United States Department of Energy
Office of Hearings and Appeals

In the Matter of Vincent E. Daniel	)		
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Filing Dates: July 29, 2013	)	Case Nos.:	WBH-13-0006
August 19, 2013	)		WBZ-13-0006
	)		

Issued: September 18, 2013

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Motion to Dismiss
Initial Agency Decision

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This Decision will consider a Motion to Dismiss filed by Battelle Energy Alliance, LLC (BEA), the Management and Operating contractor for the Department of Energy's (DOE) Idaho National Laboratory (INL), in connection with the pending Complaint of retaliation filed by Vincent E. Daniel against BEA under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The Office of Hearings and Appeals (OHA) assigned the hearing component of Daniel's Part 708 Complaint proceeding, Case No. WBH-13-0006. For the reasons set forth below, I will grant BEA's Motion to Dismiss Mr. Daniel's Complaint.

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 (Mar. 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.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or

safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1)-(3). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower Complaint with the DOE and are entitled to an investigation by an investigator assigned by the Office of Hearings and Appeals (OHA), followed by a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

Mr. Daniel filed a Part 708 Complaint on February 26, 2013, against BEA with the DOE's Employee Concerns Program (ECP) Manager at the Idaho Operations Office (IOO), and supplemented his Complaint on April 25, 2013. On April 8, 2013, the ECP Manager at IOO referred the Complaint to OHA to conduct an investigation of the allegations set forth in the Complaint. An OHA Investigator conducted an investigation of Mr. Daniel's Complaint and issued a Report of Investigation (ROI) on July 29, 2013. In his ROI, the Investigator concluded that Mr. Daniel had not submitted sufficient evidence to prove by a preponderance of the evidence that that he made a protected disclosure, or that his alleged protected disclosures were a contributing factor in his negative performance appraisals and termination.

Immediately after the Investigator issued his Report, the OHA Director appointed me as the Hearing Officer in this case. On July 31, 2013, I sent a letter to the parties, asking them to address specific issues in this case, and I also provided the parties an opportunity to submit dispositive motions. On August 19, 2013, Mr. Daniel submitted a response to the issues I raised in my letter, and BEA submitted a Motion to Dismiss Mr. Daniel's Complaint. On September 3, 2013, BEA submitted its Response Brief in Support of its Motion for Dismissal. On September 17, 2013, Mr. Daniel submitted his Response to BEA's Motion for Dismissal.

C. Factual Overview

The facts of this case as stated by the Investigator in his ROI and as developed through the documents received during the investigation are summarized as follows. Mr. Daniel has worked for several DOE contractors at the INL since 1989, and began working for BEA in 2008. ROI at 2. In late 2009, Mr. Daniel was transferred to the INL's Hot Fuel Examination Facility (HFEF). *Id.* HFEF performs scientific and engineering tests on spent fuel from the Advanced Test Reactor (ATR). *Id.* The spent fuel from the ATR contains radioactive isotopes, which are referred to as "Nuclear Accountable Materials" (NAM) and for safety, national security, environmental and economic reasons, must be measured and accounted for. *Id.* The HFEF tracks the NAM with an electronic database known as the Mass Tracking System (MTG), and the responsibility of maintaining the accuracy and integrity of the MTG falls on the Primary HFEF Material Balance Area (MBA) Custodian. *Id.* INL's Safety and Security Office (INLSSO) also maintains another database, LANMAS, of all NAM at INL, which includes those assigned to the HFEF facility. *Id.*

Mr. Daniel contends that on June 28, 2010, Rick Casler, who was the MBA Custodian, assigned him the task of reconciling the MTG data with the LANMAS, and informed him that after the annual MBA inventory in July 2010, Mr. Daniel would be assigned the duties of the Primary MBA Custodian for HFEF. Daniel Statement at 1. One day later, on June 29, 2010, Mr. Daniel obtained the LANMAS records. *Id.* He asserts that after he reviewed the data and compared it with the NAM reported in the MTG, he discovered that it did not match with the LANMAS database. *Id.* Mr. Daniel alleges that he subsequently reported this discrepancy to Mr. Casler, who instructed him to meet with Roy Keyes, the MBA custodian of another INL facility, for assistance in reconciling the two databases, and stated that if further necessary, to contact the INLSSO. *Id.* Mr. Casler, on the other hand, contends that it was he who informed Mr. Daniel about the discrepancy between the MTG and the LANMAS as part of the transition of the MBA custodianship. Casler Interview at 1.

