Case Nos. VWC-0001 and VWC-0002

April 27, 1998

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Agency Decision

Names of Petitioners: Daniel L. Holsinger

K-Ray Security, Inc.

Date of Filing: January 13, 1997

Case Numbers: VWC-0001

VWC-0002

This case involves a complaint filed by Daniel Holsinger (Holsinger) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The matter comes before me pursuant to a decision by the Deputy Secretary of Energy. In a December 17, 1996 Decision Reversing and Remanding Initial Agency Decision, the Deputy Secretary instructed the Office of Hearings and Appeals (OHA) to conduct a full assessment of the equities involved concerning the reinstatement of Holsinger to a position of security guard at the DOE Federal Energy Technology Center (FETC), located in Morgantown, West Virginia. (1) Following that directive, I have held a hearing to take evidence and have considered the issues raised by the Deputy Secretary in light of that evidence. I am issuing a new Agency Decision set out below.

I. Background

The procedural and factual background of this case is fully set forth in Daniel L. Holsinger, 25 DOE ¶ 87,503 (1996)(Holsinger). I will not reiterate all the details of this case here. For purposes of this Decision, the relevant facts are as follows.

In January 1990, Mr. Holsinger began to work as a part time security officer for the security contractor at FETC. He was retained in that status when Watkins Security Agency (WSA) began

performance of the contract in March 1990.

On October 7, 1994, Holsinger filed a complaint pursuant to Part 708 with the Office of Contractor Employee Protection (OCEP). In the complaint Holsinger alleged that reprisals were taken against him by management officials of WSA as a consequence of his making disclosures concerning the possible theft of government property by a member of the WSA security force. According to Holsinger, the reprisals included suspensions and his ultimate dismissal by WSA.

After conducting an investigation into the matters raised by Holsinger, OCEP issued a proposed disposition, concluding that Holsinger had shown by a preponderance of evidence that he had written an anonymous letter to the Director of DOE-FETC stating that a member of the guard force had removed buckets covered with rags from the facility. OCEP found that this letter constituted a protected disclosure under Part 708. OCEP also found that Holsinger had shown by a preponderance of evidence that a three-day suspension that he received and his eventual dismissal by WSA occurred as a result of the protected disclosure. Finally, OCEP concluded that WSA failed to establish by clear and convincing evidence that the adverse personnel actions would have occurred absent Holsinger's protected disclosure. The relief recommended by OCEP included a proposal that Holsinger be awarded back pay by WSA, and that K-Ray Security, Inc. (K-Ray), the current FETC security contractor, reinstate Holsinger.

A hearing on the Holsinger complaint, conducted by an OHA hearing officer, was convened at the request of Holsinger, WSA and K-Ray. However, at the hearing it was announced that Holsinger and WSA had settled all issues between them, and WSA was ultimately dismissed from the proceeding. Thus, at the hearing, the only issues raised concerned whether K-Ray should be required to reinstate Holsinger. In an Opinion issued on May 16, 1996, the OHA hearing officer determined that K-Ray should be required to do so. Holsinger, 25 DOE at 89,020.

K-Ray appealed that determination to the Deputy Secretary of Energy. In his opinion regarding that appeal, the Deputy Secretary considered K-Ray's position that reinstatement was not an appropriate remedy, since the firm was not involved in any of the WSA adverse personnel actions. The Deputy Secretary agreed with the OHA hearing officer that reinstatement, even by a successor

employer, may be ordered if the circumstances warrant it. However, he found that the OHA hearing officer failed to conduct a full assessment of the equities involved in the reinstatement of Holsinger. Based on testimony at the hearing, the Deputy Secretary expressed a concern that reinstatement might cause substantial hardship to both K-Ray and K-Ray employees who might have to be terminated if Holsinger were reinstated. Accordingly, the Deputy Secretary remanded this matter to the OHA for a full assessment of the equities involved in connection with Holsinger's reinstatement.

