June 25, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Elaine M. Blakely

Date of Filing: September 30, 2002

Case Number: VBH-0086

This Decision involves a whistleblower complaint that Elaine M. Blakely filed under the Department of Energy's (DOE) Contractor Employee Protection Program. From 1986 to April 2002, Ms. Blakely was employed at the DOE's Fernald, Ohio site, most recently by Fluor Fernald, Inc. (FFI). Ms. Blakely alleges that FFI management retaliated against her for activity protected under the DOE Contractor Employee Protection Program.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

B. Procedural History

On February 21, 2001, Ms. Blakely filed a complaint with the Manager of DOE's Ohio Field Office (DOE/OFO). In that complaint, Ms. Blakely alleged that she had made a safety-related disclosure to FFI in September 1998, that this disclosure was protected under Part 708, and that in retaliation for the disclosure, FFI assigned her in March 1999 to a different project at the site. On March 14, 2002, the DOE/OFO manager dismissed Ms. Blakely's complaint for lack of jurisdiction, noting that Ms. Blakely did not file the complaint until 23 months after the alleged retaliation. *See* 10 C.F.R. § 708.14 ("You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation."). Ms. Blakely appealed the dismissal of her

complaint to the Director of DOE's Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18. The OHA Director denied Ms. Blakely's appeal on April 3, 2002.

On April 4, 2002, FFI laid off Ms. Blakely, along with 60 other FFI employees, as part of ongoing downsizing at the Fernald site. On April 9, 2002, Ms. Blakely filed a new Part 708 complaint with the Manager of DOE/OFO, alleging that her termination was a retaliatory action. She claims she was terminated "because I challenged the safety basis for the Waste Pits Remedial Action (WPRAP); I requested the Office of Inspector General to investigate; and I filed a previous 10 CFR 708 complaint for retaliation." Administrative Record of Investigative File, VBI-0086 (hereinafter "AR") at 14. DOE/OFO forwarded this complaint to the OHA, and the OHA Director appointed a staff attorney to investigate the complaint. After the investigator issued his report on September 30, 2002, the OHA Director appointed me as hearing officer in this case. I convened a hearing held at Cincinnati, Ohio, on December 10-12, 2002. The OHA received post-hearing submissions from the parties and closed the record on March 27, 2003.

II. Analysis

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." *Id.* Accordingly, in the present case, if Ms. Blakely establishes that a protected disclosure, participation, or refusal was a factor contributing to her termination, she is entitled to relief unless FFI convinces me that it would have terminated her even if she had not engaged in any activity protected under Part 708.

After considering the record established by the parties' submissions and the testimony presented at the hearing, for the reasons stated below I find that Ms. Blakely engaged in protected activity under Part 708 beginning in October 2000 with communications to her employer and the DOE Office of Inspector General (DOE/IG), and continuing with the filing of her first Part 708 complaint in February 2001. However, I have concluded that Ms. Blakely has not met the burden of proving by a preponderance of the evidence that her protected activities contributed to her termination. Even assuming that Ms. Blakely's protected activities contributed to her termination, I find that FFI has shown by clear and convincing evidence that it would have terminated Ms. Blakely absent those activities.

A. Whether Ms. Blakely Engaged in Activity Protected Under 10 C.F.R. § 708.5

Ms. Blakely alleges in her present complaint that she was terminated "because I challenged the safety basis for the Waste Pits Remedial Action (WPRAP); I requested the Office of Inspector General to investigate; and I filed a previous 10 CFR 708 complaint for retaliation." Letter from Elaine M. Blakely to Susan Brechbill, DOE/OFO (April 9, 2002).[1]

The Part 708 regulations states that the following conduct by an contractor employee is protected from reprisal by his employer:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--
>
> (1) A substantial violation of a law, rule, or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or

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1. The report of investigation in this case stated, *inter alia*, that because "the complaint that Blakely filed in February 2001 was dismissed," the "only issue to be considered in this investigation is whether the termination of Blakely's employment in April 2002 was retaliation for her pursuit of a Part 708 claim." Report of Investigation (ROI) at 2 & n.1. The investigation therefore did not consider whether the termination was retaliation for her earlier alleged protected activities, i.e. her disclosures related to WPRAP in September 1998 and her disclosures to the DOE Inspector General, which took place in the fall of 2000.

   I believe the investigation framed the issue in this case too narrowly. Clearly, the fact that Ms. Blakely's February 2001 complaint was dismissed as time-barred precludes her from raising in a new complaint allegations of retaliation that formed the basis of her earlier complaint. For example, as Ms. Blakely was barred in February 2001 from complaining of her March 1999 transfer, she surely is barred from raising the same issue in her April 2002 complaint now before this office. Thus, I agree with the investigation's finding that the only allegation of retaliation not time-barred is her termination. However, while the regulations clearly bar allegations of retaliation that occur more than 90 days before the filing of a complaint, they just as clearly do not bar allegations of protected conduct, no matter when they occurred, so long as they are alleged to have contributed to a retaliatory action taken within the 90 days preceding the filing of the complaint. Thus, I determined prior to the hearing that Ms. Blakely should be allowed to argue that protected conduct aside from the filing of her February 2001 complaint were contributing factors in Fluor Fernald's decision to terminate her. Electronic Mail from Steven Goering, OHA, to Mark Sucher, FFI, and Elaine Blakely (November 21, 2002).

