February 13, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeals

Names of Petitioners: Curtis Hall
Bechtel National, Inc.

Date of Filings: April 2, 2007
April 2, 2007

Case Numbers: TBA-0042
TBA-0064

This Decision considers two Appeals of an Initial Agency Decision (IAD) issued on March 15, 2007, by a Hearing Officer in the Department of Energy's (DOE) Office of Hearings and Appeals (OHA). The IAD addressed the merits of a whistleblower complaint filed by Curtis Hall against his former employer, Bechtel National, Inc. (BNI), under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. *See Curtis Hall*, 29 DOE ¶ 87,022 (2007). In his complaint, Mr. Hall alleged that BNI inappropriately selected him for termination under a reduction in force (RIF) in retaliation for his having made disclosures protected under the provisions of Part 708. In the IAD, the OHA Hearing Officer found that BNI had retaliated against Mr. Hall in violation of Part 708, and ordered BNI to take certain remedial action. In its Appeal, BNI challenges the IAD's findings of liability in the case. OHA has designated BNI's Appeal as Case No. TBA-0064. Mr. Hall's Appeal focuses on the remedy provided in the IAD, arguing principally that the Hearing Officer should have afforded the parties an opportunity to submit arguments on matters relating to the appropriate relief in the case. OHA has designated Mr. Hall's Appeal as Case No. TBA-0042. As set forth in this Decision, I have determined that BNI's Appeal is without merit and that the Hearing Officer's liability determination contained in the IAD should be sustained. With regard to Mr. Hall's Appeal, I have determined that some portions of it have merit and that the Appeal should be granted in part.

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 or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary

purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a “whistleblower” proceeding [a “protected activity”], will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations contained in 10 C.F.R. Part 708 establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by BNI and Mr. Hall in their respective Appeals, is performed by the Director of the Office of Hearings and Appeals (OHA).[1] 10 C.F.R. § 708.32.

B. Factual Background

At all times relevant to this proceeding, BNI was the prime contractor at the DOE’s Hanford Site[2] in Richland, Washington. Under the terms of its contract with the DOE, BNI is charged with designing, building, and commissioning the Waste Treatment Plant (WTP) at the Hanford Site to immobilize millions of gallons of chemical and radioactive waste through a process known as vitrification, whereby the waste will be mixed with molten glass and the resulting glass logs will be shipped to a federal repository for safe storage. IAD at 3.

BNI hired Curtis Hall on January 10, 2005, for the position of Controls and Instrumentation (C&I) Engineer in BNI’s Plant Wide Systems Group (PWS) at the WTP. *See* BNI Exhibit (Ex.) 2. The PWS group is responsible for the design, configuration and qualification testing of the Integrated Network Control (INC) System and interconnected field devices that track waste and materials as they are processed through the WTP. IAD at 4. The INC being developed for use in the WTP at the time Mr. Hall began his employment with BNI was designed by ABB, a recognized industrial automation and engineering firm. Hereinafter the INC will be referred to as the ABB control system. The communication technology that linked the ABB control system to external monitoring devices throughout the plant was Foundation Fieldbus (FF). ROI at 3. The fieldbus devices associated with the FF consist of transmitters, analyzers, indicators and control valves that measure and execute various process variables, including pressure, temperature, flow, conductivity and radiation. *Id.* Mr. Hall’s principal responsibility as a

---

1 On April 4, 2007, the Acting OHA Director at the time, Fred L. Brown, appointed Ann S. Augustyn to act in the capacity as OHA Director to perform the functions specified in 10 C.F.R. §§ 708.33 and 708.34 in connection with the two Appeals under consideration. While the two Appeals were pending, the Deputy Secretary of Energy appointed the undersigned as OHA Director.

2 The 586-square mile Hanford Site was established during World War II to produce plutonium for the nation’s nuclear weapons defense and operated for four decades until the late 1980s. *See* Report of Investigation in Case No. TBI-0042 (ROI). Since that time, the Hanford Site has been engaged in the world’s largest environmental cleanup. *Id.* Sixty percent by volume of the nation’s high-level radioactive waste is stored at Hanford in 177 underground storage tanks. *Id.*

C&I Engineer was to configure and test software for FF field devices to determine their compatibility with the ABB control system. *Id.*

On two occasions in April 2005, April 1st and April 15th, Mr. Hall raised safety concerns with his BNI supervisors about his perception that the ABB control system was unreliable.[3] IAD at 5. BNI relieved Mr. Hall of significant job responsibilities after April 1, 2005, and selected him for a RIF that resulted in the termination of his employment from BNI in July 2005. *Id.*

C. Procedural Background

Mr. Hall filed a Part 708 complaint on October 20, 2005, with the DOE's Employee Concerns Program Office (ECP) at the Hanford Site, alleging that he was improperly selected for the RIF because he had raised protected disclosures about the safety of the ABB control system. When efforts to mediate the complaint proved futile, Mr. Hall requested the ECP on February 23, 2006, to forward his complaint to the DOE's Office of Hearings and Appeals (OHA) for an investigation followed by a Hearing. An OHA investigator conducted an investigation into the allegations contained in Mr. Hall's complaint and then issued a Report of Investigation (ROI) on June 22, 2006. In the ROI, the OHA investigator concluded that Mr. Hall had made a protected disclosure that, on the basis of its proximity in time, was a contributing factor to adverse personnel actions taken against him by BNI. ROI at 18. The OHA investigator also concluded that the evidence developed during the investigation did not support a finding that BNI had met its "clear and convincing evidence" burden that it would have selected Mr. Hall for the RIF in the absence of his having made a protected disclosure. *Id.*

Immediately following the issuance of the ROI, the OHA Director appointed a Hearing Officer in the case. The Hearing Officer conducted a four-day hearing in Richland, Washington, from October 3, 2006, to October 6, 2006. At the hearing, 15 witnesses testified and hundreds of exhibits were discussed. After receiving closing arguments and considering the parties' briefs, along with the documentary and testimonial evidence presented, the Hearing Officer issued the 65-page IAD on March 15, 2007, finding in favor of Mr. Hall.

II. The IAD

In the IAD, the Hearing Officer first found that Mr. Hall had met his burden of establishing by a preponderance of evidence that he had made disclosures, as described in 10 C.F.R. § 708.5, and that those disclosures were contributing factors to an act of retaliation against him by BNI. IAD at 44-45. Specifically, the Hearing Officer determined that Mr. Hall had made disclosures to BNI officials on April 1 and April 15, 2005, that were based on his reasonable belief that there were serious problems with the interoperability of the ABB control system selected for use at the WTP with other digital programs. *Id.* at 45. In addition, the Hearing Officer found that Mr. Hall's April 1 and 15,

---

[3] The thrust of Mr. Hall's disclosures was that any malfunction in a computerized system that "controls" the production processes in a nuclear waste treatment operation implicates public health and safety.

