

Case No. VBH-0010

September 1, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Petitioner: Jagdish C. Laul

Date of Filing: December 3, 1999

Case Number: VBH-0010

This Decision involves a complaint filed by Dr. Jagdish C. Laul (hereinafter the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant contends that his dismissal by his employer, Excalibur Associates, Inc. (Excalibur) was a reprisal for his participation in a prior Part 708 proceeding. Excalibur is a subcontractor of Kaiser Hill Company (Kaiser) who is the managing and operating contractor of DOE's Rocky Flats Field Office (Rocky Flats).

I. The DOE Contractor Employee Protection Program

A. Regulatory Background

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). The program's primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. A DOE contractor may not discharge or otherwise discriminate against any employee because that employee has participated in a Part 708 proceeding or otherwise engaged in protected conduct. 10 C.F.R. § 708.5(b). Employees of DOE contractors who believe they have been discriminated against in violation of Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to (i) an investigation by an Office of Hearings and Appeal (OHA) investigator, (ii) a hearing and independent fact-finding by an OHA hearing officer, and (iii) an opportunity for review of the hearing officer's initial agency decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.30, 708.32.

B. Procedural History

On December 18, 1998, the complainant filed this complaint with the DOE Office of Inspections of the Office of the Inspector General. On April 16, 1999, the Office of Inspections transferred a number of pending complaints, including the subject complaint, to OHA. On April 26, 1999, the OHA Director

appointed an investigator to examine and focus the issues raised in the complaint. The investigator conducted an investigation, and issued a Report of Investigation on December 3, 1999. (1) On that same day, the OHA Director appointed me the hearing officer in this case.

On May 10, and May 11, 2000, I convened a hearing on the complaint in Rocky Flats. The transcript of the Hearing will be referred to in this decision as TR.

II. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "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." 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See [Ronald Sorri](#), 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). See also *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*).

B. The Contractor's Burden

If the complainant meets his burden, the regulations require Excalibur to prove by "clear and convincing" evidence that it would have terminated the complainant if he had not engaged in protected conduct. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See *Hopkins*, 737 F. Supp. at 1204 n.3. In evaluating whether a contractor has met its burden, the hearing officer considers the strength of the contractor's evidence in support of its action and any evidence that the contractor takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

III. Background

Excalibur is a small company(2) formed to provide technical services to DOE contractors. Excalibur received its first contract during May 1997. Excalibur's closing brief at 2. The two founders and principals of Excalibur are Charlie Burns, Chief Executive Officer and Wayne Spiegel, Chief Operating Officer. Hereinafter these two individuals will collectively be referred to as Excalibur's senior management. The third member of Excalibur's management with significant involvement in this proceeding is David Richards. He was employed by Excalibur between October 1997 and May 1999. Starting in February 1998 he was the direct supervisor of the complainant.

Excalibur's primary contract with Kaiser required that Excalibur prepare "Emergency Preparedness Hazards Assessments" (EPHA) and "Emergency Assessment Resource Manuals" (EARM) for most of the sites at the Rocky Flats facility. A building or a work area is considered a site. The EPHA described in detail the risks associated with the release of each hazardous material located within a site. TR. at 318. After the EPHA for a given site was prepared by Excalibur and approved by Kaiser, Excalibur prepared the EARM for that site. Because the EARM used the EPHA as its primary source, during the hearing the EARM was often referred to as a derivative document. The EARM provided operational guidance on the appropriate actions to take in the event of the release of each hazardous material located within a site.

Two Kaiser employees, Mark Spears and Wilbert Zurline, had the primary responsibility for substantively reviewing the EPHAs and EARMS written by the Excalibur employees. Mr. Spears was the manager of the Hazardous Assessment Committee (HAC); Mr. Zurline was the alternate manager. Mr. Zurline was

responsible for the initial review of the EARMS. Mark Spears was responsible for the final review. Collectively, Mr. Spears and Mr. Zurline will be referred to as the HAC managers.

The complainant started working for Excalibur on November 17, 1997, AR at 405, as a principal scientist.(3) Excalibur assigned the complainant to work primarily on drafting and revising EARMs.(4)

During the hearing there was significant testimony regarding the complainant's performance. The testimony generally indicated that the complainant was a hard worker, motivated and technically competent. The testimony also indicated several areas in which the complainant needed to improve, including the quality of his written work, his ability to follow oral direction and his responsiveness to others' concerns.(5) I will briefly review some of the testimony regarding the complainant's performance.

