

Case No. VWA-0014

February 5, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Charles Barry DeLoach

Date of Filing: November 1, 1996

Case Number: VWA-0014

This Decision involves a whistleblower complaint filed by Charles Barry DeLoach (DeLoach) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. For a four year period, DeLoach was employed by Westinghouse Savannah River Company (WSRC), a DOE management and operating contractor, at DOE's Savannah River site (Savannah River). DeLoach alleges that during his tenure at WSRC, he made disclosures regarding health and safety issues to various supervisors or managers at Savannah River. On March 19, 1993, DeLoach was fired after an investigation by Wackenhut Services, Inc. (Wackenhut), a subcontractor at Savannah River, revealed that DeLoach had stolen government property with an estimated value of approximately \$48,000. DeLoach contends that his safety and health disclosures were the true cause of his termination.

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 purpose is to encourage contractor employees to disclose information 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 10 C.F.R. Part 708. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed to a DOE official or to a DOE contractor, information that the employee believes in good faith evidences, among other things, substantial and specific danger to employees or public health or safety. See 10 C.F.R. § 708.5(a)(1)(ii). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with

the DOE. The regulations entitle these employees to independent fact-finding and a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer, followed by an opportunity for review of their case by the Secretary of Energy or his designee. See [David Ramirez](#), 23 DOE ¶ 87,505, [aff'd](#), 24 DOE ¶ 87,510 (1994).

B. Factual Background

In 1981, DeLoach began working at Savannah River. In April 1989, WSRC became the prime management and operating contractor at the site. During his employment with WSRC, DeLoach made various Quality Improvement Safety Suggestions between 1990 and 1993. He also alleges that during that same time period, he made several other disclosures relating to safety and health concerns. These issues pertained to the following items: (1) leaking oil drums; (2) excessive radiation in his work area allegedly causing him to have high cesium levels in his whole body counts; (3) the lack of a fire extinguisher in the welding area; (4) being required to weld around combustible materials; (5) dirty drinking water; (6) excessive noise in his work area; (7) faulty welds and the use of uncertified welders; (8) misinformation allegedly provided by an official at a safety class regarding the cause of an earlier safety incident; (9) an accident in which a cabinet fell on him; and (10) his alleged exposure to asbestos and WSRC's resulting refusal to include a report of that incident in his medical files. DeLoach contends that all of these incidents caused him to be labeled as a "troublemaker," which in his view, resulted in his eventual termination.

On February 25, 1993, an anonymous person, who identified himself only as a WSRC management official, telephoned WSRC's Employee Concerns Office to report that he had overheard another employee in his carpool state that DeLoach had been stealing tools from the Savannah River site and possessed at his residence "orange tools," i.e., tools that had been exposed to radiation. See Ex. 6 (interview with Employee Concerns employee who took call); Ex. 25 (Notice of Employee Concern).(1) On March 8, 1993, the concern was forwarded to Wackenhut which began an investigation. DeLoach was informed of the investigation on March 12, 1993 and gave permission for Wackenhut and state police to search his home. Pursuant to that search, approximately \$12,000 of suspected DOE equipment was seized. When a second search was conducted at DeLoach's house, \$36,000 worth of additional equipment was seized. Although serial numbers had been removed from many of the tools, Wackenhut was able to determine that most of these tools were government property. DeLoach admitted having stolen much of the property.(2)

Upon hearing of the results of the investigation, WSRC President Ambrose Schwallie, based on the recommendation of a WSRC committee, decided to fire DeLoach. That termination occurred on March 19, 1993. Subsequently, DeLoach met with the WSRC Employee Concerns Office regarding some of the issues he claims were protected disclosures concerning health and safety at Savannah River. That office conducted an investigation of the complaints raised by DeLoach at that meeting and reported its findings to him in a letter dated May 24, 1993. Ex. 22. DeLoach then filed his whistleblower complaint dated February 26, 1994.

C. Procedural History

The DOE's Office of Contractor Employee Protection (OCEP)(3) conducted an investigation into the allegations contained in DeLoach's complaint and issued a Report of Investigation and Proposed Disposition on September 30, 1996. OCEP concluded in its Report that DeLoach had not met his burden as required by Part 708 and, as a consequence, was not entitled to any relief. Specifically, OCEP found that although DeLoach had shown that he made protected disclosures to officials at WSRC, he had failed to show that those disclosures were a contributing factor to any adverse personnel action taken against him by WSRC. It further found that there was clear and convincing evidence that, even in the absence of the disclosures, WSRC would have terminated DeLoach.

