

July 15, 2002
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY
Hearing Officer Decision

Name of Petitioner: Ronald D. White

Date of Filing: October 27, 2000

Case Number: VBH-0068

This Decision involves a complaint filed by Ronald D. White (White or “Complainant”) under the Department of Energy (DOE) Contractor Employee Protection Program, codified at 10 C.F.R. Part 708. Complainant is a former employee of a DOE contractor, Midwest Research Institute (the contractor or MRI), the management and operating contractor of DOE’s National Renewable Energy Laboratory (NREL), located in Golden, Colorado. According to White, the contractor made him the subject of reprisals because he made protected disclosures to DOE and the contractor in January 1999 and May 2000. In his complaint, White alleges that the contractor then took negative personnel actions against him, culminating in his dismissal in August 2000. On the basis of the hearing that was conducted and the record before me, I have concluded that White is not entitled to relief under 10 C.F.R. Part 708.

I. Background

A. The Contractor Employee Protection Program

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

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. The regulations provide, in pertinent part, that a DOE contractor may not retaliate against any employee because that employee has disclosed to a DOE official or to a DOE contractor, information that the employee reasonably believes to evidence, among other things, a substantial violation of a law, rule, or regulation. *See* 10 C.F.R. §§ 708.5 (a)(1). Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE. In response to such a complaint, the employee is entitled to an investigation by an investigator appointed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. §§ 708.21-.23. After the investigator's report on the complaint is issued, an OHA Hearing Officer will generally conduct an independent fact-finding and evidentiary hearing. 10 C.F.R. §§ 708.24-.25. The Hearing Officer will issue a formal, written opinion on the complaint. 10 C.F.R. § 708.31. Finally, a party may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. § 708.32.

B. The Present Proceeding

1. Procedural History

On October 27, 2000, White filed a complaint with the Office of Hearings and Appeals, requesting an investigation and hearing. The OHA Director appointed an investigator and on May 21, 2001, the investigator issued a report setting forth the results of her investigation of the complaint. *See Report of Investigation*, VBI-0068 (May 21, 2001). The investigator found that White made a protected disclosure, and that proximity in time between the disclosure and the initiation of the alleged negative personnel action raised a Part 708 inference that the protected disclosure was a contributing factor to the alleged retaliation. However, according to the investigation, the contractor also demonstrated a reasonable basis for dismissing the complainant and demonstrated that it followed its normal procedures for terminating an employee. Nonetheless, the investigator was unable to conclude that the contractor met its burden of proving by clear and convincing evidence that it would have dismissed White despite his protected disclosures.

On May 21, 2001, I was appointed hearing officer in this case. The parties participated in discovery, and the hearing was held from February 25 through February 28, 2002 in Denver, Colorado. I received the transcript of the hearing on March 21, 2002, thereby closing the record in this case. Sixteen witnesses testified at the hearing, one via videotaped deposition. The individual presented 80 exhibits, and the contractor presented 225 exhibits. The official transcript of that hearing shall be cited as "Tr." and pertinent documents, received into evidence as hearing exhibits, cited as "Ex."

2. Factual Overview

Ronald Dee White received a bachelor's degree from Texas Christian University (TCU) in 1969 and a Masters Degree from TCU in 1970. Tr. at 46. From 1976 to 1980, he was an energy economist at the Federal Energy Administration (predecessor of DOE), and then spent one year as an energy economist at the US Agency for International Development (US AID). Exhibit K; Tr. at 46-47. White then became Assistant Commissioner of Agriculture for Regulatory

Programs in Texas from 1982 to 1984. After leaving that position, he formed a consulting group specializing in rural energy in developing countries. In December 1990 he joined the Solar Energy Research Institute (SERI), predecessor to NREL, as an international market analyst, a position he held until his termination in August 2000. Tr. at 47.

a. Early NREL Career (1990-1997)

White was first employed by SERI in 1990 as an international market analyst, tasked to perform basic economic analysis of the market conditions for renewable energy technologies. Tr. at 50. White's performance appraisals were satisfactory through 1992 and did not note any significant problems. Ex. A-C. However, in late 1992, White delivered a draft report four months late and then repeatedly missed commitments to deliver the final report (the APEC Compendium). Ex. 3. White promised a final draft by January 1993 so that the APEC Compendium could be issued in February; however he had not submitted his input as of February 3, 1993. *Id.* NREL staffers and DOE employees in Washington, DC then requested that White be removed from his position as editor of the APEC Compendium. Ex. C, Tr. at 244-246. In 1993, White began to report to Walter Short, a branch manager. White's appraisal for calendar year 1993, signed by Short, stated that White needed "immediate improvement" in completing projects and that White needed to improve relationships with the NREL Washington, DC office because those relationships had "gradually deteriorated." Ex. C. Notwithstanding this appraisal, White received a satisfactory rating and a raise. In May 1994, White asked for a promotion but Short refused, instead advising White that he should "start delivering a solid performance at [White's] current grade level." Ex. 6. In June 1994, White and Short agreed to have more formal and frequent performance reviews. Ex. 9. In August 1994, White missed a deadline to review country profiles. Ex. 10-12. Nonetheless, White's calendar year 1994 appraisal stated that White had a successful year. Ex. D. In that appraisal, White agreed to a developmental objective to produce a "significant, quality NREL technical report" in 1995. *Id.*

During 1995, White and a few other employees created NREL's international program in order to allow NREL to maximize international opportunities. In July 1995, White was detailed to the World Bank (Bank), i.e. NREL continued to pay his salary while he worked at the Bank. Tr. at 51. Short testified that he believed the assignment to be a good fit for White because it involved skills like imparting knowledge of renewable energy to World Bank officials, something White was very good at, but did not require a written product. Tr. at 1167. White continued to report to Short officially, but reported on an informal basis to a senior colleague in Washington, Sam Baldwin. Tr. at 51. White traveled with World Bank teams to develop renewable energy projects for World Bank funding. Tr. at 52. At the Bank, White was nominated for a staff "Excellence Award" for his work on photovoltaic energy. Tr. at 377, 665, 842.

