

Case No. LWA-0006

September 2, 1994

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Helen Gaidine Oglesbee

Date of Filing: February 28, 1994

Case Number: LWA-0006

This Decision involves a whistleblower complaint filed by Helen Gaidine Oglesbee (Oglesbee) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. Oglesbee has been and is currently an employee of Westinghouse Hanford Company (WHC), the management and operating contractor at the DOE's Hanford Nuclear Site. She alleges that she made health and safety complaints to her immediate supervisor from December 1990 to August 1991, and that beginning in October or November 1991, she elevated these concerns to higher management officials at WHC. Oglesbee maintains that WHC took the following reprisals against her: failing to respond to her health-related issues and denying her access to reports and analyses of those issues; removing her designation as "lead" secretary; issuing her a performance improvement plan; transferring her involuntarily to another WHC office; issuing her a performance expectations letter; issuing her written reprimands, and delaying promotions to Level IV Secretary and to permanent Plant Engineer. These alleged actions occurred during the period January 1991 through June 1993. The DOE's Office of Contractor Employee Protection (OCEP) investigated the complaint and found that no reprisals had been taken against Oglesbee that would entitle her to relief under Part 708. Oglesbee requested a hearing before the Office of Hearings and Appeals (OHA) under 10 C.F.R. § 708.9(a), reasserting her claim that reprisals were taken against her for raising health and safety concerns. The hearing in this case was held on June 15 and 16, 1994 in Richland, Washington.

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, contractor-operated (GOCO) 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. In several previous decisions issued under Part 708, OHA Hearing Officers have determined that contractors discriminated against employees for such disclosures, and directed them to provide appropriate relief. See, e.g., Ronald Sorri, 23 DOE ¶ 87,503 (1993), David Ramirez, 23 DOE ¶ 87,505 (1994), Universities Research Association, Inc., 23 DOE ¶ 87,506 (1994). In another decision, however, an OHA Hearing Officer found that the complainant failed to meet his threshold burden of proving that a disclosure warranting protection under § 708.5 had been made, and denied relief. Francis M. O'Laughlin, 24 DOE ¶ 87,____, Case No. LWA-0005 (July 29, 1994).

B. Factual Background

The following summary is based on the OCEP investigative file, the hearing transcript (hereinafter "Tr."), and the pleadings submitted to OHA by the parties. Except as indicated below, these facts are uncontroverted.

Beginning in June 1987, Oglesbee was employed by WHC at the Hanford B Plant facility. OCEP Proposed Disposition at 2. B Plant was built in 1943 as part of the Manhattan Engineer District, the secret wartime project to develop the atomic bomb. From 1944 until approximately 1952, the facility was used to produce plutonium for nuclear weapons. See WHC Post-hearing Brief at 6. It was later used to extract radioactive strontium and cesium isotopes from liquid waste, and to store cesium capsules. Id. B Plant has been inactive since the mid-1980s, but given its history of processing toxic and radioactive materials, it must be maintained in safe condition for eventual decontamination and demolition. Id.

Oglesbee was first employed as a Secretary Level III (June 1987 to September 1992). OCEP Proposed Disposition at 2. During the time the alleged reprisals took place, Oglesbee was promoted to Secretary Level IV (September 1992 to January 1993), to a Temporary Upgrade Plant Engineer (January 1993 to June 1993), and finally, to a permanent Plant Engineer (June 1993 to the

present). During this same period, Oglesbee received five successive pay raises, the last of which resulted in a 26.13 percent salary increase. Id. Her present duty station is located at the Federal Building in the city of Richland. Tr., Vol. I at 124-25.

At the hearing, Oglesbee's counsel set forth her allegations of reprisal in a chronology highlighting "seven significant periods of disclosure . . . almost immediately followed by some sort of an adverse personnel action." Tr., Vol. I at 9.

First, Oglesbee alleges that in December 1990, she told her supervisor, the late Robert Higbee, that she would not tolerate an unhealthy work site, and also wrote a memo to Michael Grygiel, then B Plant manager, complaining of intimidation of employees at B Plant who raised safety concerns. Id. at 10-11. In January 1991, and allegedly in reprisal for raising these concerns, Oglesbee was removed from her position as B Plant Operations lead secretary. Id. The second alleged reprisal was a Performance Improvement Plan issued to Oglesbee on March 26, 1991, which Oglesbee claims was a response to a March 19, 1991 memo she wrote to management requesting permission for the B Plant clerical staff to participate in Operation Clean Sweep sessions. Id. at 12-13. Third, Oglesbee alleges that in July 1991 she was transferred from her position as secretary to Higbee in response to disclosures she made during meetings that month with Michael Dickinson of the WHC employee concerns office. Id. at 13-14.

On November 3, 1991, the beginning of the fourth period of alleged reprisal, Oglesbee submitted a 13-page document to WHC management containing her health and safety concerns, to which Grygiel and WHC Vice- President Ronald Bliss responded in a January 3, 1992 memorandum to Oglesbee. Id. at 14-15. On January 10, 1992, a meeting was held in Bliss' office in which it was decided to return Oglesbee to the position from which she had been transferred. Id. at 15-16. In a second meeting held the same day, WHC management decided not to return Oglesbee to her former position, a decision she alleges was a reprisal in response to her health and safety complaints. Id. at 16.

