February 27, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Petitioner: Bernard Cowan

Date of Filing: July 18, 2002

Case Number: VBA-0061

On July 18, 2002, Argonne National Laboratory-West ("ANL" or "the contractor") filed an appeal of an Initial Agency Decision (IAD) issued by an Office of Hearings and Appeals (OHA) Hearing Officer under the Department of Energy (DOE) Contractor Employee Protection Program, 10 CFR Part 708. *Bernard Cowan*, 28 DOE ¶ 87,023 (2002). The IAD found that the contractor retaliated against Bernard Cowan ("Cowan" or "the complainant"), an employee at ANL, for making disclosures protected under Part 708. The IAD ordered the contractor to reinstate Cowan, provide him with back pay, and reimburse him for the reasonable costs and expenses of prosecuting his complaint. *Id.* at 38-39. It further directed both parties to file a report providing a calculation for back pay and litigation expenses. *See* Appendix to IAD.
As set forth below, I have determined that the contractor has failed to show that the IAD was erroneous in finding for the complainant, but I have rescinded the award of reinstatement.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased 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. Thus, contractors found to have retaliated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (definition of retaliation). Under the DOE regulations, review of an IAD is performed by the OHA Director. 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Cowan's complaint are fully set forth in the 39-page IAD. I will not reiterate all of the details here. For purposes of the instant appeal, the relevant facts follow. In 1974, Cowan was hired as an Engineering Technician-Senior in the Operations Division at ANL. In 1989, he was promoted to a Training and Procedures Specialist in the Training Group of ANL. He later voluntarily transferred from the Training Group to the Fuel Conditioning Facility (FCF) as an Engineering Technician-Senior.

In 1997, an incident occurred regarding hazardous material (HAZ-MAT) at the FCF. An alarm went off, and the employees were required to evacuate. A team of HAZ-MAT technicians who were trained to respond to this type of incident were supposed to return to the facility and perform re-entry procedures before others could move back into the building. Tr. at 111. However, during this particular incident, a team member who suffered from claustrophobia refused to wear a respirator and re-enter the building. A manager then called Cowan to replace the claustrophobic employee (Shriver) during the event. Tr. at 111-113. Management informed Cowan's group that an operator had a problem wearing a respirator, and that management was working with the operator. *Id.* 1/

On March 28, 2000, Cowan wrote a letter to the Operations Division Director of ANL expressing several workplace concerns, among them the alleged safety hazard posed by the claustrophobic employee assigned to be a HAZ-MAT technician. IAD at 9. According to Cowan, that employee jeopardized the safety of every team member and raised the possibility of an unsafe re-entry operation. He discussed these concerns with ANL managers on March 28, 2000 and April 7, 2000. The director of the facility ordered an investigation into the incident on April 12, 2000. Later that month, Cowan and other ANL-W employees at the FCF were transferred to the Sodium Processing Facility (SPF). Cowan protested this transfer and was allowed to return to the FCF. On May 18, 2000, the investigation concluded that, despite his claustrophobia, Shriver had been medically certified for HAZ-MAT duty and respirator use for several years without incident, and that no medical restriction was placed on his activities. IAD at 9. The investigation also stated that according to management, no employee was required to be a member of the re-entry team. *Id.* The investigation did not address whether Shriver should continue HAZ-MAT duties.

In May 2000, Cowan applied for a Training Specialist position at ANL, but he was not selected for that position. IAD at 14. On May 18, 2000, ANL management assigned Cowan to place lock out/tag out

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1/ The HAZ-MAT technicians are ANL employees who are trained and medically certified for this job.

(LO/TO) tags on the FCF's cell lighting circuit breakers. 2/ On June 6, 2000, some of the circuit breakers were found incorrectly tagged and locked in the "on" position. Cowan complained to management that another operator was required to verify Cowans's work, but did not. An ANL occurrence report concluded that Cowan had improperly conducted the LO/TO. Cowan then alleged that someone had sabotaged his work and requested an investigation into this allegation. Both ANL and DOE investigated Cowan's sabotage allegation and found that it could not be substantiated. On June 28, 2000, Cowan was again transferred to the SPF.

Cowan filed a complaint with the Manager of Employee Concerns of the DOE's Chicago Operations Office (DOE/CH) on August 25, 2000. 3/ In the complaint, Cowan alleged that he made a protected disclosure in the March 2000 memorandum that he wrote to the Operations Division Director concerning Shriver, the claustrophobic operator. On March 5, 2001, Cowan was transferred from SPF to the radiological facility (FASB). A DOE investigator conducted an investigation of Cowan's Part 708 complaint and on November 27, 2001, issued a Report of Investigation (ROI).