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

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

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

10 C.F.R. § 708.5.

1. Disclosures Prior to October 2000

I will first examine evidence of disclosures that predate Ms. Blakely's later communications with DOE/IG and her employer in October 2000, the protected status of which will be discussed further below. I find that Ms. Blakely has not proven by a preponderance of the evidence that these earlier disclosures constitute activity protected under Part 708. Ms. Blakely refers to a number of documents in an attempt to prove that she engaged in activity protected under Part 708 when she "challenged the WPRAP safety basis." Complainant's Post-Hearing Brief at 1-3. However, only one of them predates her October 2000 disclosures.[2] This document is a handwritten note to the WPRAP project manager, Bob Fellman, dated October 9, 1998, "Re: Revised Hazard Category Calculations submitted for blue sheet review on 10/09/98." It states:

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2. Ms. Blakely indicated prior to the hearing in this matter that some documentary evidence of her disclosures might be missing. "I did assemble several 'safety basis development' files so someone could recreate the thought process from the [sic] pre-Sept. 18, 2002. However, the record which I left was altered by the Records Custodian, by his own admission. Whether those documents survived his editing of the Administrative Record or not, I do not know." Electronic Mail from Elaine Blakely to Steven Goering, OHA (November 25, 2002).

FFI argues that Ms. Blakely's allegation regarding "editing of the Administrative Record" by an FFI records custodian is "unfounded and should be disregarded. First, Ms. Blakely never identified a single specific document that she believed to be missing. Second, Ms. Blakely never requested the production of any such records so that she could review them. Third, her own exhibits include the exchange of e-mail messages involving Ms. Blakely and the records custodian that demonstrates the lack of foundation for her allegation. In this exchange, the records custodian makes it clear that he destroyed only duplicate copies of certain documents. Where he had a question about whether the documents should be in the record, *he returned the documents to Ms. Blakely for review*. Fourth, Ms. Blakely's exhibits also include an evaluation by the OFO (in response to Ms. Blakely's OIG complaint) concluding that the Fluor Fernald records custodians complied with applicable procedures. There is no basis for Ms. Blakely's implication in her OIG complaint and at various points during the hearing that there would be written documentation supporting her allegations but for some misconduct by other Fluor Fernald personnel. Indeed, Thurle Moss indicated in his testimony that six boxes of records left behind in WPRAP by Ms. Blakely were available for review, but Ms. Blakely made no request to review the documents." Respondent's Post-Hearing Brief at 5 (citations omitted).

I agree with FFI. Ms. Blakely may not escape her burden of proof in this proceeding by making unsubstantiated allegations of improper document destruction.

> I regret that I cannot support you in this matter. I have asked you not to put me in a position where I would be compelled to disobey a direct order. I understand that by not supporting you in this review, I am placing my almost 12 years of employment at the Fernald site in jeopardy.
>
> I cannot act contrary to my conscience. I have faith that my actions are the right actions to take in this matter.

Respondent's Exhibit R.

There is simply nothing in this cryptic communication that one could reasonably believe reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. This note is therefore not a disclosure protected under Part 708.

Ms. Blakely acknowledges that there is "little in writing to document that I challenged [the WPRAP safety basis]; my discussions with Mr. Fellman were verbal, there were one or two hand-written notes from me to him." Electronic Mail from Elaine Blakely to Steven Goering, OHA (November 25, 2002). Thus, the complainant points to Mr. Fellman's hearing testimony to support her contention that she made a protected disclosure. Complainant's Post-Hearing Brief at 2. However, Mr. Fellman's recollection of Ms. Blakely's communication is similarly devoid of any information the disclosure of which is protected under Part 708:

> A My recollection of this is that you stated either that you had moral or ethical objections and that is as far as it went, that for whatever those reasons were, you could not participate any further in the activities that we had now embarked upon using Doug Daniels as well as that database, which had been basically signed off on -- at least in my opinion, and I think there is a document somewhere on that, but anyway, the deal is, yes, you told me that you had ethical or -- I don't remember the words -- moral objection.
>
> Q You don't recall if I had explained them.
>
> A You did not explain them to my recollection.
>
> Q And did you ask for an explanation?
>
> A No.

Transcript of Hearing (hereinafter "Tr.") at 298.

Ms. Blakely also cites the testimony of another FFI manager to whom she reported at WPRAP, Thurle Moss. Complainant's Post-Hearing Brief at 2. However, Mr. Moss's testimony merely confirms that Ms. Blakely never explained in any more detail the basis for the concern set forth in the October 9, 1998 handwritten note quoted above. Tr. at 755.

Thus, while there is evidence that Ms. Blakely raised "moral or ethical objections" to participation on the WPRAP project, there is no evidence that she ever specified what those objections were in a way that could possibly bring her disclosures under the protection of 10 C.F.R. § 708.5.[3]

As such, Ms. Blakely has not met her burden to prove by a preponderance of the evidence that she made any disclosures related to WPRAP, or engaged in any other activity protected under Part 708, prior to her communications to DOE/IG and FFI management beginning in October 2000, which I will address next.

2. Disclosures Beginning in October 2000

On October 24, 2000, Ms. Blakely sent a memorandum to FFI management, a copy of which she provided to DOE/IG on October 25, 2000. In this memorandum, Ms. Blakely's disclosures begin to focus specifically on questions of safety at WPRAP, and thus move into territory protected under Part 708. For example, the memorandum contains the following:

> In September 1998, I withdrew my support for completion of the safety basis documentation because I considered the direction [of] the Project, Safety Analysis Team, and Independent Safety Review Committee to be inconsistent with my knowledge of the waste pit material characteristics, my best judgement as a mechanical engineer, and my best judgement as a safety analyst.
>
> . . . .
>
> I knew that if I was correct, then the Project would have continuing problems with safety issues. There would be nonconformance reports, incident reports, change proposals and project delays. These would not be immediate problems, but appear as the project progressed. These events have since occurred and are a matter of record.

