March 10, 2009

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Battelle Energy Alliance

Date of Filing: July 3, 2008

Case Number: TBA-0047

Dennis D. Patterson filed a complaint of retaliation under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Patterson alleged that he engaged in protected activity and that his employer, Battelle Energy Alliance (BEA), engaged in a series of retaliatory acts. An Office of Hearings and Appeals (OHA) Hearing Officer granted relief, *Dennis D. Patterson,* Case No. TBH-0047 (2008),[1] and BEA filed the instant appeal. As discussed below, the appeal is denied.

I. Background

The DOE established its Contractor Employee Protection Program to safeguard public and employee health and safety; ensure compliance with applicable laws, rules and regulations; and prevent fraud, mismanagement, waste and abuse at DOE facilities. 57 Fed. Reg. 7533 (1992). To that end, the program prohibits a contractor from retaliating against an employee who discloses certain information or engages in certain activity. 10 C.F.R. § 708.1.[2]

If an employee believes that a Part 708 retaliation has occurred, the employee may file a complaint requesting that the DOE order the contractor to provide relief. *Id.* The employee has the

[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[2] Part 708 concerns (i) disclosures of information concerning substantial violations of law; dangers to health and safety; and fraud, gross mismanagement, and abuse of authority, and (ii) refusals to participate in dangerous activities. 10 C.F.R. §§ 708.1, 708.5.

burden of showing, by a preponderance of the evidence, that the employee engaged in protected activity and that the protected activity was a contributing factor to the alleged retaliation. 10 C.F.R. § 710.29. If the employee meets that burden, the contractor has the burden of showing, by clear and convincing evidence, that it would have taken the same action in the absence of the protected activity. *Id.*

Patterson has worked at the Idaho National Laboratory (INL) and its predecessor, the Idaho National Engineering and Environmental Laboratory (INEEL), since 1980. Ex. 3. In 1994, the site management contractor at the time – Lockheed Martin Idaho Technologies Company (LMITCO) - appointed Patterson as manager of its ethics office, a position reporting to the company president. Ex. 114; Tr. at 535-38. In 1999, Bechtel BWXT Idaho, LLC (BBWI) replaced LMITCO and moved Patterson's office to the audit and oversight office, headed by Douglas Benson. Tr. at 548, 637. As a result, Patterson reported to Benson. *Id.* at 637. For each of the years 2000 through 2004, Benson rated Patterson's performance as "outstanding." Exs. C-G.

In 2005, BEA succeeded BBWI, and Patterson continued to report to Benson, as the manager of employee concerns. Tr. at 629, 646. That same year, a site worker - the son of Patterson's cousin – reported that the BEA security office improperly revoked his site access. Patterson investigated and concluded that the revocation did not comply with applicable procedures. Exs. 10, 127. Ultimately, BEA acknowledged that procedures had been violated, restored the worker's site access, and disciplined the BEA personnel security manager responsible for the revocation. Nonetheless, Patterson pressed for additional action, arguing that racial discrimination was an underlying factor. BEA's Equal Employment Opportunity (EEO) officer investigated and concluded that no racial discrimination had occurred.

Patterson's relationship with BEA management became strained as he continued to press his views that racial discrimination had occurred and that BEA management had engaged in misconduct. BEA's parent organization – Battelle Memorial Institute (BMI) - investigated and issued a report. Ex. 37. BMI concluded that BEA managers had not engaged in unethical conduct. *Id.* at 2. BMI did, however, voice a concern that Patterson refused to (i) accept the EEO officer's conclusion that no racial discrimination had occurred and (ii) recognize that his involvement in a relative's concern created the appearance of a lack of impartiality. *Id.* at 2-3. BMI recommended actions to improve the working relationship between Patterson and the others involved in the site access issue. *Id.* at 3.

In early 2006, Patterson received his 2005 performance appraisal and associated merit pay increase. Patterson's overall rating was "all expectations met, some exceeded." Ex. H. Also, in early 2006, BEA reclassified Patterson's position from "manager" to "specialist," because he did not have any direct reports. Exs. 41, 43; Tr. at 646. Thereafter, Patterson refused to refer to himself as the manager of employee concerns, instead using the term "specialist." Tr. at 384, 646. He also declined Benson's invitations to attend two manager meetings. *Id.* at 690-91.

In March 2006, Patterson filed an EEO complaint with the Idaho Human Rights Commission (IHRC), alleging discrimination and retaliation. Ex. 44. On May 1, 2006, BEA counsel told Patterson that BEA did not permit employees to use company time and resources "to pursue personal litigation matters." Ex. 45. Thereafter, Patterson used company email to withdraw the IHRC complaint, stating that he intended to pursue another avenue of relief. Exs. 49-51. Upon seeing the emails, BEA counsel asked BEA's security office to investigate Patterson for misuse of company time and resources. Ex. 54.

