Case No. VWA-0017

April 13, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Timothy E. Barton

Date of Filing: June 27, 1994

Case Number: VWA-0017

This Decision involves a whistleblower complaint filed by Timothy E. Barton under the Department of Energy's (DOE) Contractor Employee Protection Program. From June to September 1994, Barton was employed as a Quality Assurance/Safety Manager by R.E. Schweitzer Construction Company (RESCC), which was awarded a contract by the Fernald Environmental Restoration Management Corporation (FERMCO) to perform construction work on the Vitrification Pilot Plant at the DOE's Fernald site. Barton alleges that RESCC retaliated against him by terminating his employment for taking certain actions and making health and safety disclosures.

I. Background

A. The DOE Contractor Employee Protection Program

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

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to independent fact-finding by the Assistant Inspector General for Assessments and a hearing before a Hearing Officer from the Office of Hearings and Appeals (OHA), followed by an opportunity for review by the Secretary of Energy or her designee. See David Ramirez, 23 DOE ¶ 87,505, aff'd, 24 DOE ¶ 87,510 (1994).

B. Procedural History of the Case

On December 31, 1994, Barton filed a complaint with the U.S. Department of Labor which was referred to the Department of Energy's Ohio Field Office on January 13, 1995. The Ohio Field Office was unable to resolve the complaint and forwarded it to DOE Headquarters. The Assistant Inspector General for Assessments investigated Barton's complaint and issued a Report of Inquiry and Proposed Order (hereinafter "ROI") on June 3, 1997.

The Assistant Inspector General found that Barton had made protected disclosures and engaged in protected actions that contributed to the termination of his employment with RESCC, and that RESCC had not provided clear and convincing evidence that it would have terminated Barton's employment at the time it took the action absent his protected disclosure and protected activity. Accordingly, the Assistant Inspector General proposed that the complainant "be awarded backpay and benefits, minus any earned income and associated benefits, from the time that his employment was terminated until the completion of the RESCC project to which he had been assigned, and during which RESCC had replacement employees assigned to perform the duties he had performed," as well as "payment of reasonable costs and expenses, including attorney fees, incurred in bringing this complaint." ROI at 22.

On June 10, 1997, RESCC sent a letter to the Assistant Inspector General, in which it requested a hearing under 10 C.F.R. § 708.9. The OHA received RESCC's request from the Assistant Inspector General on June 27, 1994. On July 22, 1997, the Director of the OHA appointed me as Hearing Officer. A pre-hearing conference was conducted via telephone on December 23, 1997. The hearing was held at Fernald, Ohio on January 8-9, 1998. At the conclusion of the hearing on January 9, the parties elected to forego oral argument, and requested permission to file post-hearing briefs. The OHA received parties' post-hearing briefs on March 13, 1998.

C. Factual Background

The following summary is based on the investigative file of the Assistant Inspector General for Assessments, the hearing transcript (hereinafter "Tr."), and the submissions of the parties. Except as indicated below, the facts set forth below are uncontroverted.

On June 16, 1994, FERMCO awarded a contract to RESCC to perform construction work on the Vitrification Pilot Plant at DOE's Fernald Plant. Tr. at 92. On or about June 19, 1994, RESCC hired Barton. ROI at 3; Tr. at 131. The contract between FERMCO and RESCC required RESCC to designate an onsite Quality Assurance Representative and Safety Representative, and RESCC designated Barton for both positions. ROI at 3; Tr. at 94. During the course of his employment, Barton maintained daily health and safety logs and daily quality assurance reports which he regularly submitted to RESCC management. See ROI Exhibits 4C, 4D. Barton was also responsible for reporting deficiencies through non-conformance reports that were to be submitted to, among others, FERMCO's Construction Contracts Manager. ROI Exhibit 9.

Shortly before or on September 12, 1994, RESCC discovered that it would need to cut certain steel reinforcement bars in an area at the Vitrification Pilot Plant construction site where a concrete foundation wall was to be poured. On September 12, 1994, an RESCC foreman ordered a worker to go into the area to cut the bars with a gasoline-powered saw. As the worker was cutting the bars, a FERMCO employee saw the worker and, because there was inadequate ventilation in the area, ordered that the work be stopped due to the risk that the worker would inhale excess amounts of carbon monoxide from the exhaust of the saw. Barton was at the Fernald Plant that day, but was not present at the construction site when the worked was stopped. FERMCO categorized the event as an "unusual occurrence" and reported it to the DOE as required by the relevant DOE Order then in effect.(1) In its report on the event, FERMCO stated, "It has been determined that use of the gas powered ?cut-off saw' in the enclosed area was inappropriate. The ? cut-off saw' should only be used in an open air situation, or in an enclosed area with ventilation." ROI Exhibit 4I.

On September 14, 1994, prior to pouring the concrete wall, RESCC installed waterstop in the area where the September 12, 1994 unusual occurrence took place. Waterstop is a material made of polyvinylchloride designed to prevent the passage of water through concrete foundation walls at construction and expansion joints. In order to install waterstop in a right-angled corner, the material must be cut and the ends fused together in place with a heat source. Tr. at 175. Barton, who was at the construction site, believed that the area where the waterstop was to be installed was a "permit- required confined space" as defined in FERMCO's Environmental Safety and Health Manual, and that RESCC would need to obtain a permit

before the waterstop could be fused. See Complainant's Exhibit 3; Tr. at 186. He therefore called a safety technician from FERMCO's Industrial Hygiene Department to the scene in order to obtain a permit. Tr. at 188. The safety technician arrived, assessed the situation, and told Barton that a permit would not be required and that the work could proceed. Id. Barton told the safety technician that he did not agree with the safety technician's assessment, and asked the safety technician to call a manager from Industrial Hygiene to the job site. Id. at 189. Upon arriving at the site, the Industrial Hygiene manager stated that he agreed with the safety technician that a permit was not required prior to fusing the waterstop. Id. Barton again expressed his disagreement and requested that Industrial Hygiene issue a written determination that a permit was not required. Id. at 190. After Industrial Hygiene had given its oral opinion that no permit was required, the RESCC Project Manager proceeded to install the waterstop. Tr. at 191, 396. FERMCO issued a letter to RESCC dated September 15, 1994, stating in part that, "FERMCO considers the space between the forms [where the waterstop was installed] as an enclosed space but not a confined space." ROI Exhibit 4K.

