Case No. VBA-0033

April 5, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Names of Petitioners:Kaiser-Hill Company, L.L.C.

EG&G Rocky Flats, Inc.

Dates of Filing:August 26, 1999

August 27, 1999

Case Number: VBA-0033

On August 26 and 27, 1999, Kaiser-Hill Company, L.L.C. (K-H) and EG&G Rocky Flats, Inc. (EG&G) respectively filed Notices of Appeal from an Initial Agency Decision by a Hearing Officer from the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). In the Initial Agency Decision, the Hearing Officer granted relief to Barbara Nabb on the basis of her complaint under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. Barbara Nabb, 27 DOE ¶ 87,519 (1999). In their Appeals, K-H and EG&G challenge several aspects of the Initial Agency Decision and request that Ms. Nabb's complaint be denied. As set forth in this decision, I have determined that their Appeals must be granted in part and denied in part.

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; ensur[e] 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 that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Contractors found to have discriminated against an employee for making such a disclosure, or for participating in a related proceeding, will be directed by DOE to provide relief to the complainant.

The regulations governing DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708 and became effective on April 2, 1992. They establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included independent fact-finding by the DOE Office of Inspector General (IG), followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint.

Thereafter, the complainant could request a hearing before an OHA Hearing Officer, who would render an Initial Agency Decision, from which an appeal could be taken to the Secretary of Energy or his designee.

On March 15, 1999, DOE amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; see 64 Fed. Reg. 12,862 (March 15, 1999). Certain of these amendments have a bearing upon the present proceeding. Under the revised regulations, review of an Initial Agency Decision, as requested by K-H and EG&G, is performed by the Director of OHA. 10 C.F.R. § 708.32.

B. Factual Background

The following facts underlying Ms. Nabb's complaint are not in dispute. Ms. Nabb worked as a machinist, and then a production specialist, at DOE's Rocky Flats Environmental Technology Site until November 1994. As Rocky Flats' principal function changed from weapons production to environmental restoration, the machine shop in which Ms. Nabb worked experienced a reduction in workload, and she and her co-workers were temporarily assigned to other work areas. By rotating in and out of the machine shop, they were able to remain fully employed and available for immediate recall to the machine shop should it resume operating at full capacity. Ultimately, however, the machine shop was closed altogether. Due to a reduction in force, Ms. Nabb, along with some 80 other machinists, accepted an opportunity to train to become a radiation control technician (RCT). She began her training in September 1994. She had completed most of her training by July 1995, when the funds allocated for training new RCTs ran out. At that time, Rocky Flats management made a determination that negatively affected Ms. Nabb: all those trainees who were ready for the final step of qualification, the oral examination, would be permitted to take that examination; all those who had not advanced to that stage of readiness, in which group Ms. Nabb found herself, would not be permitted to continue their training.(1) The stated rationale for this distinction was that the orals required little time and cost, and if successfully taken, would permit a trained employee to be fully qualified as an RCT; those not as far along would require considerably more training expense to obtain qualification status. Ms. Nabb filed a grievance with her union in November 1995, regarding the discontinuation of her training. The union ultimately withdrew this grievance in January 1998, when Rocky Flats offered to continue RCT training to all those employees whose training was curtailed in 1995. Ms. Nabb refused that offer, in the belief that she should not sign a settlement agreement while her whistleblower complaint was pending. See Answer to EG&G and Kaiser-Hill Request for Oral Hearing, dated October October 11, 1999, at 2.

C. Procedural Background

In September 1994 Ms. Nabb provided information regarding her Part 708 complaint to the DOE Rocky Flats Field Office's Employee Concerns Manager. She completed the filing of her complaint with a signed affirmation on January 12, 1995.(2) The Inspector General's Report of Inquiry and Recommendations (RIR) identified four actions by Ms. Nabb that constituted conduct that was protected by Part 708. Of the five actions by EG&G and K-H management officials that Ms. Nabb claims to be reprisals for her protected conduct, the RIR determined that she had failed to prove by a preponderance of evidence that four were retaliatory in nature. With respect to the fifth alleged retaliatory action, termination of the training program, the RIR found that, while there was some evidence that Ms. Nabb's protected conduct may have contributed to the decision to stop the training program, the contractors had nevertheless established by clear and convincing evidence that that decision was not retaliatory in nature.