II. Hearing of September 17, 1997

After reviewing the complete record in this matter, I determined that it would be useful to pursue the important issues raised by the Deputy Secretary's Opinion through further fact-finding, conducted by means of an evidentiary hearing. I therefore convened a hearing at the FETC facility on September 17, 1997. The purpose of the hearing was to take testimony on the issue of the impact on K-Ray's operations of reinstating Holsinger.

Eleven witnesses testified at the hearing. They included Randolph Cooper, the DOE contracting officer, whose responsibility it is to solicit, negotiate and administer the security contracts at FETC Morgantown. Deborah Purkey, the contracting officer's representative (COR), also testified. As liaison between the DOE and K-Ray, she is responsible for overseeing the technical aspects of the performance of the contract. Testimony was given by five K- Ray security guards: John Kisner, Linda Lawson, Robert Bryan, Scott Lowe and Kent Garvin, as well as by the K-Ray security guard captain, Fred Munz. Richard Panico gave testimony as Holsinger's supervisor in connection with Holsinger's full time position as a security guard at the University of West Virginia. Diane Lewis, contract administrator for K-Ray testified, as did Holsinger himself.

At the hearing K-Ray continued to oppose the reinstatement of Holsinger. In this regard, the firm has not altered the position it adopted before the prior Hearing Officer in this case. K-Ray maintained that since it had no role in any of the retaliatory actions taken by WSA, it is inequitable to require it to bear any responsibility in redressing the harm caused to Holsinger. It also asserted that reinstatement would cause a hardship to the firm and its FETC guards.

In his testimony at the hearing, Holsinger clarified his position regarding reinstatement. He indicated that he is available to work at FETC on the midnight shift every night of the week and fully available every third week on his days off, Friday, Saturday, Sunday and Monday. On the weeks that he did not have weekends off, he would be available on Tuesday and Wednesday. He stated that he would accept reinstatement on an "as needed basis," such as in cases where other guards were sick, on vacation or for other reasons could not appear for their shifts. Transcript of September 17, 1997 Hearing (hereinafter Tr.) at 213. He further testified that he would be willing to accept a midnight shift on a regular basis for one or two nights a week. Tr. at 198.

III. Analysis

As an initial matter, I am not persuaded by K-Ray's legal position in this proceeding that it should be relieved of all obligations with respect to Holsinger because it had no relationship to WSA and because it merely assumed the security contract that was formerly performed by WSA. As the Deputy Secretary stated in his Opinion, reinstatement of a whistleblower, even by a successor employer, may be ordered if the circumstances warrant it. 10 C.F.R. § 708.10(c)(3). See Boeing Petroleum Services, Inc.; Dyn McDermot Petroleum Operations Co., 24 DOE ¶ 87,501 (1994)(Boeing). As I stated above, our endeavor here is to determine if the circumstances warrant such reinstatement in this case.

Moreover, as a general matter, K-Ray's overall position here does not withstand close scrutiny. The K-Ray contract currently in effect specifically provides at Part II, Section I.118 that K-Ray shall comply with the requirements of the DOE Contractor Employee Protection Program set forth at 10 C.F.R. Part 708. Thus, K-Ray was clearly on notice that pursuant to the terms of its agreement with the DOE, it would be subject to all of the requirements of Part 708. These regulations provide that the DOE may direct contractor firms to take actions necessary to restore to a prior position an employee who has been adversely affected by improper acts of reprisal. 10 C.F.R. § 708.11(c). Among such actions is the reinstatement by a subsequent contractor, if such reinstatement is necessary to restore the employee to the position he would otherwise have occupied absent the acts of reprisal by a former contractor. See Boeing, 24 DOE at 89,007.

It is true that a new DOE contractor may not have actual knowledge that the responsibilities it assumes by agreeing to be bound by the provisions of Part 708 include having to reinstate an employee of a previous contractor. However, the importance to the DOE of the goals of Part 708, and the protection to employees it provides, have been stated frequently, and reaffirmed recently. 63 Fed. Reg. 374 (January 5, 1998). Moreover, in the typical case, any possible unfairness to the new contractor can be mitigated by allowing it to charge the DOE for any additional costs associated with rehiring the employee.

