Case No. VBH-0017

July 18, 2000

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Jimmie L. Russell

Date of Filing: October 12, 1999

Case Number: VBH-0017

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Jimmie L. Russell under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Mr. Russell contends that reprisals were taken against him after he made certain disclosures concerning mismanagement, breaches in security procedures and safety violations at the DOE's Los Alamos National Laboratory (LANL). LANL is managed and operated by the University of California (the UC). At the time that he made the alleged disclosures, Mr. Russell worked at LANL for managers who were UC employees. However, Mr. Russell was an employee of Comforce Technical Services, Inc. (Comforce), a sub- contractor of UC. Mr. Russell alleges that certain UC employees retaliated against him for making protected disclosures at LANL, and that these retaliations resulted in the termination of his work at LANL.

I. Summary of Determination

Based on my analysis of the record in this proceeding, I find that Mr. Russell made protected disclosures that were proximate in time to the adverse personnel actions taken against him by the UC and, at the UC's direction, by Comforce. Under these circumstances, the DOE's strong commitment to whistleblowers imposes the significant requirement that the UC and Comforce show by clear and convincing evidence that, in the absence of these protected disclosures, they would have taken the same negative personnel actions against Mr. Russell.

As indicated below, the evidence in the record indicates that Mr. Russell was occasionally short-tempered and argumentative in the workplace. However, I find that the UC based its decision to terminate his assignment on alleged instances of threatening behavior by Mr. Russell which lacked any substantial factual basis or, in other instances, were grossly exaggerated.

Moreover, I find that Mr. Russell's supervisor, his group leader, and his division director appear to have played a crucial role in collecting and transmitting unfounded allegations of Mr. Russell's threatening behavior. The evident willingness of these UC managers to see Mr. Russell's actions as intentionally menacing and not to reasonably evaluate these incidents raises the strong possibility that they acted with retaliatory intent. Further, I find the consensus for the immediate termination of Mr. Russell that was reached by an emergency advisory panel at LANL was substantially tainted by the selective and misleading information that it received from these UC managers.

I also conclude that the UC's decision not to hire Mr. Russell to an in-house position when it reorganized

his job function may have reflected the retaliatory intent of his UC managers. Accordingly, I find that the UC and Comforce committed reprisals against Mr. Russell, and that the UC should be required to take restitutionary action on his behalf.

II. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy'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 such "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations.(1)

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 and in good faith believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a)(l), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations are entitled to receive an extensive series of protections. They may file a whistleblower complaint with the DOE. As part of the proceeding, they are entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they may request independent fact-finding and an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History: Mr. Russell's Complaint and the ROI Findings

Mr. Russell filed his Part 708 complaint with the DOE's Office of Inspector General (IG) on March 30, 1999. The investigation was pending when, on April 14, 1999, revisions to Part 708 took effect. See 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised procedures, investigations are conducted by the DOE's Office of Hearings and Appeals (OHA), and the revised procedures "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. §§ 708.8, 708.22. On April 26, 1999, OHA Director George B. Breznay appointed an OHA investigator to complete the investigation of Mr. Russell's complaint. On October 12, 1999, the OHA investigator issued his Report of Investigation (the ROI). The ROI made the following factual findings concerning Mr. Russell and his employment history at LANL which are not disputed by the parties:

(1) Russell is a certified security auditor with extensive military, academic and law enforcement experience. Russell began his employment at LANL in 1985, and worked for several LANL contractors. In April 1996, Russell was hired as a Self-Assessment Team Leader by Comforce, a sub-contractor providing staffing services to the LANL Security Division's Plans and Assessment Office (PAO). At some point in 1997, Michael Irving, a UC employee, became Russell's immediate supervisor.

(2) Russell received excellent performance evaluations with no negative comments for his

> three final years at LANL. Sometime around the beginning of 1999, the UC began the process of converting the position that Russell held as a sub-contractor employee to two positions to be staffed by employees of UC (the UC positions). As late as February 25, 1999, Russell was one of the two highest rated candidates for the UC positions.

ROI at 4. The ROI finds that Russell made many disclosures that fall within the definition of "protected disclosures" under 10 C.F.R. § 708.5. Specifically, it finds that

> Russell has been employed as a Self Assessment Team Leader in LANL's Security Division [hereafter the "S- Division"] since 1996. Russell was responsible for conducting audits and assessments of Safeguards and Security programs and preparing written reports of his findings. These reports routinely communicated the assessors' findings of security, safety and management deficiencies to the UC's management and to DOE. Accordingly, Russell made protected disclosures on a regular basis. In addition, the UC may have blamed Russell for reporting the locked door to LANL safety inspectors.

ROI at 4. With regard to Mr. Russell's allegations of retaliation, the ROI finds that Mr. Russell's complaint and supporting documentation contain numerous allegations of retaliation involving events that occurred in a time period spanning from the mid 1980's to the present. However, the ROI finds that Part 708 requires a complainant to file a complaint within 90 days of the date that he "knew or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a). It therefore finds that only the following alleged retaliations are covered by the current complaint: (1) Russell's March 5, 1999 termination for cause; (2) Russell's failure to be awarded one of the two UC positions that he interviewed for on February 26, 1999; (3) an alleged UC ban on hiring Russell for any work with or at LANL; and, (4) the UC's submission of allegedly derogatory information concerning Russell to DOE-AL Personnel Security. ROI at 4.

With respect to these alleged disclosures and retaliations, the ROI concludes that Mr. Russell made protected disclosures on a regular basis to his employers, and that many of these protected disclosures occurred in sufficient temporal proximity to the alleged retaliations to meet Mr. Russell's burden under 10 C.F.R. § 708.29 of showing that these protected disclosures were a contributing factor to the four acts of alleged retaliation listed above. ROI at 5.

Section 708.29 of the Part 708 regulations states that once a complainant has met the burden of demonstrating that conduct protected under section 708.5 was a contributing factor to the contractor's acts of retaliation, "the burden 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." 10 C.F.R. § 708.29. According to the ROI, the UC believes it has met the burden with respect to the four retaliations listed above. The UC contends that it terminated Mr. Russell's work assignment at S-Division due to his threatening behavior toward fellow employees. Specifically, the UC alleges that on February 26, 1999, Mr. Russell was involved in two incidents in which he threatened and intimidated the same UC employee, and that he made additional threats in the following days. As a result, on March 3, 1999, the Director of the S-Division convened a Rapid Action Team (the RAT) to deal with Mr. Russell's alleged behavior. The RAT is a LANL group designed to convene on short notice to provide advice to managers on handling difficult human resource issues such as potential violence in the workplace. The RAT met on March 4, 1999, and, according to UC officials who were present, reached a strong and unanimous consensus that Mr. Russell should be removed from the workplace. Mr. Russell was informed on March 5, 1999, his services would no longer be needed at LANL and was not permitted to return to his office. Soon after Russell's termination, the S-Division notified DOE-AL Personnel Security officials of the RAT determination to terminate Russell's work at LANL on the grounds that he had intimidated fellow employees. See ROI at 2-3.

In its analysis of these allegations, the ROI does not find convincing evidence that Mr. Russell threatened

his fellow employees or engaged in other behavior meriting the termination of his work assignment at the S-Division. Accordingly, the ROI finds that there is not clear and convincing evidence that the UC would have taken the alleged retaliatory actions (1), (3) and (4) listed above in the absence of Mr. Russell's protected disclosures. With respect to action (2), the ROI does not make a direct finding on whether the UC has shown, by clear and convincing evidence, that it would have awarded the two UC positions to other candidates. ROI at 5-11.

C. The Addition of Comforce as a Party and Its "Settlement" with Russell

While Mr. Russell acknowledged in his complaint that he was an employee of Comforce and that Comforce had terminated his employment, he contended that Comforce took this action at the instigation of the Security Division at LANL, which is managed by UC. March 8, 1999 Complaint of Jimmie Russell at 13. The ROI makes no findings concerning Comforce's role in this matter, and does not identify Comforce as a party to Mr. Russell's Part 708 Complaint. In my initial letter to the parties, I found that both the UC and Comforce are proper parties to this proceeding. In doing so, I rejected the contention, made by the UC in its response to Mr. Russell's March 8, 1999 Complaint, that the UC is not subject to a complaint from Mr. Russell under Part 708 because Mr. Russell was never directly employed by the UC. June 18, 1999 UC Response at 9-11. As I stated in that letter:

> Part 708 applies to employees of DOE contractors, and the term "contractor" is specifically defined to include "a subcontract under a contract . . . with respect to work related to activities at DOE-owned or -leased facilities." 10 C.F.R. §§708.1-2. Mr. Russell was employed by a UC subcontractor at LANL and the UC, as the management and operating contractor at LANL, took actions which directly and negatively impacted the "terms", "conditions" and "privileges" of Mr. Russell's employment at LANL. The UC therefore bears potential liability, under Part 708, to remedy these negative actions if they ultimately are found to be "retaliations" under 10 C.F.R. §708.2.

October 20, 1999 letter to the parties at 3. I further noted that although Mr. Russell's allegations of retaliation involve determinations and actions taken by the UC, it may be necessary to require Comforce, in its capacity as Mr. Russell's direct employer, to make payments or take other actions necessary to provide Mr. Russell with appropriate relief. Accordingly, I determined that both the UC and Comforce are parties in this proceeding. Id.

In a submission dated January 13, 2000, Counsel for Mr. Russell and Counsel for Comforce requested that I execute an order dismissing Comforce from the proceeding. The submission stated that the request for dismissal was made "pursuant to a settlement of disputed claims documented in a Settlement Agreement and Mutual Release ("Agreement"), which was entered into by the parties on January 13, 2000, and which will survive the dismissal of this action." The "Order Granting Dismissal" submitted by the parties provided as follows:

> It is hereby ordered that Comforce Technical Services, Inc. is dismissed with prejudice, the parties to bear their own respective attorney's fees and costs and that Comforce agrees to employ Russell in the future for a position at LANL based upon LANL's determination to reinstate or hire Russell, and subject to his acceptance of all current terms and conditions of employment with Comforce.

In a letter to the parties dated January 21, 2000, I indicated that the Agreement between Comforce and Mr. Russell and the related request for the dismissal of Comforce as a party to this proceeding raised a significant issue concerning my authority to order relief for Mr. Russell in the event that he prevails on the merits of his complaint. I stated that if the Agreement eliminated Comforce, the subcontractor who was the actual employer of Mr. Russell, from my jurisdiction, I did not believe I would be authorized to take any

remedial action against the general contractor (UC), whose liability under Part 708 appears to be based on the "subcontract under a contract," i.e., UC's agreement with Comforce. I therefore invited Mr. Russell and Comforce to present additional information concerning their settlement agreement and its impact on my ability to order relief in this proceeding.

After receiving additional comments by these parties, I stated in a January 31, 2000 letter to the parties that I found it appropriate to proceed with a hearing. The comments indicated that the "settlement" between Mr. Russell and Comforce anticipated that this Part 708 proceeding would continue and that Comforce would remain subject to certain remedial actions that I might order. In particular, Comforce agreed to implement at least some of the Part 708 remedies sought by Mr. Russell in the event that I found that the requested remedies are warranted and appropriate.See January 27, 2000 letter from Comforce to me. Under these circumstances, I found that the settlement agreement between Comforce and Mr. Russell did not have the effect of eliminating Comforce as a party to this proceeding either for the purpose of establishing Part 708 jurisdiction or for the purpose of implementing an effective remedy. January 31, 2000 letter at 2.

Based on these findings, I denied the request of Mr. Russell and Comforce that I execute an order dismissing Comforce from this proceeding. I stated that it was inappropriate to dismiss Comforce as a party to this Part 708 proceeding when I may find it necessary to require Comforce to rehire Mr. Russell or make payments to him as part of the remedy. Id. Finally, I noted that I was not bound by any findings of fact or limitations of liability that may be contained in the "Settlement Agreement and Mutual Release" entered into between Comforce and Mr. Russell. I stated that I would make my findings of fact and of liability for any remedial actions based solely on the factual record of this proceeding and the standards for liability set forth in the Part 708 regulations. I indicated that in the event that I order Comforce to take remedial action that Comforce believes is not permitted by the terms of its settlement agreement with Mr. Russell, Comforce will have the burden of invoking the settlement agreement as a defense against compliance with my remedial directives. Id.