Early in January 2002, Cowan sent email messages to all ANL employees complaining about his frustration in getting DOE to investigate his allegations of mismanagement and safety. Management concluded that portions of these emails violated company policies and as punishment for the alleged violation, Cowan was suspended for three days without pay.

After completion of the investigation, Cowan requested a hearing before an OHA hearing officer. Eleven witnesses testified at the two day hearing. After considering the evidence in the record, the hearing officer issued the IAD that is the subject of this appeal.

C. The Initial Agency Decision

1. Protected Disclosure

The IAD cited the respective burdens of proof for the employee and the contractor under Part 708:

> [T]he employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . and that such act was a contributing factor in one or more alleged acts of retaliation against the

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2/ LO/TO is a system of physical and administrative controls that prevents the operation of control devices (electric circuit breakers in this case) to prevent injury to personnel or damage to plant equipment. Investigative Report of ANL LO/TO Event (April 6, 2001) at 3.

3/ DOE/CH is the DOE office designated to receive Part 708 complaints from ANL employees.

> employee by the contractor. Once the employee has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure.

10 C.F.R. § 708.29. In applying these standards to Mr. Cowan's complaint, the IAD considered the factual record and concluded that Cowan's March 2000 disclosure to management that a HAZMAT operator was subject to claustrophobia and thus a danger to his colleagues was protected under Part 708. 4/ The hearing officer found that it was reasonable for Cowan to believe that Shriver's continued participation in the ANL HAZ-MAT response program constituted a substantial and specific danger to employee health and safety.

After concluding that the March 2000 disclosure was protected, the hearing officer then reviewed the six personnel actions that Cowan alleged were made in retaliation for his protected disclosure. The hearing officer found that three allegations met Part 708's criteria for retaliation. First, Cowan alleged he was transferred involuntarily to SPF in June 2000 in retaliation for his protected disclosure. This incident occurred within three months of Cowan's protected activity, and the hearing officer found that based on the temporal proximity between the two events, it was reasonable to conclude that the disclosure was a factor in the personnel action. IAD at 17-18.

The second item of retaliation was Cowan's November 2000 appraisal (the "interim appraisal"). 5/ Although ANL argued that the appraisal was an interim evaluation and did not have a negative effect on Cowan's salary, the hearing officer found that it had a detrimental effect on his employment. The language of the appraisal was written in negative terms, in contrast to Cowan's previous evaluations. The hearing officer found only anecdotal evidence that Cowan's performance had deteriorated. Finally, the hearing officer found that Mr. Cowan's three day unpaid suspension in January 2002 was the third act of retaliation. The hearing officer concluded that ANL did not customarily use suspension as a punishment for violating ANL policy. IAD at 37. The hearing officer based his finding of retaliation on the fact that these actions occurred after Cowan filed his complaint, when ANL management was fully aware of Cowan's alleged whistleblower activity.

4/ In the IAD, the hearing officer stated that Cowan's allegation of sabotage may be a protected disclosure, but that he would only make a determination on this issue on remand if his finding about the HAZ-MAT disclosure were reversed on appeal. IAD at 17.

5/ Although this appraisal was completed in November 2000, it covered Cowan's performance from April through June 2000.

2. The Contractor's Burden

Under Section 708.29, after a finding is made that Cowan made a *prima facie* case of retaliation, the burden shifted to the contractor to prove by clear and convincing evidence that it would have taken these actions against Cowan in the absence of the protected disclosure. The IAD considered the contractor's arguments and concluded that the contractor did not prove by clear and convincing evidence that it would have taken the three personnel actions described above against Cowan in spite of his protected disclosure. IAD at 37-38. The hearing officer rejected ANL's claim that its performance evaluation was a fair estimate of Cowan's performance. IAD at 25. Instead, he found a lack of fairness. The hearing officer concluded that there was no evidence that ANL management would have placed such emphasis on Cowan's tardiness in meeting some deadlines absent his protected disclosure. *Id.* at 25-26. The IAD also found that Cowan's managers displayed a significant level of hostility toward Cowan. With regard to the transfer to FASB in June 2000, the hearing officer again found that the contractor failed to meet its burden. He found that transfer to be an "unusual" method for ANL to use to deal with hostility between co-workers. IAD at 29-33. In fact, there was no evidence that transfers were a routine response to inappropriate behavior of ANL employees, and moreover there was no evidence that the January 2002 suspension was a normal punishment for a violation of the company's email policy.

