

Case No. VBH-0028

April 7, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Dr. Jiunn S. Yu

Date of Filing: July 2, 1999

Case Number: VBH-0028

This decision considers a Complaint filed by Dr. Jiunn S. Yu (Dr. Yu) against the Sandia Corporation (Sandia) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708.

I. Background

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (amended regulations) (definition of retaliation).

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. On March 15, 1999, DOE issued an 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).

Dr. Yu was employed by Sandia in various capacities from 1979 to March 30, 1995, when he was terminated by Sandia. On April 7, 1995, Dr. Yu filed a complaint under 10 C.F.R. Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In this complaint, Dr. Yu alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement.

The IG began an investigation of Dr. Yu's allegations. However, during the pendency of this investigation, DOE transferred most pending whistleblower investigations to this office. On May 12, 1999, OHA Director Breznay appointed an OHA investigator to complete the investigation of Dr. Yu's complaint. On July 2, 1999, the OHA investigator issued his Report of Investigation (the Report). The Report found that:

[T]he record strongly indicates that the Complainant disclosed to his Sandia Supervisor, Mr. Finnegan, and to other Sandia Officials on a number of occasions that there was a failure to fulfill a Quality Assurance

obligation to conduct on-site inspections of [Tiger Team Completed Actions]. . . . [H]is disclosure constituted a protected disclosure for the purposes of Part 708.

Report at 9. The Report further found that “the Complainant has met his burden of showing that his protected disclosures . . . were a contributing factor under the provisions of Part 708 to his March 30, 1995 termination from Sandia.” *Id.* at 10. Accordingly, the Report concluded that the Complainant had met his burden under 10 C.F.R. § 708.29. However, the Report did not reach a conclusion as to whether Sandia had met its burden of proving, by clear and convincing evidence, that it would have terminated Dr. Yu absent his protected disclosures.

On July 2, 1999, OHA received Dr. Yu's request for a hearing and I was appointed as the Hearing Officer. A hearing was held on December 7, 8, and 9, 1999, in Albuquerque, New Mexico, in which the testimony of 10 witnesses was taken under oath. On January 18, 2000, I closed the record of the present proceeding upon receipt of both parties' written closing arguments.

The present case arises in the context of DOE's increased efforts to address environmental, health and safety concerns. Admiral James Watkins, who served as the Secretary of Energy from 1991 through 1995, ordered “Tiger Teams” to conduct thorough and sweeping inspections of DOE facilities in order to find any environmental, health and safety problems. In 1991, a Tiger Team assessed Sandia National Laboratory (SNL) and found 561 deficiencies. Tr. at 59. Sandia consulted with DOE and agreed to a series of Corrective Action Plans (CAPs). Sandia agreed to implement these CAPs and then submit documentation to DOE to show that each CAP had been satisfactorily implemented. Sandia placed the responsibility for implementing and verifying each CAP with particular line organizations (Owners). Once an Owner completed a CAP, it was supposed to submit a proposed closure package to Sandia's Appraisal Management Office (AMO). Originally, the AMO was responsible for tracking CAPs and verifying that they were sufficiently documented before they were submitted to DOE for verification and closure. The purpose of the closure package was to document that the Owner had implemented the CAP.

During his final 30 months as a Sandia employee, Dr. Yu was employed as Quality Assurance Verifier in the AMO. Dr. Yu's role was to examine proposed closure packages to see if they sufficiently verified the completion of the CAP. If Dr. Yu was satisfied that the proposed package sufficiently documented the completion of a CAP, the CAP was finalized and sent to the DOE for final approval and closure.

II. Analysis

Under the DOE's Contractor Employee Protection Regulations, “the employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . as described under §708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employer by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure” 10 C.F.R. § 708.29.