Two alleged acts of reprisal took place during the fifth period set forth by the complainant. Oglesbee was issued a performance expectations letter on January 30, 1992, by her supervisor, Ray Menard, which she alleges was in retaliation for complaints she had made in a January 28, 1992 meeting with Larry Musen, the DOE Richland Field Office (DOE/RL) employee concerns program manager. Id. at 16-17. In addition, on February 26, 1992, one day after WHC received a letter from the DOE regarding the issues raised by Oglesbee, she received a written reprimand from Menard. Id. at 17-18. The sixth period began when Musen filed a report on April 5, 1992 stating that Oglesbee may have been exposed to hazardous materials and that WHC management appeared to be "scared of" Oglesbee. Id. at 18. On April 6, 1992, Oglesbee wrote to the DOE stating that WHC had not adequately responded to her concerns. Id. at 18. The following day, Menard issued a second written reprimand to Oglesbee. Id. at 19.

The final reprisal alleged by Oglesbee occurred after she had filed her complaint under Part 708 on August 21, 1992, triggering OCEP's investigation of her complaints. In January 1993, Oglesbee was promoted to the position of temporary plant engineer, an action which Oglesbee contends was an attempt to persuade her to stop pursuing her concerns. Id. at 20. Oglesbee alleges that because she continued to raise health and safety concerns, she was informed by B Plant manager Duane Bogen on May 20, 1993 that her promotion to plant engineer would not become permanent until OCEP's investigation was completed. Id. at 20- 21.

WHC maintains that Oglesbee did not articulate specific health and safety concerns prior to November 1991, and steadfastly denies that any of the actions taken against the complainant were in reprisal for her protected disclosures. Tr., Vol. I at 24; Vol. II at 7. Rather, the company contends that these actions were taken in response to Oglesbee's interpersonal conflicts with supervisors and coworkers, and in response to deficiencies in her performance. Tr., Vol. I at 24-25. The company also notes that the letters of reprimand issued to the complainant were ordered removed by a WHC Employee Appeals Board, and that Duane Bogen's message regarding the delay in Oglesbee's permanent promotion to Plant Engineer was withdrawn and Oglesbee was quickly promoted to that position. Therefore, WHC argues that there is no basis for the complainant's claim that she is entitled to relief under Part 708 for any of these actions. Tr., Vol. II at 4.

C. Procedural History of the Case

On August 24, 1992, Oglesbee filed a complaint with DOE/RL pursuant to 10 C.F.R. Part 708. On October 2, 1992, after an unsuccessful attempt was made by DOE/RL to reach an informal resolution, Oglesbee's complaint was forwarded to OCEP to institute a formal investigation. OCEP conducted an on-site investigation of Oglesbee's allegations of reprisal and issued a Report of Investigation and a Proposed Disposition on February 18, 1994. Before the on-site phase of OCEP's investigation, Oglesbee alleged that WHC had threatened to extend her status as Temporary Plant Engineer, rather than promoting her to a permanent position. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that Oglesbee had made protected disclosures related to her health and safety concerns, but that a preponderance of the evidence did not support a finding that the disclosures were a contributing factor in any of the allegedly retaliatory actions taken against her. 1/

On February 28, 1994, Oglesbee submitted her request for a hearing under 10 C.F.R. § 708.9 to OCEP. On March 10, 1994, OCEP transmitted that request to the OHA, and a Hearing Officer was appointed. On May 4, 1994, procedures and a briefing schedule were established for the hearing in this case under § 708.9(b).

On April 5, 1994, WHC filed a Motion to Dismiss the proceeding, and submitted a statement in support of that Motion on May 13, 1994. The complainant filed a reply on May 18, 1994. In its statement, WHC maintained that Oglesbee's August 24, 1992 complaint was not timely filed, and that the complaint was insufficient to confer jurisdiction on OCEP to investigate Oglesbee's allegations. On May 26, 1994, I denied WHC's Motion to Dismiss, having determined that the acceptance of Oglesbee's complaint was a reasonable exercise of discretionary authority under Part 708 by the OCEP Director. See *Westinghouse Hanford Co.*, 24 DOE ¶ 87,502 (1994).

The hearing was held in Richland, on June 15 and 16, 1994. 2/ At the close of the complainant's case, WHC again moved to dismiss the complaint. Tr., Vol II at 3-6. First, WHC reiterated its procedural arguments that the Oglesbee's complaint was insufficient to confer jurisdiction on OCEP under Part 708, and that the complaint was untimely filed. Second, WHC argued that the complainant had not met her burden of proving by a preponderance of the evidence that she had made disclosures protected under Part 708 and these disclosures were a contributing factor in personnel actions taken against her. WHC's procedural arguments were identical to those in its written motion, and I rejected them for the same reasons. Tr., Vol. II at 8-9; see Westinghouse Hanford Co., 24 DOE ¶ 87,502 (1994).

On the substantive issues, I dismissed the complainant's allegation that WHC failed to provide access to reports and analyses regarding her health concerns, on the grounds that this was not a discriminatory act that would form the basis for granting relief under Part 708. Tr., Vol. II at 8; see 10 C.F.R. § 708.5(a). The remaining allegations were not dismissed because the complainant had presented sufficient evidence, which, if uncontroverted by WHC, might have led me to conclude that she had made protected disclosures followed closely in time by adverse personnel actions that constituted violations of Part 708. Tr., Vol II at 8-16. Even though there were close calls on many of the issues at that stage in the case, I decided to deny the motion and hear the company's evidence. See Fed. R. Civ. Proc. 52(c). 3/

At the conclusion of the hearing on June 16, the parties elected to forego oral argument, and requested permission to file post-hearing briefs 30 days after they received copies of the transcript. Their post-hearing briefs were filed on August 8, 1994.