On January 8, 1996, Bob Westby, a contractor manager, sent Short an email recognizing White's invaluable assistance at the Bank and explaining how White's activities helped NREL and its subcontractors. Ex. P. In February 1996, Bob Westby became White's manager as the result of a reorganization at MRI. However, Westby soon found White to be unresponsive to his requests for information about White's assignment. Westby testified that in 1996 he repeatedly requested

that White submit performance objectives, but never received them. Tr. at 531. White testified that he submitted the performance objectives through a senior colleague, Sam Baldwin. Tr. at 376. Neither Westby or Short ever received a major report from White regarding his Bank detail. ¹ Tr. at 400, 1172.

b. NREL Career After World Bank Assignment (1997-1999)

In August 1997, the World Bank assignment concluded and White returned to NREL where he was placed on overhead until a funded project could be located for him. Tr. at 257. He began reporting to Barbara Goodman, MRI Director, in October 1997, and his team leader at that time was Roger Taylor. Tr. at 659, 1200. Taylor was White's first level supervisor and managed White's daily activities. White began to work on some proposals for energy projects in the Philippines. Tr. at 53.

In September 1998, US AID authorized a project, developed by White and his colleagues, to be funded at \$1.4 million from December 1998 to December 2000. Ex. 29, Tr. at 56. The project, Philippines Renewable Energy Project (PREP), was designed for US AID in Manila to assist the country's rural electrification program. Tr. at 56, Ex. 29. This occurred at the same time that White again began to report to Bob Westby, Center Director, who had responsibility for the international program then and was his manager throughout the remainder of his tenure at NREL. Tr. at 55. PREP consisted of approximately 10 tasks, and White was responsible for the market assessment task. White testified that PREP was NREL's first attempt to develop a comprehensive program for a country for rural electrification. Tr. at 57. Roger Taylor was the PREP project manager and very well versed in White's work. Tr. at 60. Westby, on the other hand, testified that he did not understand White's work and Taylor testified that Westby was not very interested in PREP. Tr. at 402.

While working on the PREP project, White made the first of his alleged disclosures. In December, 1998, White received an email that he believed described the misuse of funds on the Technology Cooperation Agreement Pilot Program (TCAPP) and PREP projects. Ex. V. White suspected that staff members were using money from TCAPP to begin PREP activities before the PREP funding was allocated.² On January 6, 1999, White called the DOE Office of Inspector General (IG) hotline and complained of the possible misuse of funds. Tr. at 68-69.

On January 13, 1999, Barbara Goodman held an offsite meeting regarding the performance of the employees in her group. The managers that reported to her, including Walter Short, Roger Taylor and Bob Westby, attended this meeting. Tr. at 1200. During the meeting, Goodman asked each manager to describe the strengths and weaknesses of their subordinates, and then all

¹ White testified that he published a professional paper while at the Bank. Tr. at 370.

² TCAPP was initiated in August 1997 as a mechanism to implement Article 4.5 of the Framework Convention on Climate Change. DOE, AID, and the Environmental Protection Agency support TCAPP. TCAPP focuses attention and effort on achieving technology transfer from the US to developing countries. Tr. at 67, Ex. 31. NREL implements TCAPP for DOE.

of the managers present ranked that employee according to the work that the employee actually produced, without regard for the employee's current job title. Tr. at 1203, Ex. 35. If the managers ranked an employee in a lower position than that employee's current job, that employee was identified by the group as possibly needing a performance plan. Tr. at 1205. As described below, the managers identified White as having performance problems. At the meeting, White was rated a "3" (fully satisfactory) as a Senior Project Leader Program Manager 1; however, his actual job title was Senior International Market Analyst, a higher-level position. Tr. at 1218, Ex. X. The managers commented that White needed to focus on tangible results and "send the message without sending the irritation," a reference to his sometimes rocky relationships with colleagues. Ex. 35, Tr. at 1204. The minutes of the meeting identified White as possibly needing a performance plan. Ex. 35. Taylor reviewed White's 1998 appraisal with White in early 1999, and advised White to "focus on tangible results due to perceived deficiencies in submitting deliverables." Ex. X, Tr. at 732.

White turned in a PREP work plan on February 1, 1999, earlier than the other PREP staff. Tr. at 495. White's task was Task One, and it was approved in March 1999 on his first trip to Manila, in the amount of \$250,000, the highest level of funding for all of the PREP tasks.

On March 2, 1999, the IG informed DOE's Golden Field Office of the complaint about the possible misuse of funds in the PREP and TCAPP programs and asked Golden to take appropriate action. Tr. at 343, Ex. 37. On March 12, 1999, Westby convened a meeting of the PREP and TCAPP staff in order to discuss project funding. Ex. 39. Taylor suspected that White made the complaint, and testified that at some point he told Westby of his suspicions. Tr. at 693. On March 15, 1999, Westby met with Chris Leavitt, Acting Director of Human Resources, and discussed White's performance problems. Tr. at 969-971, Ex. Z.

c. Initiation of the Informal Corrective Action Plan (CAP) (April 1999-May 2000)

On April 27, 1999, White met with Westby and Taylor at Westby's request. Ex. 44. Westby asked White to meet with him every other week for four months and present a one-page summary of specific performance objectives with deliverables and timelines. This document would become part of White's performance self-assessment. Westby considered this an "informal corrective action plan," but never specifically labeled the meetings as such in any conversation or correspondence with White or Taylor.³ Tr. at 699. Taylor testified that he thought the meetings were established to enable a new manager (Westby) to learn about the work of a subordinate. Tr. at 699. Taylor also said that Westby never directly announced in the meetings that White's performance was an issue. Tr. at 724. Three of White's deliverables and his work plan were submitted ahead of schedule in 1999. Tr. at 12.

³ The informal CAP is the negative personnel action described in White's whistleblower complaint.

White performed well in the PREP project in 1999. During 1999, White traveled to the Philippines for PREP three to four times for approximately three to four weeks at a time. Tr. at 674. White often helped out when customers visited NREL in Colorado by arranging ad hoc tours and meetings at DOE's request. Tr. at 676, Ex. KKK. During all of the time that White worked on PREP, his customer (the government of the Philippines) never complained about his work. Tr. at 456. In fact, the customer provided favorable feedback on White's work on PREP. Ex. 88. There is no evidence that White missed any major deliverables from December 1998 through most of 1999. In fact, on December 1, 1999, Westby was prepared to reduce the frequency of the regular meetings from bi-monthly to monthly. Ex. NN.