On September 15, 1994, RESCC terminated Barton's employment. There is a sharp factual dispute as to whether and when Barton made disclosures to RESCC and/or took actions that would be protected under the Part 708 regulations, and whether such disclosures or actions led to his termination. I will discuss Barton's alleged disclosures and actions in detail in the analysis below.

II. Analysis

It is the burden of the Complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Barton establishes that a protected disclosure, participation, or refusal was a factor contributing to his termination, RESCC must convince me that it would have taken the action even if Barton had not engaged in any activity protected under Part 708. Helen Gaidine Oglesbee, 24 DOE ¶ 87,507, at 89,034-35 (1994).

After considering the record established in the Assistant Inspector General's investigation, the parties' submissions, the testimony presented at the hearing, and the post-hearing briefs, for the reasons stated below I have concluded that Barton has met his burden of proving by a preponderance of the evidence that he made protected disclosures concerning health or safety that contributed to his termination. However, I have concluded that RESCC has shown by clear and convincing evidence that it would have terminated Barton absent these disclosures.

A. Whether Barton's Activities Are Protected Under 10 C.F.R. § 708.5.

The Part 708 regulations prohibit discrimination by a DOE contractor against its employee on the basis of certain activities by the employee, described as follows in 10 C.F.R. § 708.5(a).

(1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences--

(i) A violation of any law, rule, or regulation;

(ii) A substantial and specific danger to employees or public health or safety; or

(iii) Fraud, mismanagement, gross waste of funds, or abuse of authority;

(2) Participated in a Congressional proceeding or in a proceeding conducted pursuant to this part; or

(3) Refused to participate in an activity, policy, or practice when--

(i) Such participation--

(A) Constitutes a violation of a Federal health or safety law; or

(B) Causes the employee to have a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation, and the activity, policy, or practice causing the employee's apprehension of such injury--

(1) Is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety resulting from participation in the activity, policy, or practice; and

(2) The employee is not required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities;

(ii) The employee, before refusing to participate in an activity, policy, or practice has sought from the contractor and has been unable to obtain a correction of the violation or dangerous activity, policy, or practice; and

(iii) The employee, within 30 days following such refusal, discloses to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy, or practice, and explaining why he has refused to participate in the activity.

The Assistant Inspector General's ROI found that "during the course of his employment, the Complainant made safety disclosures that are protected pursuant to Part 708.5." ROI at 10. In addition, the Assistant Inspector General determined that the Complainant's actions "in identifying the potential safety problem, halting the work and seeking approvals" regarding the installation of waterstop on September 14, 1994, "were protected under Part 708." ROI at 13. Finally, the ROI found that the Complainant faxed a letter to the President of RESCC on September 15, 1994, prior to his termination that day, and that this letter "constituted a disclosure protected under Part 708." ROI at 15.

1. Barton's Disclosures Through September 8, 1994

From July 18, 1994 through September 6, 1994, Barton completed health and safety logs and quality assurance reports which he regularly submitted to RESCC. See ROI Exhibits 4C, 4D.(2) As one would expect in documents of this type, I find a number of entries related to employee health and safety, such as the discovery of contaminated soil at the work site, the danger to workers of impalement from exposed concrete reinforcement bars, and injuries resulting from workers not wearing proper protective gear. Thus, after reviewing these documents, I find that they contain disclosures that the Complainant in good faith believed evidenced a substantial and specific danger to employees or public health or safety, and therefore are protected under 10 C.F.R. § 708.5(a)(1)(ii).(3)

In addition, the Complainant alleges that "probably three or four weeks" prior to his termination he addressed safety concerns in a meeting with RESCC President Ron Schweitzer. Tr. at 156. In a sworn statement provided to the Assistant Inspector General, Barton described an August 31, 1994 meeting in which he "complained that [the RESCC Project Manager] was not requiring men to adhere to safety and quality requirements, and observed that [the RESCC Project Manager] was emphasizing productivity at the expense of safety and quality." ROI Exhibit 2. The RESCC President testified that such a meeting "may

have" taken place, but that he had no specific recollection of it. Tr. at 503-04, 525. I found the Complainant's testimony regarding this meeting to be credible, and note that his recollection is corroborated by an entry in the August 31, 1994 health and safety log submitted by the Complainant stating, "I went to our office this afternoon to talk to Ron S. Didn't accomplish much." ROI Exhibit 4-C. In the absence of any testimony specifically denying that such a meeting took place, I conclude that the meeting probably took place.(4) Because 10 C.F.R. § 708.5(a)(1)(i) protects any disclosure of what the Complainant in good faith believed was a "violation of any law, rule, or regulation," I find that Barton's expressed belief that RESCC workers were not complying with safety requirements is a protected disclosure under Part 708.

Barton also testified at the hearing that he orally communicated safety concerns to the RESCC Project Manager throughout this period. Tr. at 153, 155. However, Barton's testimony describing these conversations provides only a vague reference to safety concerns in general. Thus, he has failed to show that information disclosed in those conversations evidenced a substantial and specific danger to employees or public health and safety. The Complainant also contends that he submitted a non-conformance report to the RESCC Project Manager on August 17, 1994. Tr. at 205; ROI Exhibit 2. Yet, there is no information in this report that evidences a safety concern, a violation of any law, rule, or regulation, or fraud, mismanagement, gross waste of funds, or abuse of authority. ROI Exhibit 4-F. Thus, the Complainant has not met his burden of showing that either his oral or written communications to the RESCC Project Manager contained disclosures protected under Part 708.

