December 18, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Case:	Gary S. Vander Boegh Weskem, LLC Bechtel Jacobs Company, LLC
Date of Filing:	May 9, 2007
Case Number:	TBA-0069

This Decision considers three Appeals of an Initial Agency Decision (IAD) issued on July 11, 2003, involving a complaint filed by Gary S. Vander Boegh under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his Complaint, Vander Boegh claimed that his former employer, Weskem, LLC (Weskem) and the contractor that employed Weskem, Bechtel Jacobs Company, LLC (Bechtel), retaliated against him for making disclosures that were protected by Part 708.[1] In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that some of Vander Boegh's disclosures were protected. He also found that with regard to some of Bechtel and Weskem's personnel actions, the firms had failed to demonstrate by clear and convincing evidence that they would have taken these personnel actions in the absence of the protected disclosures. In the IAD, the Hearing Officer ordered Weskem and Bechtel to undertake a number of actions to mitigate the retaliatory personnel actions. Weskem and Bechtel each filed appeals from the IAD. Because the Hearing Officer did not grant all of the relief requested, Vander Boegh also appealed the decision. The three appeals are consolidated for review, and have been assigned a single case number by OHA, Case No. TBA-0069.

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

[1] Bechtel was the Management and Integration contractor at the DOE's Paducah, Kentucky, facility at the time of the alleged retaliatory activities.

employers. Thus, contractors found to have retaliated against an employee for such a disclosure, or for participating in a related proceeding, will be directed by the DOE to provide relief to a 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 Vander Boegh, Weskem and Bechtel in the present Appeals, 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 instant Complaint are fully set forth in the IAD. *Gary S. Vander Boegh* (Case No. TBH-0007), 28 DOE ¶ 87,040 (2003) (*Vander Boegh I*).[2] For purposes of the current appeal, the relevant facts are as follows.

Vander Boegh was a landfill manager at the DOE's Paducah facility from 1992 to the date of his termination, April 23, 2006. At the time of his Part 708 complaint, Vander Boegh was the manager of the C-746-U Landfill (U Landfill), a sanitary/industrial landfill located three miles from the DOE's Paducah facility. The U Landfill was constructed by DOE to dispose of solid waste. In 1998, DOE contracted with Bechtel to be the management and integration contractor responsible for environmental management of the DOE's Paducah facility. At that time, Vander Boegh became a Bechtel employee. In February 2000, Bechtel subcontracted the operation of the U Landfill to Weskem and Vander Boegh then became a Weskem employee.

Beginning on February 2, 2001, Vander Boegh sent several E-mails to officials at Weskem and Bechtel identifying the lack of reserve leachate (groundwater) tank space as a potential problem that could affect the operation of the landfill.[3] On March 4, 2001, Vander Boegh sent an E-mail to two Weskem officials entitled "C-746-U Leachate Issues." In this message, Vander Boegh identified problems with the lack of storage capacity in the groundwater tanks, the lack of groundwater transfer equipment and the potential risk to the landfill's 2001 operating permit if remedial action wasn't taken. Subsequently, Vander Boegh experienced a number of personnel actions he believed were motivated by his disclosures. Eventually, Vander Boegh filed a Part 708 complaint on January 4, 2002. [4]

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[2] The Hearing Officer decision will be referred to either as the IAD or *Vander Boegh I*.

[3] The U Landfill generates groundwater under the landfill itself and this groundwater is pumped to storage tanks for later disposal. The regulatory authority for the Commonwealth of Kentucky, the Kentucky Division of Waste Management (KDWM), issued a permit in February 2001 for the U Landfill. The permit specified that the groundwater tanks must have enough space to store groundwater for 15 days at U Landfill's peak production rate. Additionally, the permit required that enough groundwater must be continually removed from the tanks so that at all times the tanks have the capacity to store another 8 days production of groundwater from the landfill (8-day reserve requirement).

