

June 20, 2008

**DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY**

Initial Agency Decision

Name of Petitioner: Dennis Patterson

Date of Filing: April 25, 2007

Case Number: TBH-0047

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Dennis Patterson (“Patterson,” “the complainant,” or “Complainant”) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant was an employee of Batelle Energy Alliance, LLC, (“BEA” or “the contractor”) the management and operating contractor of the DOE Idaho National Laboratory (INL) in Idaho Falls, Idaho, where he was employed as the Employee Concerns Program Manager until June 2007. On June 1, 2006, he filed a complaint of retaliation against BEA with the DOE Office of Employee Concerns. In his complaint, Patterson contends that he made certain disclosures to officials of BEA, and that BEA retaliated against him in response to these disclosures.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE’s Contractor Employee Protection Program was established 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’s government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those “whistleblowers” from consequential reprisals by their employers. 10 C.F.R. Part 708. Under the regulations, protected conduct includes:

(a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [the] employer, or any higher tier contractor, information that [the employee] reasonably believes reveals –

(1) A substantial violation of a law, rule, or regulation;

(2) A substantial and specific danger to employees or to public health or safety; or

(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or

(b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or

(c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would-

(1) Constitute a violation of a federal health or safety law; or

(2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

Part 708 sets forth the proceedings for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. See 10 C.F.R. §§ 708.21-708.34.

B. Procedural Background

Patterson filed a complaint ("First Complaint") with the Idaho Operations Office Employee Concerns Office (DOE/ID) on June 1, 2006. DOE/ID dismissed his complaint and Patterson appealed this dismissal to OHA. OHA reversed the dismissal and ordered DOE/ID to proceed with the case. *See Dennis Patterson*, 29 DOE ¶ 87,011 (2006). On September 6, 2006, Patterson requested an investigation, pursuant to 10 C.F.R. 708.21(a) (2), and a hearing, and the complaint was transferred to OHA. On September 19, 2006, Patterson filed an addendum to the complaint ("First Addendum"). He then filed addenda on October 31, 2006 ("Second Addendum"), and February 20, 2007 ("Third Addendum"), requesting a hearing on the issues raised, but without an investigation.

On April 25, 2007, OHA issued a Report of Investigation (ROI) and I was appointed the Hearing Officer in the case on the same day. The ROI concluded that Patterson had met his burden of demonstrating that he made protected disclosures alleging that BEA abused its authority, and that those disclosures were a contributing factor to three alleged retaliatory acts. The investigator also concluded that BEA had provided sufficient evidence to demonstrate that it would have taken these actions notwithstanding Patterson's protected disclosures. On May 24, 2007, I scheduled a hearing in the case to be held on August 21, 2007. However, Patterson filed another addendum on June 26, 2007 ("Fourth Addendum"), also requesting a hearing without investigation. All of the addenda were consolidated into one complaint under the original case number. At the

request of the parties, I rescheduled the hearing to September 17, 2007. The parties participated in mediation on August 7, 2007, but the session was not successful.

On August 10, 2007, BEA filed a Motion for Summary Judgment. Mr. Patterson filed a Response to that pleading on August 27, 2007. BEA then filed a Reply in Support of BEA Motion for Summary Judgment on August 30, 2007. On August 30, 2007, the parties submitted a Joint Order to consolidate Dockets and Vacate Schedule. At the request of the parties, I granted an extension of the hearing date to November 27, 2007. On November 21, 2007, I granted in part BEA's Motion for Summary Judgment, and dismissed Mr. Patterson's First Complaint.¹ All other addenda remained under the same case number.

I finally convened the hearing in this case in Idaho Falls over a four-day period from November 27-30, 2007. Both parties submitted exhibits. BEA presented exhibits into the record which were numbered Exhibit 1 through Exhibit 137, and Mr. Patterson submitted 55 exhibits, lettered Exhibit A through Exhibit SS. BEA presented nine BEA management and non-management employees as witnesses. Mr. Patterson testified on his own behalf, and also called five current and former colleagues as witnesses. The parties submitted post-hearing briefs on February 4, 2008 ("BEA Brief," "Patterson Brief"), at which time I closed the record in this case.

C. Preface to Factual Background

This case is a consolidation of four separate complaints that arise from events that occurred between February 2005 and June 2007. This case contains many facts, names, and issues, and they are set forth in detail in Section D, "Factual Background." In that section, I set forth the facts, as elicited through documentary evidence and four days of testimony, in chronological order. However, to assist the reader, I first present this very brief summary of the facts and issues in this matter.

In 2005, BEA assumed the operations of INL and consolidated the workforces of the two previous contractors, Bechtel BWXT Idaho, LLC (BBWI) and Argonne National Laboratory-West (ANL-W). This action resulted in changes in personnel classification and performance appraisals. Patterson was Employee Concerns Manager under BBWI, and had one employee reporting to him. When BEA assumed the contract in 2005, that employee no longer reported to Patterson. In February 2005, BEA Security revoked the site access of a subcontractor employee who is also a relative of Patterson. Patterson maintained that this action was unjustified, and he launched an extensive investigation into the procedures BEA used to execute the revocation. Patterson was vocal in escalating this concern to BEA senior management, also alleging racial discrimination by the contractor. BEA found no evidence of discrimination, but Patterson did not accept that finding, to the dismay of his management. As a result of Patterson's investigation, BEA restored site access to the subcontractor employee, BEA management

¹ On November 21, 2007, I dismissed the First Complaint because five of the six allegations of retaliation were outside of the 90-day limit, and the sixth was not a negative personnel action. *See Dennis Patterson*, 29 DOE ¶ 87,035, Case No. TBZ-0047 (2007).

acknowledged that procedures had been violated, BEA revised some procedures, and the BEA Security manager was officially reprimanded. However, the relationship between Patterson and his management became strained as Patterson continued to press his views about the motivation behind the revocation. Mr. Patterson's manager directed the complainant to repair the damaged relationship between Employee Concerns and other BEA offices.

In 2006, BEA changed Patterson's job code from manager to specialist. In the spring of 2006, Patterson filed a discrimination complaint with the Idaho Human Resources Commission and, in June 2006, he filed a Part 708 complaint with DOE. The BEA Office of the General Counsel advised Patterson that he could not use company or government resources for personal litigation and, in June 2006, requested that BEA Security investigate Patterson's use of corporate and government resources for possible abuse. This led to workplace conflict and strained relations between Patterson and employees in BEA Safeguards and Security ("Security") and the BEA Office of the General Counsel. Later that year, a BEA manager, the subject of an investigation conducted by the complainant, accused Patterson of bias during that investigation. This led to BEA Security investigating Patterson again, this time on the manager's allegation of bias, in September 2006. Also in September 2006, a confidential source (a BEA employee) reported a concern to Patterson that resulted in a Security investigation into the activities of a colleague of the source. Security asked Patterson to disclose the identity of his confidential source in order to aid their investigation, but he refused because of his conviction that confidentiality was critical to encourage employees to file their concerns with his office, and also to protect those employees. In October 2006, Patterson was suspended for three days without pay, principally for his alleged lack of cooperation with Security in the two investigations into his behavior.

In February 2007, Patterson's manager rated his 2006 performance as "1" (on a scale of "0" to "4" with "4" as the highest rating). In April 2007, at a meeting with Patterson and the director of Security, Patterson's manager presented Patterson a directive to disclose the name of his confidential source in order to assist Security. The meeting was heated, and Patterson's manager alleges that Patterson was insubordinate. Patterson again refused to name the source. In June 2007, Patterson's manager gave him a zero merit increase for his 2006 performance, and a "directed reassignment" (involuntary transfer) to another position.

As discussed below, after carefully reviewing the documentary and testimonial evidence in this case, I have determined that Patterson engaged in protected conduct, and that BEA retaliated against him by the September 2006 bias investigation, the three-day suspension, the low performance rating and zero merit increase, and the directed reassignment. I have ordered relief for the retaliation, but I do not order Patterson's reinstatement to his previous position, because that position no longer exists.

D. Factual Background

(1) BEA

The Idaho National Laboratory (INL) is a DOE research and development laboratory located in Idaho Falls, Idaho. In 2002, INL was managed by Bechtel BWXT Idaho, LLC (BBWI) and Argonne National Laboratory-West (ANL-W). However, that year DOE changed the site mission to focus on building prototype nuclear plants, and began the search for a new contractor for the mission, as well as a new contractor for environmental management responsibilities. The INL contract was awarded to BEA, a nonprofit limited liability company (LLC) owned by Battelle Memorial Institute (BMI) in November 2004, and on February 1, 2005, BEA assumed operation of INL. BBWI assumed responsibilities for advance mixed waste treatment.

BEA combined the BBWI and ANL-W work forces when it assumed the contract as management and operating contractor, and also modified personnel and compensation policies as a result. BEA utilized a web-based performance evaluation system that differed from its predecessors in the categories to be evaluated. According to BEA, BBWI's system was more subjective because each supervisor determined the rating of those that reported to him or her. BEA's system, on the other hand, placed greater emphasis on performance expectations and how employee performance related to accomplishing the BEA mission.

