* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

June 27, 2002

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Bernard F. Cowan

Date of Filing: November 27, 2001

Case Number: VBH-0061

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Bernard F. Cowan under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Mr. Cowan contends that reprisals were taken against him after he made certain disclosures concerning mismanagement and safety violations to DOE officials and to his employer, Argonne National Laboratory-West (ANL-W), a contractor for the DOE's Chicago Operations Office (DOE/CH). Mr. Cowan contends that ANL-W retaliated against him by (i) referring to him in an Occurrence Report, (ii) failing to select him for a training specialist position, (iii) including undue criticism of him on a performance evaluation, (iv) transferring him to a job that deprived him of compensation, and (v) suspending him for three days without pay.

I. Summary of Determination

Based on my analysis of the record in this proceeding, I find that Mr. Cowan made at least one protected disclosure that was proximate in time to adverse personnel actions taken against him by ANL-W. Other adverse personnel actions were taken after Mr. Cowan initiated his Part 708 complaint. Under these circumstances, the DOE's strong commitment to defending whistleblowers imposes the significant requirement that ANL-W show by clear and convincing evidence that, in the absence of these protected disclosures, it would have taken the same negative personnel actions against Mr. Cowan.

As indicated below, I find that ANL-W management's findings concerning Mr. Cowan in a June 2000 Occurrence Report did not constitute an action with respect to employment under the definition of retaliation contained in Section 708.3. I find that Mr. Cowan's failure to be selected for a training specialist position, criticism of Mr. Cowan contained in a 2000 interim performance appraisal, the June 2000 transfer of Mr. Cowan from one laboratory facility to another, and Mr. Cowan's January 2002 suspension for three days without pay were each an adverse personnel action.

After concluding that there were four adverse personnel actions that were close in time to a protected disclosure or occurred during the pendency of a Part 708 Complaint, I analyze whether ANL- W has demonstrated by clear and convincing evidence that it would have taken those personnel actions absent the protected disclosure or protected activity. I find that, with the exception of its selection for the training specialist position, ANL-W has failed to establish by clear and convincing evidence that it would have taken these negative personnel actions absent Mr. Cowan's protected disclosures.

Accordingly, I find that the ANL-W committed reprisals against Mr. Cowan, and that it should be required to take restitutionary action.

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. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise take any adverse personnel action 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 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 are entitled to 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. History: Mr. Cowan's Complaint and Relevant Events Concerning his Employment at ANL-W

Mr. Cowan filed his Part 708 complaint with the Manager of Employee Concerns of the DOE's Chicago Operations Office (DOE/CH) on March August 25, 2000. On February 13, 2001, OHA Director George B. Breznay appointed an OHA Investigator to conduct an investigation of Mr. Cowan's complaint. On November 27, 2001, the OHA Investigator issued her Report of Investigation (the ROI). Mr. Cowan's employment history at ANL-W may be summarized in the following manner. In 1974, Mr. Cowan was hired as an Engineering Technician Sr. in the Operations Division (OD) at ANL-W. In 1989, he was promoted to a Training and Procedures Specialist in the Training Group of ANL-W. He later voluntarily transferred from the Training Group to the Fuel Conditioning Facility (FCF) as an Engineering Technician Sr.

The events relevant to Mr. Cowan's Part 708 complaint began on March 13, 2000, when Mr. Cowan wrote a letter to the Manager, FCF, expressing a number of workplace concerns. He had meetings with the Operations Division Director and other ANL-W managers on March 28, 2000 and April 7, 2000 to further discuss his concerns. In April 2000, Mr. Cowan and other ANL-W employees at the FCF were transferred to ANL-W's Sodium Processing Facility (SPF). Mr. Cowan immediately protested this transfer and was permitted by ANL-W management to return to the FCF.

In May of 2000, a Training Specialist position which was vacated by retirement was posted. The record reflects that Mr. Cowan, along with six others, applied for the position. He was not hired for the position.

On May 18, 2000, ANL-W management directed Mr. Cowan to "lock out, tag out" (LO/TO) certain FCF cell lighting circuit breakers.(1) During a routine inspection on June 6, 2000, some of these circuit breakers

were discovered to be locked improperly in the “on” position, although the tags indicated that they were “off”. An ANL-W occurrence report concluded that the breakers were incorrectly positioned and tagged at the time that the LO/TO was installed by Mr. Cowan. In meetings and communications with ANL-W managers, Mr. Cowan insisted that he had correctly performed the LO/TO of these circuit breakers and that he believed someone had deliberately reset them in the “on” position. He requested an investigation of the matter. On December 21, 2000, the DOE’s Argonne Area Office - West (AAO-W) requested ANL-W to investigate the alleged criminal act of someone purposefully reconfiguring the system lineup under the LO/TO performed by Mr. Cowan. In a report issued on January 31, 2001, the ANL-W concluded that, while it was possible for the alleged act to have taken place, the allegation could not be substantiated. On April 6, 2001, the AAO-W issued its investigation report concerning the LO/TO incident and reached the same conclusions.

On June 28, 2000, ANL-W management again transferred Mr. Cowan, under protest, to the SPF, where he remained until March 5, 2001 when management transferred Mr. Cowan to ANL-W’s radiological facility (FASB).

On November 21, 2000, as part of his annual performance appraisal, Mr. Cowan received an interim evaluation employee performance for the period 4/1/00 through 6/23/00. This interim evaluation gave Mr. Cowan a low rating compared to those he generally received and criticized Mr. Cowan for becoming “preoccupied with administrative problems.”

Finally, on January 7 and January 9, 2002, Mr. Cowan sent messages addressed “To: Distribution to Argonne National Laboratory employees.” ANL-W management concluded that portions of these e- mails violated laboratory policies. ANL-W management disciplined Mr. Cowan with a three day suspension, without pay, on January 10, 13, and 14, 2002.

C. The ROI’s Findings

The ROI issued on November 27, 2001 finds that in March and April, 2000, Mr. Cowan brought safety and management concerns to the attention of ANL-W management and to the DOE/CH Employee Concerns Manager. The ROI finds that it is undisputed by ANL-W management that Mr. Cowan made these disclosures and that he reasonably believed that his concerns were of the type described in Section 708.5. The ROI also finds that there was a proximity in time between the protected disclosures and the following alleged adverse personnel actions:

(1) Poor performance evaluations and minimal merit increases in performance appraisals;

(2) Denial of promotions to Mr. Cowan, and failure to select him for a Training Specialist position;

(3) Mr. Cowan’s transfer under verbal protest from the FCF to the SPF in June 2000; and

(4) ANL-W’s assignment of responsibility to Mr. Cowan in an occurrence report for failing to correctly “lock out, tag out” the FCF’s cell lighting circuit breakers on May 18, 2000.

The ROI finds that Mr. Cowan appears to have met his burden of showing that his protected disclosures were a contributing factor to these alleged acts of retaliation as required under 10 C.F.R. §§ 708.5 and 708.29. 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. The ROI finds that the available evidence indicated that ANL-W had met its burden of showing by clear and convincing evidence that it would have taken the same adverse personnel actions in the absence of the protected disclosures. ROI at 11. Specifically, the ROI finds that the available evidence establishes

that the criticism of Mr. Cowan's job performance contained on one of his evaluations was reasonable and accurate; that ANL-W acted reasonably in selecting another applicant for the position of Training Specialist; that Mr. Cowan's transfer to the SPF was a reasonable exercise of managerial discretion by ANL-W; and that ANL-W's assignment of the "lock-out tag-out" error to Mr. Cowan appeared to be factually accurate and did not result in any financial loss or loss of promotion opportunity to Mr. Cowan.

Mr. Cowan and Counsel for ANL-W exchanged and submitted responses to the findings of the ROI on December 19, 2001 and January 2, 2002, respectively. In these briefs, both parties objected to findings made in the ROI. ANL-W disputes the ROI's finding that Mr. Cowan made disclosures that are protected under Part 708. Mr. Cowan's brief indicates his belief that many of the findings and conclusions in the ROI are inaccurate.(2) In a January 8, 2002 letter to the parties, I identified certain relevant areas that I believed would help to focus the issues in dispute in this proceeding. With respect to whether Mr. Cowan had made a protected disclosure, I referred to page 7 of Mr. Cowan's March 2000 memorandum to ANL-W management. I stated that Mr. Cowan's reports concerning an operator who is a HAZ-MAT responder who resists wearing a respirator appeared to be protected disclosures concerning health and safety issues. In addition, I stated that the ROI indicates that Mr. Cowan told management officials following the May 18, 2000, Lock Out/Tag Out incident, that another operator should have verified the correctness of the tags, but that no verification was done. I stated that this reporting of a violation of a safety protocol to ANL-W management and to the DOE appeared to constitute a protected disclosure under Section 708.5.

