Case No. VWA-0015

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Am-Pro Protective Services, Inc.

Date of Filing: October 15, 1996

Case Number: VWA-0015

This Initial Agency Decision concerns a whistleblower complaint filed by Barry Stutts, a former security officer for Am-Pro Protective Services, Inc. (Am-Pro). It is undisputed that:

- Mr. Stutts and a fellow security officer, Michael Wolfe, made a protected disclosure, i.e., that their supervisors did not prepare an "incident report" concerning an open top secret safe.
- Two weeks after the protected disclosure, Am-Pro terminated Mr. Wolfe, who had worked at the DOE for 16 years.
- Eight weeks after the protected disclosure, Am-Pro terminated Mr. Stutts, who had worked at the DOE for almost two years.

As explained below, Am-Pro has failed to demonstrate by clear and convincing evidence that Mr. Stutts would have been terminated in the absence of the protected disclosure. Accordingly, under the DOE whistleblower regulations, Mr. Stutts is entitled to relief.

As I was finalizing this Initial Agency Decision,(1)Am-Pro notified me that it had filed a Chapter 11 bankruptcy petition. Although Am-Pro contended that the instant proceeding should be stayed, Am-Pro did not provide any specific citations in support of that position, or explain why DOE whistleblower proceedings do not fall within a specific bankruptcy provision which permits the continuation of proceedings to enforce a governmental unit's regulatory power. 11 U.S.C. § 362(b)(4). See Board of Governors v. Mcorp Financial, 112 S. Ct. 459 (1991). This Initial Agency Decision does not impose any obligation on the parties: I have stayed any obligation to file a request for review or otherwise respond for such period as is necessary to determine the impact of the Chapter 11 proceeding on this case.

I. Background

A. Regulatory

The Department of Energy Contractor Employee Protection Program governs this matter. The applicable regulations are set forth at 10 C.F.R. Part 708 (the whistleblower regulations).

The whistleblower regulations protect contractor employees who make what are referred to as "protected disclosures." A protected disclosure involves information that the employee in good faith, believes evidences -

(i) A violation of any law, rule, or regulation;

(ii) A substantial and specific danger to employees or public health or safety; or

(iii) fraud, mismanagement, gross waste of funds, or abuse of authority.

10 C.F.R. § 708.5. The whistleblower regulations prohibit a contractor from making reprisals against an employee for such a disclosure. Id.

The whistleblower regulations provide an employee with an avenue to seek relief for a reprisal. Id. § 708.6 et seq. Under the regulations, a complainant must make two showings. The complainant must establish "by a preponderance of the evidence" that 1) there was a protected disclosure and 2) the disclosure was a contributing factor in a personnel action. 10 C.F.R. § 708.9(d). If the complainant makes the two showings referred to above, the regulations shift the burden to the contractor. In that event, the contractor must "prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure." 10 C.F.R. § 708.9(d).

B. Procedural

This proceeding began when Mr. Stutts filed a whistleblower complaint. The Office of Contractor Employee Protection (OCEP)(2)investigated the complaint and issued a Report of Investigation and Proposed Disposition (ROI/PD).

In the ROI/PD, OCEP found Mr. Stutts' complaint to be meritorious. Upon receipt of the ROI/PD, Am-Pro requested a hearing. OCEP forwarded that request to the Office of Hearings and Appeals.(3)

In its pre-hearing brief, Am-Pro did not challenge the ROI/PD's conclusion that Mr. Stutts made a protected disclosure. Instead, Am-Pro contended that it would have terminated Messrs. Wolfe and Stutts in the absence of the protected disclosure. A hearing was held on February 12, 13, and 14, 1997. Subsequent to the hearing, each of the parties submitted additional information and briefing.

II. Analysis

A. Whether Mr. Stutts Established That He Made a Protected Disclosure

As stated above, Am-Pro does not dispute that Mr. Stutts made a protected disclosure on June 4, 1994. Am-Pro does not dispute that

- security rules require the preparation of an incident report for an open top secret safe,
- Messrs. Stutts and Wolfe discovered an open top secret safe and informed their supervisors, Lts. Sean Foster and Wade Joy,
- Lts. Foster and Joy did not prepare an incident report, and
- Messrs. Stutts and Wolfe disclosed to another Am-Pro supervisor the failure of Lts. Foster and Joy to prepare an incident report.

Similarly, Am-Pro does not dispute that the disclosure of the foregoing was protected under the whistleblower regulations.

I adopt the finding in the ROI/PD that the disclosure of the failure to prepare an incident report was protected. As just indicated, it is undisputed that security rules required the preparation of an incident report.(4)

The Order provides that "[a]ny person who discovers that classified information has been, or may have been, compromised shall take immediate action to secure the classified information and report the discovery to the security office." Order at 15. (5) The regulations protect the disclosure of information that an employee "in good faith believes evidences ...[a] violation of any law, rule, or regulation ... or mismanagement." 10 C.F.R. § 708.5(a)(1). The preamble to the regulations specifically includes references to security violations. 42 Fed. Reg. 7533, 7535-6. The preamble provides in relevant part:

4. Disclosures Regarding Security Violations. Comment was received inquiring whether the protections afforded by the rule would extend to employees disclosing information respecting improper adherence to security requirements. Since the rule protects employees disclosing information pertaining to violations of laws, rules, or regulations, an employee disclosing a security matter evidencing a violation of law, rule, or regulation would be covered by the rule. The DOE believes the rule does not require amendment in this regard.