On September 8, 1994, Barton sent a letter to the RESCC President in which he primarily refers to scheduling matters related to the ongoing construction project. ROI Exhibit 4-H. This letter contains no references to health or safety matters or violations of any law, rule, or regulation protected under 10 C.F.R. § 708.5(a)(1)(i) or (ii). I do note that the letter states, "We should evaluate the effectiveness of some of the craftspeople on the project to determine if they are truly going to assist us in the successful completion of this project or just suck on the payroll." Id. However, a complaint that workers may not be earning their keep is not evidence of "[f]raud, mismanagement, gross waste of funds, or abuse of authority," the disclosure of which is protected under 10 C.F.R. § 708.5(a)(1)(iii). I therefore find that this letter contains no protected disclosure under 10 C.F.R. § 708.5(a)(1).

2. Barton's Activities Between the September 12, 1994 Unusual Occurrence and his Termination on September 15, 1994

a. Barton's Disclosure of the Unusual Occurrence

After the September 12, 1994 incident described in section I.C above, when RESCC's work was halted by FERMCO and RESCC was cited for an unusual occurrence, Barton alleges that he called the RESCC President and notified him of the incident. Tr. at 163. There is also in the record a document that RESCC had submitted to the Assistant Inspector General, that Barton testified he faxed to RESCC on September 13, 1994, and on which is a handwritten note from Barton to the RESCC President dated "9/13." ROI Exhibit 4-I; Tr. at 164. This document contained the report FERMCO issued regarding the September 12, 1994 unusual occurrence.

The RESCC President, on the other hand, testified that he first heard of the September 12 incident from either the RESCC Project Manager or FERMCO. Tr. at 504. The RESCC President does not believe he received the unusual occurrence report with the handwritten note from Barton on September 13, 1994, Tr. at 539, but is not certain whether he saw this document prior to terminating Barton. Tr. at 544. There is no dispute, however, that Barton and the RESCC President discussed the incident at some point after the event and prior to Barton's termination. See Tr. at 504-05.

With regard to this alleged disclosure, RESCC argues,

Whether or not the Complainant advised [RESCC President] Ron Schweitzer of the September 12, 1994

incident, it would not make any sense to classify it as a protected disclosure. The Complainant was not the first one to disclose the incident to Ron Schweitzer nor did he discover it. It was discovered by FERMCO and it was inevitable that Ron Schweitzer would learn of it. It would not make sense to permit an employee to achieve protected status as a whistleblower for simply repeating a safety concern that was a matter of general knowledge by the time the employee disclosed it.

Respondent's Post-Hearing Brief at 6.

However, the stated policy underlying Part 708 is that contractor employees "should be able to provide information . . . without fear of employer reprisal." 10 C.F.R. § 708.3. This policy would hardly be furthered by a construction of the regulations that would in essence require an employee to discern the knowledge of an employer before providing information to that employer, lest the employee's action go unprotected under Part 708. Nor would it further the purposes of Part 708 if an employee must be the one who discovers a safety problem for his disclosure to be protected. To convey to the appropriate authority an unsafe condition discovered by another employee can be just as valuable to the purpose of ensuring that DOE facilities are "operated in a manner that does not expose the workers or the public to needless risks or threats to health and safety." 57 Fed. Reg. 7533 (March 3, 1992). Thus, I find that Barton, by relating the facts of the September 12, 1994 unusual occurrence to the RESCC President, whether orally or by fax, disclosed information that he in good faith believed evidence a violation of safety regulations, and thereby made a disclosure protected under 10 C.F.R. § 708.5(a)(1)(i). See META, Inc., 26 DOE ¶ 87,504 (1996) (no requirement in Part 708 that a protected disclosure must contain unique information not known to the DOE or contractor).

b. Barton's Activities on September 14, 1994

As described above in section I.C of this decision, on September 14, 1994, Barton sought to prevent the installation of waterstop at the Vitrification Pilot Plant construction site in order to obtain a permit to perform the work. The Complainant testified that he believed at the time, and still believes, that a permit was required before installing the waterstop, and that to proceed with the installation without the permit would have been in violation of safety regulations, and specifically the requirements set forth in FERMCO's Environmental Safety and Health Manual. See Tr. at 186. Barton therefore sought the opinion of a safety technician from FERMCO's Industrial Hygiene Department (IH), and later that of an IH manager. Though FERMCO personnel were of the opinion that a permit was not required, it is clear that Barton believed otherwise, and thus his expression of that opinion to FERMCO constituted a disclosure of what Barton in good faith believed was information evidencing a violation of applicable safety rules and regulations. Accordingly, these disclosures are protected under 10 C.F.R. § 708.5(a)(1)(i).

I do not find, however, that Barton's refusal to approve the installation of the waterstop while awaiting the oral opinion of FERMCO personnel and subsequently requesting that FERMCO provide a written opinion constitutes an activity protected under Part 708. Section 708.5(a)(3) prohibits discrimination against a DOE contractor employee because the employee has

(3) Refused to participate in an activity, policy, or practice when--

(i) Such participation--

(A) Constitutes a violation of a Federal health or safety law; or

(B) Causes the employee to have a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation, and the activity, policy, or practice causing the employee's apprehension of such injury--

(1) Is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or

safety resulting from participation in the activity, policy, or practice; and

(2) The employee is not required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities;

(ii) The employee, before refusing to participate in an activity, policy, or practice has sought from the contractor and has been unable to obtain a correction of the violation or dangerous activity, policy, or practice; and

(iii) The employee, within 30 days following such refusal, discloses to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy, or practice, and explaining why he has refused to participate in the activity.