The parties also exchanged and submitted extensive documentary evidence, reply briefs, and witness lists. On March 5 and March 6, 2002, I convened an evidentiary hearing (the Hearing) at which a total of eleven witnesses presented testimony. The testimony at the hearing focused on efforts by Mr. Cowan and counsel for ANL-W to show whether the disclosures of Mr. Cowan referred to in my January 8 letter should be viewed as protected disclosures for purposes of Part 708. Mr. Cowan and counsel for ANL-W also presented testimony concerning whether ANL-W's alleged adverse personnel actions listed above, as well as its 2001 transfer of Mr. Cowan to the FASB and its three day suspension of Mr. Cowan in January 2002, were or were not adverse personnel actions and whether Mr. Cowan's alleged protected disclosures were contributing factors to these actions.

Following the receipt of post-hearing submissions by the parties, I permitted counsel for ANL-W to comment on the appropriateness of evidentiary material submitted by Mr. Cowan along with his post-hearing brief. Upon receipt of these comments on April 29, 2002, I closed the record of the proceeding.(3)

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.

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. Cowan and ANL-W. "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. Cowan has met his threshold burden, the burden of proof shifts to the ANL-W. ANL-W must prove by "clear and convincing" evidence that it would have taken the same personnel actions regarding Mr. Cowan absent the protected disclosure. "Clear and convincing" evidence is a 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. Cowan 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 ANL-W, ANL-W must convince me that it clearly would have taken this adverse action had Mr. Cowan never made any communications concerning violations of unsafe or insecure practices and procedures at the FCF.

IV. Analysis

A. Mr. Cowan Made Protected Disclosures

In its filings and through witness testimony at the hearing, counsel for ANL-W argued vigorously that Mr. Cowan has made no disclosures that should be considered protected for purposes of Part 708. I have reviewed this carefully, and find that these arguments must be rejected. As discussed below, I find that the record in this proceeding supports Mr. Cowan’s assertion that he made protected disclosures to the ANL-W management and/or the DOE in March and June 2000.

1. Mr. Cowan’s March 2000 statements about a Fellow Employee Raised Significant Safety Concerns.

In a memorandum dated March 28, 2000 entitled “Whistleblower Declaration - concerns”, Mr. Cowan provided the following information in a section entitled “Emergency Response Team”:

> While assigned to the facility system operations, date is uncertain, management informed the crew that one of the operators had a problem with wearing a respirator, and management is working with him to overcome the problem. This operator is a HAZ-MAT responder and part of the re- entry team.
>
> During a FCF evacuation this operator refused to be part of the re-entry team back up. The FAS assigned me his duty as team member.
>
> This incident is not well standing for management to place this operator in an assignment that might jeopardize his safety, team member safety, or the safe operation of a re-entry.
>
> This operator still operates in the capacity of HAZ-Mat responder and re-entry member, with responsibility of responding on back shift when assigned.

March 28, 2000 memorandum from Mr. Cowan to Mr. G. L. Lentz, Operations Division Director, ANL-W, at p. 7.

On April 12, 2000, ANL-W management organized an investigation team of ANL-W employees to investigate and evaluate the issues raised by Mr. Cowan, including this HAZ-MAT responder issue. In its Investigation Report issued on May 18, 2000, the team made the finding that the operator in question, Mr. XXXXXX, has been medically certified/qualified for HAZ-MAT and Respirator for several years (most recently in November 1999) and has no medical restrictions in this regard. The team also found that being a member of a re-entry team is voluntary for all employees on-site.

See May 18, 2000 Investigation Report at 16-17 (attached to ANL-W's February 15, 2002 submission in this proceeding). The team's other findings and recommendations are discussed below.

In its December 19, 2001 response to the ROI, ANL-W contended that Mr. Cowan never made any protected disclosure for purposes of Part 708. In a January 22, 2002 reply brief, ANL-W argued that Mr. Cowan's contentions regarding the HAZ-MAT responder were not protected disclosures because his contentions were not accurate.

> . . . Mr. Cowan's statements concerning [the HAZ-MAT responder] are not true. The individual does not and has not since the Laboratory learned of the problem, been assigned as a HAZ MAT responder, nor is he a re-entry team member. He does not have nor has he had the responsibility of responding on the back shift. Therefore there is not and never has been a substantial and specific danger to employees or to the public health and safety in order to fall under the requirements of 10 C.F.R. 708.5.

ANL-W Reply Brief at 3. In its Post-Hearing Brief, ANL-W explained why it believed that the testimony at the hearing supported its position.

> Mr. Cowan's allegation . . . involved an ANL-W employee, [Mr. XXXXXX], who was qualified as a Hazardous Material Responder, but who was claustrophobic and had trouble wearing a full face respirator for long periods of time. The Laboratory first became aware of Mr. XXXXXX's problem in September 1997 -- a fact which Mr. Cowan does not dispute. [Hearing Transcript (TR) at] page 109, lines 20- 23. Mr. Cowan testified that he waited 2.5 years to report his concerns regarding Mr. XXXXXX to Laboratory management. [TR] page 114, lines 19-23. Mr. Evans,[ANL- W's Associate Division Director for Operations for the Facility Division, with oversight responsibility for the FCF], testified that the Laboratory was already aware of Mr. XXXXXX's problem when Mr. Cowan brought it to the attention of management. [TR] page 291, lines 21-24. Mr. Evans also testified that an individual's participation on a re-entry team was completely voluntary; that the Laboratory had taken steps to ensure that Mr. XXXXXX was not required to participate on re- entries, and that in the event of a hazardous spill requiring a re-entry, it would be the INEEL Fire Department who would perform those duties. [TR] page 290, lines 16-22, page 291, lines 6-9; page 292, lines 2-7; page 293, lines 11-14. Mr. Evans also testified that Mr. XXXXXX was evaluated by the medical staff and passed respirator training. [TR] page 279, line 25; page 280, line 1. Mr. Evans testified that there are things a HAZ MAT Technician could do that did not require wearing a respirator, such as "... draining, dragging, bringing Haz Mat spill containment materials ... So you can be a HAZ MAT Technician and, and not really, and, and function as a HAZ MAT Technician and not really be required to wear a respirator..." [TR] page 228, lines 20-25, page 289, lines 1-8. Mr. [Robert] Belcher, [Operations Supervisor at FCF], also testified that participation on a re-entry team was purely voluntary. [TR] page 216, lines 20-23.

ANL-W's Post-Hearing Brief at 4-5. ANL-W concludes that disclosure of the HAZ MAT incident by Mr. Cowan was not a protected disclosure because some levels of ANL-W management knew of the situation regarding Mr. XXXXXX 2.5 years before Mr. Cowan raised his concerns, and because it believes that the evidence shows that ANL- W had dealt effectively with the issue, and there was no substantial and specific safety issue as required under 10 C.F.R. § 708.5. *Id.*, at 5.

I am not convinced by ANL-W's contentions. Section 708.5(a)(2) states that an employee is protected from retaliation when he has provided to his employer information that he reasonably believes reveals "a substantial and specific danger to employees or to public health and safety." These conditions appear to have been met with Mr. Cowan's March 2000 disclosure concerning the HAZ MAT operator. As an initial matter, I reject ANL-W's assertion that this was not a covered disclosure because ANL-W management was already aware of Mr. XXXXXX's medical condition. Mr. Cowan made his disclosure to Mr. Lentz, ANL-W's Operations Division Director. At the Hearing, Mr. Lentz testified that he first became aware of the potential problem concerning Mr. XXXXXX when Mr. Cowan included that information in his March 28, 2000 memorandum to him. TR at 473. Mr. Cowan's disclosure therefore brought Mr. XXXXXX's medical condition and its potential impact on his HAZ-MAT activities to the attention of a higher level of management than had previously been aware of this situation.

I also find that the record supports a finding that it was reasonable for Mr. Cowan to believe that Mr. XXXXXX's medical condition made his participation in HAZ-MAT reentries a substantial and specific danger to employee health and safety. In his March 28, 2000 memorandum, Mr. Cowan states that Mr. XXXXXX's problem with wearing a respirator "might jeopardize his safety, team member safety, or the safe operation of a re-entry." Memorandum at p. 7. Under questioning by ANL-W counsel at the Hearing, Mr. Cowan answered that a substantial health and safety violation existed if Mr. XXXXXX volunteered to participate in a HAZ-MAT reentry and then became claustrophobic in his respirator.

> A. Okay, the violation comes in when, when you actually call him in to, to perform a duty and he will maybe accept it, and me, as a response team member, understands that this guy's got claustrophobia. Even though he can wear a respirator, we go in and all of a sudden he loses it. He's in trouble. I'm in trouble. And this is a safety concern, and it should be addressed and brought to the point. That date [in 1997] that he [refused to participate in a re-entry] brought it to [attention] that this is a concern and it should be addressed.
>
> Q. Okay, but -- And on that date Management didn't require him to go in, did they?
>
> A. No, they didn't.
>
> Q. So --
>
> A. They were upset.
>
> Q. So they were, when they were made aware of, of, of his concern about wearing this respirator, they took appropriate safety measures by not requiring him to go in?
>
> A. I'm not going to say it was appropriate methods. He shouldn't have been there in the first place, and so inappropriate would be that they had a person qualified to an area that posed safety problems, safety to him and safety to everybody that's going in, and everything around him. That's a, that's a compromise of safety, the way I look at it.

