

Case No. VWA-0041

July 11, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Lucy B. Smith

Date of Filing: May 5, 1999

Case Number: VWA-0041

This Decision involves a whistleblower complaint filed by Lucy B. Smith (Smith) under the Department of Energy's (DOE) Contractor Employee Protection Program. From September 1973 to March 1997, Smith was employed as a chemist at the DOE's Savannah River Site (SRS) by various contractors, the most recent of which was Westinghouse Savannah River Company (WSRC). At the time of her termination, Smith worked at WSRC's Waste Management Laboratory. Smith alleges that in retaliation for making a number of health and safety disclosures WSRC terminated her pursuant to a January 1997 Reduction-in-Force (1/97 Rif) and subsequently failed to rehire her.

I. Background

A. The DOE Contractor Employee Protection Program

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

B. Procedural History

On March 26, 1997, Smith filed a complaint with the DOE's Office of Inspector General (IG). After making a preliminary determination that the complaint fell within the jurisdiction of Part 708, IG then conducted an investigation into Smith's allegations and issued a report on April 13, 1999 entitled "Report of Inquiry and Recommendations" (Report). The Report concluded that Smith had made several protected disclosures but that WSRC had shown by clear and convincing evidence that Smith would have been selected for termination absent the protected disclosures. On May 12, 1999, the Director of the Office of Hearings and Appeals (OHA) appointed me to be the hearing officer in this matter. 10 C.F.R. § 708.23(a), 708.25(a). Subsequently, the hearing was held at Aiken, South Carolina on April 11-12, 2000.

II. Analysis

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 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden 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" 10 C.F.R. § 708.9(d). See [Ronald Sorri](#), 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Smith establishes that a protected disclosure, participation, or refusal was a factor contributing to her termination or failure to be rehired, WSRC must convince me that it would have taken the action even if Smith had not engaged in any activity protected under Part 708. [Helen Gaidine Oglesbee](#), 24 DOE ¶ 87,507 at 89,034-35 (1994).

After considering the record established in the investigation by the Assistant Inspector General and OHA, the parties' submissions, and the testimony presented at the hearing, for the reasons stated below I have concluded that Smith has met her burden of proving by a preponderance of the evidence that she made protected disclosures concerning health or safety that contributed to her termination. I also find, however, that she has not met her burden to prove by a preponderance of the evidence that her disclosures were a contributing factor in her failure to be rehired. Lastly, I find that Smith's complaint must be denied because I conclude that WSRC has shown by clear and convincing evidence that it would have terminated Smith absent her disclosures.(1)

A. Whether Smith Engaged in Activities Protected Under 10 C.F.R. § 708.5 (2)

The Part 708 regulations prohibit discrimination by a DOE contractor "against any employee because the employee (or any person acting pursuant to a request of the employee) has,"

(1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), 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;

(2) Participated in a Congressional proceeding or in a proceeding conducted pursuant to this part; or

(3) Refused to participate in an activity, policy, or practice when--

(i) Such participation--

(A) Constitutes a violation of a Federal health or safety law; or

(B) Causes the employee to have a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation, and the

activity, policy, or practice causing the employee's apprehension of such injury--

(1) Is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety resulting from participation in the activity, policy, or practice; and

(2) The employee is not required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities;

(ii) The employee, before refusing to participate in an activity, policy, or practice has sought from the contractor and has been unable to obtain a correction of the violation or dangerous activity, policy, or practice; and

(iii) The employee, within 30 days following such refusal, discloses to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy, or practice, and explaining why he has refused to participate in the activity.

57 Fed. Reg. at 7542 (1992) (10 C.F.R. § 708.5(a)). Smith alleges that she engaged in a number of activities that are potentially protected under Part 708.