There are significant differences between the protection afforded disclosures under 10 C.F.R. § 708.5(a)(1), and that provided for refusals to participate under 10 C.F.R. § 708.5(a)(3). Under section 708.5(a)(1), an employee need only have a good faith belief that the information he provides evidences a violation of law or a danger to safety. By contrast, for a refusal to participate to be protected under section 708.5(a)(3)(i)(A), the participation must *in fact* violate Federal health and safety law, and to be protected under 708.5(a)(3)(i)(B), the participation must evoke a *reasonable* apprehension of serious injury and be of such a nature that a *reasonable person*, under the circumstances then confronting the employee, *would conclude* there is a bona fide danger of an accident, injury, or serious impairment of health or safety.

Bearing this in mind, and the fact that the burden is on the Complainant to show that his actions fell within the scope of those protected under Part 708, I find that Barton has not met this burden with respect to his refusal to approve the installation of waterstop on September 14, 1994. The Complainant has not shown by a preponderance of the evidence that the impending installation of the waterstop without a permit (1) would have constituted a violation of Federal health or safety law; (2) caused him to have an apprehension of serious injury to himself, other employees, or the public, or that such apprehension would have been reasonable; or (3) was an action of such a nature that a reasonable person, under the circumstances then confronting the Complainant, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety.

First, while the Complainant contends that installation of the waterstop without a permit would have violated applicable health or safety regulations, the weight of the evidence in the record supports the opposite conclusion. Barton's contention rests on his assertion that the space where the waterstop was to be installed was a "permit-required confined space" as defined in FERMCO's Environmental Safety and Health Manual. Barton presented little if any evidence to support this position, stating that he relied at the time

primarily on my own knowledge of what a non-permit as opposed to a permit require confined space is.

And secondly, the all too obvious ramifications of doing it on [September] 12th [when RESCC was cited for an unusual occurrence] and when Pete McCarthy went in on the 12th and changed the atmosphere of that confined space, making it a permit required confined space.

Tr at 186-87. However, the September 13, 1994 unusual occurrence report FERMCO issued refers four times to the area in question not as a "confined space" but as an "enclosed area." ROI Exhibit 4-I. FERMCO's opinion was reinforced by the September 15, 1994 written determination it issued to RESCC which states that "FERMCO considers the space between the forms as an enclosed space but not a confined space." ROI Exhibit 4-K. Thus, I cannot find that the Complainant has proven by a preponderance of the evidence that installation of the waterstop without a permit would have constituted a violation of a Federal health or safety law.

Second, though the Complainant testified that he believed the fusing of the waterstop would have produced toxic fumes, Tr. at 176, 177, his concerns regarding installation of the waterstop seemed to have

been primarily focused on his belief that the installation would have violated permitting requirements, not on an apprehension that the installation would have caused serious injury to himself, other employees, or the public. See, e.g., Tr. at 187-88 ("the reason was that we had guidelines that we had to perform this work by and as long as I was aware that it was taking place, I was going to make sure that we were going to abide by those guidelines, or those regulations"). That Barton had any apprehension of serious injury to anyone resulting from the waterstop installation is also contradicted by the fact that he was willing to go ahead with the installation if FERMCO provided a written determination that no permit was required. The following portion of Barton's testimony, describing his reaction to the FERMCO oral opinion that a permit was not required, illustrates this point.

So the [FERMCO IH] technician called . . . Craighead. And Jack came down to the job site. And he said that he agreed with his technician. And I said, well, I vehemently disagree with you. I said but you are the -- you know, you're the power out here. I mean you're the guys, your department is who determines what is a permit as opposed to a non-permit required confined space.

So. I'm just going to have to ask you to give it to me in writing. I said just for no other reason than to cover my ass. I said because I can see the handwriting on the wall. Some other individual is going to see what's going on, going to shut the job down just like they did on the 12th and we're going to have another unusual occurrence on our hands. And I'm not going to be responsible for that. I'm going to be -- I'm going to be sure that if in fact it's going to happen, it's going to be your responsibility as the guy who said that it could happen, that it could take place.

Tr. at 189-90.

Even assuming, arguendo, that Barton did have an apprehension that serious injury to himself, other employees, or the public, would result from the waterstop installation, I find that the Complainant has not shown by a preponderance of the evidence that such an apprehension would have been reasonable under the circumstances. Section 708.5(a)(3) requires that the Complainant's apprehension of serious injury be reasonable, 10 C.F.R. § 708.5(a)(3)(i)(B), and also that the activity, policy, or practice in which the Complainant refuses to participate is "of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety resulting from participation in the activity, policy, or practice." 10 C.F.R. § 708.5(a)(3)(i)(B)(1). I conclude that a reasonable person under the circumstances would not have concluded that there was a bona fide danger resulting from the installation of the waterstop.

The opinion of a reasonable person under the circumstances of September 14, 1994, is exemplified by the position FERMCO took that the waterstop could be installed without a permit. The testimony of the Complainant and others indicates that if FERMCO could ever be characterized as being unreasonable in its safety determinations, it is because it tends to err on the side of caution. Barton testified to the Fernald Site's "high standard for safety and quality. And when I say high standard, I mean an extremely high standard with regard to safety and quality." Tr. at 129. One of the Complainant's witnesses called by the Complainant, a fellow RESCC employee, testified that

Fernald is the safest place I've ever worked, period. There's no comparison. . . . I think safety is more important than production. I really believe that here. . . . [H]ere, if you ever saw a dust particle in the air, you can report it and you can guarantee you'd be in full-face respirator within hours.