After considering the record established in the OCEP investigation, the evidence presented by both parties at the hearing, and their post-hearing briefs, I now conclude that with regard to certain of the allegations raised, the complainant failed to meet her burden to prove by a preponderance of the evidence that she made substantial and specific disclosures concerning health and safety to WHC. In those instances where the complainant made protected disclosures under Part 708 followed closely in time by adverse personnel actions, I find that WHC has proven by clear and convincing evidence that it would have taken the same actions absent her disclosures, or that WHC has already provided the complainant with an adequate remedy for the actions taken against her. Accordingly, I conclude that no relief is warranted under § 708.10.

II. Legal Standards Governing This Case

Proceedings under 10 C.F.R. 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 her 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 and safety." 10 C.F.R. § 708.5; see also Francis M. O'Laughlin, 24 DOE ¶ 87,___, Case No. LWA-0005 (July 29, 1994).

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993), citing McCormick on Evidence § 339 at 439 (4th ed. 1992).

B. The Contractor's Burden

If the complainant has met her burden of proof by a preponderance of the evidence that her protected activity was a "contributing factor" to the alleged adverse actions taken against her, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . ." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993), citing McCormick on Evidence, § 340 at 442 (4th ed. 1992). As a practical matter, the application of these standards means that if Oglesbee has established that it is more likely than not that she made a protected disclosure that was a contributing factor to an adverse personnel action, WHC must convince us that it is highly probable that the company would have taken this action even if Oglesbee had not raised any health and safety concerns.

III. Analysis

A. Oglesbee's Removal as Lead Secretary

Under 10 C.F.R. Part 708, Oglesbee has the burden of establishing by a preponderance of the evidence that a disclosure of health and safety issues was a contributing factor in her removal from the position of lead secretary in January 1991. I find that the Complainant has not met this burden. Specifically, Oglesbee has not established that she ". . . [d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor) information that [she] in good faith believes evidences . . . a substantial and specific danger to employees or public health and safety." 10 C.F.R. § 708.5 (emphasis added). See O'Laughlin, 23 DOE ¶ ___, Case No. LWA-0005 (July 29, 1994). Moreover, WHC has shown by clear and convincing evidence that intra-office personnel conflicts between December 1990 and January 1991 instigated Oglesbee's removal from the position of lead secretary. 4/

In December 1990, Oglesbee was designated as a lead secretary by Robert Higbee, her immediate supervisor in B Plant Operations. On December 8, 1990, the complainant had a doctor's appointment concerning medical problems which she thought were related to occupational exposures. Tr. Vol. I at 132. After this appointment, which complainant's counsel characterized as a

"turning point for Ms. Oglesbee," she allegedly made two different protected disclosures of health and safety problems to her superiors. Tr. Vol. I at 10. First, on December 8, Oglesbee claims she told Higbee that she wasn't going to "tolerate the exposures any more." Tr. Vol. I at 132. However, Higbee died in November 1991, and there is no corroborating evidence in the record about the content of Oglesbee's dialogue with him on this occasion. Second, on "approximately December 11, 1990," the complainant claims that she sent a note, entitled "Product and Solution Data Sheets," to Higbee's supervisor, Michael Grygiel, "which identified [her] safety concerns." OCEP Report of Investigation (hereinafter "ROI"), Ex. 1 at 4. Oglesbee argues that these two disclosures resulted in her removal from the unofficial position of lead secretary in January 1991, in "[r]etaliatio[n] for safety and health issues." Tr. Vol. I at 133.

With respect to her removal as lead secretary, I find that Oglesbee has not met her burden of proving that a protected disclosure described under § 708.5 occurred, and that such act was a contributing factor in an adverse personnel action. See David Ramirez, 23 DOE ¶ 87,505 at 89,029 (1994). Although Oglesbee alleges that she complained to Higbee about "exposures," her December 8, 1990 statement to him does not constitute a protected disclosure about a "specific danger." At the hearing, her testimony about this occasion was vague, and it was not corroborated by any other contemporaneous evidence. As noted in O'Laughlin, to form a basis for relief under Part 708, a complaint must be more specific and it must point to a substantial danger.

As for the other alleged disclosure during this period, Oglesbee has failed to prove that a note from her actually reached Grygiel before the alleged reprisal in January 1991. OCEP Exhibit 1 at 5. She admits that the note could have gotten lost, since it was sent through Plant mail distribution. Due to this possibility, the complainant later reattached it to "a more formal safety document dated 11/3/91." *Id.* There is nothing in the record which shows that Grygiel actually received Oglesbee's note before her removal as lead secretary. Consequently, the note cannot be considered a protected disclosure under § 708.5 which was a contributing factor to that action.

Moreover, WHC has demonstrated by clear and convincing evidence that "Oglesbee's conduct during the period of time that she was the lead secretary was disruptive and was negatively impacting her co-workers whom she was 'leading,'" and therefore, her removal as lead secretary was unrelated to health and safety issues. WHC's Post-Hearing Brief at 19. At the hearing, I heard from numerous WHC employees, including Vikki Chappelle (an employee at B Plant from May 1990 to May 1992), who testified that the complainant was abusive during meetings that were called in an attempt to resolve personnel conflicts between Oglesbee and other employees:

She acted like she was going to get out of her chair. She wouldn't let you talk at all. She was almost to the point of screaming. Her voice was very, very loud and to me . . . that's abusive Tr. Vol. II at 45.

