May 8, 2002

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Interlocutory Decision

Name of Petitioner: Sue Rice Gossett

Date of Filing: May 25, 2001

Case Number: VBZ-0062

This Initial Agency Decision concerns a whistleblower complaint filed by Sue Rice Gossett (Gossett) against her former employer, the Safety and Ecology Corporation (SEC), under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. SEC is a sub-contractor of Bechtel Jacobs Corporation (BJC), the DOE's Managing Contractor at the Portsmouth Site in Piketon, Ohio (Portsmouth). Gossett alleges that she engaged in activity protected by Part 708 and, as a result, was retaliated against by SEC. As discussed below, I have determined that Gossett is entitled to relief.

The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and to prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities by encouraging contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices. 57 Fed. Reg. 7533 (March 3, 1992). In order to achieve these objectives, the regulations protect whistleblowers from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. §§ 708.5(a)(1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

Procedural History

Gossett filed a whistleblower complaint with the DOE's Oak Ridge Operations Office on January 23, 2001. By a memorandum dated February 13, 2001, the Oak Ridge Operations Office forwarded it to the OHA. This complaint was received by the OHA on February 22, 2001 and OHA Attorney Kent Woods was appointed as the Complaint Investigator on February 23, 2001. (1) Mr. Woods conducted an investigation of the allegations in the Complaint and on May 24, 2001, issued a Report of Investigation (the ROI). The ROI found that Gossett had made several protected disclosures and had suffered an adverse

employment action, her January 19, 2001 termination. Citing both the temporal proximity between some of the protected disclosures and her termination as well as evidence reflecting manifest hostility on the part of SEC managers to Gossett's protected activity, the ROI found that Gossett's protected activities were a contributing factor to SEC's decision to terminate her employment. The ROI accordingly concluded that the evidence in the record of the investigation was sufficient to shift the burden from Gossett to SEC to prove by clear and convincing evidence that it would have terminated her even if she had not engaged in protected activity. The ROI further concluded that, at that stage, SEC had not met this burden.

Pursuant to 10 C.F.R. § 708.21(a)(2), the case proceeded to a hearing. On May 24, 2001, I was appointed as Hearing Officer by the Director of the Office of Hearings and Appeals. My appointment as Hearing Officer was followed by a period in which the parties engaged in discovery. A hearing was held on October 23, 24, and 25, 2001, in Piketon, Ohio. The hearing was followed by an exchange of briefs, and the Record of this proceeding was closed on February 15, 2002, when OHA received Gossett's Reply to SEC's Post Hearing Brief.

Background

The Complainant, Sue Rice Gossett began working for the Portsmouth Site's radiation control program in February 1996. (2) Although Gossett had a Bachelors Degree in Sociology and an Associates Degree in Health Physics, she was originally employed as an office clerk at the Portsmouth Site. While in this position she attended a six week night course which trained her for the position of Radiation Control Technician (RCT). There were two examinations in this course, one for core academic material and one for site specific material. She successfully passed these exams in August and September 1997 and was hired as an RCT at the Portsmouth Site on October 3, 1997. She was hired by Bartlett Nuclear Services, the subcontractor which supplied RCTs to the Portsmouth Site at that time.

In March 1999, SEC took over the contract for RCT services at the Portsmouth Site. Gossett was interviewed and hired for a junior RCT position with SEC in that month. In June 2000, while Mr. Phil Borris was SEC's Manager at the Portsmouth Site, Gossett was subsequently promoted to the position of senior RCT. During her three years as an RCT at Portsmouth, Gossett's performance was consistently evaluated as at least satisfactory.

DOE guidelines require that RCTs receive continuing education in radiation control. According to DOE guidelines, RCTs should be re-qualified every 24 months in order to document this continuing education process. Gossett took her first re-qualification examination on December 22, 2000. The examination consisted of a total of 100 questions. In order to pass the examination a score of at least 80 percent was required. Gossett received a score of 74 percent on her first examination. On January 8, 2001, Gossett took a second re-qualification examination. Again the examination consisted of a total of 100 questions and required a score of at least 80 percent to pass. Gossett received a score of 73 percent on this second examination. On January 12, 2001, Gossett was informed by SEC management that she would be terminated if she failed to obtain a passing score on her third examination. On January 19, 2001, Gossett was administered a third examination. Immediately after she finished taking the third examination, it was assigned a grade of 74 percent. Within 4 hours of completing the third examination, Gossett's employment with SEC was terminated.

The Complainant contends that SEC used her failure to pass this third examination as a pretext in order to obscure its true motivation: retaliation against the Complainant for her whistleblowing activities. (3) SEC maintains it terminated Gossett because, upon her failure of a third re-qualification examination, she was no longer qualified to work as an RCT at the Portsmouth site and SEC did not have any other open positions for which she was qualified.

It is the burden of the Complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate as described in § 708.5,

and that such act was a contributing factor to one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); McCormick on Evidence § 339 at 439 (4th Ed. 1992). (4)

Gossett's Protected Disclosures

In the present case, it is clear, as indicated by the evidence set forth in the appendix to this decision, that Gossett made numerous protected disclosures between March 1, 1999, and January 19, 2001, the period in which she was employed as an SEC RCT at the Portsmouth Site. (5) The significance of the evidence set forth in the appendix is threefold. First, it clearly shows that Gossett made numerous protected disclosures during her tenure with SEC. Second, it shows that Gossett's disclosures led to embarrassment and friction at the Portsmouth Site. Third, its shows a recurring pattern under which Gossett would make protected disclosures and then be reassigned to a different part of the Portsmouth Site.

