United States Department of Energy
Office of Hearings and Appeals

In the Matter of Edward G. Gallrein, III	)			
	)			
Filing Dates:	January 14, 2014	)	Case Nos.:	WBH-13-0017
	February 12, 2014	)		WBZ-13-0017
	February 14, 2014	)		WBZA-13-0017
		)		

Issued: April 10, 2014

Initial Agency Decision
Motions to Dismiss

This Decision will consider Motions to Dismiss filed by Babcock and Wilcox Technical Services Y-12, LLC (B&W), the management and operating contractor for the Department of Energy's (DOE) Y-12 National Security Complex in Oak Ridge, Tennessee, and by GemTech Y-12, LLC (GemTech), a subcontractor of B&W, in connection with the pending Complaint of retaliation filed by Edward G. Gallrein, III, against B&W and GemTech under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708.[1] For the reasons set forth below, I will grant B&W's and GemTech's Motions and dismiss Mr. Gallrein'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

[1] GemTech's submission was styled a Motion for Summary Judgment. Because these Motions will be analyzed in the same manner, I will refer GemTech's submission as a Motion to Dismiss throughout this Decision.

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 Administrative Judge, and an opportunity for review of the Administrative Judge's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

Mr. Gallrein filed a Part 708 Complaint on August 12, 2013, against B&W and GemTech with the DOE's Employee Concerns Program (ECP) Manager at the National Nuclear Security Administration (NNSA), and supplemented his Complaint on October 11, 2013. On December 26, 2013, OHA received a referral of the Complaint from the ECP Manager at NNSA to conduct an investigation of the allegations set forth in the Complaint, followed by a hearing. Further communications disclosed that Mr. Gallrein had in fact requested a hearing without an investigation, and the OHA Director appointed me as the Administrative Judge in this case. On January 14, 2014, I sent a letter to the parties, offering them the opportunity to address the specific issues in this case in written submissions. Following the distribution of those submissions, B&W and GemTech submitted Motions to Dismiss Mr. Gallrein's Complaint, on February 12 and 14, 2014, respectively. Having secured an extension of time in which to respond, on March 13, 2014, Mr. Gallrein submitted his Responses to the two companies' Motions to Dismiss. On March 14, 2014, B&W submitted a reply to Mr. Gallrein's Response to its Motion.

C. Factual Overview

Mr. Gallrein was an employee of GemTech, who was hired specifically to work as a Safety and Security Specialist at B&W's Program Management division. He worked in this capacity from November 30, 2011, to May 16, 2013. His responsibilities included attending and reviewing training classes that the Program Management division presented. He compiled comments and suggestions after observing some of those classes, which he provided at first to B&W managers with direct control over the programs, then later to higher-level B&W managers and, in some cases, to DOE personnel. Many of his comments pointed out weaknesses in the training programs, particularly in the trainers but also in the course material and the training environment. Because many, if not all, the trainers worked in the same office as Mr. Gallrein, his criticisms created a tense workplace for all involved. Mr. Gallrein alleges in his Complaint that, beginning in March 2013, he felt threatened by the actions of his co-workers and his management chain. His Complaint alleges several incidents of retaliation, the final and most significant of which was his termination on May 16, 2013.

D. The Motions 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)[2]; *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 B&W 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).

Here, B&W argues that Mr. Gallrein's Complaint should be dismissed, because he has failed to identify any protected disclosures that he made. B&W Mot. to Dismiss at 5. It contends that his alleged disclosures represent observations, suggestions, opinions, or criticisms. *Id.* at 6. B&W argues that, applying an objective test, Mr. Gallrein did not intend to make protected disclosures at the time of the disclosures, but merely labeled them as such after the fact, in his Complaint. *Id.* at 7. Having failed to identify any disclosures protected under Part 708, B&W argues, Mr. Gallrein has not met his burden under Part 708, and his Complaint cannot be sustained. *Id.* at 5.

GemTech argues that Mr. Gallrein's Complaint should be dismissed or, in the alternative, GemTech should be dismissed from the proceeding, because the complaint was not timely filed, because Mr. Gallrein has not alleged that GemTech engaged in retaliation against him, and because GemTech lacks the ability to provide any of the remedies Mr. Gallrein seeks. GemTech

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

Mot. to Dismiss at 2. It also incorporates by reference the arguments B&W presented in its Motion to Dismiss. *Id.*

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--
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> (1) substantial violation of a law, rule, or regulation;
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> (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;
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> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or
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> (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 and his Addendum to the Complaint, Mr. Gallrein avers that he made the following protected disclosures:

- In March 2012, he reported to Morris Hassle, Gerald DeVault, and George Singleton, all of B&W, that NNSA funds were improperly used at a training session to pay for meals for employees not entitled to them. Complaint (Comp.) at 3. [Disclosure #1]
- Starting in July 2012, he reported his comments and suggestions regarding an Alarmed Response Training (ART) course he had observed in June 2012 at the request of J. Toby Williams, B&W Manager for Global Security and Analysis and Training, and Mr.