However, problems with timeliness arose later that month. On December 21, 1999, Kelli Anderson asked White and several of his colleagues to provide input to her in early January for her use in compiling an AID Quarterly Report. Ex. 58. Anderson was the administrative assistant to Ron Benioff, the manager responsible for coordinating the report, a quarterly report of progress on AID projects. Deposition of Ron Benioff at 57, Tr. at 456. Each employee was to submit a paragraph or two summarizing their progress on AID projects for the past quarter. *Id.* at 60. NREL was delinquent in producing these required reports for AID, and had been requested to begin submitting the reports on a regular basis. Deposition of Ron Benioff at 58. White did not submit his input in January.

White also began to demonstrate defiance of his manager's requests. On February 3, 2000, Westby asked White to provide a progress report on all of his scheduled deliverables by the end of the following day. Ex. 61. On February 4, White sent Westby and Human Resources an e-mail stating that his computer had crashed and that he had no access to his files. That evening, the computer was repaired and White promised to work on the report the following day, a Saturday, prior to a trip to the Philippines. Ex. 62. White failed to submit the report prior to leaving for, and even after his arrival in Manila. Westby had not received the document by February 14, and sent White a fax in the Philippines asking for its submission. Ex. 63.

White continued to exhibit the procrastination that marked his early NREL career. Anderson asked White again for his input to the AID Quarterly Report on February 14th. On February 17th, Westby asked White to send his material to Anderson. Ex. 63. On February 20th, White told Westby that Ron Benioff had not contacted White about the report, even though White knew that Anderson reported to Benioff. *Id.* On March 17, 2000, White sent an email to Anderson asking her for a schedule of 2000 due dates for input to the Quarterly Report and a description of the format for that input. Ex. 85. On April 19, 2000, Anderson repeated her request for White's input for the Report by May 5, 2002. White asked Anderson again on April 24 for a schedule and she responded the same day. *Id.*

In White's performance appraisal for calendar year 1999, Westby noted that White failed to meet two deliverable deadlines in December 1999 and that White needed improvement in working relationships. Ex. XXX. Westby rated White as a "2" (needs improvement). White then wrote to Westby's manager and complained that Westby was retaliating against him. White also requested that NREL retain a mediator to investigate and mediate the dispute. Ex. TT.

d. Progression to a Formal Corrective Action Plan and Termination (May-August 2000)

Not only did White miss the May 5 deadline for the Quarterly Report input, he also did not respond to Anderson's request until after May 15. By way of explanation, White wrote in an email to Westby that he had requested a schedule of report input dates from Anderson in March 2000 in order to plan his work, but never received such a schedule. Ex. 85. White stated that this "was a problem waiting to happen." *Id.*

Chris Leavitt, then Acting Director of Human Resources, began sitting in on the meetings with Westby in May 2000 after Roger Taylor, White's team leader, declined to attend further, and she testified that White often challenged Westby's directions to White. Tr. at 975-977, 1006, 1046. Taylor had attended the meetings from April 1999 to May 2000. Tr. at 696. However, Taylor testified that the meetings became unproductive and he stopped attending in May 2000 when it became clear to him that the meetings were not being used to communicate the substance of White's work but rather seemed punitive in nature. Tr. at 701, 743. Taylor informed Westby that he no longer desired to be a team leader if that position required Taylor to participate in meetings that Taylor viewed as unproductive and subjected White to a higher level of scrutiny than other employees. Ex. BBB. The meetings became increasingly tense and White advised Human Resources that he disapproved of Westby's management style and that Westby was trying to intimidate White. Ex. 75. Westby also expressed displeasure with White in the meetings, at one point leaving a meeting abruptly. Ex. LLL.

On May 17, 2000, Westby's manager, Jon Pietruszkiewicz, denied White's request for mediation, stating that it was not NREL's policy to provide outside mediation for disputes that could be resolved "with existing resources, policies and procedures." Ex. 92. He informed White that he would be placed under a formal corrective action plan, which White received on May 22. Ex. AAA. At the end of 60 days, NREL management planned to assess his performance and determine what further action would be required. Ex. AAA. Judy Marshall, new Director of Human Resources, refused to meet with White to discuss his formal corrective action plan or allegations of retaliation. Tr. at 1138.

White again procrastinated in meeting deadlines for submitting a written report. On May 22, he committed to submit the AID Quarterly Report information to Anderson on May 23 by close of business. However, by May 24th, Anderson had not received the requested input from White. Ex. 97.

White made allegations of retaliation during a meeting with the Golden Field Office on June 1, 2000. Ex. 109. Westby sent White a Written Reprimand for missing a meeting that was scheduled for that day. Ex. DDD. During a subsequent performance meeting, White committed to producing a deliverable for Westby on Wednesday, July 5, 2000. Ex. 114. He did not meet that deadline. Instead, in a July 5th email, White explained to Westby that White missed the deadline because White's personal computer failed on Thursday, June 29. *Id.* White stated that after visiting Westby's office on June 29 and finding that Westby was absent, White did not

know how to get in touch with Westby. Ex. 114. White sent the deliverable to Westby on July 10. *Id.*

On August 8, 2000, White was terminated. Ex. 64. He filed a complaint with OHA on October 27, 2000, and requested an investigation followed by a hearing. Ex. MMM. OHA investigated the case and issued a report on May 21, 2001. The report of investigation (ROI) concluded that White made a protected disclosure, that the protected disclosure was a contributing factor to his dismissal, and that the contractor had a reasonable basis for dismissing White. Ex. NNN. The investigator was not, however, able to find clear and convincing evidence that NREL would have dismissed White in spite of his protected disclosures. *Id.*

II. Legal Standards Governing This Case

A. The Complainant's Burden

The regulations describe the burdens of proof in a whistleblower proceeding as follows:

The complainant shall have the burden of establishing by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant. Once the complainant has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure, participation, or refusal.

10 C.F.R. § 708.9 (d); *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (*Sorri*). “Preponderance of the evidence” is 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 Hopkins v. Price Waterhouse*, 737 F.Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th ed. 1992). As a result, White has the burden of proving by evidence sufficient to “tilt the scales” in his favor that he disclosed information which he believed evidenced a substantial violation of a law, rule, or regulation. 10 C.F.R. § 708.5(a)(1). If the complainant does not meet this threshold burden, he has failed to make a prima facie case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a *contributing factor* in the personnel actions taken against him, in this case the imposition of an informal corrective action plan that culminated in his termination in August 2000. 10 C.F.R. § 708.29; *see Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying “contributing factor” test). Temporal proximity is sufficient to establish the final required element in a prima facie case of retaliation. *See Sorri*, 23 DOE ¶ 87,503 (1993); *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). *See also* ROI at 3-4.