1. August 5, 1996 Report regarding unsanitary and unsafe conditions in the ladies restroom

First, Smith asserts that she conducted examinations of two ladies' restrooms (in Buildings 241-28H and 704-56H) that had been used to obtain bioassay samples and that had been previously identified as having potential problems. On August 5, 1996, Smith wrote a memorandum (August Memorandum) to her supervisor, Woodie Melton, pointing out that a required bioassay form was not available at the bioassay station in one of the restrooms and noting that both restrooms were unsanitary in some respects. See Report Exhibit B-1. Section 708.5(a) requires that for a disclosure to be protected the disclosure must reference a "substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5(a)(1)(ii). Smith's August Memorandum primarily discusses the unsanitary nature of the restrooms. While one can say that the August Memorandum discusses public health in a general sense, it does not describe a substantial and specific danger to employees or the public. Thus, I do not find Smith's August 5, 1996 memorandum to be protected under Part 708.

2. October 10, 1996 Disclosure concerning proper monitoring procedures in the ITP facility

Second, Smith claims that sometime in October 1996, she noticed that the red alert lights were flashing in the Stripper Building, and signs were posted indicating an asphyxiation hazard in that building. See Report Exhibit A-2 at 2-3. (3) The Personnel Contamination Monitor (PCM) that Smith used was located in a building next to the Stripper Building. *Id.* at 3; Report Exhibit A-4 at 2. Consequently, Smith used a PCM in another building and tried to ask Melton if the building containing the PCM had a ventilation system separate from the Stripper Building. Smith states that she was trying to determine if it was safe for her and other employees to use the PCM when the asphyxiation hazard alarm was activated in the Stripper Building. Report Exhibit A-2 at 3; Report Exhibit A-4 at 2. She did not find Melton but asked Annie Bell (Bell), her shift supervisor, who did not know the answer. Report Exhibit A-2 at 3. Smith contacted Wyatt Clark (Clark), the assistant manager of the ITP facility, who also did not know but stated he would try to find out. *Id.*; Report Exhibit A-4 at 2. WSRC has stipulated that the October 10, 1996 communication is a protected disclosure under Part 708. See February 9, 2000 Letter from Michael L. Wamsted, Senior Counsel, Westinghouse Savannah River Company, to Richard A. Cronin, Jr., Hearing Officer.

3. December 9, 1996 Disclosure regarding Rad-Con Permits

In a monthly report dated December 9, 1996, Smith identified three potential safety concerns regarding the Rad-Con Permits posted outside a laboratory in the Stripper Building. See Hearing Exhibit W-13 (December 9, 1996 memorandum from Smith to Melton); Report Exhibit A-2 at 3; Report Exhibit B-3 at 1-2. A Rad-Con Permit is a notice posted outside radiological areas that employees are required to read prior to entering in order to ensure that they are aware of hazards and safety requirements. Report Exhibit A-2 at 3. Smith reported that one Rad-Con Permit incorrectly read: "Possible Hazards: Benzene and/or Oxygen Deficiency." Because the laboratory had a ventilation system separate from the Stripper Building, there might not be a possibility of oxygen deficiency. If oxygen deficiency were possible, Smith recommended that monitors and warning lights should be installed. Smith reported that another Rad-Con Permit should have stated that personnel are required to wear safety glasses. Smith also suggested that the probe holders for the beta/gamma radiation detection should be redesigned to allow the probe to be held sideways to prevent contaminate particles from falling on the probe while an employee's hands were monitored. See Report Exhibit A-2 at 3; Hearing Exhibit W-13. Melton recalls that Smith's report referenced two issues concerning the Rad-Con Permit: the "Benzene and/or Oxygen Deficiency" notice and the desirability of including a requirement that safety glasses be worn. Report Exhibit A-3 at 4-5. WSRC has also stipulated that Smith's December 9, 1996 Report is a protected disclosure under Part 708. See February 9, 2000 Letter from Michael L. Wamsted, Senior Counsel, Westinghouse Savannah River Company, to Richard A. Cronin, Jr., Hearing Officer.

4. Smith's submission of January 13, 1997 "One" Form

Smith believed that no action had been taken by her supervisor regarding the safety items in her December 9, 1996 Report. Report Exhibit A-2 at 3-4; Report Exhibit A-4 at 2. Consequently, she contacted Clark to ask about how to proceed. Report Exhibit A-4 at 2. Clark suggested that Smith file a "One" Form describing the items discussed in her December 9 Report. Report Exhibit A-4 at 2; Report Exhibit B-3. According to Clark, he assured Smith that SRS senior management would look into her concerns. Smith then completed and submitted a "One" Form detailing the concerns she had listed in her December 9 Report. Report Exhibit A-4 at 2; Report Exhibit B-3.