Gallrein's supervisor. Comp. at 3-4. He first sent an e-mail to Mr. Williams in which he concluded, "Finally, you must take action to stop the glamorization of alcohol, showing inappropriate videos, and cutting the course short from its approved and certified length, this is a taxpayer funded course for learning. . . ." Comp. Exhibit (Ex.) B. He then forwarded the message to Mr. Singleton, adding, "Read between the lines that a lot of shortcuts were being taken that diminished the approved and certified course." Comp. Ex. C. [Disclosure #2]

- Mr. Gallrein issued a written report containing his observations and recommendations on the ART course in August 2012 and revised it in January 2013. In that report, he reiterated those concerns, specified that the course met for only 19 hours rather than the 24 hours scheduled, and stated that those concerns "resulted in risk of an accusation of fraud, waste, abuse as well as an alcohol incident, not to mention failure to conduct the training competently and effectively." Comp. Ex. D at 21. Mr. Gallrein provided copies of this report, in draft and final versions, to B&W and DOE managers and officials. Comp. at 4. [Disclosure #3]
- In a March 20, 2013, e-mail to Mr. DeVault, Mr. Singleton, and Mr. Williams, Mr. Gallrein stated that at some point in the past, Y-12's delivery of the ART course "varied significantly" from its approved form, and the certificates and credits awarded to students since that time were "defective." Addendum to Complaint (Comp. Add.) at 2, Ex. 1. [Disclosure #4]
- In an April 1, 2013, e-mail to Joe Schwarzel, an employee of B&W subcontractor Aquila Group, Mr. Gallrein stated, "It is my opinion that the Certificate issued for some period unit just recently would be considered defective based on the enormous variace [sic] from the originally approved [Department of Homeland Security] course . . ." Comp. Ex. F. *See* Comp. at 6. [Disclosure #5]
- On April 22, 2013, Mr. Gallrein sent Mr. Schwarzel a copy of a co-worker's report on a Personal Radiation Dosimeter (PRD) training course that pointed out that the trainers had not used NNSA- and DHS-approved materials, and that the training was convened "at a hotel rather than on site, as required by the NNSA and DHS course approval." Comp. at 7. [Disclosure #6]
- In an April 22, 2013, e-mail to James C. Nobles, Jr., a B&W employee in its Ethics Department, and Mr. Williams, Mr. Gallrein reported that the teaching staff had used a student in a role play exercise. Comp. Ex. S. He stated in that e-mail that this practice raised a safety concern, as the staff had not inquired into the student's medical or psychological health, and any adverse effect of the role play created a risk of liability. [Disclosure #7]
- Mr. Gallrein provided a copy of his co-worker's report on the PRD course to NNSA. Comp. at 8. [Disclosure #8]
- On April 23, 2013, Mr. Gallrein sent an e-mail to Mr. Williams in which he set forth his "strongest recommendation" regarding preparation for future presentations of the PRD course in light of his co-worker's report on the course. Comp. Add. Ex. 9. In his Addendum to the Complaint, Mr. Gallrein alleges that this e-mail was "clearly protected activity" because he urged Mr. Williams "to obtain all of the DHS approved materials for the . . . course." Comp. Add. at 2. [Disclosure #9]