Id. at 7536. The inclusion of disclosures concerning security violations is consistent with the purpose of the DOE whistleblower regulations, which is to "involve DOE and contractor employees in an aggressive partnership to identify problems and seek their solution." Id. at 7533. Proper security at DOE's facilities is imperative and, therefore, information that rules are not being followed is vitally important to management.

Although not disputing the existence of a protected disclosure, Am-Pro argues that the supervisors acted properly in not preparing an incident report because they were following the instructions of a DOE security specialist. Who was ultimately responsible for the failure to prepare an incident report or whether the failure was justified is a management issue that is outside the scope of this proceeding.**(6)**It is sufficient that Mr. Stutts "in good faith believes" that the failure to prepare an incident report "evidences a "violation of any law, rule, or regulation" or "mismanagement." 10 C.F.R. § 708.5.

Once there is a protected disclosure under the DOE whistleblower regulations, as there is here, any reprisal for the disclosure is expressly prohibited. 10 C.F.R. § 708.5 ("Prohibition against reprisals"). The DOE has a frequently cited policy of "zero tolerance" for reprisals.

B.Whether Mr. Stutts Established That the Protected Disclosure Was a Contributing Factor in his Termination

In support of his position that the protected disclosure was a contributing factor in his termination, Mr. Stutts cites the termination of Mr. Wolfe two weeks after the disclosure and his own termination only six weeks after that. Mr. Stutts maintains that subsequent to the protected disclosure, Lts. Foster and Joy engaged in a pattern of harassment that ultimately provoked the conduct that Am-Pro cites as the basis for Mr. Stutts' termination.

Am-Pro maintains that, even if Mr. Stutts' contentions concerning Lts. Foster and Joy are true, the protected disclosure could not have been a contributing factor to Mr. Stutts' termination. Am-Pro maintains that the General Manager of the DOE contract (the General Manager) had no knowledge of the protected disclosure at the time he signed the July 28, 1994 memorandum terminating Mr. Stutts.

Whether or not the General Manager had actual knowledge of the protected disclosure is not determinative of whether Mr. Stutts has met his burden under Section 708.9(d). A complainant filing a whistleblower complaint is generally not in a position to present evidence concerning the knowledge of those making personnel decisions. Thus, a complainant can meet his burden under Section 708.9(d) by submitting sufficient evidence to permit a reasonable person to infer that the protected disclosure was a contributing factor to the determination. Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989).

Mr. Stutts has met his burden under Section 708.9(d). It is undisputed that three Am-Pro supervisors, Lts. Foster and Joy, and Major Dolores Ellison, knew of the protected disclosure on the date it was made. It is also undisputed that the three individuals, beginning on the same date, took various actions, including the following:

·June 4, 1994, the date of the protected disclosure:

Lt. Foster, in the presence of Lt. Joy and Major Ellison, reprimanded Messrs. Stutts and Wolfe for making the protected disclosure.

·June 18, 1994, two weeks after the protected disclosure:

Lt. Joy reported Mr. Wolfe for conduct that resulted in his termination on June 21, 1994.

·July 27, 1994, eight weeks after the protected disclosure:

Lt. Foster reported Mr. Stutts for conduct that resulted in his termination on July 28, 1994.

The knowledge of Lts. Foster and Joy and Major Ellison, coupled with the temporal proximity between the protected disclosure and the reprimand and terminations, is more than sufficient to permit a reasonable person to conclude that the protected disclosure was a contributing factor within the meaning of Section 708.9(d). Accordingly, under that section, the burden shifts to Am-Pro to establish by clear and convincing evidence that it would have terminated Mr. Stutts in the absence of the protected disclosure.

C.Whether Am-Pro Has Proved That It Would Have Terminated Mr. Stutts in the Absence of the Protected Disclosure

Am-Pro contends that the termination of Messrs. Wolfe and Stutts within eight weeks of the protected disclosure was merely coincidental. Am-Pro contends that both individuals engaged in conduct that would have resulted in their termination, even in the absence of the protected disclosure.

1. Mr. Wolfe's Termination

Lt. Joy reported the conduct cited by Am-Pro as the basis for Mr. Wolfe's termination. Lt. Joy reported that Mr. Wolfe had "pre-signed" SF702s ("Security Container Checksheets") for two rooms. The SF702 is the form on which security officers document the particular point in time that they check a security container, which can be either a room or a safe.(7) Mr. Wolfe had entered the time at which he was supposed to check the doors to the rooms, even though he had checked the doors over an hour earlier. Lt. Joy also reported that Mr. Wolfe had not locked three office doors in a separate wing of the building.

The Am-Pro memorandum terminating Mr. Wolfe cited falsification of official documents. Hrg. Ex. 5. The memorandum cited the pre-signing of the SF702s. The memorandum also cited the failure to lock the three office doors in a separate wing.

