**United States Department of Energy**
**Office of Hearings and Appeals**

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| In the Matter of Denise Hunter | ) | |
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| Filing Date: December 6, 2013 | ) | Case No.: WBA-12-0004 |
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Issued: April 29, 2014

## Decision and Order

This Decision considers an Appeal of a Decision issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on August 5, 2013, of a Complaint filed by Denise Hunter (Hunter) against her former employer, The Whitestone Group (Whitestone), under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. In the Decision, an OHA Hearing Officer found, after an evidentiary hearing, that Hunter had participated in protected activities under Part 708 and that, as a result, Whitestone retaliated against her by discharging her from her position. The Hearing Officer further found that Whitestone had not shown by clear and convincing evidence that it would have terminated Ms. Hunter's employment in the absence of her protected activity. In the present case, Whitestone appeals various findings contained in the Hearing Officer's Decision. As set forth in this Decision, we have determined that the Appeal be denied.

## 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 2, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The Part 708 regulations prohibit retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including "disclosing to a DOE official, . . . any other government official who has responsibility for the oversight of the conduct

of operations at a DOE site, your employer, or any higher tier contractor, information that [the employee] reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. OHA is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include a "statement specifically describing the alleged retaliation" and "the disclosure, participation, or refusal that [the complainant believes] gave rise to the retaliation." 10 C.F.R. § 708.12.

**B. Factual Background**

Several contractors at the DOE's Argonne National Laboratory (ANL) facility in Argonne, Illinois, had employed Hunter over a period of 11 years. *In the Matter of Denise Hunter*, Case No. WBH-12-0004, at 2 (2013) (*Hunter* or Initial Agency Decision (IAD)). Hunter worked as the Project Manager overseeing ANL's protective force, which provides physical security for ANL's facilities and site. *Id.* In the spring of 2011, Whitestone became the contractor providing protective force services at ANL. *Id.*

In April 2011, Whitestone hired Lyle Headley (Headley) as the Operations Manager for ANL's protective force. Hunter became concerned that Whitestone had hired Headley without conducting the specified pre-employment screening as mandated by Whitestone's contract with ANL and various DOE directives. *Id.* at 3. Hunter asserts that she reported her concern regarding Headley's hiring to several Whitestone, ANL, and DOE officials. *Id.* In November 2011, Whitestone conducted the mandated screening of Headley and discovered information that disqualified Headley from employment. *Id.* at 3.

In September 2011, Hunter received phone calls from concerned Whitestone vendors and subcontractors claiming that they had not received payment for goods and services already provided to Whitestone at ANL. *Id.* at 4. Hunter claimed that she knew that Whitestone had already submitted some of the underlying invoices to ANL for reimbursement. *Id.* at 4. Hunter believed that such a practice constituted fraud since, under Whitestone's contract with ANL, Whitestone was required to pay an expense before it could be reimbursed. *Id.* at 4. At the hearing, Hunter testified that she had reported this concern to a number of officials at Whitestone and ANL. *Id.* at 4.

Whitestone's contract with ANL was modified effective January 1, 2012, to permit other Whitestone employees temporarily to share the Operations Manager's responsibilities and to be compensated for those additional duties until a permanent replacement could be found. *Id.* at 3. Hunter prepared a schedule of adjusted pay rates for those employees who assumed additional temporary duties, including herself.[1] *Id.* at 3. Because the employees had not yet received payment for their extra duties, on February 22, 2012, Doris Manning (Manning), who had been temporarily promoted to Operations Manager, sent an e-mail to Conway and Glenn First (First),

[1] At the hearing, William Conway (Conway), Whitestone's Regional Manager, testified that Hunter's actions in this regard did not reflect his intention that one employee be selected to temporarily fill the Operator Manager's position until a permanent replacement could be found. Transcript of Hearing (Tr.) at 507-08.