- In an April 23, 2013, e-mail to Mr. Schwarzel and Mr. Williams, Mr. Gallrein stated "a small number of cadre/staff are sub-optimizing" the opportunity "to make our Nation safer and more secure" "at a cost of increased risk to untold thousands by degrading and diminishing training (not to mention violating the DHS certification), and others at Y-12 are enabling them (by not holding them accountable, and shooting the messenger)." Comp. Ex. L. *See* Comp. at 7. [Disclosure #10]
- In an April 24, 2013, e-mail to Mr. Nobles and Mr. Williams, Mr. Gallrein provides Mr. Nobles with a copy of his co-worker's report on the PRD course, and writes that "B&W may be complicit in the mismanagement of" its training program; that there "appears to be fraud, waste and abuse of taxpayers' funds"; and that because the course does not conform to DHS certified materials, "as such it is defective." Comp. Ex. T. [Disclosure #11][3]
- On May 14, 2013, Mr. Gallrein sent an e-mail to Mr. DeVault, Mr. Williams, Michael J. Evans (President of Gem-Tech), Mr. Nobles, Mr. Schwarzel, and Ryan Baker of Office of the Inspector General at the DOE's Oak Ridge Office (IG). Attached to that e-mail was a letter he had addressed to Mr. DeVault, in which he charged B&W with a "possible pattern of mismanagement . . ., potential fraud, waste, and abuse, not to mention possible safety issues. . . ." He also reported that he had taken his concerns to the NNSA and the DOE IG. Finally, he enumerated examples of retaliations taken against him as a result of his having raised these concerns earlier. Comp. Ex. M [Disclosure #12]
- On June 9, 2013, Mr. Gallrein sent a letter to the Senior Agent-In-Charge of the Office of the IG at the DOE's Oak Ridge Office in which he wrote, "There is unanimous agreement that the facts indicate gross mismanagement, fraud, waste, and abuse shared by DoE/NNSA and B&W/Y-12." [Disclosure #13]

Mr. Gallrein's Complaint and Addendum to Complaint were founded entirely on retaliation for making alleged protected disclosures, as set forth in 10 C.F.R. § 708.5(a), and not on retaliation for participating in a Congressional proceeding or Part 708 proceeding, as in subsection (b) of that provision, or for refusing to participate in an activity for reasons described in subsection (c). In a Statement of Critical Issues that I permitted each party to file, Mr. Gallrein described his alleged protected activity in essentially the same manner. In his Responses to the Motions to Dismiss, however, Mr. Gallrein has now expanded the scope of his Complaint to allege additional protected disclosures, as well as protected activity under subsections (b) and (c). Mr. Gallrein, who is represented by counsel, had three opportunities to explain the bases for his Complaint before B&W and Gen-Tech submitted their Motions to Dismiss. The federal courts have held that the plaintiffs may not amend complaints through arguments in briefs in opposition

[3] Neither Disclosure #7 nor Disclosure #11 was alleged as a protected disclosure in the Complaint or the Addendum to Complaint. Nevertheless, the language quoted in the above descriptions of those Disclosures appears in documents attached to the Complaint for other purposes. Complaint Exhibit S contains the safety concern described in Disclosure #7, though the Complaint refers to that exhibit not for that purpose, but rather for reasons related to alleged retaliations. *See* Comp. at 9. As for Disclosure #11, in his Complaint, Mr. Gallrein alleges that he "made it clear" in Complaint Exhibit T "that Mr. Ken Williams' excuses regarding the problems were untruthful." *Id.* I have reviewed Exhibit T and find nothing in that e-mail that supports his allegation that he was disclosing any purported untruth. On the other hand, Exhibit T does contain the above-quoted language, which alleges mismanagement, failure to use approved teaching materials, fraud, waste, and abuse. For the sake of completeness of this analysis, I will include these disclosures among Mr. Gallrein's allegations of protected disclosures.

to motions for summary judgment. *See, e.g., Speer v. Rand McNally,* 123 F.3d 658, 665 (7th Cir. 1997) (and cases cited therein). The same result is appropriate under these circumstances. To permit Mr. Gallrein to bolster his position at this juncture is inherently unfair to this process, as it would require the moving parties to amend their Motions to Dismiss to address Mr. Gallrein's new theories for recovery and open the door to continuing rounds of amendments. Consequently, I will not consider the applicability of subsections (b) and (c) of section 708.5 in this case nor will I address those alleged disclosures that Mr. Gallrein introduced for the first time in his Responses to the Motions to Dismiss. Instead, I will focus on whether the disclosures Mr. Gallrein included in his Complaint and Addendum to Complaint qualify as protected disclosures under subsection (a).

As a threshold matter, I will dismiss Disclosure #13. Part 708 places the burden on Mr. Gallrein of establishing by a preponderance of the evidence that he made a disclosure, and that it was a contributing factor in one or more alleged acts of retaliation against him by his employer. 10 C.F.R. § 708.29. Without ruling whether Disclosure #13 constitutes a protected disclosure under section 708.5, I find that he cannot establish that it was a contributing factor to any of the retaliatory actions he has alleged in his Complaint. The last retaliation that Mr. Gallrein alleges was his termination on May 16, 2013, which occurred some three weeks before the date of his letter to the Inspector General's office in which he made Disclosure #13. Therefore, nothing Mr. Gallrein revealed in that letter could possibly have contributed to any retaliatory actions that he alleged in his Complaint. For that reason, I will dismiss that portion of Mr. Gallrein's Complaint relating to Disclosure #13.[4]

