United States Department of Energy
Office of Hearings and Appeals

In the Matter of Leslie Smith	)	
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Filing Date: May 4, 2020	)	Case No. WBA-20-0006
	)	
	)	

Issued: April 1, 2021

Decision and Order

This Decision concerns the appeal (Appeal) by Leslie Smith (Appellant) of an initial agency determination (IAD) by the United States Department of Energy's (DOE) Office of Hearings and Appeals (OHA). The IAD denied Appellant's complaint of retaliation against her former employer, Consolidated Nuclear Security, LLC (CNS), which manages and operates the Y-12 National Security Complex (Y-12), under DOE's Contractor Employee Protection Program regulations codified at Part 708 of Title 10 of the Code of Federal Regulations (Part 708). Appellant challenges an OHA Administrative Judge's conclusion that CNS proved by clear and convincing evidence that Appellant would have been terminated, even in the absence of her protected conduct. For the reasons set forth below, Appellant's appeal is denied.

I. The DOE Contractor Employee Protection Program

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. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7,533 (Mar. 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The Part 708 regulations prohibit retaliation by a DOE contractor against an employee because that employee has engaged in protected activity, including disclosing information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation, a substantial and specific danger to employees or to public health or safety, or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower complaint with DOE and are entitled to an

investigation by an investigator assigned by the Office of Hearings and Appeals (OHA), followed by a hearing conducted by an OHA Administrative Judge, and an opportunity for review of the Administrative Judge's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.22, 708.28, 708.32.

An employee who files a complaint has the burden of establishing by the preponderance of the evidence that he or she engaged in protected activity, as described in 10 C.F.R. § 708.5, and that the employee's protected activity was a contributing factor in one or more alleged acts of retaliation by the contractor against the employee. 10 C.F.R. § 708.29. If the employee meets that burden, the burden then shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's protected activity. *Id.*

II. Factual and Procedural Background

Appellant, an Assembly and Disassembly Operations (ADO) team supervisor, began her career at the DOE's Y-12 complex in 2007. *Leslie Smith*, OHA Case No. WBH-20-0006 at 4 (2021). The Appellant supervised a team of workers in the "assembly, disassembly, and quality evaluation of nuclear weapons components[.]" *Id.* at 4; Appeal at 4.

The Appellant's supervisor, Mr. Eddie Price (Mr. Price), secured a different position at Y-12 in January 2019, and when the position became available upon his departure, the Appellant submitted her name for consideration. *Smith* at 7. However, she was not chosen for the position. *Id*. Mr. Richard Young (Mr. Young), an African American male, was ultimately chosen in May 2019 to fill the position left by Mr. Price. *Id.*

During this time, the Appellant underwent a routine Human Reliability Program (HRP) recertification process. *Id.* at 6. The Appellant was initially being evaluated by Dr. Pamela Jones (Dr. Jones), but the matter was subsequently turned over to Dr. William Conklin (Dr. Conklin), and on March 19, 2019, Dr. Conklin notified the Appellant that she had been recommended for recertification. *Id.*

In June 2019, Mr. Emmet Wade (Mr. Wade) reported to Dr. Conklin that the Appellant had allegedly "engaged in four incidents of inappropriate behavior, including the use of a racial slur in the workplace." *Id.* at 7. Accordingly, Dr. Conklin began an investigation into the matter. He noted in his July 8, 2019, HRP Psychological Evaluation Report (PER) that seven of the Appellant's colleagues agreed that the Appellant "was difficult to work with[,]" and three of those interviewed alleged that she "seemed to discriminate against African Americans." Ex. Q at 3. The report further stated that "[one coworker] said that the [Appellant] used a racial slur about another coworker (the group's new manager), but none of the others [he] spoke with could corroborate this report." *Id.* Mr. John Anderson (Mr. Anderson) was the employee who provided Dr. Conklin with the aforementioned information regarding the racial slur. *Smith* at 7. The Appellant was temporarily removed from HRP at that time. *Id.* In a meeting with Dr. Conklin on July 9, 2019, the Appellant denied having used the slur, asserted that her colleagues showed her a lack of respect because of her gender, and expressed her belief that she was being targeted for holding individuals accountable. Ex. Q at 2. In a July 11, 2019, HRP PER, and after he consulted with the Employee Issues Panel, Dr. Conklin concluded that, while the alleged behavior was cause for concern, "the

most egregious accusations" could not be corroborated. Ex. Q at 1; *Smith* at 8. Accordingly, Dr. Conklin recommended reinstatement of the Appellant's HRP certification at that time. *Smith* at 8.

