December 9, 1998
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Russell P. Marler, Sr.
Date of Filing: August 31, 1998
Case Number: VWA-0024

This Decision involves a complaint filed by Russell P. Marler, Sr. (Marler or "the complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, codified at 10 C.F.R. Part 708. Marler is a former employee of a DOE contractor, DynMcDermott Petroleum Operations Company (DM), and alleges in his complaint that certain reprisals were taken against him by DM, including a poor performance evaluation and selection for termination under a Reduction-in-Force (RIF), as a result of his participating in an act protected under Part 708. More specifically, Marler alleges that these adverse personnel actions were improperly taken against him in retaliation for his serving as a witness in another proceeding brought under Part 708, and therefore seeks appropriate redress. On the basis of the hearing that was conducted and the record before me, I have concluded that Marler is not entitled to relief under 10 C.F.R. Part 708.

I. Background

A. The DOE Contractor Employee Protection Program

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

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. These procedures typically include independent fact-finding by the DOE Office of Inspector General (IG), followed by the issuance of a Report of Investigation setting forth the IG's findings and recommendations on the merits of the complaint. 10 C.F.R. § 708.8. Thereafter, the complainant may request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision, followed by an opportunity for further review by the Secretary of Energy or his designee. *See* 10 C.F.R. §§ 708.9-708.10.

B. The Present Proceeding

(1) Procedural History

Marler was terminated from employment by DM on September 22, 1994, and filed the present complaint under Part 708 with DOE on November 1, 1994. In his complaint, Marler alleges that his termination, under a company RIF, and a preceding poor performance evaluation, were the result of his participation as a witness in another proceeding brought under Part 708. The IG accepted jurisdiction over the complaint and conducted an on-site investigation of Marler's claims during the period September 24-27, 1996. The IG completed all of its investigative activity in the case on October 15, 1997.

Following its review of the summary of statements and documentary evidence assembled during its investigation, the IG issued a Report of Inquiry and Recommendations (ROI) in this matter on June 26, 1998. In the ROI, IG found that although Marler's participation as a witness in the collateral Part 708 proceeding was a contributing factor in the adverse personnel actions taken against him by DM, its investigation established clear and convincing evidence that DM would have taken the same actions against him even in the absence of such participation. Accordingly, IG recommends in the ROI that Marler be denied relief under Part 708.

In a letter received by the IG on July 28, 1998, the complainant exercised his right under Part 708 to request a hearing in this matter. 10 C.F.R. § 708.9(a). On August 31, 1998, the complainant's hearing request along with the ROI and supporting investigatory exhibits were forwarded to OHA. On September 4, 1998, I was appointed as Hearing Officer in this case. 10 C.F.R. § 708.9(b). After a number of contacts with the parties in the form of written correspondence and conference calls, I convened a hearing in this proceeding on October 28-29, 1998. The official transcript of that hearing will be cited in this determination as "Tr.". Pertinent documents that were attached to the ROI as exhibits will be cited as "Exh.".

(2) Factual Background

The following summary is based upon the hearing testimony, the ROI investigative file and the submissions of the parties. Except as indicated, the facts set forth below are uncontroverted.

Marler, the complainant, was hired in 1985 by Boeing Petroleum Services, Inc. (Boeing), the management and operating (M&O) contractor of DOE's Strategic Petroleum Reserve (SPR), until Boeing was succeeded by DM on April 1, 1993. Tr., vol. II at 70; Exh. 54. Subject to certain management and supervisory changes, discussed below, Marler served as a parts provisioner in the Integrated Logistics System (ILS) division under both Boeing and DM. The general function of the ILS is to ensure that there is an adequate inventory of parts, in terms of type and quantity, to maintain the equipment and machinery located at the various SPR sites. The ILS is essentially comprised of two functions, Provisioning and Cataloging. The complainant's primary area of provisioning related to parts for instrumentation control, site security and electrical maintenance. Tr., vol. II at 88.

During his first years of employment with Boeing, Marler's supervisor was Francis M. O'Laughlin (O'Laughlin), then the ILS Manager. Pursuant to a reorganization instituted by Boeing in May 1991, however, David M. Ryan (Ryan) was selected as Logistics Manager in the newly created Material Directorate, and O'Laughlin became Ryan's subordinate. This change was made in order to improve the performance of the ILS group and remedy a provisioning backlog that had developed under O'Laughlin. Tr., vol. II at 228. This realignment and demotion in authority ultimately led O'Laughlin to file an action under Part 708, on April 1, 1992, and later to resign from Boeing on May 15, 1992. At that time, Ryan became the complainant's supervisor.

