

# Case No. VWA-0012

## DECISION AND ORDER OF THE DEPARTMENT OF ENERGY

### Initial Agency Decision

Name of Petitioner: Ronny J. Escamilla

Date of Filing: June 13, 1996

Case Number: VWA-0012

This Decision involves a whistleblower complaint filed by Ronny J. Escamilla (Escamilla) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. For a three-month period in 1993, Escamilla was employed by Systems Engineering & Management Associates, Inc. (SEMA), a DOE subcontractor, at DOE's Rocky Flats Plant (Rocky Flats). During his brief tenure at SEMA, Escamilla alleges that he made disclosures of waste and mismanagement to various managers at Rocky Flats. Escamilla contends that these disclosures resulted in his being harassed in the workplace and ultimately terminated.

### **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, contractor-operated 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.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. 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 in good faith believes evidences, among other things, fraud, mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. 708.5(a)(1)(iii). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee. See David Ramirez, 23 DOE 87,505, aff'd, 24 DOE 87,510 (1994).

#### **B. Factual Findings**

Many of the facts in this case are contested. My findings of fact set forth below are based on (1) the entire record developed in the case, including the Office of Contractor Employee Protection (OCEP) investigative file, all pleadings submitted by the parties and the transcript of the September 24, 1996 hearing, and (2) my observations of the witnesses' demeanor at the hearing and my concomitant determinations regarding those witnesses' credibility.

In October 1992, EG&G Rocky Flats, Inc. (EG&G), then the prime management and operating contractor at Rocky Flats, conducted a study of three computer systems to determine which system best met Rocky Flats' engineering needs in view of that facility's mission change from production to environmental clean-up and restoration. See Exhibit (Ex.) 1 to the Report of Investigation.<sup>(1)</sup> After an extensive analysis of these computer system options, EG&G management concluded that ComputerVision (CV) would best meet the functional requirements of its Engineering & Technical Services (E&T) Group. Id.

To assist the E&T Group in making the transition to the CV system, EG&G turned to SEMA, one of its subcontractors that was tasked with providing skilled computer support personnel to EG&G. See Transcript of September 24, 1996 Hearing at 32-33 (hereinafter Tr.). SEMA, in turn, placed a newspaper advertisement seeking, inter alia, a "CAD/CAM Engineer/Technician" who could provide "user training and support, productivity tool development and file translation" from AC to CV. See Ex. 2. The advertisement specified that applicants must have experience with ComputerVision. Id.

Mr. Escamilla responded to and was selected for the advertised position described above. See Ex. 5. Escamilla's qualifications for the position were set forth on his résumé as: two Bachelor of Science (B.S.) degrees, one in mathematics and the other in psychology; and experience with both AC and CV systems. See Ex. 3. When Escamilla reported to work at Rocky Flats on August 10, 1993,<sup>(2)</sup> he was required to fill out a number of forms, including an Application for Employment and a Verification of Degree form. Escamilla completed the employment application, certified to the veracity of all the information contained in that document, and signed an acknowledgment that any false and misleading information given on his application or in his interview may result in discharge. Ex. 6. As Escamilla was completing the degree verification form, however, he orally advised Larry Dyer, the hiring official at SEMA, that he did not have a college degree. Ex. 43, 44. Dyer was apparently unconcerned about Escamilla's revelation because he knew SEMA could hire an applicant for the computer position who did not possess a college degree provided the applicant had sufficient prior relevant job experience. See Ex. 43 at 2. Dyer claims he never reviewed the paperwork Escamilla completed on August 10, 1993 but simply sent the documents to SEMA's corporate offices in Virginia for further processing. Id.

Almost immediately after Escamilla assumed his new position at SEMA, issues related to his work performance began to surface. During Escamilla's first two weeks on the job, the CV system failed. Ex. 46 at 2. When Escamilla was approached by EG&G management to explain why he was sitting by idly in the computer room instead of rebooting the CV system, he claimed at first that he was the AC person, not the CV person. Id. Escamilla subsequently admitted to EG&G management that he simply did not know how to reboot the CV system. Id.

