November 8, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Frederick L. Higgs

Date of Filing: December 7, 2006

Case Number: TBH-0057

This Decision concerns a whistleblower complaint that Frederick L. Higgs (the complainant) filed under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708, against his former employer, Texas Environmental Plastics, Ltd. (TEP), a DOE subcontractor at the DOE's Savannah River Site in Aiken, South Carolina.[1] The complainant contends that he made a number of disclosures that are protected under Part 708, and that TEP retaliated against him for making those disclosures by terminating his employment. As relief from this alleged reprisal, the complainant seeks back pay and additional monetary compensation as well as reinstatement as a TEP employee in the position of "key" employee, a position he did not hold before his employment was terminated. After considering all the submissions by the parties and all the testimony received at the hearing held on this matter, I have concluded that the complainant has not made a disclosure protected under Part 708 and, therefore, is not entitled to relief.

I. Background

A. The Contractor Employee Protection Program

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

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[1] TEP is a subcontractor of Tetra Tech EC, Inc., which is, in turn, a subcontractor of Washington Savannah River Company, the management and operations contractor of the Savannah River Site.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health. *See* 10 C.F.R. § 708.5(a)(1), (2). Employees of DOE contractors who believe that they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an evidentiary hearing before an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

On April 1, 2006, the complainant filed a whistleblower complaint with the Employee Concerns Program of the DOE's Savannah River Operations Office. After attempting to resolve the complaint through union arbitration, the Employee Concerns Program determined that those efforts had failed, and transmitted the complaint to the OHA, together with the complainant's request that the OHA Director appoint a Hearing Officer to conduct an administrative hearing regarding the complaint without a preceding investigation. I was appointed the Hearing Officer for this proceeding on December 20, 2006.

In his complaint, Mr. Higgs contended that his disclosures concerned a "biased safety practice" and that he was "unlawfully fired for bringing up concerns of health and safety." Complaint at 4, 5. In preparation for the hearing, I obtained statements from the complainant and from a number of other individuals who had knowledge of the events surrounding Mr. Higgs' disclosures. I identified five disclosures that Mr. Higgs alleged were protected under Part 708, and one alleged reprisal for those disclosures, his termination from employment with TEP. Four disclosures concerned the wearing of, or failure to wear, safety vests on the worksite. The fifth disclosure addressed the failure to service the portable toilets on the worksite.

At the hearing convened on February 21, 2007, I heard testimony from Mr. Higgs; Navann Chou, Mr. Higgs' supervisor; Crystal Smith, a fellow employee who had been appointed "safety person" for the TEP work crew; Sam Mangrum, an estimator for TEP who arranged for the company's labor needs at the Savannah River worksite; and Michael Estess, the senior project manager in remediation for Tetra Tech, and the individual responsible for the construction project on which Mr. Higgs worked. Both parties submitted additional documents at the hearing and after the hearing, which I have accepted into the record.

II. Findings of Fact

In this section, I will lay out the evidence received in this proceeding that has permitted me to determine facts, events and circumstances surrounding Mr. Higgs' alleged disclosures. Although I also received evidence concerning TEP's alleged acts of retaliation, I will not address this evidence. Because I find that Mr. Higgs did not make a disclosure that was protected under Part 708, I need not consider actions taken allegedly in retaliation for a protected disclosure.

Mr. Higgs was employed by TEP as a general laborer for a four-month period, from August 2005 to December 12, 2005. He was a union steward for the Laborers' International Union Local 515 during that time. Transcript of Hearing (Tr.) at 11, 36, 53. He worked under the direction of a supervisor on a construction site where heavy equipment shared the terrain with laborers working on the ground. *Id.* at 16, 46, 65. Due to the hazardous conditions of the worksite, all workers were required to wear protective gear, including high-visibility clothing. *Id.* at 15, 225.

A. The Disclosures

1. Disclosure to Annatah Vongtajack

In his complaint and at the hearing, Mr. Higgs asserted that his first protected disclosure occurred when he told Annatah Vongtajack, a co-worker, that he was not wearing a safety vest. *Id.* at 13, 37. The date of this event is uncertain, but it appears to have taken place in November 2005. Restatement of Complaint (January 30, 2007).

