December 3, 2009

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Names of Petitioners:	Billy Joe Baptist
Date of Filing:	May 27, 2009
Case Number:	TBA-0080

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on May 7, 2009, involving a complaint of retaliation filed by Billy Joe Baptist ("Baptist," or "Complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Baptist alleged that his former employer CH2M-WG Idaho (CWI) retaliated against him for engaging in activity protected under Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that five of the six alleged acts of retaliation set forth in the complaint are time-barred under Part 708. The Hearing Officer also granted summary judgment to CWI regarding the sixth act of retaliation, Baptist's termination, and then dismissed the complaint without a hearing. Baptist appealed the decision. As set forth below, the appeal is denied.

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 "reasonably and in good faith" believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. § 708.5 (a). Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"] will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations set forth at 10 C.F.R. Part 708 establish administrative procedures for the processing of complaints. Under these regulations, review of an IAD, as requested by Baptist, is performed by the Director of OHA. 10 C.F.R. §708.32.

B. History of the Complaint Proceeding

For purposes of review, I set forth the pertinent facts as averred in the Report of Investigation (ROI) and in the subsequent IAD.[1] CWI is the management and operating contractor for the Idaho Cleanup Project at the DOE Idaho National Laboratory (INL) site. Baptist was a CWI employee who was appointed to serve on the Electrical Safety Committee (ESC), a group that monitored the implementation of the Electrical Safety Improvement Plan. Baptist alleges that two weeks after CWI won a DOE safety contest in January 2006 that recognized Baptist's personal efforts, the then-president of CWI designated Baptist as a Subject Matter Expert (SME) for electrical safety.[2] Baptist was responsible for conducting independent assessments and in May 2007, he submitted a report alleging safety and regulatory violations concerning a transformer on the site. At a June 4, 2007, ESC meeting, Baptist expressed his safety concerns about the transformer to CWI senior management. Baptist alleges that he was removed from his supervisory duties, his duty as a SME, and his positions on several CWI safety committees immediately after the meeting. ROI at 6.

Baptist took personal leave for a medical condition after the ESC meeting on June 4, 2007. On June 6, 2007, he completed an application for short-term disability benefits (STD) with CWI's insurance carrier, Cigna Insurance Group. ROI at 7. Debbie Anglin, CWI Human Resources Benefits Specialist, assisted Baptist with his application. Shortly thereafter he had surgery for his condition and began to receive STD payments. In October 2007, Cigna contacted CWI to determine if Baptist could return to work. Baptist's physician cleared him to return to work with a 15-pound weight restriction and Anglin asked Baptist's supervisor if a light duty position was available.[3] She then told Cigna that CWI could not accommodate Baptist in a light duty position. IAD at 4.

In December 2007, Baptist was approved for long term disability benefits (LTD) when his STD ran out. He requested Inactive Employee Status (IES) on Dec 19, 2007, and his manager approved the IES request retroactive to July 2007. [4] ROI at 7; IAD at 4.

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[1] The events leading to the filing of Baptist's complaint are fully set forth in the IAD. *See Billy Joe Baptist*, Case No. TBH-0080 (2009). Decisions issued by 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] CWI denies that Baptist was designated an SME. ROI at 4.

[3] Baptist's managers did not recall speaking to Anglin about a new position for Baptist.

[4] IES is a form of unpaid leave available to regular full-time CWI employees who have worked for at least one year and need to be absent from work due to illness or injury. ROI at 15. There are four options for an employee whose IES status has expired: (1) return as a full time employee after receiving medical clearance; (2) return to work as a part time employee after receiving medical and management clearance; (3) take an unpaid administrative leave of absence; and (4) termination. IES required CWI to return an employee to the same or equivalent position, assuming that the employee complied with the requirements to obtain proper clearances. Response at 12, fn 50. Complainant does not dispute that he understood the policy that he would be terminated for failure to get the proper medical clearances to return to work. CWI asserts that its policy is that all employees who are on IES for one year and who have not sought reinstatement or other employment with the company during that year are automatically terminated. IAD at 4, fn 10.