As the weeks went on, EG&G personnel who had daily contact with Escamilla commented that Escamilla refused to perform many of his assigned day-to-day systems administration duties. See Ex. 42, 46, 51. Those co-workers who offered assistance to Escamilla during these times found Escamilla to be very defensive and unwilling to admit he needed help. Id. Finally, Mary Ann Gaug, the EG&G Manager to whom Escamilla reported, determined that Escamilla "had no knowledge of CV and was unable to do the general CV support tasks he was hired to do." Ex. 46. In an effort to find something for Escamilla to do to earn his pay, Gaug assigned him the task of writing a manual to document CV systems procedures. Id.

Meanwhile at staff meetings and in one-on-one conversations, Escamilla was openly challenging EG&G's decision to implement CV for its E&T Group. Ex. 44, 46, 47, 49, 51, and 54. Escamilla constantly argued that AC was a better system than CV, citing AC's less expensive cost as sole support for his contention. Id. During his employment with SEMA, Escamilla never offered any facts or data to support his preference for AC or explained how AC could meet the EG&G's engineering needs more effectively than CV. Ex. 52.<sup>(3)</sup> When Escamilla raised his views regarding AC directly to EG&G and SEMA management, both responded in a similar manner. Both advised him that (1) EG&G management had selected CV after a careful in-depth analysis of other computer systems; (2) he was hired to support CV, not reopen the debate about which computer system best suited EG&G's engineering needs; and (3) the matter was not open for further discussion. Ex. 43, 46. Without any other indicators, Escamilla construed these comments as

validating his perception of waste and mismanagement associated with the implementation of the CV system, concluding that management would not be asking him to refrain from discussing his concern if nothing were awry. Ex. 19 at 3.

Eventually, Escamilla's unyielding advocacy for the AC system and relentless attack on CV caused his co-workers to view him as an arrogant, opinionated person who (1) had no regard for those whose views differed from his own, (2) possessed limited knowledge about CV and consequently could not intelligently discuss the differences between AC and CV, and (3) supported AC because it was the only system he knew well. Ex. 42, 46, 47, 51, 52. As a consequence, many of Escamilla's co-workers avoided him and ignored his opinions. Ex. 52. Conversely, Escamilla viewed his co-workers as combative and attributed their seemingly negative attitude towards him as a direct result of his revelations of waste. See Ex. 21 at 1; see also Ex. 44 at 3.

Escamilla's manner of communicating his views regarding CV also led to conflict in the workplace. Only five weeks into Escamilla's employment, Escamilla and another SEMA employee, Michael Glanert, became embroiled in an altercation related, in part, to Escamilla's views on CV. Ex. 19, 43, 54. The altercation culminated in Glanert accusing Escamilla of acting unprofessionally and using obscene language and Escamilla accusing Glanert of using racial slurs against him. Ex. 54. Ultimately, this incident formed the basis of an internal Equal Employment Opportunity (EEO) Complaint that Escamilla filed with SEMA.<sup>(4)</sup> It was during the course of this internal EEO investigation that SEMA's corporate headquarters in Virginia discovered for the first time that Escamilla had falsified his résumé and his employment application.<sup>(5)</sup> Ex. 54 at 3.

In the weeks that followed, Escamilla's work performance failed to improve. Those who reviewed Escamilla's drafts of the CV systems procedures manual opined that the drafts were written poorly from a grammatical standpoint and were technically inaccurate, jumbled, and confusing. See Ex. 51, 46, 42, 43, Tr. at 177. Both Larry Dyer, a SEMA Manager, and Maryann Gaug, an EG&G Manager, had discussions with Escamilla concerning his poor work performance. Ex. 43, 46.

On November 2, 1993, Dyer allegedly gave Escamilla a memorandum which reiterated Escamilla's job responsibilities and advised that if he were unwilling or unable to perform these responsibilities his services were no longer necessary. Ex. 18. According to Dyer, Escamilla responded by threatening that he would not go quietly. Ex. 18 at 7. Escamilla claims he was never given a copy of that memorandum. Ex. 44.