Adverse Personnel Actions

Adverse personnel actions were taken by SEC employees against Gossett during her tenure with SEC as an RCT. The information set forth in the appendix reveals that Gossett was repeatedly taken off projects soon after she reported health or safety issues. This pattern of repeated reassignments constitutes an adverse personnel action, since it served to intimidate and harass Gossett as well as undermine her authority and stature as an RCT. More importantly, Gossett was fired on January 19, 2001. A termination clearly constitutes an adverse personnel action.

Gossett's Protected Disclosures Were a Contributing Factor to Several Adverse Personnel Actions

Having established, by a preponderance of evidence, that she (1) had made protected disclosures under 10 C.F.R. § 708.5, and (2) incurred several adverse personnel actions, Gossett must also show, by a preponderance of evidence, that her protected disclosures were a contributing factor to her adverse personnel actions. Gossett has met this burden. Specifically, the record contains evidence of a recurring pattern of hostility towards Gossett on the part of various managers at the Portsmouth Site that appears to be directly related to her whistleblowing. The record also establishes temporal proximity between Gossett's protected disclosures and the adverse personnel actions.

A Pattern of Hostility

Gossett's protected disclosures inspired hostility on the part of Gossett's co-workers and managers. For example, a July 18, 2000 report issued by Bonnie Spencer, BJC's Quality Engineer, entitled "Investigation of possible HF Exposure in the L-Cage" states in pertinent part: " This is not the first incident involving a disagreement between [Gossett] and the L-Cage supervisor. There have been personality clashes between them in the past, and also between [Gossett] and Waste Management personnel in other facilities."

A September 8, 2000 e-mail from SEC's then site manager Dave Hall to Gossett's supervisor Delores Stowe reflects the hostility of some of Gossett's co-workers to her whistleblowing, while showing that SEC's past management was appropriately supportive of her protected activities. Hall's e-mail states in pertinent part:

> I did not get a chance to talk to Sue [Gossett]. Please provide her with the following

information.

> The PACE employees on the job she is supporting have commented to BJC regarding the note taking that Sue is doing. They expressed comment that the note taking might be directed at their performance. Neither BJC or SEC have any concern over the note taking. BJC is going to discuss the situation with the PACE workers. If there are any actions taken by anyone directed toward her, please let us know and we will address it through BJC.

September 8, 2000 E-mail from Dave Hall to Delores Stowe.

Apparently, Gossett's whistleblowing activities were of great concern to Dave Hall's successor as SEC's Portsmouth Site Manager, Joseph Shuman. After a November 17, 2000 meeting between Gossett and another SEC employee with a BJC official, Michael J. Eversole, Shuman wrote the SEC employees a memo in which he stated:

> It has come to my attention that you spent approximately 1.5 hours in a meeting this afternoon with Mike Eversole. I can only assume that a meeting for this length of time, with both of you in attendance, must involve a relatively significant issue that crosses the line of industrial and radiological safety.
>
> I expect that issues of this nature be brought to my attention immediately. I also expect that Angie Peterson and Delores Stowe, since they are in the RCT supervisory chain, would be informed immediately. I further expect that a lengthy meeting with the BJC PHP, Mike Eversole, regarding such issues would be attended by myself, Angie Peterson, and Delores Stowe.
>
> In the future, you are directed to contact me, in writing, of the nature of this meeting and its applicability to a project or activity in order for me to validate the time on your time sheets. Without this information, I cannot sign off for reimbursement from BJC. . . .

November 17, 2000 Memorandum from Joseph Shuman, SEC Senior Site Manager, to Rodney Gossett and Susan Rice [now Susan Gossett]. Shuman was well aware of, and clearly displeased by, Gossett's whistleblowing activities at the time that he wrote this memorandum. In that context, it is clear that this memorandum was an overt warning against further whistleblowing. Shuman's testimony at the OHA hearing strongly supports this inference. 10-24-01 Tr. at 149. At the hearing, Shuman admitted that he suspected that Gossett was discussing health and safety issues with Mr. Eversole. *Id.* at 147. Shuman then further admitted that he didn't ask other employees to provide written justifications for participation in meetings. *Id.* at 148.

Shuman's testimony at the hearing further revealed the discomfort Gossett's whistleblowing activities caused him. Shuman testified that he told Gossett [and another SEC employee, her soon-to-be husband, Rodney Gossett] that if he had their concerns he would not express them or handle them in the same way, and that if he had felt the way they did, he would leave the site and find another job. *Id.* at 150-151. Shuman further testified:

> . . . I did not agree with their perspective that the health and safety was that significantly compromised and, although I respect their rights under the law, and I respect the existence of what are called whistle blower standards in the law, in the nuclear industry and other industries, it is not a standard that, in my own personal mind set, I would ever use because I feel that it is my responsibility, as an employee with an organization is [sic] to do whatever I can do within the organization and with the other organizations on-site to resolve the issues in a timely and efficient manner. And if I feel strongly enough about an issue and if I feel that I cannot work with my – the company I'm employed with or the other companies on-site to resolve those issues, then I would terminate my employment because I don't believe that going through the whistleblower standard is going to create any more efficiency or cause the

> company to respond in any better way than if I put forth my best effort with them as an employee or even as a subcontractor.

Id. at 151-152. During his testimony, Shuman even admitted that he warned the Gossetts that if they were to continue going "behind his back," it could cause conflict with him. *Id.* at 152. Shuman also testified that the DOE Manager for the Portsmouth site, Sharon Robinson, wanted to put a stop to the Gossetts' whistleblowing activities. *Id.* at 160.