Whitestone's Vice-President of Operations, on behalf of affected Whitestone employees seeking an explanation for the delay in payment. Exhibit (Ex.) 18 at 1-3. A copy of this E-mail was also sent to Jeanne Shaheen (Shaheen), ANL Procurement. The February 22, 2012, E-mail also complained about the lack of communications on this issue between the affected employees and Conway and First. Ex. 18 at 1.

On February 27, 2012, Hunter filed a Part 708 Complaint (February 27, 2012, Part 708 Complaint) with the Employee Concerns Program Manager of the DOE's Office of Science's Chicago Office. In the February 27, 2012, Part 708 Complaint, as supplemented by a second filing (Supplemental Complaint) the next day on February 28, 2012, Ms. Hunter claimed that Whitestone had retaliated against her by belittling her and lying about her to her staff, by undermining her authority, and by reducing her salary. Ex. 27 at 3-8.

Subsequently, on March 8, 2012, Hunter was placed on a 45-day probation by Whitestone for "not properly defusing a major internal issue . . . [and] not communicating critical information to your direct supervisor." Ex. 10 at 35-36. At the hearing, Conway, Hunter's direct supervisor, testified that the probation was prompted by the February 22, 2012, E-mail sent by Manning to him and Shaheen on behalf of herself and her co-workers. Tr. at 460. Hunter was informed that Whitestone would conduct a "re-evaluation meeting" on April 15, 2012.

On April 1, 2012, Hunter received an E-mail from Headley's sister. In that E-mail, Headley's sister informed Hunter that Headley was storing DOE uniforms and DOE-issued badges (hereinafter referred to as theft of official equipment) at their parent's home. On April 2, 2012, Hunter forwarded the E-mail to Conway who in turn informed her that Headley's sister had previously provided the information to Conway in November 2011 and informed ANL at a later date. Ex. 30. Hunter informed Conway that the numbers appearing on the badges in question did not match any assigned to Whitestone's protective force. Hunter also forwarded her April 2, 2012, E-mail to Sandra Guendling (Guendling) at ANL.

On April 9, 2012, Whitestone terminated Hunter's employment. The given reason for the termination was that an investigation found that Hunter had allegedly participated in fraudulent activity and had falsified a document. Ex. 10 at 33-34. The document allegedly prompting the decision to terminate Hunter was a form letter ("re: Temporary Employment Adjustment" (TEA)), prepared by Hunter, containing blanks to be filled, for the purpose of informing Whitestone employees at ANL of their temporary duty pay modification in exchange for accepting additional responsibilities after Mr. Headley's termination. Ex. 22. In this document (TEA Document), a blank was completed for Denise Hunter. However, in the blank following the term "Accepted," appeared the names "Bill Smith, William, Sylvia Rada." Upon seeing the TEA Document on April 9, 2012, Conway determined that neither he nor Smith had signed it. August 16, 2012, OHA Report of Investigation (ROI) at 11.[2] Conway determined that this was adequate grounds to terminate Hunter. On the same day, First and Conway went to the local sheriff's office and asked that criminal charges be brought against Hunter. After an investigation, the sheriff's office concluded that little or no effort had been made to disguise or mimic the

[2] During the Investigation and at the hearing, Hunter stated that she had placed the names on the TEA Document. ROI at 11; Tr. at 152, 155.

questionable signatures and that Hunter likely lacked the requisite intent to deceive necessary to find that probable cause existed to justify an arrest. *Hunter* at 5; Ex. 23. [3]

## C. Procedural Background

### 1. Complaint, the OHA Investigation, and Pre-Hearing Pleadings

On March 9, 2012, Hunter served the February 27, 2012, Part 708 Complaint on Whitestone. Hunter requested an investigation and hearing by OHA. At the request of the OHA Investigator, Hunter provided a "Second Supplemental Complaint" on June 12, 2012 (Second Supplemental Complaint). ROI at 4 n.5. In the Second Supplemental Complaint, Hunter alleged that she made six Part 708 protected disclosures, three of which are relevant to the current Appeal:

1. That Whitestone hired Headley without conducting a required pre-employment screening process;
2. That Hunter reported to Whitestone and ANL that Headley had taken protective force uniforms and a DOE security badge from ANL and stored them outside the ANL facility;
3. That Whitestone was billing ANL for reimbursement of costs before it paid those expenses to vendors and subcontractors.[4]

Report of Investigation (ROI) at 5-7; Second Supplemental Complaint. On August 15, 2012, the OHA Investigator issued a ROI regarding his investigation of Hunter's Complaint. In the ROI, the OHA Investigator concluded that Hunter's disclosure regarding the lack of a required background investigation on Headley and her filing of the February 27, 2012, Part 708 Complaint were protected under Part 708. ROI at 6. The OHA Investigator found that Hunter's disclosure about Headley's background check was a contributing factor in her being placed on probation on March 8, 2012, and her being terminated on April 9, 2012. The OHA Investigator also found that the filing of Hunter's February 27, 2012, Part 708 Complaint was another contributing factor in Hunter's April 9, 2012, termination. ROI at 8.

On August 20, 2012, the Hearing Officer requested that Hunter provide him with a list of her disclosures and the connection between them and Whitestone's alleged retaliation. August 20, 2012, Letter from William Schwartz, OHA Hearing Officer to Vincenzo Field, Esq., Counsel for Hunter, and Jeffrey Weinstein, Counsel for Whitestone. Hunter's September 22, 2012, Brief (September 22, 2012, Hunter Brief), filed in response, listed four protected disclosures/activities:

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[3] In October 2012, Jeff LeRe (LeRe), Executive Vice President of Whitestone, contacted the sheriff's office with another document which Whitestone believed contained the forged signature of Manning by Hunter. *Hunter* at 5; Tr. at 523; Ex. H. The sheriff's office, after comparing the signature on that document with that of Ms. Manning and Ms. Hunter, found no similarities between the signature appearing on the document and that of either Ms. Manning or Ms. Hunter, and administratively closed the file. Ex. 29 at 2.

[4] Hunter also claimed that she made protected disclosures when she reported Whitestone's: (1) "Fraudulent Billing of Personal time Off" to Conway and other officials; (2) "Fraudulent Billing" of salaries to Conway and other officials on various occasions from January 2012, through March 2012, and (3) "Fraudulent Billing of Overtime" to Conway and other officials. ROI at 6 n. 5. The Hearing Officer found that, at the hearing, Hunter focused her case on the three disclosures referenced in the text above and thus did not meet her burden of proof regarding these remaining three alleged disclosures. *See Hunter* at 6 n.5.

(1) she reported that Headley had not undergone the required pre-employment screening; (2) she reported to ANL that Whitestone had failed to disclose that badges and uniforms had been stolen; (3) she reported to ANL that Whitestone was violating its contract with ANL by seeking improper reimbursements; and (4) she had filed a whistleblower complaint pursuant to Part 708. September 22, 2012, Hunter Brief at 1.

**2. The Hearing Officer's Decision**

Beginning on November 27, 2012, the Hearing Officer conducted a two-day hearing where he received testimony from six witnesses and accepted 42 Exhibits into the record.[5] On August 5, 2013, the Hearing Officer issued his decision where he found that Hunter was entitled to relief pursuant to Part 708.

In the IAD, the Hearing Officer found that Hunter had made Part 708 protected disclosures concerning Whitestone's failure to conduct a required pre-employment screening of Headley and Headley's theft of uniforms and badges. *Hunter* at 7-9. The Hearing Officer went on to find that Hunter participated in a protected Part 708 activity when she filed her February 27, 2012, Part 708 Whistleblower Complaint. *Hunter* at 10.

The Hearing Officer then found that none of Hunter's protected disclosures or her protected activity was a contributing factor in Hunter's 45-day probation. *Hunter* at 11. With regard to Hunter's termination, the Hearing Officer found that there was close temporal proximity between Hunter's disclosure about the stolen equipment, the filing of her February 27, 2012, Part 708 Complaint, and her termination. Consequently, the Hearing Officer concluded that Hunter's disclosure concerning the stolen equipment and the filing of the February 27, 2012, Part 708 Complaint were contributing factors in Whitestone's decision to terminate Hunter. *Hunter* at 12-13.