On January 10, 2008, Baptist filed a complaint under the DOE Worker Health and Safety Program, 10 C.F.R. Part 851.[5] On March 6, 2008, Baptist filed a whistleblower complaint under Part 708. He alleges that he made two protected disclosures: (1) he submitted a safety report in May 2007, and (2) he discussed his safety concerns at the June 4, 2007, ESC meeting. In the whistleblower complaint, Baptist described five acts of alleged retaliation (Retaliations 1-5): (1) CWI relieved him of his supervisory duties; (2) CWI removed him from his responsibilities as a SME for electrical safety; (3) CWI removed him from the Project Evaluation Board PEB; (4) CWI removed him from Energy Facilities Contractor's Group Committee (EFCOG) committee; and (5) CWI removed him from the PLN-1971 Board. According to Baptist, Retaliations 1-5 occurred on January 4, 2007, the day of the ESC meeting. He also claimed that his termination in June 2008 at the expiration of his IES was the sixth retaliatory act (Retaliation 6).

CWI sent Baptist a letter on April 29, 2008, stating that if he wished to return to work he needed to obtain medical clearances as specified in his Request for IES.[6] Baptist never indicated that he sought to return to work and never contacted the INL medical dispensary to obtain a medical clearance to return to work. He also assumed that CIGNA would explore a new position for him at CWI. Response at 11. Baptist asserts that because of the weight restriction on his physical activities, he could only return to work as an SME for Electrical Safety. ROI at 8. CWI terminated his employment on June 10, 2008, as Baptist had anticipated in his complaint, stating that his IES status had expired.

The Idaho Operations Office referred the complaint to OHA for an investigation. An OHA investigator issued a Report of Investigation (ROI) on December 19, 2008. 10 C.F.R. §§ 708.22-23. In the ROI, the investigator concluded that the first five retaliations were "time-barred [o]n their face" because they occurred in June 2007, ten months prior to the filing. ROI at 9.[7] Because he did not file his complaint until March 2008, the investigator concluded that Baptist had the burden of showing that he had good cause for missing the 90-day deadline. [8] She also found that Retaliation 6, Baptist's anticipated termination on June 2008, fell within the regulatory deadline. *Id.*

On February 3, 2009, an OHA Hearing Officer issued a Show Cause Order, asking Baptist to show why Retaliations 1-5 were not barred from consideration under the 90-

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[5] The DOE Worker Safety and Health Program establishes worker safety and health requirements that govern the conduct of contractor activities at DOE-controlled workplaces. *See* 10 C.F.R. Part 851.

[6] According to the request, an employee who wishes to return to work requires written release from their personal physician and then must report to the nearest INL medical dispensary to obtain a medical clearance.

[7] She found that Baptist was aware of the retaliation in June 2007 when it occurred because he had visited a doctor for work-related stress and the doctor had prescribed medicine (blood pressure, nerves, and sleeping pills) for stress-related ailments prior to the alleged retaliations. ROI at 9.

[8] Part 708 states that "[you] must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation." 10 CFR § 708.14 (a).

day deadline in 10 C.F.R. 708.14. On February 18, 2009, CWI filed a Motion for Summary Judgment asking OHA to dismiss the final alleged retaliatory act, Baptist's termination. Baptist filed responses to the Show Cause Order and the Motion for Summary Judgment on April 20, 2009. CWI filed a reply to Baptist's Response to the Motion for Summary Judgment on April 27, 2009.

C. The Initial Agency Decision (IAD)

The IAD set forth the Hearing Officer's decision regarding the Show Cause Order, the Motion for Summary Judgment and Baptist's Complaint. The Hearing Officer concluded that: (1) Retaliations 1-5 were time-barred from his consideration; and (2) CWI met its burden of showing that it would have terminated Baptist in June 2008 (Retaliation 6) notwithstanding his protected disclosures because Baptist's IES status expired in June 2008. In the IAD therefore, the Hearing Officer granted CWI's Motion for Summary Judgment and dismissed Baptist's complaint.

(1) Timeliness of Retaliations 1-5

In his response to the Show Cause Order, Baptist argued that his complaint should not be deemed untimely because: (1) DOE-Idaho field officials accepted the complaint; (2) CWI failed to investigate his whistleblower complaint after he contacted the benefits specialist in June 2007 and told her about the retaliation; and (3) he worked in a hostile work environment, making the retaliations part of a continuing violation by CWI. IAD at 6. The Hearing Officer was not persuaded by any of these arguments.