Escamilla filed a whistleblower complaint under Part 708 sometime between November 3 and 16, 1993.<sup>(6)</sup>

SEMA terminated Escamilla on November 19, 1993, citing two principal reasons: falsification of his educational credentials and poor work performance.

### **C. Procedural History**

OCEP conducted an investigation into the allegations contained in Escamilla's Complaint and issued a Report of Investigation and Proposed Disposition on May 28, 1996. OCEP concluded in its Report that Escamilla had not met his regulatory burden as required by Part 708 and, as a consequence, was entitled to no relief.

On June 10, 1996, Escamilla submitted his request for a hearing under 10 C.F.R. 708.9 to OCEP. OCEP transmitted that request to OHA on June 13, 1996 and I was appointed hearing officer in this case on June 26, 1996.

Escamilla and SEMA filed pre-hearing briefs on July 31, 1996 and September 3, 1996, respectively. On September 24, 1996, I held the hearing in this case at the Rocky Flats Site in Golden, Colorado. At the conclusion of the hearing, I directed Escamilla and SEMA to file post-hearing materials to clarify certain

matters raised at the hearing. Escamilla submitted his post-hearing document on October 2, 1996; SEMA tendered its post-hearing statement on November 20, 1996. With the filing of SEMA's statement, I closed the record in this case.

## II. Legal Standards Governing This Case

As noted above, the regulations set forth in 10 C.F.R. Part 708 provide an administrative mechanism for the resolution of whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the complainant and the contractor with regard to their allegations and defenses and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

### A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. 708.9(d). See Ronald Sorri, 23 DOE 87,503 (1993) (citing McCormick on Evidence 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F.Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence 339 at 439 (4th Ed. 1992). Under this standard, the risk of error is allocated roughly equally between both parties. Grogan v. Garner, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). In the present case, Escamilla must make two showings. First, Escamilla must demonstrate that he disclosed information to DOE, to SEMA, or to EG&G which he in good faith believed evidences gross waste or mismanagement. Escamilla can also show that he communicated to management his intention to file a Part 708 complaint. If Escamilla fails to meet this threshold burden, his claim must be denied. If Escamilla meets this burden, he must next prove that his disclosure was a contributing factor to his being harassed in the workplace and ultimately terminated. 10 C.F.R. 708.9(d); see Helen Gaidine Oglesbee, 24 DOE 87,507 (1994).

### B. The Contractor's Burden

If Escamilla meets his regulatory burden as set forth above, the burden then shifts to SEMA. The regulations require SEMA to prove by "clear and convincing" evidence that the company would have terminated Escamilla even if Escamilla had not advanced his views regarding waste and mismanagement or announced that he had filed a complaint with DOE. "Clear and convincing" evidence is a much more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n. 3

## III. Analysis

Escamilla contends that he made a series of disclosures related to EG&G's selection of the CV system for use at Rocky Flats. His disclosures fall into two categories: (1) those related to his allegations of waste and mismanagement, and (2) those announcing that he had filed a complaint. After reviewing the entire record in this case, and considering the credibility of the witnesses who testified at the hearing, I conclude as follows:

- Escamilla **has failed** to show by a preponderance of evidence that he disclosed information which he in good faith believed evidenced mismanagement or waste associated with the computer system he was hired to support;
- Escamilla **has shown** by a preponderance of evidence that he disclosed to SEMA the fact he had filed a complaint with DOE. Escamilla **has also proven** that the disclosure relating to the filing of his complaint was a contributing factor to his termination;

- SEMA **has proven** by clear and convincing evidence that it would have terminated Escamilla even if Escamilla had not disclosed to SEMA that he had filed a complaint with DOE.

Accordingly, I find that Escamilla is entitled to no relief under 10 C.F.R. Part 708.

## **A. Alleged Disclosures of Waste and Mismanagement**

It is uncontested that Escamilla frequently voiced his opinion that EG&G's decision to implement the CV system was a faulty one, citing his belief that the AC system was a superior system. As discussed below, I find that Escamilla's vague allegations of mismanagement and waste associated with the CV computer system do not rise to the level of protected disclosures under Part 708.