2. Disclosure to Thomas Brantley

Mr. Higgs then reported to Thomas Brantley that Mr. Vongtajack was refusing to wear a safety vest. Mr. Brantley is an engineer who was working for QORE, another subcontractor to Tetra Tech. *Id.* at 17-18. The evidence indicates that this disclosure was made later on the same day as the first disclosure. *Id.*

3. Disclosure at Safety Meeting

During the period of Mr. Higgs' employment, each morning on the site began with a safety training meeting which all workers on the site were required to attend, including his supervisor, Navann Chou. *Id.* at 195, 200. At one such meeting, Mr. Higgs raised issues concerning safety practices on the worksite, including Mr. Vongtajack's failure to wear a safety vest. *Id.* at 20, 144. The evidence is inconclusive with respect to other details of his speech. I have, however, determined that this event occurred at least a week after the first two disclosures and possibly as late as December 9, 2005. I have also determined that Mr. Higgs invoked the names of other workers whom he had observed not wearing safety vests, and that the gist of his speech was that enforcement of the rule

that required wearing safety vests was "biased," in that some workers were required to wear safety vests, while others were not. *Id.* at 20-21, 52.[2]

4. Disclosures to the Crystal Smith

In November 2005, Mr. Chou appointed Crystal Smith, a co-worker of Mr. Higgs, as a "safety person" for the TEP employees on the worksite. She received training for that role, and her duties included ensuring that the workers wore appropriate protective equipment, including safety clothing. *Id.* at 132, 138. Mr. Higgs testified that he spoke with Ms. Smith on December 12, 2005, less than an hour before he was given his separation notice, about two workers not wearing their safety vests, Thomas Skronski, a QORE engineer, and Tony Glenn, a TEP co-worker. *Id.* at 24-25. At the hearing, Ms. Smith recalled that Mr. Higgs spoke with her in November 2005 about two workers not wearing their safety vests, Mr. Skronski and Mr. Vongtajack. *Id.* at 132. Upon further questioning, she recalled that Mr. Higgs also spoke to her about safety vests, possibly on December 12, 2005, or possibly the week before, regarding the same individuals Mr. Higgs had mentioned. *Id.* at 147, 159. Although the witnesses' memories had faded by the time of the hearing, I can safely conclude that Mr. Higgs made at least one disclosure to Ms. Smith regarding the failure of some workers to wear safety vests, and that at least one such disclosure occurred no more than one month before, and possibly on the day of, his termination of employment.

5. Disclosure Concerning Portable Toilet Maintenance

Mr. Higgs testified that on December 12, 2005, he spoke to Ms. Smith, TEP's "safety person," about the fact that the portable toilets on the worksite had not been serviced over the weekend preceding that workday. He further stated that she informed him she would bring that matter to the attention of the safety committee. *Id.* at 55-56. This disclosure occurred in the same conversation with the fourth disclosure, discussed in the above paragraph. The evidence is unclear as to whether this disclosure occurred on December 12, 2005, or during the week before that date, but I can conclude for the purposes of this decision that Mr. Higgs made a disclosure to Ms. Smith regarding the condition of the portable toilets within a week of the day his employment was terminated.

It is clear from the summary of this evidence that there are factual inconsistencies regarding the dates on which Mr. Higgs disclosed his concerns about the wearing of safety vests and the maintenance of the on-site portable toilets. Nevertheless, there is sufficient evidence to support a finding that Mr. Higgs disclosed those concerns to a number of individuals.

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[2] Despite this proclamation of bias during his disclosure, Mr. Higgs has not alleged that the bias itself was a violation of law, rule or regulation. Consequently, for the purposes of this proceeding, I have focused on whether his disclosure of the failure to wear safety vests, rather than the inconsistent enforcement of that requirement, constituted a protected disclosure.

B. Reasonable Belief that Disclosures Revealed a Substantial Violation of Law, Rule or Regulation or a Substantial and Specific Danger to Employees or to Public Health

At various stages of this proceeding, Mr. Higgs has contended that he believed his disclosures were protected under Part 708. I will next summarize the evidence regarding whether he reasonably believed the concerns he disclosed to these individuals revealed a "substantial violation of law, rule or regulation" or "a substantial and specific danger to employees or to public health," a requisite condition for the disclosures to be considered protected under the applicable regulations. 10 C.F.R. § 708.5(a)(1), (2).