Ms. Nabb then requested a hearing regarding the RIR's findings and proposed disposition.(3) The hearing was duly held, and the OHA Hearing Officer rendered an Initial Agency Decision on August 6, 1999. In this Decision, the Hearing Officer found in favor of Ms. Nabb. There was no dispute that she had engaged in protected conduct (i) when she refused to alter the travel documentation ("travelers") of 29 waste drums, at the direction of an EG&G waste management compliance specialist, in a manner that she believed would render the travelers false, and (ii) when she disclosed this event to her supervisors and managers between September 1993 and December 1994. Initial Agency Decision (IAD) at 8. The Hearing Officer determined that the proximity in time between her protected conduct and the termination of the

RCT training program (less than eight months), and the fact that company officials knew of her protected conduct, established that her conduct was a contributing factor in the decision to terminate her participation in the program. IAD at 11-12. Finally, he determined that EG&G and K-H had failed to prove by clear and convincing evidence that K-H would have made the same decision to cut off Ms. Nabb's training had she not engaged in her protected conduct. IAD at 19-20. As a result of these determinations, the Hearing Officer calculated the amount of monetary damages and ordered that the contractors pay that amount to Ms. Nabb and provide her with an opportunity to complete her RCT training. IAD at 24.(4)

After filing their Notices of Appeal, K-H and EG&G filed statements in which they identified the issues they wish the OHA Director to review. 10 C.F.R. § 708.33(a). Ms. Nabb filed her response to those statements, and each of the appellants then filed replies to Ms. Nabb's response. The issues identified by the appellants relate to several different aspects of the Initial Agency Decision, including the Hearing Officer's conclusions regarding whether the parties met their required burdens of proof and whether the assessment of liability was appropriate, both in terms of the type assessed and the parties held responsible.

II. Analysis

In their statements of issues, EG&G and K-H have raised a number of challenges to the Hearing Officer's Initial Agency Decision. The contractors argue that, as to the retaliation addressed in the Initial Agency Decision, the complaint should be dismissed. In the alternative, they challenge the Hearing Officer's determination that the protected disclosure-- the "travelers" matter-- was a contributing factor in the retaliation the contractors allegedly took against Ms. Nabb-- terminating her participation in the RCT training program. They also contend that the Hearing Officer wrongly found that those employees who made the decision to terminate the training also had knowledge of her disclosures, and that delays in Ms. Nabb's training constituted retaliation. The contractors further maintain that, contrary to the Hearing Officer's decision, they did prove by clear and convincing evidence that they would have taken the same action regarding Ms. Nabb's training even if she had not made her disclosures about the "travelers." Finally, each contractor contests the liability the Initial Agency Decision imposed on it: EG&G objects to being held jointly liable at all, while K-H objects to being ordered to offer Ms. Nabb the opportunity to complete her RCT training. In this section, each of these issues will be addressed. (5)

A. Dismissal

K-H contends that, with respect to the alleged reprisal of terminating Ms. Nabb's RCT training, the complaint should be dismissed. The facts pertinent to this argument are as follows. Ms. Nabb completed the filing of her Part 708 complaint in January 1995, after her RCT training had begun. Her training was terminated in July 1995. Ms. Nabb filed a grievance with her union concerning the termination of her training in November 1995. K-H Exhibit A. K-H offered Ms. Nabb the opportunity to continue her training in November 1997. K-H Exhibit C. The union withdrew the grievance in a January 1998 settlement with K-H, which included a provision that classes for those previously terminated from the training program would begin no later than April of that year. K-H Exhibit B. Ms. Nabb formally rejected the offer to recommence her training in documents dated February 17 and 24, 1998. K-H Exhibit D.

In arguing that dismissal is appropriate, K-H relies on certain provisions of the new version of the Part 708 regulations. Specifically, it contends that sections 708.13, .15, and .17 of the DOE regulations require dismissal of a complaint where the complainant later files a complaint, with respect to the same facts, under state or other applicable law, including final and binding arbitration. Because Ms. Nabb filed a union grievance regarding the termination of her training after she filed her Part 708 complaint, and because the grievance was settled, K-H contends that the matter became moot and the relevant portion of her Part 708 complaint should be dismissed.