Sandia has contended that Dr. Yu did not make any protected disclosures and therefore did not meet his burden of proof. However, the record clearly shows that Dr. Yu had made numerous protected disclosures during his final 10 months as a Sandia employee, including the protected disclosure discussed at length in the Report. For example, the record shows that:

- On June 21, 1994, Dr. Yu sent L. Jay Clise a five page summary of a 96 page package that Dr. Yu had previously submitted to Wendall Jones. This summary clearly expresses Dr. Yu's concern that his supervisor, Daniel Finnegan, had encouraged other Sandia employees to ignore the QA/QI [quality assurance/quality implementation] process.
- Dr. Yu's April 29, 1994 memorandum alleges that Sandia's Management Integration and Implementation Plan (the MIIP) was “mismanaged, confused abuses and manipulated and failed to delineate responsibility and accountability of QA management.”

- Daniel G. Pellegrino stated that during Dr. Yu's last year at Sandia, Dr. Yu would call him and express concerns that he did not feel he could close out Tiger Team Action items. Memorandum of September 23, 1996 interview of Daniel G. Pellegrino.
- A June 2, 1994 Memorandum of Record authored by L.J. Clise of Sandia's Audit Center indicates that Clise was aware of Dr. Yu's concerns that (1) he was not being provided with sufficient information to conduct his verifications, and (2) additional quality control measures were needed.
- In a memorandum dated April 29, 1994, entitled "Request for Help" Dr. Yu wrote Jim Martin, Finnegan's supervisor, informing him that problems with the QA/QI processes were "recurring in a wasteful/harmful pattern. . . ."
- On February 3, 1995, Dr. Yu wrote J. Tagnelia, one of Sandia's vice-presidents, claiming that: "[1] a more cost-effective compliance with requirements of 10 C.F.R. 830.120 and 830.310 would come only with an improved understanding that the 2 codes have mutually ensuring goals; and [2] A more time efficient conformance to guidelines of DOE 5700.6C and 5480.19 would come only with an improved understanding that the 2 orders have mutually enhancing objectives."
- A March 22, 1995 memo from John P. Dickey, Sandia's Ethics Director, to Dr. Yu indicates that Sandia's Audit Center had conducted a Special Management Review (SMR) to examine Sandia's authority to close corrective actions to Tiger Team findings at Dr. Yu's request.

Based on the foregoing, I find that Dr. Yu made numerous protected disclosures during the final 10 months of his employment at Sandia.

In most whistleblower cases, it is difficult or impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Therefore, Congress and the courts, recognizing this difficulty, have found that 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 personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993), citing *McDaid v. Department of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990); see also *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, the courts have found that "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F.2d at 148 (8th Cir. 1989).

Since Dr. Yu had made numerous protective disclosures during his final 10 months with Sandia, there was a temporal proximity between his protected disclosures and his termination. Moreover, it is clear that the Sandia managers who decided to terminate him had actual knowledge of this protected activity. I therefore find that he has shown by a preponderance of the evidence that his protected disclosures were a contributing factor to his March 30, 1995 termination by Sandia.

Accordingly, I find that Dr. Yu has met his burden under § 708.29, thereby shifting the burden to Sandia to prove by clear and convincing evidence that it would have taken the same actions without Dr. Yu's protected disclosures. However, I have also found that Sandia has clearly and convincingly proven that its termination of Dr. Yu was motivated by legitimate managerial considerations instead of a desire to retaliate against his protected disclosures. I am therefore denying Dr. Yu's complaint under 10 C.F.R. § 708.30(e).

Dr. Yu was obviously a highly motivated, principled, conscientious, and well intentioned employee. Dr. Yu was sincerely concerned about what he viewed as a weakening of Sandia's and the DOE's commitment to the Tiger Team process and to Total Quality Management principles. (1) The AMO hired Dr. Yu to improve the quality of the AMO's services and by the account of his first supervisor at the AMO, Richard Trager, and of the DOE Official who was then responsible for reviewing the quality of the CAPs submitted to DOE, was highly successful at this endeavor. Tr. at 304, 305. Apparently, prior to Dr. Yu's assignment to the AMO, the DOE was unhappy with the quality of the CAPs it was receiving from Sandia. Tr. at 294, 296. In fact the DOE had returned the majority of CAPs Sandia submitted to it finding that they had not been sufficiently documented. The record shows that Dr. Yu had succeeded in

significantly improving DOE's confidence in Sandia's ability to implement CAPs. Tr. at 296, 297.

