December 18, 2008

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioners:	David L. Moses UT-Battelle, L.L.C.
Date of Filing:	September 8, 2008
Case Number:	TBA-0066

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on September 3, 2008, involving a Complaint of Retaliation filed by David L. Moses (also referred to as the employee or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708.[1] In his Complaint, Moses alleged that his former employer, UT-Battelle, L.L.C. (UT-Battelle or the contractor), retaliated against him for engaging in activity protected under Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that Moses engaged in activity protected under Part 708, but UT-Battelle established that it would have taken the same adverse personnel action in the absence of the protected activity. Moses appealed that determination. The IAD also made a finding regarding the applicability of the attorney-client privilege with respect to two exhibits submitted at the hearing, finding that certain redacted portions of those exhibits were not shielded by the attorney-client privilege and should be released. UT-Battelle appealed the portion of the IAD ordering the release of the redacted information. As set forth below, we find that the determination in the IAD that UT-Battelle met its burden under Part 708 is correct. In addition, we find that the issue of whether the redacted portions of two exhibits are protected by the attorney-client privilege is moot and, therefore, UT-Battelle shall not be required to release the documents.

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, was and abuse" at DOE's government-owned or –leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary

[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

purpose is to encourage contractor employees to disclose information which they "reasonably and in good faith" believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. § 708.5(a). Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"], will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations set forth at 10 C.F.R. Part 708 establish administrative procedures for the processing of complaints. Under these regulations, review of an IAD, as requested by Moses and UT-Battelle in their respective appeals, is performed by the Director of the OHA. 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Moses' Complaint are fully set forth in the IAD. *David L. Moses*, Case No. TBH-0066 (2008). With respect to this appeal, the relevant facts are as follows.

UT-Battelle is the contractor employed by the DOE to manage and operate the Oak Ridge National Laboratory (ORNL). Moses was employed by UT-Battelle as Senior Program Manager for Nuclear Nonproliferation Programs at ORNL. A requirement of his position at ORNL was that he secure funding from DOE elements for his time. On February 23, 2007, he filed a Complaint of Retaliation under Part 708, alleging that his employer retaliated against him for disclosing irregularities in DOE contracting practices and alleging waste of funds related to a particular research project.

In 2004 and early 2005, Moses was the ORNL Lead Program Manager on DOE's Fissile Materials Disposition Program (FMDP), a program sponsored by the National Nuclear Security Administration (NNSA) Office of Fissile Materials Disposition (NA-26). Between January 10, 2004, and April 4, 2005, Moses sent 17 emails to various DOE officials and others regarding DOE contracting practices. In those emails, Moses referred to possible violations of the Foreign Corrupt Practices Act (FCPA), the Federal Acquisition Regulations (FAR), and the Department of Energy Acquisition Regulations (DEAR). Among the 17 emails was a February 2005 email to Bruno Sicard, a French representative to a multinational effort to modify Russian VVER-1000 reactors, in which Moses raised concerns that a Russian firm was impeding ORNL's ability to create contracts that did not violate the FCPA. IAD at 5. After learning of Moses' email to Sicard, Moses' NA-26 point of contact, Robert Boudreau, expressed concerns to Moses' manager, Dr. Lawrence J. Satkowiak, Director of ORNL's Nuclear Nonproliferation Office, regarding whether Moses should continue as Lead Program Manager of the FMDP. Subsequently, Moses was replaced as Lead Program Manager for the FMDP and he became a Senior Adviser to the Program.

After his change from Lead Program Manager to Senior Adviser for the FMDP, Moses sent a copy of the memorandum announcing the change to an NNSA employee at the DOE's Savannah River site, along with an email accusing his former NA-26 point of contact, Norman Fletcher, of

improper behavior in connection with the VVER-1000 project. *Id*. at 5-6. The NNSA employee forwarded Moses' email to Kenneth M. Bromberg, the NNSA Acting Deputy Administrator for Fissile Material Disposition. Ultimately, Bromberg decided that, given Moses' problems and "unsupported allegations" regarding NA-26 staff, NA-26 would no longer fund Moses' work. *Id*. at 6.