Tr. at 45, 46. This witness also stated, "One thing you don't do at Fernald is defy the authorities . . . . Especially about your health and safety. Because that will get you fired and run off faster than anything else." Tr. at 58. Accordingly, though reasonable persons can obviously disagree in evaluating the danger of an activity, I find that Barton has not shown by a preponderance of the evidence that he had a reasonable basis for believing that serious injury or a bona fide danger of an accident, injury, or serious impairment of health or safety would result from the installation of waterstop.(5)

Finally, Barton testified at the hearing that in a regular meeting between RESCC employees with

FERMCO officials on September 14, FERMCO requested a special meeting with RESCC, including the RESCC President and Project Manager, "to specifically discuss schedule and the events that had taken place that had led up to that period of time, which was poor quality, poor safety and schedule slippage." Tr. at 244, 245. Barton stated that, sometime between this regular meeting and his termination on September 15, he discussed the requested meeting with the RESCC President, who asked, as related by the Complainant,

[W]hat are we going to be talking about? What do they want us to talk about? And I said, well, basically, Ron [Schweitzer, RESCC President], everything that we've encountered. They perceive there being big problems with what's going on in the field and they're not listening to Ray [the RESCC Project Manager] and I. You know, they want to hear it from you.

And, you know, I said, well, basically, up till now, you know, I've been trying to work with Ray on this and try to resolve these issues and get him to be safe, get him to be quality conscious, but I mean when we go into this meeting, you know, I mean they know what I'm up against. I'll have to come clean, I'll have to tell them the truth.

. . . .

[The truth being that] I got no cooperation in those issues -- on those issues, the safety, quality. Cooperation, you know, with Ray and his manpower regarding those issues.

Tr. at 250. Assuming this conversation took place as the Complainant related in his hearing testimony, the information conveyed by Barton that he was not getting cooperation from the RESCC Project Manager and others on safety issues would constitute a protected disclosure under 10 C.F.R. § 708.5(a)(1)(ii), just as the same information conveyed in the Complainant's late August or early September meeting with the RESCC President was similarly protected, as discussed above in section II.A.1.(6) However, unlike the Complainant's earlier meeting with the RESCC President, this latter conversation to which Barton testified is not corroborated by any contemporaneous documentation. Nor is there any mention of this conversation, as there was with the earlier meeting, in the sworn statement the Complainant gave to the Assistant Inspector General. See ROI Exhibit 2. I therefore do not find that Barton has proved by a preponderance of the evidence that this conversation took place.

I therefore conclude regarding the Complainant's activities on September 14, 1994, that his disclosures of information to FERMCO that he in good faith believed evidenced a violation of the applicable health and safety regulations were protected under 10 C.F.R. § 708.5(a)(1)(i), but that his refusal to approve the installation of the waterstop on this date does not qualify as a protected action under Part 708. Nor can I find that Barton's request to FERMCO personnel that it issue a written determination falls into any category of protected disclosure, participation, or refusal set forth in 10 C.F.R. § 708.5(a).

c. Barton's Disclosures on September 15, 1994

Barton alleges that on September 15, 1994, prior to his termination from RESCC, he sent two faxes to the RESCC President, one from home at approximately 5:00 A.M. and one from the construction site at approximately 2:00 or 2:30 P.M. Tr. at 196, 201; ROI Exhibits 4-F, 4-L. Barton's testimony regarding the fax he sent in the early morning is corroborated by his wife, who testified at the hearing that she recalled being awake in the middle of the night with her husband, prior to his termination, and the Complainant writing a letter which he faxed to the RESCC President sometime between 2:00 and 5:30 A.M. Tr. at 230-33.

The RESCC President testified that he did not receive either of the faxes the Complainant transmitted until the morning of September 16, 1994, the day after Barton was fired. Tr. at 514, 570. Tr. at 261. The RESCC President's son, who worked at the RESCC office, testified that on September 16 either he or a secretary found two faxes on the fax machine that morning, and that he gave the two faxes to his father.

Tr. at 262. He also testified that he was the last person to leave the office on September 15 and that before he left he checked the fax machine for incoming faxes and found none. Tr. at 261. The testimony of the RESCC President and his son is undermined, however, by a handwritten notation on the fax that the Complainant alleges he transmitted on the afternoon of September 15. This notation, which the RESCC President testifies he wrote, states "RCVD 9-15- 94." ROI Exhibit 4-F. When asked when he wrote the notation, the RESCC President testified,

I have no idea. I would assume it was done sometime after -- there was a suit filed and we were, I guess, requested to get documents together and we were trying to gather all the documents.

. . . .

Because I know I received these after I fired him, so I couldn't have already put the 15th on there.

Tr. at 515. I do not believe this RESCC President's testimony provides a sufficient explanation for the "RCVD 9-15-94" notation. Because I find that the credibility of the testimony of the RESCC President and his son is weakened by the notation on one of the documents, I put more faith in the relatively convincing testimony of the Complainant and his wife on this issue, and therefore conclude that the Complainant has shown by a preponderance of the evidence that both faxes were sent to the RESCC President prior to the Complainant's termination.(7) The next issue, then, concerns whether these faxes contained disclosures protected under Part 708.

One of the fax transmissions contained a cover sheet from Barton to the RESCC President stating, "According to P.O. VIII of the R.E.S.C.C. Quality Assurance Program, ?The Quality Assurance Manager will perform inspections which will be documented by utilizing the attached documents.' Please see attached documents." ROI Exhibit 4-F. Attached to the cover sheet were two non- conformance reports that Barton completed which were dated August 17, 1994, and September 15, 1994. I have reviewed these two reports and, as I have already found with respect to the August 17, 1994 report in section II.A.1 above, I find no information in either report evidencing a safety concern, a violation of any law, rule, or regulation, or fraud, mismanagement, gross waste of funds, or abuse of authority. Accordingly, I find nothing in this fax transmission that qualifies as a protected disclosure under 10 C.F.R. § 708.5(a)(1).