The record indicates that it is highly probable that if Holsinger still had been employed by WSA at the time that K-Ray took over the contract, he would have been re-hired as a routine matter, along with all the other guards at that time. Transcript of February 28, 1996 Hearing at 76-77. I do not believe that it would be equitable to excuse K-Ray from its contractual duties under Part 708 simply because it had no connection with WSA. In fact, the unfairness runs the other way. If Holsinger were to miss out on the opportunity to continue to work as a guard at the FETC facility simply because the prohibited reprisals, including his dismissal, occurred while he worked for the previous contractor, this would be inequitable to him and substantially weaken the protections offered by the Part 708 Contractor Employee Protection Program. By entering into the contract with the DOE to provide security guard services, K-Ray implicitly and explicitly agreed to participate in that program. Absent some unusual inequity or other serious reason to excuse it from participation, I am not inclined to except it from the program in this case simply because it is the successor contractor.

In this regard, during the hearing, K-Ray appeared to argue that it is a small enterprise, with only 25 employees working in the security area. K-Ray drew our attention to what it believes would be inevitably unfair and disruptive effects if Holsinger were rehired even for as little as 16 hours per week. Tr. at 307-310. K-Ray seems to contend that in light of these factors, and as a small contractor operation, it should not be saddled with the burden of rehiring a whistleblower. See, e.g., Tr. at 315-317.

We cannot accept that position, since the Department has already rejected it. An option to include a small size exception, or a minimum threshold for subjecting contractors to the requirements of the Contractor Employee Protection Program was available to the Department in 1992, when it promulgated the final rule. That rule, as set forth in Part 708, does not include a small size exception, and these regulations cover all DOE contractors, large and small.

K-Ray next argues that in this case it should be excepted from the rule, because it would be unfair to the firm to require it to reinstate Holsinger in this case. K-Ray cites the following specific inequities as a basis for such an exception: (i) it claims that reinstatement of Holsinger will place an undue hardship on K-Ray's employees at the FETC site; (ii) it contends that reinstatement would cause financial hardship to the firm; and (iii) it maintains that reinstatement will create undue burdens in scheduling work shifts for Holsinger. After fully exploring each of these claims at the hearing, I do not find them to be supported by the record in this case.

A. Hardship to K-Ray Employees

K-Ray claims that reinstating Holsinger will hurt its other employees in several ways. The firm contends that if Holsinger is reinstated, it will be forced to terminate another employee, or reduce the hours of other members of the guard force. This claim is not borne out by testimony at the hearing. Mr. Cooper, the senior DOE contracting officer, clearly indicated that there is no DOE requirement limiting the number of employees that K-Ray may use to fulfill its obligation to supply security services under its contract with the DOE. Tr. at 94-5. See also testimony of Deborah Purkey, Tr. at 32. Accordingly, K-Ray would not be automatically required to terminate another employee upon reinstating Holsinger.

K-Ray argues however, that in order to provide Holsinger with hours as a security guard, it would necessarily have to take those hours from another guard or guards and this would mean either termination of those guards or a reduction in their normal hours. Again, K- Ray's assumption is not supported by the record. At the hearing there was considerable testimony to the effect that schedules of security guards were regularly adjusted when other guards were on vacation, took sick leave or for personal reasons could not appear for their regularly scheduled shifts. Tr. at 109, 138-9, 145, 159, 162, 175, 185-189.

In this regard, K-Ray submitted work schedules for its second quarter of 1997. These schedules show a significant number of regularly occurring vacation hours, sick leave and other leave requiring adjustment of the preset guard schedules. The testimony and the schedules indicate that there are a number of hours of available time that Holsinger could be offered without affecting the preset work schedules of any guards. As indicated above, Holsinger testified that he is willing to work on an "as needed" basis. He is available on all midnight shifts. Further he has a number of full days each week that he is free to work at FETC. Tr. at 191. Thus, K-Ray could certainly offer Holsinger the opportunity to work shifts in place of employees who cannot work their scheduled hours. This would not adversely affect the regular schedules of other FETC security guards.