After losing his NA-26 funding, Satkowiak arranged for Moses to begin working on a project in the DOE's Reduced Enrichment for Research and Test Reactors (RERTR) program, sponsored by NNSA's Office of Global Threat Reduction (NA-21). *Id*. at 6. In September 2006, Moses exchanged emails with Charlie Allen at the University of Missouri Research Reactor Center (MURR) and George Vandergrift at Argonne National Laboratory (ANL) regarding the RERTR program. Those emails were copied to Satkowiak, Ralph Butler, MURR Director, and Parrish Staples, Moses' NA-21 point of contact, as well as others within ANL and ORNL. In a September 6 email, Moses harshly criticized Allen's and Vandergrift's research practices and alleged wasteful spending regarding the program. Following this email, Moses was placed on paid administrative leave for one week, without access to the ORNL computer system, and was issued a "disciplinary written warning" due to the unprofessional language and tone he used in addressing his colleagues in the September 6 email. Subsequently, NA-21 withdrew its funding of Moses' work. *Id*. at 9.

On October 5, 2006, Satkowiak sent Moses a memorandum which, among other things, reminded Moses that his position as a Senior Program Manager required him to secure funding for his time. The memo further stated that, if Moses did not secure alternate funding, his employment with ORNL would be terminated for failure to meet the performance requirements of his position. *Id*. On January 25, 2007, Moses received a rating of "Not Fully Contributing" on his 2006 performance assessment. Moses received a Performance Improvement Plan (PIP) on February 2, 2007, which emphasized his need to secure funding for his work and correct the behaviors which led to his loss of funding from NA-26 and NA-21. On February 25, 2007, Moses informed Satkowiak that he had not secured funding for work beyond March 2007. Consequently, Satkowiak referred Moses' case to an ORNL Suspension/ Termination Review Committee (STRC), with a recommendation that Moses's employment be terminated for lack of funding. On March 12, 2007, the SRTC determined that Satkowiak should offer Moses the option of early retirement and, if Moses declined that option, Satkowiak had the STRC's approval for termination. Moses elected early retirement. *Id*. at 10.

This matter was referred to OHA for an investigation followed by a hearing. An OHA investigator issued a Report of Investigation on October 2, 2007. 10 C.F.R. §§ 708.22, 708.23. Subsequent to the investigation, an OHA Hearing Officer held a hearing in this matter over a period of three days. During the hearing, the Moses testified on his own behalf and presented the testimony of two additional witnesses: an ORNL management employee and a DOE official. UT-Battelle presented the testimony of eight ORNL management employees.

After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the IAD that is the subject of this appeal.

II. INITIAL AGENCY DECISION

The IAD set forth the burdens of proof in cases brought under Part 708. The IAD stated that it is the burden of the complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation. 10 C.F.R. §§ 708.5, 708.29. The IAD further noted that if an employee meets this burden, the burden then shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's protected disclosure or activity. 10 C.F.R. § 708.29. The IAD considered the application of these elements to the Moses proceeding.

A. Protected Activity and Contributing Factor Analysis

The IAD noted that the Complainant's alleged protected disclosures fall into two categories: (1) the 2004-2005 emails regarding DOE contracting practices and (2) the September 6, 2006, email concerning alleged wasteful spending on the RERTR program. As to the first category of disclosures, the IAD found that the 2004-2005 emails, with the exception of the February 2005 email to Bruno Sicard, contained protected disclosures under Part 708. The IAD noted that UT-Battelle agreed that those emails contained protected disclosures. *Id*. at 11. The IAD further noted that the September 6, 2006, email contained information that the Complainant reasonably believed revealed a gross waste of funds. *Id*. at 13.

The IAD further noted that the Complainant alleged that three negative personnel actions were retaliations for his making protected disclosures: (1) in September 2006, he was placed on paid administrative leave for one week, with no access to his work computer or email during that time; (2) he was denied a merit increase as a result of an unsatisfactory fiscal year 2006 performance assessment, and (3) he was offered the choice between early retirement and termination in March 2007. *Id*. at 14.