### **1. Mismanagement**

EG&G management decided to implement the CV system for its engineering needs after undertaking an examination and analysis of alternative computer systems. The reasons for management's decision are well documented in its extensive computer study. In fact, Escamilla's job existed only to facilitate the implementation of CV at Rocky Flats and for no other reason. In addition, Escamilla knew when he applied for and accepted the job with SEMA that his job would involve supporting the CV system, not any other system. <sup>(7)</sup> During his employment with SEMA, Escamilla implied, through his constant criticism of the CV system, that EG&G's selection and implementation of that system constituted mismanagement. There is not one scintilla of evidence in the record which supports a finding that Escamilla disclosed information which he, in good faith, believed constituted mismanagement.

I am convinced from the record that Escamilla's communications to management regarding the CV system simply reflected his disagreement with EG&G's decision to acquire and implement CV and nothing more. It is not disputed that Escamilla was more familiar with AC than CV and that he strongly preferred the AC system. The weight of the evidence in the record indicates that Escamilla was not as technically proficient in the use of CV as he should have been to perform the duties for which he was hired. His inability to reboot the CV system when it faltered, his inability to draft a technically correct CV manual, and his inability to perform his day-to-day systems administration duties support this finding. It is difficult for me to imagine how someone who could not perform his day-to-day computer support activities in a competent fashion could carefully evaluate and reject the multiple factors considered by EG&G management in deciding which computer system to utilize for its engineering division. While Escamilla would like me to believe that he was an expert in CV and hence able to opine intelligently about the virtues of all computer systems, I find the weight of evidence to suggest otherwise. Moreover, I find that EG&G's selection of the CV system was a reasonable exercise of its discretion. My decision to defer to EG&G on its selection of the CV system is also bolstered by the Deputy Secretary of Energy's determination in Mehta v. Universities Ass'n, 24 DOE 87,514 (1995)(Mehta). In the Mehta decision, the Deputy Secretary reversed the Initial Agency Decision which involved a complainant who made alleged protected disclosures of mismanagement. Particularly, the complainant alleged that procedures governing his access to a computer should be changed. The Deputy Secretary held that:

Equating a particular type of disagreement to "mismanagement" as contemplated by the "whistleblower" regulations demands a careful balancing lest the term encompass all disagreements between a contractor and its employees. While a conclusion with respect to the merits of a particular claim of mismanagement may not be required in all cases, there must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, at the same time granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork.

Id. at 89,065. For all the foregoing reasons, I find that Escamilla's disagreement with EG&G management's decision about the kind of computer system EG&G's engineering group would utilize does not rise to the level of a protected disclosure regarding mismanagement as contemplated by the Part 708 regulations.

## 2. Waste

Escamilla's criticism of the CV system focused on the purported waste inherent in EG&G's intended use of a computer system which was, in Escamilla's opinion, more expensive than the AC system. However, Escamilla's charges of waste were, at all times, general and unsubstantiated. He never, for example, articulated why AC better suited EG&G's engineering needs, or why he believed the use of the CV system constituted a gross waste of funds. Ex. 52. At the hearing, Escamilla was given the opportunity to clarify precisely why he believed his claims regarding the CV system rose to the level of gross waste. His testimony on this issue centered again on his general assertions that the AC system was cheaper and more efficient than CV. Tr. at 349 and 350. When asked to explain some of the benefits of utilizing the CV system, Escamilla responded " as far as cost goes, I can prove to you that Autocad is a lot cheaper and efficient." Id. However, he failed to communicate any fact to support his general assertion of waste.

Assertions of waste in the most general sense do not satisfy the regulatory standard set forth in Part 708. See Francis M. O'Laughlin, 24 DOE 87,505 (1994). The regulations provide, in relevant part, that:

A DOE contractor covered by this part may not discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, intimidate, or otherwise discriminate against any employee because the employee . . . has [d]isclosed . . . information that the employee in **good faith** believes **evidences** . . . gross waste of funds . . .