Mr. Daniel further avers that he made additional disclosures regarding his discovery of these discrepancies. He states that on July 6, 2010, he met with Roy Keyes and Teri Dixon of INLSSO to notify them of the differences between the two databases. Daniel Statement at 2. Subsequently, on July 8, 2010, Mr. Daniel also claims that he informed Tom Bean, the INL Safeguards Lead at Material and Fuels Complex, about his concerns regarding the discrepancy. *Id.* He was allegedly assured that if he became the primary MBA Custodian, Mr. Bean and his staff would assist him in reconciling the two databases. *Id.* He further contends that on that same day, Mr. Bean emailed Sean Cunningham, Nuclear Facilities Manager, to express concern about Mr. Casler's alleged absence during the MBA inventory turnover. *Id.* Mr. Daniel alleges that on July 13, 2010, his concerns about the discrepancy between the MTG and LANMAS databases were documented and that INLSSO initiated a corrective action as a result. Daniel Statement at 2.

Furthermore, Mr. Daniel avers that on February 1, 2011, he emailed Mr. Bean and Mr. Casler inquiring about non-compliance issues with the previous MBA HFEF, stating that the previous MBA Custodian did not update the MTG database and that Mr. Daniel consequently had to correct it in order to include the changes. *Id.*

On October 18, 2011, Mr. Casler placed Mr. Daniel on a Performance Improvement Plan (PIP). Daniel Statement at 2. The PIP listed specific criteria that Mr. Daniel allegedly did not meet, which are the following:

> - As the HFEF Material Balance Area (MBA) custodian, you did not manage the facility nuclear material inventory as required by PLN-3151, Hot Fuel Examination Facility Nuclear Material Control Plan and Procedures, and you did not notify your manager in a timely manner that you were unable to reconcile HFEF nuclear material inventory records with safeguard records.
>
> - Paperwork for material transfers has been, overall, habitually late, even when transfer schedules were known in advance.
>
> - As a staff specialist assigned to the Hot Fuel Examination Facility, you have not effectively managed your time to be able to accomplish assigned tasks.

Soon after, on November 14, 2011, Mr. Daniel received a poor performance review due to his failure to reconcile the MTG and LANMAS databases and efficiently resolve the problems with the HFEF. *Id.*

Mr. Daniel asserts that on February 20, 2012, most of his job duties were reassigned and that when he inquired further, he was informed that it was because of his complaints about not having enough time to complete his work. Daniel Statement at 3. On August 6, 2012, Mr. Daniel was released from his responsibilities as the primary HFEF MBA Custodian, and the next day, on August 7, 2012, the HFEF Operations Manager, Kelly Kynaston, informed him that he was being placed on a PIP, citing his previous PIP from October 18, 2011. *Id.* On January 22, 2013, Mr. Daniel was terminated from employment.

D. BEA's Motion to Dismiss

The Part 708 regulations do not include procedures and standards governing motions to dismiss. In the absence of such standards, the Federal Rules of Civil Procedure, though not governing this proceeding, may be used for analogous support. *See, e.g.*, *Billy Joe Baptist*, Case No. TBH-0080 (2009)[1]; *Edward J. Seawalt*, Case No. VBZ-0047 (2000) (applying standards of Fed. R. Civ. P. 56 to motion for summary judgment). The Motion to Dismiss filed by BEA in the present case is most analogous to what would, under the Federal Rules, be a motion to dismiss for "failure to state a claim upon which relief can be granted . . . ." Fed. R. Civ. P. 12(b)(6); *see Hansford F. Johnson*, Case No. TBZ-0104 (2010) (applying standards of Fed. R. Civ. P. 12(b)(6) to Motion to Dismiss).