By all accounts of ILS personnel, Ryan demonstrated a tougher, more "hands-on" management style than his predecessor, O'Laughlin, and immediately instituted changes to enhance the performance of the provisioning function in ILS. Tr., vol. II at 86, 173-74, 190-91. Most significantly, it was Boeing's desire and Ryan's mission to automate the provisioning function. Previously, the complainant determined the parts provisioning list through visits to SPR field sites and contacts with maintenance personnel and vendors; he then gave the list to a data entry clerk for entry into the ILS database. Tr., vol. II at 67-68. According to the complainant, he had absolutely no personal contact with the computer for his first seven years as an ILS provisioner. Tr., vol. II at 69. However, in 1992, Ryan instituted a new system which entailed an engineer determining the parts provisioning list and the three ILS provisioners, Marler, Crystal Verges (Verges) and Amelie Breaux (Breaux), providing computer support with ILS data entry and analysis. Tr., vol. II at 11-12. Ryan assigned Louise Wade (Wade), then the Cataloging supervisor, to also supervise the provisioners in implementing this change in operating procedure. Tr., vol. II at 12-13.

According to Wade, the provisioners were not immediately receptive to the new automated operating procedure requiring substantial use of the computer. Tr., vol. II at 23. She noted that the complainant was least able in use of the computer among the provisioners and, in her observation, frequently required the assistance of his colleagues. Tr., vol. II at 25-26. In this regard, Wade testified that there were often errors in Marler's work due to his inability to analyze and input data using the proper codes into the ILS database. Tr., vol. II at 14-18. The complainant's fellow provisioners stated that although the complainant was slow at data entry and sometimes needed assistance in accessing segments of the ILS database, they never had to do his work and the complainant was a good worker. Tr., vol. II at 169-70, 199- 200.

Beginning in 1992, many of Marler's coworkers noticed that a strained relationship had developed between Marler and Ryan, who was then the complainant's second line supervisor. Tr., vol. II at 176, 190. According to Verges and Breaux, the complainant and Ryan were previously friendly toward one another and were commonly known to go on fishing trips together, until an incident which occurred on a fishing trip in early 1992. *Id.* Marler relayed an account to them and to other persons in the organization, that in the course of the fishing outing, he and Ryan engaged in a conversation concerning the demotion and resignation of O'Laughlin. As recounted by Marler, he accused Ryan of betraying O'Laughlin for supporting Boeing and then assuming O'Laughlin's management position, since O'Laughlin had previously been Ryan's friend and had indeed helped Ryan to secure a job with Boeing. Tr., vol. II at 81-82. Marler stated that prior to the fishing trip confrontation, his relationship with Ryan "was great" but after the incident Ryan became: "Very cold. He ceased talking to me. . . . And it was obvious. Everybody in the department saw it." Tr., vol. II at 84-85.(1) Marler says Ryan became very "nitpicking" of his work following the fishing trip. Tr., vol. II at 86. Some time later after the fishing trip, Marler states that he was told by another ILS manager that Ryan was out to get him. Tr., vol. II at 156-58.

On April 1, 1993, DM succeeded Boeing as the M&O contractor of the SPR. Under conditions of its contract with DOE, DM was directed to hire all of Boeing's employees but to reduce the total number of employees, then approximately 1050, to less than 970 by fiscal year 1995, beginning October 1994. Tr., vol. I at 127-28, 204. In addition, the new DM management was made aware of DOE's continuing dissatisfaction with the performance of the ILS provisioning function. Tr., vol. I at 97-100. Under DM's proposal, the company agreed to make more extensive use of computers in the ILS. Tr., vol. I at 130. The determination was made by Ryan's superiors, including Ronald Jacobs (Jacobs), Manager, Maintenance and Material Department, and his boss, Robert McGough (McGough), Director, Operations and Maintenance Directorate, that the ILS provisioning group might function better by increasing the number of engineers, pairing one engineer with each provisioning analyst. Tr., vol. I at 133, 210- 11, 377.