10 C.F.R. 708.5(a)(1)(iii) (emphasis added). Based on the record and my serious reservations about Escamilla's credibility, I find that Escamilla's vague allegations of waste based simply on his ethereal opinion do not rise to the level of a protected disclosure. In this regard, I am unable to conclude that Escamilla disclosed information which he in good faith believed evidenced gross waste of funds. The concept of good faith is closely linked to one's honesty. In this case, Escamilla's honesty is highly questionable. First, he impugned his own integrity by knowingly and willingly falsifying his educational qualifications. Then, at the hearing he continued to undermine his credibility by refusing to acknowledge that his falsifications and misrepresentations were serious matters. Instead, he attempted to divert focus from his actions by providing evasive responses and non-sequiturs to questions relating to his falsifications. The following excerpts from the transcript highlight my concern in this regard:

Q: . . . the Record reflects that you erroneously stated on a number of documents, including your resume and your application . . . that you had . . . two Bachelor of Science degrees. I'd like you to address that issue.

A: I have one. Do you want to see it?

Q: You have a Bachelor of Science degree?

A: I have a Degree. It doesn't say "Bachelor of Science," it says

"equivalence of."

Q: . . . Did you . . . put anything in writing which said, "the equivalent of?"

A: It was never during the interview process, the mention with Larry Dyer where I have the degree never became an issue.

Tr. at 286-87. I find equally as troubling other hearing testimony where Escamilla provided conflicting statements. For example, Escamilla implied at one point that Larry Dyer told him to state on his employment forms that he had a B.S. degree because Dyer knew he was working towards a degree. Id. at 290. In response to the direct inquiry whether Dyer told him to misrepresent his educational credentials, Escamilla responded, "He said, 'Go ahead and put it down, You're going to be working on it. It doesn't matter.'" Id. When asked more pointedly whether Dyer told him to lie, Escamilla responded, " He didn't

say, he said, 'Put that you're working toward one down.'" Id. at 316-17. In addition, under questioning, Escamilla revealed that he had misstated facts in Exhibit 14 relating to an incident with his colleague, Glanert. Id. at 321. Escamilla's explanation for the misleading statements was that he was emotionally upset when he wrote the subject document to his supervisor and, as a result, could not "think straight." Id. In addition, I find it significant that Escamilla lied about other matters at the hearing. When I asked him why he stated on his résumé and employment application that he had a B.S. degree, Escamilla responded "I didn't put it on the Application." Id. at 287. The employment application, on its face, reveals that Escamilla represented he had a B.S. degree from Metro State College. See Ex. 3. Another instance that demonstrates Escamilla's lack of candor involved his representation that SEMA hired him to support the AC system. Tr. at 21. The advertisement to which Escamilla responded, on its face, undermines Escamilla's testimony concerning this matter, as do other statements by management officials to Escamilla regarding his position description. See Ex.2; Ex. 46 at 3; Ex. 18; Ex. 43 at 1, 7, 10.

In addition, as noted in footnote 3 supra, I refused to entertain other contentions Escamilla raised during the proceeding because I determined that he never raised them during the course of his employment with SEMA, despite his argument to the contrary. Finally, Escamilla confused the record in this case by interjecting allegations of waste and mismanagement stemming from his disagreements in 1990-91 with L&M, a former DOE subcontractor at Rocky Flats that has no relationship with SEMA. Tr. at 19-20, 237, 275. At various times during the hearing, I explained to Escamilla that the 1990-91 issues were not relevant to this proceeding and attempted to refocus his line of argument. Id. at 20, 240-42, 258. Escamilla refused to accept my direction and continued to attribute to SEMA allegations of waste and mismanagement that Escamilla allegedly witnessed two years earlier as an employee of L&M. Id. at 275. Escamilla exclaimed at one point during the hearing, "I won't let them do to me what they did before." Id. This comment and others like it caused me to consider that the anger and hostility Escamilla was exhibiting and the allegations he was advancing might be misplaced. In conclusion, my observations of Escamilla during the 10-hour hearing and the record in this proceeding convince me that Escamilla was not acting in good faith when he raised his general assertions of waste against SEMA.