Mr. Wolfe did not file a whistleblower complaint. Although Mr. Wolfe viewed the termination as a reprisal for the protected disclosure, he believed that he could not file a whistleblower complaint since he had engaged in the conduct cited in the termination memorandum. ROI/PD, Ex. 4.

Although Mr. Wolfe did not file a whistleblower complaint, the circumstances surrounding his termination are obviously relevant to Mr. Stutts' complaint. They were both terminated within eight weeks of the date that they made the protected disclosure. Unless Am-Pro can establish that it "would have" terminated Mr. Wolfe in the absence of the protected disclosure, Mr. Wolfe's termination lends strong support to Mr. Stutts' complaint. Although Am-Pro's evidence concerning the reasons cited for Mr. Wolfe's termination is certainly relevant, the best evidence concerns how Am-Pro disciplined other employees engaging in similar conduct, taking into account any other relevant circumstances.

Am-Pro has not identified any instance in which it terminated an employee for pre-signing an SF702. Moreover, it is clear that Am-Pro suspended, rather than terminated, two other employees that pre-signed SF702s. During the hearing, in response to questions by Mr. Stutts'

counsel, an Am-Pro lieutenant reluctantly testified concerning his limited, second hand knowledge of those situations.(8)The General Manager, who testified subsequently, confirmed the existence of these suspensions.

The General Manager, in his testimony, sought to distinguish Mr. Wolfe's termination from the two suspensions. The General Manager testified that Mr. Wolfe was not terminated solely because he pre-signed SF702's. Instead, he testified, Mr. Wolfe was terminated because he also left three office doors unlocked.

Keeping in mind that Am-Pro has the burden of persuasion with respect to the General Manager's argument, I find that Am-Pro has failed to meet that burden. Am-Pro has not established that the three unlocked doors account for the disparity in discipline between Mr. Wolfe and the other officers. First, Am-Pro has not argued, or offered evidence to the effect, that it would have terminated or even suspended Mr. Wolfe or any other employee based on the three unlocked doors alone. The three doors were not entrances to security containers; the only reason that Mr. Wolfe was supposed to lock the doors was because the occupants had left them locked. ROI/PD, Ex. 49, at 3.4(9)Second, Am-Pro has not explained how the combination of the two offenses together resulted in a compromise of security. The pre-signing of the SF702s occurred on the "B" and "C" wings; the unlocked office doors occurred on the "A" wing. Third, even if the presence of the three unlocked doors was a cumulative factor, Am-Pro has not established that Mr. Wolfe's case, when viewed in its totality, warranted more serious discipline than the situations with the other officers, when viewed in their totality. Am-Pro has not provided information concerning the extent, or circumstances, of the pre-signing by the other individuals, nor has Am-Pro provided information concerning their service at DOE. Thus, there is no basis upon which to conclude that Mr. Wolfe, who was a good employee at the Germantown facility for 16 years, warranted more severe discipline than the suspended employees. Because Am-Pro has failed to explain the disparity in the treatment of Mr. Wolfe and the other officers, Am-Pro has failed to demonstrate that it would have terminated Mr. Wolfe in the absence of the protected disclosure.

2. Mr. Stutts' Termination

In support of its contention that it would have terminated Mr. Stutts in the absence of the protected disclosure, Am-Pro first denies Mr. Stutts' assertions of harassment. Am-Pro further maintains that Mr. Stutts' conduct on July 27, 1994 was insubordinate and disorderly and that Am-Pro terminates individuals who engage in such conduct.

a. Events leading up to the termination

It is undisputed that Lt. Foster reprimanded Mr. Stutts for making the protected disclosure. Lt. Foster maintains that Messrs. Wolfe and Stutts violated the chain of command, because they made the disclosure to another lieutenant and did not tell Lt. Foster. It is clear, however, that the whistleblower protections are not limited only to disclosures made through the chain of command. Accordingly, as the ROI/PD found, the reprimand itself was a reprisal in violation of the whistleblower regulations. ROI/PD at 7-8.

The remainder of Mr. Stutts' allegations of harassment by Lt. Foster relates to Lt. Foster's responsibility for Mr. Stutts' work schedule. Mr. Stutts maintains that Am-Pro supervisors generally resolved scheduling problems by notifying employees and relying on volunteers. Mr. Stutts maintains that prior to the protected disclosure, he did not have conflicts with Lt. Foster over his work schedule with the exception of one instance. Mr. Stutts maintains that after the protected disclosure, Lt. Foster refused his offers to work overtime and intentionally scheduled him in a manner that conflicted with his military reserve obligation and personal plans.(10)

Am-Pro contends that the record does not support Mr. Stutts' claim of harassment. Am-Pro contends that Mr. Stutts worked approximately the same number of hours before and after the protected disclosure. Am-Pro also contends that Lt. Foster scheduled Mr. Stutts in the same manner as he scheduled other employees.