B. The Contractor's Burden

If White makes a prima facie case, the regulations require NREL to prove by “clear and

convincing” evidence that the company would have terminated White even if he had not made protected disclosures. “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 NREL has met its burden, I will consider: (1) the strength of the contractor’s evidence in support of its decision to terminate White; and (2) any evidence that the contractor takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *See Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (quoting *Geyer v. Dep’t of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff’d*, 116 F.3d 1497 (Fed. Cir. 1997)) (*Carr*).

III. Analysis

I have carefully reviewed the record in this proceeding, including the testimony of the witnesses at the hearing and the exhibits submitted into evidence by both parties. For the reasons set forth below, I find that although White made a disclosure that is protected under 10 C.F.R. § 708.5(a)(1), and that disclosure was a contributing factor in an adverse personnel action taken against him, MRI has proven by clear and convincing evidence that it would have taken the same action absent the complainant’s disclosure.

A. The Alleged Protected Disclosures

In his complaint, White alleges that he made four protected disclosures to DOE. The first disclosure was White’s telephone call to the IG Hotline on January 6, 1999, reporting possible misuse of funds in the PREP and TCAPP projects. The three additional disclosures are: (2) a complaint to NREL that an NREL employee had intentionally undermined Complainant’s efforts to obtain funding from the United Nations Development Program for a project in the Philippines; (3) a May 3, 1999 complaint to NREL that a colleague tried to subvert White’s efforts to hire a summer intern; and (4) a March 22, 2000, response to a performance appraisal that White alleged was a form of retaliation against him for making the May 1999 disclosures. Ex. 88, Ex. EE. Counsel for NREL did not dispute the fact that Disclosure 1 (the IG complaint) is protected under Part 708. Prehearing Statement of NREL at 2 (February 20, 2002). To make a prima facie case of retaliation, White need only show one disclosure that was protected under Part 708. *See Janet L. Westbrook*, 28 DOE ¶ 87,018 (2001). I therefore find that White has met his threshold showing under Part 708 that he engaged in an activity protected under Part 708.⁴

B. White’s Disclosures Were a Contributing Factor in His Termination

A finding of “temporal proximity,” i.e., a finding that “the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action,” is sufficient to show that a protected disclosure was a contributing factor in a personnel action. *See Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993) citing *McDaid v. Department of Hous. and Urban Dev.*, 90

⁴ NREL argued that the other three alleged disclosures are not protected activities under Part 708 and I agree. There is no evidence that they allege or demonstrate what White believed to be a substantial violation of a law, rule or regulation. 10 C.F.R. Section 708.5(a)(1).

FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

White made the complaint to the DOE IG on January 6, 1999. The IG sent NREL a letter advising NREL of the complaint on March 2, 1999. NREL asked Westby to investigate, since he was the manager in charge of TCAPP and PREP. Tr. at 419. On March 10, 1999, Westby informed his staff that he would hold a meeting about the complaint on March 12, 1999. Taylor testified that he sent White an email from his personal email account stating that management was very upset about the IG complaint. Tr. at 695

Westby, the manager responsible for putting White on the informal corrective action plan, denies actual or constructive knowledge of the disclosure to the IG prior to placing White on the informal corrective action plan on April 27, 1999. In fact, Westby stated during his deposition that he discovered White was the source of the complaint only after White's termination in August 2000. Tr. at 438. However, there is evidence in the record to dispute this statement and Westby's testimony that he was unaware of any IG involvement. Tr. at 445. Westby's testimony on when he learned that White was the source of disclosures conflicts with the testimony of other witnesses. At the hearing Westby was not clear about the time when he actually found out that White was responsible for the complaint. Tr. at 438-445. There was also evidence in the record that other employees had discussed White as the possible source of the complaint. Taylor quickly suspected that White was the source of the IG complaint, and testified that he informed Westby of his suspicion "at some point." Tr. at 694. White's former manager Walter Short testified that he learned of the complaint around 1999 from Westby, prior to the time that Westby claims he learned that White was the source of the disclosure. Tr. at 1175-1177, 1196. Westby's manager testified at his deposition that he told Westby that White was the source in May 2000, well before White was terminated. Deposition of Jon Pietruszkiewicz at 17-19, 66-68. Finally, Judy Marshall, MRI Director of Human Resources, testified that she discussed the complaint and allegations of retaliation with Westby prior to White's termination. Tr. at 1130.

I find temporal proximity between White's disclosure in January 1999 about the alleged misuse of funds in the TCAPP and PREP projects and the initiation of the informal CAP in April 1999. The disclosures occurred within six months of the date when Westby began the informal CAP. *See, e.g., Frank E. Isbill*, 27 DOE ¶ 87,513 (1999) (six months between disclosure and alleged retaliatory action); *Barbara Nabb*, 27 DOE ¶ 87,519 (1999) (eight months); *Russell Marler*, 27 DOE ¶ 87,506 (1998) (three months to four years). This temporal proximity gives rise to a Part 708 inference that the January 1999 disclosure was a contributing factor in the negative personnel action that NREL took against White in April 1999, i.e., placing him on an informal corrective action plan.

Based on the above, I find that White has established a prima facie case that his protected disclosure was a contributing factor to the alleged retaliatory action. The burden now shifts to NREL to prove by clear and convincing evidence that it would have terminated White despite his protected disclosures.

C. Evidence That NREL Would Have Taken The Same Action Against White Absent His Protected Disclosure

NREL argues that it would have terminated White despite his disclosures to DOE employees based on: (1) his history of performance problems; and (2) his poor working relationships with co-workers. After reviewing the record, I find that the contractor has shown by clear and convincing evidence that it would have terminated White notwithstanding his protected disclosures.