Based on the findings that Cowan made a protected disclosure in March 2000, and that ANL retaliated against him via a negative appraisal, a transfer in June 2000 and a three day unpaid suspension, the hearing officer granted Cowan's complaint and awarded him the following relief: (1) removal of the final FCF appraisal from his personnel records; (2) reinstatement as a shift operator at FCF; (3) payment of lost wages resulting from his transfer out of FCF; (4) payment of wages for the three day suspension; and (5) the removal of any reference to the suspension from his personnel file. IAD at 27, 33, 37. The hearing officer further directed both parties to provide each other with a calculation of back wages by July 30, 2002. Appendix to IAD. 6/

II. The Contractor's Arguments on Appeal

In its Statement of Issues (or "Statement"), ANL set forth three arguments. 7/ Two of the arguments are based on the premise that Cowan never made a protected disclosure, and thus there could be no showing that the alleged protected disclosure was a contributing factor to an act of retaliation. Statement at 2-8.

6/ To date, neither party has submitted this information.

7/ Complainant sent an extensive amount of material to this office, but did not directly address the issues that ANL presented on appeal. *See* Memoranda and Electronic Mail from Ben Cowan to OHA (August 14-October 13, 2002). Much of the documentation that Complainant submitted was already in the record of this case.

ANL's final argument is that the hearing officer abused his discretion in ordering reinstatement, and did not give proper deference to ANL's responsibility for maintaining a safe work environment. *Id.* at 8-9.

III. Analysis

In previous cases, this office has set forth the standard for consideration on appeal of a hearing officer's findings of fact and conclusions of law. Factual findings are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,501 at 89001 (1995); *O'Laughlin v. Boeing Petroleum Services, Inc*., 24 DOE ¶ 87,513 at 89,064 (1995). A Hearing Officer's conclusions of law are reviewable *de novo*. *See Pierce v. Underwood*, 27 DOE ¶ 87,544 at 89,224 (1999). I will apply these standards to my review of the IAD.

A. The Protected Disclosure

The contractor states that the March 2000 memorandum is not a protected disclosure because: (1) the hearing officer mistakenly believed that Shriver could rejoin the re-entry team; (2) the incident involving Shriver occurred almost two years prior to the disclosure, (3) membership on the re-entry team was voluntary; and (4) Cowan's first level managers were aware of the problem when it occurred. Statement of Issues at 2-4.

The record supports the hearing officer's findings that Cowan reasonably believed that Shriver, the claustrophobic employee, could rejoin the re-entry team. Thus, it was reasonable for Cowan to believe a safety hazard was imminent. Cowan did not know that the employee's participation in re-entry was voluntary. At the hearing, Cowan testified that in March 2000, he was not aware of any actions ANL had taken to resolve the situation with the claustrophobic employee. Tr. at 115. Cowan acknowledged that his first level management resolved the immediate problem in 1997 with Shriver–they decided that they would allow him to work without a respirator. Tr. at 113-114. However, this was not a permanent resolution of the situation since some emergencies may have been severe enough to require the re-entry team to wear respirators. The problem was not resolved until after Cowan's disclosure in 2000, when the investigation report was completed. In fact, ANL management did not investigate the situation until April 2000, and changes were not initiated until the completion of the investigation in May 2000. IAD at 12-13. One of the changes resulting from the investigation was a recommendation to tell all technicians that assignment to the HAZ-MAT team was "purely voluntary." IAD at 14. ANL also removed the requirement of HAZ-MAT qualification from the nuclear facilities operator position (a job that offered lucrative shift work) and recommended that operators immediately inform their supervisor if they have a problem wearing protective gear. IAD at 14. This policy change appeared to address the issue of operators who felt pressured, economically or otherwise, to be on the HAZ-MAT team despite a medical condition. According to the evidence, all of these changes can be traced to Cowan's disclosure. For the

reasons above, I concur with the hearing officer's finding that it was reasonable for Cowan to believe in March 2000 that Shriver's continued participation in the HAZ-MAT program was a substantial and specific danger to employee health and safety.