On October 8, 1996, DeLoach submitted his request for a hearing under 10 C.F.R. § 708.9 to OCEP. OCEP transmitted that request to OHA on November 1, 1996 and I was appointed hearing officer in this case on November 6, 1996. On December 17, 1996, I held the hearing in this case in Aiken, South Carolina. DeLoach testified for himself and WSRC presented the following witnesses: Meredith Metz, Manager of the Employee Concerns Office, WSRC; Betty Brunson, Human Resources Representative, WSRC; Mack Underwood, Chief Investigator, Wackenhut; Ambrose Schwallie, President, WSRC; Gary Cooper, Supervisor, WSRC; Benny Jackson, Maintenance Manager, WSRC; and Barry McDougal,

Maintenance/Work Control Liaison, WSRC. After the hearing, I directed WSRC to submit several documents in order to clarify certain matters raised at the hearing. WSRC submitted the last of these documents on January 6, 1997. With that filing, I closed the record in this case.

II. Legal Standards Governing This Case

As noted above, the regulations set forth in 10 C.F.R. Part 708 provide an administrative mechanism for the resolution of whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the complainant and the contractor with regard to their allegations and defenses and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "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." 10 C.F.R. § 708.9(d). See [Ronald Sorri](#), 23 DOE ¶ 87,503 at 89,009 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)) (Sorri). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See *Hopkins v. Price Waterhouse*, 737 F.Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

In the present case, DeLoach must make two showings. First, DeLoach must demonstrate that he disclosed information to an official of DOE or to WSRC that he believed in good faith evidenced a substantial and specific danger to employees or public health or safety. See 10 C.F.R. § 708.5(a)(1)(ii); 10 C.F.R. § 708.9(d). If DeLoach fails to meet this threshold burden, his claim must be denied. If DeLoach meets this burden, he must next prove that his disclosure was a contributing factor to his termination. 10 C.F.R. § 708.9(d); see [Helen Gaidine Oglesbee](#), 24 DOE ¶ 87,507 (1994) (Oglesbee).

B. The Contractor's Burden

If DeLoach meets his burden as set forth above, the burden then shifts to WSRC. The regulations require WSRC to prove by "clear and convincing" evidence that the company would have terminated DeLoach even if DeLoach had not made protected disclosures. "Clear and convincing" evidence is a much more stringent standard than "a preponderance of the evidence"; it 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.

III. Analysis

The parties contest many of the facts in this case. My findings of fact set forth below are based on (1) the entire record developed in the case, including the OCEP investigative file, all documents submitted by the parties and the transcript of the December 17, 1996 hearing and (2) my observations of the witnesses' demeanor at the hearing and my determinations regarding those witnesses' credibility.

After reviewing the entire record in this case, and considering the credibility of the witnesses who testified at the hearing, I conclude that DeLoach has shown by a preponderance of evidence that he disclosed information that he believed in good faith evidenced substantial and specific dangers to health and safety. I further conclude, however, that WSRC has proven by clear and convincing evidence that it would have terminated DeLoach even if DeLoach had not made protected disclosures to WSRC. Accordingly, I find that DeLoach is not entitled to relief under 10 C.F.R. Part 708.

A. Alleged Disclosures

As mentioned earlier, DeLoach alleges that he made a number of disclosures to WSRC officials between the time that WSRC assumed the contract to manage Savannah River in April 1989 and his termination in March 1993. DeLoach also made sixteen Quality Improvement Safety Suggestions (QISS), some of which relate to the same matters he contends were protected disclosures. Hearing Ex. 7.(4) One of the QISSs relates to DeLoach's complaint in 1990 that oil drums were leaking onto the ground. DeLoach testified that when building facility manager Wyatt Clark refused to address the problem, he called the state Department of Health and Environmental Control, which he said ordered WSRC to fix the problem. See Hearing Tr. at 16, 22-27. According to DeLoach, Clark then implemented DeLoach's suggestion to prevent the oil drums from leaking. DeLoach's allegation of having made this disclosure is confirmed by the record of his report to the WSRC Employee Concerns Office and by records of his QISS. See Hearing Exs. 6 and 7.