(1) Evidence in Support of Complainant's Termination

NREL argues that White was terminated because of (1) a history of performance problems and (2) poor working relationships with colleagues. I agree with the DOE investigator that NREL has presented credible evidence to support its argument that White was terminated because of a history of performance problems. Ex. NNN (ROI) at 4. However, NREL's argument that the termination was justified by White's poor working relationships is not persuasive, and is countered by credible evidence that White was generally well regarded by his peers and by some managers. Because the first argument is substantiated, as explained below, I need not reach the arguments NREL puts forth regarding White's relationships with his co-workers.

a. Timeliness and Production of Deliverables

Based on a review of the record and my observations during four days of testimony, it is clear that White was an experienced, capable economist with a creative approach to his work and a flair for working with his counterparts in developing countries. White ably promoted his projects and NREL's mission in the developing world. White's PREP customer, the government of the Philippines, never complained about his work, and he was able to broker some important projects in the Philippines while working for NREL. Even Westby acknowledged the creativity of White's work and his value to NREL. Tr. at 539. However, it is also clear that as much as White loved certain aspects of his job (i.e., making deals, creating projects, visiting counterparts in foreign countries, meeting people), White disliked and avoided other aspects, especially writing about his job and producing the deliverables requested by his manager. In December 1998 he found himself reporting to a manager who, based on past experience as White's supervisor, demanded that White produce tangible results of his work in the field on a regular basis.

White's problem with timeliness first became evident in the record in late 1992 when he missed an important due date that was reported to his then manager, Walter Short. White delivered a draft late, and repeatedly missed a deadline on the paper that was to be presented at a conference. This was reflected in a comment on the complainant's 1993 performance appraisal

⁵ I note that the Notice of Termination never determined that White failed to comply with Requirement 6, the requirement to follow NREL's policies and procedures in resolving workplace concerns. Ex. III.

that he needed “immediate improvement” in his deliverables. Short testified that White never finished a major written project for a client during the time that White worked for Short, from late 1992 through 1995. Tr. at 1162. In a staffing analysis, White’s second level manager Tom Bath wrote that from 1992 to 1994, White was not assigned to “any projects with long-term milestones because of a history of inability to deal with project planning and the completion of deliverables.” Ex. 27. Bath continued that White had not completed any major reports or publications from 1990 to 1994. *Id.* Short testified that he identified these performance problems and tried to work them out informally with White and Bath. Tr. at 1179. Short also testified that White made an effort to improve, and Short gave White a performance objective in 1995 to complete a major technical paper. Ex. D. However, White was assigned to the World Bank in August 1995. Short testified that White did not resolve the performance problem--the World Bank assignment did not require the delivery of a tangible product. Tr. at 1180-1183. White never produced a major project paper, thus not meeting his 1995 performance objectives. Ex. D.

While still at the Bank, White began to report to Westby in February 1996. Westby testified that he asked White repeatedly for updated performance objectives and White never delivered them, thus putting Westby on alert for potential performance problems.⁶ There is evidence in the record, however, that White did send performance objectives to Westby.⁷ First, there is a brief memo from White describing his performance goals that was sent to Sam Baldwin (White’s informal supervisor while working at the Bank) in 1997 for his review, and Baldwin testified that the memo was probably sent to Westby also. Ex. Q, R. Second, the record contains a memo in June 1996 entitled “Brief Overview of Past Activities and Proposed Plan for 1997.” I also note that in the memo White states “Bob [Westby] has asked for my performance goals *again*,” and notes that he (White) is at fault for not engaging his management in discussions about his performance goals. *Id.* Thus, White acknowledges that Westby asked for the information more than once, and that White should have actively pursued the topic with Westby.

After White returned from the World Bank assignment in August 1997, his reviews were satisfactory. His 1998 appraisal noted, however, that he “needs to focus on tangible results (reports, workshops, subcontracts).” Ex. X. Problems with timeliness were noted in the manager’s meeting on January 13, 1999, but these problems do not appear in the record again until later in 1999. In fact, in February 1999, White was the first of his colleagues to submit his PREP Work Plan. Further, Westby himself testified that White had not missed any deliverable deadlines from the time Westby began supervising White in December 1998, to March 15, 1999, the date of Westby’s meeting with Chris Leavitt, Acting Director of Human Resources, to

⁶Westby admitted that he did not properly manage White during his World Bank assignment because he did not correct this problem when he encountered it in 1996. Tr. at 53. Instead of confronting White and attempting to resolve this problem informally, Westby took a formal, inflexible approach and used White’s unresponsiveness in 1996 (along with the consensus at the 1999 manager’s meeting that White may have needed a performance plan) as the basis for the informal CAP--without White even knowing that his performance was at issue.

⁷ Performance objectives are professional goals for the next performance appraisal period.

discuss White's performance problems. Tr. at 434-437. Westby admitted during the hearing that he placed White on an informal corrective action plan based solely on White's history of performance problems, not based on anything Westby had observed since becoming White's manager again in December 1998. Tr. at 435.

Despite regular performance meetings with Westby, White missed key deadlines for deliverables in 2000. In early February, White missed a deadline for submitting a progress report to Westby, explaining that his computer had crashed on the due date of the report. White did not reply to repeated requests from Anderson in early 2000 to submit input for the AID Report, even after Westby intervened. See Section I.B.2.c., *supra*. In fact, on February 20th White wrote Westby that he was surprised to hear from Westby because Ron Benioff (Anderson's manager) had never contacted White about the report. White wrote "If I knew what was wanted and what the reporting schedule is, this would not happen." Ex. 58.

Notwithstanding the previous statement, White was late again with input for the next AID Quarterly report. Ex. 85. On April 19, 2000, Anderson asked White and his colleagues for input by the close of business on May 5, 2000. Ex. 85. Despite several reminders, White had not submitted his input by May 24. *Id.* White's actions demonstrate his cavalier attitude toward a reasonable workplace request. Even after Anderson gave White the information he had asked for, he thumbed his nose at her request by refusing to respond to her until ten days after the deadline, and then failed to send the data by May 23 as he had promised. Ex. 85. NREL could not remain a viable entity if all of its employees adopted White's contempt for deadlines. His uncooperative behavior justified Westby's next step in the progressive discipline, which was to place White on a formal CAP on May 22, 2000. That document stated, in pertinent part:

You are to inform me, prior to its deadline, when you will need to miss a deliverable. In addition, you are to include with such communication an acceptable justification and a date certain for the completion of the deliverable. This recognizes that the nature of your work may reasonably require adjustments in deliverables and deadlines.