2005, disclosures constituted "protected" disclosures under 10 C.F.R. § 708.5(a)(2) because they revealed information about a "substantial and specific danger to employees or to public health or safety." *Id.* Next, the Hearing Officer determined that BNI's selection of Mr. Hall for the RIF that led to his eventual termination in July 2005, constituted an act of retaliation as defined in 10 C.F.R. § 708.3. *Id.* at 52. Finally, the Hearing Officer decided that Mr. Hall's protected disclosures were contributing factors to BNI's retaliation against him because (1) the BNI officials responsible for the retaliation had actual knowledge of Mr. Hall's protected disclosures; and (2) there was temporal proximity between the two April 2005 protected disclosures and Mr. Hall's selection for inclusion in the RIF that led to his July 2005 termination. *Id.* at 51.

Once the Hearing Officer concluded that Mr. Hall had met his "preponderance of evidence" burden as described above, he shifted his analysis to evaluating whether BNI had met its "clear and convincing" evidentiary burden that it would have terminated Mr. Hall through the RIF process absent Mr. Hall's protected disclosures.[4] The Hearing Officer first rejected BNI's contention that workplace conflict between Mr. Hall and another employee, Brandon Gadish, would have resulted in Mr. Hall's termination. *Id.* at 55. The Hearing Officer next rejected BNI's argument that it had selected Mr. Hall for inclusion in the RIF based on a ranking that it did of Mr. Hall's group in February and March 2005. *Id.* at 56. The Hearing Officer also found without merit BNI's position that the B-minus rating it had given to Mr. Hall in February 2005 reflected Mr. Hall's job skills or performance. *Id.* In addition, the Hearing Officer found unpersuasive BNI's argument that it would have terminated Mr. Hall because he had been selected for termination by an "Assignment Complete" [5] date in March 2005. *Id.* at 59. Finally, the Hearing Officer concluded that testimony at the hearing indicated that BNI officials had considered Mr. Hall's protected disclosures in selecting him for the July 2005 RIF. *Id.* In the end, the Hearing Officer decided that BNI had not shown by clear and convincing evidence that it would have selected Mr. Hall for the July 28, 2005, RIF had he not made protected disclosures on April 1 and 15, 2005. *Id.* at 62. Accordingly, the Hearing Officer ordered BNI to provide relief to Mr. Hall for the company's retaliation against him.

With regard to the relief, the Hearing Officer ordered BNI to reinstate Mr. Hall to his former position at the WTP or to a position that is comparable to the one from which he was laid off. The Hearing Officer further directed BNI: (1) to provide Mr. Hall with lost wages, [6] plus interest, to be calculated in accordance with an Appendix attached to the

---

[4] The Hearing Officer first found that the purpose and scope of the RIF was legitimate based on convincing evidence that the RIF was necessitated by a reduction in federal funding for the construction of the WTP and the need to adjust the design of the plant. *Id.* at 52.

[5] One of the managers at WTP testified that BNI maintained a document called the "register" that listed every employee by his or her position number, the date the employee began his or her employment, and the projected release date for the employee. Tr. at 780-781. The projected release date was referred to throughout the Part 708 proceeding as the "Assignment Complete" date.

[6] The Hearing Officer did not specify in the Ordering Paragraphs of the IAD that Mr. Hall was entitled to compensation for lost benefits such as sick leave, annual leave, overtime pay, and retirement benefits. The Appendix to the Decision, however, clearly enumerated these lost benefits as part of the remedial action in the case.

Decision; and (2) to reimburse Mr. Hall for reasonable legal fees and other expenses related to his Part 708 complaint. *Id.* at 64.

III. BNI's Appeal

On April 2, 2007, BNI filed a Notice of Appeal with OHA in accordance with 10 C.F.R. § 708.32. BNI filed its "Statement of Issues" for review on appeal on April 17, 2007, and it filed its brief in support of its Appeal on June 13, 2007. Mr. Hall, through his counsel, filed his response to BNI's brief on July 13, 2007.

In its Appeal, BNI does not contest the IAD's finding that Mr. Hall made protected disclosures on April 1 and 15, 2005, about safety issues pertaining to the ABB control system. BNI Brief at 1. Instead, BNI raises several legal and factual challenges to the Hearing Officer's findings that: (1) Mr. Hall established by a preponderance of evidence that his protected disclosures were contributing factors to BNI's ultimate termination of Mr. Hall's employment, and (2) BNI failed to establish by clear and convincing evidence that it would have selected Mr. Hall for inclusion in the RIF and eventual termination on July 28, 2005, absent his protected disclosures. *Id.* at 2. More specifically, BNI argues that the Hearing Officer made a legal error in his "contributing factor" analysis in that he failed to properly consider that BNI had designated Mr. Hall's employment as "Assignment Complete" prior to any of Mr. Hall's protected disclosures. *Id.* at 1, 21-22, 28. Moreover, BNI also submits that it had legitimate, non-retaliatory, business reasons for selecting Mr. Hall for the RIF, and argues that the Hearing Officer erred in finding otherwise.

A. Analysis

It is well established in appeals brought under 10 C.F.R. Part 708 that factual findings of a Hearing Officer 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. *Oglesbee v. Westinghouse Hanford Co*., 25 DOE ¶ 87,501, 89,001 (1995); *O'Laughlin v. Boering Petroleum Services, Inc.*, 24 DOE ¶ 87,513, 89,064 (1995); *Rosie L. Beckham,* 27 DOE ¶ 87, 557, 89,317 (2000). With respect to a Hearing Officer's conclusions of law, they are reviewable *de novo*. *Salvatore Gianfriddo*, 27 DOE ¶ 87,544 (1991); s*ee Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion').")

