Case No. VBH-0042

March 1, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Hearing Officer Decision

Name of Petitioner: Richard R. Sena

Date of Filing: February 24, 2000

Case Number: VBH-0042

This Decision involves a complaint filed by Richard R. Sena (Sena) against Sandia Corporation under the Department of Energy's Contractor Employee Protection Program. That program is codified at Part 708 of Title 10 of the Code of Federal Regulations. 10 C.F.R. Part 708. In his complaint, Sena maintains that he was retaliated against and ultimately constructively discharged for disclosing that laboratory personnel were using the Internet improperly at Sandia National Laboratories.

I. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect such "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Part 708 of Title 10 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 and in good faith 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)(l), (a)(3). An employee of a DOE contractor who believes he has been discriminated against in violation of the Part 708 regulations is entitled to receive an extensive series of protections. He may file a whistleblower complaint with the DOE. As part of the proceeding, he is entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). 10 C.F.R. §§ 708.21-.23. After the investigator's report on the complaint is issued, an OHA Hearing Officer will generally conduct an independent fact-finding and evidentiary hearing. 10 C.F.R. §§ 708.24-.25. The Hearing Officer issues a formal, written opinion on the complaint. 10 C.F.R. § 708.31. Finally, a party may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. § 708.32.

II. Factual Findings

Sena is a former employee of Sandia Corporation at the Sandia National Laboratories. He worked there for

more than 25 years. In 1995, he noticed that a number of employees who worked in close proximity to him were using the Internet connection in their offices to view sexually explicit materials in violation of Sandia policy. Sena reported this information to the Sandia ethics office. Sandia conducted an investigation and discovered that six people -- one Sandia employee and five contractor (subcontractor to DOE) employees -- were using the Internet connection to view sexually explicit materials on the office computers. At the time, such an offense was grounds for dismissal. A senior manager, Neil Hartwigsen, confronted each of the five contractor employees with information that Sandia computer security personnel had compiled about their access to sexually explicit web sites from Sandia offices. Each agreed with the information provided by the computer security personnel. Hartwigsen took each of their badges and told each that he was fired and that he would not be coming back to work at Sandia. Tr. at 432. At the time of discharge, Hartwigsen told them that they would not be allowed to work in the same area at Sandia again. Tr. at 442, 443. The one Sandia employee was on vacation and unreachable. When he returned, he was not fired because the policy at Sandia had changed in the interim to allow penalties less severe than termination.

At the time of this incident, Sena was told by Hartwigsen that the employees who were fired would never return to work at Sandia, so that he would have no interactions with them while at work. At the time, Hartwigsen believed that they would not return to that work environment, Tr. at 458, and that Sena would never have a working relationship or contact with these employees again. Tr. at 459-60. On the evening of the day the employees were fired, someone blew up Sena's mailbox in front of his home. This was particularly traumatic to Sena because (1) his daughter witnessed it and was extremely upset, and (2) he reasonably felt it was a threat to the safety of his family. At the time, Sena testified that a security officer suggested that he obtain a gun for protection. In addition, a number of threatening telephone calls were made to Sena at his residence.

In July 1998, two of the contractor employees discharged for viewing sexually explicit Internet sites returned to the Sandia site as employees for other contractors (hereinafter referred to as the offending employees). They were permitted access to the same general area in which Sena worked. Sena objected to this and immediately told Hartwigsen that he feared for his safety. Hartwigsen understood from their conversation that Sena feared that some or all of the dismissed employees were out for vengeance. Tr. at 438. Hartwigsen knew about the mailbox incident and some threatening phone calls because Sena had reported these incidents. *Id.* Despite this knowledge, Hartwigsen believed that many of the employees suffered in their lives and jobs because of the dismissals. Tr. at 442. Hartwigsen did not want to deprive them of a livelihood. Tr. at 456. He therefore sponsored the reinstatement of security clearances for a number of these employees so they could resume work at Sandia. Tr. at 467. Hartwigsen allowed them to continue to work at Sandia and to come back into the office space that he controlled. However, he did not allow them to have offices and computers. *Id*. Hartwigsen testified that at the time he thought that he could not prevent these people from returning as new contractor employees, but could deny them office space. Tr. at 454. He now knows that he was mistaken and that he could have prevented the offending employees from having physical access to the Lab site. Tr. at 455. However, Hartwigsen also testified that he did not seek any advice from the procurement or the legal departments at Sandia because he believed he already knew the answer to the question about whether he could remove the offending employees. Tr. at 479-80.