Ex. AAA. Rather than attempt to comply with this condition, which does not appear unreasonable, White challenged its language and used this as an excuse for missing deadlines during the 60-day period that the CAP was in force. Even though this passage is unambiguous, he testified at the hearing that the words "acceptable justification," and "date certain" are "vague" and "likely to cause problems in complying with [the CAP], in terms of dealing with Bob Westby over deliverables...." Tr. at 208. This displays an uncooperative nature and supports NREL's contention that White did not accept Westby's direction.

Even in the face of formal notification that his performance was deficient, White ignored the requirements of the formal CAP. He continued to ignore deadlines and set forth weak excuses for not doing his job. For example, on May 24th, Ron Benioff left a voice mail message for Westby stating that he and Anderson continued to have difficulty in getting the AID data from White, and that requests for input turned into "heated dialog." In response to Westby's inquiry

about the delays, White replied that for two months he had been trying to get an answer to his request for a schedule and format. He characterized Benioff's phone call as "rude" and stated:

I have no problem with your asking me to have something to Ron/Kelli by the time I leave work tonight. I am sorry that you had to do it, however. . . . If Ron had responded to my March 21 email in anything like a timely fashion, he could have avoided being rude to a colleague, he could have avoided the misuse of your time on this matter, and he could have had the proper information for his deliverable to AID on time. But he did not. . . . As you can see I did my dead level best to avoid this result.

Ex. 85.

White's performance continued to deteriorate in 2000 and he became more brazen in ignoring the CAP requirements. He missed another important deadline the following month – a deliverable that he promised to Westby on June 30. White testified that his hard drive failed on June 29. On Wednesday, July 5, Westby again asked White to send him the deliverable and to leave a voice mail on its completion, and said he would follow up with White on his return to the office on Monday, July 10. However, White showed his disdain for Westby's direction when he replied via email on July 5 that "any fair person who was here in the last few days would have concluded that I was focused on the task and doing all that was humanly possible to meet the delivery deadline." *Id.* He emailed Westby on July 10 that he would submit the document that day. Ex. FFF. At the hearing, White explained his failure to follow Westby's direction as follows:

Q. Why didn't you leave the voice mail on July 5?

A. Well, because I knew that he wouldn't be back until Monday, and there wasn't

any point in leaving three or four emails with pieces of messages of pieces of

information. That by Sunday I knew that we'd have a report for him, and tell him the bad

news, but tell him the whole story. . . .

Tr. at 162. This exchange reveals White's attitude toward taking Westby's direction and his attitude toward the CAP. White simply refused to do what Westby asked him to do. He clearly did not take the terms of the CAP seriously because he continued to miss deadlines without notifying Westby in advance. Rather than follow Westby's instructions and notify Westby before July 5 that a date would slip, White waited until the deadline to even communicate with Westby. Despite this, White insisted that he was doing everything possible to make his deadline. That is not credible--he did not attempt to recreate the report from memory or existing documents, he did not attempt to renegotiate the deadline, and he never left a voicemail relating the status of his project.

The record supports the NREL argument that White was terminated because of performance problems. White seems to have made minimal effort to meet his manager's demands after being placed on a formal CAP in May 2000. Even assuming, *arguendo*, that White did not know that he was on an informal CAP in April 1999, he should have realized that Westby had a more than passing interest in the reports that Westby requested at the biweekly meetings. Most employees in White's situation would have completed the assignments in order to comply with the CAP and avoid any negative repercussions. Even Taylor, who was very supportive of White, stated that White could have produced the reports, but did not want to. Ex. NNN (ROI) at 9. Rather, White argued with Westby during the performance meetings about the meaning of Westby's memos and whether or not he was required to produce these reports. Tr. at 977-978.

At the hearing, White rationalized his non-performance by blaming his manager, other employees, and his personal computer for his late submissions. When White missed AID deadlines, he blamed Anderson and Benioff for not providing him with a schedule, even though Anderson had done so in April. When he did not meet his February 4, 2000 or July 5, 2000 due dates, he blamed a hard drive failure. I do not doubt that White's hard drive failed on February 4 and June 29. However, an employee on the 35th day of a 60-day formal CAP should have gone to great lengths to turn in the report on time. See *Eugene J. Dreger*, 27 DOE ¶ 87,549 (2000) (upholding the credibility of a performance plan despite whistleblower's refusal to comply with its terms). Since his computer had crashed in February, by June he should have learned the importance of having backup data. In addition, White had almost a week to complete the July report after he found out that his computer had crashed--further evidence of the level of procrastination in his work. Finally, it is ludicrous to attribute his failure to submit a progress report to his lack of a schedule or format. He could have asked another colleague who contributed to the AID Report what format they used, and then submit something similar. When questioned about placing the blame for missing two deadlines on a computer failure, White testified:

A. It's true that I had a Toshiba computer, and that there's a class-action suit against Toshiba for the machines' failure. And I did have, in fact, documented failures of that machine.

Q. So do you believe that somehow, your inability to comply with item 2 of the formal corrective action plan was caused by the fact that you had a crummy Toshiba computer?

A. That was an issue from time to time. It certainly was.

Q. Well, the fact that you didn't like your Toshiba computer didn't prevent you from contacting Mr. Westby by telephone, though, did it?

A. You are correct that I could have contacted him by telephone. My commonsense

judgment led me to believe I should notify him before he came back.

Tr. at 214. White's behavior in this incident does not display "commonsense judgment," and the record shows that he did not comply with the formal CAP. In an email message, White complained of Westby's "hostile and prejudiced reaction to the AID Quarterly report and hard drive failure." Ex. 129. Westby was justified in having a negative reaction to this parade of weak excuses and failure to take his direction. Therefore, I find that the evidence supports NREL's argument that White did not produce deliverables in a timely manner.

b. Conclusion

NREL management identified problems with White's timeliness and production of work as early as 1993. The record also contains evidence, set forth above, that White's relationship with his manager verged on insubordination. These problems improved for a while, but then worsened in 2000, even after formal notification that his performance was under scrutiny. Based on this record, which shows White's repeated failure to meet key deadlines, produce timely deliverables, and take direction from his manager, I find that NREL was justified in terminating White.