ANL further argues that because management personnel responsible for the HAZ-MAT technicians knew of the 1997 incident and resolved it at the time, Cowan's disclosure to other management at a later date is irrelevant. This argument is incorrect. Cowan clearly differentiated between his immediate supervisors and "Management" (i.e., more senior level managers such as Gary Lentz, Division Director for Facility Division at ANL). 8/ Cowan testified at the hearing about his disclosure as follows:

> [I]t was brought to their [management's] attention about keeping [the claustrophobic employee] on as a Hazmat team or not. The time that I remember confronting Management in the respirator problem was based on the time frame of, of the Claim, because it was an issue that, you know, we were afraid to even bring up because of retaliation efforts. But it existed. He was still on the team, and during that timeframe, '97, it wasn't reported to, to Management as, you know, a problem.

Tr. at 114. The manager responsible for plant safety, Lentz, was the recipient of the March 2000 memo and confirmed that he was not aware of the situation with the claustrophobic employee until he read the Cowan memo. Tr. at 473. It was the Cowan disclosure that triggered an investigation that resulted in recommendations to make concrete changes in procedures to improve safety (i.e., restricting Shriver's participation on the team, reminding employees that participation on the team was voluntary). Thus, Cowan was able to prove through sworn testimony at the hearing that he disclosed the safety concern to a senior management official (Gary Lentz) and that Lentz was not aware of the incident until Cowan's disclosure in March 2000. Tr. at 473.

Thus, the record does not support ANL's arguments. The details of when and how ANL responded to a safety issue are irrelevant to this Part 708 proceeding. The focus here is on whether the whistleblower's concerns brought to management's attention were reasonable at the time that he reported them. The hearing officer determined that the complainant disclosed to his employer information that he reasonably and in good faith believed described a danger to his fellow employees. 10 C.F.R. §708.5 (a) (2). The key to the hearing officer's decision in this issue is best stated in the IAD as follows:

> While testimony at the Hearing indicates that further study of the situation, and action by management, may have substantially alleviated the safety concern in this area, this factor is not relevant to my inquiry under Part 708, *which is to analyze the reasonability of Mr. Cowan's concerns when he reported them in March 2000.*

8/ Lentz testified that he was the person ultimately responsible for ensuring the safe operation of ANL facilities. Tr. at 434, 473.

IAD at 13 (emphasis added). The hearing officer determined that it was reasonable for Mr. Cowan to be concerned about the potential for a safety problem caused by his co-worker. I agree with the hearing officer's finding.

B. Retaliation

ANL offers two arguments concerning the retaliation that the hearing officer found it committed. First, ANL argues that the hearing officer erroneously relied on temporal proximity between the disclosure and the alleged retaliation in finding that they were related. Statement at 5. The contractor alleges that the hearing officer erroneously failed to require Cowan to make any evidentiary showing that an alleged protected disclosure was a contributing factor in an alleged retaliation.

I reject ANL's argument. Whistleblower cases rarely have a "smoking gun" incident that neatly delivers conclusive evidence to the fact finder. As a result, in whistleblower cases adjudicated by this office, temporal proximity is an accepted means of determining that a protected disclosure is a contributing factor to an act of retaliation. *See, e.g., Timothy E. Barton,* 27 DOE ¶ 87,501 at 89011 (1998) (and cases cited therein). Similarly, federal courts adjudicating whistleblower cases permit an employee to meet his statutory burden to show that an alleged disclosure was a contributing factor to an agency personnel action by proving to the court that the personnel action occurred within a reasonable time after that disclosure. *See Kewley v. Dept. of Health and Human Services*, 153 F.3d 1357, 1363 (Fed. Cir. 1998) (explaining Congressional intent in Whistleblower Protection Act (WPA), 5 U.S.C. § 1221(e)(1)(A) & (B) (1994)) (*Kewley*). 9/

In its second argument, ANL contends that two of Cowan's allegations do not qualify as retaliation under Part 708: (1) Cowan's June 2000 FCF appraisal (the "interim appraisal"); and (2) Cowan's June 2000 transfer from the FCF to SPF. ANL bases its argument about the June 2000 appraisal on its allegation that there was no evidence of a negative trend in Cowan's appraisals, and that the rating was similar to previous ratings. *Id.* Further, ANL argues that the interim appraisal had no negative effect on Cowan's final raise,

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9/ Legislative history of the Whistleblower Protection Act (WPA) explains that when Congress amended the WPA in 1994, it intended to allow a whistleblower to demonstrate that disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in a personnel action. *See Kewley*, 153 F.3d at 1363. This "knowledge/timing test" was implemented due to Congress' desire that the whistleblower not face an insurmountable burden. *Id.*

and therefore could not be considered retaliation for protected activity. Statement at 6. I consider these two arguments below.