However, in 1993, the contract with AT&T for the Management and Operation of Sandia National Laboratory terminated. AT&T was then replaced by a subsidiary of Lockheed Martin. Lockheed Martin brought in its own management team and Trager was replaced by Daniel P. Finnegan in early June 1993. Tr. at 538. Apparently there was friction between Dr. Yu and Finnegan from the very start of their relationship. After Finnegan succeeded Trager, he began implementing changes at the AMO. (2)

Dr. Yu was extremely concerned about these changes. As a verifier, Dr. Yu was in a difficult position. He was charged with verifying the accuracy of the CAP's documentation. If he had a concern about a CAP, he needed to be able to frankly communicate that concern to each Owner. Human nature suggests that, at least on some occasions, even the most tactfully and carefully worded negative feedback is less than welcome. As Trager testified:

I think every [corrective] action team owner was objected to the action because they had to work. [sic] So it was a pain in the tail. It was an extra stop. And some of them, they considered it irrelevant. . . . And so I don't know of an action - - of an owner that was happy. They were all unhappy.

Tr. at 294.

It is clear that Finnegan had less confidence in Dr. Yu's ability to manage this difficult role than Trager had. Moreover, the two men had fundamentally conflicting viewpoints concerning Dr. Yu's responsibilities and the functions of the AMO. Dr. Yu wished to continue functioning in the same manner that he had while under Trager's supervision. On the other hand, Finnegan maintained a different vision for the AMO.

For example, Finnegan's conception of Dr. Yu's role in the process differed significantly from that of Dr. Yu. Dr. Yu believed that in order to properly verify a proposed completion package, he often needed access to additional information, including information documenting other CAPs, the completion of which were necessary for the proper implementation of the CAP at issue.

Apparently, Finnegan began receiving complaints from owners who thought that Dr. Yu needed only to consider the information contained in the proposed CAP to determine whether it was adequate. Tr. at 545. Finnegan testified that he ordered Dr. Yu to confine his verification analysis to information contained in the proposed CAP. *Id.* Dr. Yu viewed this as an attempt to prevent him from finding deficiencies in the CAP packages, and an infringement upon the independence he needed to conduct his quality assurance process.

Finnegan also sought to have Dr. Yu give the line organizations written feedback reports on their proposed CAPs. In the past, Dr. Yu had usually supplied his feedback to the line organizations verbally. Tr. at 539. Dr. Yu, contending that preparing written feedback reports was wasteful, initially resisted this new requirement, but began preparing written feedback reports as requested by Finnegan. Dr. Yu claims that Finnegan's motivation for requiring written feedback reports was to retaliate against him for protected disclosures, by setting him up for failure. Tr. at 452.

Sandia contends that Finnegan began receiving complaints about Dr. Yu's written feedback to the line organizations. Sandia accurately claims that Dr. Yu's written feedback memos were often poorly written, poorly organized, and plagued by numerous misspellings. It is clear from the content of those feedback reports that appear in the record that Dr. Yu's written communication skills were poor. Moreover, on some occasions the content of these feedback reports could reasonably be interpreted by their recipients as abusive and personally offensive. It is not clear that this was Dr. Yu's intention.

Moreover, Finnegan testified that he was concerned that Dr. Yu, in conducting his verification process, was reviewing whether the CAPs were likely to mitigate the finding of deficiencies. Tr. at 541-43. Finnegan thought that Dr. Yu should confine his analysis to sufficiency of the owners' documentation that

the CAPs previously agreed upon by Sandia and DOE had been implemented. *Id.* Dr. Yu felt he should be free to express his concerns about the effectiveness of particular CAPs. Tr. at 543. These differences in opinion soon began to escalate and led to the events that cumulated in Dr. Yu's termination by Sandia on March 30, 1995.