There was some testimony by Ms. Lewis, contract administrator of K- Ray, that there are two part time workers who are particularly willing to work extra hours to fill in for security guards on vacation or sick leave. Tr. at 292. Thus, it is possible that offering Holsinger the shifts of employees who are on vacation or sick leave could reduce the extra time now made available to these two part-time guards. I recognize that these two employees might appreciate this extra time and accompanying compensation. However, these two part-time employees were hired after K-Ray assumed the security contract in June of 1995. Tr. at 274-77. Therefore, any "right" to additional overtime that they may have is certainly subordinate to that of Holsinger, who had worked previously and should be viewed as a pre-existing employee.

Moreover, it does not appear that these two new employees were hired with any promise or expectation of receiving these extra shifts. They were given no guarantee as to the number of hours they would be assigned to work. Tr. at 276. On the other hand, Holsinger clearly has important interests under Part 708 that must be recognized and protected. The fact that two or more part-time employees might in some instances not receive all the extra shift duty that could conceivably become available does not in my opinion overcome Holsinger's interests.

K-Ray also argues that reinstating Holsinger would adversely affect the morale of other employees who would have to work with him. K- Ray believes that Holsinger was not well-liked or respected by other K-Ray employees, and that they would be unhappy if they had to work with him. Although there is some evidence supporting this argument, on balance, the record as a whole does not support this view.

At the hearing six security guards testified about their views of Holsinger. Captain Munz believed that improvement was needed in Mr. Holsinger's performance. Tr. at 170. He thought that Holsinger used the telephone excessively while on the job in 1994. Holsinger's inappropriate use of the telephone was the subject of earlier discipline. However, this issue is now well in the past and should certainly not create an overall problem for the entire work force.

Captain Munz also testified that Holsinger's overall reputation was that he did not "fulfill his duties." Tr. at 172. However, Captain Munz offered no specifics of why rehiring Holsinger would have a negative effect, or what duties he did not fulfill. This general testimony was not particularly convincing, and testimony by other guards did not bear out Captain Munz' view.

For example, Officer Kisner stated that for the most part Holsinger was liked by other guards. He had no opinion on the overall

effect on morale if Holsinger were rehired. Tr. at 115. He also pointed out that only 9 out of the current work force of 12 have met Holsinger, since three employees have been hired after Holsinger's termination.

Officer Lawson stated that more than half of the other officers always liked Holsinger, and that she would not have any problem if he were reinstated. Tr. at 140. She indicated that "a couple" of other officers did not like him and that reinstatement could pose a problem for those individuals. Tr. at 141. She further testified that she did not have an opinion about the effect on general morale if Holsinger were reinstated. Tr. at 140. Officer Bryan stated that he had "never had any trouble" with Holsinger. Tr. at 144.

Officer Lowe's testimony was more hesitant and ambiguous. He testified that Holsinger got along with some people, and did not get along with others. He said that he had heard from other guards that Holsinger was "not performing up to standard." Tr. at 224. He did not indicate who these employees were or provide any details on this point. He stated that morale would not be as high if Holsinger were reinstated. However, when asked if Holsinger's reinstatement would "drive a wedge between the work force," Officer Lowe testified: "I can't really say. I'm not sure." Office Lowe did not indicate that he personally would have any problem working with Holsinger, and, in fact, had had very little contact with him. Tr. at 228. In his most straightforward statement on the issue, Officer Lowe indicated that he would be troubled by Holsinger's reinstatement if it adversely affected the number of hours he worked or caused a change in his own schedule. Tr. at 226.

Officer Garvin testified that Holsinger's reputation was that "he did his job as needed." Tr. at 232. He was not aware of any personal conflicts that Holsinger may have had. He stated that Holsinger's reinstatement would cause difficulty for him only if his own hours were reduced or his work days changed. Tr. at 233.