In his (1) testimony at the hearing, (2) comments to OHA investigator Woods and (3) post-examination review of Gossett's performance on her re-qualification examinations, Brad Andrie, an SEC manager who was on temporary detail to the Portsmouth Site at the time of Gossett's termination, exhibited a remarkable antipathy towards Gossett. This antipathy seems especially inappropriate, since Andrie testified that he had only conversed with Gossett on one occasion, and then for only a few minutes. At the hearing, he contended that Gossett failed the three re-qualification examinations because she lacked theoretical, radiological, and mathematics training. 10-25-01 Tr. at 120. Andrie also attributed Gossett's test scores to a lack of operational experience. *Id.* He then claimed to have examined her resume and transcripts and found that she had no technical training. *Id.* at 121. In his interview with Mr. Woods, Andrie claimed that Gossett had never been through a formal program of health physics and theory. Memorandum of May 9, 2001 Interview of Brad Andrie by Kent Woods at 5. Andrie further claimed that "Gossett was given training credit from Shawnee State Community College as if she were in a related field, when actually she took dance and sculpture and art, and there were no mathematics or health physics courses listed on her transcript." *Id.* Andrie's claims were unfounded. The record shows that Gossett had both a Bachelor's Degree in Sociology and an Associate's Degree in Health Physics. 10-25-01 Tr. at 126; Preliminary Statement of Susan Rice-Gossett to State of Ohio Unemployment Compensation Review Commission at 4. It appears that Andrie's antipathy towards Gossett may have resulted from one of her protected disclosures. At the hearing, Andrie testified that Gossett's concerns about potential radiological contamination in an area resulted in that area's being posted as contaminated, which in his view was unnecessary. 10-25-01 Tr. at 101-02. Andrie described this posting as ". . . a major thorn, I guess, in the side of many of the other technicians." *Id.* Andrie also testified, ". . . I literally tried to get that area unposted, had it surveyed completely, and it was completely clean and my customers said we can't do that, we can't unpost it because a precedence has been set, and there's a potential." *Id.* Andrie's testimony is yet another example of how Gossett's whistleblowing angered her management. The evidence discussed above reveals a pattern of hostility towards Gossett because of her protected activities. It also confirms that Gossett's protected disclosures were a contributing factor to her frequent re-assignments and termination.

Temporal Proximity

In most whistleblower cases, it is difficult or impossible for a complainant to point to or find a "smoking gun" that proves an employer's retaliatory intent. Therefore, Congress and the courts, recognizing this difficulty, have found that a protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993), *citing McDaid v. Department of Hous. and Urban Dev*., 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, the courts have found that "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F.2d at 148.

Since Gossett made numerous protective disclosures during her year and a half tenure with SEC, there was temporal proximity between her protected disclosures and her re-assignments and her termination. Moreover, it is clear that the SEC managers who decided to terminate her had actual knowledge of her protected activity and were bothered by it. (6) Therefore, the temporal proximity between Gossett's protected disclosures and the adverse personnel actions taken against her is sufficient to establish, by a

preponderance of the evidence, that her protected disclosures were a contributing factor to her re-assignments and eventual termination by SEC. The pattern of hostility discussed above and the temporal proximity between the protected disclosures and adverse personnel actions each meet Gossett's burden of proof to show that protected disclosures were a contributing factor to the adverse personnel actions taken against her.

Whether SEC Would Have Taken Adverse Personnel Actions Against Gossett in the Absence of Her Protected Activities

I have found that the Complainant has shown, by a preponderance of evidence, that (1) she made protected disclosures, and (2) these protected disclosures were a contributing factor to her re-assignments and termination. Therefore, the burden has been shifted to SEC to prove by clear and convincing evidence that the company would have continually reassigned and eventually terminated her even if she had not made protected disclosures. 10 C.F.R. § 708.29. Clear and convincing evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F. Supp. at 1204 n.3. For the reasons set forth below, I find that SEC has not met this burden.

SEC offers no explanation for Gossett's continual reassignments. It is evident from the record that these reassignments reflected SEC management's desire to avoid further conflict. However, this pattern of repeated reassignments constitutes an adverse personnel action since it served to intimidate and harass Gossett as well as undermine her authority and stature as an RCT. 10 C.F.R. Part 708 exists to protect DOE contractor employees' right to engage in protected activity and to ensure that DOE contractor employees do not suffer any adverse consequences as a result of engaging in protected activities. Accordingly, SEC violated 10 C.F.R. Part 708 by consistently reassigning Gossett when she made protected disclosures.

SEC contends that the sole reason it terminated Gossett was her failure "to achieve a passing score on any of three different ?re-qualification' examinations." SEC Post-hearing Brief at 3. According to SEC, it has an established policy under which an RCT is only allowed three attempts at passing a re-qualification exam (the three strikes rule). *Id.* at 8. If SEC had been able to show that it had an established three strikes rule and that it had applied that policy on a consistent basis, it might have met its burden of clearly and convincingly showing that it would have terminated Gossett regardless of her whistleblowing activities.

However, the Record does not support SEC's assertion that the three strikes rule was established company policy at the time of Gossett's termination. First, SEC has never documented the three strikes rule in writing. Second, SEC produced no reliable evidence that this "oral" policy had ever been implemented by SEC before. Third, the SEC employees who testified at the hearing contradicted each other and could not provide a consistent or cohesive account of how the three strikes policy came into being. Fourth, the three strikes rule was not "cast in bronze." SEC bears the burden of proving by clear and convincing evidence that the three strikes rule on which it relies was its existing policy at the Portsmouth Site at the time of Gossett's termination. SEC has not met this burden.