Memorandum from Elaine Blakely to Lynn Macenko (October 24, 2000). FFI contends that this disclosure "still fails to articulate information that discloses a reasonable belief that one of the specified problems listed in Section 708.5(a) had occurred." Respondent's Post-Hearing Brief at 14.

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3. In its post-hearing brief, FFI notes two other written communications not cited by the complainant. Respondent's Post-Hearing Brief at 12-13. The first is a document authored by Ms. Blakely and dated February 9, 2000. In it, she relates that she "withdrew as the designated project engineer for safety analysis in September 1998 because, in my opinion, the WPRAP Project Manager and Engineering Manager expected me to perform and support activities [that] I considered unethical." Complainant's Exhibit 1. The second is a July 18, 2000 electronic mail authored by Ms. Blakely, in which she contends that "WPRAP released me because I would not support an activity I considered unethical. . . . I had become a continuous reminder that someone knowledgeable in safety analysis did not approve of the direction the project was taking with respect to establishing their safety basis." *Id.* I agree with FFI that neither of these communications reveals the type of information required to make them protected disclosures under Part 708. While both mention safety in general, neither reveals a "substantial and specific danger to employees or to public health or safety." 10 C.F.R. § 708.5.

I find the above disclosure protected under Part 708. While the statements in her memorandum are general in nature, they must be understood in context. The purpose of WPRAP is to remediate the contents of waste pits containing low-level radioactive waste byproducts of uranium and thorium processing generated at the Fernald site.[4] To allege "continuing problems with safety issues" that "have occurred and are a matter of record" at a hazardous waste site such as WPRAP certainly reveals a "substantial and specific danger to employees or to public health or safety."

The same can be said of a December 6, 2000 electronic mail message Ms. Blakely addressed to the recipients of her October 2000 memorandum (DOE/IG and FFI management personnel). In this message she states, "It is my contention that the data used to determine the [WPRAP] hazard category determination were manipulated to achieve a pre-conceived answer. . . . There are also worker safety issues if the process used to identify and evaluate potential hazards is flawed." Electronic Mail from Elaine Blakely to Ray Madden, DOE/IG (December 6, 2000). Ms. Blakely was apparently of the opinion that the data and the process used to identify and evaluate potential hazards on the WPRAP project were flawed and had been manipulated to achieve a preconceived answer. Again, given the nature of WPRAP, it is not at all unreasonable to conclude that such a situation, if true, would pose a substantial and specific danger to employees or to public health or safety.

FFI raises a fair question as to whether Ms. Blakely could have reasonably believed that the "direction" of the WPRAP project in fact had negative safety implications. Respondent's Post-Hearing Brief at 11-12. FFI offered persuasive testimony that the change in the assumptions as to the contents of the waste pits resulted in a more conservative analysis of the dangers posed in the remediation process. *See, e.g.*, Tr. at 612. It appears, however, that Ms. Blakely's concerns were not focussed on the merits of the new methodology as much as on the way in which the old methodology for analyzing the contents of the waste pits was discarded. She testified,

> There was no attempt on the part of those who came in September 1998 to understand what built the methodology that we used. There were a lot of things in there. It wasn't just that these were the numbers that were -- the upper confidence level. There were reasons why we chose those numbers and the reasons for that choice were never explored. There was a presumption on the part of the leadership team that it was done for this reason. There was no attempt to go back and understand why.

Tr. at 457-58.

In her October 2000 memorandum, Ms. Blakely made clear her opinion that the "direction" taken by WPRAP would lead to "continuing problems with safety issues." In December 2000, she warned of an impact on "worker safety" caused by a "flawed" methodology. She has explained the basis for her beliefs, i.e., that going forward with a new methodology without fully understanding the old has negative safety implications. In this instance, she may have been wrong, but I am not prepared to

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4. "Waste Pits Remedial Action Project," http://www.fernald.gov/Cleanup/wpits.htm.

find that Ms. Blakely's concerns were so baseless that they are outside the zone of reasonable belief. I therefore conclude that both of these communications are protected disclosures under Part 708.

3. February 2001 Part 708 Complaint

There is no dispute that by filing her first Part 708 complaint in February 2001, Ms. Blakely was "participating in . . . an administrative proceeding conducted under this regulation" and therefore her filing was activity protected under Part 708. 10 C.F.R. § 708.5(b); *see* Electronic Mail from Mark Sucher, FFI, to Steven Goering, OHA (November 21, 2002).

B. Whether Ms. Blakely's Protected Activity Was a Contributing Factor in Her Termination

As will be discussed in more detail below, Ms. Blakely was terminated from employment on April 4, 2002. Clearly, termination is an action with respect to Ms. Blakely's employment, and therefore would fall within the Part 708 definition of retaliation. 10 C.F.R. § 708.2. Moreover, Ms. Blakely clearly met the regulatory time constraints by filing her complaint on April 9, 2002, within 90 days of this alleged retaliatory action. 10 C.F.R. § 708.14. The next question is whether Ms. Blakely's protected activity was a contributing factor in her termination.

In prior decisions of the Office of Hearings and Appeals, we have established 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 personnel action."

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54 (1997) (quoting *Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993)); *Ronny J. Escamilla*, 26 DOE ¶ 87,508 at 89,046 (1996).