From this testimony it was evident to me that reinstatement of Holsinger in and of itself would not create any unusual or wide-spread morale problem for the current guard staff. Of the nine individuals in the guard force who know Holsinger, six testified at the hearing. Only one of those individuals, Captain Munz, stated that he personally thought Holsinger did not fulfill his responsibilities, although he did not state that he could not work with him. Officer Lowe could provide only vague evidence of a hearsay nature on this point. Although questioned on this point, neither Captain Munz nor Officer Lowe could indicate in any detail why or how Holsinger's reinstatement could cause a morale problem. Thus, I was not especially convinced by their testimony, particularly in light of the testimony of other members of the security force who indicated that they did not think that there would be a problem.

Apart from Captain Munz, the five security guards who testified were themselves either neutral with respect to working with Holsinger, or would not mind working with him. Thus, there are at most three other guards, who did not testify, who might not wish to work with Holsinger. This does not seem to be a major obstacle, even assuming that their testimony on this issue would be adverse to Holsinger. Moreover, in any work force there will be some individuals who do not get along with each other. This, in and of itself, is not a basis for not reinstating Holsinger. In any event, there was no convincing testimony to the effect that a force-wide morale problem would be created if Holsinger were reinstated.

The only problem specifically raised by the guards and K-Ray's Ms. Lewis was a fear that Holsinger's reinstatement might cause significant changes in the guards' work schedules. Tr. at 259, 261, 263. This is a completely understandable concern. K-Ray is relatively small, employing about 25 security guards. Tr. at 248. Only twelve guards are assigned to the FETC facility. Tr. at 284. Accordingly, adding or reinstating an employee is not as straightforward or simple as it would be with a much larger entity. Nevertheless, I am able to ensure that no changes in regular work schedules occur. Given the factual setting, I can order a limited reinstatement that will alleviate their concerns. Such a reinstatement plan, in which Holsinger would be called to service on an as-needed basis, should not create any hardship on any current member of the guard force, since no guard's regularly- scheduled hours will be shifted or reduced. I therefore conclude that the record does not support K-Ray's claim that the reinstatement of Holsinger would necessarily cause any overall morale problem for the rest of the K-Ray guard force.

B. Financial Hardship to K-Ray

K-Ray further argues that if it were required to reinstate Holsinger it would be subjected to a financial hardship. The record in this case provides no support for this allegation. According to testimony at the hearing, there are two base pay rates for security guards at FETC. Newly hired guards receive $6.24 per hour. Those who were formerly guards with WSA, and are thus longer term employees, receive $10.92 per hour. K-Ray Hearing Exhibit 1 (hereinafter Exh. 1). Officers in the K-Ray guard force at FETC (e.g. a captain) are paid somewhat more. Tr. at 252. Overtime is paid at the rate of one and one half times a guard's regular rate. Tr. at 77.

According to Exh. 1, which was presented at the hearing, K-Ray would incur additional salary and other related expenses of approximately $4,500, if it were required to reinstate Holsinger.(2) However, this figure is based on several unsupported assumptions. First, K-Ray presumes that if it reinstated Holsinger at its long- term guard hourly rate of $10.92 per hour, it would necessarily be replacing a less costly short-term employee whose pay rate is $6.24 per hour. K-Ray therefore calculates that it would incur additional costs of $4.68 an hour by reinstating Holsinger.

As a general rule, in making substitutions for guards who are on vacation or sick leave, K-Ray usually turns to its part time employees. K-Ray currently has five such employees, only two of whom are paid at the lower rate. Thus, if Holsinger were reinstated and, for example, asked to substitute for an employee who was on vacation, had called in sick or for some other reason was unable to appear for his shift, it is not at all certain that he would be called instead of one of the two lower paid part-time guards. He might well take the place of one of the three higher- paid part-time guards, at no additional cost to K-Ray. (3)

Moreover, in reaching its $4,500 lost revenue figure, K-Ray has also assumed that Holsinger would be reinstated at the rate of 16

hours per week for 52 weeks per year. As discussed above, Holsinger is not necessarily requesting this level of re- employment. He has indicated that he would be satisfied with being called to serve on an as needed basis. Tr. at 198-99.