Before ruling on this matter, I must consider which set of Part 708 regulations govern the possible

dismissal of any portion of the complaint in this case. The previous version of the regulations was in effect during the period in which both the protected activities and the alleged reprisals took place, and during the investigation stage of this proceeding. The current version did not take effect until April 14, 1999, by which date the Inspector General had already issued its RIR and Ms. Nabb had already filed her request for a hearing. The question before us, therefore, is whether K-H was correct in relying on the current regulations as the foundation for its claim of dismissal.

It is well established in the law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. DOE has stated it will apply the revised procedures to pending cases consistent with the case law. 64 Fed. Reg. 12862, 12865 (citing Landgraf v. USI Film Products, 511 U.S. 244, 275 (1994); Lindh v. Murphy, 117 S. Ct. 2059, 2063-64 (1997); Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 810, 817 n.17 (D.C. Cir. 1982) (citing Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966))).

Thus, it is clear that the drafters of the Part 708 revisions intended the revised regulations to apply to pending cases only "as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party." If applying the new regulations to the case before us would, as K-H contends, require us to dismiss the complaint, their application would clearly "impair the rights of, or otherwise cause injury or prejudice to" Ms. Nabb. Therefore, I must look back instead to the provisions of the regulations in effect at the time she filed her Part 708 complaint and her union grievance. Under the version of Part 708 in effect from April 2, 1992, through April 13, 1999, the provisions pertaining to the dismissal of a complaint due to pursuing a remedy in other forums appear at 10 C.F.R. §§ 708.6(a) and 708.8. See 57 Fed. Reg. 7533, 7542-43. The latter provision lists the grounds for dismissal of a complaint, among which is "[t]he complainant has pursued a remedy available under State or other applicable law." 10 C.F.R. § 708.8(a)(4) (1992). The former provision clarifies when a complaint is deemed to have been pursued under State or other applicable law, and specifically states that "[t]he pursuit of a remedy under a negotiated collective bargaining agreement will be considered the pursuit of a remedy through internal company grievance procedures and not the pursuit of a remedy under State or other applicable law." 10 C.F.R. § 708.6(a). Because Ms. Nabb's union grievance was thus not considered pursuit of a remedy that would have subjected her Part 708 complaint to dismissal under the prior version of Part 708, the revised Part 708 cannot retroactively bring her union grievance within the scope of actions that subject her Part 708 complaint to dismissal at this stage. By subjecting her union grievance to a regulatory regime to which it was not previously subject, such a retroactive application would prejudice Ms. Nabb, contrary to the clear intent of the revisions to the regulations.

For the reasons set forth above, I will deny K-H's motion to dismiss. I will, therefore, perform an appellate review of the Hearing Officer's Initial Agency Decision, paying particular attention to the challenges the contractors have raised in their appeals. I note that the Hearing Officer's findings of fact are entitled to deference unless they are clearly erroneous. Oglesbee v. Westinghouse Hanford Co., 25 DOE ¶ 87,510 at 89,001 (1995). On the other hand, his conclusions of law are subject to de novo review. Salvatore Gianfriddo, 27 DOE ¶ 87,544 at 89,221 (1991); see Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ?abuse of discretion')."). After considering the issues raised by the appellants, I agree with the Hearing Officer's conclusion that Ms. Nabb is entitled to relief under Part 708. In contrast to the Hearing Officer's finding with respect to liability of the parties, however, I find that K-H is solely liable for the remedies he fashioned.

B. The Employee's Burden

Under the regulations applicable to this proceeding, the complainant has the burden of establishing by the preponderance of the evidence that she engaged in protected conduct, and that such conduct "was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d) (1992).(6) The contractors, EG&G and K-H, have not challenged the threshold matter of

whether Ms. Nabb engaged in protected conduct, including disclosures to supervisors and company officials. IAD at 8. On appeal, however, the contractors challenge the Hearing Officer's finding that the protected disclosure on which the Hearing Officer focused-- Ms. Nabb's allegations of waste drum "traveler" fraud to supervisors and managers from September 1993 through December 1994-- was a contributing factor to any reprisals they may have taken against her. Their arguments are twofold. First, EG&G contends that too much time passed between the last of Ms. Nabb's disclosures about the "travelers," in December 1994, and the termination of the RCT training program in late July 1995. Second, K-H contends that the Hearing Officer improperly determined that the individuals responsible for canceling Ms. Nabb's training were influenced by their knowledge of Ms. Nabb's disclosures.

