it is reasonable to assume that Sorri's rating would have dropped by that amount. Therefore, L&M maintains that if Sorri's rating had otherwise remained constant for the period ending July 1, 1991, .54 points should be deducted from 4.33 which would result in an adjusted rating of 3.79. As a result, L&M contends that the $639.20 salary enhancement calculated by OCEP was incorrect because it failed to take this factor into account. This contention is flawed. First, there is no evidence in the record to show how much Sorri's specific rating would be affected by a general lowering of the curve. Thus, there is no valid basis for concluding that Sorri's rating would have decreased by the average decline of .54 points. Second, in view of the finding that Sorri's lowered performance rating was a reprisal for his protected activities, it would contravene the whistleblower protection policy underlying Part 708 to base his salary enhancement on anything but his initial rating of 4.33. The purpose of the remedy is to restore Sorri to the position in which he would otherwise have been absent the acts of reprisal. 57 Fed. Reg. at 7539. Consequently, no adjustment will be made to the $639.20 salary enhancement calculated in the Report of Investigation. See 10 C.F.R. ' 708.10(b) (Hearing Officer may rely on findings in the Report of Investigation).

As part of his back pay and these other salary-related elements of the award, Sorri should receive interest to compensate him for the time value of money lost while while bringing his complaint. See, e.g., Garst v. Dep't of the Army, 90 FMSR & 5037 (1993) (interest on back pay awarded under WPA) (Garst). Since Part 708 does not specify the rates of interest that should be applied to back pay awards for DOE contractor employee whistleblowers under ' 708.10(c), I will follow the practice of the Merit Systems Protection Board under the WPA. The MSPB awards interest on back pay under the Office of Personnel Management (OPM) regulation found at 5 C.F.R. ' 550.806(d). That regulation refers to the "overpayment rate" established by the Secretary of the Treasury in 26 U.S.C. ' 6621. The overpayment rate is the Federal short-term rate, plus two percentage points. The Federal short -term rate for a particular calendar quarter is the short-term rate for the first month of the preceeding calendar quarter, rounded to the nearest whole percent. 26 U.S.C. ' 6621(a)(1); (b)(2)(A). The sum of Sorri's back pay, lost 401(k) contribution, and lost salary enhancements is $4,579. Interest on this amount will be assessed from April 1, 1992 through December 31, 1993, based on the quarterly overpayment rates for the seven calendar quarters included in that period, and compounded quarterly. The total amount of interest calculated in this manner is $527. The interest calculations are shown in the Appendix to this decision. Thus, the total amount of back pay and related items, plus interest, to be awarded Sorri is $5,106.

An award of all reasonable costs and expenses, including attorney and expert witness fees, is also appropriate. First, I will consider Sorri's prehearing legal expenses. The Proposed Disposition directed that Sorri be awarded attorney fees and costs "in connection with the processing of his complaint" under Part 708. Proposed Disposition at 12. This should include the attorney's fees charged by Barbara Pryor, Esq. on May 21, 1992 and by David S. Proffit, Esq. on September 29, 1992. The record indicates that Sorri contacted Barbara Pryor for legal services after he was terminated on March 13, 1992. In a letter to Pryor, Sorri requested that she provide legal services on a contingency basis. Sorri had no further communication with Pryor, who billed him $38. Tr., Vol. I at 229. Sorri later contacted David Proffit after his termination, seeking to obtain his legal services on a contingency basis. Proffit provided legal advice before Sorri's attempt at informal resolution. He also discussed the possibility of filing lawsuits in state and federal courts. Sorri paid $372.99 for Proffit's legal services. Tr., Vol I at 230. Sorri's claim for these amounts is uncontested.

Next, I consider the amount of attorney's fees that Sorri "reasonably incurred" for the hearing before OHA. Sorri entered into an agreement with Thad M. Guyer, Esq., his hearing counsel, to pay him a retainer of $2,500 to take all actions necessary within the scope of the hearing. Tr., Vol I at 231-234. This rate was quoted to Sorri based on the public interest nature of his case and did not constitute Guyer's normal hourly rate. Id. at 232. In addition, the retainer agreement stated that if Sorri were successful in his claim under Part 708, Guyer would ask the OHA to award a fee equal to the number of hours billed times his normal hourly rate. Sorri contends that any attorney fee awarded should be based on what is reasonable--the full value of Guyer's services--and not on what the complainant was able to pay his attorney before the hearing.