I did not permit WHC to call a number of additional witnesses whose testimony would have been duplicative of Chappelle's testimony. Instead of presenting these witnesses at the hearing, counsel for WHC made proffers of what their testimony would have been, and counsel for Oglesbee entered into stipulations based on those proffers. These stipulations confirmed that other WHC employees had similar clashes with the complainant which negatively affected their work and "had nothing to do with any safety issues raised by Oglesbee." Tr. Vol. II at 254-256.

Based on the foregoing, I find that Oglesbee has neither "establish(ed) by a preponderance of the evidence that there was a disclosure . . . described under § 708.5" nor proved that it was a "contributing factor" in her removal from the position of lead secretary in January 1991. 10 C.F.R. §708.9 (d). Moreover, WHC has proven that there was an independent, non-discriminatory reason for Oglesbee's removal as lead secretary, even though it is not required to do so under the regulations. 10 C.F.R. § 708.9 (d). In this instance, WHC management took what it saw as the necessary step to resolve a disruptive personnel situation and removed certain duties from the complainant.

B. Performance Improvement Plan

Oglesbee alleges that the second reprisal was a Performance Improvement Plan issued to her on March 26, 1991. This occurred during a time when WHC instituted a safety program known as Operation Clean Sweep, to encourage employees to write their concerns about health and safety issues on cards which they submitted. Tr. Vol. I. at 105. On March 19, 1991, Oglesbee wrote a memo to management seeking permission for the B Plant clerical staff to participate in Operation Clean Sweep program sessions.

The record shows that on March 26, 1991, a Performance Improvement Plan prepared by Higbee was delivered to Oglesbee by Dan Lawrence, a WHC Human Resources Manager. It states that Oglesbee should "confine dealings during work hours to issues which pertain to: the direct operation of the B Plant Operation Manager's Office, personnel who directly deal with B Plant Operations Manager . . . , and preparation of correspondence, tracking of actions and resolutions of issues included in your job description." WHC Exhibit 1. Higbee also indicated that Oglesbee's "current unacceptable performance levels must change to improve your effectiveness on the job and your relationship with other plant personnel." *Id.* The complainant argues that her March 19 memo precipitated the Performance Improvement Plan, and that the memo is evidence that she made WHC aware of her health and safety concerns. See Complainant's Post Hearing Brief at 11. Oglesbee also testified that she filed Clean Sweep cards to voice her opinion about safety issues without reprisal. Tr., Vol. I at 134.

After reviewing the record, I find that like the complainant in the O'Laughlin case, Oglesbee has not met her threshold burden of showing that she made any protected disclosures during this period. For example, on one of her Clean Sweep cards Oglesbee wrote that "managers need to listen to all employees in a fair consistent manner, giving clear, concise directives that can be enforced by management." She further stated that "management needs to listen and handle with fairness and promptness the complaint of any employee." WHC Ex. 3. These writings simply do not raise a substantial and specific danger to health and safety. Likewise, Oglesbee's March 19 memo only vaguely indicated that she had health and safety concerns. In that memo,

Oglesbee wrote "I am sure we have common complaints about our environment and procedure that should be discussed at this time." OCEP Ex. 10. Evidence that safety [and health] in the most general sense was referred to does not satisfy the standard prescribed in § 708.5 that the complainant must show she actually disclosed information which in good faith she believed evidences a substantial and specific danger. In O'Laughlin, the Hearing Officer found that the complainant failed to make a prima facie case when the evidence did not show that he disclosed information evidencing any substantial and specific health and safety concerns. The same conclusion is warranted regarding this particular aspect of Oglesbee's claim.

In addition to Oglesbee not meeting her threshold burden, WHC has shown by clear and convincing evidence that the Performance Improvement Plan was issued in response to Oglesbee's disruptive interaction with co-workers which caused a decline in her work performance, and had nothing to do with her alleged mention of health and safety issues. During the hearing, several witnesses testified that Oglesbee was the cause of a disruptive work environment. For example, Vikki Chappelle described the situation as follows:

The job that I was doing at the time I liked very well but it became almost a regular basis when I'd wake up in the morning that I didn't want to go work . . . because of the conflicts at the office with Gai [Oglesbee]."

Tr., Vol. II at 46 and 47. See also the testimony of Ken Strickler, Tr., Vol. II at 238-247, and the stipulated testimony of Irene Palfrey and Tammy Doty, Id. at 255-6. Under these circumstances, there is no basis in the record for finding that the Performance Improvement Plan was an act of reprisal by Westinghouse that violated Part 708.