Am-Pro has not demonstrated that the post-disclosure schedule conflicts were unrelated to the protected disclosure. Am-Pro has not demonstrated that there was any problem with Mr. Stutts' attendance prior to the protected disclosure. In fact, the record indicates that Mr. Stutts received quarterly bonuses for good attendance prior to the protected disclosure. Stutts 5/5/97 Submission at 2. The only conflict, identified by Mr. Stutts, concerned his submission of his military drill schedule. Moreover, the fact that Mr. Stutts may have worked the same number of hours before and after the protected disclosure, as Am-Pro contends, does not address Mr. Stutts' allegation that after the protected disclosure, Lt. Foster refused to accord Mr. Stutts the same notice and flexibility accorded others. Indeed, as discussed below, the evidence submitted in this proceeding lends support to Mr. Stutts' allegation.

It is undisputed that on July 8, 1994, Lt. Foster refused to grant Mr. Stutts military leave for weekend drill duty.(11)Lt. Foster contends that Mr. Stutts did not give adequate notice, but this assertion is not convincing. First, Lt. Foster does not explain why he did not consult Mr. Stutts' drill schedule, which appears to have been standard practice.(12)Second, the circumstances strongly suggest that Lt. Foster would have known Mr. Stutts' once-a-month weekend drill schedule without referring to the written schedule. Mr. Stutts was the only member of the night shift who had military duty, and his monthly weekend drill schedule was simple.(13)Third, it is undisputed that prior to the protected disclosure Mr. Stutts did not have any difficulty, with the exception of one month, in obtaining the leave that he needed for his monthly weekend drill. (14)

It is also undisputed that (i) on July 20, 1994, Lt. Foster told Mr. Stutts that he would have to work overtime on Friday, July 22, 1994 and (ii) on July 27, 1994, Lt. Foster told Mr. Stutts that he would have to work overtime on Saturday, July 30, 1994. At this time, Mr. Stutts had Friday and Saturday nights off because he was working the "front end" of the night shift.(15)Lt. Foster contends that Mr. Stutts would have been ordered to work overtime based on the "low man" rule. Under that rule, if no security officers volunteer for overtime, the "low man," i.e., the officer with the lowest number of overtime hours, has to work the overtime. The record indicates that, except in emergencies, Am-Pro's practice of assigning overtime was based on notice and volunteers.(16) Although Lt. Foster made a general assertion of a shortage of personnel, that assertion still does not explain why he did not follow the "notice and volunteer" practice when he assigned the overtime.

Despite the foregoing, Am-Pro cites a memorandum prepared by Lt. Foster as evidence of Lt. Foster's asserted even-handedness toward Mr. Stutts. The memorandum concerned the fact that, with respect to the July 10 and July 22 incidents discussed above, Mr. Stutts had "called off." In the memorandum, Lt. Foster stated that he was not sure that disciplinary action was appropriate because other supervisors had excused the absences. Contrary to Am-Pro's characterization of the memorandum as indicating Lt. Foster's even-handedness, when it is put in proper perspective the memorandum could be interpreted to support Mr. Stutts' claim of disparate treatment. On July 27, 1994, the same date that Lt. Foster concluded in the memorandum that disciplinary action might not be appropriate, Lt. Foster told Mr. Stutts that he would have to work overtime on Saturday, July 30, which provoked the very conduct cited as the basis for Mr. Stutts' termination.

As indicated above, Lt. Foster's treatment of Mr. Stutts was not consistent with Am-Pro's general practice of flexible scheduling based on notice and volunteers. Thus, even assuming that there was a shortage of personnel during that period, as Am-Pro contends, there is no explanation for Lt. Foster's failure to follow that practice in these instances. Accordingly, Am-Pro has failed to meet its burden of explaining the disparate treatment of Lt. Foster.

b.Mr. Stutts' July 27, 1994 conduct and his July 28, 1994 termination

As stated above, on Wednesday, July 27, 1994, Lt. Foster told Mr. Stutts that he would have to work overtime on Saturday, July 30. Am-Pro has argued that, even if Lt. Foster had harassed Mr. Stutts as discussed above, Mr. Stutts' subsequent conduct on July 27 warranted termination.

It is undisputed that on July 27, 1994, shortly after beginning his 6PM to midnight shift, Mr. Stutts telephoned Lt. Foster and volunteered to work overtime from midnight to 6AM Thursday morning. Lt. Foster told Mr. Stutts that the overtime was already taken by a lieutenant. Mr. Stutts objected, stating that Am-Pro policy required that overtime be offered to security officers first. Lt. Foster then told Mr. Stutts that he would have to work overtime on Saturday, July 30. Mr. Stutts objected, stating that he had made plans to be out of town with his family. Mr. Stutts told Lt. Foster that Lt. Foster was intentionally (i) refusing his offers to work overtime and (ii) assigning him overtime when Lt. Foster knew he had plans. Lt. Foster told Mr. Stutts that Lt. Foster would not engage in a "pissing match." Mr. Stutts responded that he would show Lt. Foster the same degree of respect Lt. Foster was showing him, put down the phone, and returned to his station. Shortly thereafter, Lt. Jacques Thompson relieved Mr. Stutts of duty and told him to go to the arms room to turn in his equipment.