(2) The Complainant

Patterson has worked at INL since 1980, and served as Ethics Officer/Department Manager from 1994 to 1999 under BBWI's predecessor, Lockheed Martin Idaho Technologies company (LIMITCO). At LIMITCO, Patterson reported directly to the president, John Denson. (Transcript of Hearing) Tr. at 534-538. In 1999, BBWI replaced LMITCO and Patterson became Employee Concerns (EC) Program Manager, reporting to Doug Benson (Benson), BBWI Audit and Oversight Director. One employee, Joan Mehner (Mehner), reported to Patterson. In December 2004, BEA offered employment to Patterson effective February 1, 2005, as Department Manager of Employee Concerns reporting to Benson. BEA does not have an Ethics Officer, but rather assigns the responsibility for the ethics function and "Standards of Conduct" to the Office of the General Counsel. Transcript of Hearing (Tr.) at 637-8. During the transition to BEA in 2005, Mehner elected to stay with BBWI and consequently Patterson had no employees reporting to him.

According to the BEA Charter, the mission of the ECP Office was to oversee and promote ethical business behavior as a government contractor and to provide an independent avenue for employees to resolve concerns. Exhibit (Ex.) 69; Ex. 70 at 1. The Employee Concerns Office is responsible for receiving, coordinating and conducting investigations of reported concerns. The EC Office advises employees who report concerns that they may elect to remain anonymous, in which case confidentiality is

maintained “to the maximum extent possible.” Ex. 70. A source is only divulged if “clearly essential” to the investigation. *Id.* at 3, 4. Unless divulging names is clearly essential to the investigation, the investigator is to protect the confidentiality of both the concerned employee and the person named in the complaint. Ex. 70 (Management Control Procedure (MCP)) at 3. Benson, the first level manager of the Employee Concerns Manager, makes the final decision on whether a name should be disclosed. Tr. at 640. Mehner testified at the hearing that, with one exception, EC had honored all requests for anonymity during the years that she worked there under BBWI, even when a complaint was transferred to Security. Tr. at 600-01. In that case, she asked the employee for his permission to disclose his name to Security. *Id.*

(3) Chronology

a. 2005

BEA Revokes Site Access of a Subcontractor Employee

On February 1, 2005, BEA assumed the operations of INL. Patterson’s first complaint arises from the events that occurred when a subcontractor employee (“the subcontractor”) was denied access to the INL site in February 2005. The subcontractor, a relative of Patterson, had worked at the site periodically for eight years. On February 24, 2005, Security staff at INL revoked the site access of the subcontractor employee based on a previous felony conviction and allegedly “ongoing” problems with the law. Tr. at 115-16; Ex. 19. The subcontractor employee then contacted Patterson for assistance in getting his site access restored. Patterson met with his supervisor (Benson) and the General Counsel, Mark Olsen (Olsen). Patterson wanted to investigate the matter and expressed concerns with the manner in which Security had handled the incident. During the meeting, Patterson, Benson and Olsen discussed the issue of a possible conflict of interest due to the family relationship between Patterson and the subcontractor employee. However, according to Benson, Olsen concluded that any conflict of interest could be waived because of the limited scope of the investigation. Benson determined how to handle the conflict of interest issue. Tr. at 885.

On March 3, 2005, Patterson gave the BEA Personnel Security Manager, Jody Streier (Streier), a copy of the subcontractor employee’s police record, which showed no problems since 1998, and recommended that BEA restore the subcontractor’s site access. Tr. at 117. When the subcontractor asked about appealing the decision, Security told him that there was no opportunity to appeal. The subcontractor employee’s union later informed him how to appeal the decision. On March 8, 2005, BEA granted the subcontractor an appeal of the decision. On March 15, 2005, the appeal panel met and denied his appeal, based on Streier’s assertion that the subcontractor employee had not reported problems with the law that occurred since 2003. According to Patterson, Benson recommended that Patterson drop the matter after the appeal, but Patterson refused. Tr. at 118, 133.² Up until the investigation, Benson and Patterson had a “very positive, cordial relationship.” Tr. at 133.

² Benson, on the other hand, testified that both men jointly agreed to investigate further. Tr. at 886.

On March 16, 2005, Patterson requested the information that caused the appeal panel to deny the appeal. Streier denied his request. Patterson pursued his investigation by reviewing the applicable standards and procedures regarding site access and also collected information regarding the subcontractor's criminal record.

Patterson Alleges Violations of Procedure

Patterson continued with his own investigation. On April 22, 2005, Security gave Patterson and Benson access to the subcontractor employee's file. Ex. 19. Patterson met with Security, but found them uncooperative and after researching their procedures, he found violations. Tr. at 120. During an interview on May 3, 2005, Streier told Benson that she believed that the subcontractor could not possibly have stopped his criminal activity, and that he either got lucky and had not been caught, or he had learned to manipulate the system. Tr. at 122. On May 4, 2005, Patterson sent an e-mail to Benson reporting several procedural and regulatory violations that BEA Security had committed in the site revocation. Patterson reported procedural and regulatory violations committed by BEA Security and also filed a discrimination complaint with the BEA EEO officer. Tr. at 122.

On May 9, 2005, Patterson met with the BEA Manager of Workforce Practices in Human Resources, Arantza Zabala (Zabala), and expressed concern that the action against the subcontractor employee may have been motivated by race.³ Zabala initiated an investigation.

On June 8, 2005, Patterson met with BEA officials and discussed problems relating to alleged violations of company procedure in the matter of the subcontractor employee. On June 15, 2005, Security restored site access to the subcontractor. As a result of the investigation, Security changed at least one of its site access procedures. Tr. at 128. The relationship between Benson and Patterson, formerly friendly, began to deteriorate.

On July 9, 2005, Zabala sent Patterson an e-mail and concluded that she was unable to establish that discrimination was a factor in the removal of the subcontractor employee's access. Despite this conclusion, Patterson maintained that Steier had discriminated against his relative. On July 27, 2005, Benson informed Olsen that Patterson was going to report his concerns to the BEA president, and Olsen objected.

On August 11, 2005, Patterson met with Juan Alvarez (Alvarez), Deputy Laboratory Director for Management, and other BEA officials concerning the violations he had found during his investigation of the revocation of the subcontractor employee's site access. Patterson became agitated and visibly angry, according to the other attendees, alleging a cover-up and racial discrimination. Tr. at 641. However, Patterson denies that his behavior was unprofessional. Patterson testified that he speaks passionately and

³ Zabala is responsible for Labor Relations, Employee Relations, Diversity and Affirmative Action at BEA. TR. at 1195.

directly on issues. Tr. at 135. He considered his behavior at the meeting to be professional. *Id.*

On August 12, 2005, Alvarez issued a memo about the incident to BEA officials that explained the problems and recommended corrective and disciplinary actions. At the end of the memo, Alvarez wrote that he found Patterson's conduct at the meeting "lacked impartiality" and was interpreted by his staff to be offensive and threatening. Ex. 30. Streier received a verbal warning about her misconduct that was noted in her personnel file for six months. Tr. at 885-888.

INL Requests an Investigation of the Site Access Revocation

In October 2005, INL asked BMI to investigate the subcontractor access matter. INL later expanded its request to include an investigation of the Ethics Office investigation function, and the optimal organizational location of the Ethics Office. This investigation found that "most of the substantive aspects" of Patterson's investigation were appropriate and that Patterson's and Benson's efforts were instrumental in leading to the proper reinstatement of the subcontractor employee's site access. Ex. 37 at 2. The report concluded that Katherine Moriarty (Moriarty), BEA Senior Counsel, helped to resolve the issues of the incorrect revocation and correctly interpreted several items in the employee's record, permitting Security to reinstate access. The BMI investigators found no unethical conduct by management. Alvarez related that he may have been hasty in distributing his memorandum widely. The investigators did voice concern about Patterson's interaction with BEA managers and staff, specifically his refusal to accept the conclusion of the BEA EEO officer that racial discrimination was not involved, and his apparent inability to understand that there was an appearance of a lack of impartiality in his actions because of his relationship to the subcontractor employee. BMI recommended actions appropriate to improve the working relationships between the Ethics Office and the managers involved in the site access matter. *Id.* at 3.

b. 2006

In his 2005 performance evaluation, Benson commented on Patterson's willingness to ensure that the Standards were effectively enforced and that he "knows and lives the Standards without compromise." Ex. H; Tr. at 125. Benson gave Patterson his 2005 performance evaluation with a rating of "all expectations met" (the third highest rating). Patterson felt that he deserved a higher evaluation and, after some discussion, Benson changed the rating to the second highest rating ("all expectations met, some exceeded). However, Patterson had received the highest rating (under BBWI) for his 2004 performance as a BBWI employee. On February 24, 2006, BEA changed Patterson's job code from Manager to Specialist 5, which reduced his maximum possible monthly salary from \$11,047 to \$9,198. BEA applies the term "Specialist" to professionals, such as attorneys. Tr. at 561-2. However, Patterson's position was no longer considered managerial, since no employees reported to him after Mehner opted to remain with BBWI. Benson informed Patterson that his position description would maintain the "functional title" of Employee Concerns Manager. Tr. at 646. Patterson refused to use

the functional title, and referred to himself as “Specialist.” Tr. at 646-7. According to Benson, the relationship between Benson and Patterson deteriorated further. Tr. at 780. On March 14, 2006, Benson gave Patterson a 4.05 percent merit increase. Patterson’s merit increase for the previous year was 4.32%.