Regarding whether the protected disclosures were a contributing factor to the alleged retaliations, the Hearing Officer found that the January 2004 - April 2005 emails were not a contributing factor in either the September 2006 decision to place Moses on paid administrative leave, or in his receipt of an unsatisfactory fiscal year 2006 performance appraisal and the resulting denial of a merit increase. *Id*. at 17-18. The Hearing Officer based this finding on the fact that the alleged retaliations took place approximately 17 months and 21 months, respectively, after the most recent protected disclosure in April 2005. Therefore, he found that a reasonable person could not conclude "that the April 2005 disclosure, and those that preceded it, were contributing factors in these two personnel actions." *Id*. at 17. However, the Hearing Officer determined that the 2004-2005 emails were a contributing factor in the STRC's decision to offer the Complainant the choice between early retirement or termination. The Hearing Officer based this finding on the temporal proximity between the time the STRC members made their decision, during the March 12, 2007, STRC meeting, and when they learned of the nature of the 2004-2005 emails, either on the day of the meeting or the business day preceding it. *Id*. at 19. Similarly, the Hearing Officer found that the September 6, 2006, email was a contributing factor to each of the three alleged retaliations noted above based solely on the temporal proximity between the email and when each of the alleged retaliations occurred. *Id*. at 15-16.

B. UT-Battelle's Affirmative Showing

The Hearing Officer analyzed each of the alleged retaliations in light of the protected disclosures and determined in the IAD that UT-Battelle established by clear and convincing evidence that it would have taken the same actions in the absence of Moses' protected disclosures. As an initial matter, the IAD noted that it is "the disclosure of particular information contained in a communication that is protected [under Part 708], not the communication itself." *Id*. at 20. Therefore, the Hearing Officer concluded that Moses' September 6, 2006, email contained protected disclosures, but the email as a whole was not protected. *Id*. This distinction is of particular importance in light of the reasons offered by UT-Battelle for the allegedly retaliatory actions taken against Moses. Those reasons are set forth below. In examining each of the three allegedly retaliatory actions taken against Moses, the Hearing Officer considered several factors, including: "(1) the strength of the employer's reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees." *Id*. at 20 (*citing Kalil v. Dep't of Agriculture*, 479 F. 3d 821, 824 (Fed. Cir. 2007)).

1. September 2006 Paid Administrative Leave and "Not Fully Contributing" Rating on 2006 Performance Assessment (and Resulting Denial of Merit Increase)

The Hearing Officer found that Satkowiak, Moses' manager, would have placed Moses on paid administrative leave in September 2006, and would have given him a "not fully contributing" rating on his 2006 performance assessment, even if the September 6, 2006, email had not contained protected disclosures.

The Hearing Officer found strong evidence in the record supporting UT-Battelle's assertion that its objection to the email was not anchored in any protected disclosures contained in the email, but rather was based solely on the tone and language used in the email to convey those disclosures. *Id*. at 21-22, 23. According to the Hearing Officer, the September 6, 2006, email "went well beyond being merely blunt, and became sarcastic and gratuitously insulting to his fellow scientists." *Id*. at 22. The IAD also noted that given the nature of the email, and the fact that Moses had already lost his funding from NA-26 the previous year, Satkowiak had ample reason to be concerned that the email "would be disruptive in its consequences, a concern that was proven to be well-founded when NA-21 decided later that month that it could no longer fund Moses' work." *Id*. Therefore, the Hearing Officer concluded that there were strong reasons for the decision to place Moses on paid administrative leave apart from his protected disclosures.