In May 1993, following a confrontation with Wade, his supervisor, Marler received a Corrective Action Memorandum (CAM), a disciplinary personnel action placed in his employee file. During this time period, Wade remained dissatisfied with Marler's slow progress in acquiring the computer skills necessary to perform the automated provisioning function, stating that Marler was sometimes untimely in completing his assigned tasks, made errors and did not follow proper procedures. Tr., vol. II at 25-34, 49-51. While her yearly Performance Review, dated January 7, 1993, was not very critical, it admonished Marler to concentrate on "expanding PC skills and grasping the technical aspects of his job." Exh. 44. Wade clarified, however, that her issuance of the CAM was not specifically related to performance but to Marler's uncooperative behavior and disrespectful tone in responding to her request for a completion date for one of Marler's assigned provisioning projects. Tr., vol. II at 39-42. Ryan had nothing to do with Marler receiving the CAM, although Ryan supported Wade in her decision to issue the CAM. Tr., vol. II at 58-59.

By the fall of 1993, it became clear to DM management and the firm's Human Resources division, that DM would not be able to meet through attrition the personnel levels required by October 1994 under the DOE contract, and DM began to plan for a possible RIF. Tr., vol. I at 132, 186-87. Jacobs instructed his underlying managers, including Ryan, to provide the names of their two lowest performers. Tr., vol. I at 101. Ryan provided the names of three individuals for possible RIF, including two ILS provisioners, Marler and Breaux. Tr., vol. I at 102. Jacobs decided to target the ILS for layoffs since in his view the ILS would operate more efficiently with a smaller staff, with more "degreed" engineers and fewer analysts. Tr., vol. I at 133-34. Jacobs then had a meeting with the ILS managers, including Ryan, to review the tentative RIF

list. Those managers familiar with Marler's work supported Marler being included on the list. Tr., vol. I at 134; Tr., vol. II at 227, 240. Word of a potential RIF filtered to the ILS employees and during an ILS staff meeting, Breaux and Marler confronted Ryan, and Marler directly accused Ryan of trying to get rid of him, which Ryan denied. Tr., vol. II at 198, 213.

In December of 1993, Marler went to Jacobs, complaining that he had received no merit pay bonus and that Ryan had failed to give him a plausible explanation. Tr., vol. I at 80-81, vol. II at 103-04. Jacobs explained that merit pay bonuses that year were determined based upon a performance "totem" handed down by Boeing, that Marler was near the bottom of the totem and, in fact, even high ranking employees had received a substantially reduced bonus. Tr., vol. I at 93, 274. Marler then decided to discuss other matters with Jacobs. The complainant informed Jacobs of the strained relationship that had developed between him and Ryan following his expression of support for O'Laughlin on the fishing trip. Tr., vol. I at 92, vol. II at 106. Jacobs responded by informing Marler that a RIF was coming and his name had in fact "bubbled up" on the tentative RIF list. Tr., vol. I at 81; Exh. 26 (Jacobs' contemporaneous notes of meeting). Marler recalled the conversation as follows: "[Jacobs] said, I've got an iron worker and housewives doing provisioning work over there. And I said, how about eight years of provisioning, on-hands experience? And he said don't make no difference. He said if I had to make a cut today, I would cut you." Tr., vol. II at 105.(2)

In April 1994, Wade ceased to be Marler's direct supervisor as the result of an ILS realignment, and Ryan once again became the complainant's direct supervisor. Tr., vol. II at 54. Also in April 1994, McGough made the determination to move forward with the RIF downsizing plan required under terms of the DOE contract. Exh. 10.

On May 18-19, 1994, a hearing was conducted at the SPR offices in reference to the complaint brought by O'Laughlin against Boeing under Part 708. *Francis M. O'Laughlin*, OHA Case No. LWA-0005. Marler and Ryan were among the witnesses called to testify at the hearing although neither was aware that he would be called until a short time before the hearing. Tr., vol. I at 364, vol. II at 143-44. According to Marler, upon being notified that he would be called as a witness, Ryan approached him and threatened that Marler's future hinged on his testimony. Tr., vol. II at 113. Ryan stated that he only advised Marler that he should be careful about his testimony in terms of accuracy. Tr., vol. I at 364. Nonetheless, Marler informed in-house counsel for DM and a DOE official that he was fearful of possible retaliation by Ryan. Tr., vol. II at 113-14. Ryan stated that he had no direct knowledge of the content of Marler's testimony at the hearing, but following the hearing Jerry Siemers, a former Boeing manager, informed him "that [Marler] was very upset and asked what I had done to get him so mad." Tr., vol. I at 365.