Sena could not accept the stress that the presence of these individuals was causing and, with the approval of Dr. Clevenger, the Sandia Medical Director, went on temporary sick leave in the middle of August 1998. During the course of this leave his condition was monitored by the Sandia Medical department. Nevertheless, Clevenger and Sena both believed that finding a suitable job and returning to Sandia was appropriate. Tr. at 382-87. Clevenger thought that Sena's symptoms had improved somewhat and that Sena wanted to continue working at Sandia. Tr. at 339. Clevenger and Sena set up what they thought was a reasonable return-to-work trial in late August 1998. Tr. at 339. However, that trial lasted just two days, after which Sena returned to sickness absence. Tr. at 340.

At that time, Dr. Clevenger spoke with Hartwigsen and told him that Sena could not work in the same environment as the five employees who were terminated. Tr. at 470. Hartwigsen looked to move Sena to another position where he would not interact with them, Tr. at 567, because at the time, Hartwigsen

believed that he could not ban the offending employees from coming to Sandia. Tr. at 568. The solution that Hartwigsen offered was to transfer Sena, first to one job and then, when Sena rejected that placement, to another, so that some distance (100 yards) was placed between Sena and the offending employees. This would also place Sena in a building where the offending employees would not have a business reason to visit. Sena rejected those two job placements, and Sandia management agreed not to move Sena.

In September 1998, Sena started to see a psychologist, Dr. Clara Farah. Dr. Clevenger had suggested to Sena that his personal physician, Dr. Best, should be consulted to see if he thought Sena should seek some psychological help. Dr. Farah first saw Sena on Sept. 2, 1998. Tr. at 107. Her first tentative diagnosis was anxiety disorder. Tr. at 108. However, shortly thereafter she believed that Post Traumatic Stress Disorder (PTSD) might be the appropriate diagnosis. Tr. at 112. Dr. Farah changed her diagnosis to PTSD by September 15, 1998. Tr. at 141. On Nov. 2, 1998 Dr. Farah wrote to Dr. Best, Sena's personal physician, stating that she believed that Sena suffers from PTSD. Tr. at 141. Dr. Clevenger concurred in that diagnosis. Tr. at 353-54.

By November 1998, all of the medical personnel involved concluded that Sena would be unable to return to work at Sandia. Dr. Clevenger believes that it is a medical probability that had the offending employees not returned to Sandia in 1998, Sena would not be suffering from PTSD. Tr. at 368. However, Hartwigsen maintains that during this period he did not know the degree of impact the presence of the offending employees had on Sena. Tr. at 445, 471, 499. While Dr. Clevenger believes that he told Hartwigsen about the severe discomfort and trauma caused Sena by the presence of the offending employees, Tr. at 365, Hartwigsen believes that conversations between them were limited to discussing whether Hartwigsen could expect Sena to return to work because work was piling up in his absence. Tr. at 588. Hartwigsen testified that: "all of the conversations that I had with Dr. Clevenger were in the vein of: We expect that at some point we'll have this situation under control and he'll be able to come back to work." Tr. at 579. Hartwigsen claims that Dr. Clevenger never told him the extent to which the presence of the two employees was hurting Sena. Tr. at 581.

On April 8, 1999, while he was still on medical absence, Sena requested that he be allowed to retire on disability. Exhibit 26. Dr. Clevenger recommended that Sena be allowed to retire on full disability in a memorandum he sent to the Employee Benefits Committee on May 4, 1999. Exhibit 28. The Employee Benefits Committee, which consisted of three Sandia managers, one of whom was Hartwigsen, approved full disability retirement for Sena. This was communicated to Sena in a letter dated June 3, 1999, from the secretary of the Committee. Exhibit 16. That retirement was effective November 2, 1999. In September 1999, Sena filed a complaint under the DOE Contractor Employee Protection Program in which he claimed that he was forced to retire from Sandia because management failed to protect him after he reported the improper use of the Internet at the laboratories.