The "One" Form details Smith's concerns about inaccurate labeling of hazards for lack of oxygen and benzene contamination, her opinion that personnel should be required to wear safety glasses for protection, and Smith's concerns over accurate measurement of individual beta and gamma radiation exposure to individuals. I find that the concerns listed in the "One" Form reference a substantial and specific danger to employee safety and thus are protected by Part 708.

B. Whether Smith's Protected Disclosures Were a Factor Contributing to Her Termination or Failure to be Rehired (4)

In prior decisions of the Office of Hearings and Appeals, we have established that,

A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

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

Of the protected disclosures at issue in this case, WSRC has stipulated that Smith's October 10 and December 9 disclosures were a contributing factor with regard to the WSRC decision to terminate her. See February 9, 2000 Letter from Michael L. Wamsted, Senior Counsel, Westinghouse Savannah River Company, to Richard A. Cronin, Jr., Hearing Officer. With regard to the remaining protected disclosure,

there is clear temporal proximity between Smith's submission of the "One" Form on January 13, 1997 and her receipt of notice of termination on January 20, 1997. However, there is a lack of evidence in the record as to whether the WSRC managers responsible for Smith's selection for termination had actual or constructive knowledge of the "One" Form when they made their decision. Of the four WSRC managers who made the decision in a January 10, 1997 meeting to select Smith for termination, two, Melton and Pat Padezanin (Padezanin), denied at the hearing ever having any knowledge of the existence of the "One" Form until after Smith's termination. Hearing Transcript (Tr.) at 103, 183. The other two managers were not asked if they had any knowledge of the "One" Form. Given the lack of affirmative evidence on the issue of whether any of the responsible WSRC management officials had actual or constructive knowledge of the form, I conclude that Smith has failed to prove by a preponderance of the evidence that her submission of a "One" Form was a contributing factor in her selection for termination.

Despite finding that several of Smith's disclosures were contributing factors in her termination from WSRC, I find that none of Smith's disclosures was a contributing factor in her not being rehired by WSRC. Smith claims that, in retaliation for her protected disclosures, three chemists were hired instead of her during the period August 1998 through March 1999 despite Smith's superior qualifications. See September 1, 1999 Letter from Herbert Louthian, Counsel for Smith, to Michael Wamsted, Counsel for WSRC; see WSRC Reply to Complainant's Response to Motion to Dismiss, Case No. VWZ-0020, Exhibits 1 and 2 (November 15, 1999) (Response).

Employees terminated at WSRC become eligible for possible rehire after the employee files a WSRC form ("Statement of Interest in Maintaining Section 3161 Employment Eligibility"). Upon receipt of this form an employee's name and qualifications are placed in a database which is used to contact former employees for job opportunities. (5) See Tr. at 512-13; Hearing Exhibit S-4; WSRC Motion to Dismiss, Case No. VWZ-0020, Exhibit A (October 14, 1999) (Motion). The form states that the employee is required to complete a new form within one year of signing the current form. Hearing Exhibit W-21 at 1. After Smith received notice that she was going to be terminated, she filed this form with WSRC on January 20, 1997. Hearing Exhibit W-21. The record indicates that Smith was removed from the rehiring database in March 17, 1998 because she had failed to complete another form within the required one year period. Tr. at 503-04; Hearing Exhibit W-22 at 2. Smith did file another form on March 29, 1999. Hearing Exhibit W-22 at 3; Tr. at 503-04.

Each of the three of the chemists who were hired allegedly instead of Smith were hired when Smith was out of the rehiring database.(6) See Tr. at 501-04, 510-13. In addition, there is no evidence that Smith ever applied for any of these positions. As a result, WSRC was unaware that Smith might have been interested in the positions, and the review of the database performed by the WSRC personnel department did not show Smith as a candidate for these positions. See Tr. at 504, 512; Hearing Exhibit W-17. Based on these facts, I find that Smith's disclosures could not have been a contributing factor in her non-selection for these positions.