DeLoach also alleges that he complained several times during his employment with WSRC that a work assignment requiring welding on a cesium removal column caused him to have abnormal levels of cesium in his whole body count between 1989 and 1993. Hearing Tr. at 68-71, 76. He testified that in 1993, he was asked for three urine samples in two days and told he needed to be "chelated" to remove cesium from his body, although this procedure did not take place. Hearing Tr. at 73-76. He states that he complained about these cesium levels to supervisor Gary Cooper and managers Benny Jackson and Barry McDougal, as well as an unnamed Health Protection supervisor. Hearing Tr. at 70-71, 74. According to DeLoach, various WSRC employees told him that eating venison from the Savannah River area caused his high cesium levels. See also Ex. 22 (Report of WSRC investigation). He also claims that he was told that cesium was not detected in his body at the time of his termination. Hearing Tr. at 71. However, according to the WSRC Employee Concerns Office, cesium was detected in his whole body count at the time of his out-processing, as well as throughout his employment at Savannah River, but was considered by WSRC's Health Protection Office to be not an unusual level and consistent with the levels of other venison eaters from the Savannah River area. Ex. 22. at 11.

DeLoach stated that in 1990 he disclosed that there was no fire extinguisher in the welding area and complained about this to building facility manager Clark, who rejected his suggestion. Hearing Tr. at 17-18, 23. DeLoach also made a QISS regarding this matter and his suggestion to install a fire extinguisher was adopted. Hearing Ex. 7. DeLoach also noted that in October 1992, as well as several other times, he complained to a building facility manager, Ken Powell, about being assigned a job welding within fifty feet of combustible materials in an area where he and other employees could be injured. According to DeLoach, he refused to do the welding jobs until the combustible materials were removed. Hearing Tr. at 46-49.

DeLoach also alleges that at some time during his employment at the facility he complained to a building custodian, Burt Lancaster, about muddy drinking water at his worksite. Hearing Tr. at 28- 31. He also alleges that he complained to his supervisor (whose name he could not remember) and Lancaster regarding the level of noise in an area called the "cell" where he was required to work sometimes. Hearing Tr. at 34-36. According to DeLoach, the drinking water problem was corrected after two or three months. Hearing Tr. at 30. Eventually actions were also taken to abate the noise level in the "cell." Hearing Tr. at 35.(5)

DeLoach further alleges that he complained to Ken Powell, supervisor Ken Paradise, and manager Todd Wright that WSRC's use of uncertified welders was creating faults in the welds. Hearing Tr. at 39-42; Exhibit 1 at 6. He also asserts that in late 1992, a number of WSRC management employees, including Gary Cooper and Benny Jackson, were present when he corrected an instructor who gave what DeLoach believed to be incorrect information as to how a particular accident had happened at the plant sometime in the 1980's. Hearing Tr. at 62-64, 67.

DeLoach also notes that in either October or November of 1992, a storage cabinet fell on top of him when he opened one of the drawers. Hearing Tr. at 52. He stated that his supervisors, Gary Cooper and Ken Paradise, were immediately made aware of the accident. Hearing Tr. at 55-56. DeLoach claims that it occurred because the cabinet was not anchored to the wall or to other cabinets as required by safety rules and the cabinet's manufacturer. Hearing Tr. at 51. He stated that one day after the accident, the cabinet was anchored. Hearing Tr. at 58. The record indicates that DeLoach told Cooper and Paradise immediately after the accident that he was not injured and that none of them reported the incident as required by WSRC rules. He believes both Cooper and Paradise were reprimanded for their failure to report the incident and that this accident was therefore a further cause of resentment of DeLoach among WSRC management. Hearing Tr. at 60. WSRC's investigation that took place after DeLoach's termination concluded that Cooper, Paradise and DeLoach all improperly failed to report the incident. See Ex. 22 at 12.

DeLoach alleges that the last of his disclosures triggered his firing three months later. See Hearing Tr. at 135. The record indicates that in the evening of December 22, 1992, DeLoach entered building 241-58H in order to obtain welding rods to perform a job elsewhere on the site. While in the building, he saw three other employees working on a pipe and upon further inspection, believed there to be asbestos present on the pipe. Id. at 78.(6) DeLoach claims that he told the other employees and their manager, "Smitty" Smith, that he thought it was asbestos, and that it should be tested. DeLoach then left the area to complete his work shift. Id. at 80-81, 87-88. When he came back after completing his shift the following morning, he found the area roped off and was told that asbestos had been found.