After a number of contacts with the parties and a conference call, I convened a hearing on Mr. Russell's Part 708 compliant in Los Alamos, New Mexico on February 15, 2000. In a submission received by me in Los Alamos on February 14, 2000, Comforce again sought dismissal as a party to this proceeding. As the basis for this request, Comforce asserted that no findings in the ROI indicated that Comforce had knowledge that Russell made protected disclosures or that Comforce knew of the reasons for his termination. Comforce stated that it "merely acted out LANL's directive to terminate Russell." Submission at 3. Comforce cited two DOE whistleblower determinations, David Ramirez, (Case No. LWA-0002), 23 DOE ¶ 87,505 (1993), aff'd., (Case No. LWA-0002), 24 DOE ¶ 87,510(1994) (Ramirez), and Daniel L. Holsinger, (Case No. VWA-0005), 25 DOE ¶ 87,503 (1995)(Holsinger), as supporting its position that the DOE could order relief against a general contractor or a successor subcontractor without the subcontractor employer of the whistleblower being a party to the proceeding. At the outset of the hearing in this matter, I denied Comforce's request for dismissal. I stated that it was not clear that I had the authority to direct relief through a party who had been dismissed. I noted that the Ramirez determination did not specifically address Part 708 jurisdictional issues. The Holsinger determination dealt with the limited issue of whether a successor subcontractor employer could be required to reinstate the whistleblower. Accordingly, the implementation of the remedy in that matter required no jurisdiction over the prior subcontractor employer. Transcript of Hearing (hereafter "Tr.") at 6.

The testimony at the hearing focused on UC's effort to show that it would have taken adverse actions (1), (3) and (4) listed above in the absence of any protected disclosures by Mr. Russell, and on Mr. Russell's efforts to show that these adverse actions and his failure to be hired to a UC position (adverse action (2)) were retaliatory acts taken in reprisal for his protected disclosures. Comforce sought to show through its witness' testimony that it played no role in the decisions leading to the adverse actions taken against Mr. Russell. At the hearing, Mr. Russell testified and called nine witnesses on his behalf. The UC called eleven witnesses, and Comforce called two witnesses. Each side was allotted ample time to question each witness. Mr. Russell submitted forty-nine numbered exhibits at the hearing. The UC introduced twenty-three lettered exhibits, and Comforce submitted one exhibit. Each of the parties submitted a post-hearing brief,

and Mr. Russell was permitted to submit an additional evidentiary exhibit. Upon receiving this additional exhibit, I closed the record of the proceeding on May 23, 2000.

III. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish

> by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden 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.

10 C.F.R. § 708.29.(2)

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both Mr. Russell and the contractors. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the risk of error is allocated roughly equally between both parties. Grogan v. Garner, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake).

B. The Contractor's Burden

If I find that Mr. Russell has met his threshold burden, the burden of proof shifts to the contractors. The contractors must prove by "clear and convincing" evidence that they would have taken the same personnel action against the complainant absent the protected disclosure. "Clear and convincing" evidence is a much more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". See Hopkins, 737 F. Supp. at 1204 n.3. Thus if Mr. Russell has established that it is more likely than not that he made a protected disclosure that was a contributing factor to an adverse personnel action taken by the contractors, the contractors must convince me that they clearly would have taken this adverse action had Mr. Russell never made any communications concerning violation of security rules or regulations at LANL.

In evaluating whether the UC and Comforce have met this burden, I will consider all the evidence in the record of this proceeding. In particular, I will closely examine the strength of evidence in support of the UC's decision to terminate his work assignment at the S-Division. In a similar manner, I will consider the UC's decision not to hire Mr. Russell to one of two UC positions to which he had applied, the UC's submission of derogatory information concerning Mr. Russell to DOE Security, and Comforce's decision to terminate Mr. Russell from its employment.

IV. Analysis

A. Mr. Russell Made Protected Disclosures.

I find that the record in this proceeding supports Mr. Russell's assertion that he made protected disclosures

to the UC management and to the DOE. As discussed above, Mr. Russell was employed as a Self Assessment Team Leader in LANL's Security Division from 1996 until his termination in early 1999. In that position, he was responsible for conducting audits and assessments of security programs and preparing written reports of his findings. These reports routinely communicated the assessors' findings of security, safety and management deficiencies to Mr. Russell's UC management and to the DOE. Based on these facts, the ROI finds that Russell made protected disclosures on a regular basis. ROI at 4.

The UC argues that Mr. Russell is not entitled, "automatically", to a presumption that he engaged in protected activity as a result of his role in preparing assessments of security matters.

> Any disclosures that he made were part of a Laboratory process and were made at the request of Laboratory management which directly solicited these disclosures by assigning him the task of performing assessments. This removes the disclosures from the realm of those which are protected.

UC Post-Hearing Brief at 3. I reject this contention. The original Part 708 regulations clearly indicate that an employee who has disclosed the violation of a security rule or regulation has made a protected disclosure for purposes of Part 708, and there is no indication of any intent to exclude such a disclosure if it was made pursuant to a management assignment. The Preamble to those regulations specifically states that disclosures made pursuant to such assignments are to be considered protected disclosures.

> The DOE has determined to afford protection to employees who have made disclosures to contractors. Disclosures to contractors will include quality assurance reports and other similar reports made in the course of an employee's job responsibilities.

57 Fed. Reg. 7535 (March 3, 1992).

Mr. Russell must also prove, however, that one or more of these protected disclosures was a *contributing factor* in a personnel action taken against him. 10 C.F.R. § 708.29; see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994). A protected disclosure may be 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." Ronald A Sorri, 23 DOE ¶ 87,503 at 89,010 (1993) citing McDaid v. Dep't of Hous. and Urban Dev., 90 FMSR ¶ 5551 (1990). See also Russell P. Marler, Sr., 27 DOE ¶ 87,506 at 89,056 (1998).

The record indicates that Mr. Russell's managers at LANL's S- Division were aware of the findings of security infractions contained in his security assessments and that two of these managers, S-Division Director Stanley Busboom and Group Leader Kevin Leifheit, served on the Rapid Action Team (the RAT) whose recommendation resulted in Mr. Russell's immediate termination from his position at LANL on March 5, 1999. In addition, Mr. Busboom reported the RAT's findings to the DOE's Personnel Security Program as allegedly derogatory information after Mr. Russell's termination. S-Division management was also responsible for designating Mr. Russell's termination as "for cause" and thereby preventing his reemployment at LANL for a five year period. Another manager, Michael Irving, served on the committee that rejected Mr. Russell application to be hired as a UC employee. UC Hearing Exhibit S.

The record also indicates that Mr. Russell made protected disclosures proximate in time to these alleged retaliations. In December 1998, Mr. Russell made findings in connection with an assessment of Classified Matter Protection and Control (the CMPC assessment). In connection with this assessment, the UC acknowledges that there was a dispute between Mr. Russell and his immediate supervisor, Mr. Irving, as to whether certain data should be identified as security "infractions" or security "incidents". UC Post-Hearing Brief at 17, citing Tr. at 135 (Testimony of Mr. Irving). For purposes of Part 708, however, data indicating either an infraction or an incident is sufficient to constitute the disclosure of the violation of a security rule or regulation, and is therefore protected.(3) The record indicates that Mr. Russell continued to

submit draft security assessments, presumably containing data concerning security violations, right up until his termination in early March 1999. Complaint of Mr. Russell at 11, Tr. at 137 (testimony of Mr. Irving). Accordingly, I find that Mr. Russell made protected disclosures which were proximate in time to the four alleged reprisals.

In its Post Hearing Brief, the UC argues that Mr. Russell's testimony at the hearing indicated that he believed that the alleged retaliations taken against him were based on causes other than his protected disclosures. Even if statements by Mr. Russell were to be viewed as admissions that some of his supervisors were inclined to discriminate against him for reasons unrelated to his protected disclosures, it does not follow that his protected disclosures therefore did not "contribute" to the decision of these supervisors to take the alleged adverse personnel actions that he has identified in his Part 708 complaint. Barbara Nabb, 27 DOE ¶ 87,519 at 89,118 (1999). In this regard, I note that, under questioning by his own counsel, Mr. Russell testified that with respect to his supervisor, Mr. Irving, "the root cause of our rocky relationship was directly related to the arguments we had over self-assessments." Tr. at 1164-65. Accordingly, I reject the argument that the admitted existence of other potential sources for retaliation precludes me from inferring that protected disclosures made by Mr. Russell, in close temporal proximity to adverse personnel actions taken against him, were contributing factors to the decisions to take those actions.

I therefore conclude that Mr. Russell has met his burden of showing that his disclosures of security violations at LANL constituted a contributing factor in the negative personnel actions identified as alleged reprisals in the ROI. The burden is therefore with the contractors, the UC and Comforce, to prove by clear and convincing evidence that they would have taken the same actions without Mr. Russell's disclosures.

B. The Decision to Terminate Mr. Russell's Work Assignment at S- Division Was a Reprisal.

With respect to the UC's decision to terminate Mr. Russell's work assignment at S-Division, the ROI finds that on Friday, February 26, 1999, Mr. Russell was allegedly involved in two incidents. First, Mr. Russell allegedly threatened and intimidated Mr. John Waterbury, a co-worker who was a member of the committee that was screening candidates for the UC positions. Later on that same day, Mr. Waterbury allegedly found Mr. Russell yelling, cursing and forcefully shoving a locked door in the basement of the building in which they both worked. The ROI notes that Mr. Russell asserted that he was merely yelling for help in opening the door. ROI at 2. The ROI reports that on Tuesday, March 2, 1999, Mr. Kevin Leifheit (Mr. Russell's group leader) and Mr. Irving informed the division office that Mr. Russell had threatened and intimidated other employees. Id. In particular, they reported that Mr. Russell had written a threatening statement on a whiteboard in the group office. ROI at 9.

On Wednesday, March 3, 1999, the situation was brought to the attention of Mr. Stanley Busboom, the Director of LANL's Security Division and the decision was made to convene a Rapid Action Team (the RAT). The RAT is a LANL group designed to convene on short notice to provide advice to managers on handling difficult human resource issues such as potential violence in the workplace. The RAT included Mr. Busboom, Mr. Leifheit, a member of the special projects office, a legal representative, a clinical psychologist and an employee relations specialist. On March 4, 1999, the RAT met to consider the concerns raised about Mr. Russell, and reached a strong and unanimous consensus that Russell should be removed from the workplace. ROI at 2-3.

At the Hearing, the UC presented the testimony of several of the individuals involved in these events in the effort to show that its stated reasons for terminating Mr. Russell's assignment were correct. In its Post-Hearing Brief, the UC maintained that

> the Laboratory clearly has met its burden of showing by clear and convincing evidence that Russell would have had his assignment terminated notwithstanding any alleged protected

> disclosures. . . . Further, it is clear that Waterbury, Irving, Leifheit and Busboom were convinced in good faith that Russell presented a threat.

UC Post-Hearing Brief at 35.

I do not agree. The burden of the UC in this case is to show by clear and convincing evidence that in the absence of Mr. Russell's protected disclosures, the behavior of Mr. Russell would have led to the termination of his work assignment. As discussed below, my review of the record indicates that, rather than such a clear and convincing showing supporting the UC's actions, there is convincing evidence indicating that alleged instances of threatening behavior by Mr. Russell lacked any substantial factual basis and, in other instances, were grossly exaggerated. Moreover, Mr. Russell's supervisors, Mr. Irving and Mr. Leifheit, appear to have played a crucial role in transmitting these unfounded allegations of threatening behavior to their division manager, Mr. Busboom. Mr. Leifheit and Mr. Busboom later presented these allegations to the other members of the RAT.(4) These RAT members may have been acting in good faith when they relied on the information collected by Messrs. Irving, Leifheit and Busboom, but by that point the process was already tainted by the selective and misleading information that they received. Moreover, there was no mechanism in the RAT process, a process usually reserved for instances of overt violent or threatening behavior, for the verification of the allegations being made against Mr. Russell.

In a memorandum dated March 12, 1999 [hereinafter the "Busboom Memorandum"], Mr. Busboom informed the Director of the DOE Albuquerque Operations Office's Division of Security and Safeguards that the S-Division had requested Comforce "to terminate [Mr. Russell's] services with LANL for cause." Mr. Busboom attached two summaries to his memorandum "explaining the background of the situation." The second attachment to this memorandum discussed the RAT's investigation and findings concerning Mr. Russell.(5) UC Hearing Exhibit L. The heading "Facts" appears at the top of this summary. The document states that

The panel considered the following information in making their recommendation of dismissal:

* Mr. Russell was observed by his co-workers to be under pressure from the IEO investigation. . .