TR at 120-121. I do not believe there can be any dispute that if someone is working as part of a team in a chemically or radioactively contaminated area, and is suddenly compelled to remove his respirator, he would pose a substantial safety risk to himself. Moreover, such an action would be dangerous to other team members who are relying on his participation and support. That it was reasonable to believe that this situation was dangerous is supported by the findings of the investigative team appointed by Director Lentz. Their May 18, 2000 Investigation Report indicates that, once Mr. XXXXXX's situation came under the scrutiny of an investigation, management determined that Mr. XXXXXX's HAZ-MAT activities should be restricted until his medical condition improved. They also removed the requirement that shift operators like Mr. XXXXXX be qualified as HAZ-MAT technicians.

> 3. On May 15 [2000], this committee was advised that the operator [Mr. XXXXXX] has been temporarily restricted from the use of a full face respirator in the event of an emergency

> response. The operator will continue full face respirator use during normal work assignments as required. When the operator advises management that this medical condition has been improved, this restriction will be re-evaluated. The operator will continue to maintain Rad Worker II qualifications which include fit testing for respirator use. HAZ-MAT technician qualifications which include fit testing for respirator use. HAZ-MAT technician qualifications are being dropped and are not required in order to function as a shift operator.

May 18, 2000 Investigation Report at 16-17 (attached to ANL-W's February 15, 2002 submission in this proceeding). These actions taken by management indicate that Mr. XXXXXX's participation as a HAZ-MAT responder was viewed as a sufficiently serious safety concern by ANL-W management at that time to warrant restricting his HAZ-MAT activities and changing the HAZ-MAT qualifications for his work as a shift operator. They therefore support a finding that in March 2000 it was reasonable for Mr. Cowan to believe that Mr. XXXXXX's continued participation in the HAZ-MAT responder program constituted a substantial safety and health concern.

While testimony at the Hearing indicates that further study of the situation, and action by management, may have substantially alleviated the safety concern in this area, this factor is not relevant to my inquiry under Part 708, which is to analyze the reasonability of Mr. Cowan's concerns when he reported them in March 2000.

Finally, I reject ANL-W's argument that there was no real danger posed by Mr. XXXXXX's condition because HAZ-MAT reentries were volunteer activities, and Mr. XXXXXX was always free to refuse to participate. Prior to Mr. XXXXXX's March 2000 disclosure, it is not clear to what extent employees were aware of the voluntary nature of this program. In its Report, the investigation team specifically recommends that

> 1. All [Nuclear Facilities Operators] should be reminded that being qualified as a HAZ-MAT responder is not a job requirement and is purely voluntary on their part.

Id. at 17. The team also felt that it was important to encourage employees to come forward and report any problems they might have in participating as a HAZ-MAT responder.

> 2. Additionally, the NFO's (or anyone else) who feels he/she may have a possible problem or concern with wearing any protective equipment should immediately advise their supervisor, and management should take whatever action (e.g., temporary removal from that area of their responsibility, referral to medical, etc.) is determined to be business-prudent to resolve the matter in a mutually satisfactory manner.

Id. These recommendations appear to address a concern that, at the time Mr. Cowan made his disclosure, some ANL-W employees felt pressured to ignore health problems and participate as HAZ-MAT responders. Moreover, it is clear from the May 18, 2000 Investigation Report that until May 2000, being a qualified HAZ-MAT technician was required in order to function as a shift operator (and receive the higher wages paid to shift operators). Report at 17. This also would have been likely to induce an employee to participate in HAZ-MAT reentries, whether or not he felt comfortable doing so. Management's May 2000 decision to remove HAZ-MAT technician qualifications for shift operators appears to acknowledge and address this problem.

Accordingly, for these reasons I find that it was reasonable for Mr. Cowan to believe, in March 2000, that Mr. XXXXXX's continued participation in the HAZ-MAT responder program constituted a substantial and specific danger to employee health and safety.

2. Mr. Cowan's Statements Concerning the Lock-out Tag- out Incident

With respect to the Lock Out/Tag Out incident, the ROI finds that on May 18, 2000, Mr. Cowan, as part of

his assigned duties, placed lockout/tagout (LO/TO) tags on the FCF's cell lighting circuit breakers. On June 6, 2000, some of these circuit breakers were later found to be locked in the "on" position and incorrectly tagged. In my January 8, 2002 letter to the parties, I stated that the ROI indicates that Mr. Cowan told management officials following the discovery of the incorrect tags, that another operator should have verified the correctness of the tags, but that no verification was done. I stated that this reporting of a violation of a safety protocol to ANL-W management and to the DOE appeared to constitute a protected disclosure under Section 708.5 and invited further discussion of this issue in the pre-hearing submissions and at the hearing. *Id.*

In his response to the ROI, Mr. Cowan asserted that at a June 6, 2000 meeting with ANL-W managers concerning the incorrect LO/TO, he

> stated and submitted signed testimony . . . that he requested verification from an operator in the control room. Both operators in the control room informed Mr. Cowan that a verifier was not required. Mr. Cowan upon receiving the information proceeded with caution in performing the process of de-energizing and/or verifying [that] the appropriate circuit breakers were in the requested position per the Lockout Tagout Authorization (LTA) form, installing locking devices, and attaching appropriate tags.

Cowan Response to ROI at item number 70. In its Reply Brief, ANL-W asserts that Mr. Cowan did not report any violations in this matter.

> After the breakers had been set, another operator, not Mr. Cowan, made the discovery that the breakers were improperly set, reported it to management, and management discovered during the following investigation that there had been no verification of the setting. Mr. Cowan cannot therefore, claim protection under 10 C.F.R. Part 708.

ANL-W Reply Brief at 3. At the Hearing, under questioning by the Hearing Officer, Mr. Cowan testified that he had not disclosed to management that there had been no verification of the LO/TO because they had already discovered that fact.

> THE HEARING OFFICER: . . . [Y]ou were aware at the time that the verification was not done. Did you report that at some point during the investigation of the incident to anyone?
>
> MR. COWAN: During the critique, or the investigation?
>
> THE HEARING OFFICER: Well, the critique or -- When was the first time you spoke about the verification?
>
> MR. COWAN: Well, the first -- This is real kind of difficult because the verification itself was identified by Management themselves.
>
> THE HEARING OFFICER: Uh-huh.
>
> MR. COWAN: Because they instructed that I, I could, and then it was found in another investigation that there were several FASs that didn't understand the red-tag verification part of it. But that was mentioned at that critique that, you know, this was a problem. I didn't do it, but they did, okay?
>
> THE HEARING OFFICER: Okay.

TR at 99. Accordingly, I conclude that Mr. Cowan made no disclosure concerning the lack of verification of the LO/TO.

However, in the context of this LO/TO incident, Mr. Cowan made other statements that could be

considered to constitute protected disclosures within the meaning of Part 708. Section 708.5(a)(1) protects employees who disclose information that they reasonably believe reveals a substantial violation of law, rule or regulation. Section 708.5(a)(2) protects disclosures regarding fraud, gross mismanagement or abuse of authority. At the June 6, 2000 meeting with management, and in later conversations with ANL-W managers and fellow employees, Mr. Cowan contended that he had performed the LO/TO correctly and that some other ANL-W supervisor or employee had deliberately reset the breakers in order to discredit him. He later contended that his abrupt transfer from FCF to SPF in June 2000 was to prevent his disclosure of evidence concerning "several employees and line managers that possibly could be involved." Cowan Response to ROI at item number 65. While ANL-W acknowledges that Mr. Cowan made these accusations beginning on June 6, 2000, it vigorously contends that there is no substantial evidence that anyone tampered with the position of the circuit breakers between the time they were locked by Mr. Cowan on May 18, 2000 and the time that they were discovered to be locked in the incorrect position on June 6, 2000.

> Mr. Cowan's allegations of sabotage or possible criminal acts have not been substantiated. The allegations are based solely upon assertions by Mr. Cowan. Therefore, the Laboratory believes that a reasonable person could not believe the allegations made by Mr. Cowan are true and they are not protected disclosures under 10 C.F.R. 708.5.

ANL-W Closing Brief at 7.

I am not convinced that Mr. Cowan's inability to substantiate his allegation that his work was sabotaged absolutely precludes me from finding that he made a protected disclosure. Rather, in making my determination on that issue, I believe that I would have to evaluate the reasonableness of Mr. Cowan's allegation in light of several factors. These would include my evaluation of Mr. Cowan's honesty and sincerity in making these assertions, Mr. Cowan's experience with circuit breakers and the configuration of the electrical panels, the likelihood that evidence would be available to Mr. Cowan had sabotage occurred, evidence of hostility toward Mr. Cowan from his managers and co-workers during the May 18 through June 6, 2000 period, and the opportunity that these managers and co-workers had to open the locks and change the position of the circuit breakers. There is abundant evidence in the record of this proceeding concerning all of these factors. However, as I have already made the finding that Mr. Cowan made a protected disclosure on March 28, 2000, it would not be administratively efficient or productive to the resolution of this complaint for me to conduct such an extensive analysis. In the event that my finding concerning Mr. Cowan's disclosure regarding the HAZ-MAT operator is reversed on appeal, this determination can be made on remand.