Mr. Lee Irons (Mr. Irons), a union laborer, sought out Ms. Leslie Daugherty (Ms. Daugherty), a Compliance and Ethics Specialist with Ethics and Employee Concerns (E&EC), on July 9, 2019, with the purpose of filing a complaint alleging that the Appellant had engaged in belittling and rude behavior toward him in the presence of other employees. *Id*. An E&EC investigation into the allegations was initiated. *Id.* Pursuant to applicable protocol, Ms. Angela Miller, Senior Labor Relations Specialist, joined the investigation, as union members were expected to be interviewed in the process. *Id.*[1] After Ms. Daugherty compiled an investigatory plan, Ms. Miller and Ms. Daugherty interviewed Mr. Anderson on July 16, 2019. *Id*. During his interview, Mr. Anderson informed investigators that the Appellant had used a racial slur in referring to Mr. Young. *Id*. Specifically, Mr. Anderson stated that the Appellant came to his office prior to an office meeting held for the purpose of introducing Mr. Young as the new manager, and asked Mr. Anderson "if he was going to 'meet the new head N***er.'" *Id*.; Ex. KK at 4. During his interview with Ms. Miller and Ms. Daugherty, Mr. Anderson stated that Mr. Olson, his officemate, commented on the Appellant's statement and that he had a conversation with another supervisor, Mr. Michael Lyke (Mr. Lyke), regarding the matter. *Id.* at 102. He also stated that he wrote himself a note, memorializing his intention to email himself a narrative of events, which he does when "something happens[.]" Tr. at 263; Ex. KK at 4.[2] The note was left on his desk over the weekend. Tr. at 263.

Mr. Anderson's officemate, Mr. Daniel Olson (Mr. Olson), informed Ms. Miller and Ms. Daugherty that he did not remember the Appellant calling their new manager a racial slur, indicating he is "hard of hearing[.]" Ex. KK at 4. He then stated that "if [Mr. Anderson] said it happened[,] then it happened." *Id.* During his testimony, Mr. Olson went on to confirm that the Appellant stopped by his office the morning of the staff meeting, that he heard the Appellant mumble something, and that Mr. Anderson turned to him after to say, "I can't believe she said that." Tr. at 651. Mr. Olson stated he asked Mr. Anderson for clarification on that point, and Mr. Anderson responded by indicating that the Appellant had stated it was "time to go meet the new N-word." *Id.* at 651-52. He stated that he watched Mr. Anderson "cry over that statement[.]" *Id.* at 655. Mr. Olson had also been interviewed in connection with Dr. Conklin's HRP investigation and denied having heard the statement. *Id.* at 647.

Mr. Lyke, having availed himself of the use of Mr. Anderson's desk over the weekend, saw the note Mr. Anderson had left himself on the desk. *Id.* at 295; 301-02; Ex. KK at 133. Mr. Lyke was not interviewed by Dr. Conklin in connection with the investigation he conducted into the matter. Ex. V at 1. Ms. Miller and Ms. Daugherty interviewed Mr. Lyke on July 18, 2019, and during his interview, he indicated that when Mr. Anderson asked him whether he had been in his office, Mr. Lyke informed Mr. Anderson he had covered the note regarding the alleged slur. Ex. KK at 131,

[1] Footnote 14 of the IAD states, "[t]he Record suggests Ms. Miller had other reasons to participate in the investigation. Ms. Daugherty prepared notes of a phone conversation with Ms. Miller on July 10, 2019, in which she noted that Ms. Miller 'wants to be in on interviews due to information rec'd [sic] on other issues involving L smith.' Ex. KK at 18." *Id.*

[2] Mr. Anderson testified that he felt that documenting the event in this manner was the best course of action at the time, as such a documentation "put a stamp on it, it made it to where you couldn't change it, it made it real." Tr. at 281. Mr. Anderson forwarded this email, dated May 16, 2019, to Mr. Miller and Ms. Daugherty. *Smith* at 9.

133. When asked if he heard the Appellant use a racial slur, he told the investigators that the Appellant had also stopped by his office on the day of the staff meeting, and stated to him "I guess we'll get to meet the new head n****r." *Id.* at 133.

