Case No. VWA-0021

June 1, 1998

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Carlos M. Castillo

Date of Filing: February 2, 1998

Case Number: VWA-0021

This Decision involves a complaint filed by Carlos M. Castillo (Castillo or “the complainant”) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Castillo is the former employee of a DOE contractor, Kiewit Construction Company (Kiewit), and alleges in his complaint that during that employment certain reprisals were taken against him by Kiewit as a result of his raising a concern related to safety. These alleged reprisals include the complainant’s wrongful termination from employment and, after he had been rehired, being improperly selected for a company layoff. After a preliminary investigation of this matter by the DOE Office of Inspector General, Castillo and Kiewit exercised their option for an expedited hearing under 10 C.F.R. § 708.9. On the basis of the hearing that was conducted and the record before me, I have concluded that Castillo is not entitled to relief under 10 C.F.R. Part 708.

I. 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 those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2,

1992, establish administrative procedures for processing complaints of this nature. These procedures typically include independent fact-finding by the DOE Office of Inspector General (IG), and a hearing before a Hearing Officer assigned by the Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision, followed by an opportunity for review by the Secretary of Energy or his designee. *See* 10 C.F.R. §§ 708.8-708.10. As explained in the succeeding section of this Decision, however, the pre-hearing investigative stage of the proceeding, generally conducted by the IG, was partially dispensed with in this case based upon the agreement of the parties.

B. The Present Proceeding

(1) Procedural History

In his complaint, Castillo claims that Kiewit took reprisals against him, first in the form of his wrongful termination from employment on October 19, 1994. Following this alleged reprisal, Castillo filed complaints with the State of Nevada Department of Industrial Relations, Health and Safety Division, and with the National Labor Relations Board (NLRB). However, Castillo's complaint before the State agency was dismissed for lack of jurisdiction, and the NLRB ultimately dismissed his complaint after he was rehired by Kiewit on November 21, 1994, under a negotiated settlement between the company and the complainant's union. On December 7, 1994, shortly after he was reinstated, Castillo filed a statement of safety concerns with the DOE Office of Civilian Radioactive Waste Management (OCRWM), Quality Concerns Program. At that time, OCRWM advised Castillo that his claim that he was terminated in connection with reporting a safety matter should be referred to the DOE Office of Contractor Employee Protection (OCEP), later reorganized into the DOE Office of Inspector General (IG), for review under 10 C.F.R. Part 708. Castillo accordingly filed a complaint, 10 C.F.R. § 708.6, that was received by the IG on December 17, 1994.

OCRWM then initiated an investigation into the safety matters raised by the complainant which allegedly resulted in his October 19, 1994 termination. Pursuant to that investigation, OCRWM issued a final report on February 24, 1995, in which it concluded that "[t]he site visit revealed there were no serious health or safety issues existing . . . [and] the expression of a safety concern played no part in the decision to terminate the employee." Thereafter, on May 31, 1995, Kiewit laid off the complainant under a reduction in force necessitated by budget cuts. Castillo then filed a second complaint with the NLRB; however, Castillo withdrew that complaint with the approval of the NLRB in June 1995.

On September 10, 1996, the IG agreed to accept jurisdiction of the "whistleblower" complaint filed by Castillo. *See* 10 C.F.R. § 708.8. Following its assessment that attempts at informal resolution of the matter were unavailing, the IG advised the complainant and Kiewit by letter dated February 11, 1997, that an on-site review and investigation of the complaint would be conducted. However, prior to issuing a formal Report of Investigation, 10 C.F.R. § 708.8(f), the IG offered the parties the option to proceed to a hearing before the Office of Hearings and Appeals (OHA), under 10 C.F.R. § 708.9, in order to expedite the agency's adjudication of this matter. That option was accepted by mutual agreement of the parties in letters received by the IG from Kiewit and Castillo, on December 12 and 15, 1997, respectively. Pursuant to that agreement, the case file was transmitted to OHA on February 2, 1998, and I was appointed as Hearing Officer, 10 C.F.R. § 708.9(b), on February 6, 1998. Unlike conventional proceedings conducted under Part 708, the absence of a Report of Investigation under the expedited procedure required substantially greater factual development of the record at the prehearing and hearing stages.(1) Thus, after numerous contacts with the parties in the form of written correspondence and conference calls, I scheduled a hearing in this proceeding, which was conducted on April 15-16, 1998. The official transcript of that hearing shall be cited in this determination as "Tr." and pertinent documents, received into evidence as hearing exhibits, cited as "Exh."