Following the hearing, the already poor relationship between Marler and Ryan deteriorated even further in the view of many ILS workers. Tr., vol. I at 176, vol. II at 167. Wade, Marler's previous supervisor, stated that following the hearing, the rumors that Ryan was going to get rid of Marler became common. Tr., vol. II at 61. Pete Kelly, an engineer who was temporarily brought in to work in ILS during this time frame, testified that Ryan was "bitter" about Marler serving as a witness, and following the hearing became unduly critical of Marler's work, stating: "It was evident that [Marler] was being harassed heavily." Tr., vol. I at 167. Indeed, Kelly stated that on several occasions following the hearing, Ryan stated during private conversations in Ryan's office that he was going to get rid of Marler. Tr., vol. I at 155-56.

In a letter dated July 28, 1994, DM informed DOE of its proposed staffing changes under the RIF in the Operations and Maintenance Directorate, and the complainant's position was one of six proposed for deletion at DM's New Orleans, LA, site. Exh. 31. In deciding to include Marler, Ryan testified that he was directed by Jacobs to lay off an employee and he had only the three ILS provisioners, Verges, Breaux and Marler, to choose from. Tr., vol. I at 372. Ryan stated that he chose Marler because, based upon the position skill requirements to maintain the ILS database and do reports, Marler was "the most expendable of the three." Tr., vol. I at 373.

On August 16, 1994, Marler received his annual Performance Evaluation rating from Ryan, who gave the complainant an unfavorable overall rating of "Marginal." Exh. 43. Wade, who was Marler's direct

supervisor for a portion of the rating period, until April 1994, had only conversational input into this Performance Evaluation of Marler. Tr., vol. I at 371, vol. II at 38.

In a letter dated August 17, 1994, DM informed DOE of its determination to RIF twelve DM employees from its field sites and four from the New Orleans site, including the complainant. Tr., vol. I at 277; Exh. 33. By letter dated September 22, 1994, Marler was advised by DM that his employment was being terminated through involuntary RIF, effective that day. Exh. 35.

Within a few days of receiving notice of the RIF, several of Marler's coworkers, including Verges, Breaux and Henry Haskell, then an ILS engineer, went to McGough's office to express their view that Marler was productive and was unfairly selected for the RIF. Tr., vol. I at 195, vol. II at 171, 208-09. Although McGough does not recall, Verges and Breaux testified that the matter of possible retaliation was raised. Tr., vol. I at 196, vol. II at 209. Notwithstanding, McGough determined after conferring with Jacobs to let the selection of Marler for the RIF to stand. Tr., vol. I at 196.

Following the September 22, 1994 RIF, there were additional personnel changes in ILS Provisioning. Jacobs decided to bring in another engineer from the field, Larry Evans, to work in ILS to replace Henry Haskell, who retired. Tr., vol. I at 145-46. After the beginning of the 1995 fiscal year, McGough received permission from DOE to increase staff and, in November 1994, DM hired Cahn Tran, an electrical engineer, to work in ILS. Tr., vol. I at 211. Cahn Tran, coupled with a provisioning analyst, performed some of the same but more extensive duties than those previously performed by Marler. Tr., vol. II at 178-79. Timothy Hewitt, DM Operations Manager, testified that this system of pairing a degreed engineer with a provisioning analyst, long sought by Jacobs, has made ILS Provisioning much more effective. Tr., vol. II at 236-37.

II. Legal Standards Governing This Case

In 10 C.F.R. Part 708, we find the rule applicable to the review and hearing of allegations of reprisal based on protected disclosures made by an employee of a Department of Energy (DOE) contractor. Proceedings under Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or his designee. *See*David Ramirez, 23 DOE ¶ 87,505 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has "[p]articipated in . . . a proceeding conducted pursuant to this part." 10 C.F.R. § 708.5(a)(2). In the present case, Marler claims in his complaint that adverse personnel actions were taken against him by DM, including being selected for layoff under a company RIF and receiving an unfair Performance Evaluation, as a result of his participating as a witness in *Francis M. O'Laughlin*, OHA Case No. LWA- 0005 (*O'Laughlin*), a proceeding brought under Part 708 against Boeing, DM's predecessor M&O contractor.