B. Mr. Cowan's Protected Disclosure Was a Contributing Factor to the Alleged Acts of Retaliation

Under 10 C.F.R. § 708.29, Mr. Cowan must also prove that his protected disclosure concerning the HAZ-MAT operator was a *contributing factor* with respect to any adverse personnel action taken against him. *See Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994). A protected disclosure may be a contributing factor to an adverse 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).

As noted above, the ROI finds that there is close proximity in time between the protected disclosure and the four alleged instances of retaliation discussed in the ROI. ROI at 4. I agree with three of these findings. The record indicates that Mr. Cowan's managers at FCF were aware that in March 2000, Mr. Cowan had declared himself a whistleblower and submitted a memorandum detailing his concerns to Director Lentz. Three alleged retaliations - (1) his failure to be selected for a Training Specialist position; and (2) the

issuance of an occurrence report that assigned partial responsibility for LO/TO errors to Mr. Cowan; and (3) Mr. Cowan's transfer to the SPF - all occurred within three months of the date of his memorandum to Mr. Lentz. The performance evaluation at issue in this proceeding, concerning Mr. Cowan's performance at the FCF from April 1, 2000 through June 23, 2000, appears to have been completed in November 2000. This is significantly more distant in time from the protected disclosure, although it could be included as part of a pattern of alleged retaliatory activity that began in May and June 2000 and thereby found to be proximate in time to Mr. Cowan's March 2000 disclosure. However, Mr. Cowan initiated his Part 708 whistleblower complaint on August 25, 2000. This is protected conduct under Part 708. Adverse personnel actions that occur after the filing of a Part 708 complaint and during the pendency of that complaint are clearly proximate in time to that protected conduct. *See Jagdish C. Laul*, 28 DOE ¶ 87,996 at 89,049 (2000). Accordingly, Mr. Cowan has shown that his protected conduct was a contributing factor with respect to this alleged retaliation (the performance evaluation). Similarly, Mr. Cowan has made this showing with respect to other alleged retaliations that occurred during the pendency of this Part 708 complaint. These include Mr. Cowan's transfer from the SPF to the FASB on or about June 1, 2001, and Mr. Cowan's three day suspension without pay from the FASB in January 2002.

I therefore conclude that Mr. Cowan has met his burden of showing that his disclosure and/or his protected activity under Part 708 constituted contributing factors in the above-identified negative personnel actions taken by ANL-W. The burden therefore shifts to ANL-W to prove by clear and convincing evidence that it would have taken the same actions without Mr. Cowan's disclosures or protected activity.

C. ANL-W's Decision Not to Select Mr. Cowan for a Training Specialist position was not a Retaliation

The first adverse personnel action following Mr. Cowan's protected disclosure occurred in May 2000. The ROI finds that at that time, a Training Specialist position which was vacated by retirement was posted. The ROI finds that Mr. Cowan, along with six others, applied for the position, and that he was not hired for the position. The ROI made the following findings concerning ANL-W's selection process.

> The DOE/CH found that the reasons for selecting the successful applicant in this case were justifiable and well articulated. There is no other evidence in the record including interviews of management officials and other documentation submitted by Cowan that disputes DOE/CH's findings with respect to this position. I agree with the DOE/CH on this issue. Based on the foregoing, the evidence clearly and convincingly shows that the contractor would have taken the same action regarding Cowan's advancement opportunities in the absence of his protected disclosures.

ROI at 7, *citing* DOE Argonne Group's Employee Concern #ANL-W-OO-1, Final Report (December 21, 2000) at 19. Mr. Cowan disputes this part of the ROI. However, a document provided by ANL-W at the Hearing, along with the testimony of Director Lentz, confirms the findings made by the DOE Argonne Group in its Final Report. The May 18, 2000 Investigation Report of ANL-W regarding Mr. Cowan's concerns notes that in January 1999, the employee who was assigned to the position of "HFEF Training Specialist" retired and the training duties were reassigned to a Chief Technician in HFEF. At the Hearing, Director Lentz testified that this position of Training Specialist subsequently was posted, and a hiring process was conducted. He stated that there were five or six applications for the position, including one submitted by Mr. Cowan. Director Lentz testified that although no ANL-W regulations required it, the HFEF Manager developed a rating system to rank the applicants according to their qualifications. He further testified that Mr. Cowan was ranked second or third among the candidates, and that the position was awarded to the individual who had been filling it on a temporary basis. TR at 467-68. There was little other discussion of this matter at the Hearing, and neither party discussed the issue in their post-hearing brief.

I find that the evidence presented by ANL-W at the hearing demonstrates that the hiring process for the

HFEF Training Specialist position was fairly conducted by the HFEF Manager. Director Lentz testified that the HFEF Manager devised criteria that he believed were important for the position, and ranked the applicants according to their qualifications. The position was awarded to the individual who had been temporarily assigned to those job tasks for the previous year, a fact that is not surprising, since that individual's knowledge of HFEF training procedures would clearly be a great point in his favor. Mr. Cowan has made no specific allegations of unfairness concerning this hiring process or any specific charge that the winning applicant was less qualified than himself. Under these circumstances, I find that ANL-W has met its burden of showing by clear and convincing evidence that it would have selected the same applicant in the absence of Mr. Cowan's protected disclosure.

D. Portions of an Occurrence Report that Made Findings Concerning Mr. Cowan Did Not Constitute an Adverse Personnel Action

I find that Mr. Cowan has not established, by a preponderance of the evidence, that the findings made in a June 2000 occurrence report constituted an adverse personnel action against him. As noted above, on May 18, 2000, Mr. Cowan, as part of his assigned duties, placed lockout/tagout (LO/TO) tags on some of the FCF's cell lighting circuit breakers. On June 6, 2000, some of these circuit breakers were found to be locked in the "on" position and incorrectly tagged. Later on June 6, ANL-W management convened a critique, attended by Mr. Cowan, concerning the incorrectly tagged circuit breakers. Following the critique, on June 7, 2000, ANL-W issued Occurrence Report CH-AA-ANLW-FCF-2000-0006 (the Occurrence Report) concerning the incident. The following portions of this Occurrence Report discuss Mr. Cowan's involvement in this incident:

> 23. Description of Cause:
>
> . . . The direct cause of this event was improper resource allocation. The operator who positioned the breakers [Mr. Cowan] and applied the tags had declared himself a "whistleblower" and was working under additional stress caused by this declaration. Management should have evaluated assigned work responsibilities more closely.
>
> 24. Evaluation (by Facility Manager/Designee):
>
> . . . Malicious noncompliance was not found. The operator who incorrectly positioned the breakers and placed the tags felt he had correctly positioned the breakers and hung the tags. Management investigated the potential for someone repositioning the breakers. Discussions with the FAS's and investigation of how the breakers were locked and tagged showed it would be extremely difficult to reposition a breaker by one individual. The Data Acquisition Storage System (DASS) was reviewed to see if there was any indication of repositioning of the breakers (i.e., a sudden increase of current on the bus duct) and no conclusive evidence was found. All investigations led to the conclusion that the breakers were incorrectly positioned and tagged [by Mr. Cowan]. No punitive action is required.

Occurrence Report at 3-4, attached to January 29, 2001 ANL-W Investigation Report.

Mr. Cowan contends that the Occurrence Report wrongly concludes that he negligently mispositioned the circuit breakers at the time that he performed the LO/TO, and rejects the possibility that the circuit breakers were later repositioned in an effort to discredit him. Cowan Response to ROI at item 65. The ROI Investigator conducted interviews with FCF personnel concerning this issue and reviewed subsequent studies of these allegations by both ANL-W and the DOE. She concluded that there was "no solid evidence" that the circuit breakers were repositioned in an effort to discredit Mr. Cowan, rather, the evidence suggested that he merely made a mistake. She also found that he suffered no adverse consequences as a result of the conclusions reached in the Occurrence Report "because the facility area

supervisor responsible at the time incorrectly decided not to have a second operator verify the correctness of the LO/TO." ROI at 10.

I do not believe that the Occurrence Report's assignment of responsibility for a LO/TO error to Mr. Cowan constitutes an adverse personnel action against him by ANL-W. Mr. Cowan has not shown that he was harmed by the findings of the Occurrence Report. There is no indication that the Occurrence Report became part of his personnel file at ANL-W. Moreover, the Occurrence Report specifically finds that the direct cause of the error was a "management problem," not the conduct of the operator. It also states that "no punitive action is required" concerning the operator's conduct." Occurrence Report at 3-4. There is therefore no ground for me to consider relief for Mr. Cowan concerning the findings made in this Occurrence Report.

While the findings made concerning Mr. Cowan in the Occurrence Report do not constitute an adverse personnel action against him, the use of these findings by ANL-W to penalize or discriminate against Mr. Cowan certainly would. There is one instance in which the LO/TO incident was cited in a negative manner in a personnel document concerning Mr. Cowan. *See* ANL-W Performance Appraisal of Mr. Cowan for Review Cycle 4/1/00 to 6/23/00 completed by Mr. Keith Powers [hereinafter the "Final FCF Appraisal"]. However, as discussed in greater detail below, I find that ANL-W has shown that Mr. Powers' criticism of Mr. Cowan's performance during that period was not significantly affected by whether Mr. Cowan had correctly positioned the circuit breakers at the LO/TO. At the Hearing, Mr. Powers testified that he referred to the LO/TO incident "partly to show why [Mr. Cowan] was inordinately preoccupied with administrative problems." He also testified that Mr. Cowan's involvement in the LO/TO incident did not affect his overall rating on the evaluation in any way whatsoever. TR at 518. Under these circumstances, I find that the passing reference to the LO/TO incident contained in the Final FCF Appraisal does not constitute an adverse personnel action warranting further analysis under Part 708.