(2) Factual Background

The following summary is based upon the hearing testimony, the partial IG investigative file and submissions of the parties. Except as indicated below, the facts set forth below are uncontroverted.

The complainant is an ironworker, now retired, who was referred to Kiewit by the Ironworkers Union in March 1994, for employment in connection with construction work being performed at the Nevada Test Site, Yucca Mountain Project (YMP). Exh. 18 (Castillo Statement to IG, July 9, 1997) at 1. At that time, Kiewit was the subcontractor on the YMP under the prime contractor, Reynolds Electric & Engineering Company (REECO). Initially, there was a small crew of various construction craftsmen retained by Kiewit

to begin construction of the YMP tunnel portal (Portal). Castillo was one of only two ironworkers hired initially by Kiewit, along with Mr. Don Reed, although others were hired later. At that time, the Ironworkers Union business agent, Mr. Frank Caine, advised Kiewit that Don Reed would serve as foreman (Ironworkers Foreman) and Castillo would serve as ironworkers union steward. Tr. at 322, 347-48.

Kiewit is a company which is commonly acknowledged by all concerned, including the complainant, as being very safety conscious. Tr. at 263. Kiewit has a commendable safety record and utilizes the extraordinary measure of conducting a safety meeting at the outset of each work day. Tr. at 146-47. These meetings generally proceeded according to an agenda determined by management; however, all employees are encouraged to raise safety matters relating to the YMP work environment. Tr. at 54. Although safety was the primary focus, these assemblies were sometimes used as a convenient forum to discuss other matters of mutual concern, such as work assignments, usually before or after the meeting was called to order. Tr. at 73, 99-100, 353.

During the initial months while working at the YMP Portal, Castillo raised a number of safety matters both in and outside of safety meetings. One of the matters that Castillo raised concerned the placing of protector caps on steel concrete form stakes. Tr. at 56. These stakes were used to hold concrete pads in place during pouring. During the initial stages of work at the Portal, steel rebar (approximately 7/8th inch diameter) instead of conventional concrete stakes was used for this purpose. Tr. at 122. The rebar was cut and hammered into place leaving the top protruding approximately one foot above the surface of the concrete pad. Castillo was one of the most vocal workers at the site with respect to safety and other matters, discussed below, and he was perhaps the first to stress the capping of these rebar stakes as a safety precaution. Tr. at 51, 100, 183. The complainant and others reminded the work crew about the capping of stakes if the caps were forgotten or inadvertently knocked off. Tr. at 331, 374. The management and supervisory personnel agreed that the capping of stakes was a good idea and encouraged this practice. Tr. at 172, 323.

However, in his capacity as ironworkers union steward, the complainant was also very vocal to Kiewit management about a number of matters not related to safety. Tr. at 210-11. These matters sometimes related to ironworkers' pay but very often related to what Castillo believed to be improper work assignments by Kiewit supervisory personnel. Tr. at 113. For instance, the complainant was adamant that only ironworkers, and not miners working at the site, should be used to cut the steel rebar used as concrete stakes. Tr. at 58-59. Castillo often raised these types of union matters at inopportune times and disrupted safety meetings on several occasions. Tr. at 201, 323. As noted above, this daily gathering was often used as a convenient time to discuss issues not related to safety both before and after the safety meeting. However, in certain instances, Castillo would continue to voice his objections on union/work assignment issues sometimes in a loud and abrasive tone during the actual safety meeting, although he was warned to discontinue the discussion by his Kiewit supervisor. Tr. at 144, 210. Castillo was warned to desist in this behavior not only by Kiewit supervisory personnel, but by the Ironworkers Foreman and on two occasions, over the telephone and in person, by Frank Caine, the Ironworkers Union business agent who sent Castillo to the YMP and appointed him as union steward. Tr. at 212, 324-25.