The Supreme Court has held that, to survive a Rule 12(b)(6) motion, a complaint must plead "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550, 544, 570 (2007). While the complaint "does not need detailed factual allegations, . . . [f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the Complaint's allegations are true (even if doubtful in fact), ..." *Id.* at 555 (citations omitted).

In addition, prior cases of this Office instruct that such a motion should be granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact on a more complete record. *Curtis Broaddus*, Case No. TBH-0030 (2006); *Henry T. Greene*, Case No. TBU-0010 (2003) (decision of OHA Director characterizing this standard as "well-settled"); *see also David K. Isham*, Case No. TBH-0046 (2007) (complaint may be dismissed where it fails to allege facts which, if established, would constitute a protected disclosure); *accord Ingram v. Dep't of the Army*, 114 M.S.P.R. 43, 47 (2010) (finding Merit Systems Protection Board jurisdiction under federal Whistleblower Protection Act where complaint makes non-frivolous allegation that he engaged in whistleblowing activity by making a protected disclosure, and the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action).

[1] Decisions issued by OHA can be found at www.energy.gov/oha.

Here, BEA argues that Mr. Daniel's Complaint should be dismissed, claiming that three of the four alleged retaliatory acts are barred by the statute of limitations. Mot. to Dismiss at 9. Specifically, BEA avers that Mr. Daniel's placement on the PIPs on October 18, 2011, and August 7, 2012, are time-barred as those occurred more than 90 days before Mr. Daniel filed his Complaint on February 20, 2013. *Id.* Moreover, BEA claims that Mr. Daniel's poor performance review on November 14, 2011, is also time-barred as that occurred prior to the 90-days before his Complaint was filed. *Id.* BEA further contends that Mr. Daniel did not report any protected disclosures, and even assuming that he did, his alleged disclosures were not a contributing factor for any of the unfavorable employment decisions. *Id.* at 16. Nonetheless, BEA asserts that it had legitimate, non-retaliatory reasons for its actions towards Mr. Daniel. *Id.* at 21.

II. Analysis

The Part 708 regulations provide that a contractor employee may file a complaint against his employer alleging that he has been subject to retaliation for:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--
>
> (1) substantial violation of a law, rule, or regulation;
>
> (2) substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority;
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --
>
> (1) Constitute a violation of a federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

Pursuant to Part 708.12, a whistleblower complaint must contain a statement specifically describing the alleged retaliation and the disclosure, participation, or refusal that the complainant believes gave rise to the retaliation. 10 C.F.R. § 708.12(a).

In his Complaint, Mr. Daniel avers that he made several protected disclosures. He claims that because of his protected disclosures, he was retaliated against in the following ways: 1) being placed on the October 18, 2011, PIP; 2) being given a poor performance review on November 14, 2011; 3) being reassigned duties in February and April 2012; 4) being removed from his position as HFEF MBA Custodian; 5) being placed on the August 7, 2012, PIP; and 6) being terminated on January 22, 2013.

A. Statute of Limitations

BEA claims that Mr. Daniel's actions regarding the retaliatory acts that occurred prior to his termination on January 22, 2013, are time-barred. Pursuant to Part 708.14, a grievant has to file his complaint by the 90th day after he knew, or reasonably should have known, of the alleged retaliation.

