

Case No. VWA-0032

July 6, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Roger W. Hardwick

Date of Filing: March 8, 1999

Case Number: VWA-0032

This Decision involves a complaint of reprisal filed by Roger W. Hardwick (also referred to as the Complainant) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Hardwick was employed by KenRob and Associates, Inc. and worked as a subcontractor on a contract that the DOE awarded to Science Applications International Corporation (SAIC). Mr. Hardwick contends that in January 1994, he made a protected disclosure to the DOE concerning the manner in which SAIC was performing its DOE contract. Hardwick states that he was terminated from the subcontract two weeks after the disclosure and that KenRob terminated his employment in August 1994, when his contract with KenRob expired.

I. Background

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. (1) 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, fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a)(3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Director of the Office of Hearings and Appeals. 10 C.F.R. § 708.32.

The following information is not contested. In January 1992, Mr. Hardwick was an employee of KenRob and Associates, Inc. He was Telecommunications Manager at the firm's Las Vegas, Nevada Office, and his mission was to develop a base for new business in the western United States, with a primary emphasis on telecommunications and computer technical support services.

During 1993, Science Applications International Corporation (SAIC) was the prime contractor with the

DOE for a Technical and Management Support Services Contract for the Yucca Mountain Site Characterization Project (YMP). Under this contract SAIC was required to perform a wide range of scientific, technical management and administrative support services, including provision of computer support services to both DOE's Las Vegas Office, and DOE's Yucca Mountain Site office, located about 100 miles from the Las Vegas office. On December 6, 1993, SAIC awarded a contract to KenRob, which was staffed solely by Mr. Hardwick. Mr. Hardwick was named as telecommunications specialist, and his role was to provide computer support services (also referred to as information technology or IT) at the Yucca Mountain Site Office (YMSO). The performance period for this contract was from December 6, 1993, through March 31, 1994.

In January 1994 Mr. Hardwick met with John Gandi, DOE Team Leader for Information Resources Management at the Yucca Mountain office and offered his view that improvements in IT support at the YMSO were necessary. Mr. Hardwick prepared a draft letter outlining his concerns, and presented the draft to Winfred Wilson, then site manager of the YMSO.

Mr. Wilson adopted Mr. Hardwick's draft virtually without change, structured it as a memo from himself to Mr. Gandi, and sent it to Mr. Gandi. The memorandum as drafted seemed to indicate that Mr. Gandi should consider improvements in providing IT support to the YMSO. Copies of the memorandum, which was dated January 18, 1994, were sent to five SAIC employees and three DOE employees, who were located at the Yucca Mountain Site. Approximately two weeks later, Mr. Harold Brocklesby, a SAIC manager who received a copy of the memo, told Mr. Hardwick that his duties under the SAIC subcontract were over. On May 23, 1994, KenRob was awarded a contract by the DOE's Office of Civilian Radioactive Waste Management (OCRWM) to provide communications network and computer facilities support at Las Vegas, Nevada and Washington, D.C. locations. Mr. Hardwick was not offered any position under that contract. On July 13, 1994, KenRob issued a letter to Mr. Hardwick advising him that his employment would be terminated in 30 days. His employment was terminated on August 12, 1994.

On August 30, 1994, Mr. Hardwick submitted a letter to the DOE's Nevada Operations Office claiming retaliation for a protected disclosure. He alleged that facts disclosed in the January 18 memo constituted a protected disclosure, and that his removal from the SAIC subcontract, the failure of KenRob to offer him a position under the OCRWM contract and his ultimate termination all constituted retaliation for the disclosure. He submitted a formal Complaint to the Office of Contractor Employee Protection on December 23, 1994 raising the same allegations. The matter was investigated by the DOE's Office of the Assistant Inspector General for Inspections (OIG), which issued a Report of Inquiry and Recommendations on February 19, 1999. That report found that Mr. Hardwick made a protected disclosure under 10 C.F.R. Part 708, and that the disclosure was a contributing factor to his removal from the SAIC contract, and to his failure to be appointed to any position under the OCRWM contract. The OIG Report further found that SAIC and KenRob failed to provide clear and convincing evidence that these personnel actions would have been taken in the absence of the protected disclosure.