* He was also under pressure as his contract position was being converted to a UC FTE position, which he had to compete for as an external candidate.

* He had a behavior history of being involved in violent confrontations. (A physical altercation some 8-10 years ago when Mr. Russell worked for the Mason & Hanger protective force was confirmed. A verbal altercation 4 years ago, resulting in Mr. Russell being let go from a contract with [LANL's Nonproliferation and International Security Division (NIS)], was also confirmed.)

* Various incidents of poorly controlled temper and strained interpersonal relationships were confirmed from Mr. Russell's tenure as a contractor with OS/FSS/S Divisions.

* It was confirmed that Mr. Russell intimidated a member of the screening committee for the job he was applying for, just hours before [his] own interview with that committee.

* It was confirmed that Mr. Russell had written a statement on a "white board" in the group office that warned employees: "you should not be concerned with the bullet with your name on it, be concerned with the one that does not have your name on it."

* The group leader recounted that his job interview with Mr. Russell for the open position had disintegrated into a complaint session about how group business was currently conducted.

* Other instances of erratic behavior were noted, and co- workers of Mr. Russell were noted

> as fearing for their personal safety, citing concerns for his unpredictable conduct, his reputation for violent outbursts, and his affinity for firearms.

Busboom Memorandum, Attachment 2, UC Hearing Exhibit L. As the following analysis indicates, the "facts" presented at the RAT by Mr. Leifheit and Mr. Busboom were relied upon by the advisory RAT members as supporting a substantial concern that Mr. Russell might commit acts of violence against his co-workers. As discussed below, I find that these "facts" contain substantial exaggerations, unfounded allegations, and other distortions that negate the validity of the RAT conclusion. Moreover, clarifying and exonerating information was readily available and yet was not sought out or presented, leading me to conclude that the actions taken against Mr. Russell were tainted by the retaliatory motives of his UC managers, and would not have been pursued in the absence of his protected disclosures.

1. Mr. Russell Does Not Have a History of Threatening and Violent Behavior.

Through its witness testimony and argument in this proceeding, the UC has broadly characterized Mr. Russell as "a worker who clearly had trouble functioning in the workplace." UC Post-hearing Brief at 12. I do not believe that Mr. Russell's overall employment record supports such a conclusion. I concur with the ROI's finding that Mr. Russell, a certified security auditor, and "has an extensive and impressive military, academic and law enforcement background." ROI at 2. Mr. Russell is now in his early sixties. From 1956 until 1980 Mr. Russell served with distinction in the United States Marine Corps. ROI Administrative Record (hereinafter "ROI AR") at 00020. From 1982 until 1985, Mr. Russell was employed at the Harris County Sheriff's Department in Houston, Texas. From 1985 until 1992, he was employed in several positions by the Mason and Hanger Protective Force at LANL (Mason and Hanger), including the positions of Training Manager, Quality Assurance Manager, and Environment, Safety and Health Manager. In 1988, he received a recommendation from the Vice President/Contract Manager of Mason and Hanger which praised his professional abilities and added that

> Jimmie is an exceptionally honest individual who is very committed to his work, family and church. He has a very friendly and outgoing personality and is frequently asked to speak to groups of all sorts.

Russell Hearing Exhibit 2. From 1993 to 1995 he was employed directly by LANL as a security consultant. Finally, from 1996 to 1999 he served as a contract employee at LANL, first through Grumman Technical Services and then through Comforce, in the capacity of Assessment Team Leader. ROI AR at 00019. The ROI notes that Mr. Russell received excellent performance evaluations with no negative comments for his three final years at LANL. ROI at 2. Accordingly, I find unpersuasive the UC's efforts to depict Mr. Russell as a marginal and troubled employee.

Nor am I convinced that Mr. Russell's "affinity for firearms" posed a legitimate source of concern for his co-workers. Busboom Memorandum, Attachment 2. The record certainly establishes that Mr. Russell, who spent a considerable part of his career in the military and in law enforcement, maintains an active and knowledgeable interest in firearms. He is a licensed gun dealer and kept a stack of gun catalogs in an accessible spot next to his office and invited co-workers to order weapons through him. There is no indication that his interest in firearms was in any way extreme for someone with his career background, and the testimony of a co-worker who shared this interest with Mr. Russell supports this conclusion. See Testimony of Thomas A. Baca, Tr. at 613. Nor is there any evidence that Mr. Russell ever used firearms in a threatening and irresponsible manner.(6) Under these circumstances, off-hand references to weapons by Mr. Russell, in and of themselves, cannot be viewed as threatening in nature, and it is unreasonable for his managers or co-workers to make such a claim.

In his memorandum to the Director of DOE Security at LANL, Mr. Busboom stated that the RAT had found that Mr. Russell "had a behavior history of being involved in violent confrontations." Two instances of behavior are cited as support for this alleged "behavior history," only one of which involved physical

violence. That event was described as a "physical altercation some 8-10 years ago when Mr. Russell worked for the Mason & Hanger protective force." In spite of this being the only known instance of physical violence in the workplace involving Mr. Russell, no one involved with the RAT proceeding attempted to ascertain the circumstances surrounding this "physical altercation." Mr. Leifheit testified that Mr. Russell had "told a lot of folks" about the incident, so it was treated by management as a "self-admission." Tr. at 100. The ROI finds that Mr. Russell was involved in a fistfight with an employee at LANL around nine years ago, and that "there is no evidence that LANL took any disciplinary action against Russell for the incident." ROI at 17. In his testimony at the Hearing, Mr. Russell related that this incident occurred at an early morning meeting where he was threatened by another Mason & Hanger employee.

> Mr. Jennings . . . unloaded on me with venomous remarks and profanity and vulgarity and really bad things. And it was so out of line that I thought at first he was kidding and it just got worse and worse and worse. And I told him that I thought he ought to shut up. . . . At a point, we were standing -- he was sitting and I was standing very close to him. And at a point there, he says to me "I'm going to kick your so and so such and such." And I said to him -- "Well, if you feel froggy, jump." And he stood up and made a movement toward me and then I hit him in the mouth.

Tr. at 863-64. Mr. Russell further testified that he was not disciplined over this action in any way by Mason & Hanger, while he was told by the General Manager of the Mason & Hanger contract that Mr. Jennings had been disciplined for his behavior by having his salary increase suspended for a period of time. Tr. at 864. Mr. Russell further testified that, other than this incident, he has never had a physical altercation in the work force, and, throughout his career at Los Alamos, he has never threatened, pushed or shoved anyone. Tr. at 865-66. I found Mr. Russell's testimony concerning these matters to be convincing, and counsel for UC and Comforce have not produced evidence of any other physical confrontations involving Mr. Russell or evidence of physical threats made by Mr. Russell during his fifteen years of employment in the LANL workforce.(7) I certainly do not see this isolated incident occurring approximately nine years ago as supporting the view that Mr. Russell had a "behavior history" of being involved in "violent confrontations."

A second incident was cited in the Busboom Memorandum as evidencing Mr. Russell's violent behavior history. Mr. Busboom reported that the RAT had "confirmed" that Mr. Russell was involved in a "verbal altercation" four years earlier, "resulting in Mr. Russell being let go from his contract with NIS." Busboom Memorandum, Attachment 2. At the Hearing, Mr. Busboom testified that he collected this information about Mr. Russell himself, during a telephone conversation with Terry Hawkins, the Director of NIS. Tr. at 535-36. As discussed below, Mr. Busboom's account of this incident contains omissions and inaccuracies highly detrimental to Mr. Russell, leading me to conclude that his collecting and transmitting of this information was tainted by retaliatory intent. Steven Fine, the ROI Investigator, conducted a telephone interview with Mr. Hawkins on September 15, 1999 concerning Mr. Russell employment at NIS. In a memorandum, Mr. Fine reported the following information from that interview:

> Mr. Hawkins recalled that Mr. Russell was a Special Security Officer (SSO) with the Mesa-Quill Program at the T-33 facility. Mesa-Quill was an Air Force funded program. When the funding for Mesa-Quill dried up, its employees, including Mr. Russell, lost their jobs. . . .Mr. Hawkins recalled that Mr. Russell had a run-in with Handel and Perrizo at NIS. But it wasn't Russell's fault. After the incident was investigated, Handel and Perrizo were found to be at fault and disciplined.

Memorandum of Telephone Interview, ROI AR at 00399. At the Hearing, Mr. Hawkins testified that Mr. Russell lost his full-time position at NIS because the project itself was canceled. Tr. at 414. He was not questioned concerning his previous comments concerning the altercation with Handel and Perrizo. I

conclude that there is substantial evidence contradicting the "confirmed" allegation reported by Mr. Busboom that Mr. Russell lost his employment at NIS due to a "verbal altercation." In fact, Mr. Hawkins is reported to have remembered Mr. Russell as a good employee who did not cause problems in his interactions with other employees.

> Mr. Hawkins remembered that Mr. Russell did a very good job at TA-33 and was a good employee with excellent technical skills. He could get a bit hot under the collar, but there were no problems with him at NIS.

Memorandum of Telephone Interview, ROI AR at 00399. Accordingly, Mr. Busboom substantially misrepresented Mr. Russell's employment history at the NIS when reported these matters to the RAT and, later, to DOE Security.

2. Mr. Russell Did Have a Bad Temper, But It Was Known and Tolerated by His Managers and Coworkers.

The RAT correctly found that Mr. Russell had a "poorly controlled temper" [Busboom Memorandum, Attachment 2], but it addressed this issue in a one-sided and inappropriate way. The ROI investigating attorney, after conducting numerous interviews with Mr. Russell's managers, co-workers and self assessment "customers", reached the following conclusions about Mr. Russell's poorly controlled temper and his management's reaction to it.

> Many of the individuals interviewed during my investigation commented that Russell appeared to have a low frustration threshold and poor anger management skills. Moreover, it is well documented that Russell verbally abused Irving on at least three occasions. . . . [T]he UC's management appears to have tolerated Russell's occasional verbal outbursts, perhaps because of Russell's positive aspects or perhaps because of the rough and tumble nature of the security environment.

ROI at 7-8. Testimony at the Hearing confirmed that Mr. Russell occasionally vented his frustrations and anger at co-workers and managers. It also confirmed that Mr. Russell received little if any feedback from management that was critical of this behavior.

At the Hearing, Mr. Russell's immediate supervisor, Mr. Irving testified that Mr. Russell lost his temper frequently when they had discussions about assessments, but that there were three occasions when he lost his temper "I would say extremely badly." Tr. at 141. These three incidents were recounted in detail by Mr. Irving during direct examination at the Hearing. Although his testimony indicated a perspective that is biased against Mr. Russell, it was nevertheless enlightening on Mr. Russell's bad tempered behavior. That testimony provides further indication that Mr. Russell's outbursts of temper, even at their most extreme, were just that - outbursts - and were not accompanied by overt threats of violence. His testimony also indicates that Mr. Russell's management tolerated these outbursts and that Mr. Russell was not disciplined for them.

Mr. Irving first recounted a 1997 incident that occurred in a vehicle outside of Building 470, where Mr. Russell "became enraged" while discussing the problems arising from an ongoing assessment. Mr. Irving related that Mr. Russell "got out of the vehicle, right in front of Building 470, screaming and cussing at me, and yelling at me. And calling me names and so forth." Tr. at 142. Mr. Irving acknowledged that following that incident, Mr. Russell approached him later and "apologized for his behavior. We shook hands." Id. In a second incident, possibly in 1998, Mr. Irving related that following a group discussion of the problems that S- Division was having with the Organizational Safeguards Security Officer program, he and Mr. Russell had a private conversation where he admonished Mr. Russell for being critical of management's approach to the problems, during which Mr. Russell

> became enraged, he doubled up his fist. He started to come out from . . . where his desk is. And he had his fist doubled up. He was kind of frothing at the mouth, red faced. And he said, "do you want to fucking take me on?" And he got close to me. Didn't get this close, but he was about this close. He says -- "you don't want to fucking take me on."
>
> And I realized, and I think somebody was down the hall. And I realized that was inappropriate. This discussion was getting out of hand. Let's go into Debbie Ewing's office and talk this thing out. And he went on and on in Debbie Ewing's office, extremely angry that I'm trying to censor him. And then my saying under no circumstances am I trying to censor you. But once a decision is made by management, we are morally bound to support the decision as long as it is a legal, moral or ethical decision.