For all the reasons set forth above, I find that Escamilla has not met his threshold burden of establishing by a preponderance of evidence that he disclosed information which evidenced his belief in good faith that there was an instance of gross waste of funds.

## **B. Alleged Disclosure of Complaint Filing**

### **1. Prima Facie Case**

Escamilla alleges that on November 16, 1993, he advised Larry Dyer, his SEMA Manager, that he "was frightened by the hostile work environment and [he] felt the appropriate thing to do was to file an OCEP complaint with DOE." Ex. 44. Escamilla contends he told Dyer on that date that he believed his problems in the work environment stemmed from his disclosures of waste and mismanagement. Id. Dyer recalls that during the November 16, 1993 meeting Escamilla told him he had filed a harassment complaint with DOE. Ex. 43. According to Dyer, after the November 16 meeting, Dyer called SEMA's corporate office to tell them about, among other things, Escamilla's filing of a complaint. Id. at 8. Immediately thereafter Dyer called Gaug, however, he does not recall if he told her about Escamilla's complaint filing. Id. Gaug stated that she believes Escamilla told her directly that he had filed a complaint with DOE concerning waste or harassment. Ex. 46. Gaug added that she was not surprised because Escamilla had asked her for an OCEP brochure. Id.

The filing of a Part 708 complaint constitutes a protected disclosure pursuant to 10 C.F.R. 708.5(a)(2). The regulations specifically provide as follows:

A DOE contractor covered by this part may not discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, intimidate, or otherwise discriminate against any employee because the employee (or any person acting pursuant to a request of the employee) has -

(2) Participated . . . in a proceeding conducted

pursuant to this part;

10 C.F.R. 708.5(a)(2). Even if this provision did not apply to Escamilla's disclosure, the OCEP Director had the discretion to accept the complaint for processing under 10 C.F.R. 708.2(c). See Report of Investigation at 13, n.12.

The weight of the evidence in this case indicates that prior to his termination, Escamilla had communicated to SEMA that he had filed a Part 708 complaint with the DOE. Therefore, I find that Escamilla has established a prima facie case that he made a protected disclosure to a DOE contractor. I turn now to whether Escamilla has proven that this protected disclosure was a contributing factor to his being terminated.

## **2. Contributing Factor**

A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." Ronald A. Sorri, 23 DOE 87,503 (1993) citing McDaid v. Dept't of Hous. and Urban Dev., 90 FMSR 5551 (1990); see also County v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) (County). In addition, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." County, 886 F. 2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that all three persons in Escamilla's management chain, i.e., Gaug, the on-site EG&G Manager; Dyer, the on-site SEMA Manager; and Anderson, SEMA's Senior Vice-President, had actual or constructive knowledge that Escamilla filed a Part 708 complaint with the DOE prior to his termination on November 19, 1993. Gaug stated that she knew in early November 1993 that Escamilla had complained to DOE about either waste in connection with a computer system and/or engineering practices or harassment. Ex. 46. She stated she was not surprised Escamilla complained to DOE because he had asked her for an OCEP brochure earlier. Id. Dyer admits that Escamilla told him on November 16 that he had filed a harassment complaint with the DOE and that he spoke with Gaug immediately thereafter. This fact, combined with Dyer's frequent communications with Gaug prior to and on November 16, persuades me that Dyer had at least constructive knowledge that Escamilla had filed a Part 708 action. As for Anderson, the ultimate decision maker with respect to SEMA terminations, he told OCEP investigators that he heard Escamilla had filed a complaint with DOE regarding harassment and waste relating to some sort of software prior to Escamilla's termination. Ex. 40 at 3. At the hearing, however, Anderson testified he did not know about Escamilla's Part 708 filing until after he had terminated him. Regardless of which version of Anderson's recollection is accurate, I find he had either actual or constructive knowledge that Escamilla had filed a Part 708 action. (8)

I find that a reasonable person could conclude that Escamilla's protected disclosure, i.e., that he had filed a complaint, was a contributing factor to his termination in view of management's knowledge of Escamilla's complaint filing and the temporal proximity between Escamilla's revelation of his complaint filing and his termination. For this reason, I have determined that the burden shifts to SEMA to prove by clear and convincing evidence that it would have terminated Escamilla even if Escamilla had not disclosed that he filed a Part 708 complaint.