1. BNI's Challenges to the IAD's "Contributing Factor" Findings

BNI first contends that the Hearing Officer misapplied the law with regard to his "contributing factor" analysis and finding, arguing that Mr. Hall's showing of a coincidence of timing between his protected disclosure and an adverse employment action is not sufficient to prove retaliation. BNI Appeal at 28. BNI then re-argues most of the matters that it raised its in Post-Hearing Closing Argument, including its

contention that Mr. Hall's protected disclosure post-dated the "Assignment Complete" process. Relying on *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (*Breeden*), BNI then argues that Mr. Hall's protected disclosures "could not possibly have motivated [its] layoff decision because Hall was designated "Assignment Complete" and destined for layoff *before* the "disclosures" were made. For the following reasons, I find all of BNI's arguments on this issue to be devoid of merit.

a. The Applicable Legal Framework Underlying the "Contributing Factor" Analysis

Regarding BNI's contention that the Hearing Officer misapplied the law in his "contributing factor" analysis in this case, the legal burden-shifting framework embodied in the Part 708 regulations was first explained by OHA in 1993 in *Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (*Sorri*). In *Sorri*, the Hearing Officer stated that in most cases, it is impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Thus, the Hearing Officer concluded that a Part 708 complainant can meet its burden of proof through circumstantial evidence. *Citing* among other cases, *Couty v. Dole,* 886 F.2d 147, 148 (8th Cir. 1989) (*Couty*), the Hearing Officer in *Sorri* held that a protected disclosure may be found to have been a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Sorri* at 89,010. The Hearing Officer in *Sorri* also noted that the standard of proof adopted in the Part 708 regulations is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C.§ 1221(e)(1), and the 1992 amendment to Section 210 (now 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. The Hearing Officer in *Sorri* then pointed to the legislative history of the WPA and explained that "any" weight given to the protected disclosure, either alone or in combination with other factors, can satisfy the "contributing factor" test:

> The word "a contributing factor" . . . means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant", "motivating", or predominant" fact in a personnel action in order to overturn that action.

135 Cong. Rec. H747 (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20).

In cases arising under 10 C.F.R. Part 708, OHA Hearing Officers have consistently relied, in deciding whether a complainant has met its burden of proof, on the contributing factor analysis first articulated in *Sorri. See e.g. Barbara Nabb*, 27 DOE ¶ 87,519 (1999), *Jimmie Russell*, 28 DOE ¶ 87,002 (2000); *Franklin Tucker*, 29 DOE ¶ 87,021 (2007). The instant case is no exception. In the IAD, the Hearing Officer determined that the

testimonial evidence in the record supported a finding that BNI officials had actual knowledge of Mr. Hall's protected disclosures. *See* IAD at 51. Specifically, the Hearing Officer found that Mr. Hall made his protected disclosures to: (1) his group leader and his supervisor on April 1, 2005, and (2) his supervisor and BNI's Discipline Engineering Manager on April 15, 2005. *Id.* The Hearing Officer also found that Mr. Hall's supervisor immediately conveyed Mr. Hall's disclosures to other BNI officials, including Ms. McKenney and Mr. Stewart. *Id.* With regard to the temporal proximity, the Hearing Officer found that the protected disclosures took place in early and mid-April 2005, and that BNI's decision to include Mr. Hall in a July 28, 2005 RIF, took place in early July 15, 2005.[7] *Id.* The Hearing Officer then opined that "a reasonable person could conclude that the protected disclosures were a factor in BNI's decision to RIF [Mr. Hall] because the RIF selection process began shortly after the disclosures were made and lasted only about three months." *Id.*

I am unpersuaded by BNI's argument that Mr. Hall failed to meet his burden of showing by a preponderance of evidence that BNI's decision to select him for the RIF constituted retaliation under Part 708 because Mr. Hall failed to prove "retaliatory intent" on BNI's part. BNI Brief at 20-21, 28. The *Couty* and *Sorri* cases and their progeny are clear that temporal proximity between protected activity, combined with actual or constructive knowledge of the protected activity, can fully support an inference of retaliatory motive. [8] Accordingly, I find that the Hearing Officer's use of the contributing factor analysis was proper, and consistent with the OHA precedent first established in the *Sorri* case.

---

[7] In reaching this finding, the Hearing Officer rejected BNI's contention that it had made a final decision to terminate Mr. Hall before July 2005. *See* footnote 15 to the IAD.

[8] BNI claims that "countless courts have rejected such claims, absent actual evidence of retaliatory motive. BNI Brief at 28. BNI then cites four cases to support this proposition: *Sauzek v. Exxon Coal USA, Inc.,* 202 F.3d 913 (7th Cir. 2000), *Longstreet v. Illinois Department of Corrections*, 276 F.3d 379 (7th Cir. 2002), *Gagnon v. Sprint Corp*., 284 F.3d 839 (8th Cir. 2002), and *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein.* All of the cases cited by BNI arise under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (Title VII). BNI's reliance on these cases is misplaced. The legal burden of proof in cases arising under 10 C.F.R. Part 708 and the WPA is different from the burden of proof in cases arising under Title VII. In the former kinds of cases, as noted above, the complainant must establish that his or her whistleblowing was "a contributing factor" in an adverse employment action, while under Title VII, the complainant must establish a "causal connection" between his or her protected activity and an adverse employment action. *See Rouse v. Farmers* State Bank *of Jewell, Iowa*, 866 F.Supp. 1191, 1207 (N.D. Iowa 1994), *Hill v. Mr. Money Finance Company*, 491 F.Supp.2d 725 (N.D. Ohio 2007).

BNI also cites three OHA cases for the same proposition: *Janet L Westbrook*, Case No. VBH-0059 (2001), *Thomas T. Tiller*, Case No. VWH-0018 (1999) and *Ronny J. Escamilla*, Case No. VWA-0012 (1996). BNI's reliance on these cases is also misplaced. In all three of the OHA cases cited above, the Hearing Officer found that the complainant had established a prima facie case that his or her protected disclosure was a contributing factor to an act of retaliation. None of the OHA cases cited by BNI required the complainant to prove "retaliatory intent;" rather the cases inferred retaliatory motive based on the temporal proximity and management knowledge test set forth in *Sorri.*

b. Whether the Hearing Officer Erred in Rejecting BNI's Claim that It Had Marked Mr. Hall for Termination Prior to his Protected Disclosures

In its Appeal, BNI does not challenge the Hearing Officer's findings that the BNI officials who were involved in the decision to put Mr. Hall on the RIF list that led to his termination had actual or constructive knowledge of Mr. Hall's protected disclosures. Rather, BNI believes that it rebutted the presumption of retaliation stemming from the temporal proximity between the protected disclosures at issue and Mr. Hall's termination. Specifically, BNI contends in its Appeal, as it did at the hearing, that its decision to place Mr. Hall on the RIF list pre-dated either of his two protected disclosures. BNI argues that "the record is clear and the evidence uncontroverted that on March 28, 2005 – before Hall and four other Grade 24 engineers were designated 'Assignment Complete,' portending layfoff." BNI Brief at 22. According to BNI, the fact that it identified Mr. Hall for layoff before his protected activity, even if only preliminarily, negates any reasonable inference of retaliation in this case. *Id.* at 24. Furthermore, BNI argues that the deferral of the layoff only benefitted Mr. Hall, thereby dispelling any inference of retaliation.