Tr. at 143-47. Although Mr. Russell's alleged gestures and language were inappropriate, I note that Mr. Irving's response was to invite Mr. Russell into an empty, private office to continue the discussion. This is not the typical response of someone who feels physically threatened by the behavior of someone with whom he is having an argument.

The third incident recounted by Mr. Irving involved Mr. Russell's reaction to the annual performance evaluation that he received in October 1998. The evaluation was completed by Mr. Irving and signed by Mr. Tucker. At the time he completed the evaluation, Mr. Irving reported that the felt that Mr. Russell's problems with his temper

> seemed to have improved somewhat since the OSLO incident. Therefore, I rated him a 3 plus [on a scale of 1 to 5], I think, in a couple of areas ["Working with Others" and "Adaptability"]. And a 4 for attitude.

Tr. at 149.(8) Mr. Irving rated Mr. Russell outstanding (5 or 5+) in the other nine categories on the evaluation form, and made no comments under the heading "Indicate areas that need improvement." See ROI AR at 00045. Mr. Irving testified that during his discussion of the evaluation, Mr. Russell challenged the 3 plus ratings and eventually became enraged. Tr. at 151. Mr. Irving then testified that Mr. Russell scheduled an appointment with Mr. Tucker to discuss the evaluation, and invited Mr. Irving to attend. At this meeting, Mr. Irving stated that Mr. Russell again lost his temper.

> He became very irate, angry. That this was an unjust assessment of his performance. We [Mr. Tucker and Mr. Irving] were saying we felt this was a just assessment. . . . He [Mr. Russell] was attempting to impugn my integrity. Mr. Tucker is trying to tell him this was unacceptable, it is inappropriate. You can't do that without empirical evidence, etc. Then we were way up here in this heated discussion. . . . And then finally it comes down, and we're now back to . . . just a normal conversation.

Tr. at 153. Mr. Tucker agreed to review the evaluation of Mr. Russell in light of the their discussion. At that point Mr. Irving made a comment which once again enraged Mr. Russell, who, according to Mr. Irving, told him

> You're not going to talk down to me like that, your Highness. Something like that. And Mr. Tucker then stopped him right there, and said, -- you are completely out of line again. I don't know how many times he said this. And I said, Jimmie, you have concluded that my comment was condescending, which it was not. And then he said, -- well, perhaps I overacted. That was the third major incident.

Id. In a memorandum dated October 13, 1998, Mr. Tucker thanked Mr. Russell "for the opportunity to receive your verbal comments," and advised him that he had concluded that the evaluation "is appropriate for the period in question."

> Mr. Irving has advised both you and me that he observed marked improvement in your attitude and your ability to work with others. I encourage you to take Mr. Irving's constructive comments to heart and aspire to further improve your performance in these areas, as well as sustain your acknowledged superior performance in other areas.

October 13 Memorandum from John E. (Gene) Tucker to Jimmie Russell, ROI AR at 00046. This memorandum is quite revealing. Although Mr. Tucker had witnessed Mr. Russell lose his temper with Mr. Irving and himself, he evidently did not consider it of sufficient importance to warrant criticism or comment in his memorandum to Mr. Russell. Instead, Mr. Russell was informed that his ability to work with others had shown "marked improvement." Accordingly, Mr. Russell received no indication at that time, or at any time prior to his March 5, 1999 termination, that his managers considered his outbursts of temper to be a serious behavior problem.(9)

According to the Busboom Memorandum, the RAT found that "co-workers of Mr. Russell were noted as fearing for their personal safety, citing concerns for his unpredictable conduct, his reputation for violent outbursts, and his affinity for firearms." UC Hearing Exhibit L, Attachment 2. The ROI finds that the three LANL employees who expressed such concerns to the RAT were Ms. Debra Huling, Mr. Waterbury, and Mr. Irving. With respect to these individuals, the ROI Investigating Attorney concluded that "each of these individuals harbors a great deal of personal animosity against Russell. It is highly possible that one or more of the three individuals have expressed fear of Russell in order to obtain revenge against him." ROI at 10. As indicated above, I find that Mr. Irving was not physically threatened or intimidated by Mr. Russell. I will discuss Mr. Waterbury's allegations in the next section.

Ms. Huling is a LANL employee whose office was located in close proximity to Mr. Russell's until he moved to another building in the Fall of 1998. The ROI Investigator found that "upon interviewing Huling, I was left with a very strong impression that she has an intense and highly personal dislike of Russell." Id. Ms. Huling did not testify at the hearing, but her January 25, 2000 deposition in this matter confirms the ROI's findings. At the deposition (Russell Hearing Exhibit 7), she affirmed that she has an intense and highly personal dislike for Mr. Russell. Deposition at 46. She stated that she was frequently disturbed by the loud arguments and vulgar language emanating from the office area that Mr. Russell shared with a co-worker. However, she stated that "at times Mr. Russell was coaxed or encouraged" to engage in loud arguments by this co-worker and by Mr. Irving, who also raised his voice. Id. at 17-18. She also stated that "most of the comments that held the offensive language originated with [this co-worker]." Id. at 43. Although Mr. Russell's arguments with others made her very uncomfortable, she stated that at no time did she feel physically threatened by him. Id. at 33. She states that she had complained about the vulgar language to Mr. Tucker, and had mentioned feeling uncomfortable about Mr. Russell to John Waterbury and another co-worker, and to her manager, Ms. Gloria Garcia, but did not ask that any action be taken concerning the situation. Id. at 14-17.(10) She reports that during Mr. Russell's final week at LANL, she had no contact with him and did not discuss his behavior with any of her supervisors or co-workers. Id. at 24-26. Based on my review, I concur with the ROI's findings that Ms. Huling's complaints do not provide significant support for the determination to terminate Mr. Russell.

3. Mr. Russell's Behavior from February 26 through March 5, 1999 Did Not Support the Stated Reasons for His Dismissal by the UC.

As noted above, in late 1998 and early 1999, LANL's IEO investigated allegations that Mr. Russell was conducting his private gun selling business during office hours using LANL equipment. Mr. Busboom's summary of the RAT findings indicates that "Mr. Russell was observed to be under pressure from the IEO

investigation." Busboom Memorandum, Attachment 2. The basis for this finding appears to be that, after he became aware of the investigation, Mr. Russell spoke to three managers and some of his co-workers about it. Tr. at 1122. However, Mr. Russell testified that after speaking to these people and to the IEO auditor his concern was "significantly reduced."

> The impression that I got after talking to these people was that what I had done, while not right, was not a capital offense and that I might receive some type of punishment for it but it probably wouldn't be severe.

Tr. at 1122. He stated that by late February and early March, 1999, he "had almost forgotten about [it]. I think in the back of my mind, there was, you know, it was still there." Tr. at 1123. Mr. Russell's conclusion that he probably would not receive a severe punishment or termination for these violations is compatible with the recommendations of the IEO Report that was issued concerning this matter. ROI at 6. I believe Mr. Russell when he testified that his anxiety concerning this investigation had eased substantially by early March 1999. I therefore conclude that the RAT was incorrect in attributing a significant potential for threatening behavior to Mr. Russell's concern over this matter.

According to the Busboom Memorandum, the RAT also found that Mr. Russell was "under pressure as his contract position was being converted to a UC FTE position, which he had to compete for as an external candidate." UC Hearing Exhibit L, Attachment 2. There is factual support for this finding. In his testimony at the Hearing, Mr. Russell testified that, on the morning of his formal interview for the UC FTE position (February 26, 1999), he expressed anger and frustration about Mr. Irving's decision to have a formal interview process to Mr. Waterbury, who he knew was a member of the selection committee. Tr. at 990.

In a February 26 memorandum to Mr. Irving (the February 26 Memorandum), Mr. Waterbury recounted his morning conversation with Mr. Russell and a subsequent incident involving a locked door, and stated his fear that Mr. Russell could become physically violent. Because this memorandum triggered a management response that culminated in the RAT determinations, I will analyze its contents in detail. As the discussion below indicates, I do not find that the actual facts warranted Mr. Waterbury's conclusion that Mr. Russell constituted a physical threat to Mr. Irving and himself.

In the February 26 Memorandum, Mr. Waterbury recorded the insulting comments that Mr. Russell allegedly made concerning Mr. Irving's judgment in requiring him to make a formal presentation in applying for one of the UC FTE positions. He also provided the following description of his encounter with Mr. Russell at a recently locked door in their office area, after he allegedly explained to Mr. Russell that the door had been locked to establish a security perimeter.

> My attempt to clarify appeared to increase his agitation and he loudly stated, "I don't want to have to use a fucking key to get out of here. You got all the doors padlocked and you expect me to get out." . . . As I was trying to explain, he forcefully shoved the door wide open, ignored my communication, and walked off leaving the door unsecured. He acted like I personally locked the doors to complicate his life.

February 26, 1999 Memorandum from Mr. Waterbury to Mr. Irving, ROI AR at 00225. With respect to the encounter, Mr. Waterbury reported that "I felt as if he was about to strike me at any moment." Id. Mr. Waterbury concluded his memorandum to Mr. Irving with the following comments.

> Based on his comments and hostile behavior today, and personally witnessing countless past episodes where he was out of control, I have genuine fear that you personally (over any other S&S employee) are in harm's way and (God forbid) possibly your family as well. His many firearms, combat training, and under his current frame of mind his "perceived injustice" towards him, I hate to think what we might be facing at the hands of Jimmie.

Id. (emphasis in original). Based on Mr. Waterbury's account of his interactions with Mr. Russell on that date, the RAT found that Mr. Russell "intimidated a member of the screening committee for the job he was applying for." UC Hearing Exhibit L, Attachment 2. The ROI, however, is critical of the RAT's reliance on this account.

> The RAT accepted and relied upon Waterbury's account of February 26, 1999 without hearing Russell's side of the story. Moreover, Waterbury's conclusions about Russell's behavior on that day were accepted and relied upon by the RAT without any substantive analysis. While the alleged behavior attributed to Russell was unprofessional, impolitic and suggests poor self-control on Russell's part, it certainly did not suggest a propensity for violence as the RAT team concluded.

ROI at 9.

I find that the testimony at the Hearing supports the position that Mr. Russell's interactions with Mr. Waterbury on February 26 were not physically threatening to Mr. Waterbury or to Mr. Irving, and did not constitute intimidation of Mr. Waterbury.

In his testimony, Mr. Russell stated that immediately prior to his February 26 conversation with Mr. Waterbury, he had been talking to a co-worker, Pat Trujillo, who was critical of Mr. Irving's formal interview procedures for selecting the UC FTE positions. "He thought it was ridiculous and overkill and he had never seen it done that way before." Tr. at 988. Mr. Russell testified that he expressed agreement with these views and, when Mr. Waterbury visited Mr. Russell's office a few minutes later, he "started pontificating about my opinion of the process." Tr. at 990. Mr. Russell admits that he expressed anger, disgust and frustration in his comments to Mr. Waterbury, Id.., but he also testified that Mr. Waterbury's memorandum exaggerated the level of personal criticism and profanity that Mr. Russell used concerning Mr. Irving in this conversation. Tr. at 1135.(11) Mr. Russell also denies that his comments were intended to intimidate Mr. Waterbury, or to influence his decision as a member of the selection committee. Tr. at 994.

At the Hearing, Mr. Waterbury testified that at the time he had this conversation with Mr. Russell, he believed that Mr. Russell was simply venting his frustration about the interview process.

> [Waterbury] So, I went into this office at the time and said Jimmie are you all right? And without a moment's hesitation he turned around and just let loose with the fact that we knew what he could and couldn't do; didn't Mike Irving have to get permission to do an interview, the purpose of the interview. Mike Irving doesn't know what he's doing, etc. And I then thought to myself I [should] be anywhere but there. And I said okay Jimmie I just wanted to make sure that you were all right. And I walked away.
>
> Q How did you interpret that at the time?
>
> A Jimmie being Jimmie. Being -- I just let it go.

Tr. at 295. Mr. Waterbury testified that it was only in the late afternoon, following the door incident at 11:00 am and Mr. Russell's interview for the UC position at 1:30 pm, that he realized that he had been intimidated.