On March 3, 1999, KenRob submitted a request for a hearing under 10 C.F.R. § 708.9 to the Office of Contractor Employee Protection. That Office transmitted the request to OHA on March 8, 1999, and I was appointed hearing officer in this case on March 10, 1999. SAIC submitted its request to participate in the hearing on March 18, 1999.

Hardwick, SAIC, and KenRob filed pre-hearing briefs on May 10, 1999.(2) SAIC and KenRob filed Motions for Summary Judgment on May 25, 1999 and Hardwick filed his opposition to those Motions on May 28, 1999. I issued a letter on May 28, 1999, denying the Motions. On June 1, 1999, the contractors took Mr. Hardwick's deposition. On June 8, 1999, I held the hearing in this case at the DOE's Las Vegas, Nevada Office. I terminated the hearing after all evidence concerning the nature of Mr. Hardwick's disclosure had been received. I announced to the parties at that time that I believed Mr. Hardwick had failed to show by a preponderance of evidence that the disclosure he made in the January 18, 1994 memo was protected under 10 C.F.R. Part 708. Accordingly, I saw no need to proceed with a presentation of evidence concerning whether SAIC and KenRob would have terminated Mr. Hardwick in the absence of

the disclosure. I told the parties that I would provide a detailed explanation of the reasons for my conclusions in an Initial Agency Decision. I indicated to Mr. Hardwick that he would be able to appeal to the Director of the Office of Hearings and Appeals my determination that he had not made a protected disclosure. 10 C.F.R. §§ 708.30, 708.32, 708.33.

II. Legal Standards Governing This Case: The Complainant's Burden

It is the burden of a complainant under Part 708 to establish “by a preponderance of the evidence that he or she made a disclosure. . . 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 (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); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

The Contractor Employee Protection Program does not provide protection to employees for every disclosure. Part 708 enumerates the specific types of disclosures for which employment retaliation is prohibited. Generally, protected disclosures are those which reveal information concerning gross waste, fraud, abuse, gross mismanagement, substantial violations of law and substantial dangers to employees or to public health and safety. 10 C.F.R. § 708.5. Given the facts of the present case, Hardwick must, at the outset, demonstrate that he disclosed information to DOE, to SAIC or to KenRob which indicates gross waste, mismanagement, fraud or abuse. (3)

III. Evidence Regarding the Disclosure

A. Documentary Evidence and Discovery

Mr. Hardwick contends that he made a protected disclosure in a written document dated January 18, 1994 (OIG Exhibit 28). As stated above, that document is a memorandum from Winfred A. Wilson to John Gandhi. Mr. Hardwick contends that he drafted most of this memorandum.

The memorandum describes the status of computer support services at the YMSO. It states that the primary area of concern is the coordination and communication of the Las Vegas computer support staff and the computer support staff at the YMSO. The memorandum contends that in several instances the YMSO did not receive prompt technical assistance because the Las Vegas support staff was busy. The memorandum alleges employees had experienced a “significant degradation of service” of the Local Area Network (LAN) at YMSO. The memorandum goes on to assert that the field operations have a lower priority than Las Vegas operations. In addition, the memorandum states that “[a]n additional concern is the lack of documentation and policies and procedures relative to the IS (information systems) operations and configurations at the YMSO.”

These disclosures do not obviously fall within in any of the areas of protected disclosures set forth in 10 C.F.R. § 708.5. The facts alleged in the memorandum do not anywhere suggest, nor can they be read to indicate, a substantial violation of law, a substantial and specific danger to employees or to public health or safety, any fraud, gross waste of funds, abuse of authority, or mismanagement.(4) I do believe that on its face this memorandum raises areas in which Mr. Wilson believed that there was some room for improvement by Mr. Gandhi in overseeing the provision of IT services.