On June 1, 2006, Patterson filed a Part 708 complaint, alleging that BEA retaliated against him for disclosing (i) the security office's improper revocation of the worker's site access and (ii) subsequent management impropriety. Ex. J. He alleged that BEA retaliated against him by, *inter alia,* giving him a lower performance appraisal and pay increase and by reclassifying his job from "manager" to "specialist."

In July 2006, a security office investigator interviewed Patterson, asking him about his use of company time and resources for (i) his IHRC and Part 708 complaints and (ii) emails with a diversity organization. Ex. 54 at 5-9. In late August 2006, the investigator made a follow-up telephone call to Patterson about the investigation, and he asked if Patterson knew about a new investigation. Patterson responded, but did not answer the question.

In September 2006, the security office investigator interviewed Patterson in the new investigation, which concerned a manager's allegation that Patterson exhibited bias in investigating an employee concern filed by the manager's subordinate. Ex. 61. Just before that interview, Patterson asked BEA counsel whether BEA permitted the use of company time and resources to pursue a Part 708 complaint. She responded that such use was permitted, subject to certain limitations. Ex. 60.

During the September 2006 interview, the security office investigator asked Patterson again if he had advance knowledge of the new investigation. When Patterson answered "no," the

security office investigator asked why Patterson had not answered the question a week earlier. Patterson answered "to keep you guessing" and "keep the playing field level" (hereinafter the "keep you guessing/level the playing field" comment). Ex. 61 at 28. When Patterson made the statement, both parties laughed. Tr. at 934, 962 (security office investigator).

Although the security office investigator did not review the file documenting the investigation giving rise to the bias allegation against Patterson, Tr. at 950-51, the security office investigator asked Patterson numerous questions about the process. One question he asked concerned the fact that Patterson's report was not marked "Official Use Only." Ex. 61 at 14. Patterson conceded the error, but argued that he was being unfairly singled out, stating that others were sending unmarked emails about his Part 708 complaint. *Id.* The security investigator asked Patterson if Benson's administrative assistant had shared information with him, and Patterson refused to answer. *Id.* at 15-16. The security investigator then interviewed Benson's administrative assistant and another employee, but did not substantiate that any such sharing had occurred.

A week after the September 2006 interview, Patterson amended his complaint, citing the security office investigations as retaliations for his pursuit of his Part 708 complaint. Ex. W. The investigations did not substantiate that Patterson had misused company time and resources or that Patterson had exhibited bias.

In October 2006, BEA suspended Patterson for three days without pay. Ex. 65. The suspension notice cited, *inter alia*, a failure to cooperate with the security office investigator during the September 2006 interview and a failure to follow BEA counsel's May 1, 2006, instruction not to use company resources to pursue litigation against BEA. Exs. 65, 67 at 5. Patterson amended his complaint again, citing the suspension as retaliation for pursuit of his Part 708 complaint. Ex. Z.

In January 2007, Benson gave Patterson his 2006 performance appraisal, with an overall rating of "some expectations not met." Ex. 79. Benson cited, *inter alia,* the suspension notice and conduct referenced therein. *Id.* Patterson amended his complaint, citing the appraisal as retaliation for his pursuit of his Part 708 complaint. Ex. CC.

During the spring of 2007, Patterson had ongoing discussions with Benson about an employee concern that had been transferred to the security office. Ex. 76 at 1. Patterson refused to provide the name of the concerned employee, arguing that the security office did not need the name and its disclosure would violate the BEA's

written procedure that confidentiality should be protected to the maximum extent possible. Ex. 66 at 19. Discussions on this matter escalated in March and April 2007, Exs. 82-89, and culminated in an April 24, 2007, meeting, in which Benson instructed Patterson to provide the name, Ex. EE. The meeting took place at 3:00 P.M., and Benson instructed Patterson to provide the name by 9:00 A.M. the next day. Patterson proposed elevating the matter to the site head; Benson stated that Patterson's right to talk to the site head did not affect his right to impose the deadline. Patterson did not provide the name, but provided information from which the security office identified the individual.

In June 2007, Benson told Patterson that, as a result of his 2006 performance appraisal, his 2007 pay did not include a merit pay increase. The same month, BEA reassigned Patterson to another position at the same pay; BEA cited, *inter alia,* Patterson's conduct during the April 24, 2007, meeting. Ex. FF. Patterson amended his complaint, citing the zero merit pay increase and reassignment as retaliations for his pursuit of his Part 708 complaint. Ex. HH.