[4] When Vander Boegh submitted his whistleblower complaint, the Employee concerns manager dismissed his complaint for lack of jurisdiction on April 21, 2003. Vander Boegh appealed and in considering the appeal, OHA decided that, in fact, jurisdiction existed to allow the employee concerns manager to continue to process the case. *Gary S. Vander Boegh*, 28 DOE ¶ 87,038 (2003).

The Hearing Officer conducted a hearing on March 4-6, 2003, concerning Vander Boegh's whistleblower complaint.[5] In his July 11, 2003 IAD, the Hearing Officer found that Vander Boegh's February 2, 2001 E-mail to two Weskem officials detailing potential problems with groundwater storage and transfer was protected under 10 C.F.R. Part 708. He further found that none of Vander Boegh's claims of retaliation were barred due to a lack of timeliness.

The Hearing Officer then analyzed the alleged retaliations. The Hearing Officer found that the following personnel actions were retaliatory[6]:

> 1. A March 5, 2001, memorandum from Mr. Dan Watson, a project manager at Weskem regarding the priorities that should be given to various functions of Vander Boegh's employment and warning Vander Boegh about excessive E-mails;
> 2. The Weskem and Bechtel decision to halt construction of an office trailer at the U Landfill site for Vander Boegh;
> 3. Weskem's August 2001 proposal to relocate Vander Boegh's office to the Paducah Plant site;
> 4. Bechtel's proposal to DOE for contract changes (Option A) that would have transferred Vander Boegh's position from Weskem to Bechtel;
> 5. Weskem's low rating of Vander Boegh in several performance categories and critical remarks contained in his 2001 performance review.

To remedy the retaliatory actions taken against Vander Boegh, the Hearing Officer found that Vander Boegh was entitled to the following remedial actions:

> 1. Removal of the March 5, 2001, memo from Vander Boegh's personnel file;
> 2. An Order mandating the construction of an office trailer at the U-Landfill;

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[5] As an initial matter, before the hearing, the Hearing Officer found that he could not provide a remedy for longstanding salary differences between Vander Boegh and similarly situated employees that predated his protected disclosures. The Hearing Officer also determined that he would not consider claims regarding the inadequacy of Vander Boegh's support staff or the deficiencies of Vander Boegh's office space that existed prior to the alleged protected disclosures discussed *Vander Boegh I*, 28 DOE at 89,281.

[6] The Hearing Officer found that the "aggressive" actions and threats and intimidation taken by Bechtel and Westkem employees towards Vander Boegh did not merit a full determination whether the actions were retaliatory, since Bechtel had counseled the employee responsible for three of the specific acts of threats and intimidation against Vander Boegh and thus there was no need for Part 708 relief. *Vander Boegh I*, 28 DOE at 89,291-92.

3. An Order that Vander Boegh's primary office not be moved from the U-Landfill site for a period of one year without the permission of Vander Boegh;
4. An Order prohibiting Bechtel from recommending any change with respect to Vander Boegh's job for a period of one year without the permission of Vander Boegh;
5. Removal of the 2001 Performance Appraisal from Vander Boegh's personnel file;
6. Preparation of a list of litigation expenses incurred by Vander Boegh;
7. An Order requiring Weskem and Bechtel to pay the litigation expenses detailed in the schedule of litigation expenses prepared by Vander Boegh.

Bechtel and Weskem appealed the IAD. Vander Boegh also filed an appeal claiming that the Hearing Officer had failed to address the issue of whether or not the negative March 5, 2001 memo and the below-average ratings in certain performance categories adversely affected Vander Boegh's pay raise for that year. *See Vander Boegh's Limited Appeal of Order*, Case No. TBH-0007 (August 4, 2003).

On March 19, 2003, during the pendency of the appeal, Vander Boegh filed a second complaint with DOE (Complaint No. 2). *See* Employee Concerns Reporting Form (received March 19, 2003). In Complaint No. 2, Vander Boegh alleged that Bechtel employees had interfered with his ability to perform his proper duties as a Landfill manager in retaliation for his Part 708 complaint. He also alleged that he was improperly forced by Bechtel officials to sell the Lockheed-Martin stock in his 401(k) retirement plan in retaliation for his Part 708 activities.