The Appellant was informed on July 19, 2019, that she was being placed on paid administrative leave, pending the completion of the investigation. *Smith* at 10. Ms. Daugherty compiled a "Conclusive Summary" of the investigation she conducted into the matter, which contained the conclusion that the Appellant had used a racial slur in referring to Mr. Young. *Id.* at 10; Ex. KK at 1-7. In a Disciplinary/Termination Case Summary (DTCS) signed and dated September 3, 2019, Ms. Miller recommended the termination of the Appellant. Ex Y at 2. The DTCS concludes that, although the Appellant denied having used a racial slur and asserted it was nothing more than a rumor, the investigation found that she had used the slur. *Id.* Both the DTCS and the "Conclusive Summary" determined that the Appellant had violated CNS's Standards of Conduct and Appearance, Code of Business Conduct, and Discrimination and Harassment policy. *Id.*[3] Ms. Diane Grooms (Ms. Grooms), CNS's Chief Human Resources Officer, was provided a copy of the DTCS, as she was ultimately responsible for making the final determination regarding disciplinary actions. Tr. at 44, 75. In addition to reviewing the DTCS, Ms. Grooms conferred with Ms. Miller, Mr. Chad Mee (Mr. Mee), the Labor Relations Manager for CNS, and Mr. Reed Mullins (Mr. Mullins), Senior Director of Production Operations. *Id.* at 38, 89-90. Based on the information she had at her disposal, Ms. Grooms felt termination was appropriate and the Appellant was terminated from her employment with CNS on September 12, 2019. Tr. at 73, 75; Ex. AA at 1.

On November 20, 2019, the Appellant filed a Part 708 Complaint against CNS, alleging that CNS had, among other things, terminated her for making eleven disclosures protected under Part 708. *Smith* at 2. The Complaint was sent to OHA on May 4, 2020, and upon its receipt, OHA assigned a staff attorney (OHA investigator) to investigate the allegations contained therein. *Id.* The OHA investigator issued a Report of Investigation (ROI) on August 3, 2020, after having refined the alleged disclosures and acts of retaliation with the assistance of the Appellant. *Id.* at 3. An Administrative Judge was assigned to the matter after the completion of the ROI. CNS submitted a Motion for Summary Judgement on October 5, 2020, and the Administrative Judge granted partial summary judgement with regard to two of the Appellant's alleged actions of protected conduct and four of the alleged acts of retaliation on October 22, 2020. *Id.* A hearing, totaling three days, was held to determine the remaining issues, during which a total of seventeen witnesses testified, including the Appellant, and a total of fifty-two exhibits were submitted. *Id.* On February 5, 2021, the Administrative Judge issued the IAD, finding that one of the Appellant's disclosures was a contributing factor in her termination, but that CNS would have terminated the Appellant regardless of her protected conduct. *Id.* at 15-17. The Administrative Judge went on to conclude that CNS was able to show by clear and convincing evidence that it terminated the Appellant "because of her use of a racial slur and not because of her protected disclosures." *Id.* at 18.[4]

[3] The Disciplinary/Termination Case Summary cited the accounts of Mr. Anderson, Mr. Lyke, and Mr. Olson. Ex. Y at 1. It also provided an account by Mr. Anthony Cannon, one of the individuals the Appellant asked to be interviewed. *Id.* at 2. He recounted a time when the Appellant emailed him regarding an injury her daughter sustained while playing soccer, stating that "some BLACK girl ran into her ankle." *Id.* Mr. Cannon stated that he responded to her email, asking "what difference [it made] that the girl was Black." *Id.*

[4] As the Administrative Judge made the aforementioned determinations, only facts pertinent to the analysis whether CNS proved by clear and convincing evidence that it would have terminated the Appellant regardless of her protected

On February 19, 2021, the Appellant filed a timely notice of appeal, and a Statement of Issues on March 5, 2021. CNS provided a timely response on March 25, 2021. The issue on appeal is whether CNS proved by clear and convincing evidence that the Appellant still would have been terminated regardless of her protected activity.

III. Analysis

Pursuant to the Part 708 regulations, all underlying conclusions of law are reviewed *de novo* on appeal, and all underlying conclusions of fact are only reversed if they are clearly erroneous. *See Denise Hunter,* OHA Case No. WBA-12-0004 at 6 (2014) (citing *Curtis Hall*, OHA Case No. TBA-0042 at 5 (2008)). Under the applicable regulations, the Appellant, having initiated the Appeal, is tasked with identifying the issues that she wishes the OHA Director to review. 10 C.F.R. 708.33(a).