Due to the sporadic nature of the work at the Portal, Castillo and other workers were laid off for brief periods during the initial months of the YMP. However, in late June 1994, Castillo was laid off once again and did not return to the YMP until September 1994. Exh. 18 at 2; Tr. at 210. At that time, the complainant was assigned to work at a YMP location referred to as the Precast Yard, a site several miles away from the Portal, which had recently been erected for the purpose of fabricating concrete slabs for the YMP tunnel. The supervisor of the Precast Yard was Mr. E.Z. Manos (Precast Yard Supervisor). Exh. 18 at 2. While working at the Precast Yard, the complainant continued to raise various safety matters. According to the complainant, the capping of concrete stakes was among the matters which he emphasized to the Precast Yard Supervisor. Tr. at 260-62. Although conventional concrete stakes rather than rebar were used at the Precast Yard, the complainant asserts that the stakes were not always capped. In addition, apart from these safety issues, Castillo continued to voice concerns on union/work assignment

issues in his capacity as union steward. Despite the warnings he had received while working at the Portal, the complainant continued to use safety meetings as a forum to address union/work assignment concerns. Tr. at 196-97, 201. The Precast Yard Supervisor complained to Kiewit management personnel that on a few occasions, Castillo impeded the start of safety meetings by persisting with union matters even when told to cease the discussion. Tr. at 326, 396- 97.

The burgeoning conflict between the Precast Yard Supervisor and the complainant came to a head on the morning of October 19, 1994, prior to the start of the daily safety meeting. At that time, the Precast Yard Supervisor announced a new procedure for transporting certain workers from the Precast Yard to the Portal, specifically that due to differing work-day schedules, the ironworkers, electricians and carpenters would ride a van to be driven by him, as opposed to a bus previously used to transport all workers. Exh. 2 (Castillo NLRB Affidavit, October 25, 1994) at 9; Tr. at 253-55. Castillo strongly objected to this new procedure on the basis that as a Kiewit management official, the Precast Yard Supervisor could not transport workers but instead a member of the Teamsters Union must be utilized for this purpose. *Id.*; Tr. at 173. A heated argument ensued between the complainant and the Precast Yard Supervisor, with loud exchanges lasting for about 15 minutes. Tr. at 74, 374-76. The Precast Yard Supervisor told Castillo to end the discussion in order to begin the safety meeting, but Castillo refused stating that he would seek resolution of the van matter from higher Kiewit management. Tr. at 174. The complainant abruptly left the Precast Yard and began walking to the Portal area where the Kiewit on-site offices were located. Upon arriving at the Portal area, Castillo was told by Mr. Jim Morris, the Construction Manager, that based upon the recommendation of the Precast Yard Supervisor who had phoned him, the complainant had been fired. Tr. at 213.

On the basis of an agreement negotiated by the Ironworkers Union business agent and the Kiewit YMP Project Manager, Castillo returned to work for Kiewit at the YMP in November 1994. Tr. at 216. A principal condition of Kiewit agreeing to rehire Castillo, recommended by the Ironworkers Union, was that Castillo would no longer serve as union steward. After his return, Castillo did not repeat the practices that led to his firing. The Precast Yard Supervisor who had initiated the complainant's termination left the company shortly after his return. Tr. at 29. Although Castillo continued to make safety recommendations, he was not obtrusive in doing so and the complainant maintained good working relations with his coworkers, the Ironworkers Foreman and the succeeding Precast Yard supervisors. Tr. at 89, 273, 276, 360-61.

In May 1995, the decision was made by Kiewit to lay off approximately 75% of the workers at the Precast Yard due to YMP budget cutbacks and because there was already a large inventory of concrete slab segments produced at the Precast Yard. Tr. at 217. The Ironworkers Foreman was told that he must lay off all but a minimum crew of the ironworkers. Tr. at 177. Under this direction and since there were no union seniority rights applicable at the YMP, the Ironworkers Foreman followed a straightforward selection process. Tr. at 182. Besides himself, the Ironworkers Foreman decided to retain two individuals, Mr. Pete Robles, who filled in as foreman in his absence and was considered to be a top worker, and Mr. Floyd Cooper, who then was the ironworkers union steward. Exh. 18 at 6; Tr. at 330. The remaining four Precast Yard ironworkers, including Castillo, were selected for layoff. This selection process was approved by the Mr. Jeff Moore, who was then supervisor of the Precast Yard, and by Kiewit management. Tr. at 191-92, 218. Thus, on May 31, 1995, the complainant was laid off by Kiewit. Although Kiewit designated Castillo "eligible for rehire" at the time of the layoff, the determination whether to return him to work at the YMP as ironworker positions became available was not in Kiewit's control but a matter between the Ironworkers Union and the complainant. Tr. at 177, 283-84. For reasons beyond the scope of this proceeding, the Ironworkers Union never referred Castillo to Kiewit for rehire at the YMP after he was laid off on May 31, 1995. The complainant retired in June 1996. Exh. 18 at 1.