In an agreement dated January 4, 2004, Vander Boegh and Bechtel settled Vander Boegh's Complaint No. 2. *See Settlement Agreement and Full and Final Release of Claims.* In the Settlement Agreement, Bechtel agreed to undertake a number of actions with regard to the Vander Boegh's job and working conditions in exchange for Complainant's agreement to withdraw Complaint No. 2 and release Bechtel from liability related to that particular complaint.

On February 21, 2006, Vander Boegh filed another whistleblower complaint and later submitted two supplements to the complaint (collectively "February 21 Complaint"). The February 21 Complaint first alleges that Bechtel breached several provisions of the Settlement Agreement relating to an inquiry Bechtel agreed to make concerning Vander Boegh's liquidation of his Lockheed Martin stock and Bechtel's failure to submit disclosure statements that would have identified him as "Landfill Manager" to the KDWM. Vander Boegh alleges that as a result he was thus subject to intimidation by Bechtel and Paducah Remedial Services (PRS), the new M&I contractor at the DOE's Paducah facility, in an effort to accept waste in violation of the DOE waste acceptance criteria and the Commonwealth of Kentucky's administrative regulations. Vander Boegh also alleged that Bechtel had failed to honor a provision in the Settlement Agreement whereby Bechtel employees were forbidden to disapprove WESKEM recommendations for promotions or salary increases for Vander Boegh. In this regard, the Complaint alleged that he had been informed that his continued employment was not guaranteed when PRS and a new subcontractor, Duratek, took over operations at the DOE's Paducah facility. Vander Boegh alleged that he was informed that he could not attend a work force transition meeting, but as a subcontractor employee was offered an opportunity to attend

a "retirement session." Vander Boegh believed that he was being marked for termination due to his Part 708 activities.

Vander Boegh was subsequently terminated from his position on April 23, 2006. On April 14, 2006, Vander Boegh filed a complaint with the Occupational Safety and Health Administration (OSHA) of the United States Department of Labor. This complaint accused Bechtel, Weskem, PRS, Duratek and the DOE of violations of various environmental statutes and alleged the same facts as his February 21 Complaint. On July 13, 2006, the Regional Administrator of OSHA issued findings concerning the April 14, 2006 OSHA Complaint. In her findings, the Regional Administrator found that Weskem, Bechtel and DOE provided clear and convincing evidence that they had not engaged in a conspiracy to take adverse action against Vander Boegh and that PRS and Duratek had provided clear and convincing evidence that they would have hired another landfill manager notwithstanding Vander Boegh's raising safety concerns or filing complaints against them.[7] *See* July 13, 2006, Determination Letter from OSHA to Gary S. Vander Boegh at 4.

On June 29, 2006, the DOE's Environmental Management Consolidated Business Center (EMC) dismissed Vander Boegh's February 21 Complaint for lack of jurisdiction. EMC determined that the February 21 Complaint should be dismissed under 10 C.F.R. § 708.17(c)(3), which provides for dismissal of Part 708 claims for lack of jurisdiction if an individual files a complaint under state or other applicable law with respect to the same facts as those alleged in the 708 complaint. EMC found that Vander Boegh's April 14, 2006, OSHA complaint alleged the same facts as his February 21 Complaint. Vander Boegh then filed an appeal of EMC's dismissal with OHA. In an August 3, 2006 decision, OHA, after examining the DOL's determination of Vander Boegh's complaint, affirmed EMC dismissal of the February 21 complaint, citing 10 C.F.R § 708.17(c)(3). [8] *Gary S. Vander Boegh* (Case No. TBU-0049), 29 DOE 87,010 (2006) (*Vander Boegh II*).