After an employee has met his or her burden in showing by a preponderance of the evidence that he or she made a protected disclosure pursuant to § 708.5 and that the Contractor took a retaliatory action that would not have occurred but for the alleged protected disclosure, the burden then shifts to the Contractor. 10 C.F.R. 708.29. The Contractor must show by clear and convincing evidence that it would have taken the same action irrespective of the employee's disclosure. *Id.* To determine whether an employer would have taken an adverse action against am employee regardless of the protected conduct, OHA considers: "(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." *Matter of Dean P. Dennis*, OHA Case No. TBH-0072 at 5 (2009) (*quoting Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007)); *see also Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). As the Administrative Judge determined that the Individual met her burden of proof, the issue on appeal is whether the Administrative Judge made an error of law when he concluded that CNS showed by clear and convincing evidence that it would have terminated the Appellant's employment regardless of her protected conduct.

As an initial matter, the Appellant presented a variety of arguments in her Appeal, a large portion of which fail to address errors in how the Administrative Judge applied the law to the facts.[5] Prior

activity have been included in the background. Our decision in *Leslie Smith,* OHA Case No. WBH-20-0006 (2021) contains background information pertinent to the Appellant's protected activity. Decisions issued by OHA are available on the OHA website located at http:www.oha.doe.gov.

[5] In addition to asserting a general denial of ever having uttered the slur in reference to her manager, a number of the arguments presented pertained to pretrial matters, stemming as far back as when CNS provided their first response to the Head of the Field Element. Appeal at 9-12; 25; 32. Not only do these arguments fail to illustrate any defect in the IAD, but the Appellant had the opportunity to address these alleged pre-trial defects contemporaneously with their occurrence, which would have been the appropriate time to do so. The Appellant argues defects pertaining to the conduct and actions taken by CNS and the Administrative Judge throughout the hearing process. *Id.* at 13-20; 23. She also specifically states that CNS and the Administrative Judge had "constructive knowledge" that her termination was either a "cost-savings initiative[]" or that she "posed a threat to the [c]ompany's viability[.]" Appeal at 24; 33. Not only does a review of the record fail to reveal any evidence of impropriety or the appearance of impropriety on behalf of the Administrative Judge, but the allegations made against the Administrative Judge and CNS fail to illustrate how or why the IAD was defective in terms of the Administrative Judge's application of law to the facts. Perhaps most

to addressing the more substantive arguments presented, it should be noted that the Appellant argues that further investigation should be conducted, stating that communications between the HR Manager and Mr. Smith, as well as any consultation with legal counsel, "should be examined for completeness if due diligence is to be upheld." Appeal at 28. The issue of attorney-client privilege aside, other than indicating conversations took place between HR, Mr. Smith, and counsel, and voicing her desire for OHA to "examine these interactions and scrutinize the degree to which they influenced Ms. Groom's deliberations[,]" the Appellant fails to provide any reason, let alone an extraordinary circumstance, as to why any further investigation should be conducted. *Id. See Shou Yuan Zhang* OHA Case No. WBA-17-0011 at 3 (2019). [6]

a. Whether the Administrative Judge Erred in Considering the "*Carr* factors."

At the core of her argument, the Appellant asks for a judgement rendered in her favor based on the fact that she was able to demonstrate that her protected conduct was a contributing factor in CNS's decision to terminate her employment, and that OHA should refuse to consider the factors outlined in *Carr v. Soc. Sec. Admin*, as it "encourages decisions based on speculation[.]" Appeal at 24, 34.[7] This approach, however, is not based in law. As indicated above, once the Appellant has proven her case by a preponderance of the evidence, the burden shifts to the Contractor to show by clear and convincing evidence that it would have terminated the Appellant regardless of her protected conduct. In order to make such a determination, OHA turns to applicable case law for guidance. The IAD addressed all three of the *Carr* factors and provided evidence from the record to support the conclusions made therein, as is appropriate. *Smith* at 17-18.

Although she asks OHA to abandon the *Carr* factors, the Appellant indirectly argues that the Administrative Judge misapplied the facts to one of the *Carr* factors. Specifically, she argues that whether Ms. Daugherty had any motive to retaliate against her for engaging in protected activity is immaterial to the analysis, stating that the Administrative Judge should have instead examined the motives Ms. Miller or Mr. Smith had for retaliating. Appeal at 26-27. The Administrative Judge determined that the Appellant had made a protected disclosure to Ms. Daugherty, namely, that she had told Ms. Daugherty in March 2019 "that CNS managers retaliated against her for raising safety and security-related concerns[.]" *Smith*, at 17. It was based on this disclosure that the Appellant was able to show "sufficient temporal proximity between her protected conduct and her termination[,]" and that Ms. Grooms had constructive knowledge of this disclosure. *Id.* at 16-17. Accordingly, this argument ignores the absolute necessity in making a determination regarding Ms. Daugherty's possible motives to retaliate, as the record shows that not only did the Appellant

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concerningly, the Appellant made her allegations without providing any substantive proof in support thereof. The justifications provided for these allegations consisted of statements rooted solely in speculation.