1. The Official Taking the Action Was Ms. Blakely's Supervisor, Shelby Blankenship

In the present case, Ms. Blakely's termination was part of an ongoing process of downsizing at the Fernald site. Tr. at 385-95. In this process, several rounds of layoffs have occurred. *Id.* Ms. Blakely has not alleged that the ongoing downsizing, or the particular layoffs that occurred on April 4, 2002, in which Blakely and 60 other FFI employees were terminated, was motivated in any way by her protected activity. I would, in any event, find such an allegation implausible on its face.

As part of the Involuntary Separation Process (ISP) that preceded the April 4, 2002 layoffs, at least 25 different job categories were targeted for reductions in personnel, including Ms. Blakely's category of Engineer. Respondent's Exhibit K. In the Engineer category, FFI management set a target reduction of five positions. *Id.* Because two engineers voluntarily separated prior to the April 4 layoffs, only three engineers were involuntarily separated, i.e. terminated. *Id.* Again, Ms. Blakely

has not alleged that FFI management's decision to reduce the number of Engineer positions by five was motivated by a desire to terminate her. Moreover, I find it highly unlikely that Ms. Blakely's protected activity could have led to, or in any way contributed to, a decision by FFI to layoff four of Ms. Blakely's fellow engineers as a pretext to also terminate Ms. Blakely.

There being no plausible connection between Ms. Blakely's disclosures and the April 4 layoffs in general, or the decision to reduce the number of engineers by five, "the official taking the action" in the present case would by necessity be the official(s) whose decisions resulted in Ms. Blakely being one of the three engineers who were laid off on April 4, 2002. After examining the details of the ISP process, I conclude below that "the official taking the action" in this case was Ms. Blakely's supervisor at the time of her termination, Shelby Blankenship.

For each potentially affected employee, the ISP process required the employee's supervisor to fill out an "Individual Employee Rating Form." Mr. Blankenship completed Ms. Blakely's form in February 2002. Respondent's Exhibit L. As was the case with 22 other engineers, Ms. Blakely was rated in six categories, "Initiative," "Communication Skills," "Quality of Work," "Work Habits," "Technical Knowledge," and "Skills Applicability." *Id.* On a five-point scale, Ms. Blakely scored the next to lowest rating in five of the six categories, and scored a "3" in one category, "Work Habits." *Id.* For purposes of comparing ratings, each employee's ratings were averaged for the six categories (assigning 1 point for the lowest rating and 5 points for the highest), using the following weighting:

		Ms. Blakely's Rating
Initiative	20%	2
Communication Skills	20%	2
Quality of Work	10%	2
Work Habits	15%	3
Technical Knowledge	15%	2
Skills Applicability	20%	2

Respondent's Exhibit H. Thus, Ms. Blakely's weighted average rating was 2.15, on a scale from 1 (worst) to 5 (best). Respondent's Exhibit J. Compared against the 22 other employees in the Engineer job category, Ms. Blakely ranked last, the next highest average score being 2.55, held by both the second and third lowest ranked employees. Combining these ratings with the need to reduce the number of Engineers by three, FFI chose to terminate the three lowest rated employees. This process was followed in other job categories as well, such that there is no evidence that FFI chose a particular process for terminating engineers in an attempt to retaliate against Ms. Blakely. Tr. at 504. Ms. Blakely admits as much. Tr. at 667-69.

The method for ranking engineers differed from other job categories only in the weights that were assigned to each skill category. Looking at Ms. Blakely's rating in each category, and to the weights assigned each category, I cannot conclude that the weighting of one category versus another

contributed to Ms. Blakely's last place ranking. For example, Ms. Blakely's "strongest" category, "Work Habits," was assigned a 15% weight. But even had that category been given the heaviest weight of 20%, Ms. Blakely's weighted average would have increased only slightly, from 2.15 to 2.3.

Thus, put simply, the FFI official whose decision resulted in Ms. Blakely's termination was the person who filled out her Individual Employee Rating Form, her supervisor Shelby Blankenship.[5]

2. Whether Mr. Blankenship Had Actual or Constructive Knowledge of Ms. Blakely's Protected Activity

Mr. Blankenship testified at the hearing in this case, and was asked specifically whether he was aware of Ms. Blakely's disclosures to DOE/IG or her February 2001 Part 708 complaint. With respect to her Part 708 complaint, Mr. Blankenship testified as follows.

> THE HEARING OFFICER: Did you become aware that she filed a Part 708 complaint with the Department of Energy in February 2001?
>
> THE WITNESS: I don't know if I was aware of this in that time frame or not.

Tr. at 860. Aside from this testimony, there is no evidence in the record that sheds any light on whether Mr. Blankenship was aware of Ms. Blakely's February 2001 Part 708 complaint.[6] Given this lack of evidence, and the fact that Ms. Blakely bears the burden of proving that her protected activity contributed to her termination, I cannot conclude that Mr. Blankenship was aware of her February 2001 complaint. However, Mr. Blankenship's testified that in December 2000 or January 2001, Ms. Blakely informed him of her communications with DOE/IG. Tr. at 859-60.

3. Whether Mr. Blankenship Acted Within Such a Period of Time that a Reasonable Person Could Conclude that the Ms. Blakely's Disclosures to DOE/IG were a Factor in Her Termination

Mr. Blankenship testified that Ms. Blakely told him of "complaints" to DOE/IG in either December 2000 or January 2001, shortly after he became her supervisor. The action taken by Mr. Blankenship

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5. Ms. Blakely alleges that the "system used by [FFI] Human Resources (HR) to ensure that skills assessments were performed uniformly either failed or were [sic] not applied to my case." However, Ms. Blakely cites testimony that merely describes the processes used by FFI HR as they are applied to all employees, not only Ms. Blakely. Complainant's Post-Hearing Brief at 5 (citing Tr. at 698-700, 831-34, 871, 873-877). Thus, this testimony is not evidence that a non-uniform application of the skills assessment process played a role in Ms. Blakely's termination.