E. The Findings of the Final FCF Appraisal Constituted a Retaliation Against Mr. Cowan

In his Part 708 Complaint, Mr. Cowan contended that he was improperly rated on his performance evaluations, but did not cite specific years in which such allegedly improper ratings were made. The ROI considered the evaluations written subsequent to Mr. Cowan's protected disclosures. Those evaluations included three separate appraisals covering review cycles for Mr. Cowan within fiscal year 2000 (October 1, 1999 through September 30, 2000). The ROI found that it was undisputed that Mr. Cowan is a very competent Nuclear Facility Operator. On a rating scale of one to five, with five being the highest rating, Mr. Cowan received a 3+, 3-, and a 4- on the evaluations in these review cycles. ROI at 5. It should be noted that Mr. Cowan's overall evaluation for fiscal 2000 was a 3+, which is contained in an appraisal dated November 19, 2000, completed by Mr. Cowan's supervisor at the SPF, Mr. J. L. Brink.

The only performance evaluation during this period to which Mr. Cowan has made a specific objection is the Final FCF Appraisal. As noted above, this was an interim evaluation for the period April 1, 2000 through June 23, 2000, completed by Mr. Cowan's supervisor at the FCF, Mr. Powers. For this period, Mr. Cowan received a numerical rating of 3-. Under the heading "Accomplishments" on the evaluation form, Mr. Powers made comments generally critical of Mr. Cowan's performance.

> Mr. Cowan was preoccupied with administrative problems. His work was affected. He would not spend time in the Operations Office on day shift. Work assignments given to him (procedure walkdowns) were not completed on time. Adjustments to Operating Systems (air cell exhaust control set points) were turned over to others to perform. Mr. Cowan was involved in a lockout/tagout incident.
>
> Mr. Cowan maintained all required qualifications.

> Mr. Cowan did not complete assigned procedure reviews.

Under the heading "Appraiser Comments" on the evaluation form, Mr. Powers also was critical of Mr. Cowan's job performance during this period:

> Mr. Cowan allowed problems that involved administrative management to interfere with his work. His attention to detail on watch suffered. He spent more time researching Human Resources documents than he did to watch standing. His direct supervision always had to find him if he wasn't actually on the console watch. Mr. Cowan's professional ability suffered during this time period.

Final FCF Appraisal at 1, 5. Under "Employee Comments", Mr. Cowan stated that he disagreed with this evaluation, and that he had supportive documents to justify his claim. He also characterized the evaluation as "a Retaliation effort to discredit my performance." *Id.* at 5.

The ROI found that the Final FCF Appraisal score of 3- was not inconsistent with scores that Mr. Cowan had received in previous years.

> For the majority of his past ratings, the complainant has received a 4 rating. However his ratings have ranged from a 3- to a 4+ over the years, with 3 defined as acceptable performance and 4 considered above average. Given the well-documented record of the contractor's own internal evaluations of the complainant's performance records as well as the consistent accounts of management officials which I found convincing and persuasive, it is clear to me that Cowan's performance evaluations were consistent with his prior evaluations and unrelated to any protected disclosures.

ROI at 5-6. The ROI specifically finds that the rating contained in the Final FCF Appraisal was valid and that the criticism contained in that evaluation was consistent with ANL-W's usual practice.

> Even the interim appraisal in which Cowan received an overall rating of a 3-, although occurring in close proximity to his protected disclosures, appears to me to have been a consequence of his lack of proper attention to his job duties because of his whistleblower concerns. In addition, there is no evidence in the investigatory file that suggests that Cowan's performance appraisals at issue negatively affected any merit increases or promotion potential for him. Rather, his evaluations were, as is often the case, used as a developmental tool to praise Cowan for his strengths, but also to suggest areas that could be improved upon. The relevant inquiry in this case is whether, in the absence of protected disclosures, the contractor would have taken the same action that followed the protected disclosures. I believe ANL-W has provided clear and convincing evidence that it would have taken the same actions with regard to the complainant's performance appraisals.

ROI at 6. In his response to the ROI, Mr. Cowan did not specifically challenge any of these findings. At the Hearing, Counsel for ANL-W presented witness testimony to support the ROI's findings regarding the Final FCF Appraisal. Mr. Powers testified that following the LO/TO critique and the Occurrence Report, Mr. Cowan

> spent an inordinate amount of time delving into Argonne National Lab Policy and Procedure Manuals trying to show where he was right and we were wrong and/or illegal in what we had done.

TR at 517. He testified that an example of his work assignments not being completed on time occurred when he was assigned to "walk down" some new procedures "step by step, [to] make sure they work." TR at 518. He stated that Mr. Cowan was assigned to perform this task over a weekend, when he was working 12-hour days, and that he did not complete the task. *Id.* Under questioning from Mr. Cowan, he further stated that he could not identify the exact procedures that were involved in this "walk down" because he

had received this information in writing from Mr. Robert Belcher, Mr. Cowan's immediate supervisor. Mr. Powers stated that he generally relied on immediate supervisors and their input in writing his performance evaluations, and that in this case Mr. Belcher gave him "almost 100 percent input." TR at 536-37. Mr. Powers testified that he had noticed on several occasions during this period that Mr. Cowan was absent from the FCF Control Room. TR at 534. Mr. Powers explained that this was Mr. Cowan's assigned workplace.

> His assigned work space or work location is the Control Room for the facility operators, which also has the console in it. When they're not actively on the console they're required to be in that area so they can be found for any other tasks that are needed in the facility.
>
> . . . If [Mr. Cowan] wasn't [operating] the console, he didn't spend much time in there. . . . one of the places we would find him would have been in the Ops Base using the computer that's in there, or searching other documents. If we needed him, we had to page him to find him.

TR at 519-520. Under questioning from ANL-W counsel, Mr. Powers stated that he believed the performance evaluation was a fair estimate of Mr. Cowan's performance for the period, and that it was not retaliation. TR at 520.

I cannot concur with the ROI's conclusion that ANL-W has met Part 708's clear and convincing evidentiary standard with regard to its Final FCF Appraisal. My judgment on this question has been informed by additional evidence that was not before the Investigator. As an initial matter, the Final FCF Appraisal is strikingly different in tone from the other two appraisals received by Mr. Cowan for fiscal 2000. While the other two appraisals contain only complimentary comments concerning Mr. Cowan's performance, the comments in the Final FCF Appraisal are almost entirely critical in nature. Through its witness testimony, I find that ANL-W has provided anecdotal evidence that appears to indicate that Mr. Cowan's overall work performance declined slightly during this period due to his preoccupation with other matters. However, under the standard set forth at Section 708.29, ANL-W must show by clear and convincing evidence that it would have *taken the same action* without the employee's disclosure, *i.e.*, that when similar performance problems had previously occurred, Mr. Cowan and his co- workers received such criticism. As I stated in my December 3, 2001 letter to the parties:

> In determining whether ANL-W has shown that it would have evaluated and transferred Mr. Cowan in the same manner in the absence of his protected activities, it will be necessary for me to consider whether ANL-W's treatment of Mr. Cowan was consistent with its treatment of other, similarly situated employees. Such consideration of ANL- W's general employment practices is fully consistent with OHA precedent in this area. See Thomas Dwyer, 27 DOE ¶ 87,560 at 89,337 (2000); Roy Leonard Moxley, 27 DOE ¶ 87,546 at 89,241 (1999); and Morris J. Osborne, 27 DOE ¶ 87,542 at 89,209 (1999). As indicated in those determinations, the standard in the clear and convincing area is not whether it was *reasonable* for ANL-W to have taken its adverse personnel actions regarding Mr. Cowan. The standard is whether the ANL-W *actually would have taken* these actions absent his protected disclosures.

December 3, 2001 Letter at 4. This is a very difficult standard to meet when dealing with a highly subjective process such as an employee evaluation. For example, while ANL-W has identified an instance where Mr. Cowan did not complete an assigned procedure review on time during the relevant rating period, it has not provided convincing testimony that Mr. Powers would have been likely to have placed such emphasis on this event in a Final Performance Appraisal of Mr. Cowan in the absence of Mr. Cowan's protected disclosure.

In addition to a lack of convincing evidence in support of ANL-W's position, I find that testimony at the Hearing indicates that a significant level of hostility existed toward Mr. Cowan from his managers and co-workers as a result of his protected activity, and that this hostility was likely to have influenced the Final

FCF Appraisal. At the Hearing, I asked Mr. Powers if Mr. Cowan's immediate supervisor, Mr. Belcher, was upset concerning Mr. Cowan's allegations of safety concerns about the HAZ-MAT responder, Mr. XXXXXX. He replied that Mr. Belcher was not pleased that the issue had been raised. He said that "none of us [at FCF] believed it was an issue. . . . To have brought it up later to say it was an issue, yeah, we were a little tight about it." TR at 552-53.