In order to ensure that I was construing the memorandum properly, I consulted other evidence in the record of this proceeding. For example, I looked at the Complaint that Mr. Hardwick filed with Sara

Rhoades of the DOE's Nevada Operations Office. In that document, dated August 30, 1994, Mr. Hardwick stated that he had "identified several work areas that were not being done, even though SAIC had a contract to provide those services and were supposedly providing them." He further alleges that the January 18 memorandum "identified and reported Waste Fraud and Abuse by a major DOE/YMP contractor team. . . ." However, beyond these rather broad charges, this Complaint document provides no additional insight into the nature of why DOE's or SAIC's failure to provide better IT services at YMSO constituted waste, fraud, abuse or mismanagement. He did not explain how the facts described in the memo supported his claim that SAIC had committed gross waste, fraud, or mismanagement, assuming that it had in fact failed to provide those services.

I also reviewed the March 11, 1997 statement made by Mr. Hardwick to a DOE/IG investigator during the investigation phase of this proceeding. In that interview Mr. Hardwick described his January meeting with Mr. Gandi as follows. "I explained to him my belief that SAIC was not providing support that they were required to under the terms of their contract. I pointed out that SAIC was not providing necessary equipment and staffing to remedy a problem we were having with the network bogging down and not meeting user expectations or needs. I also pointed out that we were not receiving planning support for anticipated expansion of the network in new facilities." Thus, in the interview, Mr. Hardwick focused on the failure to provide adequate IT service at YMSO, and did not explicitly explain why he believed the failure to provide these services was covered by Part 708, or state the nature of the improper contractor activity. He seemed to be alleging non- performance of the contract, although his assertions could be construed to cover mismanagement issues. In any event, he did not explain to the investigator how and why the alleged failure to provide the services amounted to mismanagement, gross waste, abuse or fraud.

Thus, after reviewing all of the preliminary documents regarding the substance of the alleged protected disclosure, the January 18 memorandum, Mr. Hardwick's Part 708 Complaint filed with the DOE, and his statement to the OIG investigator, I still could not determine how the disclosed inadequate computer support constituted a revelation of gross waste, mismanagement, fraud, abuse or any other criterion mentioned in Section 708.5. The memorandum did not on its face point to any of the regulatory criteria, and none of the related documents clarified in what way SAIC's actions could have amounted to gross waste, fraud, abuse or mismanagement.

Accordingly, during the pre-hearing phase of this proceeding, I indicated to Mr. Hardwick that it was important that he provide me with additional information to support his position that the facts concerning inadequate computer support disclosed the types of concerns set forth in Section 708.5, and therefore rise to the level of a protected disclosure. I specifically discussed this issue in a May 17 letter, and during our May 19 prehearing telephone conference. I again referred to this issue in a letter of May 20.

In order to clarify whether the disclosure was protected, I allowed the contractors, SAIC and KenRob, to file Motions for Summary Judgment and briefs on whether the allegations concerning the improvements needed in IT support, as set out in the January 18 memorandum, qualified as protected disclosures under Part 708. Upon receiving those Motions, I sent a letter to Mr. Hardwick's attorney asking Mr. Hardwick to supply specific information concerning the reason he believed that the disclosed facts demonstrated serious mismanagement, gross waste, fraud or abuse. I asked him to indicate which statements in the January 18 memorandum Mr. Hardwick believed in good faith revealed serious mismanagement, gross waste or fraud. I asked Mr. Hardwick to indicate exactly what he in good faith thought the mismanagement, gross waste or fraud was. I stated that vague, general assertions that a contractor was not performing the work it was hired to do are not sufficiently specific to permit an analysis of whether Mr. Hardwick in good faith believed the information disclosed revealed gross mismanagement, gross waste, abuse or fraud. I stated that Mr. Hardwick must include what work he believed the contractor was improperly failing to perform and why this alleged failure constituted serious mismanagement, gross waste or fraud. Letter of May 26, 1999.