Idaho Human Resources Commission (IHRC) Complaint and Allegations of Misuse of Government and Corporate Equipment

On March 14, 2006, Patterson filed a complaint with the Idaho Human Rights Commission (IHRC) alleging discrimination based on race and retaliation. Ex. 44. On April 27, 2006, Patterson asked Moriarty for two files that Moriarty assumed were for the purpose of furthering his IHRC complaint. On May 1, 2006, Moriarty informed Patterson that it was inappropriate for employees to pursue personal litigation during business hours. Patterson replied that he would follow the Standards of Conduct and the BEA Employee Handbook. Patterson sent four e-mails and one fax to the IHRC on May 24-25, 2006. On May 25, 2006, the IHRC notified Moriarty of Patterson’s intent to withdraw his IHRC complaint, and referenced Patterson’s office e-mail address, and telephone and fax numbers.

Several important events occurred on June 1, 2006. First, Patterson filed a Part 708 complaint alleging that BEA retaliated against him for making protected disclosures when he reported procedural violations committed by BEA surrounding the revocation of the subcontractor employee’s site access. Second, the IHRC withdrew Patterson’s complaint upon his request for administrative dismissal without a Notice of Right to Sue. Ex. M. Finally, surprised that Patterson had ignored her admonition about personal litigation, on June 1, 2006, Moriarty initiated an investigation to determine the extent of Patterson’s use of company time and equipment. Tr. at 1352-1360. In the past, when confronted with an allegation that an employee had used company resources, Benson had either counseled the employee about the use of company resources or he had put that information in the employee’s Performance Appraisal. *Id.* at 891-3. The investigation was assigned to Torrance Shirley (Shirley), BEA Security, who examined Patterson’s e-mails and informed Moriarty on June 6, 2006, that Patterson had filed or was about to file a Part 708 complaint.

On July 5, 2006, BEA received a copy of Patterson’s complaint. On July 10, 2006, Moriarty directed the investigator to proceed with the investigation. On July 13, 2006, Shirley informed Patterson that he was under investigation for possible misuse of government equipment and resources, and later that day he interviewed Patterson for approximately 20 minutes. Ex. NN; Tr. at 957. The interview was recorded and transcribed. Ex. NN; Ex. 54.

Shirley found that Patterson had made ten calls to the IHRC. Ex. 54 at 7. Shirley also found that Patterson had used company time to work on his Part 708 complaint. However, Patterson steadfastly maintained that company policy permitted some use of company time and resources for his Part 708 complaint and, at the end of the investigation, Shirley concluded that Patterson’s use of company resources was

incidental. Tr. at 154-157. BEA acknowledged that an employee could use company time and equipment to pursue a Part 708 complaint, and to contact DOE, thereby affirming Patterson's previous contention. Tr. at 194-196; 446-47; Ex. U, Ex. BB at 4. Shirley presented his findings to a Personnel Action Advisory Group (PAAG), a group of managers convened by Human Resources to determine disciplinary action.

Employee Confidentiality Issue

In September 2006, a BEA employee filed a complaint with the Employee Concerns Office alleging that another employee, who also held a political office, was using company time to conduct political activities on the telephone. Ex 86. As a 501(c) (3) entity, BEA was prohibited from participating in any political campaign and such actions, if true, put their contract in jeopardy. On September 22, 2006, Patterson, Benson, Moriarty and two employees from Security met to determine the appropriate course of action. The group decided to transfer the case to Security, headed by Tom Middleton (Middleton), for investigation. Dee Wise (Wise) was assigned as principal investigator, and Patterson sent his file to Wise that day.⁴ On September 25, 2006, Wise informed Patterson that she needed the name of the person who reported the allegation, and added that Security could protect his or her identity. Tr. at 1148; Ex. 75. Patterson refused to release the name, and said that he would intercede and ask questions of the source. Tr. at 1148. Wise felt limited without the name of the source. *Id.* at 1152.

On September 28, 2006, Benson sent Security an e-mail stating that confidentiality was required by the EC Procedure and that they could not breach that requirement. Patterson offered three options for Wise to get information that she needed, but he refused to reveal the name.⁵ However, after discussions with Middleton, Benson asked Patterson to disclose the name of his source so that Wise could complete her assignment.

Although the request had been transferred to Security for investigation, Patterson contacted Wise three times asking for updates and also a copy of the final report. Wise then asked Patterson not to communicate with her except through her managers. Tr. at 1150-2.

Events That Led to Allegation of Bias Against Patterson

Between May and July 2006, Patterson conducted an investigation of an employee concern, an allegation that an employee was not properly evaluated by his manager. Tr. at 205; Ex. OO; Ex. 61. As part of the investigation, he interviewed the complainants' manager. Patterson concluded that the manager had not evaluated the employee properly and did not use information from all relevant contributors. The manager then filed a formal employee concern with Benson alleging bias in Patterson's conduct during the

⁴ When a case is transferred from the Employee Concerns Office, the receiving organization has full responsibility for the new matter.

⁵ Even though Wise was new to the company, she had substantial experience in investigations. Tr. at 1139-42.

investigation. Tr. at 659. Specifically, the complainant alleged that Patterson was “prosecutorial,” had failed to inform him of the scope of the investigation, and had failed to validate the facts presented by the interviewee during the interview, resulting in inaccuracies in the report. No one challenged the accuracy of the report. Ex. 61 at 5. On July 19, 2006, Benson asked Security to investigate the concern, recusing himself because Patterson’s first Part 708 Complaint had accused Benson of retaliation. Tr. at 656, 897. The investigation was again assigned to Torrance Shirley.

On August 31, 2006, Shirley called Patterson for follow-up questions on the first investigation, and Patterson asked him “Is there anything else?” Tr. at 927-8. Shirley then asked Patterson if anyone had informed him of the second investigation, but Patterson at first refused to answer the question and later stated “I’d rather not answer that question.” At the time, Patterson was at the hospital visiting a sick friend. Tr. 200-02. He chose to defer answering that question until the interview. Tr. at 202.

On September 6, 2006, Patterson was told to attend an interview with Shirley. The interview lasted one hour and 14 minutes. Ex. OO; Tr. at 957. Patterson’s attorney was present. Shirley informed Patterson that he was required to answer all questions and that failure to respond would be viewed as not cooperating with the investigation. Ex. 61. When Shirley asked why Patterson had not told him if anyone had given him advance notice of the second investigation, Patterson jokingly stated that he liked “to keep [Shirley] guessing” and “to level the playing field.” Ex. 61 at 28. Patterson said this jokingly, but Shirley testified that he did not take it as a joke, rather he was surprised. Tr. 934. The men then had a discussion of e-mails, with Patterson complaining that Shirley and Benson sent unencrypted e-mails about the investigations that Patterson alleged invaded his privacy; *i.e.*, people who did not have a “need to know” had seen e-mail correspondence. According to Patterson, he had knowledge of administrative personnel opening mail that concerned his issues. Shirley asked Patterson if he had unauthorized access to Benson’s e-mail messages via Benson’s secretary, and Patterson at first said “I’m not saying anything like that. No.” Ex. 61 at 15. Patterson later stated “I’m not answering your question.” *Id.*

Patterson acknowledged that this would be held against him. *Id.* Shirley also questioned why Complainant had failed to mark a document “Official Use Only.” Complainant admitted the mistake, and explained what he did to correct the mistake. Shirley investigated Benson’s secretary in order to see if she had shared Benson’s e-mails with Patterson. However, Shirley could not substantiate that Patterson had inappropriate access to any e-mail and the investigation into the matter was dropped. Tr. at 846-47. The investigation did not establish bias by Patterson in his conduct of the employee concern investigation.

On September 19, 2006, Patterson filed an “Addendum” alleging that BEA management initiated two Security investigations as retaliation for filing a Part 708 complaint. As a remedy, Patterson requested reimbursement for the attorney fees incurred when his attorney attended the September 6, 2006, Security interview, and also an undetermined

remedy set forth as “To be determined based on the outcome of the Security Investigations.”

Three-Day Suspension

Benson was concerned by Patterson’s behavior and interaction with Shirley during the interviews. At the conclusion of the investigations, Benson convened a Personnel Action Advisory Group (PAAG) to discuss appropriate disciplinary action.⁶ Members of the PAAG included Benson, Moriarty, Shirley, Terry Brooks of Human Resources and Art Clark. Tr. at 605. Shirley presented summaries of his investigation. Benson testified that he read the transcripts and listened to portions of the recorded interviews and then made a decision on discipline based on Patterson’s behavior in the September 2006 investigation. Tr. at 666-667. Human Resources prepared a suspension notice, reciting all inappropriate behavior or performance, including issues that standing alone would not warrant suspension. Tr. at 1055-1056; 1110-111; 1132-33.⁷ Consequently, on October 16, 2006, Complainant was suspended without pay for three days for the following misconduct:

Your failure to cooperate with an investigation by misleading an investigator; refusal to answer investigation questions regarding the unauthorized use of government computers and systems and the attendant inferred unauthorized use of government computers and systems; failure to follow company policies and protocols regarding an Employee Concerns investigation; failure to follow directions from BEA Office of General Counsel.