Although in the Final FCF Appraisal and in his initial testimony, Mr. Powers was critical of Mr. Cowan's frequent absences from the FCF Control Room, subsequent testimony indicates that his co- workers and supervisor were happy about his absence. He testified that when he would ask the console operators where Mr. Cowan was, several times the answer was "We hope anywhere but here." He also noted that Mr. Belcher tolerated his absence.

> I asked Bob Belcher, "Why, why are you allowing [Mr. Cowan] to stay out of the Control Room? He is on there? For better and worse, and I lived with this decision out there. He said it was less disruptive to the Control Room if Ben would stay out doing these things. You've got to remember, not only was it the lockout/tagout incident that he was busy researching documentation for. This also had to do with his transfer to and from SPF.

TR at 552.(4) The Hearing also revealed that there existed a personal friendship between Mr. Belcher and Mr. XXXXXX, the HAZ-MAT responder, that naturally would make Mr. Belcher antagonistic to Mr. Cowan for making an accusation concerning Mr. XXXXXX's suitability as a HAZ-MAT responder. In his testimony, Mr. Belcher testified that he and Mr. XXXXXX were close personal friends, and that they car-pooled together almost every day. TR at 221.

As discussed above, the record indicates that the Final FCF Appraisal was written by Mr. Powers based largely on input from Mr. Belcher. Under these circumstances, I find that ANL-W has not shown by clear and convincing evidence that this critical appraisal of Mr. Cowan would have been issued in substantially identical form in the absence of his protected disclosure. Accordingly, I will direct ANL-W to remove this appraisal from Mr. Cowan's personnel file.

There is also an issue of whether the Final FCF Appraisal affected the raises and bonus pay that Mr. Cowan received for his work in fiscal 2000. It does not appear that the Final FCF Appraisal's interim rating of 3- lowered Mr. Cowan's overall rating in fiscal 2000. The interim rating made for the period 10/1/99 through 3/31/00 was 3+. The ratings given to Mr. Cowan by Appraiser J. L. Brink for specific work responsibilities at the SPF from 6/24/00 through 9/30/00 were two 4- ratings and two 3+ ratings. This would result in an overall rating for fiscal 2000 of 3+, which is what Mr. Cowan received. At the Hearing, ANL-W introduced a listing of pay raises received by facility operators for fiscal 2000. This listing indicates that Mr. Cowan's pay raise for fiscal 2000 was completely consistent with other facility operators who received a 3+ rating. *See* testimony of Michael F. Janeczko, ANL-W Manager of Human Resources, TR at 571-576. Nor did the Final FCF Rating affect Mr. Cowan's bonus pay in fiscal 2000. At the Hearing, Mr. Powers testified that a minimum annual rating of 4- is necessary to qualify for a bonus, if bonuses are available in a particular year. TR at 542. Even in the complete absence of the Final FCF Appraisal, Mr. Cowan's rating of 3+ would not qualify him for a bonus. Accordingly, I find no evidence of any recent adverse personnel actions against Mr. Cowan with respect to raises and bonuses.

Finally, a comment appears on Mr. Cowan's interim performance evaluation for his work at FASB during the period 3/5/00 through 9/30/01 (the FASB Appraisal) that Mr. Cowan alleges is retaliatory in nature. The following statement appears under Appraiser Comments:

> Ben's familiarity with the various ANL-W safety rules and policies would prove beneficial to FASB operations if Ben remembered his responsibility to promptly notify his supervisor of his findings instead of compiling his concerns and complaints in the form of a letter that is given wide distribution.

FASB Appraisal at 5. The FASB Appraisal is otherwise complimentary of Mr. Cowan's performance, and

there is no indication that this particular comment affected any of the ratings given for specific responsibilities, or affected the appraisal's overall rating of 3. Under these circumstances, I view this comment as a reminder and a suggestion to Mr. Cowan, rather than a criticism, and find that it does not constitute an adverse personnel action for purposes of Part 708.

F. Mr. Cowan's Involuntary Transfer to the SPF in June 2000 was a Retaliatory Act

As noted above, Mr. Cowan has been transferred three times since he made his protected disclosure in March 2000. On April 10, 2000, Mr. Cowan and other employees at the FCF were transferred to ANL-W's Sodium Processing Facility (SPF). Mr. Cowan immediately protested this transfer and was permitted by ANL-W management to return to the FCF after only half a day at SPF. Testimony of Gary Tarbet, Manager of FCF, TR at 508. On June 28, 2000, ANL-W management again transferred Mr. Cowan, under protest, to the SPF, where he remained for about one year until management transferred Mr. Cowan to ANL-W's radiological facility (FASB).

Although Mr. Cowan contends that his selection for the April 2000 transfer constituted a retaliation by ANL-W management, I find that he has not established that any substantial harm resulted from this brief transfer. If ANL-W's action was retaliatory, it remedied the situation when it acceded to his protest and immediately returned him to the FCF. There is no indication that Mr. Cowan suffered any significant loss of pay as a result of this very brief transfer. Accordingly, I do not believe that it would be appropriate under Part 708 to conduct an extensive analysis to determine whether, under the standard of clear and convincing evidence, that ANL-W has shown that it would have initiated this transfer of Mr. Cowan in the absence of his protected disclosure. I therefore will make no finding concerning this transfer.

With respect to Mr. Cowan's June 2000 transfer to the SPF, the ROI finds the following:

> this transfer was initiated in an effort to ease the tension in the complainant's division, perhaps brought on by his focus on his whistleblower activities. Aside from the complainant's contention, I do not find evidence in the record that would suggest that complainant's transfers were initiated in retaliation for making protected disclosures. Rather, these transfers appear to be part of the laboratory's routine personnel actions. Based on the record, it is clear that laboratory employees had to move where the work was located and where their skills were most needed. I find that ANL-W has provided clear and convincing evidence that it would have taken the same actions in the absence of the complainant's protected disclosures.

ROI at 8.

I cannot concur with the ROI's conclusion that ANL-W has met Part 708's clear and convincing evidentiary standard with regard to its June 2000 transfer of Mr. Cowan. I agree with the ROI's finding that this transfer was made to relieve tension at the FCF between Mr. Cowan and his managers and co-workers. However, in its submissions and witness testimony, ANL-W has provided only anecdotal evidence indicating that Mr. Cowan's activities in the FCF in June 2000 aggravated others at the FCF. Under the standard set forth at Section 708.29, ANL-W must show by clear and convincing evidence that it would have *taken the same action* without the employee's disclosure, *i.e.*, that ANL-W management decision to transfer Mr. Cowan was consistent with the treatment of other, similarly situated employees, not just that it was *reasonable* for ANL-W to have taken this adverse personnel action regarding Mr. Cowan. As discussed below, there is no indication that ANL-W routinely transferred employees from one facility to another to resolve employee conflicts or ease workplace tension. Moreover, the ANL-W manager who ordered Mr. Cowan's transfer relied on recommendations made by individuals who, as discussed in the previous section, were likely to have been prejudiced against Mr. Cowan as a result of his protected disclosure. ANL-W has not shown that similar activity by another individual at FCF would have resulted in the same recommendation that he be transferred to another facility.

In its submissions and at the Hearing, ANL-W presented no information concerning whether it had ever transferred an employee other than Mr. Cowan from one facility to another as a result of tension in the workplace or a dispute with a supervisor. Moreover, under questioning by the Hearing Officer, Mr. Belcher testified that his request to have Mr. Cowan transferred for creating a hostile atmosphere at FCF was highly unusual.

> Q. Can you remember other examples of people being transferred because of an atmosphere that was created, or hostility between one or more people?
>
> A. No I can't. Again, when I was an Operator there was a Technician, but he was fired. He was coming in inebriated; on drugs. He was coming in late. And he had been given time off without pay, warned, and he was finally dismissed.
>
> Q. So in your experience at Argonne this is an unusual situation.
>
> A. Yes, very unusual.

TR at 260-261. The record indicates that Mr. Belcher has been a supervisor at FCF since 1992 (TR at 257), and yet he could recall no instance in which a personality conflict resulted in a person being transferred out of the facility. Accordingly, the available evidence indicates that at least with respect to employees at the FCF, Mr. Cowan's transfer was a highly unusual personnel action.

The individual who made the final decision to transfer Mr. Cowan to the SPF in June 2000 was Dr. John Sackett, the Deputy Associate Laboratory Director for ANL-W. At the Hearing, Dr. Sackett explained his reasons for directing the Mr. Cowan be transferred.

> The issue of the lockout/tagout, and Ben's concern that he had been wrongly accused of missetting the breakers, and his carrying that concern forward, resulted in a situation where people felt either directly or indirectly accused of having set Ben up in that manner.
>
> You can imagine that this caused a great deal of [inaudible][(5)], I will say, among the people in the facility. And I became aware of that more strongly in discussions with the Director of the Operations Division [Mr. Lentz] at the time.
>
> I was made aware of two different letters, items of correspondence from individual technicians on the point, and so I became very concerned in my role as the person responsible for nuclear safety and radiological safety at the site, that I could not allow that kind of dissension to continue in a radiological facility.