> As I said earlier, the morning incident in my mind was just Jimmie just being Jimmie. But sitting there working, it struck me that John Browne [the Director of LANL] has a zero

> tolerance policy to a hostile work environment. I began putting two and two together, how inappropriate that was. Well I didn't have to take that kind of abuse. And that -- what he did in the morning was inappropriate as well -- trying to have me influence Mike Irving to relieve him of giving a presentation requirement.

Tr. at 303. This change of impression by Mr. Waterbury weakens his allegation that the morning incident was an instance of intimidation by Mr. Russell. Whether one is being intimidated or not is something that one should know at the time. It is not a rational or reflective process. It also is possible that Mr. Waterbury may have been influenced by Mr. Irving, with whom he was in contact throughout the day, to alter his impression of this incident.

In his testimony concerning the February 26 door incident, Mr. Waterbury acknowledged that S-Division employee Mr. Byron McCloud was with Mr. Russell at the locked door, a fact that he had not included in his memorandum to Mr. Irving. He testified as he approached the door he could "hear animated voices on the other side. I couldn't hear what they were saying, but banging and kicking on the door." Tr. at 301. Mr. Waterbury testified that he opened the door and explained to Mr. Russell that the door has to be kept locked.

> and that's when I first thought he was -- he was going to take a swing at me. Still cussing, red faced -- I had to take a step back because -- he started to walk in. If I hadn't moved, he would have bowled me right over. So, I opened the door and it just was not very good. . . .I have no doubt in my own mind that if I hadn't moved, I would have been pushed aside, knocked over.

Tr. at 301-2. Mr. Waterbury describes this as "the first time I had concerns for my own physical safety" around Mr. Russell.

Mr. McCloud's account of this incident does not confirm or deny that Mr. Russell forced Mr. Waterbury to get out of his way as they passed through the door. However, it points out inaccuracies and exaggerations in Mr. Waterbury's account. Mr. McCloud recalls that it was he and not Mr. Russell who rattled a door handle and pushed and pulled on a locked door to try to get it to open. Tr. at 814. He recalls eventually exiting with Mr. Russell through a nearby door. Tr. at 815. He does not believe that Mr. Russell hollered through a doorway to anyone about a door being locked. Tr. at 815. He cannot recall whether Mr. Waterbury was present at the doorway. Tr. at 816.

Mr. Waterbury's allegation that Mr. Russell would have "bowled me right over" if he had not stepped out of the doorway, is the only direct allegation of actual physical intimidation made against Mr. Russell by anyone in the S-Division. Were this confirmed, or if I believed Mr. Waterbury's account, it might well be pivotal. However, the testimony of Mr. McCloud indicates that for him, there was nothing memorable about this encounter between Mr. Russell and Mr. Waterbury. Tr. at 815. Mr. Waterbury acknowledges that he stepped aside and that Mr. Russell did not verbally threaten, touch or shove him. Tr. at 301. I conclude that Mr. Russell acted rudely toward Mr. Waterbury in this encounter, but that there is no reason to believe that he intended to physically intimidate or assault Mr. Waterbury. I conclude that this incident does not provide substantial support for a finding that Mr. Russell presented a threat of violence in the workplace.

After fully reviewing the record in this matter, I find that the expressions of concern for the physical safety of Mr. Irving and others contained in Mr. Waterbury's February 26 memorandum lack any significant factual basis, and may have been motivated by Mr. Waterbury's desire to assist Mr. Irving and Mr. Leifheit in discrediting Mr. Russell. Mr. Waterbury testified that he composed this memorandum after discussing the morning incident with his supervisor, Mr. Irving (Tr. at 319) and Mr. Irving's supervisor, Mr. Leifheit (Tr. at 60). While Mr. Waterbury and Mr. Irving deny that Mr. Waterbury was asked to write the memorandum, the testimony of Mr. Leifheit is more circumspect.

> Q: Mr. Waterbury wrote a memo on the date of the 26. Did you tell Irving to have him do that?
>
> Mr. Leifheit: I did not tell him to do that.
>
> Q: Did you suggest to Irving that this series of events be documented?
>
> Mr. Leifheit: No, I didn't. We had a conversation. And in that conversation, it is not unlikely that we talked about what we needed if we needed to do something about this. At that point, it was not an issue of anything other than [Mr. Russell's] selection process. And so his actions relative to his interview and his selection with a focus that there was damage.

Tr. at 89. Mr. Waterbury admitted in his testimony that he gave Mr. Irving a draft of the memorandum to review before Mr. Waterbury put it in final form. Tr. at 304. These acknowledged discussions and interactions between Messrs. Leifheit, Irving and Waterbury raise the distinct possibility that Mr. Waterbury was influenced, either directly or indirectly, to exaggerate his concerns in order to please his managers and assist them in finding a means to retaliate against Mr. Russell.(12)

Mr. Leifheit testified that on Friday, February 26, 1999, both Mr. Waterbury and Mr. Irving approached him and discussed their concern that Mr. Russell might react violently if he was not selected for one of the UC-FTE positions. Tr. at 60-61. On Monday, March 1, Mr. Leifheit testified that he became "very concerned" about Mr. Russell's behavior after Mr. Irving reported that Mr. Russell had written a military axiom on the white board in a common office area. Mr. Busboom indicated that it was reported to the RAT that it was confirmed that Mr. Russell wrote a message on the white board "warning employees" that "you should not be concerned with the bullet with your name on it, be concerned with the one that does not have your name on it." Busboom Memorandum, Attachment 2. The ROI makes the following findings concerning this matter:

> This incident was taken out of context by the RAT. Tom Baca [a UC employee and coworker of Mr. Russell] recalled that Russell wrote this statement on the whiteboard while Russell and Baca were discussing their military experiences and training. During this conversation, their discussion turned to slogans and cadences. According to Baca, Russell wrote the statement on the whiteboard and asked Baca what he thought of it.

ROI at 9-10. The ROI concludes that it is clear that Russell did not write this slogan to warn or threaten fellow employees, and if the RAT had investigated the allegation further, it would not have "rashly" interpreted the statement as a threat. ROI at 10. The testimony at the hearing confirmed the ROI's explanation of this event. Mr. Baca testified that he was formerly employed as a firearms instructor, including sniper rifles, at the DOE's Training Academy in Albuquerque. Tr. at 612-613. He said that he and Mr. Russell would occasionally talk about guns, which was a mutual interest of theirs, and that on this occasion they were talking about sniper rifles and the differences between the military style rifles and the sniper rifles used by the DOE. Id. He then said that the conversation turned to different firearm maxims.

> The Air Force has certain terms that we use compared to the Marine Corps and the one that I told Jimmie that I used to use quite a bit as an instructor in Firearms proficiency is "Speed was fine, but accuracy is final." And it started like -- well, what about this phrase here? It just -- there was an exchange of phrases is what it was.

Tr. at 625. He testified that both he and Mr. Russell were writing phrases on the white board and erasing them, and that the maxim in question happened to be the last one written on the board during that conversation. Tr. at 626.

I find it extraordinary that this explanation was not made a RAT finding and was omitted from the Busboom Memorandum. This is especially troubling in light of Mr. Baca's testimony that he was approached by Mr. Leifheit and asked to write a memorandum confirming what Mr. Russell had written on the white board that day. See Russell Hearing Exhibit 12. Mr. Baca states positively that Mr. Leifheit never inquired into the circumstances which resulted in Mr. Russell writing the maxim.

> Mr. Baca: I was sitting in his office, and [Mr. Leifheit] goes -- Tom, did you ever see Jimmie write that memo. At the time that it was written down, I figured it was erased off the board. And I said yes, and he goes can you write me a statement saying that you saw Jimmie writing it. I said well sure. So, that's why I wrote the statement.
>
> Q: Did you tell Mr. Leifheit why it was written and how it came about to be written by Mr. Russell?
>
> Mr. Baca: He would never ask me why and I never questioned it why. I just said -- okay, if you want me to write it, I'll write it.
>
> Q: Did anyone ever -- did Mr. Irving or did Mr. Leifheit on March 4th ever ask you why that got written or what the circumstances were?
>
> Mr. Baca: No, he did not.

Tr. at 617. In his testimony at the Hearing, Mr. Leifheit states that he saw the maxim that Mr. Russell wrote on the white board and that he confirmed with Mr. Baca that Mr. Russell wrote it. He further states that he did not confirm with Mr. Baca the context and why it was written. Tr. at 102-03. However, although Mr. Baca's memo is addressed to him, Mr. Leifheit does not recall asking Mr. Baca to write it.

> I did not [ask Mr. Baca to write it]. I don't know why this was written. My guess is, and this is a guess, I don't recall having a conversation with Tommy about this. My guess is, speculation on my part, that Mr. Irving or Mr. Waterbury might have asked him to do this. Or he might have done this on his own.

Tr. at 102. Mr. Leifheit also testified that it was "one of my folks, I still think it was either John [Waterbury] or Mike [Irving], but it could have been Pat Trujillo as well, talked about a conversation that had taken place between Jimmie [Russell] and Tommy Baca about Mr. Russell buying a sniper rifle." Tr. at 115.(13) Mr. Leifheit testified that this rumor was given serious consideration at the RAT, but that no one spoke to Mr. Baca about it.

> Q: The concept of buying [a sniper rifle] was pretty important to you?
>
> Mr. Leifheit: It was a contributing factor. It was a concern, yes.
>
> Q: It's a pretty loaded phrase to be throwing around a RAT team, isn't it?
>
> Mr. Leifheit: Well, you don't buy a sniper rifle for duck hunting, so yes, I would agree.
>
> Q: Sure. Did anyone talk to Mr. Baca about the conversation that was relayed to you by someone, which you passed on to the RAT team?
>
> Mr. Leifheit: No, I did not.

Tr. at 115. He testified that, although a rumor, "I think it was equally important to all the other incidents" in convincing him that LANL needed to take action against Mr. Russell. Tr. at 116.(14)

Based on this testimony, I believe that the findings of the ROI Investigator on the "white board" issue are correct. Moreover, the decision of the UC manager, Mr. Leifheit, not to look for explanations that would have exonerated Mr. Russell from allegations that he was threatening his co-workers and contemplating violence clearly raises the strong possibility that Mr. Leifheit acted with retaliatory intent against Mr. Russell. The presentation to Mr. Busboom of these incorrect or misleading allegations, along with the exaggerated concerns for personal safety expressed by Mr. Irving and Mr. Waterbury, constituted Mr. Busboom's acknowledged basis for his determination to convene the RAT. (15)

4. The RAT Relied Solely on Mr. Busboom and Mr. Leifheit in its Evaluation of Mr. Russell.

The RAT was convened on March 4, and Mr. Busboom stated that it consisted of himself, Mr. Leifheit, a legal representative, a medical representative, an employee relations specialist, and a member of the special projects office. Id. According to Mr. Busboom, the RAT "reviewed facts presented by the group leader [Mr. Leifheit]," and made its recommendation to terminate Mr. Russell. Id. Thus in reaching their consensus that Mr. Russell should be removed from the LANL workforce, the members of the RAT were entirely dependent on the factual information and concerns presented to them by Mr. Leifheit and Mr. Busboom. Mr. J. Patrick Trujillo, who participated in the RAT as a leader of the Employee Relations Group, testified that the meeting lasted about an hour, that Mr. Russell was not present, and that all of the information provided to team members concerning Mr. Russell came from Mr. Leifheit and Mr. Busboom. Tr. at 360, 363. According to Mr. Trujillo, these managers shared concerns "that Mr. Russell possibly had a weapon on site" and that there was "some sort of altercation with a co-worker." Tr. at 360. After he received the recommendation of the RAT, Mr. Busboom immediately took steps to permanently remove Mr. Russell from the LANL workforce. On March 5, 1999, Mr. Russell was instructed to depart the laboratory after turning over his keys and security badge.

Based on the analysis set forth above, I conclude that the allegations brought forward against Mr. Russell by UC managers Irving, Leifheit, and Busboom were relied upon by the RAT in reaching its consensus for termination and cited by Mr. Busboom as grounds for removing Mr. Russell from the LANL workforce and identifying his dismissal as "for cause." In addition, I find that these allegations included incorrect facts, speculation, and exaggeration to such an extent that there is a clear possibility that they reflected the retaliatory intent of these UC managers. I believe that this retaliatory intent arose in large part from the protected disclosures made by Mr. Russell and his disputes with his UC managers concerning those disclosures, some of which occurred proximate in time to his dismissal. Under these circumstances, the UC has not shown, by clear and convincing evidence, that these managers would have taken these actions against Mr. Russell in the absence of his protected disclosures, and that the UC would have terminated Mr. Russell's work assignment at LANL as a result. Mr. Russell therefore is entitled to relief under Part 708 for this termination and for the resulting termination of his employment by Comforce. See Reeves v. Sanderson Plumbing Products, Inc., No. 99- 536, 2000 WL 743663 (U.S. June 12, 2000) (a plaintiff may win an employment discrimination case by presenting a prima facie case of discrimination and discrediting the employer's explanation for its actions).