In a response to the Motion, Mr. Hardwick filed an affidavit describing in more detail the level of computer support at YMSO, and laying out what he believed the IT problems at the YMSO were. He

cited that the necessary equipment and personnel were not being provided by SAIC, and that repairs “took weeks.” He stated the SAIC’s project manager, Harold Brocklesby, refused to provide the additional personnel and support. He alleged in the affidavit that Brocklesby made a “conscious decision” to “allow the IT contract at the YMSO to go unperformed.” Hardwick indicated that prior to drafting the memorandum he had a meeting with Mr. Wilson and Mr. Gandi to discuss the IT problems at YMSO. According to the Complainant, the additional allegations regarding Mr. Brocklesby’s purported failure to perform the contract did not appear in the memo because Mr. Hardwick says he wrote it in a “non-threatening” manner. He indicated that he did not wish to provoke SAIC.

Mr. Hardwick did not provide an adequate response to my question concerning why he believes the information he revealed constitutes a protected disclosure. Nevertheless, based on the minimal information he supplied, and construing that information in a manner most favorable to the Complainant, as I am required to do in connection with a Motion for Summary Judgement, I denied the Motions, and I allowed him to proceed to the hearing.

In a letter of May 28, I noted the following evidentiary issues that I believed Mr. Hardwick should be permitted to develop at the hearing:

1. Whether in his discussions with Winfred Wilson and John Gandi prior to the drafting of Exhibit 28, Mr. Hardwick disclosed information that Mr. Hardwick in good faith believed revealed contract fraud or gross mismanagement. The testimony of Mr. Hardwick, Mr. Wilson and Mr. Gandi is obviously critical to that contention.
2. Mr. Hardwick has contended that operations at the Yucca Mountain project were being “derailed” as a result of the failure of Science Applications International Corporation (SAIC) to properly allocate computer resources. This seems to be a claim in the nature of gross mismanagement. Mr. Hardwick will be permitted to testify as to what the ill-effects of the alleged mismanagement were, what he thought the seriousness of this problem was, and exactly how it affected YMSO operations. Mr. Hardwick must show that his beliefs on this matter were in good faith. It will therefore be useful to test Mr. Hardwick’s good faith in this disclosure and consider what other knowledgeable witnesses thought Mr. Hardwick believed in this regard.
3. With respect to his claim that SAIC was committing (contract) fraud, Mr. Hardwick should also be permitted to testify about what he thought the fraud was and how he thought it was being committed. We should also have testimony concerning the good faith of his beliefs on this issue.

Letter of May 28, 1999.

Further, in order to advance the development of the issue of whether the information that Mr. Hardwick revealed rises to the level of a protected disclosure, I permitted the contractors to take the deposition of Mr. Hardwick. At the deposition, the contractors were to specifically question Mr. Hardwick about the basis for his claim that the facts he revealed disclosed serious mismanagement, gross waste, fraud and abuse. I believed that if I and all parties were able to review the transcript of the deposition prior to the hearing, we would all be better able to understand the nature of Mr. Hardwick’s contentions.

The contractors’ attorneys questioned Mr. Hardwick very closely. They asked him about what if any fraud he believed SAIC committed, and what if any services SAIC did not provide but was paid for. Mr. Hardwick indicated that he did not have any knowledge of SAIC’s billing practices. He simply believed that since the firm was hired to provide IT support and since, in his view, it was not providing full support, that this constituted contract fraud. Transcript of June 1, 1999 Deposition (Tr.) at 43-47. Mr. Hardwick reiterated his position that by failing to provide what he considered to be appropriate computer support at the YMSO, Mr. Brocklesby engaged in mismanagement, and his use of “his management authority to block resources to be provided to the Nevada Test Site” constituted a form of abuse. Tr. 48-49. Mr. Hardwick could point to no specific waste that was committed by SAIC under the contract, although he

raised some rather broad generalizations on this point. Tr. at 49.