Similarly, the Hearing Officer found that Satkowiak had strong reasons for giving Moses a "not fully contributing" rating on his 2006 performance assessment. The basis for this rating was Moses' "inability to interact professionally with [the] NNSA/NA-20 sponsors," as well as his inability to secure alternate funding for his time after losing both his NA-26 and NA-21 funding.[2] *Id*. at 23. The Hearing Officer concluded that Satkowiak's assessment that Moses was unable

[2] NNSA's Office of Defense Nuclear Nonproliferation, NA-20, is comprised of seven program offices, including NA-26 and NA-21.

to "interact professionally" was based on the manner and tone he used in presenting his disclosures in the September 6, 2006, email, not on the disclosures themselves. Similarly, the Hearing Officer found that Satkowiak's comments in the assessment pertaining to Moses' inability to secure funding for his time were well-founded given that by the time the performance assessment was prepared, Moses had alienated two of the "primary sources of potential funding," NA-26 and NA-21. *Id.*

In addition, the Hearing Officer found no evidence of any motive on the part of Satkowiak, or UT-Battelle, to retaliate against Moses for making protected disclosures by placing him on administrative leave or giving him a less than favorable rating on a performance assessment. The IAD noted that the disclosures were not critical of Satkowiak or ORNL. Rather, the disclosures pertained to "officials at other DOE laboratories and at DOE headquarters." *Id.* at 22. Finally, the IAD noted that UT-Battelle had not presented evidence of similar actions against similarly situated employees. Citing *Kalil* and *Carr v. Social Security Administration*, the Hearing Officer found, however, that an employer can meet its evidentiary burden despite the lack of such evidence. *Id.* at 22, 24; *see also Kalil*, 479 F.3d at 825; *Carr v. Soc. Security Admin.* 185 F.3d 1318, 1326-27 (Fed. Cir. 1999) .

2. Decision of STRC to Offer Moses Choice of Early Retirement or Termination

Applying the three factors listed above, the Hearing Officer determined that the STRC would have made the same decision in the absence of Moses' protected disclosures. The Hearing Officer found, based on the evidence in the record, that the basis for the STRC's decision was Moses' inability to secure funding for his time. The IAD noted that, when the STRC met to discuss Moses' case, five months had passed since he lost his NA-21 funding, and his prospects for securing funding in the future "were dim." *Id.* at 26. As with the allegedly retaliatory actions discussed above, the Hearing Officer found no motive on the part of the STRC to retaliate against Moses, given that the targets of the disclosures were not ORNL or any of the STRC members, but rather were officials at other DOE laboratories and DOE headquarters. *Id.*

Finally, the Hearing Officer considered the evidence presented by UT-Battelle of its similar treatment of similarly situated employees. Among that evidence was a document showing that nine other ORNL employees who were expected to secure funding for their time like Moses were ultimately terminated after failing to do so. The length of time between when those employees lost their funding and the date their employment was terminated ranged from "zero to seven and one-half months, and average[ed] approximately three and one-half months." *Id.* at 27. Moses was offered the choice between early retirement and termination approximately five months after losing his NA-21 funding. *Id.* at 25. Based on these factors, the Hearing Officer concluded that, due to Moses' lack of funding and lack of prospects for future funding, the STRC would have offered him the choice between early retirement and termination absent his protected disclosures.

III. ARUGUMENTS ON APPEAL AND ANALYSIS

Moses appealed the Hearing Officer's findings in the IAD and filed a statement identifying the issues that he wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding and a subsequent supplement to that statement (hereinafter "Moses Statement of Issues" and "Supplementary Statement," respectively). UT-Battelle filed a response to the Moses Statement of Issues.[3] 10 C.F.R. § 708.33. In addition, UT-Battelle appealed a portion of the IAD, Section I. C., and submitted a statement of issues supporting its appeal (hereinafter "UT-Battelle Statement of Issues"). Moses did not file a response to UT-Battelle's appeal. *Id*.

A. Moses' Appeal of Initial Agency Decision

On appeal, Moses does not specifically challenge any of the Hearing Officer's findings regarding whether his disclosures were a contributing factor to the retaliations and whether UT-Battelle satisfied its burden under Part 708. Rather, Moses alleges that the Hearing Officer's findings in the IAD overstep the regulatory limitations placed on OHA by various statutes. Moses Statement of Issues at 1. In his Statement of Issues, Moses argues:

> The [IAD] exceeds its statutory mandates in excusing the actions taken by UT-Battelle … the [IAD] fails to provide remedies both as required by law and in likely violation of the equal protection and due process provisions of civil rights law based on the manner in which the statutory authorization for 10 C.F.R. Part 708 has been reinterpreted to excuse the contractor for improper, noncompliant[,] if not illegal[,] acts.