The other fax transmitted was a letter from Barton to the RESCC President dated September 15, 1994. This letter refers, among other things, to "a total lack of teamwork and an unwillingness to comply with safety requirements" and cites as an example the installation of the waterstop without a permit on September 14. ROI Exhibit 4-L. Section 708.5(a)(1)(i) protects disclosures of information that an employee in good faith believes evidences a violation of any law, rule, or regulation. I find that Barton believed in good faith, correctly or not, that installing the waterstop without a permit would violate safety rules, and that therefore this fax contains information protected disclosure under 10 C.F.R. § 708.5(a)(1)(i).

Barton also testified that on September 15, 1994, he handed to a FERMCO construction manager overseeing the RESCC contract a copy of the September 15, 1994 letter he had faxed to the RESCC President, along with the September 8, 1994 letter from Barton to the RESCC President discussed in section II.A.1 above. Tr. at 200. While I found above that the Barton's September 8 letter did not contain disclosures protected under Part 708, his September 15 letter did contain information evidencing what Barton in good faith believed was a violation of safety rules. However, the FERMCO construction manager to whom Barton alleges he gave the letters testified that he has no recollection of receiving them. Tr. at 366. Thus, I cannot find that the Complainant has proven by a preponderance of the evidence that he made a protected disclosure to the FERMCO construction manager.

3. Summary of Disclosures by Barton Found to be Protected Under Part 708

As detailed above, I find the following disclosures by Barton to be protected under 10 C.F.R. §

708.5(a)(1).

(1) information contained in the health and safety logs and quality assurance reports submitted by the Complainant to RESCC from July 18, 1994 through September 6, 1994;

(2) information Barton conveyed to the RESCC President in a meeting in late August or early September 1994 that the RESCC Project Manager was not requiring workers to adhere to safety and quality requirements;

(3) facts regarding the September 12, 1994, unusual occurrence conveyed by Barton to the RESCC President after this incident but prior to his termination;

(4) Barton's expression of his opinion to FERMCO personnel on September 14, 1994, that installation of waterstop without a permit would be in violation of application health and safety requirements; and

(5) information contained in a letter faxed from Barton to the RESCC office on September 15, 1994, in which Barton complained about the unwillingness of RESCC employees to adhere to safety requirements.

B. Whether Barton's Protected Disclosures Were Factors Contributing to his Termination

In prior decisions of the Office of Hearings and Appeals, we have established that,

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.'

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54 (1997) (quoting Ronald Sorri, 23 DOE ¶ 87,503 at 89,010 (1993)); Ronny J. Escamilla, 26 DOE ¶ 87,508 at 89,046 (1996).

In this case, there is clearly temporal proximity between Barton's protected disclosures, the first made on July 26, 1994 and the last on September 15, 1994, and his termination on September 15, 1994. As explained below, I also find that the deciding official in this case, RESCC President Ron Schweitzer, had actual or constructive knowledge of each of Barton's protected disclosures.

First, RESCC President confirmed in an April 10, 1996 sworn statement he gave to the Assistant Inspector General that he had received health and safety logs and quality assurance reports from Barton on a weekly basis, ROI Exhibit 15, and the logs and records which were found above to contain protected disclosures were submitted to the Assistant Inspector General by RESCC. ROI Exhibits 4-C, 4-D. I therefore find that the RESCC President had actual knowledge of these disclosures. Second, the RESCC President obviously had actual knowledge of the protected disclosures conveyed by Barton when the two met in late August or early September 1994, and in conversations between the two relating to the September 12 unusual occurrence. Third, the RESCC President testified at the hearing that, prior to terminating the Complainant, he was aware of the September 14, 1994 disagreement between Barton and FERMCO IH personnel over the need for a permit to install waterstop, and therefore the RESCC had actual knowledge of Barton's protected disclosures to FERMCO that day. Finally, there is no proof that the RESCC President had actual knowledge of the letter from Barton to the RESCC President found above to have been faxed to the RESCC office on September 15, 1994. However, because Barton has proved by a preponderance of the evidence that he faxed the letter to the RESCC office prior to his termination that day, because the fax cover sheet and letter was addressed to the RESCC President, and because there is no dispute that the RESCC President was in his office on September 15, 1994, I conclude that there is sufficient evidence to find that the RESCC President had at least constructive knowledge of the information contained in that letter.

I therefore conclude that the Complainant had met his burden of establishing by a preponderance of the evidence that he made disclosures described under 10 C.F.R. § 708.5, and that these disclosures were a contributing factor in his termination. Therefore, the burden shifts to RESCC to prove by clear and convincing evidence that it would have terminated the Complainant absent his protected disclosures. 10 C.F.R. § 708.9(d).

C. Whether RESCC Would Have Terminated Barton Absent His Protected Disclosures

For the reasons set forth below, I find based on my review of the record in this case clear and convincing evidence that RESCC would have terminated Barton absent the protected disclosures described in section II.A above. My conclusion is based on the compelling evidence in the record pointing to two primary motivations behind the RESCC President's decision to fire Barton.

The first clearly apparent motivation was a disagreement between the RESCC President and the Complainant regarding the scope of the Complainant's duties. Though the precise genesis of this dispute is not clear from the record, it is clear that the RESCC President held the Complainant at least partially responsible for not preventing the September 12, 1994 incident that FERMCO subsequently categorized as an unusual occurrence, and that the Complainant's response to the RESCC President was that the primary responsibility for the incident instead rested with the RESCC Project Manager. The following excerpts from the hearing testimony illustrate this point. The first excerpt is from the testimony of the RESCC President.

Q Now, were you angry with Mr. Barton after this gas powered saw incident on September 12?

A Sure, I was upset. He wasn't on the job. Like I said, why weren't you there, Tim? You could have prevented that. And he said, he wasn't there because he had to -- he was just over there in the administration building on site.

Q Are you saying that the incident was all his fault?

A The gas powered?