III. Legal Standards Governing This Case

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[ ] fraud, mismanagement, waste, and abuse" at DOE's government-owned, contractor-operated (GOCO) facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers.

Proceedings under 10 C.F.R. Part 708 offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by providing for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the OHA Director and, when appropriate, the Secretary of Energy or his designee. *See David Ramirez*, 23 DOE ¶ 87,505, Case No. LWA-0002, *affirmed*, 24 DOE ¶ 87,510 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any action, such as discharge, demotion, or any other negative action, against any employee because that employee

has disclosed to an the contractor information that the employee in good faith believes evidences a violation of any law, rule, or regulation, or a substantial and specific danger to employees or public health or safety. 10 C.F.R. § 708.5(a)(1); *see also* *Francis M. O'Laughlin*, 24 DOE ¶ 87,505, Case No. LWA-0005 (1994), *affirmed*, 24 DOE ¶ 87,513 (1995).

A. The Complainant's Burden

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 under § 708.5, and that such act was a contributing factor in 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, Case No. LWA-0001 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)).

In this case, Sena claims that the actions taken by Sandia lead to his "constructive discharge." Courts considering claims of constructive discharge have required employees to prove that their working conditions were so difficult or unpleasant that a reasonable employee in their shoes would have felt compelled to resign. *Sanchez v. Denver Public Schools*, 16 F.3d 576 (10th Cir. 1998); *Arcy v. American Sheep Indus. Assn*, 981 F.2d 1569 (10th Cir. 1992). The maintenance of an environment so hostile that it leads an employee to conclude that the only reasonable alternative is for the employee to resign may be considered an adverse personnel action for Part 708 purposes. *See* *Kensley v. Diamond Back Services, Inc*., 27 DOE ¶ 88,025, Case. No. AL—95—0009 (1999) (presumption that a resignation is voluntary may be rebutted in Part 708 proceeding by evidence which shows that it was the result of duress or coercion, i.e., a constructive discharge). This is so because "*Retaliation* means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (*e.g*., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) . . . ." 10 C.F.R. § 708.2. The maintenance by an employer of a hostile work environment after a protected disclosure is made is certainly a negative action with respect to the terms and conditions of employment. In fact, a Hearing Officer has held that a Sandia subcontractor's management failure to resolve inter-employee conflicts may be an act of reprisal under DOE regulations. *Luis P. Silva*, 27 DOE ¶ 87,550, Case No. VWA-0039 (2000).

B. The Contractor's Burden

If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d). *See* *Ronald Sorri*, 23 DOE ¶ 87,503, Case No. LWA-0001 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Sena establishes that he made a protected disclosure that was a contributing factor to an adverse personnel action, Sandia must convince me that it would have taken the same actions even if Sena had not raised any concerns. *Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 at 89,034-35, Case No. LWA-0006 (1994).

IV. Whether Sena Has Made A Prima Facie Case of Retaliation

Section 708.5 of the Contractor Employee Protection Program provides that a disclosure is protected if an employee discloses a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5. Such a disclosure must be made to "a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor." *Id*. In this case, there is no dispute that Sena disclosed to his employer that contractors were using the Internet connection that Sandia provided to view sexually explicit materials while at Sandia. At the time this was extremely serious, for Sandia policy

dictated that anyone doing such action should be fired. Thus this disclosure was a disclosure of a substantial violation of Sandia rules and clearly falls under § 708.5 as a protected disclosure. Sandia concedes this to be true. Post-hearing Brief of Sandia Corp. at 15.

It is also clear that the disclosure was a contributing factor to an act of retaliation. At the time Sandia management allowed the offending employees to return to the Sandia site, management clearly had in mind the disclosure of the incidents that occurred in 1995, because but for the disclosure, management would not have had to sponsor new security clearances for these individuals and would not have had to consider whether they should be allowed to return to the site.