Mr. Higgs described his concern in his April 1, 2006 complaint, as follows: "I believe that according to the laws of the contract under which I worked I was discriminated against and was unlawfully fired for bringing up concerns of health and safety which was my duty as steward to do. . . . I seek through DOE protection of 10 C.F.R. Part 708." Complaint at 5. Because Mr. Higgs was not represented by counsel at the hearing, I questioned him in an effort to assist him in building a record with respect to his five disclosures. As we discussed each disclosure, I asked him what his basis was for claiming that the disclosure was protected under Part 708. His responses can be summarized as follows. Regarding the first disclosure, made to Mr. Vongtajack, Mr. Higgs stated that he believed that not wearing a safety vest "violat[ed] the safety regulations." When asked what regulations had been violated, Mr. Higgs stated:

> That safety vest is to be worn in that area. There's a sign when we enter that gate each day to wear the proper PPE [personal protection equipment] with hard hat, safety vest, and safety shoes and safety glasses.

Tr. at 15. The actual content of that sign is not in evidence. On cross-examination, Mr. Higgs stated that he believed not wearing a safety vest was a violation but not a substantial violation. Tr. at 15, 39. Concerning his third disclosure, at a daily safety meeting, Mr. Higgs testified in a similar manner. He stated that he "believed it was a violation of the regulations and laws," but not a substantial one. Tr. at 22.

When testifying about his second disclosure, which he made to Thomas Brantley of QORE, he stated that Mr. Vongtajack's failure to wear a safety vest was a safety concern; he further stated that it was Mr. Vongtajack's safety that was at stake, not his. *Id.* at 19. As for the fourth disclosure about safety vests, made to Ms. Smith, when Mr. Higgs was asked who was at risk because Mr. Skronski was wearing a red and black hooded jacket but no safety vest, Mr. Higgs testified, "I imagine it would be a risk to him, or whoever he was working with where his visibility wasn't seen." *Id.* at 77. Finally, with respect to the fifth disclosure, Mr. Higgs did not cite any law, rule or regulation that set a minimum schedule for servicing portable toilets, but rather maintained that the failure was an "infringement of health" and "unhealthy." *Id.* at 27-28, 74. He also stated that shortly after this fifth disclosure, the portable toilets were serviced. *Id.* at 25.

TEP presented a great deal of evidence regarding the safety requirements on the worksite. Michael Estess, the senior project manager in remediation for Tetra Tech, and the individual responsible for the construction project on which Mr. Higgs worked, testified on this topic. According to his testimony, there was no law, rule or regulation that required that safety vests be worn. *Id.* at 197-98, 234-35. Tetra Tech imposed on itself and its sub-contractors a high-visibility clothing requirement for the specific site on which Mr. Higgs worked, because it was located along one of the main roads of the Savannah River Site and had a lot of traffic passing by. *Id.* at 199. The source of the requirement was a Task-Specific Plan (TSP) for that project, two versions of which TEP submitted into evidence at the hearing. Task Specific Plan (TSP) SSHASP for GSACU – TtFW Project 2919, dated August 15, 2005 and October 14, 2005. On the first page of each version, under "Required Safety Measures/PPE," the following appears: "Wear reflective and/or brightly colored vests or high-visibility clothing if working near traffic or equipment paths." He testified that high-visibility clothing is "[n]ot just the stuff we issue. But if they bring in something that qualifies as high visibility clothing, they've met out company procedure [sic] site specific health and safety plan." *Id.* at 224. Mr. Estess clarified that there was no requirement that safety vests specifically be worn; the TSP merely required some form of high-visibility clothing. *Id.* at 224-25.

Crystal Smith, the on-site safety person, and Mr. Higgs testified about the enforcement of the safety clothing requirement. The evidence indicates that Mr. Vongtajack, Mr. Skronski and Mr. Glenn were wearing red jackets or shirts at the time Mr. Higgs disclosed their failure to wear safety vests. *Id.* at 25, 52 (testimony of Mr. Higgs); 138-39 (testimony of Ms. Smith). Mr. Higgs stated that, after his disclosures, safety officials required Mr. Vongtajack and Mr. Glenn to put on safety vests, but did not require Mr. Skronski to do the same. *Id.* at 25, 44. Ms. Smith testified that Mr. Skronski had had his red jacket approved as high-visibility clothing. *Id.* at 135; *see also id.* at 201 (testimony of Mr. Estess). There is no evidence that Mr. Vongtajack or Mr. Glenn had done so. There is conflicting testimony regarding whether Ms. Smith or anyone else communicated to Mr. Higgs that Mr. Skronski's jacket had been approved as high-visibility clothing. *Id.* at 97 (testimony of Mr. Higgs), 135-36 (testimony of Ms. Smith). Finally, Ms. Smith testified that she was informed during November 2005 that the definition of "high-visibility clothing" was re-defined such that it could no longer be red, but had to be either bright green or bright orange. *Id.* at 139-40.