A. The Complainant's Burden

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

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

10 C.F.R. § 708.9(d); *see* Ronald Sorri, 23 DOE ¶ 87,503 (1993). "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when

weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse,* 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the burden of persuasion is allocated roughly equally between both parties. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). As a result, Marler has the burden of proving by evidence sufficient to "tilt the scales" in his favor that he participated in a proceeding protected under Part 708. 10 C.F.R. § 708.5(a)(2). If the complainant does not meet this threshold burden, he has failed to make a *prima facie* case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a "contributing factor" in the personnel actions taken against him, specifically his low Performance Evaluation received August 16, 1994, and selection for the RIF, ultimately conducted on September 22, 1994. 10 C.F.R. § 708.9(d); *see Helen Gaidine Oglesbee,* 24 DOE ¶ 87,507 (1994); *Universities Research Association, Inc.*, 23 DOE ¶ 87,506 (1993). This standard of proof is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221(e)(1), and the 1992 amendment to § 210 (now § 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In explaining the "contributing factor" test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation's chief House sponsors, stated: “The words ?a contributing factor’, ... mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” 135 Cong. Rec. H747 (daily ed. March 21, 1989)(Explanatory Statement on Senate Amendment-S.20). *See Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying "contributing factor" test).

B. The Contractor's Burden

If the complainant meets his burden, the burden shifts to the contractor. The contractor must prove by "clear and convincing" evidence that it would have taken the same personnel action against the complainant absent the protected disclosure. "Clear and convincing" evidence is a much more stringent standard; 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. Thus, if Marler has established that it is more likely than not that his participation in a protected activity was a contributing factor in his selection for RIF and poor Performance Evaluation, DM must convince me that it would have taken these actions despite such participation by the complainant.

III. Analysis

I have carefully reviewed the record in this proceeding, including the testimony of the witnesses at the hearing and the exhibits presented in the record. For the reasons set forth below, I find that the complainant’s participation as a witness in a Part 708 proceeding was protected under 10 C.F.R. § 708.5(a)(2), and that the complainant has shown by a preponderance of the evidence that such participation was a contributing factor in his selection for the RIF and receiving a poor Performance Evaluation. However, I have further determined that DM has established clear and convincing evidence that the firm would have taken the same personnel actions against the complainant even in the absence of such participation. I will therefore deny Marler’s request for relief under 10 C.F.R. Part 708.

A. Complainant’s Participation

At the outset of the hearing, the parties stipulated that a hearing was conducted under Part 708 on May 18-19, 1994, in *O’Laughlin*, and Marler served as a witness on behalf of O’Laughlin in that proceeding. Tr., vol. I at 9. The record is also clear that DM was aware of Marler’s participation as a witness in that proceeding. Although the*O’Laughlin* proceeding involved the predecessor contractor, Boeing(3), DM was put on notice since a number of DM employees were called as witnesses, as former employees of Boeing. Further, the record shows that Ryan, Marler’s direct supervisor at that time, approached Marler a few days before the hearing to discuss Marler’s participation as a witness in the proceeding, although there is disagreement as to whether Ryan’s comments at that time were threatening or merely advisory. Tr., vol. I at 364, vol. II at 113.

I therefore find that the complainant has met his threshold showing under section 708.9(d), that he engaged in an activity protected under Part 708, *viz.* participating as a witness in a collateral Part 708 proceeding, and that DM had knowledge of such participation.

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 personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993) *citing McDaid v. Dept't of Hous. and Urban Dev*., 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (County). In addition, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F. 2d 147, 148 (8th Cir. 1989).(4)

Applying these standards to the present case, I find that there is clearly temporal proximity between Marler's serving as a witness in the *O'Laughlin* hearing on May 18-19, 1994, and both the placement of Marler's position on the RIF list proposed to DOE in a letter dated July 28, 1994*, and the complainant receiving an unfavorable Performance Evaluation from Ryan, his supervisor, on August 16, 1994. The record shows that although Ryan did not have specific knowledge of Marler's testimony in the *O'Laughlin* hearing, Ryan was approached by a former Boeing manager present at the hearing who asked Ryan what he had done to make Marler so mad. Tr., vol. I at 365. In addition, there is ample testimony that following the hearing, the already poor relationship between Marler and Ryan grew worse, and the rumors of Ryan's threats to get rid of Marler more prevalent.