Further, K-Ray's current contract will expire on May 31, 1998. The firm would thus not be able to employ Holsinger for 52 weeks before the expiration of its current contract. According to the prior record in this case, K-Ray took over the WSA contract in June 1995. Report of Investigation and Proposed Disposition at 2. The contract has a one-year base and four one year options. Tr. at 51. Thus, there is only approximately one month remaining on the current K-Ray one year option. Provided there is sufficient time between the issuance of this Decision and the May 31 contract expiration date, K-Ray can certainly include in its next one year option proposal any increased costs attributable to reinstating Holsinger. Tr. at 128. In any event, at this time there is no evidence that the additional salary cost projections for reinstatement of Holsinger would approach $4,500.

I have calculated a more realistic projection of K-Ray's possible increased salary costs as follows. If K-Ray provided Holsinger with one eight-hour shift for four weeks, through the end of the current contract option of May 31, 1998, its total salary outlay for him would be $349.44 (4 weeks x 8 hours x $10.92 = $349.44).(4) The additional hourly cost to K-Ray of employing Holsinger, rather than a lower cost guard would be $4.68 ($10.92-$6.24 = $4.68). Even assuming that all of Holsinger's hours would have been performed by a guard at the lower salary rate, an assumption that, as discussed above, would in all likelihood overstate K-Ray's costs, the total additional salary attributable to reinstating Holsinger would be $149.76 (4 x 8 x $4.68 = $149.76).

Moreover, the actual percentage increase in its costs that K-Ray is likely to experience as a result of reinstating Holsinger is minimal. On July 31, 1997, K-Ray submitted sample rosters showing work schedules for its FETC guards for the second quarter of 1997. I have computed an approximate total K-Ray salary cost for a typical week using the roster for the week of June 22. The roster shows that there are three eight-hour shifts each day. In that week, there were between two and four guards on each shift, for a total of 48 guard shifts, or a total of 384 guard hours (48 x 8= 384). In that same week there was only one guard paid at the lower rate, and this guard worked a total of 40 hours. (5) In this week there were 344 hours paid at the higher rate (384-40), for a total of $3,756 (344 x $10.92), and 40 hours paid at the lower rate for a total of $250 (40 hours x $6.24) . Thus, in this week, K-Ray paid total wages of approximately $4,006 ($3,756 + $250 = $4,006). If K-Ray were to reinstate Holsinger for one shift per week, the additional cost in salary to pay Holsinger, rather than a lower cost guard, would be $37 ($4.68 x 8 = $37). This is less than one percent of its total salary cost in a week, and an amount that certainly appears to be a most minimal increase.

There has been no showing that this additional cost level would place an excessive burden on K-Ray. Nevertheless, if upon reviewing its salary outlays after reinstating Holsinger, K-Ray believes that it is experiencing an unmanageable level of increased labor costs due to that reinstatement, it has a remedy available to it. K-Ray may certainly request that Mr. Cooper and the DOE provide relief by adjusting the contract. Tr. at 132. Mr. Cooper, the DOE contracting officer, should consider that type of request in light of the fact that reinstatement of Holsinger furthers the goals of Part 708.

K-Ray also claims that it would experience additional costs of approximately $1,800 associated with reinstatement of Holsinger. These are costs attributable to uniform expenses, and additional training. These costs are not inconsiderable. Some of the costs, such as uniforms and training for newly hired employees, appear to be start-up costs that would be incurred with hiring any new employee. Other costs represent expenses for ongoing training that all K-Ray guards would have to undergo. According to Mr. Cooper, K-Ray could certainly include these extra costs in its option proposal for next year. Tr. at 128. Further, as Mr. Cooper testified, K-Ray's contract for the current year would in all likelihood already include reimbursement for items such as training for new employees. Tr. at 68-9. Thus, I cannot conclude that the $543 uniform cost and the $1300 in training costs could not ultimately be recouped by K-Ray, or that these amounts have not already been included in its current operating costs.