First, the Hearing Officer found that mere acceptance of a complaint by the field office does not cure an untimely filing. He cited OHA precedent in support of his finding. *See, e.g., Ronald E. Searle*, Case No. TBU-0065 (2007) (case dismissed for failure to comply with 90-day deadline). Second, the Hearing Officer concluded that the failure of CWI's Benefits Specialist to investigate Baptist's complaint was not an act of retaliation against Baptist. Instead he found that Baptist should have had no reasonable expectation that a conversation with the CWI Benefits Specialist about Baptist's disability benefits would trigger a whistleblower investigation. IAD at 7. The Hearing Officer was also concerned that Baptist did not raise the issue of failure to investigate until one year after filing his whistleblower complaint. IAD at 7.

Finally, the Hearing Officer found no evidence of a hostile work environment. Making reference to the Supreme Court definition of a hostile work environment as "an environment where the workplace is sufficiently permeated with harassment that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," the Hearing Officer concluded that those elements were not present in Baptist's complaint. IAD at 8 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)). Thus, the alleged "failure to investigate" was not a continuing violation that would permit the complaint to proceed to hearing with alleged retaliations that fell outside the 90-day filing deadline. Therefore, the Hearing

Officer concluded that Baptist did not provide evidence of a hostile work environment at CWI.

(2) Retaliation 6 - Complainant's Termination

In its Motion for Summary Judgment, CWI argued that there were no disputed material facts concerning Baptist's complaint and that the facts demonstrate as a matter of law that his protected disclosures could not have been a contributing factor to his termination because: (1) CWI's Benefits Specialist had no constructive knowledge of Baptist's protected disclosures; (2) there was no temporal proximity between the disclosures and Baptist's termination due to the 12 months between those events; and (3) Baptist was terminated simply for failure to comply with the requirements for reinstatement under CSI's long-standing IES policy. CWI argued that it had shown by clear and convincing evidence that CWI would have terminated Baptist notwithstanding his disclosures. IAD at 9.

According to CWI, Baptist did not comply with the CWI procedures that require an employee in IES status to indicate his intention to return to employment. [9] Consequently, CWI, in accordance with its IES policy, terminated Baptist in June 2008. Thus, the Hearing Officer concluded that CWI had shown that it would have terminated Baptist despite his protected disclosure because IES policy clearly stated that an employee on IES who did not indicate that he wanted to return to work, or did not choose any of the other available alternatives under the policy, would be terminated upon the expiration of the IES (one year). CWI had sent Baptist documents explaining his options for retaining employment after his IES status expired.[10] In addition, CWI argued that the Benefits Specialist had no actual or constructive knowledge of Baptist's alleged protected conduct, since she had no contact with him beyond the issue of his medical disability leave. Finally, CWI argued that the time between Baptist's disclosure and his termination (one year) was too long to permit any inference that the disclosure was a factor in Baptist's termination. The Hearing Officer found the above arguments to be persuasive.

In summary, the Hearing Officer ruled in the May 7, 2009, IAD that Retaliations 1-5 were time-barred and that there was clear and convincing evidence that CWI would have terminated Baptist from his position notwithstanding his disclosures. Consequently, the Hearing Officer granted the Motion for Summary Judgment on Retaliation 6 and dismissed Baptist's complaint. IAD at 6. Because all six alleged retaliatory acts had been dismissed or time-barred, the Hearing Officer did not convene a hearing on the matter.

D. The Appeal

[9] "IES" is used to describe the entire year that an employee is on STD and LTD. ROI at 7.

[10] The CWI Benefits Specialist stated that ten employees had been terminated under similar situations since 1998. CWI Response to Appeal at 9.

On May 27, 2009, Baptist appealed the Hearing Officer's findings in the IAD and filed Complainant's Statement of the Issues for Appeal identifying the issues that he wished the Director of OHA to review in the appeal phase of the Part 708 proceeding. *See Appeal*. Baptist also requested a hearing on his complaint. On July 7, 2009, CWI filed a response to Baptist's Appeal. *See Response.* In the Response, CWI requested that OHA deny the Appeal and dismiss the underlying complaint.