Mr. Daniel filed his Complaint on February 26, 2013, and accordingly, in order to be actionable, the alleged retaliation must have occurred on or after November 28, 2012. The termination is the only retaliatory action that occurred within that time period. As Mr. Daniel reasonably should have known about the PIPs, poor performance evaluations, and the reorganization of his duties when they occurred, I cannot discern a legitimate reason for why he did not complain about those alleged retaliatory acts in a timely manner. *See* § 708.15(d). Even if he claims ignorance of his rights or the procedure for filing complaints, it would be insufficient for demonstrating that he had good cause for the delayed filing. *See Caroline Roberts*, Case No. TBU-0040 (Feb. 23, 2006). Nonetheless, assuming that those alleged retaliatory acts are not barred by the statute of limitations, I conclude that Mr. Daniel has not made a prima facie showing that he made a protected disclosure under Part 708 and accordingly, his Complaint will be dismissed.

B. Sufficiency of Complaint

Mr. Daniel claims that he made the following protected disclosures: 1) on June 29, 2010, he reported to Mr. Casler that the total amount of accountable materials reported in the HFEF MTG database did not match the amount of accountable materials recorded in the LANMAS database; 2) on July 6, 2010, he notified Mr. Dixon of the discrepancies between the two databases; and 3) on July 8, 2010, he reported to Mr. Bean concerns "of being the primary HFEF MBA Custodian after the annual HFEF MBA inventory because the total amount of accountable materials was not balanced between HFEF MBA database and Safeguards database for HFEF." Supplement to Compl. at 1-2.

In his Complaint, Mr. Daniel did not aver that he reported that a rule was violated or was even implicated. In pertinent part, he asserts:

> I told Rick that I was uncomfortable with becoming the primary HFEF MBA Custodian while the accountable material in HFEF was not balanced with Safeguards records in HFEF. . . . I also talked with Jeff Parmer and Thomas Bean (MFC Safeguards Manager) and explained my concerns with taking this position and Tom assured me that the Safeguard department will work with me to help

> balance the HFEF accountable materials with the MFC Safeguards records (LANMAS) for HFEF. . . . I later met with Rick Casler and stated I was concerned about my workload because my main job task was balancing the HFEF accountable materials inventory in a timely manner. . . . I met with Eric Papaioannou and expressed my concerns about my workload and Eric told me that I just need to pay my dues like everyone before me in training to be a Nuclear Facility Manager.

Compl. at 2. Based on the allegations in his Complaint, it appears that Mr. Daniel was complaining about the amount of work it would take for him to reconcile the two databases and whether or not he had sufficient time to complete that task, or that he would be held accountable for alleged deficiencies that occurred before he was assigned that task. Indeed, he did not indicate that at the time of making the reports, he reasonably believed that there was a violation of a lab or DOE rule. Yet, in the supplement to his Complaint, it appears that Mr. Daniel modified the description of his purported disclosure to allege that he actually reported a violation of INL procedures and DOE regulations. He alleges:

> I met with Rick Casler and notified/reported to him my findings that the total amount of accountable materials reporting in the HFEF MTG database and HFEF excel spreadsheet database did not match Safeguards and Security accountable materials records for materials assigned to the HFEF facility. . . . I reasonably believed that this imbalanced [sic] was in violation of INL procedures and DOE regulations. My reported concerns were documented and validated on July 13, 2010 via corrective action initiated by Safeguards and Security "*Noncompliance issues with previous MBAC (MBA HFEF)*".

Supplement to Compl. at 1. Thus, it appears that through the supplement to his Complaint, he is attempting to re-characterize his disclosures in order to fully support his Part 708 Complaint. *See Wendy L. Warren*, Case No. WBA-12-0001 (Dec. 20, 2012) (concluding that the Investigator properly dismissed a whistleblower complaint for failure to state a claim and that on appeal, the complainant could not attempt to re-plead her case in order to make it fit within the regulatory scheme). Frankly, I question the appropriateness of Mr. Daniel's re-characterization of his alleged disclosures, particularly as he appears to modify them in order to satisfy the pleading requirements for his Part 708 complaint. *See David K. Isham*, Case No. TBH-0046 (June 19, 2007) (*See Ellison v. Merit Systems Protection Bd.*, 7 F.3d 1031, 1036 (Fed. Cir. 1993) ("[T]he test of the sufficiently of an employee's charges of whistleblowing . . . is the statement that the employee makes in the complaint . . ., not the employee's *post hoc* characterization of those statements.") (citations omitted)).