Since the contractors have conceded that Ms. Nabb engaged in protected conduct, the only remaining burden on Ms. Nabb is to establish that her protected conduct was in fact a contributing factor in the alleged acts of reprisal. As the Hearing Officer explained in the IAD, under our case law a protected disclosure is likely to be a contributing factor in a personnel action where the official taking the action has actual or constructive knowledge of the disclosure and where he acted within a period of time such that a reasonable person could find such a nexus. IAD at 7.

With respect to the timing question, I cannot find that the Hearing Officer erred when he determined that the time that elapsed between Ms. Nabb's last recorded disclosure about the "travelers" and the termination of Ms. Nabb's participation in the RCT training program was short enough to allow the reasonable conclusion that the former contributed to the latter. Applying a reasonable-person standard to this issue requires considering the circumstances of each case. Here, although more than seven months passed between the two events, it is reasonable to conclude that contractor officials did not forget about Ms. Nabb or her disclosures in the interim, particularly in light of the ample evidence of Ms. Nabb's outspoken nature and the number and variety of situations in which she had made her disclosures. Moreover, and contrary to the contractors' contention, this period is not beyond other intervals this office has considered and found to establish "temporal proximity." See, e.g., Luis P. Silva, Case No. VWA-0039 (February 25, 2000) (temporal proximity between July 1997 disclosure and personnel action in early 1998).(7) Because any training delays that the contractors may have caused occurred closer in time to Ms. Nabb's disclosures than the decision to terminate her training did, it was reasonable to conclude that a temporal link exists with them as well.

As stated above, the individual engaging in the alleged reprisal must also have knowledge of the employee's protected conduct in order to support a conclusion that the conduct was a contributing factor in the reprisal. To consider this issue properly, I must address each form of reprisal separately.

On one hand, I find that the Hearing Officer was not clearly in error when he determined that the decision to terminate RCT training was made with knowledge of Ms. Nabb's disclosures. K-H argues in its Statement of Issues that the Hearing Officer created an improper and irrebuttable presumption when he determined that Ms. Nabb's "standing as a known whistleblower is presumed to have influenced Mr. Spears and Mr. Wood," IAD at 19, at the time they decided to terminate the RCT training program in a manner that adversely affected Ms. Nabb. K-H Statement of Issues at 8-9. Although Ms. Nabb never made a direct disclosure to Mr. Spears, as she admitted in her Response to the Statements of Issues, K-H admits that Mr. Spears learned, at a December 1994 meeting with the DOE Rocky Flats whistleblower administrator, that Ms. Nabb was a whistleblower. Response to Statement of Issues (Response) at 5, 10; K-H Statement of Issues at 8. This was roughly six months before Mr. Spears and others began to structure the termination of the RCT training program. Tr. at 463 (Wood testimony). It is clear that Mr. Spears, then in charge of Rocky Flats's radiological control program, knew that Ms. Nabb was a whistleblower at the time he, together with other managers, decided to halt RCT training and set the parameters for students eligible for completing their testing.(8) Moreover, the evidence strongly suggests that they considered the effect of their decision on each of the trainees in the program. Transcript of Hearing (Tr.) at 414, 445 (Spears testimony). Mr. Spears' knowledge of Ms. Nabb's whistleblower status, taken together with the proximity in time between her protected conduct and this decision, is sufficient evidence to meet Ms. Nabb's burden to establish that her protected conduct was a contributing factor in

the decision to halt training.(9)

On the other hand, I find that the Hearing Officer did err when he considered the allegation of training delays as evidence that the contractors had not met their burden of proof. See IAD at 14-17. The Hearing Officer found that "Mrs. Nabb has presented evidence indicating that her failure to complete her RCT training . . . was due, at least in part, to unusual delays in the scheduling of her RCT training and testing." IAD at 17. The Hearing Officer did not, however, consider whether Ms. Nabb's protected conduct was a contributing factor in these delays. Specifically, he failed to consider whether the contractor employees who caused delays in Ms. Nabb's training had knowledge of her protected conduct. Consequently, I must perform this analysis de novo. As stated above, the two essential elements of this analysis are proximity of time between the protected conduct and the delays, and actual or constructive knowledge of the protected conduct by those causing the delays. I have already found proximity of time with respect to the delays. To address the knowledge issue, I have determined that the RCT trainers were responsible for causing any delays in Ms. Nabb's training progress, because they were in control of when Ms. Nabb was tested. However, there is simply no evidence in the record that these individuals had any knowledge about Ms. Nabb's protected conduct. Although Mr. Spears clearly was aware of the protected conduct, as discussed above, there is nothing in the record that indicates that this knowledge was communicated to the RCT trainers. To the contrary, James Wood, another Rocky Flats manager responsible for the termination of the RCT training program, testified that to his knowledge none of his instructors knew "that there was any whistleblower thing." Tr. at 479. Consequently, I find that Ms. Nabb has not shown by a preponderance of the evidence that her protected conduct was a contributing factor in any delays that might have occurred in her training schedule.