C. Transfer

Oglesbee alleges that following the issuance of the Performance Improvement Plan in February 1991, Higbee continued to retaliate against her for escalating her health and safety concerns with his superiors. Tr., Vol. I at 13. In July 1991, Oglesbee was transferred from her secretarial position in B Plant Operations to a similar position in B Plant Production Control. Oglesbee testified that she expressed her dissatisfaction with the possibility of a transfer. Tr., Vol. I at 137. She was told that her transfer was suggested to increase her "organizational efficiency" and to relieve tensions between her and Higbee. Oglesbee believes that her transfer was retaliatory because it occurred close in time with meetings she had in July 1991 with Michael Dickinson of the WHC Employee Concerns Program office. She claims she raised health and safety concerns in these meetings. Dickinson testified that in these early meetings with him, Oglesbee primarily discussed the interpersonal problems she had with Higbee. Tr., Vol. II at 60. He indicated that the only health matter Oglesbee actually raised before the transfer concerned the alleged failure to issue a proper occurrence report after an incident in which a small quantity of asbestos fell through the ceiling into Higbee's office in 1989. Tr., Vol. I at 95-6. According to Dickinson, it was not until later in the process of working with Oglesbee--well after the transfer took place in July 1991-- that she began to articulate additional health and safety concerns in more specific detail. Id. Nevertheless, I find that the mention of the asbestos incident to Dickinson around the time of the transfer is sufficient to meet Oglesbee's burden of proving by a preponderance of the evidence that her disclosure was a contributing factor to the transfer. See, e.g., *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

The burden therefore shifts to WHC to prove by clear and convincing evidence that the transfer would have taken place even in the absence of Oglesbee's disclosure to Dickinson of the asbestos incident. As indicated below, I find that WHC has met that burden. There is ample evidence to show Oglesbee's transfer was not a reprisal for protected disclosures, but was instead the result of her problems with her supervisor and interpersonal conflicts with her co-workers. For example, Ken Strickler testified that Oglesbee became loud, threatening and disruptive during a meeting convened by the WHC Human Resources office to resolve conflicts between her and other clerical employees who worked in the same area. Tr., Vol. II at 246. During this period, WHC managers diligently attempted to address Oglesbee's personnel problems, and it is clear that they sincerely believed her transfer would provide a fresh start and an opportunity to work in a new environment. Tr., Vol. II at 137-8. Moreover, the record indicates that Oglesbee initially benefitted from her transfer. In October 1991, she received a high rating on her performance appraisal from Ray Menard, her new manager. Oglesbee herself indicated in her comments on that appraisal that she enjoyed her new job with Production Control. See WHC Exhibit 6, Tr., Vol. I at 212.

As indicated in the preceding discussion, I find that WHC has shown by clear and convincing evidence that it would have transferred Oglesbee absent any health and safety concerns raised by her. Accordingly, I find that Oglesbee's transfer in July 1991 to B Plant Production Control was not a violation of Part 708.

D. WHC's Decision Not to Return Complainant to B Plant Operations

In October 1991, Oglesbee told Dickinson that she wanted to return to her former position in B Plant Operations. Tr., Vol. II at 61. In response to this request, two meetings were held on January 10, 1992, with WHC Vice-President Ron Bliss, Dickinson, and others in attendance. The first meeting concluded with a decision to return Oglesbee to her former position. In the second meeting, which included the new B Plant Manager, Duane Bogen, the earlier decision was reversed and it was decided that Oglesbee would remain in her position in Production Control.

Tr., Vol. I at 98-101.

At the hearing, Oglesbee's counsel described this latter decision as one of the adverse personnel actions taken against the complainant, although this was not one of the allegations raised by Oglesbee in her complaint to OCEP. Tr., Vol. I at 15-16. This claim is without merit. I found above that WHC's initial decision to transfer Oglesbee from her job in Operations did not violate Part 708 since it had two legitimate purposes: (i) to relieve tensions in Operations, and (ii) to give her a fresh start in a new office. The transfer was successful initially in achieving its goals, and there is no basis for concluding that the decision to keep her in Production Control was a "discriminatory act" as defined in 10 C.F.R. § 708.4.

In addition, rather than constituting a reprisal, WHC's handling of the complainant's request to return to B Plant Operations demonstrates that the company separated Oglesbee's safety concerns from her personnel matters, e.g., her disagreements with Higbee and coworkers, and her desire to return to her former position. Dickinson testified that the company took this approach as Oglesbee set forth more specifically her complaints of "exposures," including the following: the incident where asbestos particles fell into Higbee's office (October 1989); the expulsion of dust-contaminated air by the plant's "fresh air" recycling fan, the Buffalo Forge Unit (between 1987 and 1990); the leaking of unknown liquids through the ceiling from the plant's Aqueous Make-Up area onto the wall in Oglesbee's office (1987- 1991); and the leaking of liquid from a light ballast on one occasion in Higbee's office (either 1989 or 1990). Tr., Vol. II at 63-64; see OCEP Report of Investigation at 2, 6-9.

There is no dispute that the company gave separate consideration to Oglesbee's safety disclosures and her personnel problems, although the complainant argues this was done "to deflect attention given to [her] complaints by the DOE and [WHC] Employee Concerns." Complainant's Post-Hearing Brief at 36. After listening to the witnesses at the hearing, I am convinced that WHC's attempt to investigate and address Oglesbee's safety issues on a separate basis from her personnel problems was a rational response to the complaints she raised. Moreover, Dickinson testified that it was not unusual for the company to deal with an employee's concerns in this manner. Tr., Vol. II at 64. An example of this approach is a January 3, 1992 memorandum from Grygiel, then B Plant Manager, which responded to a November 18, 1991 memorandum in which Oglesbee raised both personnel and safety issues. OCEP Exs. 28 and 31. In that memo, Grygiel addressed each item of the complainant's personnel concerns, and then stated with regard to her safety issues that, although none of the issues raised appeared to be a current problem, any additional safety issues were to be brought to "the immediate attention of your manager or to plant management." OCEP Ex. 31.