Despite SEC's claims that the three strikes policy was established company policy at the Portsmouth Site, it has not produced any written documentation of that policy. (7) A high ranking SEC official, Brad Andrie, testified that the company maintains an official procedures and personnel manual known as "the Whitebook." 10-25-01 Tr. at 8. The three strikes rule does not appear in the Whitebook. *Id.* at 99. In fact, SEC admits that the three strikes rule has not been documented in writing. Transcript of May 14, 2001 Unemployment Compensation Hearing at 9; 10-24-01 Tr. at 9, 137.

Nor is there any reliable evidence in the record that the three strikes rule had ever been applied to any SEC employee before. In fact, the testimony of present and former SEC employees at the hearing indicates that Gossett was the only SEC employee ever fired under the three strikes rule. 10-24-01 Tr. at 237, 279, 286, 292. Moreover, at least three other SEC RCTs at the Portsmouth Site failed two re-qualification (or

qualification) exams, yet there is no credible evidence that any of these three other SEC RCTs were warned that a failure on a third re-qualification examination would result in their termination. The record indicates that Rhonda Christopher, Delores Stowe, and Lou Ann Riggs each failed their first two re-qualification examinations. (8) SEC claims that Christopher, Stowe, and Riggs were each warned that they would be terminated if they failed their third examination. However, SEC has presented no direct evidence in support of these assertions.

No SEC employee testified to personal knowledge of Rhonda Christopher's being informed that she would be terminated if she failed a third re-qualification examination. Nor does the record contain any written documentation that Christopher was so warned. At a hearing before the State of Ohio's Unemployment Compensation Commission concerning Gossett's eligibility to receive unemployment benefits (the Unemployment Hearing), Andrew Henderson, SEC's Corporate Director of Human Resources testified that Rhonda Christopher had been informed of the three strikes rule after she failed her second re-qualification examination. Transcript of May 14, 2001, Unemployment Compensation Hearing at 11. However, Henderson did not testify that he had personal knowledge of any particular verbal communication of a warning to Christopher at the Portsmouth Plant and it is unlikely that Henderson would have had such personal knowledge, since Henderson was employed at SEC's corporate offices in Tennessee, not at Portsmouth. At the Unemployment Hearing, Billie Childers, SEC's RTC training coordinator, testified that Bruce Manninen, then SEC's acting site manager at Portsmouth, warned Christopher of the three strikes rule. Transcript of May 14, 2001 Unemployment Compensation Hearing at 20-21. Interestingly, although he testified at both hearings, Manninen himself never testified that he warned Christopher about the three strikes rule. In fact, Manninen's testimony at the OHA hearing was that he did *not* discuss the three strikes rule with Christopher. 10-23-01 Tr. at 154. At the Unemployment Hearing, SEC's former site manager, Phil Borris testified that he was not aware of Christopher being warned about the three strikes rule. Transcript of May 14, 2001, Unemployment Compensation Hearing at 89-90.

No SEC employee testified that they had personal knowledge of Lou Ann Riggs' being informed that she would be terminated if she failed a third re-qualification examination. Childers testified that Riggs was warned about the three strikes rule, but could not identify who informed Riggs of the policy. 10–24-01 Tr. at 9.

No SEC employee testified to personal knowledge of Delores Stowe's being informed that she would be terminated if she failed a third re-qualification examination. Bruce Manninen testified that he did not recall warning Stowe of the three strikes rule before her third re-qualification examination. 10-23-01 Tr. at 168. Childers would not have warned her of the three strikes rule, since he repeatedly testified he was unaware that it was Stowe's third re-qualification examination at the time. 10-23-01 Tr. at 205; 10-24-01 Tr. at 12-13. Michele Britt, SEC's Corporate Personnel Manager, testified that she was unaware of any attempt to warn Stowe about the three strikes rule. 10-24-01 Tr. at 253. SEC attempts to show that Stowe was warned of the three strikes rule by claiming that Phil Borris' testimony during the OHA hearing indicates that Stowe knew of the three strikes rule at the time she took her third re-qualification examination. SEC's Post Hearing Brief at 10-11. A careful reading of the hearing transcript, however, shows that SEC's claim is without merit. Borris testified that Stowe came to him complaining "that she was going to lose her job." 10-23-01 Tr. at 108. Borris then testified that:

> I told her that I thought the system was fair and I told her just to hang in there and things would probably work their way out of the system. She was in tears when she showed up at my office. She had just failed the test for the third [time] and she said quote unquote ?I'm going to have to quit because I just can't take it anymore. That damn Billie is out to get me.' That what she said. She was in tears.

10-23-01 Tr. at 108. Borris' account of Stowe's comments clearly indicate that she was thinking of quitting her job because of the examination's difficulty rather than indicating that she thought she would be fired under the three strikes rule. Borris, SEC's former Site Manager at Portsmouth at this time, further

testified that prior to Gossett's termination, he had never heard of the three strikes rule. Accordingly, it appears that Gossett was warned about the three strikes rule after failing two re-qualification examinations while the three other SEC RCTs who found themselves in a similar situation were not.

The past and present SEC employees who testified at the hearing provided conflicting accounts of how SEC's management developed and implemented the three strikes rule. Brad Andrie testified that the three strikes rule was a well known company policy and an industry standard known by all of SEC's RCTs. 10-25-01 Tr. at 103-04. Andrie then testified that Stanley Waligora made the ultimate decision to apply the three strikes rule and that Waligora communicated this decision to Childers. *Id.* at 103. However, Stan Waligora testified that SEC had no established or written three strikes rule. 10-24-01 Tr. at 201-02. Instead, Waligora testified that SEC had a flexible policy under which an RCT with a close exam score would get another try or "continued patience." 10-24-01 Tr. at 212-13.