As of November 2007, the parties were preparing for Patterson's Part 708 hearing. BEA had filed a Motion for Summary Judgment, which the Hearing Officer granted in part, dismissing the allegations in the original complaint, largely on the grounds of timeliness. *Battelle Energy Alliance,* Case No. TBZ-0047 (2007). The same month, the Hearing Officer convened a four-day hearing, and the parties presented witnesses and documents.

Various witnesses testified about the two investigations. Benson justified his choice of the security office to investigate the bias concern on the ground that he, and the legal and personnel offices, had actual or perceived conflicts. Tr. at 656-660. As to the October 2006 suspension notice, Benson testified that, although the suspension notice listed various items as "misconduct," the actual basis for the suspension was Patterson's conduct during the September 2006 security interview, specifically his "keep you guessing/level the playing field" comment and his refusal to answer the question concerning Benson's administrative assistant. Benson further testified about the other alleged retaliations, including the directed reassignment. Benson testified that, despite the various conduct cited in the memorandum that directed the reassignment, the actual basis for the reassignment was Patterson's conduct during the April 24, 2007, meeting. Tr. at 900.

On June 20, 2008, the Hearing Officer found in favor of Patterson. *Dennis D. Patterson,* Case No. TBH-0047 (2008) (the IAD). The Hearing Officer found that Patterson's pursuit of his

Part 708 complaint was a contributing factor to the investigations and subsequent adverse actions. IAD at 16-18. In doing so, she rejected BEA's contention that an investigation cannot constitute a Part 708 retaliation. *Id.* at 19-20. The Hearing Officer further found that, with one exception (the June 2006 investigation), BEA would not have taken the same actions in the absence of the protected activity.

The Hearing Officer rejected BEA's rationale for choosing the security office to investigate the bias concern, i.e., that the security office did not have an actual or perceived conflict. IAD at 20-21. She cited the "controversy" over the security office's June 2006 investigation of Patterson. *Id.* at 21.

As for the suspension, the Hearing Officer found that Benson overstated the seriousness of Patterson's remarks during the September 2006 interview. She found that Patterson "jokingly" made the "keep you guessing/level the playing field" comment. IAD at 11. She found that Patterson's refusal to answer the question concerning Benson's administrative assistant did not impede the bias investigation. *Id.* at 23. She rejected BEA's example of the discipline of another employee for failure to cooperate with an investigation, as not comparable, because it also involved time card fraud. *Id.*

As for the marginal 2006 performance appraisal and zero merit pay increase, the Hearing Officer noted that much of the appraisal referred to the suspension (and events cited therein) and two other questionable rationales. IAD at 24-25. She found that BEA had not presented clear and convincing evidence that the rating would have been the same in the absence of the protected activity. *Id.* at 25.

Finally, the Hearing Officer addressed the directed reassignment. Benson testified, although the memorandum directing the reassignment cited various conduct, Benson's basis was Patterson's conduct toward Benson and the security office manager during the April 24, 2007, meeting. Tr. at 900. The Hearing Officer found that Patterson had been less than professional, but that the context was significant, i.e., that Patterson was accountable to INL senior management and that he believed Benson's order was not consistent with BEA procedures and put BEA at risk. IAD at 26.

Based on the foregoing, the Hearing Officer ordered various forms of relief. IAD at 29-30. The relief included monetary relief and an order that the contractor identify any vacancy comparable to Patterson's previous position and, if Patterson desires, transfer Patterson to that position.

In July 2008, BEA filed the instant appeal. As an initial matter, BEA contends that an investigation cannot constitute a Part 708 "retaliation." BEA Br. at 13-32. In any event, BEA contends that it would have taken all of the same actions in the absence of Patterson's pursuit of his Part 708 complaint. BEA Br. at 36-137. In support of this contention, BEA challenges many of the Hearing Officer's findings and conclusions.

II. Analysis

The standard of review for Part 708 appeals is well-established. Conclusions of law are reviewed *de novo. See Curtis Hall,* Case No. TBA-0042 at 5 (2008). Findings of fact are overturned only if they are clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *Id.; Salvatore Gianfriddo,* Case No. VBA-0007 (1999).

A. Whether an Investigation Can Be a Part 708 "Retaliation"

In support of its contention that an investigation cannot be a Part 708 retaliation, BEA argues that the Part 708 definition of "retaliation" governs. BEA Br. at 18. BEA further argues that the definition's examples indicate that it does not encompass investigations, even if they are retaliatory. *Id.* at 19.