After *Vander Boegh II* was issued, the Acting Director of the OHA, Fred L. Brown, sent a letter to the parties, dated February 1, 2007, in which he ordered the parties to show cause why all of the appeals of *Vander Boegh I* should not be dismissed. The Acting Director stated that, in light of recent events, namely, the change in M&I contractor and subcontractor, rendering the workplace relief granted in *Vander Boegh I* moot and the findings in regard to Vander Boegh's OSHA complaint that held that Vander Boegh's discharge was not retaliatory, dismissal of all appeals might be appropriate. Vander Boegh filed a response to the show cause letter on February 14, 2007.

On February 22, 2007, the Acting Director subsequently issued a Decision regarding all appeals in this matter. *Gary S. Vander Boegh* (Case No. TBA-0007), 29 DOE ¶ 87,018 (2007). The Decision

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[7] Vander Boegh has appealed this decision and a hearing concerning his OSHA complaint is scheduled for February 26-29, 2008.

[8] The decision noted that there were some alleged retaliations that were not explicitly considered by the DOL but that these retaliations were not of the type that Part 708 was designed to remedy. Additionally, with regard to a claim of retaliation in being forced to sell his Lockheed-Martin stock, the decision found that there was "no meaningful direct relationship" between the stock sale and an adverse personnel action against Vander Boegh. *Vander Boegh II*, 29 DOE at 89,048.

dismissed all of Vander Boegh's whistleblower claims. Subsequently, however, on May 10, 2007, the Acting Director withdrew this Decision because he had been the investigator of Vander Boegh's original whistleblower complaint. To be addressed in this Decision are the appeals by the parties of *Vander Boegh I.*

II. Analysis

Under the Part 708 regulations pertaining to whistleblower hearings, Vander Boegh has the burden of establishing by a preponderance of the evidence that he made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal. *See* 10 C.F.R. § 708.29.

A Hearing Officer's findings of fact are entitled to deference unless they are clearly erroneous. *Kaiser-Hill Company, L.L.C.*, 27 DOE ¶ 87,555 (2000); *Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,510 at 89,001 (1995). With regard to a Hearing Officer's conclusions of law, these are subject to *de novo* review. *Salvatore Gianfriddo*, 27 DOE ¶ 87,544 at 89,221 (1991); *see Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

A. Preclusive effect of Vander Boegh's OSHA complaint on this Appeal

Section 708.17 provides that the Employee Concerns Manager may dismiss a complaint if "[Vander Boegh] filed a complaint under State or other applicable law with respect to the *same facts* as alleged in a complaint under this regulation." 10 C.F.R. § 708.17 (emphasis added). In the current case, the Employee Concerns Manager dismissed the February 21 Complaint on this ground and OHA affirmed the Manager's decision. *See Vander Boegh II.* Vander Boegh's April 14, 2006, OSHA Complaint, however, does not reference the alleged breaches of the Settlement agreement. Nevertheless, Vander Boegh's remedy for a breach of the contractual provisions of the Settlement Agreement lie in civil court, not a DOE whistleblower administrative proceeding. Thus any complaints about a breach of the Settlement Agreement are also dismissed.

Nevertheless the April 14, 2006, OSHA complaint does not pre-empt consideration of the original whistleblower complaint decided in *Vander Boegh I*. Vander Boegh's April 14, 2006, OSHA complaint does not reference any of the whistleblower retaliations or the underlying facts or allegations cited by Vander Boegh that were decided in the March 2003 whistleblower hearing. The April 14, 2006, OSHA Complaint involves facts and circumstances immediately leading up to Vander Boegh's dismissal in 2006, not the retaliations that took place in 2001-2002. Consequently, I find that Vander Boegh's April 14, 2006, OSHA Complaint does not share the same facts as his original whistleblower complaint. Therefore, *Vander Boegh I* is not precluded from consideration on appeal.