C. The Employer's Burden

Once the complainant has met his or her burden of proof, the burden shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same action "absent the complainant's disclosure." 10 C.F.R. § 708.9(d) (1992). (10) "Clear and convincing evidence" is neither so light a burden as "preponderance of the evidence" nor so rigorous as "beyond a reasonable doubt," the standard used in criminal procedures. See id. Both contractors have challenged the Hearing Officer's finding that they did not meet their burden. They maintain that the evidence demonstrates that the funding for the RCT training program expired, and that this fact alone constitutes an independent business reason for terminating the training.

In stating their position, however, the contractors misstate their burden. They ignore its true dimension. As the Hearing Officer explained in the IAD, their burden was not merely to show that they had a legitimate business reason for terminating the RCT training and allowing some but not all participants to complete their qualifying examinations. See IAD at 17-18. I concede that they have established this basis, as did the Hearing Officer. IAD at 19. Their burden is larger in scope. What the Hearing Officer could not find, however, was that on this record they had met their express burden of proof under the Part 708 regulations, which was to show, by clear and convincing evidence, that they would have taken the same action had Ms. Nabb not engaged in her protected conduct. That is the issue I must address here.(11)

The facts necessary to the consideration of this issue are as follows. Due to exhaustion of funds earmarked for the training program in which Ms. Nabb participated, K-H managers were directed to stop the program. The implementation of that directive fell to three managers, including Mr. Spears and Mr. Wood. At that time, according to Mr. Wood, roughly 15 to 20 students had not yet completed the program and qualified as RCTs. Tr. at 464. Rather than stopping the training for all students instantaneously, they devised a plan by which those students who had completed all their work but for their oral boards would be permitted to take their boards, which would complete the qualification process to become RCTs. Those students who had more work to complete would not be permitted to continue their studies. Mr. Wood testified that the cost of oral boards was small-- no more than a few hours of testing per student. Tr. at 471-472. On the other hand, the cost of preparing those even one test short of their oral boards could be several weeks of preparation and testing. Id. The evidence shows that very few students were terminated

from the program along with Ms. Nabb. The Hearing Officer determined, from testimony gathered at the hearing, that six or seven students fell into the same category as Ms. Nabb. IAD at 18; see Tr. at 465, 470 (Wood testimony). According to Mr. Spears, however, there were only perhaps two or three others who shared Ms. Nabb's predicament. Tr. at 415. John Barton, the union grievance committeeman, estimated the same number. Tr. at 46. The RadCon Training records reflect Ms. Nabb and two others never passed their oral boards, while the remaining 84 students on the roster did, including five who passed them after July 24, 1995. IG Exhibit 102 (which corresponds to K-H Hearing Exhibit R). In any event, a very small number of fellow students received the same treatment as Ms. Nabb.

Based on the above evidence, one can presume that K-H management made the decision to permit some students to complete their studies because they saw that decision as advantageous to K-H's business position. Perhaps, for example, the Rocky Flats Site needed more RCTs. If so, there was a legitimate business purpose to "draw the line" among the students to permit some of them to complete their training. Justification for why they drew the line where they did, however, is a matter on which there is very little evidence. The record contains Mr. Wood's statement that preparation for and administration of oral boards cost less per student than the preceding test. What the contractors have shown, if anything, is that the decision they made is logical in a business sense. But without knowledge of the company's needs for RCTs and availability of alternate funding, I cannot find that the line they drew was the only one that had a legitimate business foundation, or even that it was the best option under the circumstances. Therefore, it is difficult to conclude that it was merely coincidental that Ms. Nabb had passed precisely one examination fewer than those students who were permitted to complete the training program and become RCTs.