In his Statement, Baptist sets forth two issues on appeal:

(1) Are there any disputed facts as to whether the Complainant was retaliated against by the contractor's failure to return him to his former position or accommodate him in a comparable position that he could perform within his 15-pound lifting limitation?

(2) Can a contractor's complete failure to investigate a whistleblower retaliation complaint constitute a continuing violation under a hostile work environment claim for purposes of Part 708's 90-day period of limitations?

See Appeal at 8, 11.

As for Issue 1, Baptist argues that he was terminated because the CWI Benefits Specialist mismanaged his IES application and because CWI failed to return him to a job that did not require heavy lifting. *Id.* at 8. Complainant contends that he had no choice but to apply for IES because CWI would not provide a position that he could perform without risk of injury. Baptist argues that this issue must be reviewed *de novo* because it was not discussed in the IAD, and that "the IAD is entitled to no weight or deference on such review." Appeal at 2. According to Baptist, "[t]he IAD does not acknowledge or discuss that the Complainant only took inactive status because the retaliators would not allow him to be active in his prior or comparable position." Appeal at 8.

Regarding Issue 2, Baptist advances three arguments: (1) the Hearing Officer erred in holding that a failure to investigate a retaliation complaint is not actionable under Part 708; (2) the Hearing Officer erred in holding that there can be no hostile work environment claim unless the hostile acts are similar and within the same chain of command; and (3) the Hearing Officer has created a "strict pleading rule" for Part 708 cases by holding that Baptist's failure to plead "failure to investigate" in his initial complaint bars its consideration at any later stage of the proceeding. Appeal at 11.

Finally, Complainant also questions the summary judgment decision. Baptist argues that the Hearing Officer's finding--that there were no material facts in dispute regarding Baptist's termination--is a conclusion of law and thus reviewable *de novo*, and that all evidence should be viewed most favorably to the party (Baptist) opposing summary judgment. Appeal at 2. Baptist argues that the IAD should be overturned because the Hearing Officer did not view the evidence most favorably "both because ignoring evidence means it has not been favorably viewed, but also because the IAD repeatedly gives more favorable views to the contractor's evidence." Appeal at 2.

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-0002 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 the witness.

A . Appeal Issue 1- Retaliation and Accommodation

Baptist's claims that there are disputed facts as to whether he was retaliated against by CWI's failure to either return him to his former position or to accommodate him in a comparable position that he could perform within his 15 pound lifting limitation. The Appeal states that "[t]he IAD is completely silent on this question, which complainant thoroughly briefed in his opposition to summary judgment." Appeal at 8. According to the Appeal, Baptist was forced to take IES status because CWI's retaliatory actions prevented him from holding a light duty position. Appeal at 2.

I agree with Baptist that the IAD is silent on this question, and rightfully so. Based on my review of the record, the Hearing Officer had no actionable claim in front of him that would allow him to proceed to the question of retaliation. The retaliations in the complaint fell outside of the 90-day deadline, and Baptist did not show good cause for the Hearing Officer to waive the deadline. The record reflects Baptist's perception that CWI was retaliating against him prior to the June 2007 ESC meeting. *See* ROI at 8-9. Complainant did not avail himself of the opportunities under the IES policy to request a new position, or any of the other alternatives under IES. Baptist asks us to ignore his noncompliance with the policy and procedures of Part 708, his failure to exercise the options available to him under the IES policy that may have allowed him to return to work, and the OHA precedent that complainants are presumed to understand their rights and responsibilities under the regulations. IAD at 7.

Under Baptist's logic, a Hearing Officer would be required to examine the issues underlying a claim that the Hearing Officer has previously found to be barred from consideration due to a fatal procedural error. Such a policy would diminish the importance of the regulations that were thoughtfully designed to govern Part 708 proceedings.