Id. at 7. Essentially, Moses' Statement of Issues and Supplementary Statement can be distilled down to one principal argument: OHA's interpretation of 10 C.F.R. § 708.29, which sets forth the burdens of proof of the parties in a Part 708 proceeding, exceeds its authority by violating provisions of various statutes. *See* Moses Statement of Issues at 1; Supplementary Statement at 2. According to Moses, having found that he satisfied his burden of demonstrating that he made protected disclosures which were a contributing factor to an alleged retaliation, the Hearing Officer had no choice but to grant Moses relief. Moses Statement of Issues at 4. He further argues that the only issue for the Hearing Officer to decide was whether his complaint was frivolous. If he found that the complaint was not frivolous, Moses contends, the Hearing Officer was required to grant him relief. *Id*. at 6. This argument is completely inconsistent with any reasonable interpretation of the Part 708 regulations.

Part 708 was promulgated pursuant to the broad authority granted to DOE by the Atomic Energy Act of 1954 and the Department of Energy Organization Act to implement rules and regulations as necessary or appropriate to protect health, life and property. 57 Fed. Reg. 7533 (March 3, 1992). As stated above, the program's primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those employees from consequential reprisals by their employers. Section 708.29

[3] It is unnecessary in this case to set out the specifics of the response, some of which are incorporated into my analysis below.

states that after a complainant has satisfied his or her Part 708 burden, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's [protected conduct]." 10 C.F.R. § 708.29. OHA's interpretation and application of Part 708 – specifically, the burdens of proof set forth in section 708.29 – are well-settled case law. *See Franklin C. Tucker*, Case No. TBA-0023 (2007); *Gilbert J. Hinojos*, Case No. TBA-0003 (2005); *Janet Westbrook*, Case No. VBA-0089 (2002).

Essentially, under section 708.29, a complainant has the burden of establishing a *prima facie* case of retaliation. The burden then shifts to the contractor to rebut the complainant's *prima facie* case. Contrary to Moses' assertions, the inquiry does not end after a complainant has made his or her showing under Part 708. The language of section 708.29 is clear – the contractor has the opportunity to rebut the complainant's showing, by demonstrating that it would have taken the same action absent any protected conduct. Moses has presented no evidence which persuades us that our long-standing precedent in this regard is improper, and we see none.

We find no error in the Hearing Officer's application of section 708.29 in this case. After concluding that Moses satisfied his Part 708 burden, the Hearing Officer then examined the contractor's evidence. The Hearing Officer weighed the evidence and testimony and was persuaded that the contractor would have taken the same action absent Moses' protected disclosures. Moses presented no evidence indicating that any of the Hearing Officer's findings on this issue are clearly erroneous, and we find none on our review of the record. Consequently, we find nothing in the record which would cause us to set aside the Hearing Officer's findings in the IAD.

Moses also argues that the Hearing Officer denied him "access during the hearing to witnesses who could corroborate the truth of my disclosures…" Moses Statement of Issues at 7. This argument is completely baseless. Part 708 does not impose on complainants the burden of establishing the truth of their protected disclosures. Rather, in order to satisfy his or her Part 708 burden, a complainant must show that they disclosed information which they *reasonably and in good faith* believed revealed, *inter alia*, fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a).[4]

In this case, the Hearing Officer did not hear testimony from witnesses whose sole purpose, according to Moses, would be to attempt to establish the truth of his protected disclosures. Such testimony was irrelevant here, there being no dispute that Moses made disclosures or as to the reasonableness of his belief that the disclosures revealed information protected under Part 708. To include it would have been an unnecessary waste of time and resources. Accordingly, we find no error in the Hearing Officer's decision to exclude the testimony of these witnesses at the hearing.

Based on the foregoing, we find that Moses has not brought forth any evidence indicating an error in the IAD warranting reversal of the Hearing Officer's findings.