Based on the foregoing, I find Marler has established a *prima facie* case that his protected disclosure was a contributing factor to his being selected for the RIF and receiving a poor Performance Evaluation. The burden now shifts to DM to prove by clear and convincing evidence that it would have chosen Marler for the RIF and the complainant would have received a poor Performance Evaluation absent his protected disclosure. 10 C.F.R. § 708.9(d).

C. Contractor's Actions Absent Complainant's Participation

I have carefully weighed the evidence presented in the record of this case and I am led to conclude, on the basis of clear and convincing evidence, that DM would have taken the same adverse personnel actions against the complainant even in the absence of his serving as a witness in the *O'Laughlin* hearing. While I am not comfortable with the role that personal animosity between Marler and Ryan may have played in these matters, it is evident that this poor relationship predated the *O'Laughlin* hearing. More importantly, I am convinced that other objective factors beyond Ryan's control, including operating changes within ILS that diminished Marler's value to the organization and DOE contractual mandates that made a RIF necessary, would have resulted in the same adverse personnel actions being taken against Marler. These factors are discussed in greater detail below.

The evolution of circumstances leading to the adverse actions against Marler stemmed from certain commitments made to DOE by DM upon assuming the M&O contract in April 1993. First, there was a perception shared by DM management and DOE that the ILS was failing to adequately perform parts provisioning for the SPR sites, evidenced by the existence of a substantial parts provisioning backlog. Tr., vol. I at 97- 100, vol. II. at 228. Hewitt, Operations Manager, testified that the ILS was viewed to be "over strength" and "under performing" and Ryan was installed as ILS manager to correct this situation. Tr., vol. II at 228-29.(5) Thus a commitment was made by DM to improve the ILS provisioning function through

* This decision, as issued, contained a typographical error specifying the date of the RIF list letter as July 28, 1998. However, the correct date of the RIF letter was July 28, 1994, as accurately stated in the Factual Background (page 4) of the decision.

increased use of computers. Tr., vol. I at 130. The second commitment made by DM was to reduce overall staff levels at headquarters and field sites from approximately 1050 on board, to 970, by fiscal year 1995, beginning October 1994. Tr., vol. I at 127-28, 204. As explained below, the convergence of these commitments worked to the disadvantage of the complainant, setting aside any animus existing between the complainant and Ryan.

DM management believed that ILS productivity would be increased through greater reliance on automation and pairing an engineer with a provisioning analyst, with the latter performing computer input and analysis of the ILS database. Tr., vol. I at 130, 133-34, 210-11, 337. This new operating procedure radically changed the nature of Marler's work responsibilities, who had previously performed his provisioning duties in hard copy which he then gave to a data input entry clerk. Tr., vol. II at 66-67. Marler conceded that prior to the change in his provisioning duties, his skill level on the computer was "none whatsoever." Tr., vol. II at 70. Wade, who was brought in by Ryan as supervisor to facilitate automation, testified that none of the provisioners (Marler, Verges and Breaux) was receptive at first, but Marler was the least able to adapt. This comes as no surprise since Verges had functional computer skills from previous employment and indeed had been a data entry clerk before rising to become a provisioner. Tr., vol. II at 168. Similarly, Breaux had substantial prior data input experience through her position with a previous contractor. Tr., vol. at 206. Marler, on the other hand, had never been introduced to the use of a computer in any work or educational environment. Although the complainant made progress, he stated: "I am not computer literate. I learned to do what I had to do and that was it. I can get in and out and do my thing, but I don't type fast. I get by. I am slow." Tr., vol. II at 93. When asked whether his computer skills were as good as either Verges or Breaux, the complainant replied: "Not hardly.(6) Thus, Wade testified that the complainant often had problems with timeliness in completing his assigned projects related to use of the computer, and frequently required the assistance of Verges and Breaux. Tr., vol. II at 16-17, 22, 26-27, 29, 46-47, 49-50.