Q Right. Or were there other people responsible, too?

A No, I couldn't say it was all his fault.

Q Okay, but you felt that he should have been there to prevent it, even though --

A On site, the primary responsibility for safety rested with Mr. Barton. And it was a safety problem.

Tr. at 507. The next excerpt is from the Complainant's testimony.

Q Did you ever have a discussion with Ron Schweitzer about that [unusual occurrence] report or the incident beyond that?

A Yes. And, you know, basically Ron said, well, you know, that's what I hired you for was to make sure that these things are prevented. And I in turn responded that I can't make Ray [the RESCC Project Manager] be safe. I mean Ray has got to take his own initiative to keep him and his people safe. I mean I can't lead him by the hand with every task and say, okay, now Ray, are you going to be safe on this task? Or, you know, do I need to stay here?

The existence of an ongoing dispute between the RESCC President and the Complainant over the scope of the Complainant's duties was corroborated by the hearing testimony of a FERMCO construction manager.

I was trying to oversee their [RESCC's] contract to get it done and they were supposed to provide quality assurance and quality control inspection, the whole gamut.

But I was aware also that [the Complainant] had this ongoing philosophical discussion with [the RESCC President] that that wasn't really what he had hired him for. That's [the Complainant] relating to me. That's not why he hired me. He hired me for the programmatic side of this stuff. I'm not supposed to be the quality control inspector type thing.

Tr. at 118.

The RESCC President testified that after the September 12 unusual occurrence he wasn't ready to fire Barton. "I wasn't happy with his performance. I wasn't ready to fire him." Tr. at 510. Asked what put him "over the edge," the RESCC President testified that "it was the incident of September 14th." Id. This is the second clearly apparent motivation for Barton's termination. September 14, 1994, was the day that Barton refused to approve the installation of waterstop without a permit, and both parties agree that the incidents of that day played a pivotal role in the RESCC President's decision to terminate Barton.

[RESCC President] ***Schweitzer expressly admitted that it was the incident of September 14, 1994 (the waterstop incident) which brought him to the point of firing Barton***. Specifically, Schweitzer was unhappy that Barton had requested Industrial Hygiene's position in writing because "[t]hat made us look foolish. . . ." Schweitzer considered the incident ***"the straw that broke the camel's back."***

Complainant's Post-Hearing Brief at 13 (citing Tr. at 510, 511, 563) (citations omitted) (emphasis in original). While both RESCC and the Complainant do not dispute the importance of the events of September 14, 1994, the Complainant contends that Barton's actions that day were protected under Part 708, while RESCC maintains they were not. See id. at 2; Respondent's Post-Hearing Brief at 2-3. For the reasons explained in section II.A.2, I have already found that while Barton's expression of opinion to FERMCO personnel that a permit was required prior to installation of the waterstop was a protected disclosure under 10 C.F.R. § 708.5(a)(1)(i), Barton's refusal to approve the installation of the waterstop and his request to FERMCO that it put its opinion on the matter in writing are not protected activities under the Part 708 regulations.

The critical issue here, then, is which of Barton's actions on September 14, 1994 precipitated his termination. I find clear and convincing evidence that it was not Barton's disclosures to FERMCO that day that upset his boss. As the Complainant states in his post-hearing brief, it was specifically Barton's request for a written determination from FERMCO that brought the RESCC President to the point of firing Barton. Tr. at 510; Complainant's Post-Hearing at 13. At the hearing, the RESCC President described Barton's request as

really unreasonable. That was not -- that was unnecessary. That made us look foolish and was just an unnecessary request I thought.

. . . .

Requiring a written authorization was not proper. That was not a proper decision. There was no reason we should say [to FERMCO IH manager] Craighead, I don't trust what you're telling me. Put it in writing for me so that I can let this work go ahead.

Tr. at 511, 564.

I therefore conclude that there is clear and convincing evidence in the record that the RESCC President's decision to terminate the Complainant was primarily motivated by a disagreement over the scope of the Complainant's duties, which manifested itself in the RESCC's President opinion that Barton bore a large amount of responsibility for the unusual occurrence of September 12, 1994, and Barton's refusal to approve the installation of waterstop on September 14, 1994, without first receiving a written

determination from FERMCO. Because I find that these were the reasons for the action taken by the RESCC President, I conclude that Barton would have been terminated absent his protected disclosures.

III. Conclusion

As set forth above, I have found that the Complainant has met his burden of proof of establishing by a preponderance of the evidence that this he made disclosures protected under 10 C.F.R. Part 708. I also have determined that the Complainant's disclosures were contributing factors in his termination. However, I found that RESCC has proven by clear and convincing evidence that it would have terminated the Complainant absent his disclosures. This result does not diminish the protection afforded the Complainant's health and safety disclosures. Part 708 unmistakably prohibited RESCC from taking any action in reprisal for these disclosures. But these regulations do not constrain an employer from taking what it sees as appropriate action in response to a employee's failure to perform his duties as envisioned by the employer, or in response to conduct that is outside that protected by Part 708. Accordingly, I conclude that the Complainant has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted under § 708.10.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Timothy E. Barton under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Assistant Inspector General for Assessments, Office of the Inspector General, Department of Energy.

Steven J. Goering

Staff Attorney

Office of Hearings and Appeals

April 13, 1998

Appendix - Case No. VWA-0017

Disclosures by Complainant in Health and Safety Logs and Quality Assurance Reports

Health and Safety Logs

Log Date Log Entry

7/26/94"FERMCO sprayed Dursban insecticide on our work area the A.M. This product is toxic! How about soil contamination after spraying?"

7/27/94"We discovered contaminated soil first rattle out of the box today."

8/10/94"I instructed Ray to have the vertical rebar covered with something to protect workers from impalement hazard."