B. Vander Boegh I

1. Timeliness of Vander Boegh's Part 708 Complaint

Weskem and Bechtel specifically challenge the Hearing Officer's finding that Vander Boegh's original Part 708 complaint was not time barred by the provisions of Section 708.14. This section provides that an employee must file a complaint by the 90th day after the date he knew or should have reasonably known of the retaliation. 10 C.F.R. § 708.14. Weskem asserts that Vander Boegh filed his Part 708 complaint in January 2002. However, the first alleged retaliatory act claimed by Vander Boegh was the issuance of a memo on March 5, 2001, approximately nine months from the date the complaint was filed. Similarly, the proposal in August 2001 to move Vander Boegh from the U Landfill as well as Weskem's decision in March 2001 to halt construction of an office trailer for Vander Boegh at the U Landfill occurred long before the complaint was filed. Further Weskem argues that Vander Boegh sent Seaborg an August 3, 2001, E-mail in which he states, "I feel I am being attacked on all fronts." Vander Boegh Exhibit K. Consequently, Weskem argues that Vander Boegh must have believed he was experiencing retaliation by August 3, 2001. Weskem goes on to argue that, since Vander Boegh must have known about the retaliation on that date, Vander Boegh's complaint should have been time barred with respect to all of the retaliatory acts found by the Hearing Officer in *Vander Boegh I* described above with the exception of the 2001 performance review.

In his Decision, the Hearing Officer found that none of these retaliations was so obviously adverse in nature that a reasonable person would have known it was retaliatory in nature and that Vander Boegh did not realize the retaliatory nature of these actions until shortly before he filed his Part 708 complaint in January 2002. *Vander Boegh I*, 28 DOE at 89,284. The Hearing Officer found that while Vander Boegh did not view the retaliatory actions as "neutral or innocent" employment actions, the actions themselves were not so overtly punitive in nature that a "reasonable person should have known they were Part 708 retaliations when they occurred." *Vander Boegh I*, 28 DOE at 89,283. Specifically, the Hearing Officer noted that Vander Boegh's response to the March 5, 2001, memo did not indicate that Vander Boegh thought the memo was hostile. Nor could the Hearing Officer find anywhere in the record where Vander Boegh considered the termination of construction of an office trailer retaliation. The Hearing Officer determined that the only evidence as to the date Vander Boegh knew he was being retaliated against was contained in Vander Boegh's January 4, 2002, complaint. The Hearing Officer found that the weight of the evidence indicated that Vander Boegh did not recognize that the various actions taken against him were retaliations until shortly before he submitted his complaint. *Vander Boegh I*, 28 DOE at 89,284. Further, the Hearing Officer concluded that a reasonable person would not have recognized these actions as being Part 708 retaliations until January 2002.

My examination of the record indicates that there is significant evidence to conclude that Vander Boegh in fact must have subjectively known or should have reasonably believed the personnel actions taken were retaliations. Vander Boegh testified as to his feelings when he received the March 5 memorandum on March 5, 2001:

> Well, his tone of his letter was, in my opinion at that point, an attempt to say and put

> in a negative file - begin a negative file on me. And, so, I stopped him, I said, before - would you mind if I read the letter myself? Because I could see that he was beginning to develop a negative file on what was happening.

Tr. at 85.[9] Even before he received this memorandum, Vander Boegh testified, he felt "threatened" by a prior March 4, 2001, E-mail from Watson. Tr. at 84; *see* Vander Boegh Exhibit I. Vander Boegh's response to the March 5 memorandum complains that the memorandum contains "so many inaccuracy and innuendo [sic]." Administrative Record (AR) at 16.

With regard to the proposal to remove him from the U Landfill site, in an August 2, 2001, E-mail Vander Boegh asks:

I respectufully request an explanation of why this move is being proposed by Weskem, especially at this time of great importance affecting the overall ability for
DOE to accept waste.