I find that the Hearing Officer did not commit error by failing to address this issue. Rather, the Hearing Officer did not reach this issue because the complaint did not meet the threshold procedural requirements to proceed to the hearing stage. The Hearing Officer cannot address the issue of retaliation (or any other issue) if the complaint does not meet the procedural requirements. In this case, Baptist filed his Part 708 complaint in March 2008, nine months after five of the six alleged retaliatory acts occurred and six months beyond the 90-day deadline.[11] Thus, I find that the Hearing Officer properly

[11] The Hearing Officer did not err when he found that the field office's acceptance of the complaint did not cure any filing deficiencies. Moreover, even though Mr. Baptist was a *pro se* complainant, he was familiar

concluded that the first five retaliations were time-barred. Once he reached that conclusion, the regulations precluded any consideration of whether the contractor refused to offer accommodation to Baptist.[12] Even assuming, *arguendo*, that there are disputed facts surrounding this issue, Baptist has not shown good cause to waive the regulatory procedures and consider the allegations.[13] Therefore, once the Hearing Officer decided that Retaliations 1-5 were time-barred and Retaliation 6 was not a retaliatory action, his determination was complete.[14]

C. **Appeal Issue 2 - Failure to Investigate and a Hostile Work Environment**

(1) Failure to Investigate

Baptist argues that the IAD erred in concluding that a contractor's failure to investigate cannot be an act of retaliation under Part 708. However, I find that Baptist misstates the conclusion of the IAD. The IAD sets forth the following two reasons why Baptist could not rely on a failure to investigate as his excuse for missing the 90-day deadline: (1) because Baptist did not raise the issue until one year after he filed his complaint; and (2) because failure to investigate could not be considered retaliation under the facts of this case as there was no reasonable expectation that conversations with an employee benefits specialist would trigger a whistleblower investigation. The IAD did *not* hold that a failure to investigate is not actionable under Part 708. Rather, the Hearing Officer found in this specific case that it was not actionable because there was no reasonable expectation that the CWI Benefits Specialist would investigate. The CWI Benefits

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with the procedure for filing complaints, having filed a Part 851 complaint with the appropriate office in January 2008.

[12] Complainant suggests that his application for IES in December 2007 was the result of a retaliation (CWI would not accommodate Mr. Baptist's lifting restriction), and thus the retaliation fell within the 90-day limit (because the complaint was filed in March 2008). Appeal at 7. However, because Complainant did not list his application for IES as a retaliatory action in the complaint, I cannot agree with Baptist's argument that we should consider his IES application a retaliatory act. This would allow Baptist to raise this argument for the first time on Appeal, wrongfully expanding the scope of the Appeal. I also note that the Hearing Officer gave Baptist an opportunity to add additional retaliatory acts to his complaint during a conference call in February 2009, and Baptist, who was represented by counsel at that time, did not supplement his complaint. CWI Response at 28.

[13] Throughout the Appeal Baptist notes the role of the Benefits Specialist in his termination. According to the record, the Benefits Specialist admitted that she did not ask him if he was going to return to work. She also told CIGNA that there was no accommodation for Baptist, even though there is some question whether his managers had agreed with this. She handled his disability applications without the input of his first line supervisor, contrary to IES policy. Baptist states that the Benefits Specialist guided him towards applying for IES and did not discuss alternatives. Nonetheless, these arguments do not change the fact that Baptist did not comply with the terms of the IES policy that could have returned him to active duty at CWI. Thus, I agree with the Hearing Officer that, based on the record, there is no proof of animus by the CWI Benefits Specialist towards Baptist.

[14] Baptist argues that the Motion for Summary Judgment was not properly granted because the Hearing Officer did not consider all materials in the light most favorable to Baptist, the opposing party. However, the Hearing Officer did just that by beginning his analysis with the assumption that Baptist made protected disclosures and that he had SME status. *See* IAD at 5, fn 13.

Specialist told Baptist that she would work with him on his disability application, and did not indicate that she would investigate his allegations of retaliation. Therefore, the contractor did not retaliate against Baptist when the CWI Benefits Specialist did not initiate an investigation into his allegations. That was not her responsibility, nor had she given Baptist any indication that she would do so. Therefore, I find no error in the Hearing Officer's decision regarding this allegation.

In addition, Complainant argues that the Hearing Officer has now imposed a "strict pleading rule" on *pro se* applicants to the Contractor Employee Protection Program because the Hearing Officer did not consider Baptist's contention that CWI failed to investigate his allegations of retaliation expressed to the CWI Benefits Specialist. According to Baptist, the Hearing Officer has concluded that unless a complainant pleads a cause of action in his initial complaint, OHA will neither consider it an adverse action nor allow an evidentiary connection to other acts of retaliation. Appeal at 12. After examining the record on this issue, I conclude that the Hearing Officer did not impose a new strict pleading rule in Part 708 cases.