TEP produced evidence that shed light on Mr. Higgs' belief at the time of his disclosures. At the hearing, Mr. Estess testified that all workers are informed orally of the terms of the TSP for their work location at a meeting held before work activity begins on the site, at which they sign an attendance sheet. *Id.* at 235. While that statement indicates that Mr. Higgs was likely informed at that meeting about the safety equipment requirements, additional evidence demonstrates that he was informed specifically about what articles qualified as high-visibility clothing. In a statement submitted into the record on February 6, 2007, Mr. Estess wrote, "It was explain[ed] by myself and Harry Atwood, [Tetra Tech] Safety Manager, to Mr. Higgs that Mr. Skronsk[i] was wearing a High Visibility jacket that had been approved by the safety department and had been discussed in prior safety meetings." Letter from Michael Estess to Sam Mangrum, February 5,

2007. He also replied to Mr. Higgs' questioning at the hearing as follows: "[Y]ou turned the conversation on Mr. Skronski. At that point, the explanation given to you [about] the jacket just did not satisfy you. You kept calling that we were showing double standards on our project which was untrue." Tr. at 219. In addition, Ms. Smith testified that when the rules changed regarding which colors were permitted on high-visibility clothing, this change was communicated to the workers at daily safety meetings. *Id.* at 148.

III. Analysis

A. Legal Standards Governing This Case

The obligations on each of the parties to this proceeding are established in the governing regulations. One provision of the regulations defines what constitutes employee conduct that is protected from retaliation by an employer. The portions of that provision that are pertinent to Mr. Higgs' complaint require that an employee file a complaint that alleges that he has been subject to retaliation for disclosing, to a DOE official, a member of Congress, any government official who has responsibility for the oversight of the conduct of operations at a DOE site, or his employer or any higher tier contractor, information that he reasonably believes reveals a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health. 10 C.F.R. § 708.5(a)(1), (2). A second provision sets forth the burdens on the respective parties. The portions of that provision that are pertinent to Mr. Higgs' complaint state that the employee who files the complaint has the burden of establishing by a preponderance of the evidence that: (1) he or she made a disclosure, as described in § 708.5 of the regulations, and (2) the disclosure was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. If the employee meets this 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 disclosure, participation, or refusal. *Id.* Accordingly, in the present case, if Mr. Higgs establishes that he made a protected disclosure, and that disclosure was a factor that contributed to his termination, he is entitled to relief, unless TEP convinces me that it would have taken the same actions even if he had not engaged in any activity protected under Part 708.

It is therefore my task, as the Hearing Officer, to weigh the sufficiency of the evidence presented by Mr. Higgs and TEP in this proceeding. Preponderance of the evidence, the burden applied to Mr. Higgs' evidence, has been defined as proof sufficient to persuade the finder of fact that a proposition is more likely true than not. McCormick on Evidence, § 339 at 439 (4th Ed. 1992). Clear and convincing evidence, which TEP must provide in order to prevail against those claims for which Mr. Higgs has met his burden, has been described as that evidence sufficient to persuade a trier of fact that the truth of a contested fact is "highly probable." *Id.*, § 340 at 442. This latter burden is clearly more stringent than the former.

B. The Disclosures

As discussed above, the first step in determining whether Mr. Higgs is entitled to relief under the Part 708 regulations is to determine whether any of his disclosures qualify for protection from retaliation by an employer. To reach that determination, I must consider, for each disclosure, first, whether Mr. Higgs made the disclosure to a person described at section 708.5 of the regulations. If I find that he made the disclosure to an appropriate individual, I must then consider whether, for each disclosure, Mr. Higgs reasonably believed that his disclosure revealed a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health. If Mr. Higgs fails to meet his burden of establishing, by the preponderance of the evidence, that he made at least one disclosure to an appropriate individual and that he reasonably believed it revealed a substantial violation or a substantial and specific danger, then he has not made a *prima facie* case and his claim must be denied. If he does meet that burden, then he must prove that the disclosure was a contributing factor in the personnel action taken against him, that is, his termination of employment.