Vander Boegh Hearing Exhibit J. The question itself indicates that Vander Boegh suspected that the motivation for the proposed move was improper. In an E-mail on August 3, 2001, to Seaborg, in which he references the proposal to move him, Vander Boegh states "I feel I'm being attacked on all fronts, due to a lack of understanding of others (not DOE)." Vander Boegh's Exhibit K. Given the evidence in the record, I believe that the Hearing Officer's determination that Vander Boegh did not realize that he was being retaliated against until shortly before he filed his complaint on January 4, 2002, is clearly erroneous. I find that Vander Boegh reasonably should have known that he was being retaliated against beginning on March 5, 2001. *Cf. Steven F. Collier*, 28 DOE ¶ 87,036 (2002) (Hearing Officer, after examining factual evidence, finds that whistleblower failed to demonstrate that he did not know or could not have reasonably known that an act constituted retaliation). As such, all of the actions that the Hearing Officer determined to be retaliatory should have been barred from consideration with the exception of the 2001 performance review which was issued to Vander Boegh on April 4, 2002. [10]

2. Vander Boegh's 2001 Performance Evaluation by Weskem

[9] Vander Boegh testified concerning the March 5 memorandum "I took this letter and took it to my attorneys, because it bothered me that I received this letter after also getting that Sunday afternoon e-mail." Tr. at 202.

[10] I also note that, with regard to Bechtel's liability, the Hearing Officer found that Bechtel had not met its burden to avoid liability, because it had failed to show that it proposed Option A knowing that it would not have adversely affected Vander Boegh. *Vander Boegh I slip op.* at 34. This analysis misapplies the standard given in Section 708.2. To find liability for Bechtel, the Hearing Officer should have determined whether Bechtel had shown by clear and convincing evidence *that it would have proposed Option A* to DOE notwithstanding Vander Boegh's protected disclosures. The state of Bechtel officials' knowledge as to the potential harm to Vander Boegh or whether Vander Boegh, in fact, would have been harmed is irrelevant to this determination. While the Hearing Officer's analysis started with a statement of the correct standard, he did not use that formulation of the standard in his analysis. Had I not found that the claim against Bechtel was time barred, I would have remanded this issue to the Hearing Officer so that he might make a specific finding using the correct standard.

The sole remaining basis for finding that Weskem retaliated against Vander Boegh is Vander Boegh's 2001 Performance evaluation by Weskem. The Hearing Officer determined in *Vander Boegh I* that Vander Boegh's previous two performance evaluations in 1998 and 1999, issued by Bechtel, were complimentary of his work. *Vander Boegh I*, 28 DOE at 89,294. These evaluations did not contain overall numeric and descriptive ratings. The Weskem 2001 performance evaluation of Vander Boegh gave him an overall rating of "Fully Satisfactory." AR at 597-600. Nine specific performance ratings were rated as "needs improvement" and were rated as a "3" on a scale from "1"- marginal to "9" - "Distinguished." *Vander Boegh I*, slip op. at 36. The Hearing Officer also cited a critical narrative passage written by the evaluator concerning Vander Boegh's ability to work with others. *Vander Boegh I*, 28 DOE at 89,295. The Hearing Officer found that Vander Boegh had met his burden to show that he had suffered a negative personnel action and that his protected disclosures were a contributing factor to that action. Specifically, the Hearing Officer noted that the evaluation was written during the pendency of Vander Boegh's Part 708 complaint. *Vander Boegh I*, 28 DOE at 89,295.

The Hearing Officer went on to find that Weskem had failed to show by clear and convincing evidence that it would have given Vander Boegh the same ratings notwithstanding his protected disclosures. While Weskem presented evidence that its evaluation system was totally different from the prior Bechtel system, testimony from Vander Boegh's Weskem supervisor that the review was an "average review overall," and testimony from the general manager of Weskem expressing his dislike of grade inflation, the Hearing Officer found that Weskem provided insufficient evidence to meet the "clear and convincing" standard. Specifically, the Hearing Officer found that Weskem had failed to demonstrate that Vander Boegh's job performance had actually deteriorated significantly in the areas cited in the 2001 evaluation. *Vander Boegh I*, 28 DOE at 89,295. Additionally, he found that Weskem had failed to produce evidence that other employees with similar performance problems had received similar ratings in their reviews.