[6] Citing *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949); *Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir 2007) (stating that such procedures "should be only sparingly used"); *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980)

[7] The Appellant also argues that CNS relied on *Carr v. Soc. Sec. Admin.* to intimidate the Administrative Judge and that, as a result, the Administrative Judge was unable to act independently. Appeal at 19-20; 22-23. A review of the record does not support the allegation that the Administrative Judge failed to act independently as a result of intimidation, or for any other reason.

make an alleged disclosure to Ms. Daugherty, but that the investigation Ms. Daugherty helped conduct uncovered information that resulted in the Appellant's termination. Tr. at 44, 75.[8] Accordingly, assessing whether Ms. Daugherty possessed any motive to retaliate against the Appellant was a necessary and appropriate component of the IAD analysis.

The Appellant further argues that the comparator employees CNS listed were, in fact, not similarly situated. Appeal at 28. She attempts to differentiate herself from these employees by pointing out the fact that they were under a separate chain of command, that a portion of them were bargaining unit employees, and further, that "[t]he circumstances surrounding [her] ordeal were unique and do not resemble the circumstances of the employees CNS offers for comparison." Appeal at 29. As an initial matter, I cannot find, and the Appellant fails to point to any legal authority that requires similarly situated employees to either be in the same chain of command or to be bargaining unit employees or otherwise. The Appellant attributes the uniqueness of her circumstances to her consistent assertion that the allegation that she used a slur is uncorroborated, which is more fully discussed below. Beyond this argument, the Appellant suggests that the Administrative Judge erred when he determined that the similarly situated employee the Appellant presented was disciplined by a different contractor than CNS, and as such, the evidence of comparator employees would weigh in favor of CNS. Appeal at 30-31.[9] I find no error in the Administrative Judge's determination. The Administrative Judge was presented with comparator employees who were terminated as a result of allegations made by coworkers, despite their denials. CNS further provided evidence of terminations after employees used the same racial slur for which the Appellant was terminated.

Finally, the Appellant argues that, even if CNS is able to prove by clear and convincing evidence that she used the racial slur, CNS is unable "to prove that such behavior could have been severe and pervasive enough to warrant termination of employment." Appeal at 31. The Appellant fails to point to any case law or regulation that necessitates any analysis beyond the finding that the Contractor met its evidentiary burden on this issue. Further, OHA is unaware of any such regulations or case law.[10]

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[8] In making her argument, the Appellant cites a footnote in the IAD which states, "[t]he Record suggests Ms. Miller had other reasons to participate in the investigation. Ms. Daugherty prepared notes of a phone conversation with Ms. Miller on July 10, 2019, in which she noted that Ms. Miller 'wants to be in on interviews due to information rec'd [sic] on other issues involving L. Smith.'" *Smith* at 8. She further recounts that Mr. Smith's administrative assistant encouraged her to reach out to Mr. Smith regarding her concerns. Appeal at 27. In addition to providing the quote from the IAD out of context, it is not apparent from these facts why the Administrative Judge misapplied the facts to law when he considered whether Ms. Daugherty had any motive to retaliate.

[9] The Appellant asserts that similarly situated employees should be limited to employees who are in the same chain of command and are salaried employees in the same fashion she is. However, in making her argument, the Appellant, confusingly, places much less importance on whether a similarly situated employee is one who is employed by the same employer. Appeal at 30.

[10] Concerningly, the Appellant argues that even if CNS is able to meet its burden by clear and convincing evidence, it could not show that her behavior was so egregious as to warrant termination, and further, that another employee's behavior was much worse, as the email she sent was "replete with racial slurs and vile language[.]" Appeal at 31-32. The employee to whom the Appellant is referring was not terminated for the email she sent, and Ms. Grooms was not the Chief Human Resources Officer at the time this employee was disciplined. Tr. at 48. In making this argument, the Appellant asks OHA to establish an arbitrary distinction with regard to how many times an individual can use a racial slur before termination is actually warranted. We decline to make any such determination.

b. Whether there was Insufficient Evidence to Corroborate the Allegation the Appellant Used a Racial Slur.