Moreover, I find that some of Mr. Gallrein's disclosures do not qualify as protected disclosures because he did not present them to a person specified in the Part 708 regulations. To be protected under the regulations, a disclosure must be made 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." 10 C.F.R. § 708.5(a). Although many of the individuals Mr. Gallrein addressed with his alleged disclosures fit within one of those specified categories, Mr. Schwarzel does not. He and Mr. Gallrein worked for different sub-contractors of B&W, the former for Aquila Group, the latter for Gem-Tech. Mr. Schwarzel was neither a government official nor an employee of Mr. Gallrein's employer or a higher tier contractor. Consequently, I will dismiss those portions of Mr. Gallrein's Complaint relating to any disclosures Mr. Gallrein made to Mr. Schwarzel, specifically, Disclosures #5, #6, and #8[5], and Disclosures #10 and #12 to the extent that Mr. Schwarzel was one of the recipients of those disclosures.

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[4] I also note that Disclosure #13 does not appear in the Table of Disclosures that Mr. Gallrein included in his Responses to the Motions to Dismiss. As the table represents a complete listing of Mr. Gallrein's disclosures, *see, e.g.*, Response to B&W Motion to Dismiss at 8, it appears that Mr. Gallrein has withdrawn that disclosure from his Complaint. Likewise, Disclosure #1 does not appear in the table. For the same reason, I find that Mr. Gallrein has determined to withdraw his allegation concerning Disclosure #1, and I will not address it in this Decision.

[5] Although the Complaint alleges that Disclosure #8 was made to a DOE official, Mr. Gallrein now states that the disclosure was made to Mr. Schwarzel "so [the PRD report] will be passed along to DOE." Response to B&W's Motion to Dismiss at 11, Ex. M. I have reviewed the April 21, 2013, e-mail that contained Disclosure #8, and find no indication that Mr. Gallrein directed Mr. Schwarzel to pass the report on. In any event, a disclosure to Mr. Schwarzel does not constitute a disclosure to the DOE.

To be protected under Part 708, disclosures to an appropriate person must have been made with the reasonable belief that they reveal (1) a substantial violation of a law, rule, or regulation; (2) a 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. I must therefore ascertain whether the substance of each disclosure falls within one or more of the three categories listed above. In addition, to determine whether an employee had the requisite reasonable belief, I must consider the employee's intent at the time of the disclosure, and whether "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced" the revelation of information that falls within one or more of those categories. *Eugene N. Kilmer,* Case No. TBH-0111 at 8 (2011) (*citing Heining v. General Serv. Admin.,* 116 M.S.P.R. 135, 143 (2011)).

In his Complaint, Mr. Gallrein states, in broad terms, the concerns he revealed in his disclosures and the category of protected disclosure that each disclosure falls within:

> [S]ubstantial violations of laws, rules, and regulations (including laws, rules, and regulations that prohibit the acceptance of government funds for products not provided; those that prohibit retaliation toward an employee who makes a good faith report of violations; those that prohibit course content that exhibits prejudice and bias on the basis of religion, national origin, race or gender; payment of government funds for meals for employees); a danger to the safety of attendees (in role playing activities); a potential security breach in holding courses offsite; fraud in the [Department of Homeland Security] approval process and acceptance of payments for courses that did not meet approved course standards and requirements; and gross waste of funds (not providing the paid-for time and content, and misuse of funding relating to meal payments).

Comp. at 8 (emphasis in original).

In his Responses to the Motions to Dismiss, Mr. Gallrein provides a table of his claimed disclosures in which he identifies, for each alleged disclosure, whether it revealed a substantial violation of law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; fraud, gross mismanagement, gross waste of funds, or abuse of authority; or a combination of these concerns. To the extent that Mr. Gallrein has restated the basis for Part 708 protection of his disclosures, I will rely on the grounds Mr. Gallrein identified in that table as I address below each of the remaining alleged disclosures under consideration.