The Part 708 regulations anticipate that many filings will be submitted by *pro se* complainants, and consequently the pleading rules are uncomplicated and easy to understand:

> Your complaint *does not need to be in any specific form* but must be signed by you and contain the following: (a) A statement specifically describing (1) the alleged retaliation taken against you and (2) the disclosure, participation, or refusal that you believe gave rise to the retaliation . . . "

10 C.F.R. § 708.12 (emphasis added).

Baptist's argument obfuscates the real issue—that Baptist himself failed to bring up the new allegation of "failure to investigate" until one year after filing his Part 708 complaint. Baptist had an opportunity to advance his argument in the complaint, and then again during a conference call where the Hearing Officer asked him if there were any additional retaliations that the Hearing Officer should consider. CWI Response at 28. Baptist, represented by counsel by this time, did not mention any additional retaliation, and therefore cannot now argue that an impermissible "strict pleading rule" prevented him from being heard.

In summary, the Hearing Officer did not initiate a new strict pleading rule. After examining the facts of this case, the Hearing Officer correctly concluded that Baptist had an opportunity to advance his argument much earlier in the case, but for some reason declined to do so. [15]

[15] Baptist argues that CWI would not have been surprised by the "failure to investigate claim" if OHA had not granted CWI's motion prior to Baptist's scheduled deposition. Appeal at 13. Baptist alleges that CWI could have inquired about the failure to investigate claim at the deposition, thus avoiding any surprise. This argument does not negate a party's responsibility to present their argument at the proper time.

(2) Hostile Work Environment

Baptist argues that the alleged failure to investigate was part of a hostile work environment at CWI created by his managers. After reviewing Complainant's arguments, I conclude that Baptist has provided no argument to disturb the Hearing Officer's decision on this issue. It is true that Baptist experienced sufficient stress at his workplace and that he visited a doctor seeking relief from that stress. The doctor prescribed medicine for stress-related maladies (e.g., high blood pressure and anxiety). Baptist stated in the pleadings that he felt that his work was not appreciated, and he felt that he was treated poorly. However, without minimizing the distress experienced by Mr. Baptist, on review I cannot find that his workplace could be considered a "hostile work environment." Even if I more properly characterize his argument as an "abuse of authority" under Part 708, I find no merit to his claims. [16]

To sum up, although Baptist clearly experienced a high level of stress at CWI, in this case there was insufficient evidence to support a finding that his managers had committed an abuse of authority. Therefore, I find that the Hearing Officer committed no error in his decision.

III. CONCLUSION

The Hearing Officer correctly concluded that Retaliations 1-5 were time–barred under 10 C.F.R. §§ 708.14 because they did not occur within 90 days of the date that Mr. Baptist filed his complaint. I also affirm the Hearing Officer's grant of the Motion for Summary Judgment, thereby dismissing Retaliation 6 of the complaint. I conclude that the Hearing Officer has not established a "strict pleading rule" for complainants in Part 708 actions. For the reasons discussed above, I find that Baptist's appeal is without merit. Consequently, I will deny the appeal.

It Is Therefore Ordered That:

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[16] I further find that Baptist has misstated the conclusions of the IAD. Baptist argues that the Hearing Officer has imposed a requirement that "only hostile acts that are similar and within the same chain of command are actionable under Part 708." Appeal at 12. However, nowhere in the IAD did the Hearing Officer impose this requirement on all Part 708 cases. Rather, he used Supreme Court precedent as a guideline to make a determination about the workplace environment, not as a strict rule. The Hearing Officer stated:

> None of the alleged conduct was physically threatening or humiliating or of a severe or pervasive nature that would raise [a] hostile work environment claim. Nor can I find any other factual circumstance in this case that would support a finding of a hostile workplace environment.

IAD at 8.

(1) The Appeal filed by Billy Joe Baptist from the Initial Agency Decision issued on May 7, 2009, is hereby 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: December 3, 2009