Mr. Burns, Excalibur's Chief Executive Officer, testified that the complainant was "motivated" and he would volunteer to undertake "a task that I wanted done." TR at 390. "I looked at [motivation to undertake a project] very favorably." TR at 391. Mr. Burns' testimony further indicated that the complainant had difficulties dealing with comments. TR at 392. I found Mr. Burns' testimony particularly thoughtful and candid when he indicated the complainant had difficulties dealing with others and was sometimes unwilling or unable to follow direction he received from management. Mr. Burns also indicated that the complainant's final documents required an additional review by editors because the first set of editorial comments was not always properly implemented. TR at 415. Mr. Burns summarized his testimony by indicating there was good and there was bad in the complainant's work. TR at 391. Mr. Burns' testimony was confirmed by Tony Miles.(6) Mr. Miles worked in a cubicle that was next to the complainant's. He testified:

On numerous occasions Charlie Burns came over and he gave [the complainant] some assignments that required extra work. And it showed that Charlie Burns had a lot of faith and confidence in [the complainant]. And on other occasions he came by and he complimented [the complainant] on work that he had done.

TR at 333. Mr. Miles also testified that he had a Ph.D. and did peer review of the complainant's work. He testified that he thought that the complainant's work was of high caliber and he was technically knowledgeable. TR at 334.

The testimony of Mr. Spiegel, Excalibur's Chief Operating Officer, indicated that he had little first hand contact with the individual. He testified that he deferred to Mr. Burns in evaluating the technical abilities of the complainant. TR at 266. He further testified that in evaluating the complainant's teamwork and work quality, he deferred to comments from his peers and Mr. Richards. TR 266. The OHA investigator's notes indicate that Mr. Spiegel's evaluation was that the complainant's work was satisfactory and that "he would have no problems rehiring him should the company have a future need of his skills." AR at 275.

Mr. Richards testified that the complainant's work was generally technically accurate. TR at 205. He also testified that "technically in some of his documents he was better and more detail-oriented. Sometimes, he missed things. I can't really say how he compared directly to any of the other analysts." TR. at 216. The testimony of Mr. Richards confirmed that the complainant had some difficulty with written and oral communications.

The complainant was discharged on October 21, 1998. The October 21, 1998, out processing form provided to the complainant indicates the complainant was discharged because there was "insufficient scope of work to justify retaining the service of [the complainant]." AR at 365. Mr. Spiegel's testimony also indicated the complainant was discharged because there was insufficient work for the complainant. TR at 545.

There is no dispute that prior to the complainant's dismissal he participated in "an administrative proceeding conducted under part 708." 10 C.F.R. § 708.29(b). That administrative proceeding was initiated

in June of 1996 when the complainant filed a whistleblower complaint against Kaiser and his direct employer Tenera, a subcontractor of Kaiser. The final agency decision on that complaint was issued on August 19, 1998. The complainant believes the October 21, 1998 dismissal was a retaliatory act for his participation in that Part 708 proceeding.

IV. Analysis

A. Complainant's Showing

As stated above, under Part 708 a complainant has the burden of demonstrating, by a preponderance of the evidence, that the complainant engaged in protected conduct and that the protected conduct was a contributing factor to a reprisal. As explained below, I have concluded that the complainant has met his burden.

1. The protected conduct

As indicated above, it is undisputed that the complainant participated in the administrative proceeding conducted under Part 708 from June 1996 through August 1998. This was protected conduct under Part 708.

2. The adverse personnel actions

Three relevant personnel actions by Excalibur's management preceded the complainant's October 21, 1998 dismissal. Each of these actions contributed to the dismissal.

The first personnel action occurred in February 1998 when Mr. Burns directed "Mr. Richards to take the lead in dealing with [Kaiser]." TR at 385. This meant the complainant would no longer be the team lead for the EARMs, he would not be permitted to sign the documents he prepared, and his interactions with the HAC managers would be reduced.

The second personnel action was Excalibur's decision to enter into a subcontract with Global Business Associates (GBA).(7) This contract was entered into during June 1998. GBA was a subcontractor with one employee, Mr. Ron Beaulieu. Under this contract GBA was given the responsibility for preparing and maintaining certain EPHAs and ERAMs. This contract and the extension of the contract into fiscal 1999 had the effect of reducing the work on EARMs available for employees of Excalibur.