[4] In some Part 708 proceedings, evidence purporting to establish the truth of a complainant's disclosures might be relevant. For instance, in a case where there is a dispute regarding a complainant's reasonable belief that his disclosures revealed protected information, as set forth in section 708.5, evidence as to the truth of those disclosures may be useful in helping the complainant meet his evidentiary burden on that issue.

B. UT-Battelle's Appeal of Section I. C. of the Initial Agency Decision

Claiming attorney-client privilege, UT-Battelle redacted material from the following documents submitted at the hearing: Exhibit A and the portion of Exhibit 22 marked "Attorney-Client Privilege 0002."[5] After an *in camera* review of the unredacted versions of those documents, the Hearing Officer determined that they were not shielded by the attorney-client privilege. Therefore, he ordered that "unless UT-Battelle file[d] a notice of appeal by the fifteenth day after its receipt of [the IAD], a copy of the information [he found was] not protected [would] be released to the complainant." *Id*. at 4. UT-Battelle has appealed the Hearing Officer's ruling pertaining to the release of the redacted documents. UT-Battelle disagrees with the Hearing Officer's interpretation and application of the privilege to the documents in question, and cites various cases in support of its position.

We have reviewed the redacted information *de novo*. We find that it is irrelevant to any of the arguments presented during the hearing or on appeal, and its release would not change the findings and ultimate result in the IAD. In this regard, the Hearing Officer noted that even if he had considered all of the redacted information as evidence, he would have reached "the same relevant legal conclusions and the same ultimate decision" he reached without considering the redacted information. *Id*. at 29, n. 17. Further, as stated above, Moses did not file a response to UT-Battelle's appeal on this issue. We are unable to discern any way that release of the withheld information could have changed either the result of the IAD or the outcome of this appeal. Therefore, the issue of whether the information is shielded by the attorney-client privilege, and consequently whether it should be released, is moot and we need not reach it here. Accordingly, UT-Battelle will not be required to comply with ordering paragraph (2) in the IAD, which requires release of the unredacted copies of the exhibits at issue.

IV. CONCLUSION

As is clear from the discussion above, Moses' appeal of the IAD turns not on any factual disputes, but rather on a disagreement with OHA's interpretation and application of the Part 708 regulations. As stated above, OHA's interpretation and application of the Part 708 regulations are well-settled case law and nothing in Moses' appeal convinces us that our established precedent on this issue is improper. Therefore, we find no error in the Hearing Officer's consideration of the evidence presented by UT-Battelle to satisfy their evidentiary burden under Part 708. Accordingly, we will deny Moses' appeal of the IAD. In addition, we find the issue of whether the redacted portions of two exhibits submitted at the hearing are shielded by the

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[5] Exhibit A, is a record of the STRC meeting convened to consider Moses' case. It contains three separate portions redacted by UT-Battelle pursuant to the attorney-client privilege. The first redaction contains advice from UT-Battelle's in-house counsel about including the requirement that an employee secure funding for his or her time in performance improvement plans intended to address funding deficiencies. The second redaction pertains to the in-house counsel's opinion regarding whether the amount of time Moses was afforded to secure alternate funding was reasonable. Finally, the third redaction concerns the in-house counsel's advice regarding potential legal consequences should the STRC decide to terminate Moses' employment. The portion of Exhibit 22 marked "Attorney-Client Privilege 0002" is an email from the UT-Battelle in-house counsel to an ORNL official regarding Moses' protected disclosures.

attorney-client privilege is moot. Therefore, UT-Battelle will not be required to release unredacted copies those documents.

It Is Therefore Ordered That:

(1) The appeal filed by David L. Moses on September 8, 2008 (Case No. TBA-0066), of the Initial Agency Decision issued on September 3, 2008, be and hereby is denied.

(2) UT-Battelle shall not be required to comply with ordering paragraph (2) of the Initial Agency Decision, which required release of unredacted copies of Exhibit A and the portion of Exhibit 22 marked "Attorney-Client Privilege 0002."

(3) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 18, 2008