6. In the absence of actual or constructive knowledge of protected activity, such knowledge has been imputed to the person alleged to have engaged in retaliatory action, upon a showing "that the person was influenced by the negative opinions of those with knowledge of the protected conduct." *Janet Benson*, OHA Case No. VBA-0082 (August 21, 2002). Because Ms. Blakely has made no such showing, I will not impute others' knowledge of her protected conduct to Mr. Blankenship.

that caused Ms. Blakely's termination, his completion of her Individual Employee Rating Form, took place in February 2002. Thus, Mr. Blankenship filled out the rating form 14 months after Ms. Blakely's December 2000 communications to DOE/IG, and approximately 13 months after Mr. Blankenship recalls being informed of these communications.

Based on this period of intervening time (13 months), would a reasonable person conclude that Ms. Blakely's disclosures to DOE/IG were a factor in the ratings Mr. Blankenship gave Ms. Blakely on the Individual Employee Rating Form? While there certainly can be no mathematical formula to make this determination, I note that decisions in prior Part 708 cases have relied on closer temporal proximity in reaching a conclusion that a protected activity contributed to an adverse personnel action. Those decisions range from cases where adverse action came the same day as protected activity, *Timothy E. Barton*, OHA Case No. VWA-0017 (April 13, 1998), or where a series of protected activities are interspersed with adverse actions, *e.g.*, *John Gretencord*, OHA Case No. VWA-0033 (November 4, 1999), to a case where the adverse action took place 9 months after the protected activity, *Luis P. Silva*, OHA Case No. VWA-0039 (February 25, 2000). On the other hand, a protected disclosure was found not to be a contributing factor in an adverse action that took place 24 months later. *Jean G. Rouse*, OHA Case No. VBH-0056 (March 6, 2001).

Thus, there is no precedent in Part 708 cases for finding that a period of 13 months is sufficiently short to infer a connection between a protected activity and an adverse personnel action. Of course, "[a]pplying a reasonable-person standard to this issue requires considering the circumstances of each case." *Barbara Nabb*, OHA Case No. VBA-0033 (April 5, 2000). For example, in the *Nabb* case, "although more than seven months passed between the two events, it is reasonable to conclude that contractor officials did not forget about Ms. Nabb or her disclosures in the interim, particularly in light of the ample evidence of Ms. Nabb's outspoken nature and the number and variety of situations in which she had made her disclosures." *Id.* By contrast, in the present case, Mr. Blankenship's knowledge of Ms. Blakely's protected activity was limited to her disclosures to DOE/IG in the fall of 2000. Nor is there any evidence that Mr. Blankenship would have been reminded of these disclosures any time after Ms. Blakely informed him of them in December 2000 or January 2001. Although it may be appropriate under more compelling circumstances, the present case is not one that calls for stretching the outer limits of sufficient temporal proximity to 13 or more months.

4. Other Circumstantial Evidence Cited by Ms. Blakely

The "temporal proximity" analysis discussed above is one way to support an argument that protected activity was a contributing factor in alleged retaliation. But the Part 708 regulations do not limit a complainant to only this means of meeting her burden of proof, and Ms. Blakely cites other evidence in contending that she has met her burden. Complainant's Post-Hearing Brief at 5-6. However, I conclude below that the evidence to which she refers does not prove that her protected conduct contributed to her termination.

Ms. Blakely cites instances where she "was reassigned to groups who stated that they had no work for me," the "system used by [FFI] to ensure that skills assessments were performed uniformly either

failed or were [sic] not applied to my case," and her "work assignments often involved tasks which were limited by my work restrictions." She also notes that she was labeled as "disruptive" and "difficult." Complainant's Post-Hearing Brief at 5-6.

It is important to reiterate here, as discussed above, that Ms. Blakely's first protected activity occurred on October 24, 2000, with her memo to FFI management. Thus, any actions allegedly taken against her prior to that date could not have been in retaliation for protected activity. Ms. Blakely's reassignments are a case in point. Ms. Blakely was assigned three different jobs after she left WPRAP in March 1999, and before she began to work for Shelby Blankenship in January 2001. However, these three assignments began, respectively, in March 1999, February 2000, and June 2000. *See* Tr. at 226. Similarly, while Ms. Blakely notes that her "work assignments often involved tasks which were limited by my work restrictions," she refers to assignments given her prior to any of her protected activities. As a result, none of these reassignments, or the way in which they were handled, could possibly have been in retaliation for her protected activities, since no protected activities had yet occurred.[7]

Ms. Blakely's reassignment to Mr. Blankenship's organization, occurring in late 2000 or early 2001, did take place after she had engaged in protected activity. However, responding to questions posed by Ms. Blakely, Mark Cherry, the FFI official responsible for making the reassignment, testified credibly that he simply transferred Ms. Blakely to where there was an opening he believed matched her qualifications.

> Q [By Ms. Blakely]: Do you recall towards the end of the year 2000 I had brought up an issue with Walt Fick?
>
> A Yes.
>
> Q Can you describe from your memory what that was?
>
> A I'm not sure what the specific issue was. I know that near that time -- I know that you and Walt had some real differences, I guess, between you two, as far as the work environment went and that's what I remember.
>
> Q Do you remember me describing it as a hostile work situation?
>
> A You may have.
>
> Q From the time when we had these discussions on the work situation with Walt Fick that it was not particularly workable for me at that time, when was the decision made to reassign me?