On June 18, 1993, just weeks after Finnegan came to the AMO, Finnegan wrote Dr. Yu, stating in pertinent part:

Your review does not include a check of how adequately the corrective action addresses the milestone or finding, or how technically sound the corrective action appears to be. The corrected actions contained in the corrective action plan have previously been accepted by the auditing agency (e.g., DOE) as technically sound and adequate to properly address the corresponding milestone/finding. As 'owner' of the finding, the line organization has the responsibility to insure that the corrective action is technically correct and appropriate. If you have concerns about the technical quality of the corrective action or how well the corrective action addresses the corresponding milestone/finding, please note your comments to the owning line organization on a separate sheet of paper (distinct from your comments to the owning line organization) and forward to me for review and follow-up.

June 18, 1993, Memo from Finnegan to Dr. Yu. Dr. Yu testified that he did not obey this guidance because he felt it violated the independence of the quality assurance process mandated by DOE Order 5700.6C. Tr. at 357-64. On August 13, 1993, Finnegan sent another quite similar memo to Dr. Yu. Tr. at 544. Finnegan testified that Dr. Yu continued to comment to line organizations on the efficacy of the corrective actions. Tr. at 545.

Finnegan testified that in April of 1994, he reviewed a feedback report that Dr. Yu had prepared to send to Wayne Cox. Tr. at 553. Finnegan was concerned that the feedback report was too convoluted and that Cox would not understand it. *Id.* He instructed Dr. Yu not to send it to Cox, but Dr. Yu sent it to Cox anyway. Tr. at 554.

On April 29, 1994, Dr. Yu wrote Jim D. Martin, Sandia's Director of Site Operations, requesting his assistance in clarifying Dr. Yu's role in the quality assurance process. Tr. at 354, 356. On May 5, 1994, Dr. Yu, Finnegan and Martin met to discuss a list of ten concerns prepared by Dr. Yu. Tr. at 180. Among these ten concerns was Dr. Yu's assertion that he needed to be allowed access to all objective evidence associated with the corrective actions he was responsible for verifying. Tr. at 185. According to Dr. Yu, Martin's response to his concerns was to inform him that Finnegan was his supervisor and that he was required to follow Finnegan's directions. Tr. at 183. Dr. Yu felt that Martin was hostile to him at this meeting and attributed this hostility to Dr. Yu's assertion, at the meeting, that Finnegan and Martin did not understand his concerns because they had not been trained in quality assurance. Tr. at 185.

According to Dr. Yu, the April 29, 1994 request and the May 5th meeting between Dr. Yu, Finnegan and Martin provoked an angry response from Finnegan. Tr. at 180. Dr. Yu contends that the day after the meeting, May 6, 1994, Finnegan came into Dr. Yu's cubicle, "stared at me with extreme anger and said, 'You asked for it! You are cutting your own throat'" and then handed him a memo. May 9, 1994 Memorandum from Dr. Yu to Martin, Tr. at 180, 366. The record shows that on May 6, 1994, Finnegan wrote Dr. Yu a memo instructing him not to send out correspondence without having it first approved by Finnegan. Finnegan testified that the May 6th memorandum was motivated by Dr. Yu's transmission of the feedback report to Cox against Finnegan's orders. Tr. at 554. Dr. Yu felt, and still strongly feels, that Finnegan was trying to suppress his freedom of speech and had no right to review his correspondence. Tr. at 367. Dr. Yu further testified that he refused to abide by those instructions given in the May 6, 1994 memorandum which he felt violated DOE's quality assurance order. Tr. at 369.