1. The Interim Appraisal

I have examined the hearing officer's reasons for concluding that this event–the interim appraisal--was an act of retaliation, and I find no reversible error here. The June 2000 evaluation (review cycle April 1-June 23, 2000) contains negative language not found in Cowan's other 2000 appraisals, and was completed within three months of Cowan's disclosure in March 2000. IAD at 25. Cowan received two other appraisals in 2000, and neither contained negative comments. Even though the interim evaluation did not have a negative effect on Cowan's salary, its rating (3- on a scale of 5) was lower than his previous ratings of 3+ (for the period October 1, 1999 through March 31, 2000) and the interim appraisal contained fairly negative comments in the "Accomplishments" section. *See* Performance Appraisals, Review Cycle October 1, 1999 to September 30, 2000. The hearing officer questioned the supervisor who prepared Cowan's interim evaluation, and found a "lack of convincing testimony in support of ANL's position." IAD at 26. I agree. The manager who prepared the evaluation relied "almost 100 percent" on input from Cowan's first level supervisor, Belcher, a close friend of the claustrophobic employee. Tr. at 536-37, IAD at 24. The record supports a finding that that relationship colored Belcher's workplace interaction with and his views about Cowan and lowered his evaluation of Cowan's performance. Tr. at 221, 552-553. At the hearing, the manager who prepared the evaluation was not able to explain or support statements in the appraisal about tasks that Cowan allegedly had not completed. Tr. at 536-537.

In conclusion, based on the hearing officer's findings of limited evidence in support of ANL's contention that Cowan's performance had declined slightly, and of a significant level of animosity towards Cowan on the part of his supervisors, I find no error in the hearing officer's finding that the decreased rating contained in the June 23, 2000 appraisal was retaliation against Cowan for protected activity.

2. Transfer from the FCF

ANL contends that Cowan's transfer in June 2000 was not a retaliatory action, but rather a business decision forced on the contractor because Cowan caused dissension in the workplace and ANL had a responsibility to maintain a safe workplace. Statement at 6-7. The hearing officer found that ANL had provided only "anecdotal" evidence that Cowan's activities in the FCF in June 2000 aggravated his colleagues and led to animosity against him and ultimately his transfer. IAD at 29-31. As explained below, my review of the record leads me to conclude that although the evidence regarding hostility toward Cowan due to his own actions is more than anecdotal, it does not rise to the level of "clear and convincing" evidence dictated by ANL's regulatory burden. *See* Section III. C., *infra* (discussion of the level of hostility in the FCF in June 2000).

To make a persuasive defense here, ANL must show that it previously utilized a transfer to ameliorate tension in the workplace of a similar nature. The IAD states that "ANL has not shown that similar activity by another [employee] at FCF would have resulted in the same recommendation that he be transferred to another facility." IAD at 30. After reviewing the record, I agree with the hearing officer. ANL submitted no evidence that it had ever transferred an employee as a result of tension on the floor or a dispute with his supervisor. Tr. at 260. A ten year FCF supervisor testified that he could not remember a personality conflict ever resulting in a transfer. *Id.* Nonetheless, in its Statement, the contractor declared that " . . . the evidence was substantial and undisputed that Cowan's actions had compromised the safety and efficiency of FCF." Statement at 6. This is a somewhat different issue, and the contractor's claim is not supported in the record. Robert Belcher, Cowan's first level supervisor, testified at the hearing that although there was no trust between Cowan and his fellow technicians, and this distrust had a negative impact on Belcher's ability to supervise, nonetheless he found no safety concerns surrounding Cowan's behavior:

> Q. Did [Cowan's poor working relationship with his colleagues] also lead to safety concerns on your part?
>
> A. No, I can't honestly say there were any safety concerns.

Tr. at 247.

The evidence on which ANL relies for support of this issue is not persuasive. Therefore, I find no error in the hearing officer's conclusion that the transfer was an act of retaliation.