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7. In her post-hearing brief, the complainant also raises anew an allegation that she had complained concerning her treatment by FFI medical personnel, but that the complaint was not addressed or resolved. Complainant's Post-Hearing Brief at 6. This allegation concerns events that took place in April 1999, *see* Tr. at 807, prior to her first protected activity on October 24, 2000, and therefore could not have been connected to her protected activities.

> A If you are looking for a discrete time period, I don't know. I think it was rather quickly.... But basically, openings were made available within facility engineering, I believe, and at that point, obviously your technical background was more suited to facility engineering . . . , something more technical towards the engineering field, and that it was supported by the openings that were available in Shelby [Blankenship]'s operation. . . .
>
> . . . .
>
> Q And this occurred shortly before or shortly after this Walt Fick situation.
>
> A About the same time.
>
> Q About the same time as Walt Fick, things started coming up. When you were discussing with Bob Nichols or whoever else in that organization, trying to find a place for me, were you presenting me as a general engineer or as a mechanical engineer or as an engineer of whatever classification?
>
> A Basically, I provided your resume at that time and that was pretty much the way it was presented with -- that was the way it was presented.

Tr. at 175-77. It is even difficult to describe this transfer as a negative action toward Ms. Blakely. There is no dispute that Ms. Blakely had a strained relationship with her supervisor prior to the transfer, Walt Fick, under whom she claimed to have been subject to a "hostile work situation."[8] Viewed in this context, moving Ms. Blakely to a different job looks to be an attempt to do something positive for her.

Ms. Blakely also contends that, once she was in Mr. Blankenship's group, he "excluded me from staff meetings with the engineers that I worked with; Mr. Blankenship did not have regular contact with me nor did he respond to my requests for technical direction; and Mr. Blankenship was aware that I had contacted the Office of Inspector General." Complainant's Post-Hearing Brief at 5. However, each of these contentions are either not supported by the record, or are not evidence of any retaliatory intent on the part of FFI or Mr. Blankenship.

First, the testimony of one of Ms. Blakely's co-workers under Mr. Blankenship supports Ms. Blakely's contention that regular meetings were held by Mr. Blankenship with engineers who worked in the same building as he did, and that these meetings did not include Ms. Blakely, who worked in another building. Tr. at 235-36. However, another of Ms. Blakely's co-workers testified that there were no such meetings, as did Mr. Blankenship. Tr. at 102-03, 866, 868-69. Moreover, even if there were such meetings and Ms. Blakely did not attend, I could conclude from those facts

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8. Ms. Blakely does not claim that this allegedly "hostile work situation" was in retaliation for her protected activity. It would, in any event, be difficult to make such a connection. Ms. Blakely began working for Mr. Fick in the summer of 2000, several months before her first protected disclosure in October 2000, and worked for him until she transferred to Mr. Blankenship's group in January 2001. Mr. Fick's testimony indicates that the relationship between the two was strained from the outset, *see, e.g.*, Tr. at 257-58, and that Mr. Fick had no knowledge of Ms. Blakely's issues, whether they were raised during her time at WPRAP or in her protected disclosures to FFI management and the IG. Tr. at 278-79.

alone that she was excluded from the meetings. And there is no other evidence in the record that would lead me to that conclusion. Finally, even if Mr. Blankenship chose to hold certain meetings with only the engineers in his building, this is not on its face a negative action against Ms. Blakely.

Second, the record does not support Ms. Blakely's contention that Mr. Blankenship did not have regular contact with her. Mr. Blankenship testified that, when Ms. Blakely first began working for him, he held one-on-one meetings with her

> every week or every other week. Perhaps less frequently than that, but no more often than once a week, I don't believe.
>
> BY MS. BLAKELY:
>
> Q Okay. What were the purpose of those meetings?
>
> A Just to -- just to provide you some support and some -- kind of get you kicked off and get you moving on your work.
>
> Q Why were they discontinued?
>
> A I'm unable to provide that level of one-on-one support over a long period of time.

Tr. at 895. Ms. Blakely also cites numerous e-mail exchanges between her and Mr. Blankenship. These e-mails indicate that, in fact, there was regular contact between Ms. Blakely and Mr. Blankenship, albeit electronically. Although Ms. Blakely contends that Mr. Blankenship did not respond to the requests for guidance submitted by e-mail, Mr. Blankenship provides a reasonable explanation for this in his testimony.

> Q Okay. As a manager, you have engineering -- engineers reporting to you. Those engineers communicate back and forth by e-mail for whatever reason. At some point -- the gist of those e-mails is a request for a response. It is a repetitive request for a response that's not closing. At what point as a manager do you decide, let's cease the e-mails back and forth and have a sit-down discussion?
>
> A Well, we did that on numerous occasions and that didn't -- that didn't produce a resolution. It just generated another series of questions. So that -- in my -- in my mind, that became an unproductive process and I didn't have time to support it.

Tr. at 896.