II. Legal Standards Governing This Case

In 10 C.F.R. Part 708, we find the rule applicable to the review and hearing of allegations of reprisal based

on protected disclosures made by an employee of a Department of Energy (DOE) contractor. Proceedings under Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or his designee. *See David Ramirez*, 23 DOE ¶ 87,505 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has " . . . [d]isclosed 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 . . . a substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5 (emphasis added). In the present case, Castillo claims in his complaint that adverse personnel actions were taken against him by Kiewit, including the initial October 1994 termination and a subsequent layoff, as a result of his disclosing to Kiewit management personnel an unsafe working condition relating to the absence of safety caps on steel stakes used in the pouring of concrete slabs.(2)

A. The Complainant's Burden

The regulations describe the burdens of proof in a whistleblower proceeding as follows:

The complainant shall have the burden of establishing 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. Once the complainant has met this burden, 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, participation, or refusal.

10 C.F.R. § 708.9(d); *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993). "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 burden of persuasion 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). As a result, Castillo has the burden of proving by evidence sufficient to "tilt the scales" in his favor that he disclosed information, in this case uncapped concrete stakes, which he in good faith believed evidenced a substantial and specific danger to employees or public safety. 10 C.F.R. § 708.5(a)(1)(ii). If the complainant does not meet this threshold burden, he has failed to make a *prima facie* case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a *contributing factor* in the personnel actions taken against him, specifically his termination on October 19, 1994, and later layoff on May 31, 1995, after the complainant was rehired. 10 C.F.R. § 708.9(d); *see Helen Gaidine Oglesbee,* 24 DOE ¶ 87,507 (1994); *Universities Research Association, Inc.*, 23 DOE ¶ 87,506 (1993). This standard of proof is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221(e)(1), and the 1992 amendment to § 210 (now § 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In explaining the "contributing factor" test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation's chief House sponsors, stated: “The words ?a contributing factor’, ... mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” 135 Cong. Rec. H747 (daily ed. March 21, 1989)(Explanatory Statement on Senate Amendment-S.20). *See Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying "contributing factor" test).

B. The Contractor's Burden

If the complainant meets his burden, the burden shifts to the contractor. The contractor must prove by "clear and convincing" evidence that it would have taken the same personnel action against the complainant absent the protected disclosure. "Clear and convincing" evidence is a much more stringent

standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F. Supp. at 1204 n.3. Thus, if Castillo has established that it is more likely than not that he made a protected disclosure that was a contributing factor to his termination and subsequent layoff, Kiewit must convince us that it would have taken these actions despite the safety matter communicated by the complainant.

III. Analysis

I have carefully reviewed the record in this proceeding, including the testimony of the witnesses at the hearing and the exhibits submitted into evidence by Castillo and by Kiewit. For the reasons set forth below, I find that although the complainant made a disclosure that is protected under 10 C.F.R. § 708.5(a)(1), he has failed to show by a preponderance of the evidence that this disclosure was a contributing factor in his October 19, 1994 termination or his subsequent layoff. I will therefore deny Castillo's request for relief under 10 C.F.R. Part 708.

A. Castillo's Disclosure

A protected disclosure for purposes of the Contractor Employee Protection Program is one that consists of "information that the employee in good faith believes evidences . . . (ii) a substantial and specific danger to employees or public health or safety." 10 C.F.R. §¡708.5(a)(1). It is essentially uncontroverted that on more than one occasion, the complainant brought to the attention of Kiewit management that certain partially embedded steel bars used to reinforce concrete did not have protective covers, or caps, thereby exposing their sometimes sharp or jagged ends to the construction workers. Tr. at 262. I am also convinced that Castillo harbored a good faith belief that this condition constituted a "substantial and specific danger" to his fellow construction workers.(3) I reach this conclusion because the complainant raised this issue on several occasions, Tr. at 262, 284, and because he had personal knowledge of an injury to at least one fellow construction worker caused by contact with an uncapped bar. Exh. 2, NLRB Aff. at 3.(4) I therefore find that the complainant made a protected disclosure for purposes of section 708.5(a)(1).

B. Was Castillo's Disclosure a Contributing Factor in Personnel Actions?

In most cases it is impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Thus, the complainant in these proceedings must usually meet his burden of proof through circumstantial evidence. For example, a protected disclosure has been found to be a "contributing factor" in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald L. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) (*Sorri*) *quoting McDaid v. Dep't of Hous. and Urban Dev*., 90 FMSR ¶ 5551 (1990). In this case, however, I find insufficient evidence, either circumstantial or direct, that Castillo's disclosure was a contributing factor in the personnel actions taken against him.