It is undisputed that Mr. Stutts did not immediately proceed to the arms room as instructed, but waited for another security officer to accompany him. As the two security officers approached the arms room, they encountered the shift supervisor, Lt. Deatherage, and told him what had happened. Lt. Deatherage told Mr. Stutts to turn in his equipment and that he could talk to Major Ellison the next day. Lt. Deatherage then entered his office, which was across the hall from the arms room and adjacent to the Central Alarm System room (CAS). As Lt. Deatherage entered his office, Lt. Foster appeared in the CAS doorway and may have stepped into the hall.(17)Mr. Stutts complained about being relieved of duty, and Lt. Foster told Mr. Stutts to turn in his equipment. Mr. Stutts held out his keys and, when Lt. Foster did not take the keys, Mr. Stutts dropped them and they hit Lt. Foster's duty belt. Lt. Thompson stepped in between the two, and

Mr. Stutts walked into the arms room and turned in his equipment. As Mr. Stutts left the arms room, Lt. Foster was still in the CAS doorway or the hall.(18) Mr. Stutts told Lt. Foster that Lt. Foster was not a professional or a good supervisor, and then left the building.

Mr. Stutts was terminated in a memorandum dated the next day. The memorandum was prepared either by Lt. Foster or Major Ellison, for the signature of the General Manager. The memorandum described Mr. Stutts as argumentative and disruptive. The memorandum described Mr. Stutts as having "stepped in front of Lt. Foster in a threatening manner."

The General Manager testified that he did not hear Mr. Stutts' version of events prior to signing the memorandum.(19)Nonetheless, the General Manager testified that even if he had heard Mr. Stutts' complaints of harassment and determined them to be true, he still would have terminated Mr. Stutts.

c. Am-Pro disciplinary practices

Am-Pro cites its employee handbook which permits termination for a first offense of insubordination or disorderly conduct. Am-Pro argues that it is a paramilitary organization responsible for safeguarding DOE facilities and, therefore, discipline is of utmost importance.

Under the whistleblower regulations, it is not enough for a contractor to demonstrate that it "could have" taken the same action against the employee for the cited conduct. Instead, the regulations require that the contractor demonstrate that it "would have" taken the same action in the absence of the protected disclosure. Although the Am-Pro handbook permits termination for a first offense of insubordination or disorderly conduct, the General Manager testified that Am-Pro may impose a lesser punishment based on extenuating circumstances. Thus, this decision considers whether Am-Pro has established "by clear and convincing evidence" that it "would have" terminated Mr. Stutts in the absence of the protected disclosure.

The General Manager's statement that he would have terminated Mr. Stutts regardless of the existence of any extenuating circumstances is not convincing. The General Manager testified that, as a general disciplinary matter, he holds lieutenants to a higher standard than he holds security officers. Hrg. Tr. II-1 at 177-78. Lt. Foster knew that the shift supervisor was handling Mr. Stutts' departure. Hrg. Tr. II-1 at 204-07. Yet, Lt. Foster chose to escalate the situation with Mr. Stutts. Thus, given the General Manager's stated practice of holding lieutenants to a higher standard, Am-Pro has not satisfactorily explained why Lt. Foster's conduct would not be an extenuating circumstance.

Moreover, Am-Pro's attempted analogies to other employee terminations are not convincing. Am-Pro has cited a January 1994 termination as analogous, but it clearly is not. In that case, the employee refused an order to leave his post, after he expressed a disagreement with his break schedule by "[getting] in [the lieutenant's] face and shout[ing] ?You're Crazy.'" Hrg. Ex. 11. The employee had a lengthy history of disciplinary problems, spanning the employee's tenure from 1990 to 1994. They included four instances of "improper conduct," 17 "unexcused lates," and violations of various other disciplinary rules. Id. Similarly, Am-Pro's attempted analogies to other terminations are unconvincing. In those situations, employees had compromised the safety of the facility,(20)cursed,(21)and/or flatly refused to obey an order.(22)Mr. Stutts' offense was

of a lesser degree: he picked up a witness before going to the arms room, and he allowed himself to be provoked by Lt. Foster's presence. Moreover, there is no evidence in the record to support a conclusion that those employees, like Mr. Stutts, had good employment records.

The fact that the cited examples involve more serious conduct than that present here does not itself warrant a conclusion that Am-Pro would not have terminated Mr. Stutts. As Am-Pro indicates, it may not be possible for a contractor to identify a fact pattern closely analogous to that presented by the whistleblower. Nonetheless, the regulations place the burden on the contractor to establish by "clear and convincing evidence" that it would have terminated the employee in the absence of the protected disclosure. As discussed above, Am-Pro has not met that standard.

In concluding that Am-Pro has not demonstrated by "clear and convincing evidence" that it would have terminated Mr. Stutts in the absence of the protected disclosure, I have fully considered Am-Pro's argument about the need for discipline in the DOE's security force. There is no doubt that strict discipline is essential, but Am-Pro's citation of the need for discipline is selective. Part of discipline is following the agency's regulations. Lt. Foster did not follow those regulations when he reprimanded Messrs. Stutts and Wolfe for the protected disclosure. Am-Pro has not disciplined Lt. Foster or Major Ellison, who was present during the reprimand. In any event, it is fundamental that the whistleblower regulations do not allow a contractor to justify the termination of a whistleblower based on discipline unless it can demonstrate that the termination would have occurred in the absence of the protected disclosure. See Marano v. DOJ, 2 F.3d 1137 (Fed. Cir. 1993) (whistleblower is protected from adverse action based on investigation prompted by his protected disclosure, unless agency can demonstrate that the same personnel action would have occurred in the absence of the protected disclosure).