i. The IAD Findings

In the IAD, the Hearing Officer made extensive findings of fact to support his conclusion that the March 2005 "Assignment Complete" process was not connected to BNI's decision in July 2005 to terminate Mr. Hall's employment. *See* IAD at 53-54, 56-57, 59, 61-63. Specifically, the Hearing Officer made six separate factual findings on this issue. First, the Hearing Officer pointed to the testimony of Mr. Douglass (Tr. at 530) that the February/March 2005 salary rankings and ratings for Mr. Hall (upon which the "Assignment Complete" rankings were compiled) were not based on Mr. Hall's performance but instead upon a "B-" rating that BNI assigned to all newly hired engineers who had not yet been given a performance evaluation. From this testimonial evidence, the Hearing Officer concluded that BNI officials had not assessed Mr. Hall's job skills and job performance for purposes of the subject performance salary ranking. *Id.* at 56-57. Second, the Hearing Officer found that the March 29, 2005 "Assignment Complete" list was based solely on the February/March salary rankings and that Mr. Hall's ranking was not related in any way to Mr. Hall's actual performance as an employee at WTP. *Id.* at 59, citing Mr. Anderson's testimony (Tr. at 745), Mr. Hall's Exhibit 13 and BNI Exhibit 276. Third, the Hearing Officer found that the testimony of Tanya Zorn indicated that the selection of employees for termination by "Assignment Complete" dates was based primarily on the most recent employee ratings. IAD at 58. In this connection, the Hearing Officer noted that Ms. Zorn testified that the March 29, 2005 "Assignment Complete" selections relied on the "reward for performance" employee rankings completed in February 2005 for engineering employees in various peer groups. *Id.* The Hearing Officer further pointed to Ms. Zorn's testimony that the employees whose positions were selected for "Assignment Complete" dates were the lowest ranked employees because higher ranked employees in positions scheduled for an early termination date had the right to bump lower ranked employees. *Id.* Fourth, the Hearing Officer found, contrary to Mr. Anderson's testimony, that "changing an employee's 'Assignment Complete' date generally is not an action which leads" to that employee's

termination. *Id.* Fifth, the Hearing Officer determined that there was no evidence that BNI ever evaluated Mr. Hall's job performance prior to April 1, 2005. Sixth, the Hearing Officer found that the four other engineers in the group of five who were to be terminated based on the "Assignment Complete" list were not new hires like Mr. Hall and that the low ratings for the other four engineers were based on actual performance evaluations. From this fact, the Hearing Officer concluded that Mr. Hall's inclusion in this group was arbitrary.

ii. BNI's Challenges to the IAD Findings

With the exception of the Hearing Officer's factual findings regarding Ms. Zorn's testimony, BNI does not attempt to demonstrate that any of the other five factual findings enumerated in Section A.1.b.i. above are clearly erroneous. Instead, BNI simply re-argues factual assertions that the Hearing Officer already rejected. In *S.R. Davis v. Fluor Fernald, Inc.,* 29 DOE ¶ 87,014 (2006) (*S.R. Davis*), the OHA Director refused to entertain, on appeal, the appellant's re-arguments of the same matters already considered by the Hearing Officer on the basis that the Hearing Officer had reviewed voluminous documentary evidence and considered testimony that had been subject to cross examination. Leaving aside the Hearing Officer's factual findings regarding Ms. Zorn's testimony, BNI has not attempted (1) to show that the Hearing Officer made any findings of facts relative to the "Assignment Complete" process that were unsupported by the evidence in the record, or (2) to point to any material facts in the record that the Hearing Officer overlooked which would have led to a different outcome. *S.R. Davis* controls here. Accordingly, I will not review five of BNI's six factual challenges to the IAD as they relate to the Hearing Officer's "contributing factor" finding. *See also C. Lawrence Cornett v. Maria Elena Torano Associates, Inc.*, 27 DOE ¶ 88,020 (1998) (Deputy Secretary holding that there is a difference between a Hearing Officer overlooking facts and rejecting them in the Initial Agency Decision.)

With regard to Ms. Zorn's testimony, BNI alleges that the "IAD misstated Tania Zorn's testimony about the role of performance ratings in the 'Assignment Complete' process." BNI Brief at 33, n.10. According to BNI, the IAD's conclusion is completely contrary to what Ms. Zorn stated. *Id.* BNI asserts that Zorn actually testified that an "Assignment Complete" date was totally unrelated to an employee's rating and cites the transcript at pages 977 to 983 to support its assertion. I have carefully reviewed Ms. Zorn's testimony with particular focus on those pages cited by BNI to support its challenge to the Hearing Officer's characterization of Ms. Zorn's testimony. There is nothing in the cited pages that undermines the Hearing Officer's characterization of Ms. Zorn's testimony. On page 982, the Hearing Officer asked Ms. Zorn: "So you used ratings to arrive [at] an assignment complete date; generally?" Ms. Zorn replied, "generally," adding, "If there was a higher-rated individual holding a position that ended sooner than a lower-rate individual, then the higher-rated individual would bump that person, the lower-rated individual and his or her employment would be extended for the position end date and the lower-rate individual would either be transferred to another position within the WTP or at another Bechtel project or their employment would end." Tr. at 982-983.

In reviewing Ms. Zorn's testimony in its entirety on appeal, I noted that she admitted that the "Assignment Complete" dates are "very fluid" and not a good indication of whether an employee would lose his or her job. Tr. at 987. On page 989 of the transcript, Ms. Zorn contradicted her earlier testimony when she advised that "Assignment Complete" dates are not based on ratings but are tied to positions. *Id.* at 989. When the Hearing Officer expressed confusion on this matter and asked again whether ratings were factored into the "Assignment Complete" dates, Ms. Zorn responded: "They're not tied into when - - they're not tied into the schedule of the position. The only time the rating comes into play is if the position has been identified by the manager to end and there is a higher-rated performer." *Id.*

Regarding the Assignment Complete dates in general, Ms. Zorn testified that she determined the assignment end dates in the initial instance for the engineering group and would then go to the manager and inquire if the release date was "real." *Id.* at 990. If the manager confirmed the release date, she would generate a list with the employee's name, send it to Human Resources (HR), and if approved by HR, notified the employee of his termination. *Id.* She added that nine times out of ten, the "Assignment Complete" dates were not "real." *Id*. When a manager informed Ms. Zorn that the "Assignment Complete" date was not "real," she re-worked the "Assignment Complete" date and extended it for six more months. *Id.* By way of explanation, Ms. Zorn stated that a manager had to review his or her schedule and budget to determine whether the "Assignment Complete" date was "real." *Id.* at 991.