Smith's argues that WSRC should be held responsible for her failure to file the form within the required one year period. Smith claims that she did not know she had been removed from the database, and that she did not notice until 1999 the portion of the form that required former employees to submit new forms within one year. See November 29, 1999 Letter from Herbert Louthian, Counsel for Smith, to Richard A. Cronin, Jr., Hearing Officer (Case No. VWZ-0020). Smith further asserts that after her termination, she talked with Carol McClure (McClure) of the WSRC Personnel Department, who informed her that all retired employees, such as Smith, would be removed from the rehiring database. *Id.*; Tr. at 437-38. Smith testified that after her termination she received a copy of the WSRC Section 3161 Preference in Hiring Policy and claims that it states that retirees such as herself are not eligible for preference in hiring. Tr. at 438. Following her conversation with McClure, Smith also asserts that she attempted to talk to Lamar Cherry (Cherry) of the WSRC personnel department to ask that she be considered for reinstatement, but never received a return call from him. Tr. at 437, 468; November 29, 1999 Letter from Herbert Louthian, Counsel for Smith, to Richard A. Cronin, Jr., Hearing Officer. Smith also suggests that the portion of the preference-in-hiring form which sets forth the requirement that the form be resubmitted within a year was

in “fine print” and that it contributed to her failure to realize that she was under a duty to complete another form within one year. Tr. at 437. In sum, Smith cites a number of reasons purportedly excusing her failure to submit the required preference-in-hiring database form.

None of the reasons Smith gives attempting to excuse her failure to complete the preference-in-hiring form leads me to conclude that WSRC sought to retaliate against Smith by contriving to have her not complete the required form to remain in the preference-in-hiring database. Two of the reasons suggested by Smith, the type size of the language of the form and the allegedly confusing language in the WSRC preference in hiring policy by themselves, if true, only indicate that inadvertent confusion or error rather than WSRC scheming produced Smith’s absence in the database. Further, I find Smith’s testimony as to her conversations with McClure and Cherry to be vague and not very compelling. McClure’s testimony regarding her conversation with Smith was much more detailed. McClure specifically testified that Smith did not ask her about preference in hiring. Tr. at 484. In sum, I found McClure’s testimony on this issue to be more convincing than Smith’s.

Cherry testified that he did receive a letter from Smith in June of 1997 asking that various other skills be entered to the database. Tr. at 507; Hearing Exhibit W-24. However, Cherry did not remember calling Smith concerning the letter and stated that he would not normally have initiated a telephone conversation in response to such a letter. Tr. at 508. Cherry did remember calling Smith on October 1, 1997 and leaving a message on her answering machine concerning a temporary position at the facility. Tr. at 509; Hearing Exhibit W-24 at 2. Smith, in turn, left a message on Cherry’s voice mail later that day indicating that she was not interested in that position. Tr. at 509; Hearing Exhibit W-24 at 2. WSRC has also submitted Smith’s notes concerning these interactions. See Hearing Exhibit W-24. Given the evidence before me, I can not find that Smith, in fact, verbally informed McClure that she wanted to be in the preference-in-hiring database. In sum, Smith has not convinced me her protected disclosures were a contributing factor to her failure to be included in the preference-in-hiring database during the period the three chemists were hired. Consequently, I find that Smith’s failure to be rehired for the three chemist positions was not attributable to any of her protected disclosures. The only act of retaliation on which Smith has prevailed in demonstrating a connection to any of her protected disclosures is her selection to be terminated in the 1/97 Rif.

C. Whether WSRC Would Have Selected Smith for Termination in the 1/97 Rif Absent Her Protected Disclosures

For the reasons set forth below, I find there is clear and convincing evidence that WSRC would have selected Smith for termination in the 1/97 Rif absent the protected disclosures described in section II.A above. This conclusion is based on compelling evidence indicating that of the four chemists considered for termination, Smith was least able to support the laboratory functions of the two WSRC labs.