Childers testified that Shuman requested that Childers ask Waligora about the existence and origin of the three strikes rule. 10-24-01 Tr. at 13-14. (9) Childers testified that he told Shuman about the three strikes rule and that it had been created by Manninen after Christopher had failed her second qualification examination. 10-24-01 Tr. at 13, 15.

Michele Britt testified that Shuman asked her to contact Waligora in order to ask about the rules concerning failures of RCT re-qualification examinations. 10-24-01 Tr. at 236-37. According to Britt, Waligora told her that SEC was giving RCTs three tries to pass re-qualification examinations. 10-24-01 Tr. at 239-40. Britt's account is at odds with Waligora's recollection. Nor did Shuman indicate that he had consulted with Britt about the three strikes rule.

Joseph Shuman, however, admitted that he did not know where or how the three strikes policy originated. 10-24-01 Tr. at 137. Shuman testified that, immediately after Shuman was told that Gossett had failed her third re-qualification examination, he asked Billie Childers to contact Stanley Waligora in order to ascertain SEC's policy on re-qualification examinations . 10-24-01 Tr. at 121-22, 131. Shuman then testified that after Childers contacted Waligora, Childers reported to him that the three strikes rule was SEC's corporate policy. (10) *Id.* at 121. Shuman also claimed that he had determined that the three strikes rule was SEC's preexisting policy by consulting with Bruce Manninen and the site managers of SEC's Paducah and Oak Ridge sites. 10-24-01 Tr. at 137-38, 168.

Although Shuman claimed he had learned about the three strikes rule by consulting Bruce Manninen and Childers, Childers claimed Manninen created the three strikes rule. Manninen, in turn, testified that SEC did not have an existing three strikes rule at the time that Christopher failed her second re-qualification examination. 10-23-01 Tr. at 153. (11) Manninen further testified that it was not his intent to create the three strikes rule by letting Christopher take a third qualification examination. 10-23-01 Tr. at 153.

SEC contends that once Gossett had failed her third re-qualification examination, she was no longer fully qualified to continue working as an RCT at Portsmouth until she passed a re-qualification examination. Since she was not qualified to continue working as an RCT, SEC contends, it checked to see if it had any other positions that she could fill at the Portsmouth Site. Having found no such positions, SEC contends, it had no choice but to terminate her employment. 10-24-01 Tr. at 137, 166, 168. However, the record shows that SEC could have taken less drastic action than termination in response to Gossett's failure to pass the third re-qualification examination. The testimony of Stanley Waligora indicates that he had advised SEC management that the three strikes rule was "not cast in bronze." 10-24-0-1 at 200-01. Waligora further testified that SEC had a flexible policy under which a RCT with a close exam score would get another try or "continued patience." 10-24-01 Tr. at 212-13. In fact, the record also contains evidence showing that SEC retained the services of a number of RCTs whose qualifications or training had temporarily lapsed. Moreover, SEC admits that its former Portsmouth site manager, Phil Borris, had a policy of remediation for RCTs whose qualifications had lapsed. SEC Post Hearing Brief at 11. It is clear that Gossett could have been placed on leave without pay or could have continued to perform her functions under the supervision of a qualified RCT until she re-qualified.

There is considerable evidence in the record indicating that terminating an educated, experienced, and competent RCT like Gossett was contrary to SEC's own business interests. Several witnesses acknowledged that SEC was experiencing difficulty in recruiting and retaining RCTs at the time of her termination. At least two of these witnesses noted that it would most likely have saved SEC money to have retained and retrained Gossett until she was able to pass a re-qualification test, instead of terminating her. 10-24-01 Tr. at 167; 10-25-01 Tr. at 88.

The evidence in the record has convinced me that SEC's decision to terminate her was instead based, in significant part, on its desire to end her whistleblowing activities. This conclusion is supported by noting the difference between the rigid manner in which SEC handled Gossett's case and the flexible manner in which SEC handled a similar case, that of its RCT Supervisor, Delores Stowe. Stowe, like Gossett, failed her first two re-qualification examinations. Stowe was then administered a third re-qualification examination. When Stowe's third re-qualification examination was first corrected, it appeared that she had missed 24 out of 100 questions. Since Stowe needed to have 80% correct in order to pass this re-qualification examination, a SEC health physicist, Bruce Manninen, reviewed the 24 questions Stowe missed. 10 -23-01 Tr. at 162-63. Manninen's review originally resulted in his identification of approximately eight questions that he believed to be "questionable or unreasonable." *Id.* at 163-64. At least four of these questions were brought to the attention of Stanley Waligora, a consultant who was ultimately responsible for the content and scoring of RCT re-qualification examinations. After a series of conversations and e-mail exchanges, which took place over a number of days, Stowe received credit for four of the 24 questions that had originally been found to be answered incorrectly by Stowe, thus raising her score to 80% and allowing her to pass this third re-qualification examination. Stowe is currently employed by SEC as its supervisor of RCTs at the Portsmouth Site.

Gossett, like Stowe, also failed her first two re-qualification examinations. On January 12, 2001, after Gossett had failed her second re-qualification examination, Gossett was informed that she would be fired if she did not pass her third re-qualification examination. There is no credible evidence in the record showing that Stowe was provided with a similar warning. Gossett was then administered a third re-qualification examination, on January 19, 2001. According to SEC, when Gossett's third re-qualification examination was first corrected, it appeared that she had missed 26 out of 100 questions. (12) Within 4 hours after she had finished taking her third re-qualification examination, Gossett's employment with SEC was terminated.