On May 24, 1994 Finnegan wrote Dr. Yu a memo instructing him to make specific changes to several feedback reports. For example, Finnegan instructed Dr. Yu to:

- "Confine both your review and your comments on the Feedback report to an objective review of the

evidence as it supports or fails to support the corrective action called for in the corresponding milestone.” (Emphasis in the original).

- “Avoid any reference to the appropriateness of ownership or lack thereof.”
- “Avoid any reference to your not being permitted to review entire package or evidence previously submitted and accepted. Likewise, avoid any reference to individuals . . . not providing you with additional evidence you feel you need. As we have discussed several times, your responsibility is to conduct a review of new documentation submitted, not to review evidence previously reviewed and accepted.”
- “Avoid any reference to cost or budget as this is beyond the scope of your review.”
- “Avoid any reference to the SCARB (Sandia Corrective Action Review Board) as their activities are also beyond the scope of your review. If you have concerns with how the SCARB conducts its activities, I will be happy to discuss these with you. If the SCARB is acting inappropriately, I will certainly bring this to the attention of Jim Martin, the SCARB chair.”
- “Avoid using terms such as 'Owner's Overseeing Executive' or 'Owner's Supervising Executive.'”

Dr. Yu interpreted this memorandum as an attempt to discredit and destroy his quality assurance process. Tr. at 372. Dr. Yu chose to ignore those portions of this memo directing him to act in a manner he considered to be contrary to the spirit of DOE quality assurance orders. Tr. at 376-79, 563. Dr. Yu raised concerns to Sandia management about: (1) these limitations on his conduct, (2) the fact that that Sandia's verification process did not implement each of the ten quality assurance (QA) criteria set forth in DOE Order 5700.6C, and (3) the DOE's delegation to Sandia of the inspection authority for all but the highest priority CAPs. As a result, Martin requested that Sandia's Audit Services Department (Audit Services) conduct a Special Management Review (SMR) of the Tiger Team Corrective Action Verification Process. That review was promptly conducted and on June 1, 1994, Audit Services issued a report of the SMR's findings. Audit Services did not find that the delegation of inspection authority to Sandia violated any laws, rules or regulations. Audit Services also found that “DOE Order 5700.6C does not mandate the use of the ten QA criteria in every process.” SMR Report at 5. However, Audit Services found that:

The verifier [Dr. Yu] should be allowed access to all objective evidence associated with the corrective action. Milestones might be independent from each other, but they are not independent from the entire corrective action. As such, it may be necessary for the verifier to review evidence from prior milestones to determine the context of the corrective action and evaluate the action accordingly.

Id.

In August of 1994, Finnegan and Dr. Yu met to discuss the results of Dr. Yu's FY94 performance review. During this review, Dr. Yu was accused of repeatedly failing to follow directions provided by Sandia Management and was told to comply with these instructions in the future. Dr. Yu was also reminded that many of his feedback reports contained comments that were not pertinent and germane to his review process and was instructed to avoid such comments in the future.

On August 19, 1994, Finnegan again wrote to Dr. Yu, ordering him to restrict his comments in feedback reports to relevant and germane issues. Tr. at 583.

On October 6, 1994, Martin wrote to Finnegan complaining about the accusatory and judgmental tone of some of Dr. Yu's comments in a feedback report that Dr. Yu had written to Martin. Tr. at 589-90.

By early 1995, the relationship between Dr. Yu and his managers had deteriorated to an intolerable level. Dr. Yu obviously distrusted his managers. Nor did he harbor an abiding respect for his managers. Instead, he felt that their actions were illegal or immoral and refused to cooperate with them. Moreover, it appears that Dr. Yu developed an unprofessional attitude towards his managers and coworkers.

In January of 1995, Finnegan and Dr. Yu met to discuss the results of Dr. Yu's FY 1995 mid-year performance review. During this review, Dr. Yu was again accused of repeatedly failing to follow

directions provided by Sandia Management and was again told to comply with these instructions in the future. Dr. Yu was reminded again that many of his feedback reports contained comments that were not pertinent and germane to his review process and was again instructed to avoid such comments in the future.