1. The October 19, 1994 Termination

At the hearing, Castillo testified that he initially stated his concern regarding the uncapped stakes in "March or April" 1994, and that he raised the issue again on October 18, 1994, the day before he was fired, in one of Kiewit's daily safety meetings. Tr. at 262. In all, the complainant stated that he raised the uncapped stakes issue with Kiewit management "3 or 4 times prior to October 19, 1994." Exh. 18, July 29, 1997 Statement to IG, at 4. Whether he actually raised it on October 18 is unclear.(5) Castillo also presented the testimony of George Christakis, a fellow construction worker at the Yucca Mountain site, in support of his contention that his October 19 termination was in retaliation for his safety disclosure. Mr. Christakis testified that he had heard, from unidentified fellow ironworkers at the union hall and from

Frank Caine, the Ironworkers Union business agent, that Castillo had been fired because of safety disclosures. Tr. at 157, 161. Castillo has provided no other direct evidence connecting his disclosure with his firing. For the reasons below, I find that the complainant has failed to carry his burden to show that his safety disclosure was a contributing factor in his October 19, 1994 termination.

I initially find Mr. Christakis' testimony to be of little probative value. Mr. Christakis was not hired as a construction worker at the Yucca Mountain site until December 8, 1994, almost two months after Castillo's initial termination in October 1994. Tr. at 159. He therefore had no direct knowledge of the termination or the events that led up to it. His claims that he had heard from fellow ironworkers at the union hall and from Mr. Caine, the Ironworkers Union business agent, that the complainant had been dismissed for making unspecified safety disclosures are hearsay on top of hearsay, and in the absence of corroborating evidence, are entitled to little weight. Furthermore, this assertion runs contrary to a statement given by Frank Caine, taken and summarized by the IG during its investigation, which recounts in pertinent part:

Caine said that [Kiewit] terminated Castillo for insubordination in October 1994 . . . . Caine said that had he been in the [Precast Yard Supervisor's] place, he would have fired Castillo "on the spot." Caine said that Castillo's conduct was improper . . . . Furthermore, Caine stated that he had advised Castillo in the past not to discuss union issues during safety meetings and not to get in confrontation with [Kiewit] management.

Statement of Frank Caine, Business Agent, Ironworkers Union Local 416, to IG, April 21, 1997, at 3. I note that it was Frank Caine who negotiated with Kiewit management to rehire Castillo three weeks later in November 1994, on conditions that the complainant would receive no back pay and would no longer serve as union steward. According to the Ironworkers Foreman, Caine would never have agreed to these conditions if he believed that Castillo had been fired for making a safety disclosure rather than for insubordination. Tr. at 328. I find his testimony convincing on this issue.

I recognize that the timing of the complainant's October 19, 1994 dismissal, coming as it did one day after Castillo purportedly reiterated his observation about the uncapped stakes during Kiewit's daily safety meeting, could lead to an inference that the two events were related. *See Sorri, supra*. Despite this proximity in time, however, several factors lead me to believe that the complainant's disclosure cannot reasonably be found to have contributed to his termination. As an initial matter, Castillo first relayed his concern about uncapped stakes in "March or April" 1994 and complained of this condition to Kiewit management on at least one other occasion prior to October 18, 1994. However, Castillo does not allege that any retaliatory actions occurred immediately after these earlier disclosures.

Moreover, several witnesses at the hearing testified that Kiewit took safety considerations very seriously. Tr. at 145, 197, 320. Indeed, Castillo himself admitted that the company was "very conscientious about safety." Tr. at 263. Kiewit's Employee Safety Handbook expressly requires that employees "[r]eport unsafe equipment, hazardous conditions, and unsafe acts to [their] supervisor at once." Exh. 28 at 5. The company held daily safety meetings for the purpose of affording employees an opportunity to raise safety related issues and consistent with this policy, the record contains a number of examples of other safety matters that were raised by the complainant and others.(6) I therefore find it difficult to believe that Kiewit would retaliate against the complainant for providing the very safety-related input that the company constantly sought and in this case received a number of times without any complaint prior to October 19, 1994.