Ms. Zorn then provided the following information regarding Mr. Hall's "Assignment Complete" dates. On February 7, 2005, Mr. Hall's "Assignment Complete" date was listed as January 15, 2006. *Id.* at 991. The documentary evidence in the record supports Ms. Zorn's testimony. *See* BNI Ex. 89. On February 21, 2005, BNI extended Mr. Hall's "Assignment Complete" date to September 7, 2006. *Id.* Again, the documentary evidence supports this fact. *See* BNI Ex. 91. On March 29, 2005,[9] Ms. Zorn sent an e-mail to HR attaching a list of employees with Assignment Complete dates of May 5, 2005. *See* BNI Ex. 103. Mr. Hall's name was on that list. Six days later, on April 4, 2005, Mr. Hall's "Assignment Complete" date was changed back to September 7, 2006. *See* BNI Ex. 110.

iii. Conclusion

The record is clear that BNI was constantly evaluating its employees' "Assignment Complete" dates and that those dates were, as Ms. Zorn testified, "fluid." The fact that BNI changed Mr. Hall's "Assignment Complete" date back to September 7, 2006, on April 4, 2005, undermines BNI's argument that the July 2005 RIF merely effectuated a decision that it had made on March 29, 2005, to lay Mr. Hall off from his employment. While Ms. Zorn's testimony may not be the model of clarity, in the end, it is the Hearing Officer who is responsible for assessing the demeanor and credibility of the witnesses, including Ms. Zorn. Since BNI has not convinced me that the Hearing Officer improperly

[9] Mr. Hall's "Assignment Complete" date was confirmed as being September 7, 2006, on six more occasions between February 21, 2005, and March 29, 2005: on February 28, March 4, March 7, March 14, March 18 and March 21, 2005. *See* BNI Exs. 94, 96, 97, 99, 100, 101.

characterized Ms. Zorn's testimony or made any other factual findings with regard to the contributing factor analysis that were clearly erroneous,[10] I affirm the Hearing Officer's finding that the "Assignment Complete" date was not connected to BNI's decision to terminate Mr. Hall.

2. Whether the Hearing Officer Erred in Finding that BNI Had Failed to Meet its Evidentiary Burden in the Case

BNI also challenges the Hearing Officer's finding that it did not present clear and convincing evidence that it would have terminated Mr. Hall in the absence of his protected disclosures. First, BNI maintains that it did, in fact, submit overwhelming evidence that Mr. Hall was among the least qualified to survive the RIF. BNI Brief at 35. Second, BNI contends that the Hearing Officer overlooked "critical comparative evidence" in the case. *Id.* at 36. Third, it argues that the Hearing Officer's reasoning is "demonstrably flawed" because he failed to consider the collective effect of the factors that led to Mr. Hall's termination. *Id.*

To support its first argument, BNI states "any reasonable manager would have concluded that Hall was among the least qualified to survive the layoff," and cites in support thereof portions of its own "Statement of Facts" on appeal that refers to testimony at the hearing. BNI does not attempt, however, to point out why the Hearing Officer's findings with regard to these same facts[11] are clearly erroneous. Instead, BNI re-asserts the same arguments that the Hearing Officer rejected in the IAD. Mere disagreement with the Hearing Officer's factual determinations is not sufficient for me to overturn his findings. As noted *supra*, it is well settled that the factual findings of a Hearing Officer are subject to being overturned only if they can be deemed clearly erroneous, giving due regard to the trier of fact to weigh the evidence and to judge the credibility of the witnesses. *Eugene J. Dreger*, 27 DOE ¶ 87,564 at 89,351-52 (2000), citing, *Oglesbee v. Westinghouse Hanford Co.,* 25 DOE ¶ 87501, 89,001 (1995), *et. al*.

BNI's second argument is that the Hearing Officer failed to consider that Mr. Hall was terminated along with the four other employees who were designated on March 29, 2005, for completion of their assignments on May 5, 2005. BNI Brief at 36. BNI contends in this regard that it treated Mr. Hall in the same manner as it did the four others who did not engage in protected conduct. *Id*. BNI is incorrect on this matter. In the IAD, the Hearing Officer carefully analyzed the evidence before him and assessed the credibility of several key BNI officials before finding that Mr. Hall's ranking in late March 2005 was based on an arbitrary rating ("B-") assigned to him because Mr. Hall had not, like the

---

[10] I rejected BNI's contention that its deferral of Mr. Hall's layoff dispelled any inference of retaliation. I base this finding on the evidence in the record that the "Assignment Complete" date was fluid and not determinative of layoff.

[11] In the IAD, the Hearing Officer held: "BNI's assertions fail to establish by clear and convincing evidence that, in the absence of his protected disclosures, [Mr. Hall] would have been included in the July 28, 2005 RIF based on workplace conflicts, poor performance or because he lacked the necessary job skills." IAD at 55. The Hearing Officer provided ample support for this finding in the IAD. *Id* at 55-59.

others in his group, been at BNI long enough to receive "reward for performance employee rating" or any other job evaluations. IAD at 56-59, 63. The Hearing Officer also carefully analyzed the ratings given to Mr. Hall by Mr. Billings in early July 2005 before concluding that BNI had not provided probative evidence to demonstrate that BNI's negative assessment of Mr. Hall would have occurred in the absence of his protected disclosures. I find that the Hearing Officer provided clear, compelling reasons to support his findings under review. I find that BNI has not demonstrated that the Hearing Officer's factual findings on this matter are clearly erroneous.

BNI also argues that the Hearing Officer committed other errors in the IAD. Specifically, BNI alleges that the Hearing Officer: (1) failed to consider the collective effect of the factors that led to Mr. Hall's low performance rating, instead considering each factor in isolation; (2) assumed rather than demonstrated that Hall's low ratings were the product of retaliation, (3) failed to determine whether any retaliatory bias in the ratings actually mattered, and (4) accepted as persuasive Mr. Hall's unsubstantiated statements that his low ratings in connection with the RIF were retaliatory. BNI Brief at 36. To support its position, BNI provides the following elaboration.