1. Whether Mr. Higgs Made a Disclosure to an Appropriate Individual

The Part 708 regulations, which govern this proceeding, require that a disclosure be made to an appropriate individual in order to be protected from retaliation by an employer. In the first of Mr. Higgs' disclosures, he alleges that he told his co-worker, Mr. Vongtajack, that he was not wearing a safety vest. Tr. at 13. Mr. Vongtajack was a co-worker and an employee of TEP. There is no evidence that Mr. Vongtajack held any position in TEP, such as a supervisor, from which I might infer that TEP had received notice of this disclosure. Rather, the evidence indicates that all workers on the site were encouraged to "challenge" each other when they observed a safety concern. *Id.* at 202-03 (testimony of Mr. Estess). It appears to me that it was in this spirit that Mr. Higgs made his first disclosure. At the hearing, Mr. Higgs testified that he also reported this matter to his supervisor, Navann Chou. *Id.* at 51. This disclosure was not reported, however, in his initial complaint to the Employee Concerns Program nor in the restatement of his complaint he provided to me on January 30, 2007, at my request. Furthermore, Mr. Chou testified that Mr. Higgs did not speak to him about this concern. *Id.* at 119. Elsewhere in their respective testimony, both Mr. Higgs and Mr. Chou were uncertain whether they had spoken about this issue. *Id.* at 50-51, 128. In light of this evidence, Mr. Higgs has not met his burden of showing that such a communication actually took place. Consequently, I conclude that Mr. Higgs' first disclosure was made only to Mr. Vongtajack. Because Mr. Vongtajack, as a co-worker, was not "a DOE official, a member of Congress, any government official who has responsibility for the oversight of the conduct of operations at a DOE site, [Mr. Higgs'] employer or any higher tier contractor," 10 C.F.R. § 708.5, this disclosure does not qualify as a protected disclosure under Part 708.[3]

[3] Even if I were to consider that a disclosure to Mr. Vongtajack, as an employee of TEP, constituted a disclosure to TEP, this disclosure would nevertheless not be protected under Part 708, for the reasons set forth below in the section analyzing Mr. Higgs' reasonable belief.

I reach the same conclusion with respect to Mr. Higgs' second disclosure. This disclosure also concerned Mr. Vongtajack's failure to wear a safety vest, and was made to Thomas Brantley, a QORE employee. Although Mr. Higgs testified that he did not know the contractual relationship between TEP and QORE, *id.* at 42, it is evident to me that he understood that Mr. Brantley and he worked for different employers. In any event, Mr. Brantley was not in fact "a DOE official, a member of Congress, any government official who has responsibility for the oversight of the conduct of operations at a DOE site, [Mr. Higgs'] employer or any higher tier contractor." 10 C.F.R. § 708.5. Consequently, this disclosure does not qualify as a protected disclosure under Part 708.

I find that the remaining three disclosures were made to individuals who meet the requirements of 10 C.F.R. § 708.5. Because all workers were required to attend the daily safety training meeting, it is more likely than not that Mr. Higgs' supervisor, Mr. Chou, was in attendance on the day that he made his third disclosure, in which he contended that the enforcement of safety practices was biased, in that some workers were required to wear safety vests and others were not. Mr. Higgs made his fourth and fifth disclosures to Crystal Smith, a co-worker employed by his employer and named the "safety person" for their work group. Because she had been given a responsibility for safety issues by their employer, his disclosures to her, particularly because they related to her official role, can reasonably be considered disclosures to the employer. Consequently, Mr. Higgs' disclosures to Mr. Chou and Ms. Smith constitute disclosures to his employer, TEP, which comports with one of the requirements set forth in 10 C.F.R. § 708.5. As a result, I will now consider whether Mr. Higgs reasonably believed that any of these disclosures met the additional requirements of that section.

2. Whether Mr. Higgs Reasonably Believed His Disclosures Revealed a Substantial Violation of a Law, Rule or Regulation, or a Substantial and Specific Danger to Employees or to Public Health