D. The Appropriate Remedy

Two provisions of the DOE regulations discuss the appropriate remedy in whistleblower cases. Section 708.10(c) governs initial decisions; Section 708.11(c) governs final decisions. Both regulations state that relief may include reinstatement, back pay, and all reasonable costs and expenses in bringing the complaint. Section 708.11(c) contains an additional provision authorizing "such other relief as is necessary to abate the violation and provide the complainant with relief." 10 C.F.R. § 708.11(c). As explained below, I find that Mr. Stutts is entitled to reinstatement, back pay, and reasonable costs and expenses.

As the ROI/PD concluded, reinstatement is an appropriate remedy for a termination. If Mr. Stutts decides not to accept reinstatement, he is free to decline that aspect of the relief.

With respect to back pay, there is general agreement between Am-Pro and Mr. Stutts that back pay, in theory, consists of the amount that Mr. Stutts would have received from Am-Pro had he not been terminated. Mr. Stutts has claimed regular pay, overtime pay, bonuses, a monetary benefit provided in lieu of health and life insurance, and a uniform allowance. The disagreements over the calculation of total back pay concern overtime and bonuses, but they are not the primary area of dispute.

The primary area of dispute concerns whether Mr. Stutts' total back pay should be adjusted to reflect his post-termination earnings and associated child care expenses. During his employment at Am-Pro, Mr. Stutts worked nights and cared for his children during the day while his wife worked. After his termination, Mr. Stutts was unable to obtain a comparably paying nighttime job. He accepted a daytime job, which meant that he could no longer care for his children during the day. The family adjusted to this change by obtaining day care for one child and having Mrs. Stutts leave work one-half hour earlier each day to pick up their other child at school. With respect to the foregoing, Am-Pro argues for an offset for post-termination earnings, citing common law cases limiting back pay to that necessary to make the victim "whole." On the other hand, Am-Pro opposes any adjustment for child care expenses or Mrs. Stutts' lost earnings on the ground that they are not specifically mentioned under Part 708.

As just indicated, Am-Pro shifts back and forth between the regulatory language and the principle of making a party "whole," depending upon which produces the lower amount of relief. This selective application of the principle of making a party whole, if accepted, would limit a complainant's relief to less than he would receive under either (i) a strict reading of the regulation or (ii) a consistent application of the principle of making him whole.

There is simply no logic or authority supporting a selective application of the doctrine of making a party whole. Either the express terms of the regulation govern, in which a party is entitled to "back pay" without any upward or downward adjustment, or the phrase "back pay" is given an interpretative gloss, pursuant to which the overriding standard is making the party "whole."

I rely on the express terms of the regulation, which does not provide for any adjustments to "back pay." The reason is simple. Rules of construction favor reliance on the express terms of statutory or regulatory provisions. Under this literal application of the regulations, Mr. Stutts would be entitled to $83,768.99 plus interest. The calculation of this amount is set forth in Appendix A and shows the amounts included for overtime and bonuses.

If, however, the regulation is interpreted to mean that Mr. Stutts should be made "whole", a source of guidance concerning the meaning of that provision is the Whistleblower Protection Act of 1989 as amended (the WPA). The regulatory preamble to the DOE whistleblower regulations makes a comment to the effect that the aim of the remedy provision is to make a party whole "in a manner similar to other whistleblower protection rules." 42 Fed. Reg. 7533, 7539 (March 3, 1992). The WPA, which is the statute generally applicable to federal government employees, provides as follows:

corrective action may include -

(1) that the individual be placed, as nearly as possible, in the position the individual would have been had the prohibited personnel practice not occurred; and

(2) reimbursement of attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.

5 U.S.C. § 1214(g). The legislative history of this provision indicates that its purpose is to make the complainant whole. Senate Report No. 103-358 at 11, 1994 U.S. Code Cong. & Admin. News 3549, 3559.(23) In any event, the Secretary has the authority under the regulations to order "such other relief as is necessary" to "provide the complainant with relief." 10 C.F.R. § 708.11(c). A remedy designed to make Mr. Stutts whole would entail consideration of Mr. Stutts' post-termination circumstances including alternative employment, child care expenses, his wife's lost earnings, and any other relevant matters. Under this theory, based on available data, Mr. Stutts would be entitled to $25,550.20 plus interest. The calculation of this amount is set forth in Appendix B.

The issues raised by the foregoing discussion have not been addressed in prior OHA whistleblower decisions in a comprehensive fashion. See Cornett, 26 DOE ¶ 87,507 (1996); Spaletta, 24 DOE ¶ 87,511 (1995); Ramirez, 24 DOE ¶ 87,504 (1994); Sorri, 23 DOE ¶ 87,503 (1994). Accordingly, the parties will be given a further opportunity to brief the issues identified above, as well as (i) the accuracy of the calculations in Appendices A and B and (ii) the determination of reasonable costs and expenses in bringing the complaint, including attorneys fees.