On January 24, 1995, Dr. Yu sent an owner of a corrective action, Dick Fate, a feedback report which had been reviewed and approved by Finnegan. Tr. at 605. In February 1995, Finnegan received both a written complaint and a telephone call from Fate about this report. Tr. at 606. Fate contended that the feedback report was very derogatory and inflammatory, and contained unsubstantiated accusations. Tr. at 607. Finnegan discussed Fate's concerns with Dr. Yu, indicated that he would handle the matter, and instructed Dr. Yu to refrain from further contact with Fate. Tr. at 607. Soon thereafter, Dr. Yu telephoned Fate, in direct contravention of Finnegan's instructions. Tr. at 152, 153, 607. A lengthy and heated conversation between Dr. Yu and Fate ensued. Tr. at 146, 149. At the hearing, Fate testified that Dr. Yu treated him in a highly unprofessional manner. Tr. at 151.

On February 17, 1995, Dr. Yu prepared a follow-up feedback report to Fate. This two page memo contained a substantial amount of unprofessional invective. For example, this memo states:

I had by then concluded that you were as corrupt (i.e. absence of integrity, disregarding quality processes, contemptuous of laws, regulations, commitments, —, arrogant of your SNL authority, failure as a manger [sic] or leader, no respect for the individuals you think are "below you," and so on) as Mr. Blejwas , as I had painfully experienced last year.

February 17, 1995 Memorandum from Dr. Yu to Dick Fate at 2.

Apparently this communication was intercepted by Finnegan, who prevented its delivery to Fate. Tr. at 537, 608. On February 24, 1995, Finnegan wrote to Dr. Yu about this memo, stating in pertinent part:

Much of your Feedback memo is of concern to me, but the last two paragraphs are particularly disturbing. These two paragraphs in your feedback memo to Mr. Fate are not supportable, violate the guidelines for corrective action feedback, and are clearly contrary to acceptable standards for dealing with fellow employees. I will not tolerate the further publication or transmittal of such statements from this organization and I will not allow your Feedback memo to be forwarded to Mr. Fate.

February 24, 1995 Memorandum from Finnegan to Dr. Yu.

On February 25, 1995, Martin wrote Dr. Yu, stating in pertinent part:

[I]t appears that you have used on several recent occasions verbiage which I consider accusatory, rude and insulting in your Feedback to various corrective action owners. . . . I interpret some of your comments as accusations of deliberate malfeasance or misfeasance and thus tantamount to an accusation of criminal conduct. If you believe that any such managerial actions are deliberate malfeasance or misfeasance, then I insist that you take this information to the DOE Office of Inspector General. . . .

On March 3, 1995, Dr. Yu wrote Martin, informing him that "about 07:30 today, I told Mr. Finnegan that I would be sending [the February 17, 1995 Feedback Memo] to Mr. Fate unless he shows me the basis of his self-indulged SMA [Sandia Management Authority] to suppress Sandians' human rights to communicate." Later that day, Martin wrote Dr. Yu a memo in response reminding him that the Sandia Code of Conduct prohibits the use of insulting, abusive, or offensive language.

On March 7, 1995, Dr. Yu was instructed to use a specific automated form to track and conduct follow-up on pending corrective actions. Tr. at 614. Dr. Yu expressed resentment at having to use the automated form, which he considered unnecessary and redundant, and did not use it as instructed. Tr. at 423, 614-15. At the hearing, Dr. Yu testified that he thought that the adoption of the form "was a provocation to induce me into insubordination" since the information Dr. Yu was expected to put in the form was already

available though the SIMS. Tr. at 423.