The Hearing Officer stated that "[m]anagement decisions that impact negatively on a small group of employees that includes a whistleblower must be viewed as inherently suspect in a Part 708 analysis." IAD at 19. I do not necessarily agree with the characterization that such management decisions are "inherently suspect." Nevertheless, they must be closely examined. I find that, after considering the complete circumstances surrounding the decision to terminate Ms. Nabb's training, the contractors have simply not met their regulatory burden to show by clear and convincing evidence that they would have drawn that line where they did if Ms. Nabb had not engaged in protected conduct. Because they have not established that their training decision was the only legitimate business option, or even the best of several under the circumstances, I conclude that they have not shown that they would have made the same decision "absent the complainant's disclosure." Because the contractors have not met their burden and therefore have not overcome the complainant's allegations on this issue, I agree with the Hearing Officer that K-H has failed to show that its termination of Ms. Nabb's training was not a retaliatory act for purposes of Part 708.

D. Remedy Issues

Because I uphold the Hearing Officer's finding that K-H retaliated against Ms. Nabb when it terminated her RCT training, I must now address the remedy fashioned in the IAD.

Of the many allegations of retaliation that Ms. Nabb claimed in her Part 708 complaint and subsequent amendments, I find that Ms. Nabb has prevailed on only one-- the termination of her RCT training.(12) The remedy issues that the contractors have raised on appeal fall into two categories. The first concerns the effect of the settlement of Ms. Nabb's union grievance on one aspect of the remedy fashioned by the Hearing Officer. The second is EG&G's contention that it should not be held jointly and severally liable for any violations of Part 708 that occurred at Rocky Flats after June 30, 1995, the date on which its responsibilities for operating the Rocky Flats facility terminated.

In its Statement of Issues, K-H argues that it should not be required to offer Ms. Nabb another opportunity to complete her RCT training. As discussed in the Dismissal section above, K-H invited Ms. Nabb to continue her training in November 1997 and again in early 1998 in settlement of her union grievance. At that time, Ms. Nabb rejected the offer. Nevertheless, the Hearing Officer ordered K-H to offer Ms. Nabb an opportunity to complete her RCT training. K-H now contends that requiring it to offer training yet

again frustrates Part 708's policy of encouraging resolution of grievances internally when possible. The underlying premise appears to be that requiring K-H to offer the training will reward Ms. Nabb for ignoring the offer at the union grievance level. I do not agree that requiring the contractor to provide training will frustrate the policy of the whistleblower regulations. The Part 708 regulations promote internal resolution of grievances by requiring the complainant to show that he or she has exhausted all applicable grievance-arbitration procedures before filing a complaint. 10 C.F.R. § 708.12(d); see 10 C.F.R. § 708.6(c)(1) (1992) (refers to "internal company grievance procedures" rather than "grievance-arbitration procedures"). Part 708 is therefore intended to govern only after the failure of more "local" processes, which in this case included the procedures Ms. Nabb followed. In a case in which the complainant wrongly initiates a Part 708 action after filing a complaint in another forum, the complaint will be dismissed. However, once Part 708 is properly invoked, as in this case, it is irrelevant whether the remedy happens to coincide with that reached through grievance procedures. I find instead that the policies underlying Part 708 would be frustrated if a hearing officer were prevented from fashioning an appropriate form of relief merely because it had been offered at an earlier stage of a process designed to "restore employees to the position they would have occupied but for the retaliation." 64 Fed. Reg. 12862, 12867 (policy set forth in context of restitutionary remedies authorized under the revised regulations). Consequently, I find that the Hearing Officer did not err when he required K-H to offer Ms. Nabb an opportunity to complete her RCT training program.

Along the same vein, EG&G argues that the Hearing Officer was without jurisdiction to grant any remedy for K-H's retaliatory termination of Ms. Nabb's training, because the union-grievance settlement bound her and was the result of a complaint under "State or other applicable law" that requires dismissal of her Part 708 complaint under the revised regulations at 10 C.F.R. § 708.15(d). As discussed in the Dismissal section above, that provision does not apply to the facts of this case. Because Ms. Nabb's union grievance concerning her training does not dictate dismissal of her Part 708 case, the Hearing Officer was free to fashion a remedy under the regulations.