Because the Hearing Officer found that Hunter's disclosure regarding the theft of official equipment and the filing of her February 27, 2012, Part 708 Complaint were contributing factors in Hunter's firing, the Hearing Officer went on to evaluate whether Whitestone provided clear and convincing evidence that it would have terminated Hunter notwithstanding her Part 708 protected disclosure or activity.

In his analysis, the Hearing Officer used the analytic framework set forth in *Kalil v. Dep't of Agriculture*, 479 F.3d 821 (Fed. Cir. 2007) (*Kalil*) (*citing Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006)) to evaluate whether Whitestone had shown by clear and convincing evidence that it would have taken the personnel action against Hunter notwithstanding her protected activity.[6] In reviewing the first *Kalil* factor, the strength of Whitestone's stated reason for terminating Hunter, the Hearing Officer found that it was unlikely that Hunter had tried to deceive anyone with the TEA Document because only Conway's first

[5] The Hearing Officer heard testimony from Hunter, Conway, Manning, John D. Clark (Clark), Chief Executive Officer at Whitestone, Robin Covington, Hunter's secretary while she was the Project Manager at ANL, and Lori Colussi-Junk (Colussi-Junk), Whitestone's Director of Human Resources.

[6] The *Kalil* factors are: (1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing; and (3) any evidence of similar action against similarly situated employees for the non-whistleblowing aspect alone. *Kalil*, 479 F.2d at 824.

name had been written on the document and that none of the alleged forged signatures on the TEA Document were written in the correct signature area to indicate their approval of the pay adjustment for Hunter. *Hunter* at 14. In making this finding, the Hearing Officer also noted evidence where Whitestone officials in October 2012 had forwarded another alleged forged document (where Hunter had allegedly forged Manning's signature on a document) to the local sheriff's office to investigate whether legal proceedings were warranted. The local sheriff's office declined to pursue the matter since Hunter's alleged forged signature on that document had no similarities to a sample of Manning's authentic signature. *Hunter* at 5-6, 14. Given this evidence, the Hearing Officer found that Whitestone's rationale for terminating Hunter was "weak and pretextual." *Hunter* at 14.

As for the second *Kalil* factor, the strength of any motive to retaliate for Hunter's protected activity, the Hearing officer found that there was evidence that Whitestone had motive to retaliate against Hunter. The Hearing Officer noted that Whitestone had actual knowledge that Hunter had contacted ANL regarding the stolen equipment and that any inquiry arising from that disclosure might reveal Whitestone's negligence in not initially investigating the theft. The Hearing Officer also found that Whitestone was not comfortable with Hunter's filing of a Part 708 complaint since the firm had never been subject to a Part 708 complaint and was potentially concerned about many of the issues she had raised. *Hunter* at 15; Tr. at 293-94, 459-60. The Hearing Officer also cited testimony from Conway to the effect that, hypothetically, he would have recommended suspending Hunter had he known she had communicated her concerns to ANL. *Hunter* at 15; Transcript of Hearing at 459-60. As evidence of another potential source of animus against Hunter, the Hearing Officer noted that the DOE's Office of Inspector General conducted an investigation shortly after Hunter filed the February 27, 2012, Part 708 Complaint. Further, Whitestone's contract with ANL, despite initially being for a five-year duration, was reopened for bidding by ANL significantly before the expiration of the initial five-year contract period. *Hunter* at 15.

With regard to the third *Kalil* factor, treatment of similarly situated employees, the Hearing Officer found little probative evidence. While Whitestone claimed that it had fired another employee for falsification of documents, the Hearing Officer found that there were such differences in the way that matter had been handled as compared to Hunter's treatment that no findings could be made with regard to the third *Kalil* factor. *Hunter* at 15-16.