## **C. SEMA's Burden**

SEMA maintains that it based its decision to terminate Escamilla on two principal facts: (1) he falsified employment documents and (2) he performed poorly on the job. There is no dispute that Escamilla knowingly falsified his resume and employment documents and that he knew he could be terminated for so doing. Escamilla's varied attempts to negate the import of these falsifications has no impact on my

ultimate determination that his falsifications constituted an independent ground for his termination. For example, I was not swayed by Escamilla's attempts to minimize his falsification by offering excuses for his action at the hearing. See Tr. at 286-302. As for Escamilla's oral statement to Dyer regarding his lack of a degree, I observe that Escamilla was still in possession of the falsified documents at the time he made his revelation to Dyer and yet made no attempt to correct the falsified documents. Further, I observe that Escamilla continued to compound his falsification during and even after his term of employment by trying to perpetuate the myth that he held two college degrees. Ex. 14, Complainant's Pre-hearing Submission; see also note 4. Finally, I also note that SEMA's corporate policy is to terminate persons who are found to have falsified employment documents. In fact, in the only other situation involving an employee who falsified his educational credentials, SEMA was preparing to implement its policy when the employee quit. Tr. at 46; Ex. 54 at 4; Ex. 39. For all these reasons, I am convinced that one of the chief reasons SEMA terminated Escamilla was his falsification.

I am also convinced by the evidence in the record that Escamilla's work performance would have been an independent ground for terminating him. The record is replete with evidence from EG&G and SEMA management officials and co-workers that Escamilla lacked the ability to perform his job at the technical level expected of him. Ex. 46, 50, 51, 42. For example, Escamilla was unable to reboot the system for which he was hired to support and was unable to write a quality procedures manual. These duties were basic requirements for the job for which Escamilla was hired. The record indicates that management gave Escamilla several opportunities to prove himself in the workplace after orally advising him that his job performance was not satisfactory. For example, Gaug decided Escamilla was not capable of performing basic CV support skills; however, she assigned him to draft a manual outlining system administration procedures. Escamilla failed dismally at this task as well. Moreover, Escamilla was a probationary employee during his brief tenure with SEMA. SEMA's company manual, a copy of which Escamilla placed into evidence at the hearing, advises employees that they are on probation for six months and that SEMA can terminate them at its discretion without notice during this period. Escamilla Hearing Exhibit 3. SEMA has convinced me that Escamilla's poor job performance during his probationary period would have resulted in the company discharging Escamilla under the terms of its corporate policy.

Based on the foregoing, I have determined that SEMA has proven by clear and convincing evidence that it would have terminated Escamilla even if he had not advanced his communications that he filed a Part 708 complaint. Therefore, I find Escamilla is entitled to no relief under Part 708.

#### **IV. Conclusion**

As set forth above, I determined with respect to Escamilla's allegations of waste and mismanagement, that he has not met his regulatory burden as required by 10 C.F.R. Part 708.5. Thus, I did not analyze whether those disclosures were contributing factors to the alleged harassment Escamilla purportedly experienced and to his termination. However, with respect to Escamilla's allegation that he was terminated for communicating to management that he had filed a Part 708 complaint, I determined that he has met his burden of proof of establishing by a preponderance of the evidence that this was a disclosure protected under 10 C.F.R. Part 708. I also found that Escamilla's disclosure was a contributing factor in his termination. However, I found that SEMA has proven by clear and convincing evidence that it would have terminated Escamilla absent his disclosure. Accordingly, I conclude that Escamilla has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted under 708.10.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Ronny J. Escamilla under 10 C.F.R. Part 708 is hereby denied.

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

Assessments, Office of the Inspector General, Department of Energy.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date:

1. The three computer systems EG&G management examined in detail were the following: Computer-Assisted Three-dimensional Interactive Application (CATIA); ComputerVison (CV); and AutoCAD (AC). Exhibits 1, 46.