According to DeLoach, he was told that morning by his supervisor, Gary Cooper, that he should remove all of his clothes in order for them to be destroyed, as a precautionary safety measure. Id. at 83. DeLoach also states that he told Cooper that morning that everyone present in the building since the previous night should be given nasal smears as tests for asbestos exposure. Id. at 90. He also claims that he informed Cooper, as well as Benny Jackson (Cooper's supervisor), Gerald Busbee, Maintenance Manager for H-Area (Waste Management), and Dr. E.R. Herman, the H-Area physician, that he wanted a report of the incident placed in his medical records. During the WSRC investigation of DeLoach's complaints after his termination, Dr. Herman confirmed that DeLoach requested this addition to his medical records.(7) See Ex. 22 at 12. DeLoach claims that a week or two after he requested the addition (and a week or two prior to his termination), he informed Jackson that if a report of the incident was not included in his medical records by April 1, 1993 he would inform the local newspapers of the incident. Hearing Tr. at 86-87, 95, 305.

DeLoach contends that all of these incidents caused him to be labeled as a "troublemaker" and a "big mouth." See Hearing Tr. at 31, 39. He believes that his complaining was probably discussed among supervisors at the plant and that it contributed to his eventual termination. Hearing Tr. at 73. He does not know who made the anonymous phone call leading to the Wackenhut investigation, but suspects that it was one of the supervisors with whom he had frequent contact, and that it was made in retaliation for his complaining so much. DeLoach stated, however, that he does not believe his immediate supervisor during the latter part of his employment, Gary Cooper, made the anonymous phone call. Hearing Tr. at 134. He is also unable to state with any certainty which supervisors or managers may have been involved in the decision to terminate him. See Hearing Tr. at 39, 122-23.

None of the three WSRC management employees who testified, Jackson, McDougal and Cooper, could recall DeLoach making any of the disclosures described above. Hearing Tr. at 260-65, 289, 300-01, 304-05, 307. This failure to remember DeLoach's complaints may be due in part to the long period of time that has elapsed since the alleged disclosures. I also believe that these supervisors do not remember DeLoach's alleged disclosures because they did not take them seriously or consider them significant at the time they were made. The record reveals that DeLoach complained often to many people about many matters. Benny Jackson said that DeLoach "like[d] to talk a lot and carry on." Hearing Tr. at 304. Barry McDougal said that DeLoach would "run his mouth all day long" and "kept something going all the time." Hearing Tr. at 286-87. It is therefore possible that the particular incidents DeLoach recalls were of more significance to

him than to the employees to whom he complained.

Nevertheless, I believe DeLoach has shown by a preponderance of the evidence that he made complaints to a number of WSRC supervisory employees and management officials on a number of different safety and health issues. Whether the complaints were considered valid and significant by WSRC management is not the critical question. If DeLoach made complaints to WSRC employees regarding what he believed to be substantial and specific dangers to safety or health, they qualify as protected disclosures.⁽⁸⁾ I believe DeLoach's complaints were made in good faith and WSRC has not provided evidence to the contrary. Compare [Ronny J. Escamilla](#), 26 DOE ¶ 87,508 (1996) (complaints found not to be in good faith). My finding that DeLoach made these complaints and acted in good faith as required by 10 C.F.R. § 708.5(a)(1)(ii) is supported by the fact that DeLoach received monetary bonuses for some of his QISSs and that some of the health and safety matters he raised were addressed and corrected. In several of the incidents DeLoach refers to, the matter was promptly investigated and if a serious health or safety problem existed, it was corrected. I therefore find that DeLoach made protected disclosures as contemplated by Part 708.

B. Contributing Factor

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." Sorri, 23 DOE at 89,010; see also *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (Couty). In addition, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." Couty, 886 F. 2d at 148.

In this case, there is clearly temporal proximity between DeLoach's disclosures regarding the discovery of asbestos, his requests for the incident to be included in his medical records, his threat to go the local newspapers and his termination. Under Sorri, if the deciding official in this case, WSRC President Ambrose Schwallie, had actual or constructive knowledge of the disclosures, in conjunction with the temporal proximity, DeLoach will have met his burden.