The Appellant argues, in various ways, that the Administrative Judge erred in his determination, as the evidence failed to corroborate the allegation that she had used a racial slur in referring to her new manager. Appeal at 17-19; 20-21; 25; 28-30. The Appellant argues that the Administrative Judge failed to consider "exculpatory evidence," which proved that the Appellant did not utter the slur. In making this argument, the Appellant repeatedly references the fact that Mr. Olson failed to hear the slur, even though he had been present at the time the statement was made, and Dr. Conklin's indication that he was unable to corroborate the allegation during his investigation into the matter. Appeal at 19; 20-21.[11] However, as this evidence does not constitute a definitive recounting of all relevant facts, it does not and cannot lead to the conclusion that the Appellant did not utter the slur. After Dr. Conklin's investigation, and despite Mr. Olson's assertion that he did not hear the Appellant use a slur, Ms. Miller and Ms. Daugherty received Mr. Lyke's account of the Appellant's use of a racially charged statement, as well as "a first-hand account of [the Appellant] sending a racially insensitive email to an African American employee." *Smith* at 17.[12] Stated simply, Mr. Olson's failure to hear the slur and Dr. Conklin's investigation do not result in a conclusive finding that the Appellant did not use the N-word in referring to her new manager, especially in light of the evidence uncovered by Ms. Miller and Ms. Daugherty.

c. Whether the Administrative Judge Made Improper Credibility Assessments.

In making her argument regarding exculpatory evidence, the Appellant states that the Administrative Judge made flawed credibility assessments, first by simply stating that he had doubts regarding her credibility, and second, by "reach[ing] an illogical conclusion that two, less-than-credible, male accusers is enough to tip the balance to indicate" that CNS showed by clear and convincing evidence that it would have terminated the Appellant regardless of her protected activity. Appeal at 17-18.[13] Of particular note is the Appellant's allegation that the Administrative Judge's credibility assessment with regard to Messrs. Anderson and Lyke, as compared to the assessment he made regarding her credibility, evidences "a dangerous pitfall of non-sensical dichotomous thinking, or [reveals] his judgments are influenced by a value system which parses the virtue of truthfulness along gender lines." Appeal at 18. This argument ignores the entirety of

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[11] Mr. Olson's account of events and Dr. Conklin's indication that he could not corroborate the allegation that the Appellant uttered the slur were recounted and considered on pages 7-9 and 17 of the IAD.

[12] The Appellant takes issue with the relevance of this email, stating that it was a "personal, private correspondence with a long-time friend[.]" Appeal at 25. She also states that she fails to see "how the characterization of someone as being Black, such as a Black American, is derogatory or a distinction from how the DOE or CNS's own HR Division uses the term on a daily basis." *Id*. at 25-26.

[13] "It is well established in appeals brought under 10 C.F.R. Part 708 that factual findings of a[n Administrative Judge] are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses." *Anthony T. Rivera*, OHA Case No. WBA-17-0010 at 11–12 (2014) (citing *Curtis* Hall, OHA Case No. TBA-0042 at 5 (2008)). OHA has refused to overturn an Administrative Judge's finding of fact simply because the Appellant has disagreed with a credibility determination. *Id.* at 19, 21.

the IAD's analysis regarding the matter of credibility in favor of making a serious allegation without providing any evidence to support it, inaccurately painting the Administrative Judge's assessment as one that places complete trust in the accounts provided by Messrs. Anderson and Lyke, which is contrary to what the IAD actually states. *Smith* at 17.

The Appellant goes on to state that Mr. Anderson's credibility should be doubted due to "memory problems associated with his medication regimen[.]" Appeal at 21. She also alleges that Mr. Lyke was likely in a state of duress when he came forth with his allegations against her, as the new position to which he was transitioning at the time would require that he report to Mr. Wade, and further still, that CNS pressured him into making the allegations. Appeal at 21-22. Not only does the Appellant now make assertions not in the record, she also fails to provide any support for these assertions.[14]

IV. Conclusion

Appellant has not established that the Initial Agency Decision was based on a legal defect or clearly erroneous finding of fact. Accordingly, the determination of the Administrative Judge is affirmed.

It Is Therefore Ordered That:

(1) The appeal filed by Leslie Smith, Case Number WBA-20-0006, is denied.

(2) This 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, pursuant to 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

[14] The Appellant cites the interview with Ms. Fonda Hampton in making the assertions pertaining to Mr. Anderson's memory. A complete review of the interview did not reveal information specific to any alleged memory difficulties.