2. For the record, Escamilla was employed from 1990-1991 at Rocky Flats by another DOE subcontractor, L&M Technologies, Inc. (L&M) Ex. 3. According to Escamilla, L&M terminated him for voicing his disagreement with the CATIA computer system. Ex. 44

3. In his Statement to OCEP investigators 16 months after his termination, Escamilla advanced eight reasons why AC was an economical computer system which was efficient and adaptable to EG&G's future use. Ex. 44 at 5. There is no evidence in the record to indicate Escamilla ever discussed AC as being efficient and adaptable to EG&G's future use or articulated any of these eight reasons to anyone during the term of his employment with SEMA. I will therefore accord no weight in this Decision to these belated contentions.

Similarly, I will not consider Escamilla's unsupported assertion that he challenged the CV system because of safety concerns. During the hearing, Escamilla claimed for the first time that he advocated the use of AC instead of CV out of concern for the safety of workers at Rocky Flats . Tr. at 339-348. When asked at the hearing why he never articulated that concern orally or in writing previously, Escamilla responded, " Okay, is it wise to put all of your eggs in one basket?. . . am I going to tell you everything that I'm going to do? I mean, would that be wise?" Tr. at 340. Based on this response and my reservations about Escamilla's credibility at the hearing, I do not believe Escamilla ever raised the safety issue during the course of his employment with SEMA.

4. SEMA investigated the EEO complaint and found no evidence of discriminatory behavior, harassment, or improper conduct by Glanert or any other SEMA employee against Escamilla. Ex. 17. SEMA memorialized its findings in a letter dated October 5, 1993 to Escamilla. Id.

5. The altercation between Escamilla and Glanert also involved Escamilla's refusal to take direction from Glanert. Ex. 43 at 5. Escamilla advised Fredericka Wall, the Human Resources Manager at SEMA who conducted the internal EEO investigation, that Glanert should not be supervising him as Escamilla had "a good education and lots of experience." Ex. 54 at 2. It was these remarks that prompted Ms. Wall to review both Escamilla and Glanert's personnel files. Wall learned from the files that Glanert had a Master's Degree while Escamilla did not possess a college degree. Id.

6. The record is unclear regarding the exact date Escamilla filed his Part 708 Complaint. Escamilla maintains he filed the Complaint on November 3, 1993. Barbara Wade, the Manager of the Rocky Flats Whistleblower Program during the period in question, advised OCEP investigators that Escamilla filed his Complaint with her office shortly after his termination on November 19, 1993. Ex. 53 at 2. At the hearing, Wade stated that the OCEP statement accurately reflected her recollection of dates at the time. Tr. at 200. However, she also testified that Escamilla "was terminated real close or after submitting the complaint," suggesting the possibility that Escamilla might have given her the whistleblower complaint prior to his termination. Id. at 199. Unfortunately, the Rocky Flats Whistleblower office did not maintain a system to log in complaints as they were received. Id. at 204-205. Consequently, Rocky Flats cannot confirm the date of filing for Escamilla's complaint.

Other evidence in the record persuades me, however, that Escamilla filed his complaint sometime between November 3 and November 16, 1993. Larry Dyer, Escamilla's Manager at SEMA, acknowledged that Escamilla told him on November 16, 1993 that he **had filed** a harassment complaint with DOE. Ex. 43 at 8. Gaug, Escamilla's EG&G Manager, stated that "**in early November, Escamilla complained** to DOE about either waste of government money in regards to the computer system and/or unsound engineering practices or harassment because of his ethnicity." Ex. 46 (emphasis added). She further stated that she believed Escamilla complained to DOE because he had asked for an OCEP brochure earlier. Id. In addition, Wall recounts that on the day Escamilla was fired, he called her and stated his view that he was fired because he **had filed** a complaint with DOE.

7. Curiously, on numerous occasions, Escamilla asserts that he was hired to support AC not CV. These assertions are simply false.

8. If Anderson's earlier recollection of events is accurate then he had actual knowledge of the complaint filing. If his hearing testimony is accurate, then Anderson had constructive knowledge through Dyer, the person whom Anderson entrusted with overseeing SEMA's Rocky Flats operations.