The third personnel action was Excalibur's senior management's written rating of each of its twelve analytical employees. Complainant's exhibit #12. This rating was prepared in June 1998.(8) The complainant was rated the lowest of the twelve Excalibur employees. That written rating of its employees was the most important factor in Excalibur's determination of which employee to dismiss.

As the foregoing indicates, three negative actions - Excalibur's removal of the complainant as the team lead, Excalibur's transfer of work to an outside contractor and Excalibur's low rating of the complainant - contributed to the complainant's dismissal. As explained below, the complainant has met his burden of demonstrating that his protected conduct was a contributing factor to the three negative actions that led to his dismissal.

3. Contributing Factor

It is undisputed that a complainant can show that protected conduct was a contributing factor by showing that the official taking the action had 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. For an example of a case applying this standard, see [Barbara Nabb](#), 27 DOE ¶ 87,519 (1999).

As explained below, the complainant has met this standard: the complainant has shown such constructive knowledge and temporal proximity. I consider the temporal proximity first.

a. Temporal proximity

In this case the three preliminary Excalibur personnel decisions all occurred at the same time as the protected conduct, i.e., during the pendency of the complainant's protected participation in the Part 708 proceeding. Therefore, there is a direct temporal nexus between the complainant's protected conduct and the personnel decisions that led to his dismissal. There is also a close time nexus between the protected conduct, which concluded during August 1998, and his October 21, 1998 dismissal.

b. Actual or constructive knowledge

Although it is clear that Excalibur had no direct knowledge of the protected conduct, the complainant has demonstrated that Excalibur's management had constructive knowledge of such conduct. As explained in section i below, the complainant can demonstrate constructive knowledge by demonstrating that the individuals making the personnel decision were influenced by the opinions of those persons with knowledge of the protected conduct. In this case, there are two communication linkages that demonstrate that negative information was passed from those with knowledge of the protected disclosure to Excalibur's management. The first is between Kaiser employees involved in that protected proceeding and the Kaiser HAC managers. The basis for finding a passage of negative information from those involved in the protected proceeding to the HAC managers will be discussed in section ii below. The second linkage is between the HAC managers and Excalibur's management. The method used to pass negative information from the HAC managers to Excalibur management will be discussed in section iii below.

i. The legal standard for demonstrating constructive knowledge

Under Part 708 case law, a complainant can establish constructive knowledge by showing that the person taking the alleged retaliatory act was influenced by the negative opinions of those with knowledge of the protected conduct. See [Am-Pro Protective Services, Inc.](#), 26 DOE ¶ 87,511 (1996) (Am-Pro); [Morris J. Osborne](#), 27 DOE ¶ 87,542 (1999); [Jimmie L. Russell](#), 28 DOE ¶ 87,502 (2000). For example, in Am-Pro, the complainant's first and second level supervisors recommended to the third level supervisor that he terminate the complainant for insubordination, and the third level supervisor took the recommended action. Am-Pro found that, because the third level supervisor acted on information originating with those with knowledge of the protected conduct, the third level supervisor had constructive knowledge of the protected conduct. Thus, the decision stands for the proposition that if the alleged retaliation is based on information that is tainted by the protected disclosure, the decision maker has constructive knowledge of the protected disclosure. In the other two cases cited, the personnel recommendation of independent committees were directly affected by those with direct knowledge of the protected conduct.

The foregoing decisions take into account the realities of organizational structure and the manner in which we have seen retaliations occur in the workplace. If a complainant makes a protected disclosure to his immediate supervisor, and his immediate supervisor retaliates by recommending the complainant's dismissal, it is unlikely that the immediate supervisor will cite the protected disclosure. Instead, the immediate supervisor will likely cite a pretext such as poor performance or misconduct. As a result, the decision maker is led to believe and reasonably believes that poor performance or misconduct prompted the recommended action, and the decision maker takes the recommended action on that basis. Thus, the decision maker's lack of knowledge of the protected conduct is attributable to reasonable reliance on subordinates.

Excalibur argues, however, that in order for a complainant to demonstrate that the person taking the retaliatory action had constructive knowledge of the protected conduct, the complainant must establish that the person should have known, in the exercise of reasonable care, of the protected conduct. As authority for this proposition, Excalibur cites the definition of “constructive knowledge” in Black’s law dictionary.