Finally, no less than seven of the witnesses at the hearing testified that Castillo's termination was not related to any safety disclosure, but was instead the direct result of the complainant's practice of inappropriately raising issues related to his duties as shop steward at the safety meetings. This persistent behavior culminated in a loud, heated argument on October 19 between Castillo and the Precast Yard Supervisor over the latter's decision to transport certain workers on the site rather than using a Teamster.(7) In this regard, I find the testimony of five witnesses, Phillip Fey, Joseph Roach, James

Morris, Don Reed (Ironworkers Foreman), and Floyd Cooper (succeeding Ironworkers Steward) to be particularly significant. Mr. Fey and Mr. Roach, a carpenter and an operating engineer at the YMP who were present at the October 19 safety meeting and were called as witnesses by Castillo, testified that the complainant's dismissal was not due to his safety disclosures, but was instead the result of a "personality clash" between Castillo and the Precast Yard Supervisor regarding union-related issues. Tr. at 74, 109, 116, 119. James Morris was the Kiewit Construction Manager who made the decision to fire Castillo. He stated that he had previously instructed the complainant to stop raising union-related matters at safety meetings. Tr. at 212. He further testified that on October 19 he received a call from the Precast Yard Supervisor who described the occurrences at that morning's safety meeting and recommended that Castillo be terminated for insubordination. Tr. at 213. Mr. Morris also stated that although he had been made aware of the uncapped stakes, he did not know who had raised the issue, and it had nothing to do with the complainant's dismissal. Tr. at 214, 216.

The Ironworkers Foreman was also present at the October 19 meeting and witnessed the heated exchange between Castillo and the Precast Yard Supervisor. In discussing the complainant's termination, he stated that the Precast Yard Supervisor "didn't have any choice" but to recommend dismissal because the complainant was "undermining a supervisor's authority in front of the men." Tr. at 327. He further testified that he would have sought to fire Castillo too, adding that "I don't think safety had one thing to do with it." Tr. at 361.(8) Similarly, Floyd Cooper, the complainant's fellow ironworker who ultimately succeeded him as steward, who was also at the October 19 meeting, was of the same opinion that the Precast Yard Supervisor had no choice but to have Castillo fired, stating that the complainant's conduct was "disrespectful" to the degree that the Precast Yard Supervisor had to "take appropriate action . . . in order to keep the respect for himself from the other men that observed this." Tr. at 378.

I therefore conclude that the complainant has failed to show, by a preponderance of the evidence, that his safety disclosure was a contributing factor in his October 19, 1994 termination. The capping of concrete stakes was a safety practice advocated and asserted as a safety reminder by the complainant and other workers in the context of countless safety measures promoted regularly at daily safety meetings. The evidence presented in the record is overwhelming in support of the finding that Castillo was disruptive of safety meetings and confrontational with Kiewit management over union/work jurisdiction issues despite repeated warnings from Kiewit and his own union to desist in this behavior. It was that behavior that directly produced the firing. Irrespective of Castillo's present claim that he asserted the matter of caps on stakes the day before his firing, it is unreasonable to conclude that this purported disclosure was a contributing factor in that personnel action. Under the circumstances evidenced in the record, to exalt the caps on stakes issue to the level of a "contributing factor" would be tantamount to the tail wagging the dog.

2. The May 31, 1995 Layoff

The procedures utilized in the May 31, 1995 layoff were thoroughly addressed in the testimony of the Ironworkers Foreman and Jeff Moore, who was the supervisor of the Precast Yard at that time. Due to budget cutbacks and a large inventory of concrete slabs in stock, the determination was made to lay off approximately 75% of the workers at the Precast Yard in all construction crafts. Tr. at 217. The Ironworkers Foreman testified that he was instructed to lay off a given number of ironworkers, such that only three would be retained. Tr. at 329-330. As required by union regulations, he retained himself, as foreman, and Floyd Cooper, who had succeeded Castillo as the ironworkers shop steward. As the third retainee, he chose Pete Robles because Mr. Robles was the alternate foreman, who assumed Ironworkers Foreman's duties when he was absent. *Id.*

I find the record to be devoid of any indication that Castillo's safety cap disclosure was a contributing factor in his layoff. I note initially that after the complainant was rehired in November 1994, he had no further difficulties with Kiewit management or supervisors. Shortly after Castillo's return, the Precast Yard Supervisor who took action to terminate him left Kiewit due to personal family reasons. The Ironworkers Foreman, the complainant, his coworkers and subsequent supervisors all concur that the

complainant got along well and was a good worker from the time he was rehired until the layoff. Tr. at 89, 176, 273. 329. In this regard, I note that the complainant was laid off with the notation that he was "eligible for rehire." This meant that the Ironworkers Foreman had been satisfied with the job that the complainant had done, and that he was eligible for further employment as an ironworker with Kiewit. Tr. at 361. I think it very unlikely that this provision would be applied to someone who had been the victim of a retaliatory personnel action.(9)