C. S-Division's Communication to DOE Security of Unsubstantiated or Exaggerated Derogatory Information Concerning Mr. Russell Was a Reprisal.

As discussed above, I have found that many of the "Facts" listed in Attachment 2 to the Busboom Memorandum as support for the concern that Mr. Russell was a potentially violent individual are inaccurate, speculative or highly exaggerated. In the cover memorandum itself, Mr. Busboom asked DOE Security that the information in the attachments be kept confidential because "we are extremely concerned that [Mr. Russell] would use any knowledge gained in this manner to target our employees for further acts of intimidation, or potentially -- violence." Busboom Memorandum. At the Hearing, Mr. Busboom

testified that when he reported these concerns to DOE Security, he was acting pursuant to the requirements of DOE Order 472(1)(b), which directs the UC, as a DOE contractor, to report derogatory information concerning an employee to the DOE. Tr. at 507-9.

While Mr. Busboom is correct in identifying his duty to report certain derogatory information concerning an employee to the DOE, I find that the concerns that he reported to the DOE concerning Mr. Russell were inaccurate and of such a nature as to interfere with Mr. Russell's ability to obtain access authorization (a security clearance) in the future. Moreover, as discussed above, I find that the UC has failed to show that these inaccuracies would have been present absent Mr. Russell's protected disclosures. I therefore conclude that the UC should be required to take such remedial action as may be necessary to provide the DOE Safeguards and Security Division with full and accurate information concerning the derogatory allegations about Mr. Russell that were contained in the Busboom Memorandum.

D. The UC Effectively Barred Mr. Russell from further Employment at LANL.

The ROI finds that Part 708 provides the DOE with jurisdiction over Mr. Russell's allegation that, subsequent to his March 5, 1999 dismissal from the LANL workforce, the UC retaliated against him by banning him from being hired for any work with or at LANL. ROI at 4. With regard to this allegation, the ROI finds that

> The UC terminated Russell for cause. Security Division management informed at least one other division director at LANL (Terry Hawkins, Division Director of the NIS) that Russell had been terminated for cause.

ROI at 5. The ROI also refers to the Busboom Memorandum, which bears the subject heading "Derogatory Information - Dismissal for Cause." Id. The effect of a dismissal for cause is a lengthy ban on a former employee's reemployment at LANL. In its Post- Hearing Brief, the UC acknowledges that the contract between the UC and Comforce provides that Comforce

> shall not refer candidates to the University who have:
>
> 1. Been discharged for cause by the University or by any subcontractor at the Los Alamos National Laboratory within the last seven (7) years.

UC Hearing Exhibit A, Other Document Section, Appendix I, p. 26. At the Hearing, Ms. Rose Ann Casale, the Regional Manager of Comforce, testified that immediately after Mr. Russell's March 5, 1999 termination, Comforce took steps to place Mr. Russell in a new position. Tr. at 666, 679, 701. Mr. Keith Whitworth, Comforce's Senior Recruiter, testified that he would have submitted Mr. Russell's resume for subsequent LANL openings, but was told by Mr. Fred Shelly, the UC's Staffing Specialist for Contract Workers, that "he didn't want to see [Mr. Russell's] resume coming across his desk." Tr. at 743. Later, Comforce received a LANL database sheet for Mr. Russell indicating that it was prepared by Mr. Shelley and dated May 14, 1999. This database sheet indicates that effective March 5, 1999, Mr. Russell's assignment ended. Under "reason" the words "per instruction of client - for cause" are written. Comforce Hearing Exhibit 1. Mr. Whitworth testified that his understanding was that "when someone is terminated for cause, we can't get them hired back up at the Lab for a period of seven years." Tr. at 743. In his testimony, Mr. Shelly confirm that Mr. Russell's official record at LANL indicates that his assignment with S-Division was terminated "for cause" and that this information would be made available to any prospective employers of Mr. Russell at LANL. Tr. at 434-35.

I conclude that the UC placed what in effect was a ban on the rehiring of Mr. Russell at LANL following the termination of his assignment with S-Division. Mr. Shelly's statement that he didn't want to see Mr.

Russell's resume carried the strong message that Mr. Russell was unwelcome as a job applicant at LANL. The UC's designation of Mr. Russell's termination as "for cause" led officials at Comforce to believe that the UC was invoking a contract provision that placed a seven year ban on Mr. Russell's employment at LANL. In its Post-Hearing Brief, the UC makes the ingenious argument that this contract provision is inapplicable in this instance because it only refers to a "for cause" termination of "employment" and the UC was never Mr. Russell's "employer." UC Post-Hearing Brief at 31. I reject this reasoning. The phrase "for cause" in the context of employment actions carries a specific meaning that is commonly understood by Comforce and UC officials as limiting the employee's future employment rights with LANL. The UC understood how Comforce would view this designation when it was applied to the termination of Mr. Russell's work assignment at S- Division, and the UC has offered no other explanation for using the words "for cause" in Mr. Russell's official employment record. Accordingly, I conclude that the UC effectively banned Mr. Russell's reemployment at LANL.

E. Comforce Is Liable for the Termination of Mr. Russell's Employment under Part 708, But Equity Favors Placing the Remedial Actions with the UC.

In its post-hearing brief, Comforce contends that it bears no liability for any of Mr. Russell's claims because it "was unaware that Jimmie Russell made any disclosures under 10 C.F.R. § 708.9 or that Comforce terminated his employment for such disclosures." Comforce Post-Hearing Brief at 1. At the hearing, Ms. Casale testified that when the UC terminates an employee's assignment at LANL, Comforce is forced to end the employee's employment. Accordingly, Comforce ended Mr. Russell's employment on March 5, 1999. She indicated that but for the UC termination of his assignment, Comforce would still employ Mr. Russell in his position as a Self-Assessment Team Leader at LANL. Tr. at 677-78. See Comforce Post-Hearing Brief at 2-4.

Although I find that Comforce had no role in the UC's decision to terminate Mr. Russell's work assignment at LANL, Comforce admits that it terminated its employment contract with Mr. Russell because the UC ended his work assignment with LANL. As discussed above, the UC's decision to end his work assignment constituted a retaliation against Mr. Russell for activity that is protected under Part 708. Comforce therefore terminated Mr. Russell's employment as a result of Mr. Russell's protected activity, and is jointly and severally liable with the UC for the damages arising from this termination.

As noted above, Part 708 applies to employees of DOE contractors and the term "contractor" is specifically defined to include "a subcontract under a contract . . . with respect to work related to activities at DOE-owned or -leased facilities." 10 C.F.R. §§708.1- 2. Mr. Russell was employed by a UC subcontractor, Comforce, to perform a work assignment at LANL. Both the UC and Comforce took actions which directly and negatively impacted the "terms", "conditions" and "privileges" of Mr. Russell's employment at LANL. Accordingly, both the UC and Comforce bear liability to remedy these "retaliations" under 10 C.F.R. §708.2. Although Comforce has shown that it acted against Mr. Russell solely as a result of actions taken by the UC, that showing does not relieve Comforce from liability in this matter. Part 708 contains no provision exempting a subcontractor from liability under such circumstances. To create such an exemption would vitiate the protections for whistleblowers that Part 708 was intended to provide. Accordingly, I find that Comforce is jointly and severally liable, along with the UC, for the damages arising from Comforce's termination of Mr. Russell's employment on March 5, 1999.

In the present case, both the UC and Comforce have sufficient resources to compensate Mr. Russell for back pay, lost benefits, litigation costs and other expenses necessary to provide relief for his termination from the LANL workforce by the UC and the resulting termination of his employment by Comforce. Under these circumstances, it is appropriate to consider the equities of requiring the UC and Comforce to share the burden of providing these remedies, or alternatively, of assigning these remedies to one or the other party. In Daniel Holsinger (Case No. VWA-0005), 26 DOE ¶ 87,506 (1996), the Deputy Secretary encouraged the weighing of equities in a situation where the imposition of an equitable remedy (in that instance reinstatement) placed a burden on an innocent party.

> With any equitable remedy, however, an adjudicator "must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" Teamsters v. United States, 431 U.S. 324, 375 (1977) [quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944)]. "Especially when * * * an equitable remedy threatens to impinge upon the expectations of innocent parties, the [adjudicator] must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable.'" Ibid. [quoting Lemon v. Kurtzman, 411 U.S. 192, 200-201 (1973) (plurality opinion of Burger, C.J.)].

Id. at 89,018. In the present case, Comforce has shown that it acted against Mr. Russell solely as a result of actions taken by the UC, and that it had no role in the deliberations leading to the UC's actions. Moreover, the UC's effective ban on Mr. Russell's employment at LANL after March 5, 1999 prevented Comforce from mitigating Mr. Russell's damages by seeking his employment in another contractor position at LANL. As discussed below, I find that the UC has not shown that it would not have hired Mr. Russell to an in-house position in March 1999 in the absence of his protected disclosures. Therefore, the most appropriate equitable remedy for Mr. Russell is for the UC to bring Mr. Russell back into the LANL workforce as its own employee and to provide him the wages and benefits that he would have received if he had been hired by the UC on March 6, 1999, the day after his dismissal from Comforce.(16) In light of these findings, I believe it is appropriate to hold the UC solely responsible for the repayment of Mr. Russell's lost wages and benefits, and for his litigation expenses. I will direct Comforce, as well as the UC, to delete from its employment records any reference to a "for cause" termination of Mr. Russell from the LANL workforce in March 1999.

F. The Decision by UC not to Hire Mr. Russell to a UC FTE Position Was a Reprisal.

As a contract employee in the LANL workforce, Mr. Russell is protected by Part 708 from retaliations for his protected disclosures, both by his employer, Comforce, and by his contract employer, the UC. As noted above, Mr. Russell's protected disclosures to his UC managers occurred proximate in time to his March 5, 1999 removal from the LANL workforce and dismissal from Comforce. These disclosures also occurred proximate in time to the March 1999 determination by UC management not to hire Mr. Russell for one of the two UC positions that it was creating to replace the contractor position of Self Assessment Team Leader then held by Mr. Russell. This administrative reorganization shifted Mr. Russell's job duties from a contract position with Comforce to a UC position.

Mr. Russell, as a contract employee of the UC who has made protected disclosures proximate in time to this reorganization, clearly is protected from retaliatory acts occurring during its implementation. I therefore find that the UC has not shown, by clear and convincing evidence, that it would have rejected Mr. Russell for both of the reorganized UC positions in the absence of his protected disclosures and the retaliatory intent that these disclosures engendered in his UC managers.

1. Mr. Russell was well-qualified for the UC positions.

It is not contested that Russell had the necessary training and experience required for the UC positions. At the Hearing, Mr. Waterbury testified that prior to conducting the interviews, each member of the screening committee (himself, Mr. Irving and Ms. Marcene Roybal) ranked the applicant resumes according to a matrix of qualifying characteristics and that Mr. Russell's resume ranked "within the top five." Tr. at 297. In fact, the resume ranking contained in Mr. Irving's March 8, 1999 Report (March 8 Report) to Mr. Leifheit (UC Hearing Exhibit V) indicates that Mr. Russell was tied for second place on the basis of his overall resume ranking among the 54 job applications that had been submitted. However, the top ranking candidate, Mr. David Cornely, declined an invitation to be interviewed for the S Division positions

because “he had accepted employment elsewhere.” Mr. Paul Mathis, who tied with Mr. Russell for the second highest score, also accepted employment elsewhere. March 8 Report at 2-3. Accordingly, Mr. Russell was the top ranked candidate available for selection by the UC on the basis of his resume qualifications. Moreover, as noted above, Mr. Russell had consistently received overall evaluations of “Outstanding” in his annual performance evaluations from S Division managers, and these evaluations contained no negative comments. Although Mr. Irving testified extensively at the Hearing concerning his encounters and arguments with Mr. Russell in 1998 and concerning complaints that he received regarding Mr. Russell’s alleged abrasiveness, Mr. Irving did not express these criticisms of Mr. Russell when he ranked Mr. Russell’s resume on February 5, 1999. He awarded Mr. Russell nine out of ten points in the following categories: (i) Demonstrated competence dealing with senior management & DOE Staff; (ii) Excellent interpersonal oral and written communication skills; and (iii) Demonstrated ability to work in a team environment. UC Hearing Exhibit U. Accordingly, I concur with the ROI’s finding that “Russell was among the top candidates for these positions.” ROI at 8, ft. 4.