C. Reinstatement

The final issue that ANL raises in its Statement deals with the hearing officer's order to reinstate Cowan as a technician in the FCF (his position in June 2000). IAD at 33. The contractor appeals this award based on the safety of ANL employees and the efficient operation of the facility. Statement at 8-9. According to ANL, Cowan has a "history of accusing employees at FCF of criminal conduct" which resulted in a "hostile work environment with a corresponding decrease in morale and efficiency." Statement at 8. The contractor explains that because the prime contract requires ANL to maintain the safety and health of its workers, reinstating Cowan would violate the contract and possibly result in sanctions against ANL. *Id.* Further, because Cowan did not object to his transfer to FASB in June 2001, according to ANL there is no basis to move him from the FASB, his current location. *Id.*

The remedy of reinstatement is an equitable remedy and depends on a consideration of the equities in a given case. *See Robert Burd*, 28 DOE ¶ 87,025, Case No. VBA-0060 (2002); *Morris J. Osborne*, 27

DOE ¶ 87,542 (1999). Although not binding on us here, federal court cases are very instructive in this regard. In reviewing a decision to award equitable relief, federal courts have stated that an appellate body is deferential to the fact finder, and does "not normally find an abuse of discretion absent evidence of a lapse in judgment." *Selgas v. American Airlines*, 104 F.3d 9, 12 (1st.Cir. 1997). *See also Squires v. Bonser*, 54 F. 3d 168, 171 (3rd Cir.1995) (*quoting Langnes v. Green*, 282 U.S. 531, 541, 51 S.Ct. 243 (1931)) (stating that the reviewing tribunal is obliged to require that discretion be exercised in accordance with what is right and equitable under the circumstances and the law) (*Squires*).

ANL asks us to deny reinstatement based on the high level of hostility between Cowan and his FCF colleagues and managers. It is true that courts have denied an award of reinstatement based on findings that the animosity between parties makes such a remedy impracticable. *See Squires*, 54 F. 3d at 172; *Duke v. Uniroyal*, 928 F. 2d 1413, 1424 (4th Cir. 1991) (court must consider whether reinstatement is practical); *Marshall v. TRW*, 900 F.2d 1517, 1523 (10th Cir. 1990). 10/ There are, however, other factors that should be considered, including whether a complainant comes to the court of equity with "clean hands," *Robert Burd*, 28 DOE ¶ 87,025 (2002) (denying reinstatement of complainant who omitted information about previous employment), the unavailability of a position in which to place the complainant, *Coston v. Plitt Theatre*, 831 F. 2d 1321, 1331 (7th Cir. 1987), or a continued reduction-in-force, *McNeil v. Economics Laboratory*, 800 F.2d 111, 118 (7th Cir. 1986). *See also Daniel Holsinger v. K-Ray Security, Inc.*, 26 DOE ¶ 87,506 (1995) (discussing whether reinstatement would require a small contractor to displace an innocent employee). A hearing officer must conduct a full assessment of the equities, and must "look to the practical realities and necessities inescapably involved in reconciling competing interests" in order to determine the "special blend of what is necessary, what is fair, and what is workable." *Daniel Holsinger v. K-Ray Security, Inc.*, 26 DOE ¶ 87,506 at 89,018, *(quoting Lemon v. Kurtzman*, 411 U.S. 192, 200-201 (1973) (plurality opinion of Burger, C.J.)) (*Holsinger*).

I reviewed all evidence of workplace hostility in the record, including hearing testimony and four letters from employees (one letter was anonymous, but purported to be written by an ANL employee). Lentz testified that Cowan's transfer was based on the four letters and a conversation between Lentz and Gary Tarbet, Facility Manager. Tr. at 484. The four letters described the interaction between Cowan and his co-workers in June 2000. Two of the letters, one written by Gene Kurtz, FCF Supervisor, and the other by Robert Belcher, Cowan's first level supervisor at the FCF, are worded very strongly. *See* Memorandum from Robert Belcher to Gary Tarbet, FCF Plant Manager (June 14, 2000); Memorandum from Gene Kurtz to Gary Tarbet (June 23, 2000). They are contemporaneous expressions of a high level of frustration with Cowan's behavior in the workplace, and ask for management assistance in dealing with Cowan. Belcher testified at the hearing that he requested Cowan's transfer after Cowan asked him to arrange a

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10/ The hostility at the workplace must surpass the normal level of hostility between parties to litigation. *Grantham v. Trickey*, 21 F. 3d 289, 296 (8th Cir. 1994); *EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1462 (7th Cir. 1992).

meeting between Cowan and whoever allegedly "set him up" for punishment in the LO/TO incident. Tr. at 224-225.