To facilitate this analysis, I will describe Smith’s workplace organization and position duties. When Smith accepted a position at WSRC’s Waste Management Laboratory (WML), WML was organized into two separate laboratory organizations, the Effluent Treatment Facility laboratory (ETF lab) and the In-Tank Precipitation Facility laboratory (ITP lab). See Hearing Exhibit W-11. Each laboratory was staffed with one supervisor, two chemists and several technicians. *Id.* At the time of the 1/97 Rif, Smith and Kenneth Cheeks were the chemists working at the ITP lab. Thelma Hill-Foster and Linda Youmans were chemists at the ETF lab. Tr. at 78.

At the ITP lab, Smith was a process control chemist who supported the lab technicians by performing such tasks as establishing methods of chemical analysis, writing procedures and training technicians. Tr. at 34-35. The job also entailed troubleshooting and repairing problems with the analytical equipment as well as being able to operate the equipment and perform various chemical analyses. Tr. at 35, 303, 331. Before coming to WML, Smith had spent a number of years in the quality assurance field and in risk assessment positions, none of which could be considered the equivalent of a process control chemist position. Hearing Exhibit W-15; Tr. at 259-60, 171-72, 271, 352; Report Exhibit B-6.

Early in January 1997, Melton, the Manager of the WML, was notified that WSRC's High Level Waste Division (HLWD) planned to reduce WML's personnel staffing because of a \$100,000 cut in funding for each lab. Tr. at 74-77; Hearing Exhibits W-11, W-16 (December 30, 1996 Baseline Change Proposal outlining budget reduction and WSRC divisions to be affected). On January 8, 1997, Melton was asked about the impact on WML if 4 positions were eliminated (including chemists) from the labs. Hearing Exhibit W-11 at 1. The next day, Melton was informed that Dave Amermine, the HLWD deputy manager, decided to reduce WML by four positions - three lab technicians and one chemist. *Id.* at 2. On January 10, 1997, Melton, along with his supervisor, Jim Collins (Collins), Padezanin and Lori Chandler (Chandler), Melton's previous supervisor in December 1996, met to discuss the issue of personnel cuts. Tr. at 76-77, 178, 195. After some discussion with other officials, Padezanin concluded that only two employees, a chemist and a laboratory technician, would have to be laid off from WML to meet the budget constraints. Tr. at 175-76. This reduction contemplated three chemists providing support to both labs rather than two chemists supporting each lab. See Hearing Exhibit W-11 (Proposal A); Tr. at 237, 325-27.

In the January 10 meeting, the four participants then discussed what criteria would be used to select the one chemist for termination. Tr. at 178. The criteria selected were: performance, current contribution to the organization, potential contribution to the organization and time in position. *Id.* The four managers then considered Smith, Cheeks, Hill-Foster and Youmans. Based on the criteria, they selected Smith for termination. Tr. at 179-80. Padezanin then instructed Melton to prepare a Certification of Non-Discrimination (CND Form) form which outlined the reasons for Smith's selection. Tr. at 177; Hearing Exhibit W-12. The CND Form stated that Smith's "overall contributions to effectiveness of the WML" were not as significant as those of the other three chemists. Hearing Exhibit W-12 at 2. Further, Cheeks, Hill-Foster and Youmans each had more time in position than Smith. *Id.*

Melton testified that Smith ranked last among the chemists in each of the four criteria. Tr. at 88-92. With regard to performance, Melton testified that Smith's performance had been subpar compared to the other three chemists and Melton had met with Smith several times about her inability to complete her assigned tasks. Tr. at 88. As to current and potential ability to contribute to the organization, Melton testified that Smith ranked last because she had not completed the training on the operation of all the equipment in the ITP lab, and did not understand the analytical processes as well as Cheeks. Tr. at 88-90. Melton testified that Smith had the least amount of time as a process control chemist. Tr. at 92. (7) Padezanin and Chandler's testimony concurred in the evaluation of Smith in comparison with the other three chemists. Tr. at 179-80, 277-280. (8)