EG&G also argues that it cannot be held liable for retaliations that occurred after the responsibility for operating Rocky Flats had been transferred from EG&G to K-H on July 1, 1995. This argument takes on significance because the only allegation of retaliation on which Ms. Nabb has prevailed is that of terminating her from the RCT training program, which occurred some time after July 24, 1995.(13) If EG&G is correct in its contention, EG&G bears no liability in this case. The Hearing Officer held both companies jointly and severally liable for the remedies, though he expressed his belief that K-H should be responsible for providing the relief. IAD at 24. He did not, however, express any justification for reaching that conclusion. Although it is clear that Ms. Nabb made several disclosures to EG&G personnel, and that many EG&G personnel were rehired by K-H when it assumed responsibility for operating Rocky Flats, nothing in the record supports a finding that EG&G was involved in any way in the decision to terminate Ms. Nabb's training. Consequently, I find that EG&G should not be held liable for this retaliatory action.

As neither of the contractors has asked for review of the terms of the remedies that the Hearing Officer has fashioned, I need not address them. I will, however, modify the interest provision of the IAD to comport with the calculation methodology that OHA has employed in other Part 708 determinations. This methodology follows the practice of the Merit Systems Protection Board under the Whistleblower Protection Act, employing an Office of Personnel Management regulation found at 5 C.F.R. § 550.806(d), and is outlined in the Sorri case. Sorri, 23 DOE at 89,017. The total amount of interest calculated in this manner is $11,777.23, as set forth in the appendix to this decision. For the reasons stated above, the remedies set forth in the IAD, as modified by this interest calculation methodology, are the sole responsibility of K-H.

It Is Therefore Ordered That:

(1) The Appeal filed by Kaiser-Hill Company, L.L.C., on August 26, 1999, of the Initial Agency Decision issued on August 6, 1999 (Case No. VWA-0031), is hereby denied.

(2) The Appeal filed by EG&G Rocky Flats, Inc., on August 27, 1999, of the Initial Agency Decision issued on August 6, 1999 (Case No. VWA-0031), is hereby granted to the extent that it shall not be held liable for any retaliatory action taken against Barbara Nabb, and denied in all other respects.

(3) Kaiser-Hill Company, L.L.C., shall pay to Mrs. Nabb, by no later than June 30, 2000, the following amounts in compensation for actions taken against her in violation of 10 C.F.R. Part 708:

(i) $498.24 for lost salary for the period September 1, 1995 through April 30, 1998(14);

(ii) $36,897.53 for lost overtime pay for the period September 1, 1995 through April 30, 1998;

(iii) $1,200 for reasonable costs and expenses incurred by Mrs. Nabb since the filing of her Part 708 Complaint on January 12, 1995; and

(iv) $11,777.23 for interest on the amounts in (i) through (iii) above, for the period September 1, 1995, through June 30, 2000.

(4) Kaiser-Hill Company, L.L.C., shall offer Ms. Nabb the opportunity to receive the training necessary to qualify for the RCT II job classification, and shall offer Ms. Nabb a position as an RCT II at the time that she completes the required training.

(5) 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.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 5, 2000

(1)On July 1, 1995, the responsibility for operating the Rocky Flats facility for the DOE passed from EG&G to K-H.

(2)Although Ms. Nabb's complaint was complete in January 1995, several allegations were investigated that she raised after this date, including her termination from the RCT training program in July 1995.

(3)During the pendency of the hearing, the new "whistleblower" regulations took effect, and the Hearing Officer relied on the revised regulations in handling this proceeding, citing the new regulatory provisions in his Initial Agency Decision.

(4)Ms. Nabb's complaint contained several allegations of protected disclosures and retaliations that the Hearing Officer did not analyze fully in the IAD. Before the hearing, Ms. Nabb stated that she no longer wished to pursue one claim of retaliation, that she had been denied funeral leave. The Hearing Officer dismissed two others before the hearing (acid burns and revocation of her access authorization), as actions beyond the scope of Part 708. Letter from Hearing Officer to Ms. Nabb, April 20, 1999. The Hearing Officer ruled that another (temporary assignments to undesirable work locations), along with the two preceding allegations, were actions for which Part 708 offered no remedy, even if she were to prevail. IAD at 20. Finally, the Hearing Officer denied an allegation that Ms. Nabb raised for the first time at the hearing (denial of crewleader pay) for lack of evidence. IAD at 21.