In both his statements to the OCEP investigator and in his sworn testimony before me, Schwallie has stated explicitly that he knew nothing about any health or safety complaints made by DeLoach, and that he terminated DeLoach solely on the basis of his theft of government property. Hearing Tr. at 243; Ex. 13. The record indicates that the decision to discharge DeLoach was made by Schwallie, based on the recommendation of a committee. According to Schwallie and Betty Brunson, WSRC Human Resources Representative, in cases involving the possible termination of an employee, WSRC's normal procedure is to form an ad hoc committee to recommend to Schwallie the action to be taken. The committee is usually composed of representatives from the Human Resources Office, the General Counsel's Office, the Equal Employment Opportunity Office, the employee's line management and Wackenhut if criminal activity is involved. Hearing Tr. at 241, 243, 252. The record indicates that in this case there was such a committee which met with Schwallie regarding the action to be taken with respect to DeLoach. Hearing Tr. at 241; Exs. 8 (interview with Findley), 13 (interview with Schwallie). However, Schwallie could not recall who served on the committee in this case. Hearing Tr. at 241, 243.⁽⁹⁾ Both Schwallie and William "Dean" Findley, a consultant to the WSRC Human Resources Office who participated on the committee, have stated that there was no mention made during the committee meeting of any disclosures or complaints by DeLoach regarding health or safety. Hearing Tr. at 243 (Schwallie's testimony); Ex. 8 (interview with Findley).⁽¹⁰⁾

From the record, it is impossible to determine whether any of the managers DeLoach has identified as having first-hand knowledge of his disclosures had any input into the decision to terminate him. Nor is it possible to determine that the member(s) of line management who may have served on the committee or had input into the termination decision had no actual or constructive knowledge of DeLoach's disclosures.

However, it is not necessary for me to decide whether DeLoach has met this part of his burden, because WSRC has demonstrated by clear and convincing evidence that it would have terminated DeLoach even if DeLoach had not made any protected disclosures.

C. Justification for DeLoach's Termination

WSRC's policy was to terminate employees in all cases of proven theft, i.e., where there is conclusive evidence of intent to steal. Hearing Tr. at 241; see also Ex. 10 (report of Office of Personnel Management investigator). In this case, Wackenhut discovered approximately \$48,000 worth of DOE property at DeLoach's home and DeLoach admitted prior to termination that he stole government property. Hearing Tr. at 214. It is clear to me, and DeLoach agrees, that WSRC was justified in terminating him, and would have done so even if he had not made disclosures. See Hearing Tr. at 103-04, 129-130.

Nevertheless, DeLoach argues that when he was fired for theft of government property, he was treated differently from other WSRC employees whom he considered to be similarly situated. DeLoach named two other employees of WSRC who he believes were treated differently (Employee One and Employee Two). These examples do not support DeLoach's position. The case of Employee One involved the discovery of seven tools, valued at \$20 total, in the employee's vehicle as he was leaving the site. The employee claimed that he had not intended to steal the tools and there was no conclusive evidence of intent to steal.⁽¹¹⁾ The employee was therefore not fired but instead suspended for two weeks and placed on probation. Employee Two was observed taking 50 pounds of grass seed (valued at \$35.00) from a government-owned vehicle and placing it into his own vehicle. Employee Two admitted taking the grass seed for personal use and since the intent to steal was clear, the employee was fired. Ex. 16 (review of Wackenhut investigation).

These examples do not demonstrate that WSRC treated DeLoach, or anyone else, inconsistently. In Employee One's case, there was no conclusive evidence of intent to steal, whereas in Employee Two's case there was such proof.⁽¹²⁾ Furthermore, both of these cases involved property of relatively small value, and are therefore not similar situations to DeLoach's theft involving property valued at nearly \$50,000.

Moreover, even if DeLoach had identified an isolated case involving theft of government property from WSRC where the employee was not terminated, this would not be sufficient to demonstrate that DeLoach was terminated in retaliation for his alleged disclosures. It is clear to me from the record that WSRC attempted to implement consistently its policy of terminating employees where there was conclusive evidence that they intended to steal government property. This is supported by a finding in the OCEP investigation that in the four cases in 1993, including DeLoach's, in which there was conclusive evidence of theft of government property, each employee was terminated. Ex. 16 (review of Wackenhut investigation). Further, WSRC has submitted evidence showing in each of the two cases in 1996 in which there was conclusive evidence of theft of government property, each employee was terminated. Memorandum of December 9, 1996 Pre-Hearing Telephone Conference; see Hearing Exs. 1, 5. In addition, the Wackenhut investigator testified that in the four major theft cases, including DeLoach's, that have occurred during WSRC's tenure at Savannah River (all involving theft of comparable magnitude to DeLoach's), the employees were terminated. Hearing Tr. at 218-221. He also testified that, based on his eleven years of experience, the decision to terminate DeLoach was justified and DeLoach was not treated differently from any other employees where there was clear evidence of intent to steal government property. Hearing Tr. at 222. This testimony is uncontroverted. I am therefore satisfied that DeLoach was not differentially treated by WSRC, and that he would have been terminated even if he had not made protected disclosures. See also Oglesbee, 24 DOE at 89,043.