Finally, in a January 22, 1992 memo to the complainant, WHC President Thomas Anderson affirmed the company's decision to keep Oglesbee in her Production Control position, and stated that his memo was "our final response to your employee concern." OCEP Ex. 38. Dickinson testified that while he considered her personnel issues closed by the Anderson memo, he continued to investigate the safety issues raised by Oglesbee. Tr., Vol. II at 64.

E. Performance Expectations Letter and Reprimands

In early 1992, Oglesbee received a Performance Expectations Letter and two letters of reprimand, each of which she contends was a reprisal for her health and safety disclosures. These were given to the complainant by Ray Menard, Oglesbee's supervisor after she was transferred to B Plant Production Control. Menard testified that Oglesbee initially performed well in her job, but that in late 1991 he became concerned because Oglesbee was spending a great deal of time on the telephone in the morning during the office's peak hours. He observed that Oglesbee would at times not answer incoming telephone calls, and that certain work was not being performed in a timely manner, such as producing daily reports and processing time cards. Tr., Vol. II at 205-09. Menard testified that he related his concerns to Oglesbee in November 1991, and that after her performance did not improve, he issued her a Performance Expectations Letter in January 1992. Id. at 209-11. On February 26, 1992, after continuing dissatisfaction with her performance and two contentious meetings with the complainant, Menard gave Oglesbee a letter of reprimand. Id. at 211-16; OCEP Ex. 82. A second reprimand was issued on April 7, 1992, following complaints from B Plant Deputy Manager Russ Murkowski that another employee, Sandra Rigney, had received unwanted telephone calls from the complainant. Tr., Vol. II at 216-18; OCEP Ex. 84.

It is undisputed that the Performance Expectations Letter and reprimands were issued to Oglesbee at a time when she was making continuing complaints to WHC management and the DOE which included health and safety concerns. In fact, it was Menard's observation that Oglesbee was not answering telephones or performing timely work because of the time spent on her concerns. See Tr., Vol. II at 223-23. Thus, an inference can be drawn that Oglesbee's protected disclosures were a contributing factor in these personnel actions. See, e.g., Ronald Sorri, 23 DOE ¶ 87,503 at 89,009-10 (1993).

The burden therefore shifts to WHC to prove by clear and convincing evidence that the same actions would have been taken against Oglesbee absent her protected health and safety disclosures. The company has not met this burden. Admittedly, the complainant's concerns were not confined to health and safety issues, and it is clear that some of Oglesbee's activities were not protected under the regulations. For example, it appears that the second reprimand issued to Oglesbee was prompted at least in part by complaints from the B Plant deputy manager about her annoying phone calls to Sandra Rigney. Tr., Vol. II at 217-18; OCEP Ex. 84. Nonetheless, the second letter of reprimand refers to "14 written communications and numerous phone calls" initiated by Oglesbee in pursuing her concerns with WHC and the DOE. OCEP Ex. 84. Although the record is not definitive on this point, the burden of persuasion remains with WHC, and there is not clear and convincing evidence that the Performance Expectations Letter and reprimands would have been given to the complainant if it were not for her protected activities.

To be sure, every employer has a strong interest in running an efficient organization, and it is not the purpose of Part 708 to hinder the ongoing work of DOE contractors. As a manager, Menard faced a dilemma. There is no evidence that his actions were taken in response to the substance of Oglesbee's complaints. Rather, his main concern appeared to be that Oglesbee complete her work on time, and he saw that the time spent on her concerns was getting in the way of effective performance. However, he also stated in his testimony that Oglesbee would have had 3-4 hours per day to pursue her complaints during the office's non-peak hours, so there was clearly room here to accommodate the interests of both employer and employee. Tr., Vol. II at 233. Unfortunately, the record indicates that this was never communicated to Oglesbee, either orally or through the disciplinary letters issued to the complainant. Id. at 237-38.

Thus, while Menard claims that he never intended to discourage Oglesbee from expressing her concerns, the Performance Expectations Letter and letters of reprimand as written could reasonably have been perceived as an attempt to do just that. It would therefore be consistent with the stated policy of the Part 708 regulations to conclude that such letters should not appear in a complainant's personnel file. See 10 C.F.R. § 708.3 (employees should be free to make disclosures "without fear of reprisal"). However, the regulations also favor resolution of whistleblower complaints through internal company grievance procedures. See

10 C.F.R. § 708.6. In the present case, a WHC Employee Appeals Board ordered that the letters of reprimand be removed from Oglesbee's personnel file on April 27, 1992. Colleen Lloyd, a WHC Personnel Records Custodian, confirmed that Oglesbee's personnel file does not contain the January 30, 1992 Performance Expectations Letter, or the two letters of reprimand. Tr., Vol II at 24. The Board's decision to remove the letters of reprimand was based on its finding that Menard had failed to follow the WHC progressive discipline policy. It did not conclude that the disciplinary letters were issued in retaliation for the reporting of health and safety concerns. Tr., Vol. II at 120-3; OCEP Ex. 86. Regardless of the reason for its action, however, I conclude that the relief ordered by the Board renders this issue moot.

My conclusion regarding the mootness of the reprimand issue is in accord with two relevant federal court decisions. One is a U.S. Supreme Court case which discusses the issue in the Title VII context. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). The court stated that a controversy becomes moot when "(1) it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur . . . and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* at 631 (citations omitted) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). In that case, the conditions for mootness were met because (1) there was no reasonable expectation that the City would go back to using an old civil service examination that had been found to be discriminatory, and (2) the City's changed hiring practices had eradicated the effect of the past discrimination.