Moreover, the record shows that SEC clearly gave Stowe the benefit of the doubt when it re-scored her third re-qualification examination, while it assigned the review of Gossett's third re-qualification examination to an individual, Brad Andrie, who was highly biased against her and who apparently let his malice towards Gossett affect his analysis of her third re-qualification examination. The record shows that Stowe's score was adjusted upwards by four points as a result of SEC's post examination review. Originally, SEC found that Stowe had missed question numbers 6, 8, 19 and 26. However, as a result of SEC's post-examination review of Stowe's third re-qualification examination, SEC eventually gave Stowe credit for each of these question thus raising her score from a failing grade of 76% to the lowest possible passing grade of 80%. A close analysis reveals that SEC's post-examination review of Stowe's third re-qualification examination was generous to Stowe.

On question number 6, Stowe picked answer A, while the answer key originally used to score her test provided that the correct answer was B. However, Stanley Waligora, the consultant who was SEC's ultimate arbiter of the re-qualification exam contents, convincingly testified that the answer key was incorrect and that the correct answer was actually A. 10-24-01 Tr. at 188. Accordingly, SEC's awarding of a point to Stowe for her answer to question number 6 was perfectly appropriate and should have been expected under any circumstances.

On question number 8, Stowe again picked answer A, even though the answer key originally used to score her test again provided that the correct answer was B. SEC also found that the answer key to question number 8 was incorrect and gave credit to Stowe for question number 8. Apparently, the answer key was

corrected prior to Gossett's second re-qualification examination, since Gossett answered question 8 by picking answer A and was immediately given credit for it. Accordingly, SEC's awarding of a point to Stowe for her answer to question number 8 was perfectly appropriate and should have been expected under any circumstances.

On question number 19, Stowe again picked answer A, even though the answer key originally used to score her test again provided that the correct answer was D. However, the record shows that due to a typographical error (fixed by the time Gossett took her second re-qualification examination) the answer key originally used to score Stowe's third re-qualification examination was not accurate. Stowe should not have lost credit for picking answer A, since the typographical error rendered answer D incorrect. However, answer A was not correct either. (13)

On question number 26, Stowe's answer was D, while the answer key indicated that the correct answer was A. Apparently, Manninen contended that Stowe should get credit for her answer and she eventually did. However, the question and its answer key were never corrected and exactly the same question was given to Gossett in her second re-qualification examination. Gossett chose answer A and was given credit for it. Stanley Waligora, the consultant who was ultimately responsible for the content and scoring of RCT re-qualification examinations, testified that answer A was the correct answer and that answer D was an incorrect answer. 10-24-01 Tr. at 189-90. Thus, SEC gave Stowe the benefit of the doubt in order to allow her to pass her third re-qualification examination.

The record shows that SEC's reaction to Stowe's potential failure of her third re-qualification examination was markedly different than SEC's reaction to Gossett's potential failure of her third re-qualification examination. SEC implicitly acknowledges the significant discrepancy between its handling of Gossett and Stowe's third re-qualification examinations, since it offers a number of explanations for these discrepancies. Specifically, SEC contends that these discrepancies were the result of (1) a change in SEC's management, (2) Stowe's taking the initiative to challenge four questions as opposed to Gossett's failure to challenge any questions, and (3) SEC management's preliminary review of Gossett's third re-qualification examination which revealed that only four of the questions Gossett missed could reasonably be challenged, while SEC's preliminary management review of Stowe's third re-qualification examination showed that there were enough questions at issue to affect the outcome of the examination.

At the time of Stowe's third re-qualification examination and the post-examination review that ultimately raised her score from 76 percent to 80 percent, Phil Borris was SEC's Portsmouth Site Manager. However, Borris was subsequently demoted. When Gossett took her third re-qualification examination on January 19, 2001, Joseph Shuman was SEC's top manager at the Portsmouth site. It was Shuman who ultimately decided to terminate Gossett. SEC contends that the discrepancy between its handling of Gossett and Stowe's third re-qualification examinations can be explained by this change in management. SEC Post-hearing Brief at 11. (14) Simply put, the change in management does not relieve SEC of its burden to show by clear and convincing evidence that it would have terminated Gossett even if she had not made protected disclosures. Moreover, SEC's contention is internally inconsistent with SEC's own assertions since SEC, in order to show that the three strikes rule was a longstanding and established policy, attempts to argue that Stowe was aware of and affected by the three strikes rule. SEC's Post Hearing Brief at 10-11.

SEC also claims that the disparity in treatment resulted from a legitimate difference in the manner in which Stowe and Gossett handled the grading of their respective third re-qualification examinations. SEC claims that Stowe challenged four answers to her test, while Gossett did not challenge the grading of her exam. SEC's claim is without merit, however, since even if the distinction is relevant, SEC has failed to convincingly show that Stowe actually challenged these questions on her exam.

SEC attempts to explain the difference in the way Gossett and Stowe were treated by noting that although its post examination review of both tests found four questions were potentially graded wrong, four points were not enough to make a difference in Gossett's case while four points were sufficient to provide Stowe with a passing score. This contention is without merit. First, it fails to address the obvious discrepancy

between SEC's handling of Stowe, who got the benefit of the doubt for at least one point, and Gossett, whose termination appears to have occurred even before SEC completed its evaluation of her test. (Andrie testified that he had not even completed his evaluation of Gossett's examination at the time of her termination). 10-25-01 Tr. at 19. Second, SEC has failed to support the factual underpinnings of this contention. SEC could not even identify which four questions missed by Gossett were potentially graded wrong.