WSRC has presented evidence documenting Melton's dissatisfaction with Smith for her alleged failures to complete assigned tasks, for withholding information from Melton and for making unauthorized sample swaps with another organization. See, e.g., Hearing Exhibits W-3, W-5, W-7, W-8; Tr. at 42-43, 45-46, 50-51. Smith maintains that these alleged performance problems were related to her safety disclosures. See, e.g., Tr. at 395-96, 408-12, 448; Hearing Exhibit W-8 (January 7, 1997 memo from Smith to Melton). However, there is no evidence in the record concerning what, if any, similar problems that the other three chemists, Cheeks, Youmans or Hill-Foster, may have experienced. In the absence of such other evidence regarding the other chemists, Smith's alleged performance problems are not sufficient to convince me that WSRC would have selected her for termination in the 1/97 Rif in the absence of her protected disclosures. Nevertheless, there is other evidence in the record, as discussed below, which leads me to find that Smith, because of her incomplete training, was not as capable of fully supporting the ITP or ETF labs as were the other three chemists. In light of this evidence, I find that WSRC has presented clear and convincing evidence that it would have selected Smith for inclusion in the 1/97 Rif regardless of her protected disclosures.

Cheeks had supported the ITP lab for several months by himself before Smith was brought over to the ITP lab. Tr. at 92, 301. As of January 1977, Cheeks had over two years of experience supporting the ITP lab. Tr. at 300. Youmans and Hill-Foster were currently supporting the ETF lab and had approximately two years of experience in those positions. Tr. at 277. In contrast, Smith had not completed all of the training

for the ITP lab nor had performed training for the ETF lab. (9) Given Youmans' and Hill-Foster's current experience, their ability to support the ETF lab would have been demonstrably superior to Smith's. Cheeks has significant experience supporting the ITP lab and had even been tasked with training Smith for the ITP lab. His knowledge of the ITP analytical procedures was clearly greater than Smith's. In sum, I find that WSRC has shown clear and convincing evidence that it would have selected Smith for termination in the 1/97 Rif regardless of Smith protected disclosures.

Smith's arguments to the contrary are unavailing. Smith has submitted evidence that both Cheeks' and Hill-Foster' college degrees were in biology and not in chemistry. Tr. at 129-30, 200, 250, 463. However, regardless of their formal education, the fact remains that Cheeks and Hill-Foster both were currently supporting the ITP and ETF labs respectively. As described earlier, Smith had not completed training on all the instrument systems in the ITP lab and had no training in the systems in the ETF lab. Smith asserts that she could do the job in the ETF lab since she had previously used most of the instruments. Tr. at 473-74. However, the record indicates that Smith's previous positions had not required much work as a hands-on chemist. (10) I am convinced that Smith could not have immediately stepped in and adequately supported the ETF lab in a manner equal or superior to Youmans or Hill-Foster. Further, Cheeks testified that the equipment in the ETF lab was different from the ITP lab equipment, and that it would take someone a longer training period to be able to support the ETF lab. Tr. at 325. Smith also points out that her current performance rating of 3 - performance meets or exceeds all management expectations for position and grade - was the same as Hill-Foster's. Tr. at 123, 287. That is not a determinative factor. The key issue is the then-current state of Smith's training in the ITP lab and her ability versus the other three chemists' ability to support the ETF and ITP labs.

Smith also alleges that the reason that she did not complete her training was that Melton gave Cheeks priorities that conflicted with Smith's training. Tr. at 473. However, there is simply no evidence that Melton or anyone else at WSRC deliberately tried to delay Smith's training because of her disclosures. Smith's training program schedule had been developed by Cheeks who then obtained Melton's approval. Tr. at 303. However, Cheeks also testified that because of other lab duties, he could not devote his time exclusively to training. (11) Tr. at 321. Cheeks testified that in his opinion that a person should be able to complete the training in seven to eight months. (12) Tr. at 322. By the time of the decision to include Smith in the 1/97 Rif, Smith had been at the ITP lab for approximately nine months. (13) Smith herself has testified that because the training had to be scheduled, some delay was to be expected. Tr. at 390. Given the relatively short time Smith had been at the ITP lab, the amount of time needed to complete the training and the lack of any other evidence to the contrary, I conclude that Smith's failure to complete the training was not due to any type of retaliation by WSRC.