(2) Evidence That NREL Followed Its Normal Termination Procedures

In order to ascertain whether NREL has presented clear and convincing evidence that White was terminated despite his protected disclosure, I have examined whether there is evidence that NREL followed its customary termination procedures. I find substantial evidence in the record to support NREL's argument that it followed standard procedure in terminating White.

White's termination was preceded by many discussions that included the director of the laboratory, human resources personnel, and legal personnel. Tr. at 984. NREL's termination procedure, which was extensively described in the ROI, is as follows: the employee is placed on an informal CAP, followed by a formal CAP, culminating in a termination if the conditions of the formal CAP are not met. Ex. NNN (ROI) at 10. The contractor submitted for the record 13 formal CAPs issued between 1997 and 2002, and I reviewed each document.⁸ Nine are 60-day plans, two are 90-day plans and two are less than 45 days. Ex. 143. In each example, the employee's manager, the employee, a human resources (HR) representative, and team leader signed the formal CAPs. Five dealt with the issue of timeliness and four dealt with interactions with co-workers. Each formal CAP required regular meetings and a review at the end of a specified time period with HR, the employee and his or her manager.⁹

White's termination followed the steps set forth above. He was given 60 days to improve, and nine of the 13 CAPs also had 60-day terms. In addition, based on my review, NREL regularly

⁸ NREL's Director of Human Resources (HR) testified that each year three to five employees are on formal CAPs. Tr. at 975.

⁹ The terms of White's formal CAP appeared to be reasonable. Ex. AAA.

dealt with problems of employee timeliness by placing those employees on a CAP. Five of the 13 CAPs dealt with the issue of timeliness, thus supporting NREL's contention that placing White on a CAP was a normal personnel procedure when faced with a performance problem. I do, however, find an abnormality in White's case as regards the informal CAP. Both White and Taylor testified that they were not aware that White's performance was an issue when Westby started the regular meetings in April 1999. Although this does not taint the entire termination process, it is not an effective way to manage an employee with a performance problem. Westby should have been forthright and informed White from the start that his performance was not up to par. Notwithstanding this omission, the terms of the informal CAP were clear and White knew that his performance was an issue months prior to the implementation of the formal CAP.

NREL also presented evidence on the terminations of other employees.¹⁰ The Director of HR testified that there was at least one termination per year at NREL. Tr. at 983. Three termination notices, with formal 60-day CAPs attached, are in evidence. Ex. 142. Each of these notices is similar to the termination notice, with attachments, that White received. However, two aspects of White's termination are troubling: (1) the refusal of the contractor's personnel managers to meet with White regarding his allegation of retaliation, and (2) NREL's initial denial of White's request for mediation.

Judy Marshall, the new HR Director in June 2000, refused to meet with White regarding his CAP because she felt that her role was merely to monitor the discipline and termination process, not to question the decision to place White on a CAP. Tr. at 1110.¹¹ Marshall and other HR officials testified that they had no knowledge of White's retaliation claim until the summer of 2000. Tr. at 1116. At that time, the Human Resources Department did not investigate the allegation of retaliation, or examine how Westby disciplined other employees in his group. Tr. at 996. The HR officials stated that because they considered White's performance problems to be substantiated, they did not investigate the retaliation claim further. Tr. at 1038-1040.

White requested mediation in his dispute with Westby in March 2000. Westby's manager denied the request in May 2000.¹² White then made a complaint of retaliation to DOE's Golden Field Office under the DOE Employee Concerns Program (ECP) on June 1, 2000. Ex. 109. The Golden Field Office referred the concern to NREL to ensure that NREL utilized informal dispute resolution prior to engaging in the ECP process. *Id.* DOE was aware of NREL's refusal to mediate, and reminded NREL that DOE favors informal means of resolving workplace disputes. *Id.* In July 2000, NREL replied that there was an ongoing investigation into White's concern at

¹⁰ According to the testimony of Chris Leavitt, Director of HR, terminations were rare because most employees on a formal CAP either improved their performance or resigned from NREL. Tr. at 1039.

¹¹ Marshall joined NREL in June 2000, and was only employed there for ten weeks. Tr. at 1107-1108.

¹² NREL declined to mediate for two reasons: (1) company policy that mediation is not appropriate for performance problems, and (2) an internal decision that NREL had expended sufficient resources on the White case. Deposition of Jon Pietruszkiewicz at 23, Ex. 000.

the time of his complaint and that the investigation was still active. Ex. 116. NREL further stated that its management determined the need for mediation on a case-by-case basis, and asked for time to pursue its internal process. Ex. 116. Nonetheless, NREL did make a last minute attempt at pursuing mediation. On August 4, 2000 (four days prior to White's termination), the contractor initiated a teleconference between NREL legal, NREL human resources, a representative from the DOE Golden Field Office, and the DOE Headquarters Office of Dispute Resolution in order to determine whether any aspects of White's termination could be reviewed by an outside mediator. Ex. JJJ at 2. The participants ended the conversation "with a general recognition that Mr. White's termination would be performance based and that there were no aspects of the termination appropriate for intervention by an external mediator." *Id.*

I find that NREL followed its standard procedures regarding White's termination. The record contains documentation on the contractor's disciplinary procedures and sample CAPs and termination notices. After following the normal process and denying White's initial request for mediation, NREL contacted DOE immediately prior to termination in order to determine whether any part of the termination process could be mediated. DOE personnel appear to have concurred with the decision that no aspects of the termination process were appropriate for mediation. Ex. JJJ. This information, coupled with testimony at the hearing and other evidence already in the record, supports the contractor's action in terminating White.

(3) NREL's Treatment of Similarly Situated Employees

In addition to proving that NREL followed its standard procedures in terminating White, the contractor must also show that it did not discriminate against White for making a protected disclosure to the IG in January 1999. After reviewing the record, I find that NREL has presented credible evidence that White was not singled out for discipline and termination due to his whistleblowing. White, on the other hand, did not offer any substantiated evidence that NREL treated him differently than similarly situated employees. The definition of a "similarly situated employee" is key to my finding in this case.

It is clear from the record that many of White's colleagues submitted at least one, and often more than one, late deliverable. Ex. MM, QQ. However, only White was disciplined, only White was terminated, and most important, only White was a whistleblower. In fact, White is the only employee that Westby has ever put on a performance plan or terminated while he was a manager at NREL. Tr. at.568-569. These facts require me to closely scrutinize the contractor's historic treatment of similarly situated employees who were not whistleblowers. *See Robert Burd*, 28 DOE ¶ 87,017 (2001).