Moreover, the criteria employed by the Ironworkers Foreman in determining who was to be retained in May 1995 were largely objective and do not reflect a retaliatory intent. Indeed, Castillo himself stated that he believed the layoff procedure to be fair. Tr. at 282.(10) Furthermore, I find it difficult to believe, and I do not conclude, that the Ironworkers Foreman, as a union member himself, would retaliate against a fellow union member for raising issues having to do with worker safety. For these reasons, I find that Castillo has failed to prove by a preponderance of the evidence that his disclosure was a contributing factor in the May 31, 1995 reduction in force.

IV. Conclusion

As set forth above, I have determined that the complainant has failed to establish the existence of a violation on the part of Kiewit for which he may be accorded relief under DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. Although Castillo made a protected disclosure, he has failed to demonstrate that the disclosure was a "contributing factor" in either the October 19, 1994 termination or the May 31, 1995 reduction in force, within the meaning of 10 C.F.R. § 708.9(d). Moreover, even if the record supported his belief that his disclosure was a contributing factor, I find clear and convincing evidence that Kiewit would have taken these actions even in the absence of the disclosure. Despite being instructed on more than one occasion by Kiewit management and his own union to refrain from raising non-safety related, union issues in safety meetings, the complainant continued this practice, culminating in the October 19 meeting, at which Castillo became involved in a loud, heated argument with his supervisor over a work assignment matter. Virtually all of the witnesses who were in attendance at that meeting, including those called by Castillo, testified that they too would have fired the complainant based upon his conduct; indeed, under the circumstances he had left the Kiewit supervisor and management with no other choice. The Part 708 regulations were never intended as a means to insulate contractor employees from the consequences of insubordinate behavior going beyond reasonable limits of toleration. *See* *Timothy E. Barton,* 27 DOE ¶ 87,501 at 89,013 (1998) (determination to terminate contractor employee primarily motivated by employee's aggravated refusal to follow work directive of company manager). With respect to the May 31, 1995 reduction in force, there is simply nothing in the record to indicate that the decision to include Castillo among those laid off would have been any different had it not been for his disclosure.

Accordingly, I will deny Castillo's request for relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Carlos M. Castillo 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 his designee is filed with the Assistant Inspector General for Assessments, Office of the Inspector General, Department of Energy.

Fred L. Brown

Hearing Officer

Office of Hearings and Appeals

(1)The expedited procedure that was offered to the parties by the IG in this and other cases was a precursor to changes that have been proposed by DOE in the regulations governing the Contractor Employee Protection Program, 10 C.F.R. Part 708. *See* Notice of Proposed Rulemaking (NOPR), Criteria and Procedures for DOE Contractor Employee Protection Program, 10 C.F.R. Part 708, 63 Fed. Reg. 374 (January 5, 1998). Unlike the present regulations, where both parties must agree to the expedited procedure, under the proposed regulations, after the IG has accepted jurisdiction over a complaint and attempts of informal resolution have proven unavailing, a complainant is afforded two avenues for proceeding directly to the hearing stage absent an IG investigation and Report of Inquiry (previously a "Report of Investigation"): (1) the complainant may elect to have the complaint submitted directly to the Office of Hearings and Appeals for a hearing, bypassing the inquiry stage, NOPR § 708.7(b)(3); or (2) the complainant may request a hearing in the event a Report of Inquiry has not been issued by the IG within 240 days of being notified that informal resolution of the complaint was not reached, NOPR § 708.8(f). Under either alternative, without an IG investigation of the complaint and Report of Inquiry, the Hearing Officer must develop the factual record at the hearing stage of the proceeding. NOPR § 708.9. In this regard, it should be noted that the proposed rules provide that the Hearing Officer may order reasonable discovery upon the request of a party. NOPR § 708.9(c)(1).

(2)The specific disclosure and alleged retaliatory actions were determined by the IG in accepting jurisdiction over Castillo's Part 708 complaint in this matter, and initiating a preliminary investigation. *See* Letter from Sandra L. Schneider, Assistant Inspector General for Assessments, IG, to Carlos M. Castillo, February 11, 1997. These matters were principally gleaned by the IG from documents relating to Castillo's NLRB action, particularly his affidavit taken in that proceeding, which was forwarded to the IG by Castillo on December 17, 1994, and deemed by IG to contain sufficient information to constitute a Part 708 complaint.