Ex. X. Patterson had not received a verbal or written warning prior to this suspension. Tr. at 136; Ex. O. The Notice also highlighted Patterson’s position as program manager for the Employee Concerns Office, and stated that his “misconduct demonstrates a lack of judgment and has resulted in a loss of credibility regarding your ability to ensure fair treatment, to effectively address resolution of employees’ concerns in compliance with INL’s Standards of Conduct, Conflict of Interest criteria and BEA’s policies and protocols, and/or to effectively implement DOE Order 442.IA, Department of Energy Employee Concerns Program. Further, your misconduct has demonstrated an inability to communicate effectively with co-workers and has severely hampered your ability, and hence BEA’s ability to coordinate multi-discipline investigations to resolve employee concerns.” Ex. X. The notice directed Patterson to immediately begin to restore the trust and confidence of management and his fellow employees. Ex. 65.

Benson testified that the primary reasons for suspending Patterson were: (1) the complainant’s refusal to answer Shirley’s question on whether Patterson had gained

⁶ Prior to initiation of any proposed suspension or discharge or at the request of a manager, BEA Employee Relations will convene a PAAG to assist line management to determine a possible course of disciplinary action. Ex. 67 at 1-73.

⁷ The items that did not warrant suspension were: (1) Patterson’s failure to follow Benson’s directive to allow all interviewees to review their statements; and (2) Patterson’s failure to follow Moriarty’s directive not to use government property to pursue his IHRC complaint. Tr. at 671.

access to e-mails regarding the investigations; and (2) Patterson's statements that he had refused to answer a question "to keep [Shirley] guessing and level the playing field." Benson described this conduct as "inappropriate." Tr. at 668-9.

On October 31, 2006, Patterson filed an "Update to Addendum" (Complaint III) indicating that the suspension was a retaliation for his past 708 activity. As a remedy, he requested (1) removal of the suspension notice from his personnel file, and (2) reimbursement for lost pay and benefits.

On November 2, 2006, a second employee sent Patterson an e-mail complaining about the political phone calls, and Wise asked to speak to the new source. Patterson conducted an interview with the source in his office, but Wise again maintained that she could not proceed without direct contact with the sources.

c. 2007

In January 2007, Benson rated Patterson's 2006 performance as "some expectations not met ("1" on a scale of "0" to "4," with "4" as the highest rating)."

On February 20, 2007, Patterson filed a "Second Addendum" (Fourth Complaint) alleging that BEA had retaliated against him by evaluating his performance at the level of "1" on a scale of 0 to 4 for the period January 1-September 30, 2006. The Second Addendum was processed as Patterson's fourth complaint. Patterson requested that his appraisal be revised to reflect his actual performance.

On March 13, 2007, Wise interviewed the subject of the political telephone calls investigation, but determined that she needed more information to rebut certain statements from the interview. Tr. at 1154-55. On March 28, 2007, Security decided to contact the people who had received calls from the subject of the investigation in order to ascertain the subject of their conversation, i.e., to determine if the conversation was political in nature. Wise first obtained background information on the recipients of the calls and then traced the phone calls that Patterson had identified as relevant. Tr. at 1153. Wise determined that each individual called had a potential political connection to the subject of the investigation. Security was unwilling to risk exposure of the subject employee, and did not go forward with contacting the individuals who had received the phone calls. Tr. at 712, 719. Security still maintained that the name of the source was critical to its investigation.

On April 19, 2007, Patterson sent an e-mail to Benson and Middleton telling them to invite their families to the Part 708 hearing so that they could see justice done. Ex. 90.

Events Leading to Patterson's "Directed Reassignment"

On April 24, 2007, Benson, Patterson and Middleton met regarding the confidential source. Benson presented Patterson a formal directive to disclose the name of the source to Wise by the following day at 9 o'clock. Benson stated that a personal meeting

between the source and the principal investigator was essential to the investigation. Disturbed by Patterson's behavior at the meeting, Benson and Middleton went to Moriarty's office immediately after the meeting and created a memorandum of their recollection of events. Following are some excerpts from that document:

Dennis became visibly angry, raising his voice. His body language changed (he began rocking in his chair); he began sneering at Doug and Tom; and his facial features changed—he was obviously “furious” in response to Doug's statements regarding the path forward in the investigation.

At this point, Dennis lost his composure and became extremely agitated. He repeatedly made provocative, threatening comments to Doug and Tom, threatening that any action would have consequences.

Dennis threatened Doug and Tom, saying “You know what 9 o'clock is going to bring. Do you know what the consequences will be to you and the company?” Later, Dennis stated, “BEA will pay!”—again the connotation being that the company would suffer consequences.

Dennis was insubordinate, responding to Doug “You don't have the training or background to tell me how to run my program. You can't tell me to disclose the name of my confidential source. You can't tell me how to run my program.” (Notably, in the meeting of April 16, 2007, Dennis told Doug and Tom that he had not promised confidentiality to his source.)

Dennis became increasingly aggressive, saying “Middleton, you know me well enough to know what I'm going to do.” (This was strange, because Dennis has had a long term relationship with Tom, and had never addressed him in this way before.)

* * *

Dennis continued to raise his voice, saying to Tom “Am I clear on this? You have not provided a credible reason for disclosing this person's identity.”

* * *

After leaving the room, Dennis returned to make a final statement to Tom, stating in a derogatory tone “You're doing a great job as head of Safeguards & Security.”

Ex. 92; BEA Brief at 67-68.

Late in the evening on April 24, 2007, Patterson sent an e-mail response, still refusing to name the source. However, he did state that the source was not a BEA employee. Ex. 93.

With this new information, Wise was able to determine the identity of the source via a seating chart.⁸

On April 25, 2007, Middleton experienced what he called a “disturbing encounter” with Patterson when Patterson cut off Middleton’s car as he was backing out of his driveway to leave for work. BEA Brief at 78. Middleton found this disturbing because in the ten years that they were neighbors, they had never left for work simultaneously.⁹ Patterson waited at a stop sign for what Middleton considered a prolonged period, with Middleton behind him, and did not move until another car approached. *Id.*; Tr. at 1291-4.

On April 25, 2007, Benson convened a PAAG. The PAAG members were Benson, Middleton, Zabala, Moriarty, and Mark Holubar, Zabala’s manager. Tr. at 1198-99. The PAAG members decided that they needed additional managers present, and reconvened the next day with Olsen and Clark. *Id.* at 1199. The PAAG also had additional meetings. Zabala interviewed Patterson to get his version of the meeting, and she testified that Patterson felt intimidated by Middleton’s presence at the meeting. Zabala considered Patterson to be hostile and condescending during their interview. Tr. at 1201. The PAAG members discussed his previous suspension where he was asked to cooperate with Security, and they felt a lack of confidence in his ability to continue in his position. *Id.* at 1202. The members of the PAAG considered terminating Patterson, but Benson suggested reassignment. *Id.* at 1203. Zabala searched company vacancies for a suitable position for Patterson, and ultimately placed him as a Management Systems Process Lead in Engineering Design. *Id.* at 1204.

On June 7, 2007, Benson gave Patterson a zero merit increase. On June 13, 2007, Benson reassigned Patterson to the position of Management Systems Process Lead in Engineering Design. Patterson filed a “Third Addendum” (Fifth Complaint) on June 21, 2007, citing the zero merit increase and directed reassignment as acts of retaliation. As remedy, he requests: (1) a wage increase consistent with the average for those employees who received a top performance rating; and (2) reassignment to the position of Manager of the Employee Concerns and Business Ethics Office.

BEA Modifies the Employee Concerns Manager Position

In September 2007, Benson modified the position description for the Employee Concerns Manager, and renamed the position “Senior Auditor/Employee Concerns Program Manager.” Ex. RR at 3; Tr. at 755-56. The new position was radically changed. Benson

⁸ Wise ascertained the name of the second source and, during an interview, the source named other witnesses, which enabled Wise to complete the investigation. Wise substantiated the concern regarding political activity. Tr. at 1152, 1158.

⁹ Middleton also testified about other behavior that Middleton considered “distressing,” e.g., Patterson sits on his porch and glares at Middleton while Middleton works in his yard; Patterson does not speak to Middleton in the hall; and Patterson allegedly passes Middleton’s office frequently and makes sure that Middleton sees him. Tr. at 1293-7.

converted a permanent position into a lower level, two-year rotational assignment.¹⁰ According to Benson, the workload in Employee Concerns did not justify a full-time position, and he needed another auditor. Tr. at 757-58, 767-68, 902. At the time of the hearing, the position was temporarily filled by an employee from BEA Human Resources. *Id.*

On September 21, 2007, Shirley filed a formal complaint against Patterson with Zabala of Employee Relations. Tr. at 942-45; 1204-05; BEA Brief at 81. According to Shirley, Patterson followed him for approximately 100 yards in an INL office building to a cubicle area. When an occupant of the cubicle area asked Patterson if Patterson needed help, Paterson pointed to Shirley, causing the occupant to believe that Patterson and Shirley were together. Patterson then left the area. Shirley reported the encounter because he was concerned about Patterson's intentions "based on [Patterson's] actions of not speaking to Shirley or Shirley's co-workers, his frequent appearances in passing by the Security area, and because Shirley had conducted the investigations that resulted in Patterson's suspension." BEA Brief at 81 (citing Tr. at 945, 978). Zabala interviewed Patterson about the incident and described him as disrespectful, rude, and unprofessional during their meeting. Tr. at 1209-10. Patterson maintained that he followed Shirley intending to ask him a question but then changed his mind. Zabala informed Patterson that Shirley found his conduct "intimidating" and hoped that it would not happen again. BEA did not take any disciplinary action against Patterson. Tr. at 1221.