Mr. Hardwick raised a new claim during the deposition. In various formulations, he contended that SAIC's failure to provide adequate IT support jeopardized the entire Yucca Mountain project. He contended that because Mr. Brocklesby was not providing appropriate support at the Nevada Test Site "the future of the staff management and the documents records center and all the other activity at the Test Site were in jeopardy unless we could get Harold [Brocklesby] to do something." Tr. at 115. Mr. Hardwick stated that he told Mr. Gandhi that he feared for the "future ability of the Test Site to go forward and continue its characterization work. . . and that if we didn't document these issues as they came up. . . it could have to do with licensing, it could have to do with the integrity of the core samples, the implications could be far reaching." Tr. at 115-116.

Mr. Hardwick also claimed that he had indicated to Mr. Gandhi that "SAIC was charging for support at the test site and you're not getting any support." Tr. at 120. He made the claim that "the entire \$14.5 million SAIC contract was wasted and endangered" as a result of what he saw at the Yucca Mountain Site. Tr. at 190. He explained that "the licensing support system is the critical piece and the sample management facility data that was being collected without a license, you couldn't open a repository and you had to have some sort of licensing support system when you made your application at the NRC." Tr. at 191. Overall, Mr. Hardwick believed that "Brocklesby wouldn't provide any support, . . . wouldn't provide the staff, wouldn't provide the equipment, . . . that it was derailing the project, it was not able to go forward." Tr. at 267.

The information provided at the deposition does little to advance Mr. Hardwick's position that he had revealed to Mr. Gandhi information which disclosed gross waste, fraud, abuse, or serious mismanagement. His support for his position amounted to no more than broad generalizations, and highly speculative assertions. At the deposition Mr. Hardwick did not provide the underlying specifics to support his claims.

In sum, as of the date of the hearing, Mr. Hardwick had made numerous, general claims, but had yet to state with specificity how the failure to provide what he believed to be the correct level of support at YMSO would result in gross waste, fraud, abuse, or serious mismanagement. In fact, he admitted at the deposition that he did not actually have any information from which he could reasonably conclude that contract fraud had occurred. Tr. at 42- 47. Overall, during the deposition, he had pointed to no specific instances of failure to provide computer support services that resulted in gross waste, fraud, abuse, or serious mismanagement.

B. The June 8, 1999 Hearing(5)

Four witnesses testified at the hearing: (i) Mr. Hardwick, (ii) Mary Ann Jones, a DOE computer specialist and Mr. Gandhi's deputy, (iii) Mr. Gandhi, and (iv) Mr. Wilson.

(1) Mr. Hardwick's Testimony

At the hearing Mr. Hardwick admitted that the January 18 memorandum did not on its face allege any gross waste, fraud, abuse or gross mismanagement. He further stated that he did not have any specific knowledge of any contract fraud related to the SAIC contract to provide IT support. He acknowledged that he had no information that would have led him to believe that SAIC was being paid for work that it did not do, other than his previously stated general assertion that SAIC was supposed to provide IT support to the YMSO, and he believed that its priorities were directed to the Las Vegas Office.

With respect to the January 18 memo, he claimed that he intentionally softened his assertions, believing that this was a more appropriate way of achieving his goal of obtaining more IT support for YMSO. However, he maintained that in the meeting with John Gandhi prior to the drafting of the memo he specifically voiced all of his underlying concerns regarding waste, fraud, abuse and mismanagement. He stated that Mr. Gandhi's testimony would support this assertion. He said that he did not believe that Ms.

Jones was present at the meeting.

At the hearing Mr. Hardwick produced two new documents. The first, dated May 17, 1994, was a memorandum to Mr. Wilson from Mr. Gandhi, which, according to Mr. Hardwick, outlines some steps that SAIC took to address the “escalating need for services” at YMSO. Mr. Hardwick contended that the improvements noted in the memorandum reflect the full extent of the discussions that he had with Mr. Gandhi at their January meeting and support his contention the discussions covered areas such as mismanagement, gross waste, fraud and abuse.