III. Conclusion

As indicated above, Mr. Stutts made a protected disclosure on June 3, 1994 and has established that the protected disclosure was a contributing factor in his termination eight weeks later. Am-Pro has failed to establish by clear and convincing evidence that it would have terminated Mr. Stutts in the absence of the protected disclosure. Accordingly, under the regulations, Mr. Stutts is entitled to relief. Alternate calculations of relief are provided in Appendices A and B. Further briefing will be permitted on the remedy issue, including the reasonable costs and expenses of bringing the complaint.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by Barry Stutts, OHA Case No. VWA-0015, is hereby granted as set forth in Paragraphs (2) through (5) below.

(2) Am-Pro shall reinstate Mr. Stutts and reimburse him for back pay and the reasonable costs and expenses to be determined in a Supplemental Order.

(3) Counsel for Mr. Stutts shall submit to the undersigned Hearing Officer and to counsel for Am-Pro (i) a quarterly schedule of the amounts Mr. Stutts would have earned had he remained in Am-Pro's employ, and (ii) a list of all reasonable costs and expenses claimed by Mr. Stutts including attorneys fees. Counsel for Mr. Stutts shall also submit, for purposes of an alternative calculation, quarterly schedules of (i) Mr. Stutts' earnings since his termination and (ii) child care costs, Mrs. Stutts' lost earnings and any consequential damages. Counsel for Am-Pro will have an opportunity to file a response.

(4) This is an Initial Agency Decision that, in the absence of a stay, becomes the Final Decision of the Department of Energy unless a written request for review by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments within five calendar days of receipt of the Initial Agency Decision.

(5) Any requirement to take any action pursuant to Paragraphs (3) and (4) above is stayed for such period of time as is necessary to permit a determination of the impact of Am-Pro's Chapter 11 bankruptcy on this proceeding.

Janet N. Freimuth

Hearing Officer

Office of Hearings and Appeals

Date: June 13, 1997

APPENDIX A

Calculation of Back Pay

1994 Biweekly Pay = Regular Pay + Overtime Pay +Health & Uniform Benefit

Regular Pay $ 868.22 ($10.52 per hour x 82.53 regular hours)(24)

Overtime Pay $ 69.59 ($15.78 per hour x 4.41 overtime hours)(25)

Health &

Uniform Benefit $ 75.20

Total: $1,013.01

Biweekly Pay Periods

1994 (07/29/94 - 12/29/94):11

1995 (12/30/94 - 12/28/95):26

1996 (12/29/95 - 12/26/96):26

1997 (12/27/96 - 06/26/97):13

Bonuses

per calendar quarter: $172.77

1994: 1 quarter

1995: 4 quarters

1996: 4 quarters

1997: 1 quarter as of 03/31/97

Total Back Pay assuming 3% increase each January 1

1994: ($1,013.01 x 11 pay periods) + $172.77 (1qtr.) = $12,674.43

1995: ($1043.40 x 26 pay periods) + $711.80 (4 qtrs.) = $27,840.20

1996: ($1,074.70 x 26 pay periods) + $733.15 (4 qtrs) = $28,675.35

1997: ($1,106.94 x 13 pay periods) + $188.79 (2 qtrs) = $14,579.01

TOTAL BACK PAY: $83,768.99

APPENDIX B

Calculation of Back Pay with Adjustments

Back Pay With Adjustments = Back Pay - (Post-termination earnings - wife's lost earnings - child care expenses)

1994: $12,674.43 - $ 6,029.35 ($ 8,987.10 - $ 636.75 - $2,321) = $ 6,645.08

1995: $27,840.20 - $16,885.06 ($24,469.76 - $1,602.70 - $5,982) = $10,955.14

1996: $28,675.35 - $18,933.25 ($25,287.20 - $ 223.95 - $6,130) = $ 6,742.10

1997: $14,579.01 - $ 1,667.88 ($ 3,067.88(26) - $ 0 - $1400)(27) = $ 1,437.88

TOTAL BACK PAY WITH ADJUSTMENTS: $ 25,550.20

Notes

(1)The DOE regulations require that I issue a decision within 30 days of the conclusion of post-hearing briefing. 10 C.F.R. § 708.10(b).

(2)OCEP has since been abolished and its functions transferred to the Assistant Inspector General for Assessments.

(3)Although Mr. Stutts questioned whether the request was filed within 15 days of service of the ROI/PD, Mr. Stutts did not pursue the matter. The record indicates that the request was timely; in any event, at most the request could have been four days late, a de minimis delay for which an extension is appropriate. 10 C.F.R. § 708.15.

(4)The record contains a memorandum from a DOE Office of Safeguards and Security (DOE Security) official who investigated the failure to prepare an incident report. ROI/PD, Ex. 40. He stated that security rules require that security infractions be documented, and he cited DOE Order 5639.1, "Information Security Program (10/19/92)," which is also in the record, see ROI/PD, Ex. 49.

(5)See also ROI/PD, Exs. 48 (DOE HQ General Order-010, "Safe Checks") and Ex. 2 (Am-Pro Protective Agency, Inc. "Performance Test 62.7").