Excalibur’s definition of constructive knowledge is not applicable in this proceeding. As just explained, under Part 708, a complainant can demonstrate constructive knowledge by showing that the alleged retaliation is based on information that is tainted by the protected disclosure. None of the decisions cited above contained a finding that the decision maker should have known, in the exercise of reasonable care, of the protected conduct, and there is nothing in those decisions to indicate that the decision makers’ lack of knowledge resulted from a lack of reasonable care. Indeed, those decisions demonstrate how a definition of constructive knowledge that requires proof of lack of reasonable care would ignore the decision making context in which reprisals commonly occur.

Finally, I note that, aside from Excalibur’s specific argument about constructive knowledge, a thread running through Excalibur’s submissions is that Part 708 protections do not apply where the decision maker has no retaliatory intent. I disagree. By looking at the decision maker, this narrow reading would deny Part 708 protection to any complainant even though the employee’s protected conduct contributed to the adverse action. It would thereby frustrate Part 708’s purpose of protecting whistleblowers. Moreover, the respondent’s argument is inconsistent with case law under the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1). *Marano v. Dep’t of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). In *Marano*, the complainant disclosed mismanagement in his office. The resulting agency investigation confirmed the accuracy of the disclosures, which in turn led to a reorganization of the office, including the transfer of the complainant. The court held that, even though the agency did not have any retaliatory motive in transferring the complainant, the complainant had met his burden of establishing that his disclosures were a contributing factor to the transfer. Thus, the *Marano* decision makes clear that a complainant can meet his burden without establishing retaliatory motive.

As explained below, the complainant has demonstrated that Excalibur’s management had constructive knowledge that he participated in a protected proceeding. Although the linkage between these Kaiser employees and Excalibur’s senior management is more attenuated than the linkage in the three cases cited above, the same principle applies. The record indicates that it is more likely than not that the complainant’s participation in a prior Part 708 proceeding led various Kaiser employees to make negative comments about the complainant that predisposed the HAC managers to negatively evaluate the complainant to Excalibur.

ii. The HAC managers’ constructive knowledge of the protected conduct

As discussed below, the record indicates that the complainant’s prior Part 708 proceeding resulted in a general animus toward the complainant, that Kaiser employee Spears was aware of that animus, and that Kaiser HAC manager Spears and his fellow HAC manager Zurline, passed negative comments about the complainant along to Excalibur’s management. I conclude that the HAC managers’ comments were based on a preconceived negative bias toward the complainant because the HAC managers made those comments in unusual haste, the comments had significant immediate effects on the complainant, and there is no support for the accuracy of their comments.

In this case at least three Kaiser officials were directly aware of the complainant’s participation in the protected proceeding. They are R. E. Kell, the deputy manager of the Kaiser Safety Engineering and Technical Service Office (SETS office), Robert Allen, Manager, Kaiser Human Resources, and Dana Dorr, Kaiser Work Force Restructuring Manager (hereinafter referred to collectively as the “directly involved Kaiser employees”). Mr. Kell signed the April 1996 memorandum that directed Tenera, the complainant’s employer, to dismiss the complainant. Excalibur Exhibit #17. That dismissal was the adverse personnel action that led to the prior whistleblower proceeding. Mr. Allen and Mr. Dorr worked for Kaiser on investigating and evaluating the prior whistleblower complainant.

The evidence is clear that other Kaiser employees knew of the protected conduct and made negative comments about the complainant. The record indicates that two senior Kaiser/Tenera employees, Mr. Maini, a Tenera employee who headed the Kaiser SETS Office, and Ms. Bateman, made comments that the complainant was a whistleblower and should not be rehired during 1996.(9) In addition the record indicates that Mr. Tony Buhl, Vice President Environment Safety and Health and Assurance, made comments that he would not hire the complainant during 1998.(10)

It is clear that HAC manager Spears worked with various Kaiser employees who had knowledge of the complainant's participation in the protected proceeding. On the organization chart for the SETS Office(11) dated March 1, 1996, Mr. Spears reported directly to Mr. Maini and his deputy Mr. Kell. As mentioned above, Mr. Kell was directly involved in the prior proceeding and Mr. Maini, his supervisor, was found by the Deputy Inspector General to have made negative comments about hiring the complainant. Ms. Bateman is also listed on that organization chart. As also mentioned above, she was also found by the Deputy Inspector General to have made comments aimed at assuring the complainant was not hired. Including Mr. Spears, there are six people named on the March 1996 organization chart of the SETS Office. Three of the other five people on the chart were directly involved in the prior protected proceeding. In such an office set up I believe that while Mr. Spears may not have been aware that the complainant was a whistleblower, Mr. Spears would have been aware of the problems being caused by the complainant and the negative feeling of his peers and supervisors toward the complainant.