A. The Disclosure Alleged by the Complainant To Be Protected by Section 708.5(a)(1)

Section 708.5(a)(1) protects the disclosure of information that a complainant reasonably believes "reveals . . . substantial violation of a law, rule, or regulation." In his Responses to the Motions to Dismiss, Mr. Gallrein no longer contends that his disclosures concerning acceptance of government funds, course content, or payment of meals revealed substantial violations of laws, rules, or regulations. Mr. Gallrein does contend, however, that Disclosure #7 revealed a

substantial violation of a law, rule, or regulation. He supports his position by quoting a portion of an April 22, 2013, e-mail to Mr. Nobles and Mr. Williams in which he alleges "reprisal/retribution against me for being a whistleblower." Response to B&W Motion to Dismiss at 11; Response to GemTech Motion to Dismiss at 9. Although he does not cite the law, rule, or regulation he reasonably believed was violated, I can deduce that, at the time he filed his Complaint, Mr. Gallrein was alleging a violation of Part 708 itself. In essence, he contends that he reasonably believed that reporting perceived retaliations to his supervisor and a B&W Ethics Office employee revealed violations of Part 708, because he was a "whistleblower."

Mr. Gallrein's contention is incorrect as a matter of law. Part 708 does impose an affirmative duty on DOE contractors not to retaliate against whistleblowers: "DOE contractors may not retaliate against any employee because the employee . . . has taken an action listed in Secs. 708.5(a)-(c)." 10 C.F.R. § 708.43. However, at the time of Mr. Gallrein's April 22, 2013, e-mail, he had taken no "action listed in Secs. 708.5(a)-(c)." At that juncture, it had not been determined or even alleged that Mr. Gallrein had made a disclosure protected under section 708.5(a); indeed, Mr. Gallrein had not yet filed a Part 708 complaint. Further, Mr. Gallrein does not allege that he had engaged in a protected activity, i.e. that he had previously participated in a Congressional or Part 708 proceeding under section 708.5(b), or refused to participate in actions proscribed by section 708.5(c). Under these circumstances, I must reject Mr. Gallrein's apparent claim to "whistleblower" status at the time of his April 22, 2013, e-mail, and correspondingly reject his collateral claim that he disclosed a violation of Part 708 by that transmittal.

B. The Disclosure Alleged by the Complainant To Be Protected by Section 708.5(a)(2)

Section 708.5(a)(2) protects the disclosure of information that a complainant reasonably believes "reveals . . . substantial and specific danger to employees or to public health or safety." In his Responses to the Motions to Dismiss, Mr. Gallrein contends that Disclosures #4, #7, and #9 revealed such danger to public health or safety. In Disclosure #4, Mr. Gallrein notified three B&W managers that the ART course that he had observed "varied significantly" from the form that had been approved in the past, and questioned whether that "violation" should be investigated and whether the course certificates and credits awarded to students should be voided for those students who took iterations of that course that did not comply with the course's approved design. Comp. Add. Ex. 1. In his Responses to the Motions to Dismiss, Mr. Gallrein contended that this disclosure was covered by section 708.5(a)(2). Response to B&W Motion to Dismiss at 10; Response to GemTech Motion to Dismiss at 8. He did not allege that this disclosure revealed a substantial and specific danger to employees or to public health or safety in any of his three iterations of his Complaint, however, and I will not permit him to amend his Complaint in this manner at this late date. Moreover, although Mr. Gallrein was clearly disclosing his opinion that the course was in need of improvement and even investigation, nothing on the face of this disclosure refers to danger to employees or the public. I cannot conclude that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by Mr. Gallrein could reasonably determine that Disclosure #4 evidences a contemporaneous intent to reveal a substantial and specific danger to employees or to public health or safety.

Mr. Gallrein's Disclosure #7 revealed, among other concerns, that a student in one of the courses he observed played a role in a training exercise during that course. He wrote that neither the instructors nor B&W were aware "of students [sic] medical/psychology conditions." Comp. Ex. S. As he clearly identified this paragraph of his e-mail as addressing a safety concern, a disinterested observer could reasonably conclude that Mr. Gallrein intended to reveal a safety matter to the recipients of his e-mail. The same disinterested observer would not conclude, however, that Mr. Gallrein reasonably believed the safety concern he disclosed met the "substantial and specific danger" threshold of 10 C.F.R. § 708.5(a)(2). 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 this threshold. In *Chambers v. Dep't of Interior*, the Federal Circuit wrote:

> 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.

515 F.3d 1362, 1369 (Fed. Cir. 2008). Although recruiting a role player from among paying students may not be appropriate for other reasons that Mr. Gallrein enunciated in his e-mail, I find it highly speculative that the practice could result in harm to that student or any other class member, or any member of the public. An adult student with a medical or psychological condition that contraindicated his or her participation in a role play would most likely not volunteer to play a role or, if selected, would decline. A scenario in which harm might occur would require the student to suffer from some condition, to be asked to participate, to be unwilling or unable to decline, and to be placed under a stress that he or she could not tolerate. Given the highly speculative nature of the safety danger that Mr. Gallrein revealed in this disclosure, I conclude that Disclosure #7 did not reveal a substantial and specific danger to employees or to public health or safety.