TR at 612-613. Dr. Sackett stated that he then met with Mr. Cowan, and when Mr. Cowan refused to voluntarily transfer to the SPF, he told him "Well, in that case, I must direct that transfer." TR at 613. Dr. Sackett clearly relied on information supplied to him by Mr. Lentz in forming his opinion that a high degree of dissension had been created at the FPF as a result of Mr. Cowan's activities. In his testimony, Mr. Lentz stated that between April and early June, the FCF Manager [Mr. Gary Tarbet] and several supervisors voiced concerns to him about their increasing inability to work with and supervise Mr. Cowan.

> They were to the point where they were afraid every time they did something Ben would say, "You're retaliating against me," or that they were going to be written up. They felt they had insufficient supervisory control of Ben doing the jobs.

TR at 450. He testified that in June 2000, he received several letters and an anonymous complaint, all leading him to the conclusion that there was a deterioration in the environment of the FCF and that it would not be wise to leave Mr. Cowan in the facility because "it put both Ben and everybody else under strain that I didn't think was necessary." He therefore recommended to Dr. Sackett that Mr. Cowan be

removed from the FCF. TR at 451.

In his testimony at the Hearing, Mr. Belcher stated that he initiated the effort to have Mr. Cowan transferred from the FCF. He testified that he decided to go to Mr. Tarbet's office and urge that Mr. Cowan be transferred out of the FCF following a conversation that he had with Mr. Cowan. He stated that in that conversation, Mr. Cowan

> approached me and told me to get whoever had set [Mr. Cowan] up [on the lockout/tagout] to come and talk to [Mr. Cowan] in private and [Mr. Cowan] would drop the issue. That was the straw that broke the back, when I went up and I requested that [Mr. Cowan] be taken out of the facility.

TR at 225.

I find that this testimony does not meet ANL-W's burden of proof on this issue. As discussed above, the standard in the clear and convincing area is not whether it was *reasonable* for ANL-W to have transferred Mr. Cowan to SPF in order to alleviate a tense atmosphere at FCF. *See Janet L. Westbrook*, 28 DOE ¶ 87,021 (2002) (mere plausibility and reasonability not adequate to meet the contractor's clear and convincing standard of proof). The standard is whether the ANL-W has shown by clear and convincing evidence that it *actually would have* transferred Mr. Cowan in the absence of his protected disclosures. There is no dispute in the record that Mr. Cowan was actively pursuing his investigation of the lockout/tagout incident and making inappropriate, speculative and possibly accusatory statements to his managers and co-workers concerning the incident. However, I do not believe that ANL-W has established by clear and convincing evidence that, in the absence of his disclosure, Mr. Cowan's activities and statements would have resulted in the decision to transfer him out of the FCF. There is no indication that ANL-W management employed such transfers as a disciplinary or corrective option in responding to instances of inappropriate or accusatory behavior by employees. Nor is there evidence indicating that Mr. Cowan posed any direct safety risk to other employees. While Dr. Sackett referred to the safety risks that could arise from dissension in a radiological facility, ANL-W has made no showing that transferring Mr. Cowan out of FCF was a necessary means to address that problem. Accordingly, I find that ANL-W has not met its evidentiary burden concerning this issue.

As I noted above, there is evidence that Mr. Belcher was upset about Mr. Cowan's protected disclosure concerning Mr. XXXXXX. With respect to the transfer, Mr. Belcher acknowledges that he initiated the action to have Mr. Cowan transferred from the FPF. One of the letters critical of Mr. Cowan that Mr. Belcher conveyed to Mr. Tarbet and Mr. Lentz was written by Mr. XXXXXX. *See* undated note from J. L. XXXXXX submitted as an ANL-W Hearing Exhibit. Under these circumstances, ANL-W clearly has not shown that Mr. Belcher would have reacted to Mr. Cowan's behavior by initiating action to have him transferred out of FCF in the absence of Mr. Cowan's protected disclosure. Accordingly, I find that ANL-W has not shown by clear and convincing evidence that it would have transferred Mr. Cowan to the SPF in June 2000 in the absence of his protected disclosure.(6)

I therefore will direct ANL-W to return Mr. Cowan to the shift position that he occupied at the time of his removal from the FCF and to compensate him for any lost overtime and premium pay that resulted from this transfer out of the FCF. In this regard, the record indicates that Mr. Cowan was working as a shift technician at the FCF at the time of his June 2000 transfer to the SPF. At the Hearing, Director Lentz testified that beginning in April 2000, when Mr. Cowan's initial transfer to the SPF was canceled at his request, ANL-W management placed him in a rotating shift schedule, which permitted him to earn more money through additional overtime and premium pay. TR at 438, 440. Director Lentz also testified that at the SPF, where Mr. Cowan was transferred in June 2000, the ultimate goal was to put everyone on a 24 hour day shift rotation, that would have provided Mr. Cowan the same opportunity to earn overtime and premium pay as he had at the FCF. TR at 440, 459. However, it is not clear that this goal of placing all SPF workers in a shift rotation was realized for the entire period that Mr. Cowan worked at the SPF. Moreover, on March 5, 2001, Mr. Cowan was transferred from the SPF to the FASB, and there is no

evidence in the record that shift rotation work was or is available at that facility. In his December 27, 2001 submission entitled "Requested Relief," Mr. Cowan also claims that all overtime above the normal scheduled shift overtime accrued by Mr. Cowan's replacement on the FCF shift was "a real and actual loss of income to Mr. Cowan." Mr. Cowan is correct. Under these circumstances, I will require ANL-W to calculate the gross salary, including overtime and premium pay, that it would have paid to Mr. Cowan if he had remained in his shift position at the FCF, including additional overtime worked by his replacement on that shift. If this amount is in excess of Mr. Cowan's gross salary since his June 2000 transfer to the FCF, I will direct ANL-W to pay him the difference.

G. Mr. Cowan's Three Day Suspension Without Pay in January 2001 Was a Retaliation

On January 7, 2002, Mr. Cowan sent an e-mail message addressed "To: Distribution to Argonne National Laboratory employees." In this e- mail message, Mr. Cowan expressed great frustration concerning his efforts to have the DOE investigate his allegations of mismanagement and safety violations at ANL-W. In particular, he was critical of the "DOE Employee Concerns Organization" and the employee concerns officer who was his contact in that organization. On January 9, 2002, Mr. Cowan sent another e-mail to all ANL-W employees in which he purportedly quoted an unnamed ANL-W supervisor who sent Mr. Cowan a harsh response to his January 7 e- mail. In a January 9, 2002 memorandum, Dr. Sackett informed Mr. Cowan that his e-mails were in violation of laboratory policies and suspended him without pay until further notice. In this memorandum, Dr. Sackett described ANL-W's concerns with Mr. Cowan's e-mails:

> Your e-mail transmissions of January 7 and 9, 2002 to ANL-W employees violate Laboratory policies. These transmittals also do not reflect the views of the Laboratory and could subject the Laboratory to possible legal action. Additionally, your transmittals are in direct disregard of the instructions given to you by the Laboratory Director, Dr. Grunder, in a letter dated September 10, 2001, which stated, in part: ". . . We strongly believe in the process that we are engaged and that it is the proper forum for these issues to be resolved. Any action outside this forum should be held in abeyance until such process is completed. . . ."

January 9, 2002 memorandum from Dr. Sackett to Mr. Cowan, included in ANL-W hearing exhibits. ANL-W management ultimately disciplined Mr. Cowan with a three day suspension, without pay, on January 10, 13, and 14, 2002.

In its Post-Hearing brief, ANL-W contends that it has established that ANL-W did not retaliate against Mr. Cowan by suspending him for three days without pay. It cites the finding in Dr. Sackett's memorandum that Mr. Cowan violated laboratory policy, and testimony at the Hearing which affirmed this finding and which indicated that other ANL-W employees have been suspended for violating Laboratory policies. ANL-W Post Hearing Brief at 10.

I find that ANL-W has failed to meet its burden under Part 708 to show that it would have taken the step of suspending Mr. Cowan without pay in the absence of his Part 708 protected activity. I agree with ANL-W that Mr. Cowan's use of ANL-W e-mail to express his opinions and experiences concerning the whistleblower process to all ANL-W employees violates the company's policy concerning the use of its networking resources. Moreover, I find that Mr. Cowan was sufficiently informed concerning this policy and ANL-W's views regarding the dissemination of his Part 708 concerns, that he should have been aware that ANL-W would not sanction these e-mails. In March 2000, Mr. Cowan acknowledged and signed an ANL-W policy document entitled "Use of Information Resources at Argonne National Laboratory." This document states in part that it is Laboratory Policy "to prevent the use of Laboratory-owned computing and networking resources for unauthorized purposes." It further states that

> It is your responsibility to comply with this policy. Whenever you utilize any of the Laboratory's Information Resources you are expected to conduct your activities within

> reasonable standards of professionalism and in accordance with the Argonne Code of Ethics. . . .
>
> Argonne's information resources are provided solely for the purpose of carrying out Laboratory work (including authorized work for its customers). Laboratory work primarily consists of assigned technical and management activities, but may also include professional development, training, and other Laboratory approved activities undertaken with the knowledge and approval of management. . . .