In November 2007, Patterson visited Zabala's office prior to Thanksgiving and said "Happy Thanksgiving. I'm looking forward to seeing you." Tr. at 1230. Zabala found this to be "intimidating" because she interpreted the remarks as pertaining to the hearing in this case. *Id.*

II. ANALYSIS

A. Did Patterson Engage in Protected Conduct?

Under the regulations governing the DOE Contractor Employee Protection program, the complainant "has the burden of establishing by a preponderance of the evidence that he or she 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." § 708.29. *See Joshua Lucero*, 29 DOE ¶ 87,034 (2007); *Ronald Sorri*, 23 DOE ¶ 87,503 (1993). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Lucero*, 29 DOE at 89,180 (citing *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)). Patterson filed his first Part 708 complaint on June 1, 2006. In that complaint, Patterson alleged that he made protected disclosures when he sent e-mails to Benson indicating that BEA had violated its procedures by revoking the site access of the subcontractor employee. Patterson also alleged that he made a protected

¹⁰ Under BEA, the functional position of "Employee Concerns Manager" was a Specialist 5 (with Specialist 6 as the highest level), but the new position was reclassified as a Specialist 3 or 4. Tr. at 567-69.

disclosure when he briefed Alvarez in August 2005 about the same issues.¹¹ He then filed four supplemental complaints on (1) September 19, 2006; (2) October 31, 2006; (3) February 20, 2007; and (4) June 26, 2007. Therefore, I find that Patterson engaged in protected conduct based on his participation in this Part 708 proceeding. As described below, I further find that this protected conduct was a contributing factor in one or more alleged acts of retaliation against Patterson by BEA.

B. Whether Protected Conduct Was a Contributing Factor in an Act of Retaliation

Section 708.2 of the Contractor Protection regulations defines retaliation as “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 disclosure of information.” 10 C.F.R. § 708.2. In his complaint, Patterson maintains that BEA retaliated against him in the following ways:

1. Initiated two Security investigations, in July 2006 and in September 2006;¹²
2. Suspended him for three days without pay beginning October 16, 2006;
3. Gave him a “1” performance rating (“some key expectations not met”) on a scale of “0” to “4” on his performance review dated January 10, 2007;
4. Gave him a zero merit increase on June 7, 2007, for his 2006 performance; and
5. Ordered a “directed reassignment” that involuntarily transferred him from his position as Employee Concerns Manager to a new position as Management System Process Lead in Engineering Design and Drafting on June 14, 2007.

In order to prevail in a Part 708 action, the complainant must show, by a preponderance of the evidence, that the protected disclosures or conduct were a contributing factor in the retaliation against him. In prior decisions of the Office of Hearings and Appeals, we have decided that:

¹¹ As noted in Section I.B., I dismissed this complaint on November 21, 2007, on procedural grounds. *See Dennis Patterson*, 29 DOE ¶ 87,035 (2007). Nonetheless it appears, based on the findings of the ROI, that there was substantive merit to the disclosures, which alleged an abuse of authority related to violations of company procedure. The focus of this Decision is not, however, on the allegations contained in the first complaint but on those alleged retaliatory actions that occurred after Patterson filed his first complaint, as the mere filing of this complaint constituted protected conduct under Part 708.

¹² In its Motion for Summary Judgment, BEA argued that the Security investigations cannot be considered retaliation because contractors have a duty to investigate allegations of misconduct. However, we concluded that the use of an investigation to punish or discipline an employee can be considered an act of retaliation. *See Dennis Patterson*, 29 DOE ¶ 87,035, Case No. TBZ-0047 (2007) (stating that the motive and intent behind the investigation determines whether an investigation has been used in a retaliatory manner).

A protected disclosure may be a contributing factor in a personnel action where “the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.”

Charles Barry DeLoach, 26 DOE ¶ 87,509 (1997) (quoting *Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993)). If these conditions are met, the burden of proof shifts from the complainant to the contractor, which must then show by clear and convincing evidence that it would have taken the same actions against the complainant even in the absence of the protected disclosures. *Id.*

I find that the officials responsible for the alleged adverse personnel actions had actual knowledge of Patterson’s protected activity. The record in this case describes a sequence of adverse personnel actions that occurred in the 12 months from July 2006 to June 2007. During that year Patterson filed four Part 708 complaints. It is clear from the testimony at the hearing that the BEA managers who were responsible for these adverse personnel actions had actual knowledge of his protected conduct--all members of the first PAAG knew that Patterson had filed a Part 708 complaint because that information was in the report that Shirley presented to the first PAAG. Tr. at 886-7. I further find that that there was temporal proximity between his protected conduct and the alleged acts of retaliation which occurred between July 2006 and June 2007. “[T]emporal proximity” between a protected disclosure and an alleged reprisal is sufficient to establish the required element in a prima facie case for retaliation. *See Casey von Bargen*, 29 DOE ¶ 87,031 at 89,167, Case No. TBH-0034 (2007) (stating that a showing that protected activity occurred proximate in time to the adverse personnel action is sufficient for complainant to meet the contributing factor test); *Dr. Jiunn S. Yu*, 27 DOE ¶ 87,556 (2000).

I recognize that this time period coincides with a period of corporate change at INL, and I do not minimize the reality that some employees weather change better than others. Despite documented evidence of friction between Patterson and some of his colleagues, I cannot conclude that his workplace behavior was the sole cause of the adverse personnel actions. A review of the relevant events, including the protected conduct and alleged retaliations, leads me to conclude that it is more likely than not that these were not “isolated occurrences.” *See William Cor*, 28 DOE ¶ 87,026 at 89,212, Case No. VBH-0079 (2002). Therefore, I find that the temporal proximity between Patterson’s protected conduct and the adverse personnel actions is sufficient to establish, by a preponderance of the evidence, that his protected conduct was a contributing factor to the alleged acts of retaliation.

C. Whether the Contractor Would Have Taken the Same Action in the Absence of the Protected Disclosures

Section 708.29 states that once a complaining employee has met the burden of demonstrating that conduct protected under § 708.5 was a contributing factor in the contractor’s retaliation, “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.” 10 C.F.R. § 708.29. “Clear and convincing evidence” requires a degree of persuasion higher than preponderance of the evidence, but less than “beyond a reasonable doubt.” *See Casey von Bargen*, 29 DOE ¶ 87,031 at 89,163 (2007). If the contractor meets this heavy burden, the allegation of retaliation for whistleblowing is defeated despite evidence that the retaliation may have been in response to the complainant’s protected conduct.

It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against a whistleblower in the absence of the whistleblower’s protected conduct. The Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, has identified several factors that may be considered, including “(1) the strength of the [employer’s] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees” *Kalil v. Dep’t of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007) (*citing Greenspan v. Dep’t of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006)).

1. Security Investigations

a. July 2006- Misuse of Government Equipment

On June 1, 2006, BEA requested that Security investigate Patterson for the alleged misuse of company time and resources. Ex. 121 at 1; Ex. 122. Security interviewed Patterson on July 13, 2006. Patterson contends that this investigation was in retaliation for filing Part 708 complaints, and BEA counters that it would have initiated the investigation despite the complaints. BEA states that its Standards of Conduct prohibit the use of company property for personal gain or personal causes.

BEA’s network and Internet connection is to be used for official use only. However, incidental personal use is permissible as long as it does not interfere with the operations of BEA, create additional costs, or interfere with employee’s duties.

* * *

Use of BEA e-mail system and Internet connection for personal advertisement or gain; on behalf of outside business ventures; to leak confidential or privileged information or for personal, political, or religious causes is prohibited.

Standards of Conduct and Business Ethics, Ex. 66 at 9.

Patterson argues that other similarly situated employees were not subject to investigation. *See Patterson Brief* at 10-11. In the past, when Benson suspected misuse of equipment, he would counsel the employee or put that information into the employee’s performance appraisal. Tr. at 888-9. Patterson alleges that his use of the office equipment was

incidental and, in the case of his Part 708 activity, permissible. Patterson notes that IHRC is listed as recommended dispute resolution program for employees in the BBWI handbook. Ex. Q at 1-2.