Disclosure #9 occurred in an April 23, 2013, e-mail Mr. Gallrein addressed to Mr. Williams, his supervisor. In it, he set forth his "strongest recommendation" regarding preparation for future presentations of the PRD course in light of his co-worker's report on the course. Comp. Add. Ex. 9. I have reviewed this document and find that the content outlines Mr. Gallrein's suggestion for actions Mr. Williams should take to address the weaknesses Mr. Gallrein and his co-worker perceived in the PRD course. I can find no language in that e-mail that discloses any safety concern at all, let alone a substantial and specific danger to employees or to public health or safety. In his Response to the Motions to Dismiss, Mr. Gallrein points to the following language as evidence of a protected disclosure under both subsections (a)(2) and (a)(3): "Report to NA-21 your findings and plan of action to address, correct and improve the course – today." Response to B&W Motion to Dismiss at 12; Response to GemTech Motion to Dismiss at 10. Despite Mr. Gallrein's contention, that language simply does not reveal a protected disclosure of any nature. I conclude that Disclosure #9 did not reveal a substantial and specific danger to employees or to public health or safety.

C. The Disclosures Alleged by the Complainant To Be Protected by Section 708.5(a)(3)

In his Response to the Motions to Dismiss, Mr. Gallrein contends that several of his disclosures qualify for as protected disclosures under 10 C.F.R. § 708.5(a)(3). That provision protects the disclosure of information that a complainant reasonably believes "reveals . . . fraud, gross mismanagement, gross waste of funds, or abuse of authority." Specifically, Mr. Gallrein indicates that the following disclosures alleged in his Complaint and subsequent revisions revealed information of this nature: Disclosures #2, #3 #4, #7, #10, #11, and #12.[6] The subject matter of those disclosures was Mr. Gallrein's comments and recommendations on two courses his office delivered, the ART and the PRD. With the exception of Disclosure #3, his report on the ART course he observed, he made the remaining disclosures in e-mails to B&W, GemTech and DOE personnel. Although the nature of the report and the e-mails were recommendatory, Mr. Gallrein contends that each of them contained statements that revealed fraud, gross mismanagement, gross waste of funds, or abuse of authority. I note that, but for Disclosures #3, #11, and #12, in which Mr. Gallrein actually invoked the terms "mismanagement" and "fraud, waste, and abuse," his disclosures do not specifically refer to fraud, gross mismanagement, gross waste of funds, or abuse of authority. Consequently, I must consider the actual words and their context to determine whether he reasonably believed he was revealing such behavior at the time he made the disclosures.

I will address below my findings regarding whether Mr. Gallrein reasonably believed that he was revealing fraud, gross mismanagement, or gross waste of funds in any of the disclosures enumerated above. Because, even in a light most favorable to him, I cannot interpret any of his disclosures as having revealed abuse of authority,[7] I will not consider that behavior below.

1. Fraud

When analyzing allegations of fraud in other Part 708 cases, we have looked to a standard legal reference for a definition of the term: the "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *Eugene N. Kilmer,* Case No. TBH-0111 (2011) at 11 (citing *Black's Law Dictionary* (9th ed. 2009)). I have reviewed the seven disclosures enumerated in the above paragraph for evidence that Mr. Gallrein had a reasonable belief that he was disclosing fraud, and conclude that none of his disclosures rise to the level of this definition of fraud. In the four disclosures in which Mr. Gallrein did not mention "fraud, waste, and abuse"—Disclosures #2, #4, #7, and #10—I cannot find that his language or the context of the disclosures demonstrate an intention to be revealing fraudulent activity. As a group, those disclosures focused on waste of funds and, in some instances,

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[6] Mr. Gallrein also associated Disclosure #9 with section (a)(3). Because I found, above, that Disclosure #9 did not contain language that revealed a protected disclosure of any nature, I conclude that Disclosure #9 did not reveal fraud, gross mismanagement, gross waste of funds, or abuse of authority.

[7] OHA has defined abuse of authority as "an arbitrary or capricious exercise of power by an official or employee that adversely affects the rights of any person or that results in person gain or advantage to himself or to preferred other persons." *See Cassondra B. Stark,* Case No. WBU-13-0003 at 6 (2013); *Thomas L. Townsend,* Case No. TBU-0082 (2008).

mismanagement, but did not allege any knowing misrepresentation or concealment by B&W or GemTech.