On appeal, Weskem argues that it is not appropriate to compare different rating systems. Further, it argues that the Hearing Officer ignored the fact that Vander Boegh's supervisor had to intercede in a number of incidents where Vander Boegh and another individual had "heated discussions" and that the supervisor had to "counsel" Vander Boegh. With regard to the Hearing Officer's opinion that Weskem would have to show that Vander Boegh was treated the same as other employees with similar performance problems, Weskem argues that no other Weskem employee had performance problems similar to Vander Boegh's. Weskem also asserts that even if all of the nine performance ratings cited areas cited by the Hearing Officer as potentially affected by his disclosure were scored as high as possible, the overall score would not have been sufficient to push Vander Boegh to the next higher level of performance evaluation, "Commendable."

After examining the record, I believe that Weskem has provided compelling arguments for me to reverse the Hearing Officer's finding of retaliation regarding the 2001 performance evaluation. An examination of Vander Boegh's 2001 Performance Evaluation Form indicates that Vander Boegh was rated on 12 areas of performance each containing 5 sub-elements which the evaluator could rate from 1 to 9 as described above. A numerical score for each area was obtained by totaling the sub-element scores and dividing by 5. The area scores were added together to obtain an overall score which was used to determine the overall performance rating. For example, a overall score of 46 to

81 would result in an employee receiving a rating of "Fully Satisfactory." AR at 600. Vander Boegh's overall score was 55.4. Even if each of the nine alleged retaliatory lower rated sub-element (each rated as a "3") had been rated instead at "9," the highest score possible, Vander Boegh's overall score would have been 66.2 points, which would not have resulted in a higher overall rating. Vander Boegh would have still only been rated "Fully Satisfactory." Consequently, assuming that Weskem retaliated against Vander Boegh in this manner, Weskem has demonstrated that this retaliation caused no harm to the Complaint's overall rating or pay raise for that year.

3. Vander Boegh's Appeal

Vander Boegh's Appeal argues that the Hearing Officer failed to consider the negative effect that the March 5, 2001, Memo and the 2001 Performance evaluation had on Vander Boegh's pay raise for that year. *See Vander Boegh's Limited Appeal Issue (Case No. TBH-0007)* (August 4, 2003). This argument is unavailing. Even assuming that the Hearing Officer improperly failed to consider these retaliation's effect on Vander Boegh's pay raise and future pay, such an error would be harmless in this case. As demonstrated above, Weskem has demonstrated that the alleged retaliation concerning the 2001 Performance evaluation did not affect Vander Boegh's pay raise. Further, the testimony presented at the hearing indicated that the March 5, 2001, memo was never a part of Vander Boegh's personnel file. Tr. at 492. Consequently, given the facts in front of me, Weskem has demonstrated that Vander Boegh's pay raise was not in fact affected by the two alleged retaliations. Consequently, I will dismiss Vander Boegh's appeal.

4. Summary of Appeal Decision concerning Vander Boegh I

As discussed above, I find that all the actions that the Hearing Officer determined to be retaliatory should have been time barred from consideration with the exception of the 2001 performance review which was issued to Vander Boegh on April 4, 2002. With regard to the 2001 performance review, I find that sufficient factual evidence exists to reverse the Hearing Officer's finding that Vander Boegh was harmed by the lowered scores on the 2001 performance review. I also find, for the reasons discussed above, that Vander Boegh's appeal is without merit. Consequently, I will grant Weskem's and Bechtel's appeals and deny Vander Boegh's appeal.

It Is Therefore Ordered That:

(1) The Appeals filed by Weskem, LLC and Bechtel Jacobs, LLC from the Initial Agency Decision issued on July 11, 2003, concerning Gary S. Vander Boegh's Part 708 complaint are hereby

granted. All remedial actions ordered by the Hearing Officer in the Initial Agency Decision are hereby reversed. Bechtel Jacobs, LLC and Weskem, LLC need not undertake any of the remedial actions ordered by the Hearing Officer in the July 11, 2003, Initial Agency Decision.

(2) The Appeal filed by Gary S. Vander Boegh from the July 11, 2003, Initial Agency Decision is hereby denied.

(3) 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
Acting Director
Office of Hearings and Appeals

Date: December 18, 2007