Lastly, Smith has presented three co-worker witnesses attesting to her commitment to safety and her job performance. See Tr. at 351-61, 361-374, 374-382. I have no reason to doubt their testimony. However, while their testimony supports Smith's concern about safety issues, two of the witnesses' observations dealt with Smith's performance in Quality Assessment. Tr. at 353-54, 363-64. The third witness, Tom Shaw, testified that he had worked with Smith while she supervised three lab technicians at the Heavy Water Lab. Tr. at 375. Shaw testified that Smith had experience as a hands-on chemist and was a hard worker and aggressive. Tr. at 376. However, the last time Shaw could have observed Smith was in 1986, the year of his retirement. Tr. at 374. Shaw's observations are too remote in time to be very relevant on the issue of Smith's competence as a process support chemist at the time of the 1/97 Rif. Consequently, this testimony does not change my conclusion that because of Smith's failure to complete her ITP training or to receive any training for the ETF lab, WSRC has shown by clear and convincing evidence that it would have selected her for termination regardless of her protected disclosures.

IV. Conclusion

As set forth above, I have found that Smith has met her burden of proof of establishing by a preponderance of the evidence that she made several disclosures protected under 10 C.F.R. Part 708. I also

have determined that several of Smith's disclosures were contributing factors in her termination. However, I also find that WSRC has proven by clear and convincing evidence that it would have terminated Smith absent her disclosures. Accordingly, I conclude that Smith has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program regulations for which relief is warranted.

It Is Therefore Ordered That:

- (1) The request for relief filed by Lucy B. Smith under 10 C.F.R. Part 708 is hereby denied.
- (2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after receipt of the decision.

Richard A. Cronin, Jr.

Staff Attorney

Office of Hearings and Appeals

Date: July 11, 2000

(1)The Report references another retaliatory act Smith allegedly experienced - that Smith received negative comments on her October 1996 Individual Assessment and Development Plan (IADP) for having raised various safety concerns. Report at 1-2. The Report goes on to find that Smith's claim of retaliation regarding her IADP was barred because she did not file a complaint concerning this incident within the 60 day deadline in the regulations. See 10 C.F.R. § 708.6(d); Report Exhibit A-1 (March 26, 1997 Complaint); Report Exhibit B-4 (October 23, 1996 IADP). At the hearing, Smith did not challenge this finding and I adopt IG's finding that Smith's claim of retaliation regarding the IADP is barred by the 60 day deadline set forth in 10 C.F.R. § 708.6(d). My review of Smith's original IG complaint does not indicate that Smith was complaining that she had received negative comments on her IADP but instead was complaining that her supervisor had made her remove specific language regarding a specific safety concern. See Report Exhibit A-2 at 2; April 11-12, 2000 Hearing Transcript (Tr.) at 397-400.

(2)This decision applies section 708.5 as it existed prior to the revisions of April 15, 1999. [Linda D. Gass](#), 27 DOE ¶ 87,525 at 89,141 (1999) ("drafters of the revisions to Part 708 did not intend to apply the expansion in scope of 10 C.F.R. § 708.5 to cases pending on April 15, 1999").

(3)Smith's supervisor, Melton, identifies the date of this incident as October 10, 1996. See Report Exhibit A-3.

(4)WSRC made a Motion during the Hearing requesting that I dismiss the failure to rehire claims by Smith. Tr. at 448. WSRC cites Smith's testimony indicating that she was offered preference in hiring for several positions. See Tr. at 440-42. However, there is no evidence that Smith was offered preference in hiring regarding the three specific chemist positions (ultimately filled by John Anton, Jesse Leon Melton and Patrice Oakmon) at issue in this case. The mere fact that Smith was offered preference in hiring for some positions says nothing as to the issue of whether Smith's disclosures were a contributing factor in her failure to receive a preference in hiring for those three specific positions. For this reason and the reasons stated in my decision denying an earlier WSRC Motion to dismiss Smith's failure to rehire claims, I dismiss WSRC's motion. See [Lucy B. Smith](#), 27 DOE ¶ _____, Case No. VWZ-0020 (February 3, 2000).