The remaining three disclosures, in which Mr. Gallrein specifically used the term "fraud, waste, and abuse," fare no better under this analysis. In the closing summary section of Disclosure #3, after describing in great detail his observations of the ART course and his recommendations for improvement, he wrote:

> Moreover, it is important to recognize the above phenomena may also lead to some inappropriate behaviors like the glamorization of alcohol, showing inappropriate videos, and significant variation from the prescribed, approved, and certified curriculum (only 19 of 24 contact hours) – resulting in a risk of an accusation of fraud, waste, [and] abuse as well as an alcohol incident, not to mention failure to conduct the training competently and effectively.

Comp. Ex. D at 21. This lengthy report clearly demonstrates Mr. Gallrein's concern for what he perceived to be the poor quality of the course presentation. His choice of words here—"a risk of an accusation of fraud, waste, [and] abuse"—demonstrates that Mr. Gallrein was attempting to warn B&W of possible exposure, protecting the company rather than accusing it of knowingly misrepresenting or concealing information. Moreover, despite his invocation of "fraud, waste and abuse," I fail to find any language or context that supports a conclusion that he reasonably believed that his report revealed fraud, as it is defined above.

In Disclosure #11, Mr. Gallrein again refers to "fraud, waste, and abuse of [taxpayers'] funds." Comp. Ex. T. In this context, I cannot reasonably interpret his use of "fraud" to stand on its own and reflect Mr. Gallrein's reasonable belief that he was revealing fraud to the recipients of his e-mail. Rather, the only reasonable interpretation is that he was using "fraud, waste, and abuse" as a fixed phrase to indicate his perception that public funds were being misspent on the PRD course. (I address this issue below.) Finally, Mr. Gallrein stated in Disclosure #12 that the disclosures he had made on earlier occasions indicated "potential fraud, waste, and abuse . . ." Comp. Ex. M. I note that Mr. Gallrein made no new disclosures of fraud, waste, or abuse in Disclosure #12; instead, he referred to those disclosures he had made in the past and characterized them as fraud, waste, and abuse. Because he made no new disclosures of fraud in Disclosure #12, Mr. Gallrein could not have reasonably believed that he revealed fraud in that disclosure.[8]

2. Gross Mismanagement

[8] Mr. Gallrein also invoked the term "mismanagement" in Disclosure #12. He did not, however, make any new disclosures of mismanagement, but rather characterized his earlier disclosures as indicating a "possible pattern of mismanagement." *Id.* For the same reasoning as set forth above, Mr. Gallrein could not have reasonably believed that he revealed gross mismanagement or, for that matter, gross waste of funds, in that disclosure. I find that Disclosure #12 was not a disclosure at all but rather a document in which he emphasized that his earlier disclosures revealed mismanagement and fraud, waste, and abuse. I will therefore dismiss that portion of the Complaint relating to Disclosure #12.

I also find that none of Mr. Gallrein's disclosures evidence a reasonable belief that he was revealing gross mismanagement. Similar to his allegations of fraud, Mr. Gallrein did not use the term "gross mismanagement" in any of his disclosures, and mentioned "mismanagement" only in Disclosures #11 and #12. In Disclosure #11, Mr. Gallrein wrote that "B&W may be complicit in the mismanagement of DoE/NNSA Training programs." Comp. Ex. T. [9] Moreover, reading his disclosures broadly, I can also interpret the following as possibly being assertions of mismanagement: cutting the course short from its approved length (Disclosures #2, #3, #4), "glamorization of alcohol" and showing inappropriate videos (Disclosure #3), using students as role players without obtaining hold-harmless agreements from them (Disclosure #7), and allowing the quality of instruction to diminish (Disclosure #10).

Prior OHA decisions have found that gross mismanagement is

> more than 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 management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission.

Kilmer at 12 (and cases cited therein).

By this standard, Mr. Gallrein's disclosures, as he describes them and as they are documented contemporaneously in the record, do not reveal gross mismanagement. There are allegations of management not responding to his concerns and not implementing his suggested corrective actions, but management's lack of response, even if I were to agree that it was short-sighted, does not in and of itself illustrate an "element of blatancy" required of gross mismanagement. Moreover, most of the specific objections Mr. Gallrein raised in his disclosures are at best debatable practices concerning teaching quality and style, and even if management affirmatively decided to take no action to correct them, of which we have no evidence, I cannot find that its inaction constitutes more than simple wrongdoing or negligence. Mere differences of opinion between an employee and his supervisors as to the proper approach to a particular problem or the most appropriate course of action do not rise to the level of gross mismanagement. *Kilmer* at 11 (and case cited therein). As for his claim that the ART course ran for only 19 hours of the 24 hours it was designed to occupy, Mr. Gallrein's report and e-mails do not disclose sufficient information for me to determine that the objectives of the course were not substantially met. And even if I were to reach that determination, I would be hard pressed to conclude that management's lack of response to that disclosure was a blatant refusal to exert its authority to correct a situation that created "a substantial risk of significant adverse impact upon [DOE's] ability to accomplish its mission." Although Mr. Gallrein contends that he reasonably believed that several of his disclosures revealed misconduct, when viewed from the perspective of a disinterested person, he has not alleged management action or inaction that rises to the level of gross mismanagement.