After weighing the evidence regarding the three *Kalil* factors, the Hearing Officer found that Whitestone had not met its burden of showing by clear and convincing evidence that it would have discharged Hunter notwithstanding the filing of her February 27, 2012, Part 708 Complaint. *Hunter* at 15-16. Consequently, in light of this finding and his earlier findings, the Hearing Officer determined that Hunter was entitled to relief and should be awarded back pay and attorney's fees. *Hunter* at 16.

## II. Analysis

The standard of review in our Part 708 appeal cases is well-established. Conclusions of law are reviewed *de novo. See Curtis Hall,* Case No. TBA-0002 at 5 (2008). Findings of fact are overturned only if they are clearly erroneous, giving due deference to the trier of fact to judge the credibility of the witness. *Id.; Salvatore Gianfriddo,* Case No. VBA-0007 (1999).

In its Appeal, Whitestone asserts three principal arguments. First, Whitestone argues that the Hearing Officer improperly found that Hunter's report concerning the theft of official equipment was a contributing factor in Hunter's termination. Second, Whitestone argues that the Hearing Officer had insufficient evidence to support his finding that Hunter's February 27, 2012, Part 708 Complaint was a contributory factor in the decision to terminate Hunter. Lastly, Whitestone argues that the Hearing Officer erred in finding that it had not submitted clear and convincing evidence that it would have terminated Hunter notwithstanding her protected disclosure and activity.

**A. Disclosure Concerning Theft of Official Equipment**

Whitestone asserts that, as an initial matter, the Hearing Officer exceeded his authority by making a finding that Hunter's disclosure about the theft of official equipment was a contributing factor in her termination. Specifically, Whitestone asserts that Hunter never alleged during the entire Part 708 process that she had been *terminated* as a result of that disclosure. Whitestone Appeal at 3. Whitestone argues that, even if the Hearing Officer had authority to make such a finding, there was insufficient evidence in the record to support his finding against Whitestone. In support of its argument, Whitestone draws our attention to the ROI which found that Headley's theft of official equipment was not a substantial violation of ANL regulations as to merit protection under Part 708. See ROI at 6; Whitestone Appeal at 4. Whitestone also asserts that it had no motivation to retaliate against Hunter since reporting such incidents was an ordinary requirement of Whitestone's contract with ANL and that Hunter's report of the theft was a normal part of her duties. Whitestone Appeal at 4 n. 1 (citing relevant DOE Manual provision 470-2A and Whitestone/ANL contract, Ex. 2). Whitestone points out that there is no evidence in the record that Conway handled her disclosure in any unusual manner or expressed displeasure to Hunter. Whitestone also points out that there is no evidence in the record that ANL ever sought to take negative action against Whitestone because of Hunter's disclosure about the theft.

As to Whitestone's initial argument, our examination of the record indicates that in none of the pleadings does Hunter specifically allege that she was terminated because of her reporting of the official equipment theft. However, in her September 23, 2013, Appeal Brief, Hunter argues that Conway had actual knowledge of her report of stolen equipment and this fact supports the Hearing Officer's determination that her report concerning the theft of equipment was a contributing factor in the retaliations taken against her by Whitestone. September 23, 2013, Appeal Brief (September 23, 2013, Hunter Appeal Brief) at 9. Hunter also points out that the Part 708 regulations only require that a whistleblower specify his or her protected disclosures and activities along with the act of retaliation he or she may have experienced. Thus, a whistleblower is not required to specifically plead which protected activity is responsible for which retaliation. Hunter also argues that in her Second Supplementary Complaint she specifically listed her report of the theft as a protected disclosure and her subsequent termination as a retaliation. September 23, 2013, Hunter Appeal Brief at 6.