It is in this backdrop that it became clear in October 1993, that DM would likely be unable to meet the workforce reductions required under the DOE contract through attrition, and DM management began contingency planning for a possible RIF. Jacobs, Ryan's superior, requested all of his subordinate managers to identify their two lowest performers. Tr., vol. I at 101. Ryan responded by identifying three individuals, Paul Simon, who worked under Ryan as a logistics analyst, and Marler and Breaux from ILS Provisioning. Tr., vol. I at 101-02. When Marler's name was presented as a RIF candidate, there was no objection raised by any of the managers assembled at meeting by Jacobs to review the list. Tr., vol. I at 33. Marler was viewed as the most expendable from the provisioning group by other managers familiar with the nature and level of his work. Tr., vol. II at 227, 240. I am aware that many of the negative impressions of Marler on the part of upper level DM management (Jacobs and McGough) were drawn from Ryan, who may have had personal reasons to dislike Marler. Tr., vol. I at 74-75, 193-94. However, I find significant the testimony of Wade who was the complainant's immediate supervisor for nearly two years, ending in April 1994, who had a good personal relationship with Marler according to both Wade and Marler. Tr., vol. II at 9-10, 120. When asked which of the provisioners she would have selected for the RIF if it had been her decision, she responded: "[Marler] would have been the chosen individual because he was the weakest individual of the three there." Tr., vol. II at 53.

Thus, Marler's name was on the screen as a likely candidate for RIF approximately five months before DM management had any knowledge that Marler would be called to serve as a witness in the *O'Laughlin* hearing.(7) Based upon the circumstances confronting DM management, I find nothing which would arouse suspicion in its determination to target ILS Provisioning for downsizing and realignment, nor in the fact that Marler was deemed to be the lowest performer, in view of the new ILS operating procedure. Furthermore, the record indicates that McGough decided to go forward with the RIF in April 1994, at a time when he had no knowledge that Marler would be called to testify in the *O'Laughlin* proceeding. Exh. 10. Although the *O'Laughlin* hearing took place before DM actually notified DOE of its RIF selections in a letter dated July 28, 1994 (Exh. 31), the complainant's participation as a witness cannot reasonably be deemed to have had any impact upon a RIF selection process that had already been set in motion.

Furthermore, I find no "smoking gun" in the poor Performance Evaluation which Ryan gave to the complainant on August 16, 1994, one month prior to Marler receiving notice that he had been selected for the RIF on September 22, 1994.(8) In the August 1994 Performance Evaluation, Ryan gave Marler a rating of “Marginal.” Exh. 43. During the hearing, Ryan fully explained his position on Marler’s deficiencies with respect to all of the performance elements comprising this rating. Tr., vol. I at 294-330. I found this testimony persuasive, and reasonably supportive of the “Marginal” rating given to Marler on the descending scale of “Excellent,” “Above Expectations,” “Fully Satisfactory,” “Marginal,” and “Unsatisfactory.” Exh. 43. Indeed, a higher rating of “Fully Satisfactory” would have been inconsistent with the assessment of Marler’s work provided by Wade, who supervised the complainant for the first half of the rating period.(9)

Finally, I find nothing duplicitous in DM’s subsequent decision to hire an electrical engineer in ILS Provisioning, in November 1994, who performed many tasks previously performed by the complainant. McGough testified that DM was only able to increase its staffing level to allow for this position during the succeeding fiscal year 1995, beginning in October 1994, after receiving permission from DOE. Tr., vol. I at 211. From his testimony, I detected no intention by DM to delay asking DOE for this authority until after the RIF of Marler. Further, the determination to add a degreed electrical engineer to augment the provisioning function was always the goal of DM management. Tr., vol. I at 133, 210-11, 377, vol. II at 236-37.

For the reasons above, I have concluded that DM has carried its burden to prove by clear and convincing evidence that the firm would have taken the same adverse personnel actions against the complainant even the absence of his participation as a witness in the collateral Part 708 proceeding.

IV. Conclusion

As set forth above, I have determined that the complainant has failed to establish the existence of a violation on the part of DM for which he may be accorded relief under DOE’s Contractor Employee Protection Program, 10 C.F.R. Part 708. The record shows that Marler engaged in a protected activity by serving as a witness in the *O’Laughlin* proceeding brought under Part 708, and I am persuaded that Marler’s participation was a “contributing factor” in the adverse personnel actions taken against him by DM, including his selection for termination under a DM RIF and receiving a poor Performance Evaluation. Notwithstanding, I have determined that DM has carried its burden to show by clear and convincing evidence that the firm would have taken the same action even in the absence of Marler’s protected activity. In reaching this determination, I do not pass judgment on whether Ryan was in part motivated by personal bias in selecting Marler for termination. In the end, Marler was the unfortunate victim of DM’s plans to automate and restructure ILS Provisioning, which worked to devaluate his skills and experience. The record convinces me that the process of events leading to the adverse personnel actions began long before Marler’s serving as a witness in the collateral proceeding, continued apart from his participation as a witness, and would have occurred even in the absence of such participation.