The May 17 memorandum refers to upgrading the communications line from a 56 Kb line to a 256Kb line, which would allow for an increased capacity of telecommunications traffic and improved user response time. It describes the creation of a Novell-based LAN test bed for testing by selected YMSO members. It cites the construction of a new communications equipment room with new power conditioning equipment. It mentions the installation of new laser jet printers. The memorandum also announces plans to assign additional personnel at the YMSO and implementation of a “Hotline” service. Finally, it refers to the publication of SAIC procedures, policies and work orders that the Information Systems Department will adhere to in supporting the YMSO. These policies related to logging in and tracking of “Hotline” calls, as well as developing appropriate statistics about the nature of the calls. Mr. Hardwick discussed these items in some detail, testified that the implementation of these improvements came about as a result of the January 18 memorandum, and asserted that the May 17 memo supports his overall claim that he discussed his concerns regarding serious mismanagement, gross waste, fraud and abuse with Mr. Gandhi at the meeting prior to the drafting of that memorandum.

The other document that Mr. Hardwick introduced was a memorandum dated August 30, 1994, in which Ms. Rhoades described a conversation with Mr. Hardwick. She asked him to clarify for the record what areas SAIC was not performing and “if there were specific areas of concern, i.e., fraud, waste, abuse, safety, health, security, etc.” She indicated that according to Mr. Hardwick, “the areas of concern dealt with not adhering to policy and procedures for the operation of the Information Systems Program at YMT (disaster plan, daily backup of information, communication within the organization, no backup of files, etc.)” Mr. Hardwick contended that this document further supports his position that the facts he disclosed in the January memo raised issues of serious mismanagement, gross waste, fraud and abuse.

(2) Ms. Jones’ Testimony

Ms. Jones’ testimony did not support Mr. Hardwick. (6) She did not believe that there was a significant IT problem at the YMSO. She stated that when additional computer support was necessary at YMSO, she could be out at the site in one and one-half hours from her Las Vegas location, and that she frequently went to the YMSO to assist in computer repairs and maintenance. She indicated that she was usually at the site several times a week in any event, and could provide needed assistance at that time. She indicated that some of the items referred to in the May 17 memo were discussed at the January meeting with Mr. Gandhi and Mr. Hardwick. However, she did not believe that any of these items reflected gross waste, fraud, abuse or mismanagement. She testified that she was responsible for reviewing SAIC’s requests for payment under the contract, and that she never had any reason to believe that SAIC requested or received payment for services that it did not perform.

She did not believe that in discussing possible areas of IT improvement at the January meeting, Mr. Hardwick intended to disclose concerns of waste, fraud, abuse or mismanagement. She believed that during 1993, when the YMSO operation was beginning to expand significantly, additional IT funds were needed as a rather routine matter to support the increased level of operation at the site. She testified that the purpose of the January 18 memorandum was to provide a document that would support a request from Mr. Wilson to the DOE for additional funding.

(3) Mr. Gandhi’s Testimony

Mr. Gandhi's testimony was similar to that of Ms. Jones, although he expressed a stronger belief that additional IT services were necessary at the YMSO during the relevant period. He agreed with Mr. Hardwick that SAIC did not provide some IT services that would have been useful. He testified that he thought that obtaining additional support was a "serious" issue. However, he stated that he did not see the January 18 memo as "negative." He saw it as pointing out areas which could use some improvement. Like Ms. Jones, he testified that YMSO was an expanding operation in 1993 and 1994, and it was a matter of obtaining additional funding for IT services at that location. He believed that the purpose of the January 18 memorandum was to support a request for more funds. He did not vividly recall the May 17 memorandum, although he testified that some of the items included in that memo might well have been discussed at their meeting. He testified that he did not believe that SAIC had committed any gross waste, fraud, abuse or mismanagement, and that he did not believe that Mr. Hardwick intended to reveal any acts of that nature in the January 1994 meeting.

(4) Mr. Wilson's Testimony

Mr. Wilson confirmed the prior testimony that he did not participate in the discussion between Mr. Hardwick, Ms. Jones and Mr. Gandhi. (7) According to Mr. Wilson, after that discussion took place, a conference call was placed to inform him of the discussion and ask his opinion as to how to proceed. Mr. Wilson stated that he recommended that Mr. Hardwick draft a memorandum reflecting his concerns about IT services.