(5)WSRC established a database (preferential hiring database) containing the names of employees who had been terminated in the 1/97 Rif and who wished to be rehired if future job opportunities arose at WSRC. WSRC used the database to contact these employees so that they could be rehired for future job opportunities at WSRC. Whenever WSRC sought to hire non-WSRC personnel for a particular job

position, WSRC would be required to check the preferential hiring database to give a preference in hiring to the person most qualified in the preferential hiring database for the position. Tr. at 512-13; see Hearing Exhibit S-4 (WSRC Contractor Preference in Hiring Procedure). WSRC's preference in hiring procedures were prompted by Section 3161 of the National Defense Authorization Act of 1993 which mandated that, to the extent possible, eligible terminated employees at various defense nuclear facilities should receive preference in filling all prime and subcontractor vacancies. See Hearing Exhibit S-4. Consequently, this preference in hiring is also referred to as Section 3161 employment eligibility.

(6)WSRC management's request for the hiring of these chemist was dated April 20, 1998, within the period Smith was out of the hiring database. See Response Exhibit 1; Hearing Exhibits W-17, W-26.

(7)Smith had been employed at WSRC for approximately 23 years but her most recent experience prior to taking the position at WML was in areas other than process control chemistry. See supra.

(8)Collins testified that he didn't provide much input into the discussion since he had recently taken over for Chandler and that he did not know the ITP and ETF lab personnel as well as Melton, Padezarin and Chandler. Tr. at 245, 256. He did testify that, if choosing between Smith and Cheeks, he thought it was obvious that Smith would be the one to go given Cheeks' better performance. Tr. at 241.

(9)Because Smith had not had recent experience as a process control chemist, Melton and Cheeks decided that to best prepare Smith for her duties they would have Smith complete laboratory technician On-the-Job training packages (OTJ) involving the use and operation of the major instrument systems used in the ITP lab. Tr. at 35, 303-04. Cheeks developed a schedule for the OTJ training packages. Tr. at 303. The OTJ training packages included "hands on" instruction that required Cheeks or another lab technician to perform some of the training to demonstrate skills using various instruments and Smith would have to demonstrate competency on the instrument. Tr. at 37, 303. By December 1996, Smith had completed approximately 70-80 percent of this required training. Tr. at 38, 306. Smith had not begun instruction on the filtrate assay system, which required extensive training. Tr. at 307, 320. This training had been scheduled last because of its complexity. Tr. at 307. Smith admits that as of the date of her termination in January 1997 she had not completed the training for the ITP lab. Tr. at 451. Further she concedes that as of that date she had not received any official training for the ETF lab. Tr. at 449, 474.

(10)Smith testified that in the summer of 1995 she participated in "Expedited Site Characterization" project in which "she was heavily involved in laboratory work in that area, being the project manager there." Tr. at 450. She went to say that "we had basic pH meters and things like that in trailers" and that "It was a 12 hour-a-day, 7-day-a-week job with laboratories." Id. This testimony does not lead me to believe that Smith's current laboratory skills were equal to the other three chemists at WML. Her testimony is vague as to the exact laboratory skills and instruments she actually used in the project.

(11)Cheeks testified that Smith was not very diligent about completing the training. Tr. at 305, 331, 337. Chandler also testified that Melton had contacted her sometime in July or August 1996 concerning his concerns with Smith's lack of focus on the training aspects of her job. Tr. at 263.

(12)Chandler testified that in her opinion eight months would have been sufficient for Smith to have completed her training. Tr. at 285.

(13)Melton testified that Smith's first three weeks at ITP were taken up with preliminary facility-specific training. Tr. at 36. Thus, Smith had approximately eight months at ITP in which to train on ITP OTJ training packages when she was notified of her inclusion in the 1/97 Rif.