In this regard, I note that since Holsinger's termination, K-Ray has hired five new part-time guards. Tr. at 110. Several of those new guards were employed only briefly. Tr. at 110, 256. K-Ray certainly incurred training and uniform costs in connection with these hirings. Nevertheless, K-Ray has not appeared to contend that the training and uniform costs associated with hiring those additional personnel, even for brief periods, resulted in any hardship to it. However, if the up-front training and uniform costs prove to be an unusual burden on its operations, the firm could, as I indicated above, certainly apply to Mr. Cooper or to the DOE for relief.

C. Scheduling Burdens

K-Ray also maintains that trying to include Holsinger in its current guard operations would create unusual and significant scheduling difficulties. I do not believe that this concern is borne out by the testimony at the hearing. Holsinger's testimony is that he is regularly available only for a K-Ray nighttime shift, which runs from midnight to 8 a.m. K-Ray's assertion of unusual scheduling difficulty is based on its assumption that it would be required to provide Holsinger with a regular two-day a week nighttime shift.

I do not foresee imposing this requirement on K-Ray. As I stated above, the firm would be required only to offer Holsinger fill-in time on an as needed basis. Holsinger could present K-Ray each month with a schedule showing his hours and days of availability. K-Ray will be required to offer Holsinger a minimum of two shifts per week, which become available due to vacation, sick leave, or other employee leave, and which coincide with Holsinger's own available hours. (6) However, the firm will not be required to employ Holsinger for more than one shift per week. I see no reason that this procedure should present any unusual or significant difficulties to the firm. In fact, the availability of an additional part-time guard to fill in on an as-needed basis should provide additional flexibility to the firm, and lessen the possibility of expensive overtime pay.

D. Holsinger's Disclosure

In his remand determination, the Deputy Secretary also directed the Office of Hearings and Appeals to give consideration to an additional issue. That issue involves the underlying dispute between Holsinger and WSA. As the Deputy Secretary pointed out, due to the settlement between WSA and Holsinger, the OHA was prevented from reviewing the merits of that underlying dispute. However, the Deputy Secretary's Decision, citing Universities Research Association (LWZ-0023), 24 DOE ¶ 87,514 (1995), requested that the OHA make an "assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect,. . .granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork." Id. at 89,065.

In the Universities Research Association case, the disclosure involved an allegation of mismanagement of a laboratory hypercube computer. The whistleblower was dissatisfied with the general procedures adopted by the group leader who controlled scheduling of hypercube users. Universities Research Association (LWA-0003), 23 DOE ¶ 87,506 (1994). Thus, the disclosure in this case involved a pure management issue.

The instant case is quite different. It encompasses two types of disclosures involved in a single incident. First, according to the record, Holsinger revealed in an anonymous letter to the DOE that stealing at a DOE facility had taken place. This constitutes a protected disclosure under 10 C.F.R. § 708.5(a)(1)(i). That provision protects employees who disclose a violation of any law, rule or regulation. Clearly, Holsinger's disclosure of what he reasonably believed to be theft of DOE property fell within the purview of that regulation. Tr. at 211. He testified that as a security guard whose job it was to enforce the law, he was required to report information regarding a theft, and it would be against the law for him not to do so. Tr. at 212. In this respect, then, Holsinger's disclosure was unlike that involved in the Universities Research Association case.

The other aspect of Holsinger's disclosure was in the nature of a disclosure of alleged mismanagement. Holsinger asserted that WSA, the contractor at FETC that employed him, had not acted upon the earlier revelations of theft made by WSA employees. With respect to this aspect of the Holsinger disclosure, I agree with the Deputy Secretary that this is a management issue. Differences of opinion may well have formed the basis for this disclosure, and WSA and DOE could well have decided that further pursuit of the matter was unwarranted. In this regard, as the testimony of Mr. Cooper indicated, the DOE may have determined that a certain level of theft at FETC is de minimus. Tr. at 91-92.