BEA is correct that the Part 708 definition of "retaliation" governs, but BEA is incorrect that it does not encompass retaliatory investigations. Part 708 defines "retaliation" as follows:

> *Retaliation* means an action (including *intimidation,* threats, restraint, coercion or *similar action*) taken by a contractor against an employee with respect to employment (*e.g.,* discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities defined in Section 708.5 of this subpart.

10 C.F.R. § 702.8. As the regulation indicates, the Part 708 definition of "retaliation" includes "intimidation" or "similar action." A retaliatory investigation is a form of "intimidation" or "similar action." The Part 708 preamble supports this conclusion. During the rulemaking, a commenter asked about whether a retaliatory investigation fell within the term "retaliation." In response, the DOE stated that a retaliatory investigation and other specified actions were "generally meant to be covered by the broad definition of "retaliation." *Criteria and Procedures for DOE Contractor Employee Protection Program,*

65 Fed. Reg. 6314, 6316 (2000). Consistent with the preamble, OHA precedent recognizes a broad definition of "retaliation." *See generally John Merwin,* Case No. TBU-0052, at 3 (2006) (deviation from normal procedures to require multiple psychological evaluations could constitute a "retaliation"). Given the plain meaning of the definition, the Part 708 preamble, and OHA precedent, there is no merit to BEA's reliance on the examples of retaliations provided in the definition of retaliation, or BEA's other arguments as to why retaliatory investigations cannot be Part 708 retaliations. *See also Russell v. Dep't of Justice,* 76 M.S.P.R. 317 (1997).

B. Whether BEA Would Have Taken the Same Actions in the Absence of the Protected Activity

BEA contends that the Hearing Officer erred when she concluded that it would not have taken the same actions in the absence of the protected activity. Throughout its lengthy brief, BEA argues that the Hearing Officer ignored, misconstrued, or inaccurately described evidence.

The Hearing Officer saw the witnesses testify, and she listened to the tapes of the two security office interviews of Patterson, Tr. at 185, 916. She was, thus, in a position to consider the testimony and tape recordings in conjunction with the documentary evidence presented at the hearing. Most of the alleged Hearing Officer errors are mere disagreements with the Hearing Officer's assessment of the testimony, evidence, and credibility of the witnesses. The Hearing Officer's findings in this regard are not clearly erroneous and will be allowed to stand. Any actual Hearing Officer error is insignificant.

1. The September 2006 Bias Investigation

BEA contends that the Hearing Officer erred in concluding that it had not presented clear and convincing evidence that it would have chosen the security office to investigate the bias allegation in the absence of the protected activity. In support, BEA makes two principal arguments.

First, BEA argues that the Hearing Officer ignored evidence that the bias concern required an investigation. BEA Br. at 38-44. That is not correct. The Hearing Officer acknowledged Benson's testimony that the manager's allegation of bias was more serious than prior concerns. IAD at 20. What the Hearing Officer did reject was Benson's rationale for choosing the security office, which is the subject of BEA's second argument.

BEA argues that Benson's testimony – that he thought Patterson would be comfortable with a security office investigation -

recognized that Benson, and the legal and personnel offices, had actual or alleged conflicts; accordingly, BEA argues, it was "necessary" for Benson to transfer the concern to the security office for an investigation. BEA Br. at 40 n. 11, 45-46. BEA's argument ignores, however, that the security office also had a conflict or the appearance of a conflict. Patterson's 2005 investigation found security office deficiencies that resulted in corrective action, *see, e.g.,* Ex. 19 at 3, Patterson's allegations of security office and BEA management unethical behavior led to a review of the security office by BMI, *see, e.g.,* Ex. 30 at 5, and Patterson included these allegations in his Part 708 complaint, s*ee, e.g.,* Ex. 1 (June 1, 2006 complaint). The Hearing Officer alluded to this when she cited the "controversy" over the first investigation. IAD at 21. Because BEA's rationale for transferring the investigation outside of Benson's office would have eliminated the security office, BEA has not demonstrated that the Hearing Officer erred when she rejected the rationale.

2. The October 2006 Suspension

BEA also contends that the Hearing Officer erred in concluding that it did not present clear and convincing evidence that it would have suspended Patterson in the absence of the protected activity. In support, BEA makes three principal arguments.

First, BEA contends that the Hearing Officer erred when she found that Patterson made the "keep you guessing/keep the playing field level" comment "jokingly," citing Patterson's belief that the investigation was unfair, and the security office investigator's testimony that he not take the comment as a joke. BEA Br. at 54. The Hearing Officer listened to the tape-recording of the conversation, Tr. at 916; Patterson testified to some "levity" in his answer, *id.* at 934; and the security office investigator conceded that he and Patterson laughed at Patterson's answer, *id.* at 934, 962. The parties' contemporaneous laughter amply supports the Hearing Officer's skepticism of BEA's reliance on the comment as a basis for suspension. On this issue, BEA has not demonstrated Hearing Officer error.