Accordingly, I will deny Marler’s request for relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Russell P. Marler, Sr. 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, Office of the Inspector General, Department of Energy.

Fred L. Brown

Hearing Officer

Office of Hearings and Appeals

Date: December 9, 1998

(1)Ryan asserted that he has no recollection of the conversation with Marler regarding O'Laughlin, although he recalls going fishing with Marler on one occasion. Tr., vol. I at 222; Exh. 13 (IG Summary of Ryan Interview). Verges and Breaux both knew about the fishing incident, but based only upon what Marler had told them. Tr., vol. II at 176, 190. Ryan conceded, however, that he and Marler had an "interpersonal problem." Tr., vol. I at 321.

(2)At this point, there is a factual divergence regarding further discussion at the meeting. According to Jacobs, he explained to Marler that his skills and background in construction were not well suited to provisioning and that Marler might want to consider taking a supervisory position at one of the SPR field sites, but Marler declined. Tr., vol. I at 125-26. Both McGough, Jacob's superior, and Ryan testified as to their belief that Jacobs had offered Marler a field position which Marler refused. Tr., vol. I at 188, 253. The complainant's provisioning coworker, Breaux, recalled that Marler told her that he and Jacobs had discussed a possible field position. Tr., vol. II at 217. Marler testified at the hearing, however, that Jacobs never mentioned anything about a field job during their meeting, and if Jacobs had he would have jumped at the opportunity. Tr., vol. II at 107-110.

(3)The parties further stipulated that DM was dismissed as a party early in the *O'Laughlin* proceeding. Tr., vol. I at 9; *see* *DynMcDermott Petroleum Operations Co.*, Case No. LWZ- 0027, 24 DOE ¶ 87,501 (1994).

(4)Recently, in a case involving a protected disclosure by a whistleblower, the Court of Appeals for the Federal Circuit stated:

If a whistleblower demonstrates both that the deciding official knew of the disclosure and that the removal action was initiated within a reasonable time of that disclosure, no further nexus need be shown, and no countervailing evidence may negate the petitioner's showing. The burden of persuasion thus shifts to the agency to prove by clear and convincing evidence, a higher standard, that it would have taken the action even in the absence of the protected disclosure.

Kewley v. Dept. of Health and Human Services, 153 F.3d 1357, 1362 (Fed. Cir., 1998).

(5)Breaux, one of the provisioners who worked with Marler, testified that from the time that the Material Directorate was formed under Boeing, and Ryan took over as ILS Manager, "we always felt that we were being watched all the time." Tr., vol. II at 207.

(6)"To Marler's credit, both Verges and Breaux testified that although they assisted Marler on the computer, Marler was much more adept at reading equipment diagrams for purposes of determining parts to be provisioned. Tr., vol. II at 134-35, 169-70, 200. However, as clarified by Wade, this skill became less valuable since under the new regimen, the engineer assigned to the provisioner was charged with making this kind of parts determination. Tr., vol. II at 31-34.

(7)As noted above, Marler had no knowledge that he would be called as a witness in the *O'Laughlin* hearing until shortly before the hearing, nor had he been contacted by O'Laughlin who left DM in May 1992. Tr., vol. I at 23-24, vol. II at 144. Ultimately, O'Laughlin's complaint under Part 708, based upon a purported health and safety disclosure, was found to be without merit by the agency. *Francis M. O'Laughlin*, 24 DOE ¶ 87,505 (1994), *affirmed*, 24 DOE ¶ 87,513 (1995).

(8)Although the RIF list had been finalized by this time, DM informed DOE in a letter dated August 17, 1994, that as a security precaution, selected employees would not be notified until the effective date, September 22, 1994, and would be "out processed the effective date of the reduction in force." Exh. 33.

(9)Moreover, Ryan had a reputation for being a tough evaluator among other ILS employees he rated, apart from Marler. Tr., vol. II at 174, 203-04.