Nonetheless, assuming that Mr. Daniel alleged that he disclosed that the discrepancies between the two databases violated INL procedures and DOE regulations, his purported disclosure to Mr. Casler did not reveal anything unknown to him. In his statement to the Investigator, Mr. Casler stated that he informed Mr. Daniel about the discrepancies between the two databases and that they were within the allowable parameters, and that he "informed [Mr.] Daniel about the discrepancies as part of the transition of the MBA custodianship." Casler Statement at 1. Indeed, Mr. Daniel also acknowledged that on June 28, 2010, Mr. Casler assigned him the task of

"reconciling the MTG data with the LANMAS," thereby suggesting that there were discrepancies between the two databases to begin with in order for Mr. Daniel to be assigned the task of reconciling them. Daniel Statement at 1. Hence, based on the allegations in the Complaint and the statements compiled by the Investigator, even if Mr. Daniel complained to Mr. Casler about the discrepancies between the two databases, it would not have revealed something that was not already known by Mr. Casler. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1349-50 (Fed. Cir. 2000) (holding the disclosure "means to reveal something that was hidden and not known.").

Yet, assuming further that Mr. Daniel disclosed something that was unknown, he did not reveal any substantial violation of a law, rule, or regulation, substantial and specific danger to employees or to public health or safety, or gross mismanagement. In reviewing the sufficiency of his allegations, I must consider the reasonableness of Mr. Daniel's beliefs that there was a reportable violation. In a case decided under the Whistleblower Protection Act (WPA), upon which Part 708 is modeled, the United States Court of Appeals for the Federal Circuit addressed a preliminary issue when deciding whether a complainant has made a protected disclosure. In *Chambers v. Dep't of Interior*, the Federal Circuit stated that the test for "determining whether an employee had a reasonable belief that [his] disclosures evidenced misconduct under the WPA" is "whether a 'disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence' wrongdoing as defined by the WPA." 602 F.3d 1370, 1379 (Fed. Cir. 2010) (quoting *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999); *see also Eugene N. Kilmer*, Case No. TBH-0111; TBZ-0111 (Mar. 1, 2010 and Mar. 24, 2011) ("a complainant's belief underlying an alleged protected disclosure must be held 'reasonably' in order for the disclosure to be protected under section 708.5.").

Based on the following, I conclude that Mr. Daniel did not allege that he made a protected disclosure. In response to my July 31, 2013, letter, Mr. Daniel cited LRD-11500 Rev. 8 page 12 and 13, Section 6.8.1 Part C, F (last bullet) and L, which he asserts references "MBAC Responsibilities," and DOE Manual 470.4-6, as the regulations and rules that were violated by the discrepancies between the two databases. While Mr. Daniel cites brief excerpts from those rules that he believes were violated,[2] Mr. Daniel still has not demonstrated that at the time of making his purported disclosures, he reasonably believed that there was a *substantial* violation of those rules, or any other law, rule or regulation. *See Eugene N. Kilmer*, Case No. TBH-0111 and TBZ-0111 (Mar. 1, 2010 and Mar. 24, 2011) (while in his complaint, the complainant stated his opinion that a procedure or policy was violated, he gave very little indication that *at the time of making his disclosures*, he intended to reveal a violation of rule or regulation) (emphasis added).

[2] Mr. Daniel states the relevant language in LRD-11500 as the following: "MBAC Responsibilities. This includes, as a minimum: Maintaining records that list every item (see def.) of NM in the MBA. The records should contain the following information Changes including loss/gains, transfers, shipments/receipts. If possible, measurement uncertainties associated with the inventory. Notifying the appropriate facility management (e.g., Shift Supervisor, Facility Manager) and the Safeguards Manager immediately of any discrepant and abnormal conditions as per MCP-11505, "Nuclear Material Event Detection, Investigation, Response and Reporting" e.g., any actual or suspected diversion or theft of NM, or of any missing NM." He further states that the DOE Manual provides the following: "The site/facility operator must use techniques and equipment that maximize material loss detection sensitivity, increase the quality of accountability measurements, minimize material holdup, and reduce the magnitude of inventory differences and associated control limits consistent with the consequences of the loss of the material."