(3)I note in this regard that a disclosure need not be correct in order to be protected under Part 708. In the Final Agency Decision recently issued in *C. Lawrence Cornett v. Maria Elena Torano Associates, Inc.*, 27 DOE ¶ 87,502 at 89,017 (1998), the Deputy Secretary emphasized that: "Whether [the complainant] was correct or not - which is not the issue here . . ., so long as it was both reasonable and in good faith, plainly is the sort of disclosure meant to be protected by the regulations . . . ." In the present case, I find and Kiewit does not dispute that Castillo was both reasonable and in good faith in raising the matter of capping stakes. *See* Tr. at 18.

(4)In the October 25, 1994 NLRB Affidavit, Castillo asserts that he brought up the matter of uncapped stakes to the Precast Yard supervisor "around October 11, 1994" and "[l]ater that day, Andy [Quintana], cement finisher, cut his arm on the stake." Exh. 2 at 3. However, an engineer who worked at the site testified that his recollection of the incident was that Andy Quintana cut his arm on a stake while trying to pull the stake out of the concrete, after removing the cap. Tr. at 199.

(5)Evidence regarding the timing of Castillo's stated concerns about protective caps on stakes is by no means conclusive. Several witnesses that testified at the hearing confirmed that Castillo raised the matter of uncapped stakes at one or more safety meetings during the period May through June 1994, while the pouring of slabs took place at the YMP Portal area and cut rebar was being used as concrete stakes. *See, e.g.,*Tr. at 56, 100, 183, 322. However, no one corroborated Castillo's present assertion that he brought it up in the morning safety meeting on October 18, 1994, just one day before the firing. Indeed, Castillo's memory of this matter appears to be faulty. In his NLRB affidavit taken just one week after the firing, he stated that on October 17 or 18, he noticed that duct tape instead of actual caps was being used on the stakes and, "I may have mentioned it at the safety meeting the following morning." Exh. 2 at 3. In his IG statement, taken July 29, 1997, Castillo states that he raised the matter of capping of stakes 3 or 4 times prior to October 19, 1994, but "I can't recall the specific dates." Exh. 18 at 4.

(6)For instance, the complainant's coworkers recall him and others raising safety issues relating to the use

of flagmen to direct trucks onto the site, Tr. at 88, a forklift spewing toxic fumes, Tr. at 105, safe operation of tarp rolling equipment, Tr. at 107-08, safe driving speed of construction equipment, Tr. at 112, and trucks unsafely loaded, Tr. at 114-15. However, it is not alleged that raising any of these matters resulted in a retaliatory response. The Ironworkers Foreman explained that employees raised safety matters "[c]onstantly, from signaling operators and equipment to back up bells on equipment, things like that. Everything relating to construction constantly came up because that was a big project." Tr. at 323. Amid this volume of safety reminders, the Ironworkers Foreman characterized the complainant's revelation concerning steel stakes as "no big issue." *Id.*

(7)In a number of instances, the complainant not only raised work-related issues relevant to the Ironworkers Union which he represented, but also raised matters on behalf of other craft workers which he did not officially represent. This penchant for assuming representation of workers outside of his union gained the complainant a reputation as what is referred to as a "bull steward." Tr. at 49-50; Exh. 2 at 3.

(8)The Ironworkers Foreman corroborated the testimony of the Construction Manager that Castillo had been previously admonished to stop disrupting safety meetings with union/work jurisdiction issues. Indeed, he stated that when the Ironworkers Union business agent who installed Castillo as steward found out about the complainant's behavior, the business agent chastised Castillo and directed him to stop these disruptions of safety meetings. Tr. at 324- 25, 342. Nonetheless, the complainant continued this behavior. According to the Ironworkers Foreman, sometimes Castillo was "representing Carlos Castillo and not the people." Tr. at 344-45.

(9)Although Castillo never returned to work for Kiewit at the YMP, the decision not to rehire him was not under the authority of Kiewit but a matter between Castillo and the Ironworkers Union which administered the work assignments of its members. Tr. at 283-84, 367-68.

(10)In his statement to the IG, Castillo expressed no surprise at the layoff selection:

There were 2 ironworkers that were not laid off. They were Floyd Cooper and Pete Robles. I understand why they were not laid off. Cooper was the union steward and he would be the last to get laid off because of his position. Robles was not laid off because he filled-in as foreman during Reed's absence. There was no seniority system at YMP.

Exh. 18 at 6.