The IHRC sent Moriarty correspondence that referenced complainant's office contact information. This was credible information that Patterson had used company equipment to send the information to the IHRC, despite Moriarty's previous admonition. See Ex. 50 (e-mails from Patterson to IHRC in May 2006). As it turns out, the investigation substantiated Patterson's assertion that his use was incidental, and that he was permitted to use company equipment for his Part 708 complaint. Nonetheless, that does not negate BEA's duty to investigate possible misuse of government equipment. Prior to the investigation, Moriarty did not know the extent of Patterson's use of company equipment, and she requested an investigation to determine whether there was any misuse.¹³ Even though the allegation of misuse was not substantiated, I find that BEA properly initiated the investigation. I agree with BEA that Moriarty had a duty to pursue an investigation once she suspected that an employee was using company resources for other purposes. BEA presented credible information that it had investigated 52 employees in 2006 and 2007 for possible misuse of company resources. Ex. 125. Thus, this was not an unusual action on the part of BEA. I find that BEA has presented clear and convincing evidence that it would have initiated an investigation against complainant despite his protected conduct.

b. September 2006- Bias during an Investigation

In September 2006, a BEA manager formally complained about Patterson's behavior during an investigation into alleged wrongdoing on the part of the manager.¹⁴ The manager complained that Patterson showed bias in favor of the employee who filed the initial complaint. Benson testified that he had never found Patterson to be biased in the past. Tr. at 810, 880. When there was a complaint against Patterson in the past, Patterson's supervisor (first Denson, President of LIMITCO, and then Benson) would first review Patterson's investigation and findings. Tr. at 205-6. Benson also testified that in the two previous instances where an employee had accused Patterson of bias, Benson had handled the investigation himself. Benson met with the employees in those situations and resolved their issues informally. However, Benson argued that he deviated from procedure and transferred this case to Security because: (1) the manager had filed a formal complaint with Employee Concerns; and (2) Patterson had named Benson in his Part 708 complaint.¹⁵ Benson testified that he assumed that Patterson would not be comfortable with Legal or Human Resources as investigators because those groups were represented in the PAAG that had disciplined him. Tr. at 656, 660. BEA argued that its

¹³ I note that Shirley notified Moriarty of Patterson's Part 708 complaint before the complaint had been officially transmitted to BEA. BEA received Patterson's Part 708 complaint on July 5, 2006. Tr. at 1355.

¹⁴ In an e-mail to Benson, the manager indicated that Benson may have overstated the complainant's concerns. Ex. 120; Tr. at 834.

¹⁵ The investigation did not substantiate the allegation of bias against Patterson.

policy required investigation of the complaint, and that only Security and Human Resources could have conducted the investigation. BEA Brief at 103.

Benson's statement that only Legal or Human Resources could conduct the investigation was not credible because there is no evidence that Patterson would be more comfortable with Security, the organization that had just investigated him for the first time in his career. In fact, a review of the evidence suggests that Security would be the least likely group Patterson would choose to conduct this second investigation, given the controversy over the first. There were other characteristics of this investigation that were dissimilar to other BEA investigations. For instance, Security investigators were trained to investigate waste, fraud, and abuse, not issues such as bias. In similar situations in the past, the investigator had first reviewed Patterson's file to determine how he conducted his investigation. Tr. at 205, 210-11, 233.¹⁶ In this investigation, Shirley did not review Patterson's file to determine how Patterson had conducted his investigation.¹⁷ The clear and convincing evidence standard applicable to contractors is a difficult standard to meet and, based on the above, I conclude that BEA has not presented clear and convincing evidence that it would have taken the same action in the absence of Patterson's protected conduct.

2. Three-Day Suspension

On October 16, 2006, Benson suspended Patterson without pay for three days. The suspension notice listed the following four items of alleged misconduct: (1) refusal to cooperate with an investigation by misleading the investigator; (2) refusal to answer questions regarding misuse of government equipment; (3) failure to follow company protocol regarding employee concerns investigation; and (4) failure to follow direction from BEA Office of the General Counsel.

The first two items of alleged misconduct occurred during the September 2006 bias interview conducted by Shirley. Benson testified that he suspended Patterson primarily because of Patterson's statement to Shirley that he refused to answer a question in order to "to keep [Shirley] guessing and level the playing field," and also because of Patterson's refusal to cooperate with the bias investigation by refusing to answer Shirley's question about Patterson's access to Benson's e-mails. BEA Brief at 108. Benson considered this inappropriate during an investigation. According to Benson, Patterson should have answered the question, even though not related to the issue of bias, because he knew that it was inappropriate to access someone else's e-mail and because he was aware of the consequences of not answering an investigator's question. Benson also noted that Patterson had failed to follow company protocol when he did not allow an interviewee to review his notes, and that Patterson failed to follow the guidance of the Office of General Counsel regarding use of government equipment for personal litigation. BEA argues that the suspension was warranted because the BEA Employee Handbook

¹⁶ Although Shirley was not trained in bias investigations, I find that he credibly testified about his substantial experience as an investigator.

¹⁷ The investigator did tell Patterson that he had interviewed the employee who filed the complaint.

states that suspension without pay is warranted for “failure to cooperate with an investigation.” Ex. O at 1-71; Ex. R at 51. BEA also argues that Patterson, who expected cooperation in the investigations conducted by his office, did not cooperate in his own investigation. The contractor contends that Patterson was treated no differently than similarly situated employees, and that the only other employee who refused to cooperate with an investigation was terminated on April 24, 2007. However, I find for the following reasons that the contractor has not shown by clear and convincing evidence that it would have suspended Patterson for three days absent his protected conduct.

Allegation of Refusal to Cooperate With an Investigation

The transcript of the interview is somewhat puzzling. It appears that Patterson first answered the question (“I’m not saying anything like that. No.”), denying that the secretary had given him unauthorized access, but then later in the conversation clearly stated that he would not answer the question.

TS: As far as e-mails that you are referring to, are you saying that [Bensons]’s secretary has come forward to you with information?

DP: *I’m not saying anything like that. No.*

TS: OK. Has she shared e-mails with you?

DP: I’m not saying anything like that.

TS: But, I’m asking you a question.

DP: And I’m saying, I’m not saying anything like that.

TS: So, you’re saying she has not.

DP: *I’m not answering your question.*

TS: And, do you realize by not answering my question that

DP: They can hold that against me.

TS: OK. And you still choose to not to talk about that. OK.

DP: Yes.

Ex. OO; Ex. 61 at 15-16 (emphasis added). Despite his initial answer, Patterson clearly stated his refusal, and Shirley had to then interview Benson’s secretary.¹⁸

¹⁸ Shirley’s investigations did not substantiate improper e-mail access by anyone.

Although Patterson refused to answer one question during the interview, I find that this refusal did not impede the investigation. In fact, the investigator testified credibly that Patterson was otherwise cooperative, professional, and truthful, and the investigation did not substantiate any improper activity. Thus, I cannot conclude that the complainant was not cooperative with the investigation. Further, there are distinct differences between Patterson's punishment and the manner in which BEA treated the employee who was terminated for failure to cooperate with an investigation. First, that individual displayed a lack of cooperation so egregious that it cannot compare with Patterson's behavior. The terminated individual had engaged in ongoing and extensive fraud, using the office telephone and Internet for three hours out of each eight hour day. Ex. 125; Tr. at 1105. When questioned by investigators, he told them that he could substantiate his misuse, but became belligerent when they asked him for the information. In fact, the investigator had to ask the individual four times for the information – during an interview, on the telephone, and twice via e-mail, but the individual refused to cooperate. Tr. at 1054, 1103-4. After reviewing information regarding the individual who refused to cooperate in an investigation, it is clear that the failure to cooperate was not the basis for that employee's termination. He also engaged in time card fraud, a violation so egregious that the only other employee who committed that violation was suspended for 30 days, 10 times the length of Patterson's suspension. Ex. 125 at 5. Therefore, for the reasons set forth above, I conclude that the three-day suspension was excessive.

Allegation of Refusal to Answer an Investigator's Question

An examination of Patterson's testimony shows that Shirley called Patterson's cell phone on August 31, 2006, to ask him a few follow-up questions about the July 2006 investigation. Patterson testified that at the time of the call, he was at the hospital visiting a very sick friend. When Patterson kept asking Shirley "Is there anything else?," Shirley suspected that Patterson may have been advised that a second investigation was about to commence. Shirley asked Patterson if anyone had told him about the second investigation, and Patterson did not answer. At the September 2006 interview, Shirley again asked Patterson if anyone had warned him that he was going to be investigated again.

TS: OK. On the particular, when I asked you before, you chose not to answer.

DP: I did. I like to keep you guessing. Kinda keep the playing field even. (chuckles)

TS: That's why I'm asking. So, why didn't you answer at that point? So you're just saying you wanted to keep me guessing at that point. OK.

DP: First of all, I wasn't sure why you were asking the question. You kinda caught me off guard. Quite frankly, even though I knew the answer

was no, I decided to defer on answering that until today. But no, no one notified me of this.

Ex. 61 at 28.

As shown above, Patterson, although initially silent, truthfully answered the question about the second investigation during the interview, which took place a week after the phone call from Shirley. Although Patterson initially refused to answer, Shirley testified that Patterson was cooperative and professional throughout the interviews. He acknowledged that interview subjects are often stressed, but stated that Patterson maintained a professional demeanor. Further, Shirley testified that he believed that Patterson was truthful with him. In addition, it is not clear why Patterson should be required to answer questions about an investigation that had not yet officially opened.