On March 10, 1995, Dr. Yu was instructed to meet with Finnegan and Martin in order to discuss the results of his performance review. Dr. Yu attended the meeting but refused to stay and listen while Martin explained the contents of a Performance Action Plan (PAP) that had been developed for Dr. Yu by Sandia management. Tr. at 213-14. Dr. Yu compared this meeting to a “lynching.” Tr. at 214, 218.

On March 13, 1995, Dr. Yu was again instructed by Martin to review his PAP with Finnegan. Dr. Yu attended this meeting, but again refused to listen while Finnegan explained the PAP.

On March 15, 1995, Finnegan became aware that Dr. Yu had been regularly submitting feedback reports directly to line organizations against Finnegan’s orders and the provisions of his PAP. Dr. Yu informed his management that he refused to follow Finnegan’s directive requiring him to submit feedback reports to Finnegan for approval before distributing them to line organizations.

On March 21, 1995, Finnegan and Dr. Yu met to discuss Dr. Yu’s PAP. At this meeting, Dr. Yu refused to accept the terms and conditions of the PAP and stated that he intended to continue sending feedback reports directly to the line organization, and to continue using his own follow-up procedures instead of the automated system implemented by Finnegan.

On March 30, 1995, Dr. Yu was terminated by Sandia for insubordination.

Dr. Yu was extremely and unambiguously insubordinate. For example, Dr. Yu flagrantly disobeyed his supervisor’s orders to route his feedback reports through him. In April of 1994, Finnegan specifically prohibited Dr. Yu from sending a feedback report that Dr. Yu had prepared for Wayne Cox. Tr. at 553. Dr. Yu sent the feedback report anyway. Tr. at 554. Apparently this was not an isolated occurrence. The record shows that Dr. Yu sent a feedback report out on January 1, 1995, without routing it through Finnegan. Tr. at 603-04. On March 15, 1995, Finnegan became aware that Dr. Yu had been flagrantly disobeying his instructions to route feedback reports through him on a regular basis. Tr. at 621. As noted above, valid management reasons led Finnegan to require Dr. Yu to route his feedback reports through him. Finnegan had been receiving complaints about the feedback reports from owners, and the feedback reports contained in the record show that Dr. Yu had poor written communication skills and often did not exhibit sufficient tactfulness. Given these concerns, Finnegan was obviously justified in requiring Dr. Yu to submit feedback reports for his review.

On another occasion, in February of 1995, Finnegan specifically instructed Dr. Yu to refrain from contacting Dick Fate. Tr. at 605, 607. Clearly, Finnegan, as Dr. Yu’s manager, had a right to intercede in a personality conflict between his employee and one of his organization’s customers. Yet, Dr. Yu flagrantly violated Finnegan’s instructions by telephoning Fate soon thereafter. Tr. at 149, 607.

In March of 1995, Dr. Yu was ordered to use a specific automated form to track and conduct follow-up on pending corrective actions. Tr. at 614. It was clearly within the purview of Sandia management’s discretion to automate this tracking and control process. Yet Dr. Yu refused to comply with this order. Tr. at 423, 614-15.

Perhaps the most disturbing aspect of Dr. Yu’s insubordinate conduct involved the Personnel Action Plan (PAP) that Sandia Management had prepared for Dr. Yu. A PAP is an important device used in corporate personnel relations. PAPs are typically reserved for serious personnel problems. See [Eugene Dreger](#), OHA Case No. VBH-0021 (February 7, 2000). The PAP prepared by Sandia management was lengthy and comprehensive, but was also very reasonable in its terms. Yet, Dr. Yu refused to acknowledge or comply with the terms of his PAP. Tr. at 622-23.

Dr. Yu’s repeated failure to abide by the reasonable and legitimate instructions of his managers clearly constitute insubordination. It is well settled that “an employee’s insubordination towards supervisors and coworkers, even when engaged in a protected activity, is justification for termination.” *Kahn v. United*

States Secretary of Labor, 64 F.3d 271, 278 (7th Cir. 1995). Given Dr. Yu's continuing insubordination, Sandia was left with no other reasonable option but to terminate his employment.