Second, BEA contends that the Hearing Officer erred when she found that Patterson's refusal to answer the question about Benson's administrative assistant did not impede the investigation, stating that Patterson's refusal required that the security office investigator interview two employees and review emails. BEA Br. at 55.

As an initial matter, BEA's argument assumes that a Patterson answer would have avoided additional interviews. More importantly, as the security office investigator conceded, the

unanswered question concerning Benson's administrative assistant was not relevant to the bias investigation. Tr. at 959-60. Accordingly, the additional interviews on that question do not contradict the Hearing Officer's finding that Patterson's refusal to answer did not interfere with the investigation being conducted – the bias investigation. On this issue, BEA has also not demonstrated Hearing Officer error.

Finally, BEA contends that the Hearing Officer erred in rejecting its examples of discipline meted out to other employees as not involving similar conduct. BEA Br. at 58-62. This contention is based on BEA's characterization of Patterson's conduct as a "failure to cooperate" with an investigation. As discussed above, the Hearing Officer concluded that BEA's evidence on this issue was not clear and convincing, and BEA has not demonstrated otherwise. Since BEA has failed to establish a "failure to cooperate," BEA's reliance on discipline for "failure to cooperate" or other "prohibited practices" is misplaced. *See, e.g.,* BEA Br. at 59. Accordingly, BEA has not demonstrated that the Hearing Officer erred in rejecting examples of treatment of other employees.

3. 2006 Performance Appraisal and 2007 Zero Merit Pay Increase

BEA contends that the Hearing Officer erred in concluding that BEA would not have given Patterson a marginal performance appraisal in the absence of the protected activity. BEA Br. at 80-88. This contention lacks merit. In concluding that BEA's evidence was not clear and convincing, the Hearing Officer found that the performance appraisal given to Patterson relied extensively on the September 2006 investigation and related October 2006 suspension. IAD at 25. BEA has not argued, let alone demonstrated, that Patterson would have received the same rating in the absence of those events. Accordingly, BEA has not demonstrated Hearing Officer error.

4. Directed Reassignment

BEA contends that the Hearing Officer erred in concluding that it did not present clear and convincing evidence that it would have reassigned Patterson in the absence of the protected activity. BEA Br. at 88-122. This contention lacks merit.

The Hearing Officer discussed the circumstances of the meeting. IAD at 25-27. She did not question that Patterson could have behaved more professionally. *Id.* at 26. She noted, however, that (i) Patterson was accountable to senior INL management, (ii) Patterson had never before been ordered to disclose a reporting employee's name, and (iii) Patterson believed that

Benson's order was not consistent with BEA procedures. *Id.* at 26. These matters are not disputed. It is also undisputed that (i) the meeting occurred at 3:00 P.M. in the afternoon, (ii) Benson gave Patterson a deadline of 9:00 A.M. the next morning, (iii) Patterson asked to elevate the issue to INL senior management, and (iv) Benson refused to modify the deadline. The Hearing Officer also heard Patterson's former and current manager testify that Patterson treats colleagues with respect. Tr. at 543-46, 1011-13. Thus, the record indicates that Benson's refusal to extend the deadline, following BEA's prior retaliatory acts, precipitated Patterson's behavior. Since the behavior would not have occurred in the absence of the protected activity, BEA has not demonstrated, by clear and convincing evidence, that it would have reassigned him in the absence of the protected activity.

Finally, BEA argues that Patterson's post-reassignment behavior toward various BEA managers and employees precludes reinstatement to the employee concerns manager position. The Hearing Officer heard the witnesses testify on this issue and found that the testimony was not convincing. IAD at 26-27. Accordingly, BEA has not demonstrated that the Hearing Officer's findings were clearly erroneous.

III. Conclusion

The Hearing Officer correctly concluded that Patterson met his burden of showing, by a preponderance of the evidence, that he engaged in protected activity which was a contributing factor to the alleged retaliations. The Hearing Officer also correctly concluded that BEA did not meet its burden of showing, by clear and convincing evidence, that it would have taken the same actions in the absence of the protected activity.

It Is Therefore Ordered That:

(1) The Appeal filed by Battelle Energy Alliance on July 3, 2008 (Case No. TBA-0047), of the Initial Agency Decision (IAD) issued on June 20, 2008, 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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 10, 2009