NREL argues that it would have terminated White in spite of his protected disclosures. White, however, contends that other employees also submitted their deliverables late and that those employees were not disciplined or terminated. He has presented evidence that other PREP staff members (namely Peter Lilienthal, Roger Taylor, Laura Vimmerstedt, Ralph Overend, Paul Denne and Gary Nakarado) submitted late deliverables and were not disciplined, let alone

terminated.¹³ Ex. 73. Moreover, there is evidence in the record that management had recognized that employees other than White had a problem with timeliness. For instance, Westby and his manager complained that Nakarado was not responsive or timely while on a special assignment. The notes of the 1999 manager's meeting stated that Devon Heckman, Blair Sweezy and Gary Nakarado also had problems with timeliness. Ex. 35, Tr. at 632. Taylor testified that he often did not submit his reports on time, and that his work would not hold up to the scrutiny Westby applied to White. White argues that he was treated differently and placed on the informal CAP as retaliation for making a protective disclosure.

There are, however, marked differences in the overall performance of these employees when compared with White. Sweezy and Lilienthal, for instance, were ranked as top performers who were also identified at the managers meeting as ready for promotion. Taylor was a team leader. Sweezy submitted some reports late, but he was the leading developer of products (analyses) and completed a significant number of quality documents that have been placed on NREL's website. Tr. at 1172. White, on the other hand, did not produce any major reports in his first seven years at NREL, and completed few, if any, during his final three years there. The other PREP employees were not singled out at the managers meeting as performance problems.

To be considered similarly situated, it must be shown that the conduct and circumstances surrounding the conduct of the comparison employees are similar to those of the disciplined individual. *See Carr*, 185 F.3d at 1324. *See also Robert Burd*, 28 DOE Para. 87,017 (2001). In the instant case, I find that White's conduct is dissimilar to the conduct of the comparison employees. There is no evidence in the record that other employees had such pronounced problems with timeliness. *See Yunus v. Department of Veterans Affairs*, 242 F.2d 1367, 1372 (Fed. Cir. 2001) (holding that employees are not similarly situated if there is not evidence of a similar level of culpability on the part of both individuals); *Padron v. BellSouth Communications*, 196 F.Supp.2d 1250 (S.D. Fl. 2002) (holding that under Florida Whistleblower Act the quantity and quality of the comparator's misconduct must be nearly identical to prevent courts from second-guessing employers reasonable decisions). The record shows that White repeatedly missed deadlines even after being formally notified that management was monitoring his performance. *See* Section III.C.1.a., *supra*. This indicates to me a lack of professionalism on White's part that is reckless and verges on insubordination. White's problems with timeliness were first identified in 1993, and are well documented over the next seven years. The record contains numerous examples of his flagrant disregard for reasonable requests. White's testimony at the hearing regarding his performance vis-à-vis that of his colleagues is enlightening:

Q. Sir, as you sit here today, do you believe that any deficiencies in your own

¹³ The opinion in the *Carr* case states that employees with different supervisors or in a different chain of command are not similarly situated. *See Carr*, 185 F.3d at 1326. However, even though Westby testified that he was not responsible for the evaluations of all members of PREP, I have included them all in this analysis because Westby was responsible for the project. Tr. at 501-502.

performance played any role whatsoever in the decision to terminate you?

A. In the sense that they provided a pretext for this, yes, they did. In the sense that the things that they found as deficient in my performance could have been found in the performance of everybody else in the building – you see my point.

Q. So it's your point that each of the items that we've talked about, about deficient performance, were pretext to cover up the true scheme to retaliate against you.

A. Yes. In general, I think that's true. I'm not trying to say that there were no problems with me not meeting deliverables or something like that. What I'm saying is that if you look at the performance of my peers, you would find similar – had they been placed under this sort of an ever-tightening noose around my neck, that their performance frankly would have been a lot like mine, if they lasted that long.

Tr. at 360-361. I do not agree with White. As set forth above, I have examined the performance of his peers, and there are obvious differences. Nowhere in the record did I observe any other employee who exhibited a similar level of tardiness, nonchalance in the face of progressive discipline, or outright refusal to take direction from a manager. One of the key factors that influenced my decision that White was not similarly situated to any of his colleagues was the minutes of the January 13, 1999 performance review meeting. Ex. 35. Out of over 100 employees under the supervision of Barbara Goodman, only two were identified at the meeting as possibly needing a performance plan – and White was one of the two so identified.¹⁴ Tr. at 1211. This supports NREL's argument that White's termination was not related to his protected disclosure. NREL managers had identified his performance problems and placed him in a different category than his colleagues, based on that performance, well before NREL was notified of the complaint in March 1999. Those problems had become so severe by August 2000 that his dismissal was inevitable. In conclusion, I find that NREL has presented clear and convincing evidence that it would have terminated White despite his protected disclosure.

IV. Conclusion

After reviewing the record, I find that the respondent contractor has met its burden of proving by clear and convincing evidence that it would have taken negative personnel actions against White, culminating in his termination, despite White's whistleblowing activity. It is true that White was

¹⁴ The other employee later resigned from NREL.

a whistleblower, and to his credit was outspoken when he perceived an alleged unethical, wasteful, or irregular activity being performed with the taxpayer's money. It also is clear that Westby placed a high priority on receiving reports that White simply considered irrelevant to his work. However, Westby was not unreasonable in requesting these deliverables, and in many documented instances White refused to take Westby's direction. Even though White made a protected disclosure to DOE officials, his termination was a reasonable business decision based on White's non-compliance with a formal corrective action plan. White did not prove that he was treated differently because of his whistleblowing activity. Rather, White did not meet the terms of the formal corrective action plan, and NREL's decision to terminate him after notice and an opportunity to improve his performance was in my view clearly warranted. Accordingly, I will deny White's request for relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

- (1) The Request for Relief filed by Ronald D. White under 10 C.F.R. Part 708 is hereby denied.
- (2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within 15 days of its receipt, a Notice of Appeal is filed requesting review of the Initial Agency Decision by the Director of the Office of Hearings and Appeals with the Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0107, telephone number (202) 287-1566, fax number (202) 287-1415.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: July 15, 2002