(5)The appellants also requested an opportunity for oral argument at this stage of the proceeding. There is no provision in the regulations that precludes oral argument. On the other hand, the regulations that govern

appeal procedures, at 10 C.F.R. § 708.33, do not provide for oral argument as a matter of right. That provision permits the OHA Director, at his discretion, to obtain additional information that will "advance the evaluation." 10 C.F.R. § 708.33(b)(3). Having studied the voluminous documentation in this case and reviewed the various arguments raised in the appeals, I conclude that oral argument is not necessary to "clarify the evidence and to probe the merits of each party's position," as K-H posited in its November 11, 1999 Reply to Ms. Nabb's Response to the appeal briefs. To the extent that Ms. Nabb has raised new issues and allegations in her Response, I will not consider her Response to be relevant to this appeal determination; such issues may not be raised at this late stage. Ms. Nabb should consider whether they form a proper basis for a new Part 708 complaint.

(6)Although the Hearing Officer relied on the parallel provision in the 1999 regulations, 10 C.F.R. § 708.29, the description of the evidentiary burdens on the parties nevertheless are the same.

(7)EG&G also contends that Ms. Nabb's poor performance on some of the RCT tests, as shown in Kaiser-Hill Exhibits H and I, demonstrates that the contractors could have dismissed her from the training program at earlier stages, and since they did not, it was improper for the Hearing Officer to conclude that her eventual termination from the training program could have possibly been influenced by her disclosures. EG&G Statement of Issues at 4. I find no merit to this argument. Even if it were established that the contractors could have terminated her training earlier, the fact is that they did not. They may have had any number of reasons for postponing their adverse action to a later, more propitious time. I do not know of, and can see no use to ascribe, any particular motive to their inaction before July 1995.

(8)I also note that Mr. Spears was an employee of EG&G before the transfer of operations responsibility to K-H, and an employee of K-H thereafter.

(9)I do not agree with K-H's characterization of the Hearing Officer's "presumption" as irrebuttable and without any basis in the law or regulation. First, I fail to see that the Hearing Officer employed an irrebuttable presumption at all. The fact that the regulations specifically provide a standard for review of the employer's evidence demonstrates that the employer has an opportunity to submit evidence in opposition, and meeting the "contributory factor" test is thus clearly rebuttable. Second, Congress intentionally made the whistleblower's burden relatively easy to meet when it adopted the "contributing factor" test in the 1989 Whistleblower Protection Act (WPA), in order to reduce the "exceptionally heavy burden imposed on the employee." 135 Cong. Rec. S2780, S2784 (daily ed. Mar. 16, 1989) (statement of Sen. Levin), cited in Ronald A. Sorri, 23 DOE ¶ 87,503 at 89,010 (1993) (Sorri). The standards of proof in the WPA are similar to those in Part 708. See Sorri, 23 DOE at 89,009.

(10)Because Ms. Nabb did not meet her burden regarding her allegations of delay, I will not address them in this section.

(11)EG&G argues that I have held that clear and convincing evidence of independent, non- discriminatory reasons for a personnel action is sufficient to sustain the contractor's burden of proof. EG&G Statement of Issues at 5 n.6 (citing Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 at 89,042 (1994)). In Oglesbee, the Hearing Officer reached this conclusion under the specific facts of that case, which included a finding that the alleged retaliatory act-- delaying a promotion-- transpired as the direct outcome of following normal, established personnel procedures. In the present case, as discussed below, the Hearing Officer found retaliation in termination of training as the direct outcome of following procedures that were developed and implemented specifically to address a group of individuals of which the whistleblower was a member. However, it is these procedures which are different from those in Oglesbee. Because these procedures were not already established, but rather created to address precisely the whistleblower's situation, they do not carry the same presumption of objectivity as those in Oglesbee. I further note that the Hearing Officer completed his analysis by considering whether this personnel action would have occurred any differently had there been no knowledge of Ms. Oglesbee's disclosures. Id. at 89,043.

(12)See note 4.

(13)I note again that I have denied any allegation of retaliatory delays in training, which could have transpired while Rocky Flats was in the control of either contractor.

(14)April 14, 1998 is the date on which Ms. Nabb would have reasonably completed her RCT training had she accepted Kaiser-Hill's offer to recommence training, as calculated by the Hearing Officer. See Initial Agency Decision at 22.