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[9] I need not address the language of Disclosure #12, having found in n.7 above that it contained no actual disclosure.

3. Gross Waste of Funds

Finally, Mr. Gallrein did not make a disclosure of gross waste of funds. While he never specifically included the term "gross waste of funds" in any of his disclosures, he did refer to "fraud, waste, and abuse" in Disclosures #3, #11, and #12, and I will consider whether his invocation of "waste" in those instances indicated an intent to reveal gross waste of funds. For the sake of completeness, I will also consider whether he intended to reveal gross waste of funds in those remaining disclosures, made in his Complaint and its revisions, to which Mr. Gallrein has asserted that section (a)(3) applies in his Response to the Motions to Dismiss.

OHA has stated that "[j]ust as gross mismanagement constitutes more than merely a debatable managerial decision, gross waste of funds constitutes a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonable expected to accrue to the government." *Fred Hua,* Case No. TBU-0078 at 3 (2008). Under controlling case law, the matter being disclosed must be significant to the degree that it portends an adverse impact upon the company's ability to accomplish its mission and the actions must be so serious "that a conclusion that the agency erred is not debatable among reasonable people." *White v. Department of the Air Force,* 391 F.3d 1377, 1382 (Fed. Cir. 2004); *see also Lopez v. Department of Housing and Urban Development,* 98 F.3d 1358 (Fed. Cir. 1996); *Mentzer v. Metropolitan Police Department,* 677 F. Supp. 2d 242 (D.D.C. 2010); *Jensen v. Department of Agriculture,* 104 M.S.P.R. 379, ¶ 9 (2007).

In Disclosure #3, the report on the ART course, Mr. Gallrein referred to "inappropriate behaviors," including "significant variation from the curriculum," that created a "risk of an accusation of fraud, waste, [and] abuse." Comp. Ex. D at 21. Disclosure #11 mentions "fraud, waste, and abuse of [taxpayers'] funds" in the context of the PRD course. Comp. Ex. T.[10] The remaining disclosures, while not specifically mentioning waste, refer to taxpayer funding for the courses (Disclosures #2 and #11), the possibility that altering the ART course from its original form may have led to improperly issued course credits and certificates (Disclosures #4, #10, and #11), and potential taxpayer liability for injuries students might receive while role-playing (Disclosure #7).

Mr. Gallrein's disclosures, in essence, allege that the courses are paid for with public funds and that the deficiencies he found in their presentations reduced their value to the public and potentially placed the public at financial risk. Although these disclosures clearly illustrate that Mr. Gallrein had the courage of his convictions, they are speculative in their nature and vague as to their monetary significance. The matters being disclosed, despite Mr. Gallrein's ardor, reveal actions his office engaged in that would be "debatable among reasonable people."

As I cannot find that the complainant disclosed information that he could have reasonably believed revealed either fraud or gross mismanagement, the disclosures alleged by Mr. Gallrein are not protected under section 708.5(a)(3).

[10] Regarding Disclosure #12, *see* n.8 above.

III. Conclusion

I have found above that, even assuming the truth of the complainant's allegations as to the relevant facts of this case, those allegations do not support a plausible claim that Mr. Gallrein disclosed information that he reasonably believed revealed a substantial violation of a law, rule, or regulation; substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. For these reasons, I will grant the Motions to Dismiss.

It Is Therefore Ordered That:

(1) The Motions to Dismiss filed by Babcock and Wilcox Technical Services Y-12, LLC, on February 12, 2014, Case No. WBZ-13-0017, and GemTech Y-12, LLC, on February 14, 2014, Case No. WBZA-13-0017, be and hereby are granted.

(2) The Complaint filed by Edward G. Gallrein, III, against Babcock and Wilcox Technical Services Y-12, LLC, and GemTech Y-12, LLC, on August 12, 2013, is hereby dismissed, as is the pending hearing, Case No. WBH-13-0017.

(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.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: April 10, 2014