We find that the Hearing Officer did not exceed his authority in making this legal conclusion. Hunter's failure to allege that her disclosure concerning the theft of official equipment was a potential basis for her termination does not necessarily preclude the Hearing Officer from considering her claim when it has been implicitly raised and litigated. *See Tod N. Rockerfeller v. DOE,* 2002 CAA 00005 (January 24, 2003) (*Rockerfeller*) (whistleblower case brought under the

Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988)); *Cowan v. Bechtel Construction, Inc*., 87-ERA-29 (Secretary's Decision March 24, 1995) (*Cowan*) (whistleblower case brought under the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988)); *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992) (*Martin*) ("if an issue is tried fully by the parties, a court or agency may base its decision on that issue and may deem the pleadings amended accordingly, even though the parties did not set forth the theory in the pleadings"). In addition to the pleadings discussed above which impliedly set forth Hunter's claim that she was fired in part because of her report regarding official equipment theft, we note that this issue was specifically raised in the ROI by the OHA Investigator. ROI at 8. Further, at the hearing, Whitestone sought to adduce evidence from Conway as to the effect that Hunter's report concerning the theft of official equipment had on the decision to terminate Hunter. Tr. at 536-37. Consequently, we find that the Hearing Officer did not exceed his authority in reaching this conclusion as a matter of law.

We also reject Whitestone's other arguments about the insufficiency of evidence supporting the Hearing Officer's finding regarding Hunter's report of the theft of official equipment. In his analysis of the second *Kalil* factor, regarding his assessment of Whitestone's motive to retaliate, the Hearing Officer found that Whitestone may have been concerned about the issues raised by Hunter even if those concerns could be deemed tenuous. Supporting his conclusion was the fact that Hunter sent allegations that Whitestone had violated various laws and rules directly to ANL.[7] *Hunter* at 15. Further, the Hearing Officer cited testimony from Clark admitting that Whitestone was aware that the Office of the Inspector General had launched an investigation after Hunter had filed her February 27, 2012, Part 708 Complaint and that he was uncertain whether it played a role in ANL's decision to open up Whitestone's contract for bidding before the end of the expiration date of the Whitestone/ANL contract. *Hunter* at 15; Tr. at 295-96.

While the evidence cited by Whitestone may have some probative value on whether it, in fact, had retaliatory animus against Hunter, it is insufficient for us to overturn the findings of the Hearing Officer. As noted by the Hearing Officer in the IAD, those responsible for the agency's overall performance may well be motivated to retaliate even if they are not directly implicated by the disclosures, and even if they do not know the whistleblower personally, as the criticism reflects on them in their capacities as managers and employees. *Whitmore v. Dep't of Labor*, 680 F.3d 1353 at 1370 (Fed. Cir. 2012) (appeal of case brought under the Whistleblower Protection Act). In the absence of more compelling evidence, we cannot find that the Hearing Officer's legal conclusion on this issue was erroneous and, accordingly, affirm this finding.

**B. Hunter's Filing of the February 27, 2012, Part 708 Complaint**

Whitestone asserts that Hunter failed to allege that she had been terminated as a result of her filing the February 27, 2012, Part 708 Complaint until after the OHA Investigator's issuance of the ROI. In the ROI, the OHA Investigator found that Hunter's filing of the February 27, 2012, Part 708 Complaint may have been a contributing factor in her termination. Whitestone asserts that, significantly, the only mention as to the causation of Hunter's termination in her various submissions was an assertion that Hunter was fired as a result of her disclosure of Headley's improper hiring. Whitestone Appeal at 6-7. Only in the September 22, 2012, Hunter Brief did Hunter assert that she "agreed" with the OHA Investigator's finding that there was temporal

[7] The Hearing Officer did not specifically cite the Appellee's disclosure about the theft of official equipment in his discussion of Whitestone's possible motivation to retaliate in his discussion of the second *Kalil* factor.

proximity between her termination and the filing of her February 27, 2012, Part 708 Complaint. Whitestone Appeal at 6-7; September 22, 2013, Hunter Brief at 10. Further, in the September 22, 2012, Hunter Brief, Hunter failed to allege any connection between the filing of her February 27, 2012, Part 708 Complaint and her termination. Whitestone also alleges that the filing of the February 27, 2012, Part 708 Complaint would not have provided it with any motivation to retaliate because it had determined that the alleged disclosures were incoherent and rambling, false, or involved issues where Whitestone would not be subject to allegations of deficient contract performance. Whitestone Appeal at 8.