In the present case, the theft reported by Holsinger involved buckets covered with rags, so that he was unable to discern whether any objects of significant value were being removed from the DOE. I therefore conclude that the disclosure of the possible theft itself was protected, since Holsinger reasonably believed that an employee may well have been removing items of value from the premises. (7) On the other hand, I find that alerting the DOE that WSA was failing to take any action regarding that thievery does not necessarily constitute a disclosure of mismanagement within the scope of Part 708, since WSA could properly have determined in this case that the incident was de minimus.

IV. Conclusion

As is evident from the above discussion, I have found that K-Ray will experience little detriment if it is required to reinstate Holsinger on an as-needed basis for one shift per week. The shifts offered to Mr. Holsinger should be those of other employees who are on vacation or sick leave, or who, for other reasons are unable to appear for their shifts. I recognize that this reinstatement may result in a reduction of hours to the current K-Ray employees who might otherwise be offered those hours. However, the imposition on them will be minor, and the effects should be spread among all part-time employees. The Holsinger reinstatement need not involve more than eight hours per week of shift time.

It Is Therefore Ordered That:

(1) K-Ray shall reinstate Daniel Holsinger to a position as part- time security guard on an "as-needed" basis at the FETC facility.

(2) Holsinger shall, on a monthly basis, provide K-Ray with a schedule of his available hours for security guard work at FETC.

(3) K-Ray shall offer Holsinger a minimum of two shifts per week, which become available due to vacation, sick leave or other employee leave, and which coincide with the schedule provided by Holsinger.

(4) K-Ray shall not be required to employ Holsinger for more than one shift per week.

(5) This decision shall become the Final Decision of the Department of Energy unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments, IG-44, Office of the Inspector General, Department of Energy, 1000 Independence Avenue, S.W. Washington, D.C. 20585-0102.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 27, 1998

(1)FETC was formerly known as the Morgantown Energy Technology Center (METC). For the sake of simplicity, in this Decision

I will consistently refer to this facility as FETC.

(2)K-Ray has also included in this figure 16 percent, or $623, for indirect costs. Some of these are costs associated with items such as rent, telephone, and salary of the firm's principals. However, it is clear that this item represents an allocation of pre-existing out-of-pocket expenses for K-Ray. K-Ray would not incur any additional indirect costs of this nature, simply by virtue of being required to reinstate Holsinger. Tr. at 102. Ms. Lewis indicated that this 16 percent figure covers employer taxes on wages. Tr. at 253. Costs of this nature would constitute additional expenses for K-Ray. However, as discussed below, I do not believe the $4,500 figure is realistic. I believe a more realistic amount at this time would be approximately $149.76. Even including the entire 16 percent on that lower amount would increase the total salary costs for reinstating Holsinger by only $24 for the one-month remaining in the current contractual period. This de minimus amount should not impose a significant hardship on K-Ray's operations.

(3)It is also worth noting that any savings made by K-Ray by virtue of hiring a lower paid employee upon the departure of a higher-paid one, inure to the DOE and not to K-Ray. Tr. at 63, 96.

(4)As I indicated above, Holsinger testified that he would be satisfied with one or two regular midnight shifts per week. Tr. at 198. I therefore believe that it would be reasonable to expect K-Ray to employ Holsinger for a minimum of one shift per week, when hours that become available fall within his scheduled free time.

(5)I am aware that since the time that this roster was prepared, a new part time security guard was hired at the lower rate. Thus, K-Ray's total current salary outlay may be slightly less than during the week of June 22. On the other hand, I have not included in this calculation the fact that several officers, such as Captain Munz, also assume guard duty, and these officers earn somewhat more than ordinary guards.

(6)If K-Ray offers Holsinger a shift at a time when only one suitable shift is available, and Holsinger accepts that duty, the firm will not be required to offer Holsinger a second shift for that same week if one should subsequently become available.

(7)The record contains no clear evidence on what the items stolen may have been.