With regard to the first alleged error, BNI contends that the Hearing Officer failed to consider Mr. Hall's performance, skill set, and alleged lack of teamwork individually rather than collectively in deciding that no factor, on its own, was sufficient to "justify" discharge. *Id.* at 37. I find that BNI's position on this matter is simply untenable. The Hearing Officer provided ample justification for rejecting BNI's contention that it would have terminated Mr. Hall for the deficiencies that he allegedly possessed. *Id.*

BNI next claims that in a RIF case, the employer is never expected to prove a case for discharge. It then complains that the Hearing Officer should have examined whether BNI had honestly judged Mr. Hall to be among those who logically could be released. *Id.* at 38. Finally, BNI claims that the Hearing Officer exceeded his role as fact-finder because he acted like a "personnel manager of last resort." *Id.* at 39. Specifically, BNI argues that the Hearing Officer second-guessed BNI's judgment about the amount of Foundation Fieldbus testing needed, and whether Hall or another engineer could have performed it. *Id.* BNI is incorrect on all counts. First, it was indeed BNI's burden under the Part 708 regulations to demonstrate by clear and convincing evidence that it would have terminated Mr. Hall in the absence of his protected disclosures. The Hearing Officer concluded, and I agree based on the record in this case, that BNI did not meet its evidentiary burden in the case. Second, I find that the Hearing Officer analyzed the structure of the RIF in question and carefully reviewed the worksheets that BNI completed to rate Mr. Hall and 38 other employees. *Id.* at 61-62. The record supports the finding made by the Hearing Officer after his extensive review of the worksheets and his assessment of the testimonial evidence relating to the worksheets that BNI failed to prove that the very low ratings given to Mr. Hall were accurate assessments of his performance, teamwork and skills. *Id.* at 62. Contrary to BNI's contentions, I find that the Hearing Officer did not second-guess BNI's judgment; he merely reached findings based on the evidence presented and the entire record in the case.

BNI next argues that the Hearing Officer failed to examine the factors upon which Mr. Hall was rated in the July 8, 2005 weighted rating and compare them to the shortcomings identified before Hall's April 2005 protected disclosures. BNI Brief at 39. The company further argues that the Hearing Officer's finding that BNI would not have rated Hall as low as he did absent his protected disclosures lacks support in the record. *Id.* at 40. Moreover, BNI argues that the Hearing Officer should have explained who should have replaced Hall on the layoff list because the Hearing Officer failed to explain whether Hall would have been rated differently enough to have survived layoff. Having reviewed the relevant portions of the IAD, I find that the Hearing Officer carefully examined the ratings by Mr. Hall's supervisor, Mr. Billings, which led to Mr. Hall being placed on the RIF list. *See* IAD at 61-62. It was BNI's responsibility, not the Hearing Officer's, to do whatever comparisons it deemed necessary to meet its clear and convincing evidence burden that it would have selected Mr. Hall for the RIF in the absence of his protected disclosures. [12] This it failed to do.

BNI's final argument is that the Hearing Officer accepted Mr. Hall's unsupported uncorroborated testimony that he was rated erroneously in the RIF decision-making process. Id. at 41. There is no merit to this contention. I find that the Hearing Officer carefully evaluated and weighed the testimony of Mr. Billings, Mr. Douglas, Mr. Anderson, Ms. Zorn, and Ms. Tuttle and numerous exhibits in the case before rendering his finding on this matter. BNI also argues that "it is not retaliatory or discriminatory for an employer to make erroneous personnel judgments, and an inference of discrimination or retaliation cannot be drawn just because a fact-finder apprises qualifications differently." This argument seems to constitute an admission by BNI that it erred in its personnel decision to place Mr. Hall on the RIF. Assuming that this is a fair reading of BNI's argument, it is not probative on the appeal before me.

3. Summary

On the basis of the foregoing, I conclude that there is ample evidence in the record to support the Hearing Officer's findings that Mr. Hall made two protected disclosures which were contributing factors to BNI's decision to place Mr. Hall on the RIF list that

[12] It does not appear from the record that BNI questioned Mr. Billings at the hearing about the performance problems that resulted in the low scores. In short, BNI did not carry its burden at the hearing of justifying these critical ratings that it gave to Mr. Hall. Moreover, the Hearing Officer was concerned from the testimonial evidence in the record that Mr. Billings' low ratings of Mr. Hall were the product of knowing manipulation designed to ensure Mr. Hall's layoff. In *Sorri,* OHA rejected an employer's RIF defenses where "[a] cloud of suspicion hangs over the entire process that was used to justify [the whistleblower's] termination." *Sorri* at 89,012. In that case, the Hearing Officer found that a contractor cannot sustain its affirmative defense in a RIF case where "[t]he evidence also shows that the process by [the contractor] was unfair, and not designed to 'build out' subjective factors." *Id.* at 89,013. In cases where there is a subjective rating process, tainted by consideration of protected activity, as the Hearing Officer thought there was in this case, BNI needed to present first hand probative, specific evidence to validate its ratings of Mr. Hall. *See Steven F. Collier,* 28 DOE ¶ 87,041 (2003). It did not do so, and it cannot now complain that the Hearing Officer should have performed comparative analyses that were not raised in the first instance by BNI.

lead to his termination in July 2005. I also find that the Hearing Officer properly found that BNI had failed to meet its evidentiary burden in this case. I therefore deny BNI's Appeal and affirm the Hearing Officer's liability finding in the IAD.

IV. Mr. Hall's Appeal

On April 2, 2007,[13] Mr. Hall filed a Notice of Appeal with OHA in accordance with 10 C.F.R. § 708.32. Mr. Hall filed his "Statement of Issues" for review on appeal on April 19, 2007, and its brief in support of its appeal on June 12, 2007. BNI, through its counsel, filed its response to Mr. Hall's brief on July 10, 2007.

In his Appeal, Mr. Hall seeks review only of the remedy portions of the IAD. According to Mr. Hall, the Hearing Officer committed a procedural error when he (1) entered an appealable order prior to calculating the final award of Mr. Hall's relief in the case, and (2) failed to allow the parties an opportunity to provide input into all the remedies before summarily denying all relief except the relief awarded in the IAD. Mr. Hall also complains that the Hearing Officer was not specific enough in his ordering paragraphs. For example, Mr. Hall states that the Hearing Officer did not define "immediately" when he ordered BNI to "immediately" reinstate Mr. Hall. Similarly, Mr. Hall complains that the Hearing Officer did not define "former position" or establish a process for determining what Mr. Hall's former position was. Finally, Mr. Hall requests that I remand the case to the Hearing Officer with instructions that he complete the remedy process set forth in the IAD, including, if necessary, the taking of additional evidence as to monetary, reinstatement and affirmative relief remedies.[14] Hall Brief at 3.