Conclusion

The Complainant, Sue Rice Gossett has met her burden of proving that she made protected disclosures, and that these protected disclosures were a contributing factor to adverse personnel actions taken against her by the Contractor, Safety and Ecology Corporation. The Contractor has failed to meet its burden of showing that it would have taken these actions in the absence of the Complainant's protected disclosures. Accordingly, I find in the Complainant's behavior on the issue of liability and will issue a Supplemental Order determining the appropriate remedies.

The Part 708 regulations provide that if a hearing officer determines that an act of retaliation has occurred, the hearing officer may order reinstatement, transfer preference, back pay, reimbursement of reasonable costs and expenses, and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36. Accordingly, I direct the Complainant to submit a detailed statement setting forth the precise remedies she is seeking, including supporting documentation, within 30 days of her receipt of this Decision. The Contractor will then have 30 days from its receipt of the Complainant's statement to respond to her remedy requests and to submit evidence contradicting or explaining the Complainant's proffered supporting documentation.

It Is Therefore Ordered That:

(1) The Complaint filed by Sue Rice Gossett under 10 C.F.R. Part 708, OHA Case No. VBZ-0062, is hereby granted.

(2) Within 30 days of receipt of this Interlocutory Decision, Sue Rice Gossett shall submit to the Office of Hearings and to the Safety and Ecology Corporation, a detailed statement setting forth the precise remedies she is seeking as well as supporting documentation. The Safety and Ecology Corporation shall, within 30 days from its receipt of Sue Rice Gossett's statement, submit a responsive document to the Office of Hearings and Appeals and to Sue Rice Gossett.

(3) This is an Interlocutory Decision which will become an Initial Agency Decision upon the issuance of a Supplemental Order determining the appropriate remedies for Safety and Ecology Corporation's violations of 10 C.F.R. Subpart 708. The present decision may not be appealed by either party until it becomes an Initial Agency Decision.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: May 8, 2002

Appendix

The record strongly supports Gossett's assertions that she made numerous protected disclosures during her employment with SEC. SEC does not dispute that Gossett made protected disclosures. An extensive, yet incomplete, listing of protected disclosures and reassignments follows:

- In July 2000, Gossett and nine other Portsmouth Site employees met with Congressman Ted Strickland. During this meeting, Gossett expressed her concerns about the destruction of medical specimens and other uncorrected safety problems. 10-23-01 Tr. at 58-9.
- On July 13, 2000, Gossett submitted a written "employee concern" expressing her concerns that (1) she had been exposed to Hydrogen Fluoride (HF) gas and (2) the site's medical personnel had not been responsive to her concerns about this exposure.
- On July 17, 2000, Gossett submitted an employee concern expressing her perception of a lack of responsiveness on the part of occupational health and safety personnel at Portsmouth.
- On October 19, 2000, Gossett and three other individuals employed at the Portsmouth Site met with Dr. David Michaels, who at the time was DOE's Assistant Secretary for Environment, Safety and Health, to express their concerns about health, safety and management issues at the Portsmouth Site. 10- 23-01 Tr. at 59-63, 70, 74.
- On October 23, 2000, and November 1, 2000, Gossett submitted an employee concern to the Oak Ridge Operations Office alleging that she had been retaliated against for engaging in protected activity.
- On November 1, 2000, Gossett submitted a memorandum to Rufus H. Smith, Diversity Programs and Employee Concerns Manager, Oak Ridge Operations Office. In this memorandum, Gossett asserts that DOE failed to fully investigate an earlier employee concern. The November 1, 2000 Gossett submission further asserted:

- While she was assigned to perform radiological control coverage for the Waste Management Program in the X-7725 Area, she reported "frequent accounts of eating, smoking and chewing in radiologically controlled areas, . . . unsafe work practices and near miss failures of the existing systems of safety." *Id.* at 2. She was reassigned to the X-745 Cylinder Lot Program as a consequence of these disclosures. *Id.*

- While she was assigned to the X-745 Cylinder Lot Program, she reported "frequent accounts of smoking in radiologically controlled areas." *Id.* She was reassigned to the X-744G Program as a consequence of these disclosures. *Id.*
- While she was assigned to the X-326 "I" Cage she reported "personnel contamination of two persons . . . and multiple ISMS violations that led to personnel HF exposures." *Id.*
- While she was assigned to the X-744G Program she reported "issues including disposing of trap materials in a ?burnables' container, lack of documentation of asbestos sampling and the absence of a Safety and Health Officer." *Id.*
- While she was assigned to work as a "rover" she "reported several accounts of smoking in radiologically-controlled area, requested a safety evaluation of an arriving load when the shipment driver expressed concerns, reported the presence of suspect soil on the bottom of incoming Hanford containers and reported that a Lock Out/Tag Out (LOTO) Permit was not available for review prior to the job even after it was requested [and] . . . successive accounts of elevated work without fall protection." *Id.*

· A memorandum dated November 2, 2000, from Gossett to her supervisor, Delores Stowe, as well as an Alliance Condition Report authored by Gossett on November 3, 2000, document Gossett's concern about the possibility that work had been inappropriately performed at Portsmouth without health physics coverage.