Excalibur asked Mr. Spears two questions in an attempt to demonstrate that Mr. Spears did not have knowledge of the negative feeling toward the complainant in the SETS office. Those questions were "Do you know if [the complainant] was a whistleblower?" and "Did you ever have any conversation with Mr. Dick Kell about [the complainant]?" TR at 249-250. Mr. Spears answered no to both of those questions. However, this testimony does not even address the issue whether Mr. Spears was aware of the bad feeling in the office toward the complainant.(12)

The HAC managers' alacrity in negatively evaluating the complainant's work and their weak and evasive testimony regarding the basis for their determination provide further support for the conclusion that the HAC managers had a preconceived negative bias toward the complainant.

HAC managers Spears and Zurline negatively evaluated the complainant's work from the outset, i.e., in January 1998. HAC manager Spears testified that he first met the complainant during January 1998 when the complainant was preparing the first group of EARMs. That month the complainant provided ten draft EARMs to the HAC managers for their review. At that point the complainant had been an employee for less than two months and had just completed the first drafts of ten EARMs; these ten EARMs were the first group of EARMs that had been developed for Rocky Flats. TR at 179 and 202.

The HAC managers testified that during January 1998 they each provided negative comments directly to Excalibur's senior management, regarding the quality of all documents received from Excalibur, but the HAC managers did not testify with any specificity concerning their quality concerns. TR at 207 and 240.

HAC manager Spears testified that he provided feedback to Excalibur's CEO Spiegel, which indicated Mr. Spears "was dissatisfied with the quality of the products he was given to review." TR at 240. He indicated that there were "an excessive number of substantive and technical errors in the document." TR at 240. But he did not provide any examples of such errors at the Hearing.

Similarly, HAC manager Zurliene testified that he had meetings with the complainant and others in which he criticized the complainant's work product. TR at 179. He testified that he told Mr. Spiegel that the complainant's work was not "competently based." TR at 181. When he was asked "What was not technically competent about the [complainant's] work?", his testimony was evasive and did not specifically point to any incompetence. TR at 182. From his demeanor and the lack of specifics in his testimony, I conclude that he did not have a reasonable basis for his conclusion that the complainant's work was not technically competent. TR at 181.(13)

In summary, the initial contact between the HAC managers and the complainant was in January 1998. There was limited contact between the HAC managers and the complainant during that month.⁽¹⁴⁾ The HAC managers' specific concerns regarding the EARMs were quickly resolved. Yet, the HAC managers provided negative comments to Excalibur which, as discussed below, caused Excalibur's management to quickly downgrade the complainant.

I believe the HAC managers did not testify honestly at the Hearing about the nature of their comments. The HAC managers suggested in a portion of their testimony that their comments in January 1998 to Excalibur's senior management related to the quality of all documents received from Excalibur. TR at 500 and 501. In that testimony they were trying to convince me that they did not make comments regarding specific employees' work.⁽¹⁵⁾ My evaluation of this testimony was that it was intentionally vague and was intended to be evasive. When they made these statements, their general demeanor indicated they were not willing to recall the substance of their comments and that they were attempting to minimize the importance of their comments. Their evasiveness led me to believe their comments to Excalibur's management regarding the complainant were specific and strongly negative. The fact that only the complainant was downgraded and only his contact with the HAC managers was reduced supports my evaluation of the HAC manager's testimony.

As the foregoing indicates, I have concluded that the HAC managers had constructive knowledge of the protected conduct. It is not the complainant's burden to demonstrate exactly how the animus was passed to the HAC managers by Kaiser/Tenera employees. Such a burden is typically beyond the ability of any whistleblower. The complainant has shown that his protected conduct caused animus by the Kaiser/Tenera management and that it is more likely than not that this animus influenced the HAC managers to make negative comments to Excalibur.

iii. Excalibur's constructive knowledge of the protected conduct

It is clear that beginning in January 1998 HAC manager Spears and Zurline provided negative evaluations of the documents prepared by the complainant. Mr. Richards clearly remembered that "It was right after [the complainant] had produced the first couple of documents and we had gotten comments on them. Then I was instructed to assume full responsibility for all of them." TR at 200. Mr. Burns testified that he recalled that comments he received from Kaiser either directly or indirectly indicated that "there are problems with [the complainant's] ability and/or willingness to accept and/or deal with comments . . ." TR at 384. He also indicated that "There was a difficulty in the ability for [the complainant] to deal with the comments and come back with an answer that resolved the issue in more than just a superficial way." TR at 384. However, Mr. Spiegel described the information he received from the HAC managers in a slightly different manner. He testified that the comments indicated that the documents lacked quality. TR at 273. He also stated that the HAC managers indicated "our process lacked proper definition and that the documents had not gone through a rigid quality assurance before being forwarded to him." TR at 274.