(6)The DOE security specialist was himself (i) the custodian of the open safe and (ii) the specialist to whom Am-Pro reported and sent incident reports. When DOE Security learned of the DOE security specialist's instruction not to prepare an incident report, DOE Security admonished him for giving such an instruction and cited him with a security infraction for leaving his safe open. ROI/PD, Ex. 40.

(7)If the security container is a safe, the SF702 is located on the safe; if the security container is a room, the SF702 is located on the door outside the room.

(8)The lieutenant also testified that he had received a suspension for failing to do the required quality review of the SF702s, i.e., to review 25 percent of them to assure that the security officers were making the required checks.

(9)Those rooms contained safes, which were the security containers and, therefore, had SF702s attached. Am-Pro does not claim that Mr. Wolfe failed to check the safes or enter the correct time on the attached SF702s.

(10)The ROI/PD concluded that Mr. Stutts had not demonstrated that the schedule conflicts were reprisals for the protected disclosure. Am-Pro contended that Mr. Stutts' failure to request a hearing barred any further consideration of those conflicts. Issues of the schedule conflicts are relevant to an assessment of Am-Pro's argument that the termination was unrelated to the protected disclosure, and I am not bound by the ROI/PD. 10 C.F.R. § 708.10(b).

(11)Lt. Foster initially advised Mr. Stutts that he would have to work his entire shift beginning on Sunday, July 10, at 6PM, and ending on Monday, July 11, at 6AM, despite the fact that Mr. Stutts' drill duty lasted until midnight Sunday night. According to Lt. Foster, he then compromised and advised Mr. Stutts that he would only require him to work half of the shift. Mr. Stutts "called-off," citing his military duty, and received an excused absence (based on military duty) from another lieutenant who was unaware of his conversation with Lt. Foster.

(12)Another lieutenant testified that the drill schedules were kept on file and that he consulted them when preparing schedules. Hrg. Tr. I-1 at 228. Thus, the lieutenant testified, in the absence of a mistake, the schedule, as initially prepared, would reflect military leave. Id. 228-29.

(13)Mr. Stutts' drill occurred the first weekend of each month, unless that weekend included a holiday in which case the drill was the second weekend of the month. Stutts 5/24/97 Submission.

(14)In May 1994, Lt. Foster refused to grant Mr. Stutts leave for his drill weekend; Mr. Stutts fulfilled his Am-Pro duty, received an unexcused absence from weekend drill, and provided a second copy of his drill schedule.

(15)The front end of the night shift worked from 6PM on Sunday, Monday, and Tuesday nights until 6AM the next morning, and from 6PM to midnight on Wednesday night. The back end of the night shift worked from midnight Wednesday night to 6AM Thursday morning, and from 6PM Thursday, Friday, and Saturday nights to 6AM the next morning. Approximately every three months, Am-Pro rotated employees so that all employees would have opportunities for weekends off.

(16)Many officers wanted overtime and usually agreed among themselves who would take it. Hrg. Tr. I-1 at 189 (former Security Officer Bonzano), 223-24 (Lt. Deatherage), II-1 at 23-25 (former Security Officer Stutts), II-1 at 366-67 (Security Officer Asmussen).

(17) Lt. Foster maintains that he stayed in the doorway; Mr. Stutts maintains that Lt. Foster stepped into the hall, in violation of security rules, and into Mr. Stutts' path to the arms room.

(18)See note 16 supra.

(19)The General Manager testified that it was his general practice to hear from all sides prior to taking disciplinary action. The General Manager testified that he attempted to contact Mr. Stutts, although the record indicates that such attempts occurred after the General Manager signed the termination memorandum and in response to Mr. Stutts' request for a meeting.

(20)The memorandum of the March 3, 1993 termination stated that the facility commander was about to interview and suspend a receptionist for insubordination when she quit without notice, leaving Am-Pro "in an extreme situation nearly having an open post." ROI/PD, Ex. 27.

(21)The memorandum of the April 20, 1995 termination stated that a security officer refused to resign his name on a post log, used "loud and abusive language," and "started cursing and questioning [his supervisor] as to why he could not have brought the document to [his] post." ROI/PD, Ex. 27.

(22)The termination memoranda described the conduct as follows:

A security officer (i) refused to report to the facility commander for a counseling session (April 2, 1993 report), (ii) refused to provide documentation concerning a "no call no show" absence and was "extremely hostile and vulgar" (January 3, 1995 memorandum), and (iii) refused to

report to a particular post, used “verbal threats to harm,” and engaged in “belligerent and abusive” conduct toward a lieutenant (April 11, 1995 letter). ROI/PD, Ex. 27.

(23)A different statute, the Energy Reorganization Act, prohibits certain conduct with respect to employees of Nuclear Regulatory Commission licensees and provides for back pay and “compensatory damages.” 42 U.S.C. § 5851. See Blackburn v. Martin, 982 F.2d 123 (4th Cir. 1992) (case remanded for proper determination of amount of compensatory damages for mental and emotional distress).

(24)The number of regular and overtime hours represents the average number of such hours worked by Mr. Stutts during the pay periods in 1994 for which information was available. Mr. Stutts did not file pay information for the pay period 03/10/94 to 03/25/94.

(25)See note 1 supra.

(26)Post-termination earnings through March 13, 1997.

(27)Child care expenses through March 14, 1997.