To the extent that Whitestone is arguing that the Hearing Officer improperly considered this theory of causation in the IAD, we reject this argument. The issue was raised by the OHA Investigator in the ROI relatively early in the proceeding. At the hearing, both parties sought significant testimony from the witnesses regarding the effect that the filing of the February 27, 2012, Complaint had on the decision to terminate the Appellee. Tr. at 406, 413-14, 420, 495, 499-500, 553, 585-87. Consequently, we find that the Hearing Officer could consider this theory of causation in determining Whitestone's Part 708 liability. *See supra*.

Whitestone's remaining arguments regarding the weight of evidence supporting the Hearing Officer's finding regarding causation between Hunter's filing of the February 27, 2012, Part 708 Complaint and her termination are unavailing. As the Hearing Officer noted, there is a significant temporal proximity between the two events. Assuming *arguendo* that the February 27, 2012, Part 708 Complaint was incoherent and rambling, false, or involved issues where Whitestone would not be subject to allegations of deficient contract performance, the very fact that a Part 708 complaint was filed against Whitestone could cause officials to have a motivation to retaliate against her. *See supra*. While the facts cited by Whitestone may provide some evidence that Whitestone did not, in fact, have motivation to fire Hunter, it is not of sufficient weight for us to conclude that the Hearing Officer's finding in this regard was in error.

### C. Whether Whitestone Would Have Terminated Hunter Notwithstanding her Protected Disclosure and Activity

Whitestone alleges that the Hearing Officer, in evaluating the strength of the stated reason for Hunter's termination, fundamentally misconstrued Whitestone's reason for the termination. Whitestone asserts that, in the Employee Separation Form it issued to Hunter, it specifically stated two grounds for termination, "criminal investigation regarding forgery + [sic] falsification of documents."[8] Appeal at 9; Ex. B at 6. Whitestone asserts that it did not terminate Hunter just because she had "forged" signatures on the TEA Document in a fraudulent attempt to get a pay raise, but also because she had falsely created the TEA Document to support her February 27, 2012, Part 708 Complaint in which she had claimed that Whitestone had approved a pay raise for her. Whitestone asserts that the Hearing Officer only considered evidence as to whether Hunter had forged signatures in the TEA Document but did not consider whether Hunter had fabricated the document to support her February 27, 2012, Part 708 Complaint. Whitestone also produced evidence at the hearing indicating that the Whitestone Employee Manual specifies that an employee can be terminated for "Completion and Signing of Forms; falsification of documents." Ex. 11 at 10.

[8] Hunter received a follow-up notification letter stating that an audit and investigation uncovered that she had engaged in "fraudulent activity and falsification of documents." Ex. B at 8.

To substantiate its argument that Hunter falsely prepared the TEA Document, Whitestone cites evidence in the record indicating that there was no reason for anyone at Whitestone to ask Hunter to prepare the TEA Document. Further, Whitestone argues that Hunter's testimony indicating that, in a conference call, First and Smith had asked her to prepare the TEA Document and to put the names of Smith and Conway on it, after they had asked her who at Whitestone could sign the document, is not credible. Both First and Smith, because of their senior positions with the firm, would have surely known who could sign the TEA Document. Whitestone Appeal at 8. Additionally, Whitestone presented evidence at the hearing that Smith never authorized a pay raise for Hunter that would have required the TEA Document to have been filled out. Whitestone also points out that while Hunter testified that Conway was on the conference call at issue, Conway has consistently testified that he was not on the conference call. Hunter has also failed to produce any other document supporting her claim that she had been asked to create the TEA Document. Whitestone claims that Hunter never tried to deny that she had falsely prepared the TEA Document in an E-mail sent to Whitestone's Human Relation Director immediately after she was fired. Whitestone Appeal at 10. While Hunter claims that she sent the TEA Document to Whitestone officials in 2011, all Whitestone officials who were interviewed or who testified denied ever receiving the document until seeing a copy of the Document attached to Hunter's February 27, 2012, Part 708 Complaint. Whitestone Appeal at 11.