I found the letters of Belcher and Kurtz to be credible and enlightening in their descriptions of Cowan's interactions with his colleagues. These employees clearly take their job responsibilities seriously, and were moved by a difficult situation to bring their concerns to the attention of ANL management. 11/ There is additional evidence about Cowan's relationship with his colleagues having deteriorated to an unusual extent. He has accused his colleagues of sabotage, bombarded them with electronic mail complaining about the company, and he has contacted the FBI and police to request an investigation into the company's activities. Tr. at 528-529, 569-570. While I am unable to assess the true level of hostility at FCF without testimony from his peers, the record supports a finding that there is a high level of hostility towards Cowan in the FCF. 12/

There are other factors in the record that weigh against reinstatement. Most important, I find that Cowan's actions have slowed the resolution of his complaint. For example, even after making a serious allegation of criminal sabotage against his co-workers, Cowan refused to cooperate with ANL management in its investigation of the allegation. Tr. at 522. Cowan informed Keith Powers, a Group Leader at FCF, that he (Cowan) actually had proof of the sabotage. Tr. at 522-529. However, when Powers, appropriately concerned about the possibility of criminal activity at a nuclear facility, asked Cowan for the proof, Cowan refused to give Powers any information. Tr. at 523. In fact, Cowan declared that Powers "would have to find it [himself]." *Id.* Cowan's actions obviously impeded the investigation, and consequently I am inclined to draw a negative inference about the complainant's behavior towards his colleagues. Further,

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11/ The other two letters are less persuasive, and I do not credit the authors with the same earnest intentions. They purport to describe the animosity between Cowan and his peers, but we have not heard directly from his peers--there are no written statements from any of Cowan's colleagues (except Shriver, who was the subject of Cowan's disclosure), and none testified at the hearing.

12/ ANL did not address additional factors that could weigh against Cowan's reinstatement, such as the lack of a current position at the FCF for Cowan, a continued reduction-in-force at the facility, or whether an innocent employee would have to be displaced to comply with the order. In addition, I cannot determine from testimony at the hearing if Cowan's former supervisors are still employed in positions at FCF where they would have to continue to interact with Cowan if he were reinstated. *See Feldman v. Philadelphia*, 43 F.3d 823 (3rd Cir. 1995) (stating that the issue of hostility is moot if the individuals who were a party to the animosity would no longer have dealings with complainant); *Morgan v. the Arkansas Gazette*, 897 F.2d 945, 953 (8th Cir. 1990) (affirming awards of reinstatement where employee responsible for discriminatory comments was no longer employed). Thus, I cannot draw any inference favorable to ANL regarding these factors.

the record reflects unacceptable conduct on Cowan's part. In September 2001, ANL management sent Cowan a letter requesting him to refrain from taking his complaint outside of the framework of DOE's whistleblower process until that process was completed. Tr. at 617. However, he ignored this warning and disseminated a 71 page "Employee Whistleblower Report" with a cover page designed such that the report appears to be an official ANL publication. *Id.* *See* "Employee Whistleblower Report." Further ignoring management's reasonable request, in January 2002 he sent an electronic mail message to all ANL employees regarding his whistleblower complaint. 13/ Tr. at 621.

There is no escaping the impression that Cowan's own actions have contributed to the negative attitude of the ANL managers who did not want him back at the FCF. Since Cowan is at least partially responsible for this situation, and has burned his bridges by refusing to cooperate with those investigating his allegations of sabotage, reinstatement to his former position at the FCF would not, in my view, be a "workable" remedy in this case. 14/

It is Therefore Ordered That:

(1) The Appeal filed by Argonne National Laboratory - West, OHA Case No. VBA-0061, is hereby granted in part and denied in part, as set forth in Paragraph (2).

(2) The IAD issued on June 27, 2002 is affirmed, except the contractor shall not be required to reinstate the complainant to his former position in the Fuel Conditioning Facility.

13/ Cowan also refused to cooperate with a procedure that ANL management had instituted for SPF employees who were to be transferred when that project was completed. Each affected employee was asked to provide management with his or her top three choices for a new assignment. Tr. at 614-616. Cowan refused to participate in this process, but then complained about his new assignment. Tr. at 629-631.

14/ In addition, although ANL's appeal did not address the availability of a position for Cowan at the FCF, there is some testimony in the record about curtailed operations at that facility in 2000 and possibly in succeeding years. Tr. at 613-614.

(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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 27, 2003