At various times during the hearing, Mr. Higgs testified that failure to wear safety vests on the worksite both violated a law, rule or regulation and posed a danger to employees. While unable to cite a specific law, rule or regulation by name, he testified that a sign posted at the entrance to the worksite stated that appropriate protective gear, including safety vests, must be worn. On the other hand, both Ms. Smith and Mr. Estess testified that vests *per se* need not be worn, but that high-visibility clothing must be worn. High-visibility clothing did not need to be a vest, but it did need to be brightly colored, in accordance with established rules that changed in minor respects during Mr. Higgs' period of employment. In addition, TEP entered into evidence a Task Specific Plan, which included among its safety measures the requirement that high-visibility clothing be worn on Mr. Higgs' worksite. The preponderance of the evidence presented in this proceeding is that high-visibility clothing, but not necessarily safety vests, were required to be worn on the worksite. The evidence before me also demonstrates that the three individuals Mr. Higgs identified in his disclosures as not wearing safety vests were wearing red shirts or jackets at the time he made his disclosures. Finally, the preponderance of the evidence received in this proceeding indicates that Mr. Higgs was

informed that certain brightly colored clothing articles had been approved as high-visibility clothing and deemed suitable protective equipment in lieu of safety vests. After considering all the evidence presented in this proceeding, I conclude that it was not reasonable for Mr. Higgs to believe that safety vests were inherently safer than high-visibility clothing in his particular working environment, nor that any rule in effect required that safety vests be worn.[4] Therefore, I have determined that Mr. Higgs has not demonstrated by the preponderance of the evidence that he reasonably believed his disclosures revealed a substantial violation of a law, rule, or regulation. Moreover, even if I were to assume that a law, rule or regulation required safety vests to be worn, the violations he alleged in his disclosures were not substantial: the purpose of any such rule would be to ensure the visibility of the workers, and the individuals about whom he made the disclosures were wearing bright clothing, regardless of whether it met the technical requirements of the rule. Consequently, I cannot find that Mr. Higgs demonstrated by the preponderance of the evidence that the danger he has alleged was substantial and specific.

As for his disclosure about the portable toilets, I find that Mr. Higgs did not reasonably believe that it revealed a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health. Mr. Higgs' testimony in this regard was that he knew there must be some regulation that required portable toilets to be maintained periodically, but he could not identify any. He also testified that the lack of maintenance presented an "infringement of health" and was "unhealthy." It is not unreasonable for Mr. Higgs to assume that a law, rule or regulation exists that generally regulates the provision of sanitary facilities on a construction site. No evidence was presented in this proceeding, however, that demonstrated any requirement that the portable toilets be serviced on any specified time schedule. Consequently, I cannot find that Mr. Higgs' disclosure that the toilets had not been serviced over the preceding weekend reveals a "substantial" violation of any law, rule or regulation, even assuming the existence of a law, rule or regulation generally regarding sanitary facilities. Furthermore, without any evidence regarding the condition of the portable toilets at the time of the disclosure, Mr. Higgs' testimony alone fails to meet his burden of establishing that their condition presented a "substantial and specific" danger to employees or public health.

Because Mr. Higgs has not met his burden of establishing that he reasonably believed these disclosures revealed a substantial violation of law, rule or regulation, or a substantial and specific danger to employees or to public health, these disclosures do not comport with the description of protected activity under 10 C.F.R. § 708.5. Therefore, I

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[4] As I noted in section II.A.3 above, at the time of his disclosures, it appears that Mr. Higgs was less focused on the danger or violation of rule inherent in the failure to wear safety vests and more concerned that the rule was being enforced in a "biased" manner, in that some workers were required to wear safety vests, while others were not. *Id.* at 20-21, 52. As the evidence has established, the alleged inconsistency in TEP's application of the protective clothing rule was merely a matter of perception and did not support a reasonable belief that its disclosure revealed a substantial violation of a law, rule or regulation or a substantial and specific danger to employees or public health.

find that Mr. Higgs has not engaged in activity protected from retaliation under that provision of the Part 708 regulations.

IV. Conclusion

As set forth above, I have concluded that the complainant has not met his burden of establishing by a preponderance of the evidence that he engaged in an activity protected under 10 C.F.R. Part 708. After a thorough review of the evidence offered in this proceeding, I find that Mr. Higgs made two disclosures that are not protected under Part 708 because he did not make them to his employer or any other person defined in the regulations as an appropriate person to receive a disclosure. Moreover, although Mr. Higgs made three disclosures to his employer, he could not reasonably have believed that his disclosures revealed a substantial violation of law, rule, or regulation, or a substantial and specific danger to employees or to public health. Consequently, he has failed to establish the existence of activity that would merit protection under the DOE's Contractor Employment Protection Program. Accordingly, I have determined that Mr. Higgs is not entitled to the relief he has requested in his complaint.

It Is Therefore Ordered That:

(1) The request for relief filed by Frederick L. Higgs under 10 C.F.R. Part 708 on December 7, 2006, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: November 8, 2007