With regard to Whitestone's initial argument, the Hearing Officer did, in fact, make a finding that both reasons advanced by Whitestone for Hunter's termination -- fraudulent activity and falsification of documents – were "weak and pretextural." Hunter at 14. Notwithstanding, Whitestone argues that it had sufficient basis to terminate Hunter, even if there was no fraud or falsification associated with Hunter's preparation of the TEA Document, because Hunter presented the document to support the contention set forth in her Part 708 Complaint that she and other employees were entitled to a pay adjustment. Contrary to Hunter's testimony, Whitestone asserts that Hunter was not directed by Whitestone management to draft the TEA Document and the company never saw the document until receiving it as an attachment to Hunter's whistleblower Complaint. Whitestone maintains that the Hearing Officer failed to consider this aspect of the firm's reasons for terminating Hunter, and that the firm has thus presented "clear and convincing" evidence that it would have terminated Hunter even in absence of her protected disclosure and activity. See 10 CFR § 708.29. We do not agree.

As described above, the Hearing Officer used the *Kalil* factors to determine whether Whitestone had met its evidentiary burden. Whitestone's arguments go to the adequacy of the Hearing Officer's assessment of the first *Kalil* factor – the strength of Whitestone's reasons for terminating Hunter. Regarding the TEA Document, the Hearing Officer found that there was no falsification by Hunter or attempt to defraud Whitestone or DOE. In view of this finding, we reject Whitestone's argument that the firm has presented "clear and convincing evidence" that the firm had sufficient reasons to terminate Hunter, even if we accept Whitestone's claim that Hunter prepared the TEA Document solely to support her February 27, 2012, Part 708 Complaint.

We are not persuaded that Hunter's preparation of a document for her Part 708 Complaint can be deemed to be misconduct that would subject Hunter to termination by Whitestone. To the extent the document was prepared solely to support an argument advanced by Hunter in her Part 708 Complaint, the document essentially became part of the Complaint itself. The Part 708 regulations prohibit an employer from retaliating against an employee for filing a complaint. We

believe that this prohibition of non-retaliation for filing a Part 708 complaint would extend to the document at issue, where there was no forgery or fraud relating to the preparation of the document and it was presented solely as an attachment to the Complaint. While Whitestone disagrees with the underlying position asserted by Hunter in her Complaint, *i.e.* that she and other employees were entitled to a pay adjustment, that disagreement must be considered in the context of the Part 708 adjudicatory process and Hunter's preparation of a document to support her position in litigation would not, in our view, form an independent basis for terminating her.

We also note that there is little evidence that Whitestone officials considered grounds other than "falsification of documents" in its decision to terminate Hunter. The record indicates that Conway and other Whitestone officials, in making the determination to terminate Hunter, focused almost exclusively on the possibility of forgery and seemingly did not inquire into the possibility that Hunter had prepared the TEA Document to support her February 27, 2012, Part 708 Complaint or had engaged in other fraudulent activities. *See* Tr. at 487-68 (Conway testimony that his investigation did not include questioning Hunter or Covington); Tr. at 569-70 (Conway testimony indicating he did not remember if he consulted the sheriff's office specifically about a "forgery" or "falsification of a documents" and that he did not know the definition of "forgery"); Tr. at 635-36, 650-51, (Colussi-Junk's testimony that termination was not based solely on the alleged TEA Document "forgery" but other "alleged dishonesty" - despite the fact that the alleged dishonest actions were not specifically mentioned anywhere in Hunter's termination documents). In sum, we agree with the Hearing Officer's legal conclusion that Whitestone's stated reasons for terminating Hunter were weak and that Whitestone failed to provide clear and convincing evidence that it would have terminated Hunter notwithstanding her protected disclosure or the filing of her February 27, 2012, Part 708 Complaint. Because we affirm all of the Hearing Officer's findings in this case, we must deny Whitestone's appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by the Whitestone Group on December 6, 2013, Case No. WBA-12-0004, of the Initial Agency Decision issued on August 5, 2013, is hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 29, 2014