In the present case the conditions for mootness are met because (1) given WHC's treatment of Oglesbee since the reprimands, there is no reason to think that this particular problem will recur, and (2) the effects of the reprimands were eradicated when they were removed from her personnel file.

The second case is a federal employee whistleblower case decided by the U.S. Court of Appeals for the D.C. Circuit, and the facts are analogous. *Frazier v. Merit Sys. Protection Bd.*, 672 F.2d 150 (D.C. Cir. 1982). In this case, the MSPB found that Frazier had been transferred improperly based on his exercise of EEO appeal rights. Frazier appealed the decision because the Board did not find, as he had contended, that the transfer was prompted by disclosures he made to Congress. He therefore claimed that the decision had a continuing "chilling" effect on him. The court found that "[e]ven if we determined that the Board's decision on this point was incorrect, Frazier would be entitled to no more relief than he has already received. Under these circumstances, Frazier presents us with no continuing controversy and we will therefore dismiss his petition . . ." *Id.* at 160-61.

Similarly in the present case, regardless of the reason that the WHC Appeal Board found that the reprimands should be removed, and whether or not we think that the Appeal Board should have found that Oglesbee's disclosures led to the reprimands, Oglesbee is entitled to no more relief than she already received. As OCEP noted in its Proposed Disposition, the proper remedy for the reprimands, if they had been found to be reprisals, would have been the removal of the material from her personnel file.

F. Delay in Promotion to Secretary IV

In September 1992, under a new supervisor, Don Bailey, Oglesbee was promoted to Secretary Level IV. Oglesbee alleged in her complaint to OCEP that this promotion would have taken place sooner were it not for her health and safety disclosures. While the complainant did not present any specific evidence at the hearing to support this allegation, WHC offered the testimony of Colleen Lloyd, a WHC Personnel Records Custodian. Lloyd testified that the five and one-half years spent by Oglesbee in her Secretary Level III position was not an unusually long time for an employee to remain in that position, and that the decision to promote secretaries is left to individual managers. Tr., Vol. II at 25.

Given the lack of evidence presented by the complainant on this issue, and the conflicts Oglesbee experienced with her supervisors and co-workers described above which occurred prior to any specific health and safety disclosures, it would be difficult to conclude that Oglesbee was not promoted because of protected activity. In fact, the complainant spent a comparatively brief time in her Level III position from the time of her initial disclosure in July 1991 to her promotion to Level IV Secretary in September 1992. I therefore find that Oglesbee has failed to meet her burden of showing by a preponderance of the evidence that her protected disclosures were a contributing factor to any delay in her promotion to a Level IV Secretary.

Even though WHC has no burden of going forward with the evidence on this aspect of the claim, the record indicates that WHC management attempted to work with Oglesbee to find a position that would suit both her and the company, while at the same time demonstrating a concern for the health and safety issues she raised. For example, as discussed above, WHC continued to investigate the health and safety issues raised by the complainant after her personnel matters were considered closed. On July 9, 1992, Douglas Falk, a WHC Industrial Hygienist, issued a comprehensive report in response to Oglesbee's health and safety complaints. See OCEP Ex. 48. There is no claim that the report was not issued in good faith. In addition, when Oglesbee was promoted to the position of Plant Engineer, she was given the responsibility of monitoring employees' hazardous exposure concerns as part of the company's "ALARA" (As Low As Reasonably Achievable) program. Tr., Vol. I at 152-54. It is the circumstances surrounding this promotion that are the focus of Oglesbee's final allegation of reprisal.

G. Delay in Promotion to Permanent Plant Engineer

Oglesbee alleges that the final reprisal taken against her occurred close in time after she filed her complaint under Part 708 on August 21, 1992. Tr., Vol. I at 20. In January 1993, Oglesbee had been promoted to a Temporary Plant Engineer and was promised that her promotion would become permanent within six months. See OCEP Report of Investigation at 41. However, as explained at the hearing, promotions had to follow a routine procedure in WHC's personnel system under which employees were required to "post" for new positions. Tr., Vol. II at 164.

Duane Bogen, Plant Engineer, described the WHC posting process:

The Westinghouse system of filling positions, with the exception of management positions, is that you would fill out a position description and submit it to human resources, they would then publish this site-wide. All individuals on site who thought they would qualify and had interest in the position that was being advertised or posted could then apply for it.

Tr., Vol. II at 164-165. Bogen further testified that the manager of records (in Human Resources) would then sort through these postings, tentatively select an eligible applicant, and determine the pay grade based upon the applicant's qualifications. The job would then be offered to the applicant at that rate of pay, and he or she could decide whether to accept the offer. Id. A temporary upgrade did not require the use of this system, and it could last anywhere from a few months to a year. Tr., Vol. II at 175.

In May 1993, Oglesbee sent an electronic mail message to Bogen after she had occupied the position of Temporary Plant Engineer for five months, and after being informed by him that her temporary position would be extended an additional six months (until December 31, 1993). Tr., Vol. II at 172. Bogen testified that Oglesbee's message queried whether WHC was having "a problem with her upgrade because of her ongoing concern issues." Tr., Vol. II at 174. He responded with the following message:

You are doing OK. Very well in fact, according to Don Bailey. Until the investigation is over, and all recommendations have been made, it made sense to us to leave the situation as "Status Quo". It has nothing to do with your work performance.