I find that Sandia management's failure to remove the offending employees and alleviate the hostile work environment for Sena indicates an intent to harm Sena despite testimony that management had no such intent. *See Azzaro v. County of Allegheny*, 110 F.3d 968 (3rd Cir. 1997). Hartwigsen testified that when he allowed the offending employees to return to work at Sandia, he had no intent to harm Sena. I agree. There was no indication at that time that their return would cause Sena such trauma. Hartwigsen also testified that had he known that any harm would have occurred, that he "would have pursued other means to keep those people from coming on site." Tr. at 577. Dr. Clevenger, a senior management official at Sandia and its medical director, also did not know the extent of Sena's trauma in August 1998. But as September turned into October, and October turned into November, all the medical personnel involved knew how traumatic this situation was for Sena. Dr. Clevenger believes he told Hartwigsen about the extent of the trauma, but Hartwigsen denies this. However, even if there were miscommunication between senior managers at Sandia, that does not mean that Sandia should escape responsibility for not alleviating the hostile environment that it created. By early November 1998 at the latest, it should have realized the hostile work environment prevented Sena from returning to work. This is especially true because the remedy was simple and straightforward: remove the offending employees. There was nothing to "work on" or "get control of," and Sandia management, if not Hartwigsen, knew how to do this when it wanted to. *See* *Luis P. Silva*, 27 DOE ¶ 87,550, Case No. VWA-0039 (2000). Under these circumstances, I find that Sena has met his burden under the DOE's Contractor Employee Protection Program.

V. Whether Sandia Has Rebutted That Prima Facie Case

I now turn to the evidence regarding the contractor's burden. In its post-hearing brief, Sandia argues that it should not be held liable in this case because there is clear and convincing evidence that it would have taken the same measures absent the protected disclosures. However, I do not agree with its claim. After reviewing the record in this matter, I find that actions taken by Sandia management not only allowed the work environment to become hostile for Sena, but their actions, and lack of actions, allowed that hostile environment to continue until he could not longer work at Sandia.

Testimony at the hearing showed that Sandia management through their actions created a hostile work environment, although at the time they did not know how hostile the work environment would be. Hartwigsen testified that he sponsored the offending employees for security clearances so that they could return to Sandia to work. He did this deliberately because he believed they had suffered enough from their previous banishment from Sandia. Without such security clearances, the employees could not have returned to work at Sandia. But at the time, Hartwigsen did not fully realize the extent of trauma that would be inflicted on Sena upon the return of these employees.

The environment for Sena continued to be hostile despite the knowledge of Sandia management that it was affecting Sena in an extremely bad way. When Sena noticed the offending employees, he immediately contacted Hartwigsen and told him that he feared for his safety. Sena also questioned Hartwigsen as to why the offending employees were allowed to return to Sandia. Despite the voiced concerns by Sena, Hartwigsen allowed the offending employees to continue to remain on site and interact with Sena. At this particular time--late August 1998—there was no particular evidence to suggest that the presence of the offending employees would lead to an environment in which Sena ultimately could not function. I find

that Hartwigsen did not know the extent of the trauma inflicted on Sena by the presence of these employees at this time. Nor did Dr. Clevenger, the other senior Sandia management official dealing with this matter. However, for the reasons explained below, it seems clear to me that at some point in the fall of 1998 both Hartwigsen and Dr. Clevenger realized the severity of this situation.

By October or November 1998, Hartwigsen should have realized that something was terribly wrong with this situation. Sena noticed the presence of the offending employees on August 24, 1998. He immediately complained about the situation. Hartwigsen, who was Sena's supervisor's supervisor, claims that he did not grasp the severity of the situation at that time. I believe Hartwigsen when he testified to that effect. Dr. Clevenger also testified that he did not appreciate the severity of the problem in the August 1998 timeframe. However, when a long-term employee is on extended leave under the supervision of the Sandia medical department, at some point management must realize that the condition that led to the leave is severe. If a valued employee were on sick leave for more than several weeks, wouldn't most people believe that the underlying medical condition is out of the ordinary? I noted this at the hearing, where I asked Hartwigsen:

> Hearing Officer: What I'm concerned about is the time period in the fall of 1998. Clearly when someone goes on extended medical leave, you know something is hurting them.
>
> And yet, I hear from the testimony here that nothing was done in September and October to get rid of these two people, to make the workplace a little safer for Mr. Sena. And that concerns me. Is that accurate?
>
> Mr. Hartwigsen: Well, I understand your concern, especially retrospectively, you can see this. But I think at the time, that the prevailing thought was that he was having physical problems.
>
> As I said earlier, I had never heard of the term post-traumatic stress disorder until this week. So whether the doctors knew it or not, I don't know.