Document entitled "Use of Information Resources at Argonne National Laboratory", signed by Mr. Cowan on March 26, 2000, included in ANL-W's Hearing exhibits.(7) This document clearly indicates that the "knowledge and approval of management" is required for any use of ANL-W networking resources by employees for any uses other than "assigned technical and management activities." *Id.* Further guidance was given to Mr. Cowan in the September 10, 2001 letter from Dr. Grunder to Mr. Cowan that Dr. Sackett specifically cited in his January 9, 2002 memorandum. In his September 10 letter, Dr. Grunder stated that it was "inappropriate" for Mr. Cowan to distribute to certain ANL-W employees a report concerning some of the concerns raised in his Part 708 complaint. Mr. Cowan was advised by Dr. Grunder that "any action outside [the Part 708 proceeding before OHA] should be held in abeyance before such process is completed." September 10, 2001 letter from Director Grunder to Mr. Cowan, included in ANL-W Hearing exhibits. I conclude that, on the basis of the policy statement and Grunder letter, Mr. Cowan should have been aware that he was violating ANL- W policy when he sent the e-mails. At the Hearing, Mr. Cowan asserted that he specifically asked counsel for ANL-W for advice on a number of issues in the summer of 2001, including use of ANL-W e- mail, and when he received no response, he assumed that he had approval. TR at 632-635. I find no basis for his supposition that ANL-W tacitly approved his use of laboratory e-mail to disseminate his Part 708 complaint concerns. Dr. Grunder's letter clearly refutes such a conclusion. I therefore reject Mr. Cowan's assertion about advice of counsel.

However, with respect to its three day suspension of Mr. Cowan without pay, I find that ANL-W has not met its Section 708.29 burden of proof. As discussed above, the standard in the clear and convincing area is not whether it was *reasonable* for ANL-W to have taken this adverse disciplinary action against Mr. Cowan. The standard is whether the ANL-W has shown by clear and convincing evidence that, in the absence of his Part 708 protected activity, ANL-W *actually would have* suspended Mr. Cowan in this manner for improper use of the Laboratory's e-mail. I do not believe that ANL-W has clearly and convincingly shown this. The available evidence does not indicate that a three day suspension without pay was commonly used to discipline employees for improper e-mail use or any other violations of ANL-W policy. Mr. Janeczko, ANL-W's Human Resources Manager from 1983 until November 2001, testified that over the years ANL-W had taken disciplinary action for cases involving sexual harassment, theft, violation of safety rules, and attendance and punctuality. TR at 567. However, he did not testify whether ANL-W had any criteria or standards for determining the appropriate disciplinary action in a particular instance. He cited only one specific instance of a three day suspension being imposed by ANL-W as a disciplinary action.

> Q. Have you ever taken disciplinary action with regard to any other individual for improper use of the information system?
>
> A. Well, now that you mention it, we have. We did suspend someone three days for downloading some pornographic material off the Internet about two years ago.

TR at 567. This single instance of a three day suspension does not indicate that ANL-W's normal practice was to impose three day suspensions on employees who improperly used the Laboratory's information system. In fact, Mr. Janeczko testified that in arriving at an "appropriate" disciplinary action in Mr. Cowan's case, ANL-W considered a wide range of possibilities.

> Well, we talked about anything from doing nothing to termination of employment. The end

result of those discussions was it was decided that suspension was the way to go.

TR at 570. In light of its admission that it considered a wide range of possible responses, ANL-W has not convincingly demonstrated that it would have rejected the option of merely issuing a warning to Mr. Cowan, or taken some lesser disciplinary action, had Mr. Cowan not been a participatant in a Part 708 proceeding. Accordingly, I find that ANL-W has not met its evidentiary burden concerning this issue. I will direct ANL-W to compensate Mr. Cowan for his three day suspension, and to alter his personnel record to replace references to this suspension with a warning not to repeat his improper use of Laboratory e-mail.

V. Conclusion

Based on the analysis presented above, I find that Mr. Cowan made a disclosure protected under Part 708, and that this protected disclosure was a contributing factor to adverse personnel actions taken by ANL-W against him. Furthermore, I find that ANL-W has not shown by clear and convincing evidence that it would have criticized Mr. Cowan's work performance on his Final FCF Appraisal, transferred Mr. Cowan to the SPF in June 2000, and suspended Mr. Cowan for three days without pay in January 2002 in the absence of his disclosure and/or his participation in this proceeding. Therefore, Mr. Cowan is entitled to remedial action from ANL-W. I find that this remedial action shall include the removal of the Final FCF Appraisal from his personnel file, his reinstatement as a shift operator at the FCF, the payment of any lost wages or other compensation that resulted from his transfer out of the FCF, the payment of compensation lost as a result of this three day suspension in January 2002, and the removal of any reference to that disciplinary action from his personnel file.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Mr. Bernard F. Cowan under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) The Argonne National Laboratory - West (ANL-W) shall immediately return Mr. Cowan to the position at its Fuel Conditioning Facility (FCF) from which he was transferred in June 2000. Mr. Cowan shall be afforded the same opportunity to work as a shift technician at the FCF, and thereby receive overtime and premium pay, as is normally and customarily afforded to other qualified technicians at the FCF. Mr. Cowan also shall be afforded the same opportunities to earn extra overtime pay as other technicians at the FCF.

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

(4) The ANL-W shall produce a report that calculates any lost wages wages plus interest payable to Mr. Cowan. The ANL-W's report shall be calculated in accordance with the Appendix.

(5) The ANL-W shall pay Mr. Cowan's litigation expenses. The amount of this payment shall be in accordance with the report specified in paragraph (3) above.

(6) The ANL-W shall pay Mr. Cowan any lost wages plus interest. The amount of this payment shall be in accordance with the report specified in paragraph (4) above.

(7) The ANL-W shall remove from Mr. Cowan's personnel file the ANL- W Performance Appraisal for Mr. Cowan completed by Mr. K. E. Powers for the Review Cycle 4/1/00 to 6/23/00. The ANL-W also shall remove from Mr. Cowan's personnel files any and all references to his being suspended without pay on January 10, 13, and 14, 2002. The ANL-W may replace such references with a warning that Mr. Cowan's January 7 and January 9, 2002 e-mails to all ANL-W employees were in violation of ANL-W's

policy concerning the use of Laboratory information resources.

(8) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting Mr. Cowan relief unless, within 15 days of receiving this decision, 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: June 27, 2002

(1) LO/TO is a system governing the operation of control devices such as electrical circuit breakers, and is intended to guard against injury to personnel or damage to plant equipment. ROI at 9. In this LO/TO, Mr. Cowan was required to go to several electrical panels located at the FCF and and switch particular circuit breakers in those panels to the "off" position. He was then required to insert a lock securing the individual circuit breaker in the "off" position and affix a tag to the lock certifying that the circuit breaker was "locked out."

(2) In addition to the issues discussed later in this decision, Mr. Cowan disagreed with the ROI Investigator's decision to exclude, as irrelevant, certain incidents of alleged retaliation that occurred before March 2000, some of which date back to 1993. *See* ROI at p. 4, ftnt. 2 and p. 10-11. In light of the findings made in this decision, I believe that the Investigator acted correctly in this regard. Section 708.14(a) clearly provides that a contractor employee "must file [his] complaint by the 90th day after the date [he] knew, or reasonably should have known, of the alleged retaliation." There is no indication that Mr. Cowan lacked any knowledge concerning these earlier incidents. Accordingly, any alleged retaliations occurring before April 2000 cannot be remedied in this proceeding. In some Part 708 proceedings, information concerning earlier alleged retaliations could be relevant for evidentiary purposes in determining whether a contractor has met its burden of proof pursuant to Section 708.29. As discussed in this decision, I find that without regard to any actions taken by ANL-W concerning Mr. Cowan prior to March 2000, ANL-W has failed to make its required evidentiary showing under Section 708.29.

(3) In a letter to the parties dated April 30, 2002, I declined to include in the record of this proceeding the documents e- mailed to me along with Mr. Cowan's post hearing brief.

(4) The "transfer to and from SPF" occurred in April 2000, when Mr. Cowan and several other FCF workers were transferred by ANL-W management to the SPF. Mr. Cowan protested the transfer and ANL-W management immediately permitted him to return to FCF, transferring another FCF worker in his place. As discussed below, Mr. Cowan contends that his initial inclusion by ANL-W in the group being transferred to the SPF was a retaliation for his whistleblower disclosures.

(5) The word in the transcript is "autonomy", which does not convey a reasonable meaning in the context of Dr. Sackett's remarks.

(6) At the Hearing, Mr. Cowan also contended that his March 2001 transfer from the SPF to FASB was retaliatory in nature. TR at 630-631. As I have already determined that he should be reinstated at the FCF, and will calculate his lost benefits for the entire period since his June 2000 transfer from the FCF, I do not believe it is necessary to me to address the circumstances of his transfer to FASB and make a Part 708 determination concerning that transfer.

(7) This document also directs the signatory to "retain a copy of this form for your future reference."