A review of other BEA employee suspensions reveals some key differences that distinguish Patterson's treatment. BEA compares Patterson to an employee who was suspended without pay for four days for starting a nuclear reactor without approval. Ex. 125. There is a vast difference between Patterson's refusal to answer a question, and an individual who violated technical requirements and restarted a nuclear reactor without management concurrence and without determining the cause of the shutdown of a safety system. Yet, that individual was punished with only one more day without pay than Complainant. Patterson clearly refused to answer a question, but I cannot find that action of the same level of severity as the other actions, presented by the contractor in support of its position, that have warranted suspension at BEA. The other employees who were suspended committed more serious violations such as the misuse of government computer with "excessive use" involving sexually explicit material, pornography, and racially derogative materials, the exchange of offensive e-mails within a workgroup, inappropriate conduct in the workplace, and mistreatment of employees. *Id.* I further find that BEA could have fashioned a different punishment, because there is evidence in the record that BEA utilizes many other forms of discipline. BEA practices progressive discipline through documented verbal warnings, verbal counseling, and suspensions as short as one day. Ex. 125. For example, the BEA Personnel Security Manager, who did not cooperate with Benson's investigation into the site access revocation, was given a verbal warning that was documented and placed in her personnel file. Thus, I conclude that BEA did not present clear and convincing evidence that it would have suspended Patterson for three days absent his protected conduct. *See Curtis Hall*, 29 DOE ¶ 87,022 at 89,116-7 (2007) (contractor did not establish by clear and convincing evidence that the type of behavior exhibited by complainant in a workplace conflict generally resulted in the discipline applied to complainant).

3. Performance Rating and Zero Merit Increase

BEA argues that Patterson's rating of "1" ("some key expectations not met") was a proper rating given Patterson's marginal performance in 2006 that culminated in a three-day suspension in October 2006. *See Ex. 79* (INL 2006 Performance Review). As a

result of his “1” performance rating, Patterson received no merit increase. The factors that caused the suspension were referenced in his 2006 review, and I find that such reference properly adhered to BEA policy. BEA argues that 250 BEA employees also did not receive a merit increase in 2007 and that at least 11 other BEA employees who received a performance rating of “1” also failed to receive a merit increase in 2007.

Patterson’s rating of “1” in the areas of Security (8% of total rating), Teamwork (8% of total rating), Judgment (9% of total rating), and Ethics (12% of total rating) was based on many of the same events that were referenced in his suspension. *See* BEA Brief at 47-48. These areas comprise 37% of his total rating. However, the categories of “Adaptability” (8% of total rating) and “Communications” (8% of total rating) based their ratings on different events. Patterson received a rating of “1” in the area of Adaptability “based on his refusal to accept his role as Employee Concerns Program Manager after his job code was changed to Specialist, his insistence on identifying himself as a ‘Specialist,’ and his refusal to attend certain management meetings that Benson had asked him to attend.” BEA Brief at 48, Tr. at 690-91. In the area of Communications, Benson gave Patterson a ‘1’ for “unprofessional communications” – disclosing to counterparts at other facilities that he had filed a Part 708 complaint and posing a hypothetical that actually reflected his own litigation. Tr. at 692.

Patterson’s function may have stayed the same, but his job classification had changed significantly. It is a significant change to remove a job from the ranks of management after 10 years. Patterson was reclassified as a Specialist, and it was reasonable to reject a title that he no longer held. There was no testimony that the management meetings were a required part of his job. Tr. at 690-2. A Part 708 complaint is not a confidential proceeding, so it is likely that his counterparts would have had knowledge of the complaint at some stage in the proceeding despite his communications.

Patterson’s behavior was less than exemplary, especially in the areas of Teamwork (8%) and Judgment (12%), and this behavior will be reflected in any equitable remedy available to him. *See Robert Burd*, 28 DOE ¶ 87,025 at 89,201 (2002) (declaring that the ancient maxim of equity states that one who seeks equity must come into a court of equity with clean hands). These two categories comprise 20% of his rating. However, as stated above, BEA has not provided clear and convincing evidence that it would have suspended Patterson for three days had he not engaged in protected activity. Consequently, because the 2006 performance rating and zero merit increase were based on many of the same events as the suspension, I also find that BEA has not presented clear and convincing evidence that it would have given Patterson a “1” rating and a zero merit increase if he had not engaged in protected activity.

4. Directed Reassignment

BEA argues that the reassignment was a “good faith attempt to salvage [Patterson’s] career at the INL and was not a negative personnel action.” BEA Brief at 117. According to BEA, Patterson was reassigned due to inappropriate interaction during the April 24, 2007, meeting with Benson and Middleton “during which time he failed to treat

the managers with dignity and respect,” his failure to cooperate with Wise’s investigation and to tell her that the anonymous employee was not a BEA employee until April 24, 2007, his unwillingness to provide the name of the source, and refusal to take direction from Benson. The contractor contends that Patterson failed to follow Benson’s instructions when he stated to Benson that Benson did not have the training or background to tell Patterson how to run his program. BEA Brief at 120. Patterson denies that he made this statement.

BEA states that discharge is the appropriate penalty for insubordination, according to its handbook. Members of the PAAG considered terminating Patterson for insubordination, but deferred to Benson’s recommendation of a “directed reassignment.” BEA Brief at 119; 73. According to BEA, the managers had lost confidence in Patterson’s ability to perform as manager of Employee Concerns. Benson testified that Patterson’s conduct at the April 24th meeting was the cause of his reassignment and, absent that conduct, Patterson’s refusal to disclose the source would not have resulted in reassignment. Tr. at 900.

BEA argues that Patterson was insubordinate, and insubordination is grounds for termination at BEA. However, if Patterson’s conduct truly warranted termination, then BEA should have terminated him at that time. It is disingenuous of BEA to state that he was reassigned in order to salvage his career. *See Curtis Hall*, 29 DOE at 89,116-7 (finding that contractor did not establish that the type of behavior exhibited by complainant generally resulted in termination of an employee at that company). By the time the reassignment was put into place, all of his senior management was aware of the tension between Patterson and Security, the Office of the General Counsel, and Benson. It is difficult to see how BEA “salvaged his career” by moving him to a job that does match his educational and professional background or his aspirations.

At the time Patterson was ordered to release the name of the source, the policy in place was that the source could elect to remain anonymous, and the source’s identity would be protected to the maximum extent possible, *i.e.*, confidentiality was not guaranteed. Tr. at 802-3. However, it is not surprising that Patterson would try to protect the identity of his source because, in the 13 years that he had worked with confidential sources, he had never before been asked to reveal an identity. *Id.* at 270. In fact, Patterson testified that he considered the disclosure of a source to be a violation of company standards and procedures. *Id.* at 286. During conversations with management, Patterson stressed the negative impact on the company for taking what he considered an ill-advised action.

According to Patterson’s job description, he was accountable to INL management to identify significant risk areas, and, as the former president of LIMITCO testified, the nature of Patterson’s job caused him to sometimes step on management’s toes. Tr. at 812. Although Patterson clearly could have been more diplomatic and tactful in his delivery, he nonetheless had a duty to convey the message.¹⁹ During the April 24, 2007,

¹⁹ Some of the complaints against Patterson’s behavior seem exaggerated. Shirley filed a complaint against Patterson for allegedly following him into his office area and then leaving when asked, Middleton is disturbed when he and Patterson leave home for the office at the same time and Patterson engages in

meeting the complainant made sarcastic and hostile comments, and he became infuriated, but he did not raise his voice, or physically threaten anyone. Patterson may not have been a model employee, but he was not insubordinate as described in previous cases adjudicated by this office. *See, e.g., Casey Von Barga*, 29 DOE ¶ 87,031 (2007) (complainant had general inability to work with anyone on a regular basis, hostility to suggestions, constant strife, attitude made resolution impossible despite attempts by EEO department to repair relations); *S. R. Davis*, 28 DOE ¶ 87,044 (2004) (complainant made inflammatory and disrespectful statements to and about others, rejected manager's direction, told management that she would not be available on nights and weekends, told managers that they did not have the authority to reverse her opinion); *William Cor*, 28 DOE ¶ 87,026 (2002) (complainant refused an order to return to work because he alleged mistreatment by his supervisor); *Dr. Jiunn S. Yu*, 27 DOE ¶ 87,556 (2000) (complainant consistently disregarded orders, distributed memoranda with unprofessional invectives, and displayed "repeated failure to abide by the reasonable and legitimate instructions of his managers").

BEA argues that Patterson's reassignment is similar to that of a BEA Fire Department Staff Officer who was reassigned in April 2006 based in part on inadequate performance and failure to meet goals and objectives. Tr. at 1066-68; Ex. 137. That employee had been placed on a Performance Improvement Plan and failed to improve. Two other managerial level fire department employees were given directed reassignments after safety issues resulted in injury to some of their employees. These situations, which resulted in injury and were a threat to public safety, are not comparable to Patterson's behavior.