A. Whether the Hearing Officer Erred in Entering the IAD as an Appealable Order

Mr. Hall first argues that the Hearing Officer should have issued the IAD as an interlocutory order, solicited supplemental evidence on the remedy in the case, and then issued a final appealable order which incorporated the specific remedy ordered. Mr. Hall's argument is without merit. Prior to the hearing, Mr. Hall provided a very detailed enumeration of the relief that he sought in this Part 708 proceeding. *See* Mr. Hall's Ex. 1

---

[13] BNI has challenged the timeliness of Mr. Hall's appeal, arguing that Mr. Hall filed his Appeal two days late. BNI is incorrect on this matter. I have verified with OHA's Docket Control Division that Mr. Hall filed his Appeal at 3:37 p.m. on April 2, 2007 through OHA's special e-mail address, OHA.filings@hq.doe.gov.

[14] Mr. Hall also requests in his Appeal that I award him additional relief not previously requested. That additional relief includes: (1) reinstatement until the completion of the project in 2019; (2) a retroactive seniority date and transfer; (3) front pay until 2019 in lieu of reinstatement; (4) reimbursement of costs and expenses, including attorney's fees that Mr. Hall paid to his prior counsel; and (5) expungement of Mr. Hall's personnel record. Mr. Hall's Brief at 4-5. Only those remedies requested by Mr. Hall prior to the issuance of the IAD will be considered on appeal. Mr. Hall will not be allowed to augment his remedial relief request at the Appeal stage of this proceeding.

at 39-40.[15] Hence, there was no need for supplementary evidence on the remedy issue. The regulations at 10 C.F.R. § 708.30(d) state that: "If the Hearing Officer determines that an act of retaliation has occurred, the initial agency decision will include an order for any form of relief permitted under § 708.36." This regulatory provision supports the Hearing Officer's decision to include the remedy in his IAD. Moreover, inasmuch as the IAD considered both liability and remedy, it was appropriate for the Hearing Officer to deem the IAD "final" as both parties had the opportunity to present evidence on all issues before the Hearing Officer and to appeal the IAD under 10 C.F.R. § 708.32.

B. Whether the Hearing Officer Erred in Not Allowing the Parties an Opportunity to Provide Input into the Remedy in the Case

Mr. Hall contends that the Hearing Officer should have afforded the parties an opportunity to provide input into all the possible remedies available prior to his issuing the IAD which set forth the remedy in this case. Mr. Hall is mistaken on this matter. As noted above, Mr. Hall had ample opportunity during the prehearing phase of this case to advance his remedial requests. In fact, he clearly articulated in one of his prehearing exhibits the remedial relief that he was seeking in this proceeding. During the hearing, the Hearing Officer advised the parties at the hearing that he would ask for the precise calculations of lost wages, and expenses after issuing the IAD if he found in favor of Mr. Hall. Tr. at 212. Both parties agreed to this approach at the hearing. *Id.* In the IAD, the Hearing Officer ordered BNI to reinstate Mr. Hall to his former position or a comparable position and to pay Mr. Hall for his lost wages, plus interest, and his litigation expenses. The Hearing Officer then ordered both parties to make specific calculations to effectuate the Hearing Officer's remedial findings. In addition, the Hearing Officer provided a period of up to 60 days for the parties to discuss and negotiate any disputes concerning the calculations. There will be ample opportunity for the parties to collaborate on the remedial aspects of this case during the negotiation period provided for in the IAD, and to report back, if necessary, to the Hearing Officer at the conclusion of that period, as required by the IAD.

C. Whether the Hearing Officer Erred in Denying All Relief Except That Ordered by the Hearing Officer

Mr. Hall asserts that the Hearing Officer set forth a comprehensive and reasonable post-decision process for determining the specific relief that should be awarded, with the exception of the generalized ruling that "all other relief is denied." Mr. Hall's Brief at 2. According to Mr. Hall, the Hearing Officer gave no reasons or fact findings as to why all other relief was peremptorily denied. *Id.* at 3. The Hearing Officer was under no obligation to address "all" the possible relief that Mr. Hall might have been entitled to in the IAD. I find, however, that the Hearing Officer did not provide his reasons for

---

[15] In his pre-hearing exhibit, Mr. Hall requested the following remedies: (1) reinstatement to a Grade 25 "Not-at-Will" position, with at 10% raise, and guaranteed employment until 2011 or 2015; (2) transfer preference; (3) back pay at two times his hourly rate; (4) reimbursement of reasonable costs and expenses, including attorney and expert witness fees; (5) formal classroom training and (6) compensation for pain and suffering and emotional distress. Ex. 1.

rejecting some of the relief that Mr. Hall had requested prior to the hearing. That "other" relief included the specific terms of the reinstatement requested, *i.e*. a Grade 25 "Not-at-Will" position, with at 10% raise, and guaranteed employment until 2011 or 2015, as well as transfer preference, back pay at two times his hourly rate, formal classroom training and compensation for pain and suffering and emotional distress. Rather than remanding the case to the Hearing Officer and further delaying this proceeding, I have decided to evaluate, on my own, the remedies requested by Mr. Hall and not addressed by the Hearing Officer in the IAD. *See* 10 C.F.R. § 708.34(b)(1).

As an initial matter, I find that the following remedies requested by Mr. Hall are not available under the Part 708 regulations: (1) reinstatement to a position at a grade higher than that vacated as the result of the July 2005 RIF; (2) reinstatement to a "not-at-will" position when the position vacated was an "at-will" position; (3) guaranteed employment at the WTP, or reinstatement for a fixed period of time at the site; (4) backpay at a rate double that of what he was earning prior to the RIF; (4) compensation for pain, suffering and emotional distress. The remedies enumerated immediately above, if granted, would have placed Mr. Hall in a position better than that occupied by him prior to his termination. This is not the goal of the Part 708 regulations. The preamble to the interim final rule to 10 C.F.R. Part 708 clearly announced that the goal of the restitutionary remedies set forth in 10 C.F.R. § 708.36 "is to restore employees to the position that they would have occupied but for the retaliation." 64 Fed. Reg. 12862, 12867 (March 15, 1999). The final rule that set forth the Part 708 regulations stated that: "A complainant should consider other forums if he or she seeks more than the abatement of the retaliatory practices and basic restitution." *See* Final Rule at 65 Fed. Reg. 6314 (March 10, 2000).