- In mid-November 2000, Gossett and other employees met with Leah Dever, the Manager of DOE's Oak Ridge Operations Office and Sharon Robinson, the DOE Manager of the Portsmouth Site, to discuss the employees' health, safety and management concerns. 10-23-01 Tr. at 58, 66.
- An undated memorandum from Gossett to her supervisor, Delores Stowe, and a Memorandum from Gossett to Stowe, dated November 15, 2000, as well as an Alliance Condition Report authored by Gossett on November 15, 2000, document Gossett's concerns about a number of bulging and rusting drums in the radio-material storage area at X7745R. Gossett's memo to Stowe also reports that a site employee, Greg Sowards, had expressed concerns to her about both the lack of health physics coverage at a plant operation and the actions of other site employees who had discouraged him from

reporting the lack of health physics coverage.
- A memorandum dated November 28, 2000, from Gossett to Stowe, states in pertinent part:

During requested follow-up drum count for Bechtel-Jacobs' subcontractor, WASTREN, Inc. on November 22, 2000, technicians discovered a bulging drum which had breached the lid area. Initial surveys revealed no contamination present. The condition was reported to supervision. During these discussions it was learned that there were other known breached containers in the same area.

· In an April 4, 2001 memorandum from Gossett to Kent Woods, Attorney-Investigator, Office of Hearings and Appeals, Gossett alleges:

- On February 27, 1999, she filed a Problem Report documenting a violation of a radiological work permit at the X326L area. April 4, 2001 memorandum from Gossett to Kent Woods at 1.

- On December 1, 1999, she filed a Problem Report asserting that a worker prohibited her from posting identified contamination in his area. *Id.*
- On January 6, 2000, she issued a Stop Work Problem Report documenting a Leaking (RAM-Tagged) poly bottle repaired without notification to health physics contractor. *Id.*
- On January 24, 2000, she issued a Stop Work Problem Report in which she reported a shipment lacking radiological release papers. *Id.*
- On February 9, 2000, she reported that the radiation background from a contamination area was too high for personnel. *Id.*
- On May 24, 2000, she filed a Problem Report in which she reported exposed contamination. *Id.*
- On October 11, 2000 Gossett issued a Stop Work Problem Report in which she reported gas fumes, insufficient lighting, and the presence of snakes at a job site. *Id. at 2.*
- On October 13, 2000 Gossett reported to SEC's Health and Safety Manager that a forklift operator substituted a handkerchief for a mask. *Id.*

Endnotes

(1) On March 6, 2001, at the request of Gossett and the SEC, the OHA Director permitted Gossett's request for an investigation to be held in abeyance for a period of thirty days in order to afford the parties an opportunity to reach an informal resolution of her complaint. The parties were unable to reach an informal resolution of the complaint and OHA's investigation resumed.

(2) During her employment at Portsmouth, Gossett's last name was Rice. Subsequent to her employment at Portsmouth, Gossett was married and her last name changed to Gossett.

(3) The Complainant also contends that SEC manipulated the testing process to ensure her failure.

(4) Once the Complainant has met this burden, the burden shifts to the Contractor, which then must show, by clear and convincing evidence, that it would have taken the alleged act of retaliation in the absence of the Complainant's protected activity.

(5) In the investigatory stage of this proceeding, SEC conceded that Gossett had made at least two protected disclosures. ROI at 8.

(6) The Record clearly shows that Gossett's whistleblowing activities were well known to her fellow employees at the Portsmouth Site as well as to SEC management in Portsmouth and Oak Ridge. 10-24-01 Tr. at 236.

(7) The only documented SEC policy concerning RCT's who score less than 80% on a test (or who miss a training meeting) is an SEC RADCON Alliance Training Program Work Instruction dated July 21, 2000, which indicates that "remedies" for these occurrences should be provided within 30 days. SEC RADCON

Alliance Training Program Work Instruction dated July 21, 2000 at 5. There is no suggestion that termination is a contemplated remedy.

(8) Rhonda Christopher had previously worked at Portsmouth for other contractors. She was hired by SEC and was required to undergo SEC's RCT training and then to qualify as a SEC Portsmouth RCT. There is some dispute between the parties as to whether Christopher was attempting to qualify or re-qualify when she took these examinations. However, I find that I need not resolve this issue since the distinction would have no effect on my ultimate decision in the instant case.

(9) Childers also testified that he did not remember asking Waligora about the three strikes rule, claiming that he did not need to ask Waligora since he already knew the policy. 10-24-01 Tr. at 15.

(10) Interestingly, Gossett had been warned, at Shuman's request, about the three strikes rule days earlier, on January 12, 2001.

(11) Manninen was SEC's acting site manager at Portsmouth when Christopher failed her second qualification examination.

(12) Brad Andrie testified that he had not completed his evaluation of the validity and accuracy of Gossett's test at the time of her termination. 10-25-01 Tr. at 19.

(13) Gossett answered (the corrected version of) question 19 by picking answers A, B, and C.

(14) SEC attempts to bolster this argument by citing *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612 (7th Cir. 2000) and *Stanback v. Best Diversified Products, Inc.*, 180 F.3d 903, 910 (8th Cir. 1999) which in the context of non-whistleblower employment discrimination actions hold that employees subject to different supervisors are not similarly situated. SEC Post-hearing Brief at 11. SEC's reliance on this case law is misplaced however. The cases cited by SEC, while holding that decisions made by different decision makers are rarely similarly situated in all respects, apply only to those discriminatory discharge cases which apply the burden shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973) (*McDonnell*). The present proceeding utilizes the burden shifting framework set forth in 10 C.F.R. § 708.29 rather than the burden shifting framework used in the cases cited by SEC. Under 10 C.F.R. § 708.29, once the complainant shows that she made protected disclosures and that these protected disclosures were a contributing factor to adverse personnel actions (as the complainant in the present proceeding has done) the burden shifts to the contractor who must then show by *clear and convincing evidence* that it would have taken the adverse actions in the absence of the protected disclosures. Therefore, under 10 C.F.R. § 708.29, a complaint is not required to show that she is similarly situated to a non-protected individual who was not subject to the adverse personnel action in order to establish a prima facie case.