2. Russell’s Conduct of his Job Interviews Does Not Furnish Clear and Convincing Evidence for his Rejection by UC.

The ROI finds that Mr. Russell’s conduct of his job interview on February 26, 1999 provided a sound basis for the UC’s decision not to award either of the UC positions to Russell. Specifically, the ROI finds that each of the three members of the screening committee recalled that Mr. Russell expressed some discontent with the S- Division during his presentation to the committee. ROI at 10. It also cites Mr. Russell’s conversation with Mr. Waterbury on the morning of the interview and concludes that “Russell’s disparaging remarks about his supervisor and open ambivalence about accepting one of the UC positions clearly justify the UC’s decision to award these positions to other more enthusiastic candidates.” ROI at 12.

Mr. Russell contests this finding, and argues that the facts established at the Hearing show that Mr. Russell’s disclosures were a contributing factor to the UC’s decision not to hire him, and weigh heavily against a finding that the UC’s failure to hire Mr. Russell was by clear and convincing evidence not an act of retaliation. Russell Post-Hearing Brief at 37. I have examined the record, and conclude that UC has not made this showing. As set forth below, there is a strong indication that it was UC management’s hostility towards Mr. Russell, and not his actual behavior, that resulted in its decision not to offer him a UC position.

With respect to Mr. Russell’s conversation with Mr. Waterbury on the morning of February 26, I have already found that Mr. Waterbury’s initial reaction to Mr. Russell’s outburst was “Jimmie being Jimmie” (Tr. at 295) and that Mr. Russell was simply venting his frustration at having to make a presentation and be formally interviewed. I also found that Mr. Russell’s alleged derogatory remarks about Mr. Irving contained in Mr. Waterbury’s memorandum, particularly the phrase “God Damn Idiot,” appear to be exaggerated, and that Mr. Waterbury’s memorandum itself, written after his conversations with Mr. Irving and Mr. Leifheit, may have been intended to assist his managers in building a case against Mr. Russell. In light of these findings, the UC has not established that the complaints voiced by Mr. Russell on the morning of February 26 would not simply have been ignored if they had made by some other co-worker being required to submit to an interview under similar circumstances.

In his March 8 Report, Mr. Irving provided the following explanation for the rejection of Mr. Russell’s application:

> Mr. Jimmie Russell could not demonstrate an ability to work in a team environment. Based on the results of the interview and internal issues that have been resolved, Mr. Russell is not considered a viable candidate for the position.

March 8 Report at 2. However, the UC has not established that Mr. Russell’s actual conduct at his job

interviews establishes a clear and convincing basis for its refusal to hire him. In Mr. Irving's March 8 report, he indicates that the four candidates interviewed to date had been given a numerical rating (on a scale of 0 to 4) by each committee member for each of the twelve questions that they were asked. The combined ranking of the committee members for each of the four candidates is contained in Mr. Irving's report and indicates that Mr. Russell scored the lowest of the four, with a total of 57 points. The other three candidates had point totals of 75.5, 61 and 86.5. Given my previous findings that Mr. Irving and Mr. Waterbury exaggerated Mr. Russell's inappropriate conduct and reported rumors in an effort to get Mr. Russell terminated, their low ratings of Mr. Russell's responses cannot be accepted as an impartial assessment of Mr. Russell's performance. It is also possible that Ms. Roybal's rating of Mr. Russell may have been influenced by hostile opinions and attitudes expressed by Mr. Irving and Mr. Waterbury concerning Mr. Russell. The UC has not shown, by clear and convincing evidence, that their low ratings of Mr. Russell's responses were unbiased or would have occurred in the absence of Mr. Russell's protected disclosures.

In particular, I am not convinced that Mr. Russell received fair treatment when all three screening committee members rated as zero Mr. Russell's response to the question: "please describe how you work in a team environment." This is the only instance where any candidate received a zero ranking from all three screening committee members in response to a question, and this rating rendered Mr. Russell ineligible for the position. At the Hearing, Mr. Russell testified that he responded to the question using a football team analogy because he knew that Mr. Irving had been a football player. He discussed the importance of each team member attending to his assigned task while being on the lookout to help others with the objective of accomplishing the team mission. Tr. at 1004-05.

Mr. Irving's interview notes for that question indicate that wrote down the phrases "put out most and best work one can," "if someone needs help, he will help them find it," and "football team" while listening to Mr. Russell's answer. UC Hearing Exhibit S, question no. 8. (17)

At the hearing, Mr. Irving, Mr. Waterbury and Ms. Roybal each testified that Mr. Russell's response to the question was so poor that he or she was forced to rate his response a zero. However, in light of Mr. Russell's testimony and the contemporaneous notes of Mr. Irving, I find that these responses are not credible. I therefore conclude that the UC has not shown by clear and convincing evidence that Mr. Russell would have received a disqualifying mark on this question in the absence of retaliatory intent on the part of UC management.

Finally, I am not convinced that Mr. Russell's questions about the job position and the direction of S-Division provide a clear and convincing reason for the UC's decision not to hire him. Mr. Irving, Mr. Waterbury and Ms. Roybal testified that they were shocked when, at the end of the interview, he expressed reservations about "where this program is going." Tr. at 254. Ms. Roybal, for example, testified that she found it "disconcerting" when Mr. Russell stated that he wanted to know more about the job because it may not be something that he wanted to do. She said that it was not a positive remark "and to me, in an interview, you want to be positive." Tr. at 249. On March 1, 1999, Mr. Russell attended a scheduled employment interview with Mr. Leifheit. Mr. Leifheit testified that at this meeting Mr. Russell had "basically taken the same approach . . . as he had at the screen team interview. He didn't particularly know if he wanted the job. Didn't particularly like the division." Tr. at 64.(18)

Based on the reservations and lack of enthusiasm that Mr. Russell expressed to his interviewers concerning S-Division management practices and the conduct of assessments there, the ROI concluded that UC's decision to award these positions to "other more enthusiastic candidates" was clearly justified. ROI at 12. However, while the UC may have provided a clear justification for its decision not to hire Mr. Russell, that is not in itself sufficient to meet its burden of persuasion under Part 708. The provisions of Part 708 clearly indicate that in this situation, the burden is on the UC not just to show that it had a good business reason for its action, but to show, by clear and convincing evidence, "that it would have *taken that same action* without the employee's disclosure." 10 C.F.R. § 708.29 [emphasis added].

There may well have been legitimate business reasons for the UC to prefer candidates who expressed more enthusiasm for S-Division's management of the assessment program than did Mr. Russell. However, I cannot conclude that it is clear and convincing that this management decision would have been the same absent Mr. Russell's protected disclosures. Under Part 708, these protected disclosures are presumed to have influenced UC management to implement hiring criteria that would not operate to Mr. Russell's benefit. The UC has the burden of showing that its decision was not influenced by Mr. Russell's protected activities. The reservations that Mr. Russell expressed concerning S-Division's management of its assessment program and his request for reassurances concerning his role in the program are the type of questions that an incumbent candidate would normally ask and do not disqualify him for employment with that division. In light of his acknowledged qualifications for the position and his past record of achievement as an assessment team leader, the UC has not made a clear and convincing showing that, in the absence of his protected disclosures, Mr. Russell's expressions of reluctance and concern about the direction of the program at his job interviews would have precluded his being made a job offer.(19)

V. Conclusion

Based on the analysis presented above, I find that Mr. Russell has made disclosures protected under Part 708, and that these protected disclosures were a contributing factor to adverse personnel actions taken by the UC and Comforce against Mr. Russell. Furthermore, I find that the UC and Comforce have not shown by clear and convincing evidence that they would have taken these same actions in the absence of Mr. Russell's disclosures. Therefore, Mr. Russell is entitled to remedial action from the UC and Comforce. I find that this remedial action shall include his placement by the UC in a comparable task position to the Security Specialist 03, SSM-02 position for which his application for employment was rejected by the UC in March 1999. The UC shall also provide Mr. Russell with back pay and benefits for the Security Specialist 03, SSM-02 position going back to the day following the March 5, 1999 termination of his work assignment and employment by the UC and Comforce.(20) The remedial action shall also include the payment of attorney fees and litigation expenses by the UC, the removal and or correction of information concerning Mr. Russell in UC and Comforce personnel files, and the correction by the UC of information that it provided to DOE Security concerning Mr. Russell.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Mr. Jimmie Russell under 10 C.F.R. Part 708 is hereby granted as set forth below.

(2) The University of California (UC) shall immediately place Mr. Russell in the position of a full-time regular UC employee in a comparable task position to the Security Specialist 03, SSM-02 position for which his application for employment was rejected by the UC in March 1999 at the salary rate calculated in the Appendix to this decision.

(3) Mr. Russell shall produce a report that provides information on attorney's fees and litigation expenses. Mr. Russell's report shall be calculated in accordance with the Appendix.

(4) The UC shall produce a report that calculates the back wages plus interest payable to Mr. Russell. The UC's report shall be calculated in accordance with the Appendix.

(5) The UC shall pay Mr. Russell attorney's fees and litigation expenses. The amount of these payments shall be in accordance with the report specified in paragraph (3) above.

(6) The UC shall pay Mr. Russell back wages plus interest. The amount of this payment shall be in accordance with the report specified in paragraph (4) above.

(7) The UC shall make retirement fund contributions in the amount calculated in the report specified in the Appendix.

(8) The UC shall make information available and otherwise facilitate Mr. Russell making retirement fund contributions as calculated in its report specified in the Appendix.

(9) The UC and Comforce shall remove all information regarding his proceeding from Mr. Russell's personnel files, and shall eliminate any and all "for cause" designations made with regard to the March 5, 1999 termination of his work assignment at LANL and/or his employment with Comforce.

(10) The UC shall notify the Director, Safeguards and Security Division, DOE Albuquerque Operations Office, that Attachment 2 to the March 12, 1999 memorandum from Stanley L. Busboom, Director of Security to his Office entitled "Derogatory Information - Dismissal for Cause (Jimmie L. Russell)" contained information under the heading "facts" that is incorrect or exaggerated and that may have been assembled with the purpose of retaliating against Mr. Russell in violation of 10 C.F.R. Part 708. The UC shall enclose a copy of Mr. Busboom's memorandum and its attachments and a copy of this decision with its notification.

(11) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting Mr. Russell relief unless, within 15 days of the date of this Order, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Kent S. Woods

Hearing Officer

Office of Hearings and Appeals

Date: July 18, 2000

APPENDIX

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order: reinstatement; transfer preference; back pay; and reasonable attorney and expert-witness fees; and such other remedies as are necessary toabate the violation and provide the employee with relief. 10 C.F.R. § 708.36.

As discussed in my initial agency decision in this matter, Mr. Russell is entitled to remedial action from the UC and Comforce. This remedial action shall include his placement by the UC in a comparable task position to the Security Specialist 03, SSM-02 position for which his application for employment was rejected by the UC in March 1999, along with back pay and benefits for that position going back to the day following the March 5, 1999 termination of his work assignment and employment by the UC and Comforce. The remedial action shall also include the payment of attorney fees and litigation expenses, the removal and or correction of information concerning Mr. Russell in UC and Comforce personnel files, and the correction of information provided to DOE Security by the UC concerning Mr. Russell. Accordingly, in order to implement these remedies, I have here provided clarifications concerning the nature and extent of certain benefits that Mr. Russell is entitled to received. I have also directed the UC and Mr. Russell to make certain calculations and provide them to the other parties within 30 days of the date of this order. Finally, I have provided for a negotiation period between the parties and a final report on remedial calculations. In the event of an appeal, both the UC and Mr. Russell shall follow the negotiating and reporting steps set forth below unless those requirements are specifically stayed by an appropriate official.