Tr. at 580. Hartwigsen also testified that he did not ask Dr. Clevenger about the details of Sena's medical condition because he knew from previous dealings that the Sandia medical department would not reveal that information to him due to privacy concerns.

Dr. Clevenger clearly appreciated the severity of the problem in this time period. The testimony at the hearing shows that all three health professionals, Drs. Clevenger, Best, and Farah, agreed by November 1998 that Sena would not be returning to Sandia. This was communicated to Hartwigsen. At that time, clearly Hartwigsen knew how difficult this situation was for Sena. However, for the next several months nothing was done to remove the offending employees from Sandia.

Hartwigsen testified that he thought in 1998 that he did not have the authority to ban the offending employees from the Lab site. He testified that Sandia had recently adopted a performance-based contract model and that he had been told shortly before August 1998 that he could not influence the choice of which employees a company would use to perform under such a contract. From this knowledge, Hartwigsen inferred that he could not remove an employee once he showed up at Sandia. For this reason, he did not seek advice from either the procurement or legal departments at Sandia as to whether he could remove the offending employees from the Lab site. However, Hartwigsen now realizes that he was wrong and that he had the authority to ban those employees.

In another case also arising from Sandia, a management official had no problem banning an employee from the premises. *Luis P. Silva*, 27 DOE ¶ 87,550, Case No. VWA-0039 (2000). In *Silva*, a Sandia manager became aware of a conflict between contractor employees where one employee had to take a two-week leave because of stress. While asking management of the contractor to solve the conflict, the Sandia manager testified that she realized that "it was my right under the contract to take some steps to resolve the issue of a hostile work environment." (citation omitted). That Sandia manager then consulted with both the procurement and legal departments at Sandia and directed the contractor to remove the

offending employee who she believed was causing the hostile environment. These actions in the *Silva* case occurred in August 1997, a full year before the offending employees showed up to create a hostile work environment for Sena.

Hartwigsen also realizes that he, as a senior Sandia manager, would have to resolve a hostile work environment. Hartwigsen testified: "If we have somebody who is in a hostile work environment, I believe it's our responsibility to resolve that hostile work environment. Now, if that means removing somebody, then I think they have to be removed." Tr. at 487-88. Although Hartwigsen testified that he thought the Sena matter would ultimately be worked out, this is not convincing. Hartwigsen testified that "all of the conversations that I had with Dr. Clevenger were in the vein of: We expect that at some point we'll have this situation under control and he'll be able to come back to work." Tr. at 579. Dr. Clevenger testified, however, that he believes he told Hartwigsen about the trauma facing Sena. Tr. at 365. Nevertheless, by November 1998 two senior Sandia managers knew that the trauma would prevent Sena from returning to work at Sandia. Still nothing was done, even though there was clear, simple, straightforward ways to get the situation "under control:" remove the offending employees. Hartwigsen chose not to do this.

In summary, Sandia management created the beginning of a hostile work environment when Hartwigsen sponsored the reinstatement of security clearances for the offending employees. This was done deliberately to allow them to return to work at Sandia. Upon seeing them, Sena told Sandia management that their presence was extremely hurtful. After a few days the Sandia medical director became involved. Sandia management should have realized that the environment was hostile. Exactly when this should have occurred is unclear, but certainly it is true after Sena had been on supervised medical leave for an extended period of time. Its failure to act at that time deepened and prolonged the trauma to Sena. Sandia officials knew that Sena was suffering from PTSD by late October or early November 1998. Yet even then no one at Sandia did anything to make Sandia a safe place for Sena to try to return to work. At all times during these incidents, it appears that Sandia had the right to ban the offending employees from the Sandia site, and in fact had exercised that right previously.