Sandia argues that the fee which Sorri should be awarded should be capped by the amount he agreed to pay his attorney, or $2,500. As authority for this argument, Sandia relies on Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (Fifth Cir. 1974) (Johnson). I reject Sandia's position. This issue was considered and resolved by the U.S. Supreme Court in Blanchard v. Bergeron, 489 U.S. 87 (1989), which overruled a lower court decision on the award of fees that had also relied on Johnson. The Court held that an attorney's private fee arrangement, standing alone, does not resolve the question of what is a "reasonable" fee. It held that the defendant should be required to pay a higher amount, "should a fee agreement provide less than a reasonable fee calculated." Id. at 92. According to the Court, the "lodestar figure--the product of reasonable hours times a reasonable rate--represents a reasonable fee...." Id. at 95. I will interpret the phrase "reasonably incurred" in ' 708.10(c) like the Supreme Court, and apply the same "lodestar" approach for determining the amount of attorney's fees to award to the successful complainant in this case under Part 708. See Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 886, 888 (1984) (directing lower courts to apply the lodestar approach). As a matter of Departmental policy, it is also important to recognize the public interest nature of representing a whistleblower under Part 708, and to award a reasonable fee to encourage attorneys to take these cases. E.g., Blanchard at 96.

I have concluded that an award of back pay (plus interest), together with reasonable costs and expenses, including reasonable attorney and expert witness fees, is the appropriate remedy in this proceeding. In addition to the categories discussed above, Sorri should receive restitution for any other costs "reasonably incurred" in bringing his complaint under Part 708. These additional costs include the value of time lost from his current job in bringing the complaint, the value of time lost for the

hearing (including time spent preparing for the hearing, and attending the hearing itself), and milage, long distance telephone charges, postage, copying, court reporters (for depositions), and all other related expenses. This decision will direct counsel Guyer to submit a full accounting of his hourly charges for attorney's fees together with any costs, expenses, and expert witness fees incurred in representing Sorri, and a full accounting of any and all other costs and expenses reasonably incurred by Sorri in bringing his complaint under Part 708. The fee applicant has the burden of producing satisfactory evidence that his requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. See Blum v. Stenson, supra. Therefore, Guyer should also submit appropriate evidence to show what is a reasonable hourly rate for him to receive in this case.

IV. Conclusion

For the reasons set forth above, I conclude that Sorri has proven by a preponderance of the evidence that he engaged in activities protected under Part 708 and that these activities were a contributing factor in the decision by Sandia and L&M to terminate his employment. Neither Sandia nor L&M has proven by clear and convincing evidence that it would have terminated Sorri absent his protected activities. Furthermore, I conclude that Sandia and L&M were jointly responsible for the termination of Sorri's employment. I therefore find that a violation of Part 708 has occurred and Sorri should be awarded back pay lost as a result of the reprisals taken against him (plus interest), as well as all costs and expenses reasonably incurred by him in bringing the present complaint. After Guyer has provided the information described in Section III above, I will issue a Supplemental Order specifying the exact amount to be awarded Sorri.

It Is Therefore Ordered That:

(1) Sandia National Laboratories and L&M Technologies shall pay to Ronald Sorri the following amounts in compensation for actions taken against him in violation of 10 C.F.R. ' 708.5:

(a) $639.20 for lost salary enhancements for the period July 1, 1991 through March 13, 1992;

(b) $128.22 for lost L&M contributions to Sorri's 401(k) fund;

(c) $3,812.00 for income lost by Sorri from March 13, 1992 to the beginning of his employment with Phillips Semiconductors;

(d) $527 for interest on the amounts in (a) through (c) above, for the period April 1, 1992 through December 31, 1993;

(e) $410.99 for legal fees paid by Sorri to Barbara Pryor and David Proffit;

(f) An amount to be determined based on the information provided under paragraph (2) below in compensation for all costs and expenses, including attorney and expert witness fees, reasonably incurred by Ronald Sorri in bringing his complaint under Part 708.

(2) Thad M. Guyer, attorney for Sorri, shall, no later than 30 days after the issuance of this Decision, submit to the Hearing Officer a full accounting of his hourly charges for attorney fees together with any costs, expenses, and expert witness fees incurred in representing Sorri, including appropriate documentation as evidence that the rates requested are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. In addition to the cost categories described above, Guyer shall submit, on behalf of Sorri, a full accounting of any and all other costs and expenses reasonably incurred by Sorri in bringing his complaint under Part 708.

(3) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director, Office of Contractor Employee Protection.