Dr. Yu contends, however, that since Sandia was acting outside of its authority, he did not have to comply with Finnegan's and Martin's orders. Tr. at 360-67. This assertion is without merit. The DOE Contractor Employee Protections Program Regulation in effect at the time of Dr. Yu's termination did not provide Dr. Yu with the right to refuse to submit his feedback reports for his supervisor's review. Nor do they excuse his failure to acknowledge and comply with the terms of his PAP. The former 10 C.F.R. § 708.5(a)(3)(i) protects those employees who "refuse to participate in an activity, policy, or practice when, (i) such participation (A) constitutes a violation of a Federal health and safety law, or (B) causes the employee to have a reasonable apprehension of serious injury" Clearly, routing his feedback reports through his supervisor and acknowledging and complying with the terms of his PAP would not have violated Federal law. Nor would it have placed him in harm's way. Instead, routing his feedback reports through his supervisor was a reasonable request on the part of Sandia management. After all, as Dr. Yu's supervisor, Finnegan was responsible for maintaining the quality of the AMO's output while preserving a good working relationship with the owners.

Dr. Yu also attempts to evade responsibility for his misconduct by attributing it to an unspecified mental condition which he claims was caused by Sandia's harassment. However, Dr. Yu failed to offer any evidence other than his own testimony in support of this assertion. In the absence of expert medical testimony in support of this theory of causation, I am disinclined to grant it any weight.

Dr. Yu also claims that Sandia management deliberately provoked his insubordination. Tr. at 124. However, he has failed to explain or support this theory and I find it is not supported by any evidence in the record. Moreover, while Part 708 protects employees from retaliation for protected activity, it does not excuse intolerable conduct on the part of an employee.

Even if an employer retaliates against an employee for making a protected disclosure, an employee should conduct himself in a professional manner. It is well settled that whistleblower laws are not meant to protect employees from their own misconduct. *Carr v. Social Security Administration*, 185 F.3d 1318, 1325 (Fed. Cir. 1999); *see also, Watson v. Department of Justice*, 64 F.3d 1524, 1527 n.3 (Fed. Cir. 1995) (citing cases for the proposition that whistleblowing does not shield employees who engage in wrongful conduct); *Marano v. Department of Justice*, 2 F.3d 1137, 1142 n. 5 (Fed. Cir. 1993) (whistleblower protection laws are not intended to protect employees from the consequences of their own misconduct). Therefore, even if Sandia had "provoked" Dr. Yu, he should still be held accountable for his subsequent actions. Accordingly, I find that Sandia has clearly and convincingly shown that it would have terminated the employment of Dr. Yu even if he had not made protective disclosures.

III. Conclusion

Dr. Yu's decision to ignore his managers' reasonable instructions provided Sandia with good cause to terminate him. Accordingly, I find that the Sandia Corporation has proven by clear and convincing evidence that it would have terminated Dr. Jiunn S. Yu without his protected disclosures.

It Is Therefore Ordered That:

- (1) The Complaint filed by Jiunn S. Yu against the Sandia Corporation, on July 2, 1999, Case No. VBH-0028, is hereby denied.
- (2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: April 7, 2000

(1) It is clear that Dr. Yu's disappointment in Sandia's response to his concerns led him to lose respect for some of his managers. Dr. Yu obviously believed that his managers lacked the moral authority to give him binding directions. It is also clear that Dr. Yu sincerely believed that there were improper motives behind some of Sandia management's decisions that affected him. Dr. Yu appropriately elevated these concerns up his line of command, to Sandia's legal department, to Sandia's ombudsman, and to Sandia's Human Resource Department. Dr. Yu was obviously disappointed in these organizations' responses to his concerns. (In the case of the caustic response provided by Sandia's legal department, quite justifiably so).

(2) Apparently, as a result of a number of factors, the emphasis on the Tiger Team Corrective Actions was somewhat reduced around this time as well.