In *Silva*, the Hearing Officer found that the company, a Sandia subcontractor, "sacrificed" an employee to retaliate against Silva, ignoring complaints she made and thus failing to resolve her perceptions of a hostile work environment. In this case, Sandia similarly sacrificed Sena in order to provide employment at Sandia to the offending employees. The Sandia manager in *Silva* realized that it was her duty to resolve the hostile workplace there. And Hartwigsen testified in this case, as I've summarized above, that he realized that he would have to resolve a hostile work environment if it existed. Three medical professionals, including the Sandia medical director (who was also a senior Sandia manager), concluded that the environment was so hostile to Sena that he could not return to work. Yet Sandia management did little to alleviate the situation. Sandia has presented no evidence to show that it treated Sena in the same manner as other Sandia employees who found themselves in a hostile environment. Under these circumstances, I find that Sandia has failed to present clear and convincing evidence that meets its burden under the DOE Contractor Employee Protection Program. Accordingly, I conclude that Sena's complaint should be granted.

VI. Relief

The DOE Contractor Employee Protection Program provides as follows:

> If the initial or final agency decision determines that an act of retaliation has occurred, it may order:
>
> (1) Reinstatement;
>
> (2) Transfer preference;
>
> (3) Back pay;

(4) Reimbursement of your reasonable costs and expenses, including attorney and expert-witness fees reasonably incurred to prepare for and participate in proceedings leading to the initial or final agency decision; or

(5) Such other remedies as are deemed necessary to abate the violation and provide you with relief.

10 C.F.R. § 708.36(a). In the present case, Sena and Sandia have submitted calculations showing what each believes to be the relief necessary to put Sena in the same position had he worked until retirement age. Sandia claims that the amount needed to pay Sena is $342,324.77. According to Sandia, this figure consists of the present value of the difference between Sena's salary and his current disability pension for the period November 1999 through April 11, 2014 ($277,005.09), the present value of matching funds for Sena's saving plan ($21,819.68), and the forgone pension benefits ($43,500.00). Sena claims that he should receive $1,291,288.03. This figure includes what is described as the difference between the future value of Sena's retirement account and the value of the account when he retired ($971,425.63), plus lost wages ($319,862.70).

The calculations that Sandia submitted clearly utilized the correct methodology for calculating the amount of relief necessary to place Sena in the same position had the constructive discharge not occurred. Sandia has calculated the present value of the difference between Sena's retirement income and the income he would have received had he remained working at Sandia, the present value of Sandia's contribution to Sena's retirement account, and the forgone pension benefits. None of Sena's calculations attempt to take a stream of earnings over the next 15 years and calculate a present value of those streams. This is a fundamental flaw in his submission.

Two issues remain, however. First, Sena is entitled to reasonable attorneys fees and costs. *See* *C. Lawrence Cornett*, 26 DOE ¶ 87,510, Case No. VWX-0010 (1995); *David Ramirez*, 24 DOE ¶ 87,512, Case No. VWX-0001 (1995). Second, Sena believes that he should be compensated for the money he has removed from his retirement plan for living expenses from the date he retired until the present. Since I need to consider the former, and to receive evidence on that issue, I will also allow the parties to submit information about the latter. I will then issue a supplemental order establishing the total amount for which Sandia is liable. I also encourage the parties to consider settlement negotiations and thereby attempt to resolve all issues related to remedies and any other issues remaining in this case.

This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by each affected NNSA element, official, or employee, and by each affected contractor.

It is Therefore Ordered That:

(1) The complaint for relief under 10 C.F.R. Part 708 submitted by Richard R. Sena, OHA Case No. VBH-0042, is hereby granted as set forth in paragraphs (2), (3) and (4) below.

(2) Richard R. Sena shall submit a detailed report as described in the remedy section of this decision, showing the amount of attorney fees and costs claimed, including the basis and justification for those legal and other expenses. The report shall be due 30 days after receipt of this decision, and shall be served on the attorney for Sandia Corporation.

(3) Sandia Corporation shall be permitted to submit its comments, if any, on the report described in paragraph (2) above. The comments shall be due 10 days after receipt of the report.

(4) This is an initial agency decision, which shall become the final decision of the Department of Energy granting the complaint in part unless, within 15 days of the issuance of a Supplemental Order with regard

to remedy in this case, a notice of appeal is filed with the Office of Hearings and Appeals Director, requesting review of the initial agency decision.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: March 1, 2001