Therefore, even though I believe that Excalibur employees were not aware of the complainant's participation in the prior protection proceeding, I find that Excalibur's senior manager received and considered the negative opinions of the HAC managers. These findings lead to the conclusion that Excalibur had constructive knowledge of the complainant's participation in the protected proceeding when it made various personnel decisions regarding the individual. Once there is a reasonable inference that the complainant's participation in the protected proceeding had an effect on the individuals making personnel decisions at Excalibur the complainant has met his burden of showing that his participation in the protected proceeding was a contributing factor to the adverse personnel decisions.

B. Excalibur's Showing

In light of my finding that the complainant's protected activity was a contributing factor to his dismissal, the burden is on Excalibur to show by clear and convincing evidence that the complainant would have

been dismissed absent the participation in the prior Part 708 proceeding. Excalibur must demonstrate by clear and convincing evidence that it would have taken the personnel actions even if it had not received the HAC managers' evaluation that the complainant's work was not technically accurate. As an initial matter there has been no analysis to support the HAC managers' comments that the complainant's work was not technically competent. Excalibur did not submit any documents prepared by the complainant. Nor did it provide any analysis to support the position that the complainant's work was technically unsatisfactory.

Instead Excalibur has attempted to show that its decision to dismiss the complainant was a reasonable business decision. Excalibur has provided testimony from its senior management which indicates its reasons for reducing the complainant's contact with the HAC managers, contracting GBA, and rating the complainant as its poorest performing employee. The testimony tends to indicate that given Excalibur's receipt of the negative evaluations from the HAC managers, there was a reasonable basis for each of the three preliminary personnel decisions. The testimony also indicates that after those preliminary decisions were made it was reasonable to dismiss the complainant.(16) I am convinced that the senior management officials of Excalibur made each of the initial decisions without malice toward the complainant. Nevertheless, the burden is on Excalibur to show that it would have dismissed the complainant absent the effects of the complainant's participation in the protected proceeding.

In this case Excalibur's senior management's opinions of the complainant were clearly affected in a number of ways by the evaluation of the HAC managers.(17) Over time, the HAC managers provided information which indicated that the complainant's work was technically incompetent. Therefore, in order to prevail Excalibur is required to demonstrate that, in the absence of knowledge of the HAC managers' opinions, it would have reached the decision to hire a subcontractor, rate the complainant poorly and then dismiss him. I do not believe the testimony provided by Excalibur comes close to making these showings under the clear and convincing standard.

For instance, the decision to hire a subcontractor (GBA) was critical to the company's ability to perform its work without the services of the complainant. The testimony of Mr. Burns attempts to convince me that performing the work through GBA was more cost effective than performing the work in house. Mr. Burns suggested two reasons why he believed GBA was more cost effective. Mr. Beaulieu (the sole employee of GBA) agreed to a fixed price contract to complete 16 EPHAs and 16 EARMs in fiscal 1999. TR at 409. Mr. Burns indicated that such production levels would significantly exceed the production level of Excalibur employees in 1998. Mr. Burns further indicated that under the guidance of GBA and using GBA's methodology, an Excalibur employee, Mr. Blumstein produced significantly more EPHAs and ERAMs than he had in fiscal 1998. TR at 423. Mr. Burns ascribed the increase in production of Mr. Blumstein to the efficiency of GBA's methodology and supervision. I found this portion of his testimony to be deceptive. In fact, the development work on all of the EPHAs was completed in fiscal 1998. Mr. Burns' initial testimony indicated that you could measure the increase in production by comparing the number of documents prepared in each year. However, cross examination confirmed the prior testimony at the hearing that the work to be done in fiscal 1999 constituted revising and updating the documents prepared in 1998 and that revising and updating a document took less time than the initial preparation of a document. When asked about the difference between the 1998 development and the 1999 maintenance, Mr. Burns recognized that his stated reason for believing that 1999 production was higher than 1998 was illogical. Initially he seemed confused and was unable to articulate a reason why he believed production levels per employee were higher in 1999. Finally, after some confusion he testified without support that "It well could have taken twice to three times as many hours as what it took in fiscal 1999 as it did take." TR at 439. His initial statements provided a misleading comparison and his final statement was unconvincing and provided no reason other than his extemporaneous opinion to believe that production was higher in 1999. Therefore, Excalibur has provided no support for its position that GBA was more productive than Excalibur employees. Excalibur has failed to present a convincing rationale for hiring GBA in the absence of the negative comments of the HAC managers.