In summary, although Patterson had an abrasive personality, it is telling that the BEA managers did not terminate him, even though BEA had terminated at least nine employees in 2006 and 2007. I conclude that BEA has not presented clear and convincing evidence that it would have given Patterson a "directed reassignment" absent his protected conduct. *See Joshua Lucero*, 29 DOE at 89,185-6 (finding that even though individual conducted himself in an immature, volatile manner, his protected conduct changed his relationship with his supervisors, and contractor did not prove by clear and convincing evidence that it would have terminated complainant despite his protected conduct).

III. CONCLUSION

As the foregoing Decision demonstrates, I find that Patterson has presented a preponderance of evidence that he engaged in protected conduct by his participation in this proceeding, and that this conduct was a contributing factor to acts of retaliation. I

(according to Middleton) odd behavior, Zabala is intimidated by a reference to Thanksgiving. I note that no allegations against Patterson were substantiated and Shirley's complaint resulted in no disciplinary action. The actions that BEA labels "aggressive" and "threatening" (including the driveway dance with Middleton, and the sarcastic and condescending behavior alleged by Zabala and other colleagues) appear to be expressions of anger or immaturity that were surprising to those who had known Patterson for years. There is no evidence in the record of aggressive, threatening behavior by Patterson. *See* BEA Brief at 48.

further find that BEA has not presented clear and convincing evidence that it would have taken the same actions at issue absent the protected conduct. Therefore, I find that the complainant is entitled to relief under Part 708.²⁰ I will direct BEA to reimburse Patterson's legal fees for this proceeding, to remove the disciplinary notices from his personnel file, to adjust his 2006 wage increase to an amount equivalent to the average of those employees who received a rating of "2" during the same evaluation period, and to reimburse him for lost pay and benefits relating to his activity in this case.²¹

Patterson shall submit a calculation in support of his claim for lost pay and benefits to BEA. As for his litigation expenses, attorney fees in Part 708 cases are generally calculated using the "lodestar" methodology described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989). See *Sue Rice Gossett*, 28 DOE ¶ 87,028 (2002); *Ronald A. Sorri*, 23 DOE 87,503 (1993), *affirmed as modified*, 24 DOE 87,509 (1994); 10 C.F.R. § 708.36(4). I will direct Patterson to submit a calculation of attorney fees with evidence supporting the hours worked and the rates claimed. See *Sue Rice Gossett*, 28 DOE at 89,227 (citing *Webb v. Board of Education of Dyer County, Tennessee*, 105 S. Ct. 1923, 1928 (1985)).

Patterson also requested that BEA revise his 2006 appraisal to reflect his actual performance, and that BEA award him a wage increase consistent with the average for employees who received a top performance rating. Although BEA has not shown by clear and convincing evidence that it would have appraised Patterson as a "1" in 2006 despite his protected conduct, I cannot conclude that Patterson has presented evidence that he performed at the level of the average of employees who received the top performance rating for 2006 performance. His work on the site access issue in 2005 is admirable and was even recognized by BMI as a thorough investigation that revealed violations of procedure. However, the evidence relating to his 2006 performance shows some behavior towards his colleagues that is less than cooperative and is not representative of a top performer. See *S. R. Davis*, 28 DOE ¶ 87,044, Case No. VBH-0083 (2004) (Part 708 does not provide its complainants with protection from the ramifications of unacceptable behavior). Nonetheless, in order to place Patterson in the position that he would have occupied had he not engaged in protected conduct, I find that his increase should be adjusted to the equivalent of the average for those employees who received a rating of "2." See *Curtis Hall/Bechtel National, Inc.*, 30 DOE ¶ _____, Case Nos. TBA-0042/TBA-0064 (February 13, 2008) (stating that the goal of the restitutionary remedies in 10 C.F.R. § 708.36 is "to restore employees to the position that they would have occupied but for the retaliation").

²⁰ Patterson has requested the following remedies: reinstatement; back pay and benefits for the three-day suspension, the four days attending the hearing, one day spent at a deposition, and other uncompensated time off related to his participation in the Part 708 proceeding complaint; attorney fees; removal of retaliatory actions from his personnel file; an adjustment of his 2006 zero merit increase to the average of the wage increase for employees who received the highest rating; and a revision of his 2006 performance evaluation to reflect his actual performance. Tr. at 299-302.

²¹ I will not order that his 2006 performance review be revised to reflect his actual performance because the wage increase (for a "2" rating) has abated the violation. 10 C.F.R. § 708.36 (a) (5).

In his complaint, Patterson requested reassignment to the position of Manager of the Employee Concerns and Business Ethics Office. Although I concluded above that BEA has not presented clear and convincing evidence that it would have reassigned Patterson absent his protected conduct, I cannot find that Patterson is entitled to reinstatement as Manager of the Employee Concerns and Business Ethics Manager because that position no longer exists. In September 2007, Benson changed the position to “Senior Auditor/Employee Concerns Manager.” Benson testified that he modified the position because the Employee Concerns workload did not warrant a full time employee, and BEA presented credible evidence to support that argument.²² BEA also maintains that the position was changed to a two-year rotation in order to provide career development and cross training for its employees. Reinstatement is an equitable remedy, and an examination of the evidence leads me to conclude that the equities weigh against reinstatement. *See Robert Burd*, 28 DOE at 89,201. According to Benson’s testimony, the new position is a lower level (Specialist 3 or 4) than Patterson’s current level (Specialist 5). An equitable remedy cannot put the complainant in a worse position than the position that he currently occupies.²³ As Senior Auditor/Employee Concerns Manager under Benson’s new position, Patterson would be subject to an even lower salary scale, and would be effectively demoted. However, BEA should review all currently available vacancies in order to determine if a position comparable to Patterson’s old position exists, for which Patterson qualifies. If there is a comparable position, and if Patterson is in agreement, BEA shall transfer Patterson to that position.

It Is Therefore Ordered That:

- (1) The Request for Relief filed by Mr. Dennis Patterson under 10 C.F.R. § 708 is hereby granted as set forth below, and denied in all other respects;
- (2) Within 30 days of its receipt of this Decision, BEA shall remove the notice of suspension and other notices of retaliatory actions from Mr. Patterson’s personnel file;
- (3) Within 30 days of receipt of this Decision, BEA shall revise Mr. Patterson’s 2006 wage increase to the average of employees who were rated a “2” on their INL 2006 Performance Review;

²² It is important to examine BEA’s justification for radically changing Patterson’s position after he filed his Part 708 complaints. Tr. at 882. A contractor should not dissolve a whistleblower’s job in anticipation of, or as a barrier to, the possibility that OHA will order reinstatement of the whistleblower. However, an examination of the evidence finds that there is merit to BEA’s argument that the position of Employee Concerns (EC) Manager does not require a full time employee. The EC Office investigated only a handful of concerns annually. Ex. 126. Further, BEA can determine its own corporate structure, and its actions (as well as those of its predecessor BBWI) show a preference for an EC Manager who is less visible and lower in the corporate hierarchy than LIMITCO. At LIMITCO, the EC Manager was a highly visible manager who reported directly to the president and who also had responsibility for the ethics function. Thus, I find that BEA has presented evidence to support the modification of the position.

²³ However if Patterson so chooses, he should be considered for rotation into this position, especially in light of BEA’s expressed desire to salvage his career at INL.

- (4) Within 30 days of receipt of this Decision, Mr. Patterson shall send BEA and the Hearing Officer a report setting forth the number of days of lost pay related to his participation in this proceeding;
- (5) Within 30 days of receipt of this Decision, Mr. Patterson shall send BEA and the Hearing Officer a bill for attorney fees reasonably incurred to prepare for and participate in proceedings leading to the Initial Agency Decision. The fees shall be calculated using the lodestar approach;
- (6) Within 30 days of this decision, BEA shall notify Mr. Patterson and the Hearing Officer if there is a vacancy comparable to Mr. Patterson's previous position;
- (7) If a comparable position is identified and Mr. Patterson desires to transfer to that position, BEA shall transfer Mr. Patterson to that position within 30 days of his request for a transfer;
- (8) The parties will have up to 30 days from the later of BEA's receipt of Mr. Patterson's bill for attorney fees or BEA's receipt of Mr. Patterson's calculation of the number of days of lost pay and benefits to discuss and negotiate any disputes regarding those two items. During the period of negotiation, both parties will provide reasonable information to the other party to facilitate the other party's understanding of the calculations;
- (9) Within 30 days of the end of the period of negotiation, BEA shall reimburse Mr. Patterson for the lost pay and benefits related to his participation in this proceeding;
- (10) Within 30 days of the end of the period of negotiation, BEA shall reimburse Mr. Patterson for his attorney fees reasonably incurred to prepare for and participate in proceedings leading to the Initial Agency Decision;
- (11) Mr. Patterson's request for reinstatement to the position of Manager of the Employee Concerns and Business Ethics Office is denied;
- (12) Mr. Patterson's request for a wage increase consistent with the average for those employees who received a top performance rating in their 2006 performance appraisal is denied; and
- (13) Mr. Patterson's request that his 2006 Performance Review be revised to reflect his actual performance is denied.
- (14) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within 15 days of receiving this decision, a Notice of

Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: June 20, 2008