IV. Conclusion

As set forth above, I have determined that DeLoach made protected disclosures of specific and substantial dangers to health and safety. I have also found, however, that WSRC has proven by clear and convincing

evidence that it would have terminated DeLoach absent his disclosures. Accordingly, I conclude that DeLoach has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted under § 708.10.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Charles Barry DeLoach, Case No. VWA-0014, 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 five days of its receipt, a written request for review of this Decision by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments, IG-44, Office of the Inspector General, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0102, telephone number (202) 586-8289, fax number, (202) 586-3548.

Richard W. Dugan

Hearing Officer

Office of Hearings and Appeals

Date: February 5, 1997

(1) In this Decision, the OCEP investigative file exhibits will be cited as "Ex.," the transcript of the hearing will be cited as "Hearing Tr.," and the exhibits submitted directly to OHA by the parties will be cited as "Hearing Ex." The Hearing exhibits and OCEP exhibits are numbered separately.

(2) Ultimately, in 1993, DeLoach pled guilty in South Carolina state court to the charge of Grand Larceny and was sentenced to three years probation, suspended upon eighteen months of supervised probation and ten days of public service work.

(3) That office is now part of the Office of Inspector General and its director is the Assistant Inspector General for Assessments.

(4) In a prehearing submission, WSRC disputed that QISSs could be considered protected disclosures because they were part of a company suggestions system. See Letter from L.W. McCormack, Assistant General Counsel, WSRC, to Richard W. Dugan, Hearing Officer, OHA at 2 (December 3, 1996). I disagree. Nothing in the Part 708 regulations precludes QISSs from being deemed protected disclosures.

(5) DeLoach was unable to recall, and it is unclear from the record, whether these two incidents took place before or after April 1, 1989, the date WSRC took over the management of Savannah River site. Hearing Tr. at 33-34, 36-37.

(6) According to DeLoach the asbestos was present on a pipe. Hearing Tr. at 85. WSRC's investigation found it was only present on a gasket on a pipe flange. Ex. 22 at 9.

(7) According to the WSRC investigation, the Industrial Hygiene Office tested the air in the building the evening the asbestos fibers were found. That night, the air samples tested negative for asbestos. During the cleanup activities the next day, air samples were found to contain .007 and .072 fibers per CC which, according to the Industrial Hygiene Office, was considered well below any level requiring remedial action. Ex. 22 at 9-10.

(8) There is more evidence for some of these complaints being considered protected disclosures than there is for other complaints. However, there is sufficient evidence to find that at least three of the complaints, the leaking oil drums, the discovery of asbestos, and the failure to include a report of the asbestos incident

in DeLoach's medical records, qualify as protected disclosures.

(9)If DeLoach's line management was represented on the committee in this case, the representative would have probably been a management official at least three levels above DeLoach, because both DeLoach's immediate supervisor, Cooper, and Cooper's supervisor, Jackson, testified that they did not serve on such a committee and had no input whatsoever into the decision to terminate DeLoach. Hearing Tr. at 266-67, 297-98, 308-09.

(10)In addition, Findley stated that it would not have been unusual for the committee meeting to have been very brief, in view of the fact that Wackenhut had confirmed unauthorized possession of government property. Ex. 28 at 1 (letter from Findley).

(11)DeLoach asserted in a letter to OCEP that there had been a search of the employee's home and additional DOE tools were found. Ex. 4 at 4. OCEP's investigation found no evidence to confirm that assertion, see Ex. 16 (review of Wackenhut investigation), and no further evidence has been provided to me regarding the incident.

(12)At the hearing, DeLoach also mentioned a case of an employee (referred to here as Employee Three) who, according to DeLoach, stole some DOE tools and was terminated but was allowed to return to work at the site a year after termination. Hearing Tr. at 110-112, 324. When DeLoach first referred to this case in a letter to OCEP, he stated that it took place in approximately 1987. See Ex. 4 at 4. Because that date would place the incident prior to WSRC's tenure, this case was not investigated by OCEP or the WSRC Employee Concerns Office. At the hearing, DeLoach claimed that this incident took place after April 1, 1989, but he presented no evidence to support that claim. Hearing Tr. at 109. Nor did he in any way substantiate his account of the facts of Employee Three's case. I therefore have no basis to find that Employee Three and DeLoach were treated differently by WSRC.