Another stated basis for Excalibur's decision to dismiss the complainant was Mr. Spiegel's often-repeated

assertion that in making his decision to lay off the complainant he considered only Excalibur employees. He was clear that he did not consider laying off subcontractors. TR at 279. The decision to consider Excalibur employees only made it much more likely the complainant would be dismissed. There is no support for the proposition that Mr. Spiegel would have only considered Excalibur employees in the absence of the complainant's participation in the protected proceeding. If the HAC managers' evaluations of the complainant had been more positive, Excalibur certainly would have at least considered other options for reducing costs. Therefore, I find there was no clear and convincing evidence presented to support the position that Excalibur would have subcontracted with GBA and would have considered dismissing only Excalibur employees in the absence of the comments of the HAC managers.

After considering the documentary information, the briefs of the parties, the testimony given at the hearing, and the parties' post-hearing submissions, I find Excalibur has not shown by clear and convincing evidence that it would have discharged the complainant absent the poor evaluations of his work provided by the HAC managers.

V. Conclusion

Based on the analysis presented above, I find that the complainant has participated in an administrative proceeding conducted under Part 708, and that Excalibur's dismissal of the complainant was an adverse personnel action that constituted a retaliatory act under Part 708. Therefore, the complainant is entitled to remedial action from Excalibur. The individual has requested back pay and litigation expenses. The back pay shall be calculated from October 21, 1998 until the day the complainant accepted a position at Los Alamos National Laboratory, October 12, 1999. The hourly rate shall be the rate the complainant was paid as a consultant, \$39.60.

It Is Therefore Ordered That:

- (1) The Request for Relief filed by the complainant under 10 C.F.R. Part 708 is hereby granted as set forth below.
- (2) Within thirty days of the date of this order the complainant shall provide Excalibur with a detailed report that provides a detailed calculation of attorneys' fees and litigation expenses.
- (3) Within thirty days of the date of this order the complainant shall provide Excalibur with a report which calculates back wages for forty hours each week from October 21, 1998, through October 12, 1999. The hourly rate shall be \$39.60. There shall be no offsets for unemployment benefits or wages earned by the complainant. Interest shall accrue on the back-wages at the rate of 1% per month starting on November 1, 1999. Interest shall compound monthly.
- (4) Within sixty days of the date of this order Excalibur shall pay the attorney's fees and litigation expenses as reported pursuant to Paragraph (2) above and shall pay back wages as reported pursuant to Paragraph (3) above.
- (5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the complainant relief unless, within 15 days of the date of this Order, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Thomas L. Wieker

Hearing Officer

Office of Hearings and Appeals

Date: September 1, 2000

(1)The Investigator's Report is a ten page written determination. It will be referred to as the "IR". The Administrative Record of the OHA investigative proceeding consists of 489 pages and will be referred to as the "AR".

(2)During the 1998 fiscal year (October 1, 1997 through September 30, 1998) Excalibur had between ten and twenty employees.

(3)Mr. Burns testified that prior to hiring the complainant he did not check the complainant's references nor did he call anyone at Rocky Flats regarding the complainant. TR at 376.

(4)Mr. Burns testified that the analyst that created an EARM signed it as the subject matter expert and therefore in January 1998 the complainant was signing the EARMs that he authored. TR 379.

(5)In addition to the testimony at the hearing, the record contains three relevant memoranda from Excalibur's management. The first is an April 29, 1998, memorandum from Mr. Spiegel to the file indicating concerns that he had discussed with the complainant. AR at 399. This memorandum indicates Mr. Spiegel discussed the complainant's inability to communicate with co-workers and his failure to listen to instruction. The memorandum also indicated that Mr. Spiegel indicated to the complainant that he had many talents that were valuable to the company. The second is an August 11, 1998, memorandum from Mr. Richards to Mr. Spiegel indicating problems with the complainant's work. AR at 403. That memorandum indicated Mr. Richards' opinion that the complainant had difficulty following guidance on the structure of reports and that the complainant's written language skills were weak. The third is an August 31, 1998, memorandum from Mr. Spiegel to the file indicating he had discussed Mr. Richards' concerns with the complainant. AR at 402.