As for the 10% raise that Mr. Hall requested, I find that there is no evidence in the record to support Mr. Hall's request for a 10% raise. Nevertheless, in order to place Mr. Hall in the position that he would have been in had he not made his protected disclosures, I find that Mr. Hall might be entitled to that raise if similarly situated Grade 24 engineers received such a raise between July 2005 and the date that Mr. Hall is reinstated.

Regarding Mr. Hall's request for formal classroom training, BNI should provide this training only if it cannot reinstate Mr. Hall to his former position[16] and can find a comparable Grade 24 engineer position for him at the worksite. OHA has previously ordered a DOE contractor to provide training at the contractor's expense as an associated feature of reinstatement. *See Sue Rice Gossett,* 28 DOE ¶ 87,028 (2002). Finally, I find it appropriate to grant Mr. Hall transfer preference if BNI is able to place him in a position comparable to the one that he vacated.

---

[16] BNI states in its Response Brief on the Remedial Appeal that BNI eliminated Mr. Hall's former position after it deemed the position to be no longer necessary due to the change in the scope of the project at the WTP. *See* BNI Response Brief at 14.

D. Whether the Terminology Contained in the Remedial Provisions of the IAD Lacked Specificity

Mr. Hall contends that the Hearing Officer's award of "immediate" reinstatement and possible reinstatement to a "comparable" position is not specific enough for the parties to understand how and when reinstatement will be effectuated in this case. There is some merit to Mr. Hall's contentions. To remedy this matter, I will order the parties to discuss and negotiate these matters during the 60-day "Negotiation Period" established by the Hearing Officer in the Appendix to the IAD. Should the parties agree upon a "comparable" position for Mr. Hall, BNI will reinstate Mr. Hall to that "comparable position" no later than 61 days following the issuance of this Appeal. By way of clarification, the 60-day negotiation period will commence on the date this Appeal Decision is issued by OHA. These time periods will, however, be suspended if either party seeks Secretarial Review of this appeal in accordance with 10 C.F.R. § 708.35.

V. Summary

As discussed above, the arguments advanced by BNI in its Appeal, Case No. TBA-0064, are without merit. Therefore, I find that the liability determinations contained in the IAD should be sustained and BNI's Appeal denied. As for Mr. Hall's Appeal, Case No. TBA-0042, I have determined that some of his arguments have merit and that his Appeal should be granted in part. For administrative efficiency, however, I have rendered findings myself on those remedial matters that could otherwise have been remanded to the Hearing Officer.

It Is Therefore Ordered That:

(1) The Appeal filed by Bechtel National, Inc. on April 2, 2007, Case No. TBA-0064, be and hereby is denied;

(2) The Appeal filed by Curtis Hall on April 2, 2007, Case No. TBA-0042, be and hereby is granted in part as set forth in paragraphs 3, 4, 5, 11, 13, 14, and 15 below, and denied in all other respects;

(3) Paragraph (2) of the Initial Agency Decision issued on March 15, 2007, by Hearing Officer Woods in the matter of *Curtis Hall v. Bechtel National, Inc.*, Case No. TBH-0042, be and hereby is amended as follows: No later than 61 days after the issuance of this Appeal, and after conferring with counsel for Curtis Hall, BNI will reinstate Mr. Hall to the position that he occupied prior to his termination (at-will, Grade 24 engineer), if that position is available, or to a "comparable position" to be agreed upon with counsel for Mr. Hall in accordance with paragraphs (14) and (15) below;

(4) Paragraph (4) of the Initial Agency Decision issued on March 15, 2007, by Hearing Officer Woods in the matter of *Curtis Hall v. Bechtel National, Inc.*, Case No. TBH-0042, be and hereby is amended as follows: Bechtel National, Inc. shall produce a report that calculates the lost wages and lost benefits (such as sick leave, annual leave,

overtime pay, and retirement benefits), plus interest payable to Mr. Hall. Bechtel National Inc.'s report shall be calculated in accordance with the Appendix attached to the Initial Agency Decision;

(5) Paragraph (5) of the Initial Agency Decision issued on March 15, 2007, by Hearing Officer Woods in the matter of *Curtis Hall v. Bechtel National, Inc*., Case No. TBH-0042, be and hereby is amended as follows: Bechtel National, Inc. shall pay Mr. Hall lost wages and lost benefits (such as sick leave, annual leave, overtime pay, and retirement benefits), plus interest. The amount of this payment shall be determined in accordance with the report specified in Paragraph (4) immediately above;

(6) Except to the extent altered in this Appeal, the ordering paragraphs contained in the Initial Agency Decision in Case No. TBH-0042, and Sections A, B, C and E of the Appendix which is attached to the Initial Agency Decision are affirmed;

(7) Mr. Hall's request that he be promoted to a Grade 25 engineer position as part of his reinstatement be and hereby is denied;

(8) Mr. Hall's request that he be reinstated to a "not-at-will" position be and hereby is denied;

(9) Mr. Hall's request that he be guaranteed employment by BNI, or be reinstated for a fixed duration at the Waste Treatment Plant, be and hereby is denied;

(10) Mr. Hall's request that he be reinstated to a position that pays twice his previous hourly rate be and hereby is denied;

(11) Mr. Hall's request that he receive a 10% raise when reinstated will be granted only if BNI determines that similarly situated Grade 24 engineers at the Waste Treatment Plant received 10% more in compensation between July 2005 and the date of Mr. Hall's reinstatement;

(12) Mr. Hall's request for compensation for pain, suffering and emotional distress be and hereby is denied;

(13) BNI will provide formal classroom training to Mr. Hall only if it cannot reinstate Mr. Hall to his former position and can place him in a comparable Grade 24 engineer position at the Waste Treatment Plant;

(14) If BNI is able to place Curtis Hall in a position comparable to the one that he vacated, the company will provide Mr. Hall with transfer preference;

(15) Section D entitled, "Negotiation Period" which is contained in the Appendix to the Initial Agency Decision issued on March 15, 2007, by Hearing Officer Woods in Case No. TBH-0042 be and hereby is amended to read as follows:

> The parties will have up to sixty days from the date of this Appeal Decision (or, if appealed, the final determination issued pursuant to 10 C.F.R. § 708.35(d)) to discuss and negotiate any disputes regarding (1) the calculations to be made under the terms of the Initial Agency Decision, and (2) Mr. Hall's reinstatement, including, but not limited to, what comparable positions, if any, are available for Mr. Hall and, what training, if any, would be necessary to allow Mr. Hall to quickly assimilate into that comparable position. During the period of negotiation, both parties will provide reasonable information to the other party to facilitate the other party's understanding of the calculations and the reinstatement matters.

(16) 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. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 13, 2008