Finally, Ms. Blakely cites to testimony by people outside of Mr. Blankenship's group describing her as "difficult" and "disruptive." Complainant's Post-Hearing Brief at 6 (citing Tr. at 188, 201-03, 259, 260-61). However, there is no evidence that Mr. Blankenship's opinion of Ms. Blakely was in any way influenced by those of others with whom she had worked. Mr. Blankenship credibly testified at the hearing in this matter as to why, from first-hand experience, *he* found Ms. Blakely difficult to supervise. Nothing in that testimony indicates that his opinion was in any way based on Ms. Blakely's protected activities. Rather, Mr. Blankenship stated that Ms. Blakely "required a high

level of supervision. You required an awful lot of interaction in order to get things done whereas I was accustomed to giving engineers work and they -- they performed it without much direction." Tr. at 911; *see infra* pp. 18-20 (discussing basis for Mr. Blankenship's opinion that Ms. Blakely was relatively unproductive, needed too much supervision, and tended to be argumentative).

Based on the above, I find that Ms. Blakely has not met her burden of proving by a preponderance of the evidence that her disclosures to DOE/IG were a contributing factor in Mr. Blankenship's low ratings of Ms. Blakely that led to her termination. Moreover, as I discuss in the following section, even if I were to assume that Ms. Blakely's protected activities were contributing factors in her termination, I would find that FFI has proven by clear and convincing evidence that it would have terminated Ms. Blakely had she engaged in no activity protected under Part 708.

C. Whether FFI Would Have Terminated Ms. Blakely Absent Her Protected Activities

As discussed above, Ms. Blakely's termination in April 2002 was a result of the low ratings Shelby Blankenship gave her on an Individual Employee Rating Form he completed in February 2002. Below I discuss whether Ms. Blakely would have received these low ratings, or at least ratings low enough to rank her among the bottom three in the Engineer job category, had she made no protected disclosures to DOE/IG and FFI beginning in October 2000 nor filed a Part 708 complaint in February 2001.

Again, the fact that Ms. Blakely's first protected activity occurred on October 24, 2000 is an important piece of the analysis. Obviously, any actions allegedly taken against her prior to that date clearly reflect events as they would have occurred had Ms. Blakely engaged in no activity protected under Part 708.

Thus, Ms. Blakely's experience working in the WPRAP project, which she left in March 1999, provides a good example of how she fared in the absence of protected activity. It also, in my opinion, is the key to understanding why Ms. Blakely found herself without a job after the April 2002 ISP. Ms. Blakely describes the circumstances which led to her departure from WPRAP as follows:

> I say that WPRAP released me because I would not support an activity I considered unethical. I was the same employee then as I had been the two previous years. The project liked me well enough to offer me a full time position and even had my responsibilities delineated in their Project Execution Plan. The difference was that now I had become a continuous reminder that someone knowledgeable in safety analysis did not approve of the direction the project was taking with respect to establishing their safety basis. This disapproval was so great that I refused to support the activity, withdrew from it, and diverted my energies to closing some outstanding reports.

AR at 153.

Essentially, Ms. Blakely refused to do the work that she was assigned. As FFI points out, "While another company might well have disciplined or terminated Ms. Blakely for her insubordination, Fluor Fernald went out of its way to attempt to find other meaningful work for her; this is hardly an act of retaliation." Respondent's Post-Hearing Brief at 21. Had FFI taken such action, it would not have run afoul of Part 708, as Ms. Blakely had not yet engaged in any conduct protected under the regulations.[9] Disagreement with management alone is not a basis for affording protection to an employee under Part 708. *Narish C. Mehta v. Universities Research Association*, 24 DOE ¶ 87,514 at 89,065 (1995). In any event, the hearing testimony of the WPRAP project director describes the steps he took to find her new work.

> Q Can you describe the process that used to ultimately find me a place outside of WPRAP to work? My subsequent assignment?
>
> . . . .
>
> A . . . The first thing I did was to try to accommodate you through the new operating regime, which was unacceptable to you.
>
> Q Which -- to clarify, was Doug Daniel's inclusion.
>
> A That is correct.
>
> Q Okay.
>
> A The next thing I did was I talked to others to see if there was some kind of job that we could give to you within the organization that frankly saved your participation. I considered your participation to be net positive, Elaine. There was never an issue like that. I was dismayed that you were unable to accept Doug's primacy in that particular role. So, I went around and I said well, what can we do internally? Would could I do to try to find a spot for you?

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9. The Part 708 regulations do prohibit retaliation, under certain specified circumstances, against a contractor employee "refusing to participate in an activity, policy, or practice . . ." 10 C.F.R. § 708.5(c). In the present case, it is not necessary to determine whether the circumstances surrounding Ms. Blakely's refusal meet the criteria set forth in that section, since another section of the regulations states,

> You may file a complaint for retaliation for refusing to participate in an activity, policy, or practice only if:
>
> (a) Before refusing to participate in the activity, policy, or practice, you asked your employer to correct the violation or remove the danger, and your employer refused to take such action; and
>
> (b) By the 30th day after you refused to participate, you reported the violation or dangerous activity, policy, or practice to a DOE official, a member of Congress, another government official with responsibility for the oversight of the conduct of operations at the DOE site, your employer, or any higher tier contractor, and stated your reasons for refusing to participate.

10 C.F.R. § 708.7. There is no evidence in the record that Ms. Blakely took either of the two actions required to bring her refusal to participate within the protection of Part 708.

> THE HEARING OFFICER: Let me just clarify. Internally, you mean within --
>
> THE WITNESS: Within the project, within my own project. What could we do? I couldn't find something that made a lot sense. Then I prepared and I submitted to Dennis a statement of potential participation -- a statement of work, a job description, if you will, wherein you might have a role to support our legal team, because they were very often getting -- you were really knowledgeable about process knowledge, where data sources resided, the various information that we had and I thought, well, I know that there are inquiries going on within legal, specifically through Dan Yeager, who is part of the legal staff here and through Rene Holmes, also who was part of the legal staff, that you could be an assistant to them.
>
> So, I discussed this with Carr and he said that he didn't see that as being a fit for you and moreover, there was opportunities, there was a demand for help in the WAO [FFI's Waste Acceptance Organization] area.