8/11/94"I had to keep on the men about keeping their goggles or face shields on while placeing [sic] concrete. I have serious reservations regarding keeping the worker safe from concrete skin injuries as opposed to the hazard of impaired vision with the protection on."

8/15/94“I . . . instructed laborers to make sure all rebar ends are covered to protect workers from impalement.”

8/17/94“James Stanley hit knee with small piece of board. See accident report in rear of log.”

8/29/94“I conducted a safety meeting today about [Material Safety Data Sheets], the mud being a slip hazard and responsibility to read all [Material Safety Data Sheets].”

9/1/94 “James Stanley was trying to drive a nail through rebar when his hammer hit the rebar, bounce onto his nose. He incurred minor laceration on the bridge of his nose. SEE FILE.”

9/6/94 “Yolanda Miller hit her finger with a hammer, caused laceration. SEE 1st Report of Injury (FILE).”

“Ms. Miller . . . did not have her leather palmed gloves on when she should have.”

Quality Assurance Reports

Log Date Log Entry

7/27/94“Crew began excavation @ the lowest elevation and was planning on working uphill. But they encountered contaminated soil the first bucket of soil excavated. . . . Crew moved to uphill location until determination is made . . . by Rad. Safety.”

“RESCC encountered contaminated soil today.”

8/2/94 “Crew performing layout, notified Rick S. that “LASER” warning sign needed to be on the tripod.”

8/8/94 “[E]xcavation was caution taped off as a secondary barrier per req.”

8/9/94 “There were 2 deficiencies with safety found today during walk thru. Rebar caps on form pins and boards over extension cords @ walkway.”

8/10/94“Wise guys are using P.V.C. cement without [Material Safety Data Sheet].”

8/24/94“I instructed crew to be aware of unprotected protruding rebar and to cover the ends with something to prevent impalement.”

8/31/94“Crew was observing using improper picking devices for EFCO forms. Deficiency was corrected by utilizing shake out hooks instead of eye bolts.”

9/1/94 “James Stanley hit himself on his nose with his hammer today. (SEE 1st Report of Injury).”

9/6/94 “Yolanda Miller hit her hand with a hammer today. SEE 1st Report of Injury.”

(1)DOE Order 5000.3B, in effect from February 22, 1993, to October 30, 1995, defines an “unusual occurrence” as a “non-emergency occurrence that has significant impact or potential for impact on safety, environment, health, security, or operations” and provides that

[o]ral notification to DOE of unusual occurrences shall be as soon as sufficient information is obtained to indicate the general nature and extent of the occurrence but, in all cases, within 2 hours of categorization. However, oral notification to DOE should be accomplished as soon as possible for those occurrences judiciously determined to likely generate external interest. A Notification Report shall be prepared and submitted before the close of the next business day from the time of categorization (not to exceed 80 hours).

DOE Order 5000.3B (January 19, 1993).

(2)The Complainant notes that the Assistant Inspector General found in the ROI that the Complainant "reported a number of safety and quality issues in his daily safety and quality assurance logs which qualified as protected disclosures under Part 708" and contends that the "fact that Barton made these specific reports went unchallenged at hearing." Complainant's Post-Hearing Brief at 16. The Complainant therefore argues that I should adopt the findings of the Assistant Inspector General regarding these disclosures. Id. Though I agree with the Complainant that RESCC does not dispute the content of the health and safety logs and quality assurance reports submitted by Barton, RESCC has never conceded that the concerns reported in those logs and reports qualify as protected disclosures under Part 708. I therefore must determine whether, as found by the ROI, these logs and reports contain disclosures protected under 10 C.F.R. § 708.5(a)(1). See 10 C.F.R. § 708.10(b) ("[T]he Hearing Officer may rely upon, but shall not be bound by, the findings contained in the Report of Investigation.").

(3)In an appendix to this decision, I have set forth the specific log and report entries that I find are disclosures protected under 10 C.F.R. § 708.5(a)(1)(ii). I find that all other entries in the health and safety logs and quality assurance reports were either not related to safety or, if safety related, did not appear to be information that Barton in good faith believed evidenced a *substantial and specific* danger to employees or public health or safety. See Francis M. O'Laughlin, 24 DOE ¶ 87,505 (1994) ("Evidence that safety in the most general sense was referred to does not satisfy the regulatory standard of the complainant having actually disclosed information which in good faith is believed to evidence a substantial and specific danger, that applies to protected health and safety disclosures.")

(4)I am aware that Barton testified at the hearing that this meeting took place on a Saturday, Tr. at 156, while August 31, 1994, fell on a Wednesday. See ROI Exhibit 4-C. This seeming inconsistency, which is somewhat understandable given the passage of time since the events in question, is of little significance because by either account the meeting would have taken place prior to Barton's termination.

(5)In his testimony, Barton referred to portions of a Material Safety Data Sheet for "Specification Grade PVC Waterstop" which state that "P.V.C. involves Hydrogen Chloride, carbon monoxide and other toxic gases when burned," that "[f]umes from Molten Plastic should not be breathed unnecessarily," that a "self-contained breathing apparatus [should be used] if fusion welding in non-ventilated confined area," and that there should be "[v]entilat[ion] when fabricating (fusion welding) in confined area." ROI Exhibit 4-J; Tr. at 176-78. This document clearly points to the dangers of fusing waterstop in a *confined area* without ventilation or appropriate safety gear. But, as noted above, a preponderance of the evidence does not support a finding contrary to that of FERMCO that the area in question on September 14, 1994, was a confined area.

(6)I do not believe that the Complainant's statement that he intended in the future to disclose information in an upcoming meeting with FERMCO can be classified as a disclosure protected under Part 708.

(7)Both faxes contain date stamps generated by a fax machine, and both read September 13, 1994. However, since the parties agree that the faxes were not transmitted on that day, I find that the date stamps provide no evidence that helps resolve the factual dispute between the parties as to the time of the fax transmissions.