(6)Mr. Miles worked for Excalibur as an employee of G.D. Barri. G.D. Barri was subcontractor of Excalibur.

(7)Mr. Spiegel testified that the decision to subcontract some of Excalibur's work to GBA was a business decision made by Mr. Burns. TR at 536. He also testified that he knew the decision to hire GBA had the potential of causing the layoff of current employees. TR at 539.

(8) Mr. Spiegel testified that the written evaluation was prepared during the May/June time frame. TR at 558.

(9)Complainant's exhibit #4 is the June 22, 1998, Supplemental Report of Inquiry and Recommendation. That report was prepared by the Acting Deputy Inspector General for Inspections. The report indicates Mr. Maini and Ms. Bateman attempted to dissuade Tenera management from rehiring the complainant. Complainant Exhibit #14 at 13. The organization charts contained in complainant's exhibit #9 indicate that Mr. Maini was the head of the Kaiser SETS Office and was a Tenera employee.

(10)Tony Miles testified at the hearing. He indicated that during 1998 he was considering submitting a bid to become a subcontractor. Mr. Miles testified that he discussed the proposal with Mr. Buhl. Mr. Miles indicates that Mr. Buhl was favorably inclined to the project. However, Mr. Miles testified that when he mentioned the complainant's name Mr. Buhl indicated that the complainant had "been engaged in a whistleblowing incident, and, he said that he would probably have some reluctance to bring a person like that into his company." TR at 243.

(11)There were four Kaiser organization charts included in complainant's Exhibit #10. The first is an overall organization chart for Kaiser. The second and third indicate the organization of two offices listed on the overall organization chart and mentioned in the text. The fourth is a lower level office which is not referred to in this decision. Two of the office organization charts are dated March 1, 1996. The other two organizational charts are undated but they appear to reflect the organization on March 1, 1996.

(12)It is difficult to elicit testimony that the HAC managers were aware of the negative feeling of other Kaiser employees toward the complainant because the HAC managers themselves would not recall a general comment that indicated euphemistically that the complainant was not a team player. Nevertheless, such a euphemism or code word would have led the HAC managers to form the opinion that the complainant should be placed under a higher level of scrutiny. Euphemisms/code words that have been seen in other cases include “insubordinate”, “dangerous” and “does not act in the best interest of the company”. People usually pick euphemisms/code words that are somewhat reasonable. Therefore, my impression is that the euphemisms/code words used in this case probably were more likely to have been along the lines of “he is a pain in the neck”, “he never listened to what I tell him”, “he is hard to get along with” and “he makes my life difficult”.

(13)In addition there was no testimony or documents indicating a basis for finding the complainant’s work was, in fact, technically unsatisfactory. In the last week of January nine of the EARMs were accepted after the requested changes were made. See the “approved by” date on the first ten pages of complainant exhibit #5. There was no basis presented to indicate specific technical errors in the complainant’s work nor was any testimony provided which indicated that the complainant’s work was less satisfactory than other Excalibur employees.

(14)Mr. Spears met with the complainant only two times before the complainant was removed from his lead position. Excalibur’s post hearing brief at 16.

(15)Mr. Burns testified that he received comments from the HAC managers regarding specific Excalibur engineers. TR at 500. Additionally, in its post hearing brief Excalibur indicates that Mr. Spears provided specific comments about the quality of work presented by Mr. Beaulieu. Post Hearing brief at 17.

(16)Mr. Spiegel testified that prior to the complainant’s dismissal, Excalibur moved Mr. Blumstein and Mr. Richards to other activities. TR at 563.

(17)The complainant need only establish that the HAC managers’ negative comments contributed to Excalibur’s decisions. In Osborne a supervisor convinced a disciplinary committee that the complainant was engaged in time card fraud. The committee had no retaliatory motive. However, the committee was manipulated into recommending dismissal by the false information provided by the supervisor. In that case the committee relied on the statements of the supervisor that the individual had committed time card fraud. In this case Excalibur’s senior management relied on the evaluations of the HAC managers. At the hearing in the Osborne case the committee members were convinced they had made an independent judgment. However, they were unable to explain why they believed the action of the complainant constituted time card fraud.