Thomas O. Mann

Hearing Officer

Office of Hearings and Appeals

Date:

APPENDIX

I. Sorri Chronology

March 1990: Sorri begins employment with L&M.

August 23, 1990: Sorri receives performance evaluation rating of 4.588 on a 5 point scale for period ending 7/1/90, above the average of 4.16 for L&M employees in the MDL.

August 1990: Sorri verbally raises concerns to Mike Nicholas about overpressurized gas cylinders in ion implanters.

December 1990: Sorri writes a memorandum to Nicholas further detailing his concerns about pressures in the gas cylinders. Meeting between Sorri and managers from L&M and Sandia results in agreement to order new, lower pressure cylinders.

January 3, 1991: Sorri files internal safety complaint with Sandia after learning that new cylinders had not been ordered.

January 1991: Additional meetings are held between Sorri and managers from L&M and Sandia, at which agreement is reached on how safety concerns should be resolved. Sorri raises fears that reprisals will be taken against him.

February 13, 1991: Nicholas orders Sorri to vent cylinders of toxic arsine gas to reduce pressure; Sorri believes this is unsafe and contrary to agreement reached in January.

February 14, 1991: Sorri files safety complaint with DOE.

February 15, 1991: Sorri ordered to remove personal items from the MDL, stripped of employee badge, escorted from the premises, and relocated to L&M headquarters.

February 27, 1991: Sorri placed on administrative leave with pay.

March 22, 1991: Sorri receives performance evaluation rating of 4.33 on a 5 point scale for period ending 12/31/90, below the average of 4.6 for L&M employees in the MDL.

March 25, 1991: Sorri returned to MDL; assigned to review and rewrite ion implant maintenance procedures.

March 28, 1991: Sorri writes to Congressman Panetta, disclosing concerns regarding safety and the resolution of his safety complaints.

July 19, 1991: Sorri receives lowered performance evaluation rating of 3.438 on a 5 point scale for period ending 7/1/91, below the average of 4.06 for L&M employees in the MDL.

November 1991: Sorri again writes to Congressman Panetta regarding reprisals for his health and safety concerns.

December 3, 1991: Sorri files complaint with Sandia regarding safety of the mid-current ion implanter.

January 27, 1992: Sandia president Narath receives inquiry from DOE Albuquerque Office regarding Sorri's November 1991 letter to Congressman Panetta.

January 31, 1992: Sandia issues Request for Quotation to L&M, proposing an amendment of their contract to consolidate job descriptions in the MDL under three general task areas, and requesting resumes of L&M employees being proposed for tasks described in the RFQ.

February 5, 1992: Ron Jones sends memo to Harry Weaver stating that Sorri had "not progressed on a timely basis" on his writing assignment and "is causing problems within the contract force, with negative statements during meetings and while talking to his peers."

February 7, 1992: Fil Martinez sends memo to L&M employees requesting updated resumes by February 12, 1992.

February 12, 1992: Sandia president Narath writes in letter to DOE Albuquerque Office that Sorri will not be returned to his maintenance responsibilities in Ion Implant because the MDL's "new operation mode does not call for maintenance to support production."

February 1992: L&M submits resumes for its MDL contract employees to Sandia. Ron Jones evaluates resumes using rating scheme developed by Harry Weaver. Sorri receives a rating of 28, the lowest of all L&M employees.

March 2, 1992: Harry Weaver sends memo to Peercy stating that four MDL employees, including Sorri, will be terminated.

March 13, 1992: Sorri is terminated by L&M president Montoya.

March 27, 1992: Sorri given performance evaluation rating of 2.625 on a 5 point scale for period ending 1/1/92.

* * * *

II. Calculation of Interest on Back Pay and Related Awards

Calendar Quarter	Starting Amount	Interest Rate	Ending Amount
2d Quarter 1992	$4,579	7 %	$4,659
3d Quarter 1992	4,659	7%	4,741
4th Quarter 1992	4,741	6 %	4,812
1st Quarter 1992	4,812	6 %	4,884
2d Quarter 1992	4,884	6 %	4,957
3d Quarter 1992	4,957	6 %	5,031
4th Quarter 1992	5,031	6 %	5,106

* At the hearing, Sandia reiterated its challenge to the timeliness of Sorri's complaint. Since Sandia has failed to provide any new evidence or legal arguments which would lead us to change our initial ruling, we affirm our determination that Sorri's complaint was properly accepted by the OCEP Director.