A. Clarification Concerning Mr. Russell's Benefits

Mr. Russell is not entitled to restoration of sick and annual leave that would have been accrued since March 6, 1999. It is likely that Mr. Russell would have used that leave. Therefore, it would amount to double counting to compensate him for all the hours during the unemployment period while permitting him

to accrue leave for future use. Of course when reinstated he should be credited with all leave he had accrued and not used prior to his dismissal unless he has been previously compensated for that leave.

I believe it is highly speculative to determine the earnings and the investment pattern of funds that would have been contributed by the UC to the retirement account that it would have maintained for Mr. Russell. Therefore, I will direct the UC to now contribute any amounts it would have contributed during the unemployment period. In addition, the UC shall facilitate Mr. Russell's contribution of any retirement fund amounts he would have contributed had he been employee during the unemployment period.

B. The UC's Calculations

In order to calculate back wages plus interest, retirement fund contributions and leave accrued, The UC shall make the following calculations and provide them to Mr. Russell within 30 days of the date of this order. (21) In the event that the exact date of reinstatement to the LANL workforce is unknown, the UC shall make the calculations through the first pay period ending on or after October 31, 2000.

1. Calculate the number of hours of overtime the average Security Specialist earned during each pay period ending during the period March 1, 1999 through February 29, 2000. In the alternative to making such a calculation, the UC may use four hours of overtime each week.

2. Provide for each pay period the basic pay rate per hour Mr. Russell would have received per hour. For the period from March 6, 1999 until the date that annual pay increases are granted, the UC shall use the hourly rate Mr. Russell would have received if he had been hired to the Security Specialist 03, SSM-02 position for which his application for employment was rejected by the UC in March 1999. For periods after the date of annual hourly rate change, the UC shall increase the rate by the average increase that Security Specialists received. In the alternative to making a calculation of the average increase of Security Specialists, the UC may use 5%.

3. Using the principles described in item 2, provide for each pay period the overtime rate Mr. Russell would have received.

4. Determine the gross wages the individual would have earned by multiplying the basic salary rate (item 2) by forty and the overtime hourly salary rate (item 3) by the number of overtime hours (item 1).

5. Calculate the amount of interest that would have been earned on the gross wages. The interest shall be 10% annually, accrued and compounded semiannually. The calculation shall be made by accruing 5% interest on the balance of the salary accrued (item 3) and the prior interest accrued on December 31 and June 30 of each year.

6. Provide a calculation of the amount the UC would have contributed to any retirement account during the unemployment period.

7. Provide information on each retirement or leave benefit that is based on the length of an employee's service. For each such plan, indicate how the firm will adjust Mr. Russell's credited service to compensate for the unemployment period.

8. Calculate the amount Mr. Russell was eligible to contribute to retirement programs during the unemployment period. Indicate how the UC will facilitate Mr. Russell's ability to make those contributions.

9. Calculate the amount of accrued leave Mr. Russell will have on the date of his

reinstatement.

C. Mr. Russell's Calculations

Within 30 days of this order Mr. Russell shall provide the UC the following information,

1. A calculation of the out of pocket litigation expenses and attorney's fees. In calculating attorney's fees, Mr. Russell's counsel should estimate his hours and expenses for this calculational portion of the proceeding. Mr. Russell's attorney shall provide the UC with sufficient information to understand how his hours and costs were determined. Mr. Russell shall also provide reasonable information regarding his out of pocket litigation expenses.

2. Records describing the medical expenses Mr. Russell believes would have been paid by insurance if Mr. Russell had not been discharged. Also, Mr. Russell should indicate any change in Mr. Russell's medical insurance cost as a result of his discharge. The change in medical insurance cost will be an offset to the incremental medical bills or an additional recoverable expense.

D. Negotiation Period

The parties will have ample time up to sixty days from the date of this order to discuss and negotiate any disputes regarding the calculations. During that period I expect that both parties will provide reasonable information to facilitate the other party's understanding of calculations.

E. Final Report

Seventy days from the date of this order Mr. Russell shall provide a report to the UC and the Office of Hearings and Appeals with a summary calculation. Mr. Russell shall describe in detail any matters that remain in dispute. The UC will have 15 days from the date of that report to provide a response.

Footnotes

(1)On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12,862 (March 15, 1999).

(2)As Mr. Russell's complaint was pending on April 14, 1999 when the revised Part 708 regulations took effect, I will apply the language of the original version of the Part 708 regulations wherever application of the revised Part 708 would subject a party to a more stringent showing or other regulatory requirement to which it was not previously subject. To apply the revised Part 708 language in such an instance would clearly prejudice that party, contrary to the clear intent of the revisions to the regulations. See Salvatore Gionfriddo, 27 DOE ¶ 87,544 at 89,224 (1999).

(3)In its Post-Hearing Brief, the UC argues that Mr. Russell's dispute with UC management concerning his CMPC assessment cannot involve a protected disclosure in this instance because the dispute concerning this assessment apparently centered on Mr. Russell wanting to give the assessed program office a higher overall rating ("satisfactory") than did his managers ("marginal"). UC Post-Hearing Brief at 16, citing Tr. at 977. I do not agree. The dispute relates to the proper evaluation of a program area based directly on the reporting of regulatory violations that are protected disclosures under Part 708. Whether the dispute involved a more favorable or less favorable rating category is irrelevant to the fact that the data that constituted the protected disclosures were an essential element in the dispute.

(4)The evident willingness of Messrs. Irving, Leifheit and Busboom to see Mr. Russell's actions as intentionally menacing and not to look for any alternative explanation raises the strong possibility of retaliatory intent on their part.

(5)The first attachment involved information surrounding an investigation by LANL's Audits and Assessments Division Internal Evaluations Office (IEO) of a complaint that Mr. Russell was using his office and computer for personal business. The UC Post Hearing Brief asserts that "the termination [of Mr. Russell] was solely and completely linked to the reasonable perception that Russell presented a threat of violence in the workplace." UC Post Hearing Brief at 4. Accordingly, I will not consider whether the findings of the IEO audit justified the termination for cause of Mr. Russell.

(6)In fact, on February 24, 1997, while an employee of Comforce at S-Division, Mr. Russell taught a fire-arms safety course with the support of the Los Alamos Sportsmen's Club (LASC), a LANL-sponsored club under the Club 1663 program. See February 20, 2000 memo from Mr. Maxwell T. Sanford II, LASC membership chair, to Mr. Russell, attached to May 23, 2000 submission of counsel for Mr. Russell entitled "Motion to Supplement Evidentiary Record."

(7)The UC did present the testimony of Mr. Waterbury, who claimed that he felt threatened by being in Mr. Russell's path as he allegedly stormed through a door in the S-Division offices. I will discuss that incident below, but for now it is sufficient to find with respect to this incident that there is no indication either that Mr. Russell intended to make physical contact with Mr. Waterbury as he passed through the doorway, or that he actually did so.

(8)According to Mr. Irving's Memorandum of Record, dated October 13, 1998, a 3 plus rating equates to slightly above "meets the basic standards for the position held." UC Hearing Exhibit J.

(9)Mr. Irving composed a memo for his own file, dated October 13, 1998, in which he criticized Russell's behavior in this episode, and reported that "I told Tucker that I would request that Mr. Russell's services be terminated if he acted in the same manner with me again." UC Exhibit J. At the Hearing, Mr. Tucker confirmed that Mr. Irving told him this, but testified that he did not mention this comment to Mr. Russell. Tr. at 244. Mr. Irving's memo was not placed in Mr. Russell's official employment file and Mr. Russell was unaware of its existence prior to the termination of his position at S- Division. Tr. at 848-852. While Mr. Irving's memorandum describes Mr. Russell's attitude as "hostile" and "belligerent" when they were discussing his evaluation, Mr. Irving never indicates that Mr. Russell physically threatened him during these discussions.

(10)In his testimony at the Hearing, Mr. Busboom stated that in November 1998, Ms. Huling had visited his office to express a concern about "her general fear of firearms and her specific fear of firearms in the hands of Mr. Russell." Tr. at 477. Ms. Huling, however, did not report this meeting in her deposition. Instead, she stated there that she expressed her fears about Mr. Russell and his firearms to Mr. Busboom "sometime after March 5" when she expressed thanks to Mr. Busboom for letting her know on March 5, 1999 that Mr. Russell had been terminated. Huling Deposition at 29. It appears that Mr. Busboom may be mistaken in his recollection.

(11)Mr. Russell freely admitted in his testimony that he had a very low opinion of Mr. Irving's performance as a manager, considering him to be too controlling and too eager to please his superiors. He testified that when Mr. Irving had asked him "point blank" if Mr. Russell thought he was a "yes man," Mr. Russell had explained his reasons for holding that opinion. Tr. at 997-1001.

(12)Mr. Waterbury testimony at the Hearing indicates that his efforts to please his supervisors extended beyond performing the duties of his position with LANL. He acknowledged performing roof and auto repairs for Mr. Irving and helping to pour a driveway for Mr. Leifheit. Tr. at 316.

(13)In his testimony, Mr. Baca stated that at no time during their discussion of sniper rifles, did Mr. Russell express any interest in buying one. Tr. at 617-18.

(14) In addition to the incidents already discussed, Mr. Leifheit referred to a February 24, 1999 incident where Mr. Russell allegedly exhibited anger and attempted to push open a locked door in order to exit his work area (Tr. at 57-58), and to a March 1 conversation where Mr. Russell allegedly complained to a co-worker about Mr. Irving's unfair conduct of the selection process and stated that "I can play hardball, too." Tr. at 63. These incidents were discussed at the RAT as evidence of Mr. Russell's poorly controlled temper and strained interpersonal relationships. However, they do not provide significant support for the RAT's conclusion that Mr. Russell presented a physical threat to Mr. Irving or to his co-workers.

(15)On March 12, 1999, Mr. Busboom reported to DOE Security that on March 2, Mr. Irving and Mr. Leifheit met with him and discussed their concerns "that Mr. Russell may have threatened and/or intimidated other employees." Busboom Memorandum, Attachment 2. On March 3, he again met with Mr. Leifheit "and the decision was made to convene a rapid action team." Id.

(16)In the absence of any retaliatory acts by the UC and Comforce, Mr. Russell would have continued working at LANL as a contract employee for a short period after March 5, 1999, before converting over to a UC position. However, as a matter of administrative efficiency and equity, I believe it is proper to use March 6, 1999 as his first day in a UC position for purposes of calculating Part 708 relief.

(17)This page also indicates that when writing his notes concerning Mr. Russell's response to this question, Mr. Irving deliberately avoided putting any comments on the portion of the page reserved for positive remarks and headed "strengths." At the Hearing, Mr. Irving explained that he placed the comments quoted above in a neutral spot at the bottom of the page because he felt that they did not rise to the level of a "strength." Tr. at 234. However, this is the only instance in recording his interview notes where Mr. Irving did not record all of his comments in the two boxes labeled "Strengths" and "Weaknesses." It therefore indicates to me the strong possibility that Mr. Irving had decided to rate Mr. Russell a zero on this question regardless of how he answered it, and was determined to leave the "Strengths" box empty.

(18)In his testimony, Mr. Russell explained that he asked the screening committee about the direction of the program because "there were differences between the job that I had been doing and the way this one was written up in the job ad, and I was curious as to what those differences meant." Tr. at 1054. Mr. Russell also testified that at the conclusion of a very brief interview with Mr. Leifheit, he spent ten or fifteen minutes in conversation with him concerning the direction the assessment program was heading, assessment philosophy, Mr. Russell's relationship with Mr. Irving, and how assessors were treated in the field. He testified that he did most of the talking in response to Mr. Leifheit's questions and comments. Tr. at 1077-78. I do not find such questions and comments to be outside the bounds of acceptable behavior for an in-house candidate interviewing for a position.

(19)Similarly, I find that Mr. Russell's behavior toward his coworkers and managers, as discussed in the previous sections of this opinion, does not furnish a clear and convincing basis for the UC not to have hired him. Nor does the IEO report concerning his use of certain office resources for his private business.

(20)In providing this back pay and benefits, the UC is not entitled to offsets for wages and benefits earned by Mr. Russell from other sources during this period. The express terms of the regulation do not provide for any adjustments to "back pay." See Am-Pro Protective Services, Inc. (Case No. VWA-0015), 26 DOE ¶ 87,511 at 89,071 (1997).

(21)The UC shall also provide Mr. Russell's counsel with sufficient detail for him to determine how the weekly hours of overtime and wage rate increase calculations were made.