Tr. Vol. II at 184.

When Bogen's superior, Ron Bliss, became aware of this response, he verbally reprimanded Bogen for taking an improper action, and immediately promoted Oglesbee to Permanent Plant Engineer effective May 24, 1993, thereby by-passing the normal requirements of the WHC posting procedure. Tr., Vol. II at 183.

Oglesbee's counsel contends that Bogen's e-mail message is "direct evidence that the extension of complainant's temporary upgrade was (1) a retaliatory action and (2) was taken solely because complainant filed a complaint under 10 C.F.R. 708." See Complainant's Post-Hearing Brief at 15. Standing alone, this evidence is enough to satisfy the complainant's burden of showing by a preponderance of the evidence that her health and safety concerns were a contributing factor to the delay in making permanent her promotion to Plant Engineer. Thus, the burden is shifted to WHC to show by clear and convincing evidence that the delay in making Oglesbee's promotion permanent would have occurred even in the absence of her whistleblowing activities. The record shows that Bogen had two reasons for his action. First, he testified that:

My understanding is that generally [when] investigation, labor-type investigations are made, you try to leave the situation as is, status quo, you don't promote people, you try to leave things as is until it shakes out and truth is known and whatever decisions are made.

Tr. Vol. II at 178. Unfortunately, Bogen did not consult the WHC Legal Department before sending his reply to Oglesbee's e-mail message, or he would have learned that his first reason was incorrect. Id.

Second, and more importantly, Bogen went on to explain that there was an independent procedural reason for delaying the promotion of Oglesbee to the permanent position. WHC was downsizing its security guard force during this period. As a result, the normal posting process for all WHC jobs, including the Permanent Plant Engineer position, was temporarily halted while the effort was under way to place the guards whose jobs were eliminated into other positions at the Hanford Site. Tr., Vol. II at 175. Until the Plant Engineer job could be posted, Bogen lacked the authority to promote Oglesbee to the permanent position. Id. at 178. In other DOE whistleblower cases, we have found violations of Part 708 when contractors departed from their normal personnel procedures to the detriment of the complainant. E.g., Ronald Sorri, 23 DOE ¶ 87,503 (1993); see also Deford v. Sec'y of Labor, 700 F.2d 282 (6th Cir. 1983) (evidence showed that the agency did not follow its normal procedure in transferring whistleblower). In this case, however, the record indicates that WHC was merely following its normal personnel procedures by not making Oglesbee's promotion permanent until the job could be posted.

Based on the record developed in this proceeding, I find that WHC has shown by clear and convincing evidence that there were independent, non-discriminatory reasons which justified the delay in promotion. Although Bogen's e-mail message may have appeared to Oglesbee to be a reprisal, Bliss immediately recognized the problem and exercised his authority as WHC Vice-President to remedy any potential harm to Oglesbee. In doing this, the company by-passed its normal personnel procedures, but its action worked to Oglesbee's great advantage: she got the promotion without waiting until the position could be posted, and she received a 26 percent increase in salary. Under these circumstances, there is no basis in the record for finding that the delay in Oglesbee's promotion to permanent Plant Engineer was an act of reprisal by Westinghouse that violated Part 708.

III. Conclusion

As set forth above, I have determined that with regard to certain of the allegations raised, the complainant failed to meet her burden of proving by a preponderance of the evidence that she made substantial and specific disclosures concerning health and safety to WHC. In those instances where the complainant made protected disclosures under Part 708 followed closely in time by adverse personnel actions, I find that WHC has proven by clear and convincing evidence that it would have taken the same actions absent her disclosures, or that the complainant has already been provided an adequate remedy for the actions taken against her. Accordingly, I conclude that the complainant has failed to establish the existence of any violations of the DOE Contractor Employee Protection Program for which further relief is warranted under § 708.10.

It is Therefore Ordered That:

(1) Helen Gaidine Oglesbee's request for relief under 10 C.F.R. Part 708 is hereby denied.

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

Thomas O. Mann

Hearing Officer

Office of Hearings and Appeals

Date: September 2, 1994

1/ With regard to Oglesbee's complaints that she was issued written reprimands and that her promotion to Plant Engineer was delayed, the OCEP found that these issues had already been resolved by WHC in accordance with the relief OCEP would have recommended had it found that the actions were retaliatory. WHC removed the written reprimands from Oglesbee's personnel file in April 1992, and she was promoted to Plant Engineer in June 1993.

2 / OHA staff attorneys Steven J. Goering and Kimberly A. Jenkins attended the hearing, and along with OHA staff analyst Stephani Ratkin, assisted in the drafting of this decision.

3 / As characterized by one federal court, a denial of defendant's motion to dismiss at the close of plaintiff's case "amounts to nothing more than a refusal to enter judgment at that time. At most it constitute[s] a tentative and inconclusive ruling on the quantum of plaintiff's proof." See *Sanders v. General Services Admin.*, 707 F.2d 969, 972 (7th Cir. 1983) (quoting *Armour Research Foundation of Illinois Institute of Technology v. Chicago, Rock Island & Pacific Railroad*, 311 F.2d 493, 494 (7th Cir.), cert. denied, 372 U.S. 966 (1963)).

4/ The unofficial title of "lead secretary" is not a job position recognized by WHC's Human Resources department and therefore, has no pay or benefits attached to it. (WHC's Post-hearing Brief at 17).