Tr. at 311-13.

Thus began a pattern wherein Ms. Blakely was moved from one job to another. As discussed above, three of these moves (including her transfer out of WPRAP) took place before Ms. Blakely engaged in any protected activity, and so each clearly would have taken place in the absence of that activity. I have also found above that there is no evidence that Ms. Blakely's last transfer, in January 2001 to Mr. Blankenship's group, was tainted in any way by her protected disclosures, and in fact appeared to be an helpful attempt to get Ms. Blakely out of what she considered a "hostile work situation."

This last transfer, though by all appearances well-intentioned, did not result in a good fit between Ms. Blakely and Mr. Blankenship's group. Mr. Blankenship testified credibly at the hearing as to what the source of the difficulties was, and I am convinced that the same problems would have arisen in the absence of any protected conduct by Ms. Blakely. The three principal issues seem to have been Mr. Blankenship's opinion that Ms. Blakely was relatively unproductive, needed too much supervision, and tended to be argumentative.

According to Mr. Blankenship, when Ms. Blakely first came to his organization, "the project that we felt was best fitted to her skill mix was the development of some engineering standards that we had been talking about establishing and hadn't had time to do. And that was the assignment that we made to her." Tr. at 843.

> [H]er job was to coordinate that information, pull it together, and get it produced in whatever form we -- we felt was appropriate.
>
> Q How successful was she in accomplishing this task?
>
> A Not very. To my recollection, the original list of I think about two dozen things, and we may have -- we may have struck some of those off during the

process. My recollection is that -- that two or three of those got completed during her tenure.

Tr. at 844; *See also* Tr. at 916 ("You had worked on some of it for 14 months and had, you know, had 14 percent of it done. In my mind, I felt like that was a job that -- that probably could have been completed in three months or so.").

Mr. Blankenship also testified that Ms. Blakely "required a high level of supervision. You required an awful lot of interaction in order to get things done whereas I was accustomed to giving engineers work and they -- they performed it without much direction." Tr. at 911.

> MS. BLAKELY: Okay. The question is, we -- we have the question of the amount of time that had to be devoted to me being one of the issues which made me difficult to supervise. We have established that it is a normal expectation when a new employee joins a group that there is more time necessary to bring that individual on board than it would be to manage folks that have been there for a long time.
>
> THE HEARING OFFICER: Mm-hmm.
>
> MS. BLAKELY: I'm trying to establish how long this getting me on board process took and whether that is included in his description that I was a difficult employee, since it seems to be a time-related thing.
>
> THE WITNESS: It took 14 months and we never achieved it.
>
> MS. BLAKELY: Okay.
>
> THE HEARING OFFICER: How long do you think it should take?
>
> THE WITNESS: I would have thought two or three months.

Tr. at 912-13; *see also* Tr. at 887 ("The fact that -- that you had an awful lot of trouble, you know, manipulating this and you required a tremendous amount of -- of interaction and direction I think places your level of competency below that of the other people in the peer group . . . .")

Finally, Mr. Blankenship described Ms. Blakely as argumentative. When asked by Ms. Blakely at the hearing, he explained why.

> A Well, we -- we frequently had -- had contests. There would be disagreement over what a procedure meant or where -- we had an argument at one juncture where some calculations belonged. And I -- you know, in several of those instances, you were arguing with the subject matter expert.
>
> Q Okay. Question: What is the difference between arguing with a subject matter expert versus requesting clarification from the subject matter expert?
>
> A I think the difference is that when you're provided direction and you don't follow it.
>
> Q But what if the individual has questions on the direction? Is that being argumentative if one asks for further clarification?
>
> A At some juncture that becomes argumentative, yes.

Tr. at 914-15; *see also* Tr. at 853 ("I found Ms. Blakely to be a little difficult to work with. You know, I've worked with a lot of -- a lot of engineers, and I found her to be difficult to function with.").

My assessment of Mr. Blankenship's testimony is that his were honest opinions, arrived at from first-hand experience with Ms. Blakely, that he would have held whether or not he knew she had engaged in any protected activity. In light of these opinions, it is not at all surprising that Mr. Blankenship gave Ms. Blakely the low ratings he did on the Individual Employee Rating Form, in which his comments included observations that Ms. Blakely "[d]emonstrates frequent need for direction in order to sustain progress on work," "is frequently argumentative," and "has demonstrated a limited amount of fully complete work." FFI Exhibit L. Because, as discussed above, it is these low ratings that led to Ms. Blakely's dismissal, I find clear and convincing evidence that Ms. Blakely would have been one of the three employees in the Engineer category who were involuntarily separated, whether or not she had engaged in activity protected under Part 708.

III. Conclusion

As set forth above, I have concluded that the complainant has met her burden of proof of establishing by a preponderance of the evidence that he engaged in activity protected under 10 C.F.R. Part 708. However, I have also determined that Ms. Blakely has not met her burden of proving that her protected activity was a contributing factor in her termination from FFI. Even assuming that Ms. Blakely had met her burden in this regard, I found that FFI has proven by clear and convincing evidence that it would have taken the same action absent his disclosures. Accordingly, I conclude that the complainant has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted.

It Is Therefore Ordered That:

(1) The request for relief filed by Elaine M. Blakely under 10 C.F.R. Part 708 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 receipt of the decision.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: June 25, 2003