In fact, he did not allege in this Complaint that the time he made his purported disclosures, he revealed a violation of any DOE or lab rules. Rather, Mr. Daniel alleges that he complained about a discrepancy in the NAM reported in the MTG and the LANMAS databases. However, even if those records contained discrepancies that violated the rules cited by Mr. Daniel, Mr. Daniel failed to allege that they were so significant such that they constituted a *substantial* violation of those rules. This is particularly relevant in light of Mr. Casler's statement that the discrepancies were within the allowable parameters and that Mr. Daniel was assigned the task in order to reconcile the databases. Thus, I cannot find that a disinterested person could reasonably conclude that Mr. Daniel's purported disclosure revealed a substantial violation of a rule or regulation.

Second, I cannot conclude that Mr. Daniel disclosed a substantial and specific danger to employees or public health or safety. In *Chambers*, the Federal Circuit explained further about this type of disclosure:

> A variety of factors . . . determine when a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA. One such factor is the likelihood of harm resulting from the danger. If the disclosed danger could only result in harm under speculative or improbable conditions, the disclosure should not enjoy protection. Another important factor is when the alleged harm may occur. A harm likely to occur in the immediate or near future should identify a protected disclosure much more than a harm likely to manifest only in the distant future. Both of these factors affect the specificity of the alleged danger, while the nature of the harm – the potential consequences – affects the substantiality of the danger.

515 F.3d at 1369. Mr. Daniel did not allege that he had a reasonable belief that the discrepancy between the databases created a substantial and specific danger to health or safety of the employees or public. As stated in our Regulations and in *Chambers*, the disclosed danger must be *substantial* and *specific*. Mr. Daniel did not even allege that any danger would result from the discrepancies between the two databases; rather, he asserts that he disclosed a violation of the rules and requirements pertaining to the tracking of NAM in the MTG and LANMAS databases. Accordingly, Mr. Daniel did not make a disclosure under Section 708.5(a)(2).

Finally, Mr. Daniel also did not make a disclosure of gross mismanagement. OHA has previously found that gross mismanagement is:

> more than a de minimis wrongdoing or negligence. It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. Therefore, gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission.

Eugene N. Kilmer, Case No. TBH-0111 and TBZ-0111 (quoting *Fred B. Hua*, Case No. TBU-0078 (2008) (internal citations omitted)).

By this standard, Mr. Daniel's disclosures do not reveal gross mismanagement. Notably, there is no indication, based on Mr. Daniel's allegations, that the discrepancies compromised BEA's ability to satisfy its mission. *See Fred B. Hua*, TBU-0078 (concluding that the complainant's disclosure of a flawed technical work plan was not a disclosure of gross mismanagement as there was "no indication in the complaint that the project came to a standstill or that the flaws in the documents compromised [the agency's] ability to complete its mission."). Without more, I simply cannot conclude that he made a disclosure of gross mismanagement.

III. Conclusion

Based on all the foregoing, I find that Mr. Daniel did not make a protected disclosure that is actionable under Part 708. Accordingly, I will grant BEA's Motion and dismiss Mr. Daniel's Part 708 Complaint.

It Is Therefore Ordered That:

1. The Motion to Dismiss filed by Battelle Energy Alliance, LLC, on August 19, 2013, Case No. WBZ-13-0006, be and hereby is granted.

2. The Complaint filed by Vincent E. Daniel against Battelle Energy Alliance, LLC, on April 8, 2013, is hereby dismissed, as is the pending hearing, Case No. WBH-13-0006.

3. This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

Shiwali G. Patel
Hearing Officer
Office of Hearings and Appeals

Date: September 18, 2013