Mr. Wilson agreed with Mr. Hardwick that more IT support was needed at YMSO, and believed that YMSO was given a lower priority than the Las Vegas Office in the provision of IT support. He stated that the effect of this lower priority was that it "sometimes it took a day to get people" to come out to YMSO and make necessary repairs. He attributed this to limited funds, and thought that there should be additional funding provided for YMSO. Like Ms. Jones and Mr. Gandhi, he believed that the purpose of the January 18 memo was to convince the DOE to provide this additional funding.

Mr. Wilson also commented specifically on the portion of the January 18 memo citing the "lack of documentation and policies and procedures related to the IT systems operations and configurations at the YMSO." He testified that he was the DOE employee who would have had an interest in such documentation, but that he did not see this lack of documentation as a serious concern, or one that would have any important implications for the YMSO project. He stated that as a manager, he simply would have liked to be able to point to a complete set of policy documents. Overall, it was his testimony that SAIC had not committed any gross waste, fraud, abuse or mismanagement, and he did not believe that the January memorandum intended to convey acts of that nature.

IV. Analysis

As stated above, the Part 708 regulations in relevant part provide that a "protected disclosure" is one which reveals "fraud, gross mismanagement, gross waste of funds, or abuse of authority." § 708.5(a). Ordinarily, if a complainant states that he has made a protected disclosure in written form, I would look to the four corners of that document to determine whether it confirms that he revealed information raising a concern of that nature.

In the present case, the relevant document, the January 18 memorandum, does not specifically allege any action from which I can conclude that Mr. Hardwick revealed gross waste, fraud, abuse or mismanagement. Although he stated in a number of documents submitted in this case that he made disclosures of that nature, at no time did he ever describe in sufficient detail how the alleged deficiencies he reported, i.e., "problem of priorities" or "lack of support" specifically affected YMSO operations and caused concerns that are covered by Section 708.5 (8) Nor had he specified a particular safety hazard, violation of law or fraudulent incident. Up to the point of the hearing itself, Mr. Hardwick had not made what I considered to be a well-articulated statement of how the information he disclosed to Mr. Gandhi fell

within the coverage of that section. This caused me to suspect that he did not in good faith believe that his disclosure was covered by Part 708. Even though he had yet to advance a rationale for why his disclosure was protected, in order to be scrupulously fair to Mr. Hardwick, I believed that it was important that he be given the opportunity to develop his case further through the presentation of witnesses at a hearing.

I will therefore consider whether any testimony at the hearing supports his view that he made a protected disclosure. At the hearing, Mr. Hardwick himself could point to no gross waste of funds, or fraud that arose as a result of the lesser prioritization of IT services to YMSO. He did not provide the type of testimony I referred to in my May 26 letter, noted above, in which I drew particular attention to the parties to the fact that I was seeking to hear about his beliefs and the actual and specific ill-effects of the alleged failure to provide IT services. (9)

Apart from his own repeated assertions as to his belief, which have been discussed above, there is virtually no support for his position. I cannot find that the belatedly introduced May 17 memorandum from Mr. Gandhi to Mr. Wilson establishes that Mr. Hardwick disclosed acts that raised concerns regarding gross waste, fraud, mismanagement and abuse at the January meeting. This document talks of improvements that had been made, and Ms. Jones did confirm that some of the improvements were previously discussed at the January meeting. These areas included upgrading various computer-related systems. The witnesses generally believed that such additional services would be useful.

I cannot conclude, however, that the improvements mentioned, either individually or in the aggregate, suggest that there were concerns rising to the level of serious mismanagement, gross waste, fraud or abuse. Rather, they appear to be areas for possible improvement, subjects which employees and managers regularly discuss in order adjust resource allocation and to establish appropriate work priorities. Employees and managers may well disagree as to how and when to implement change, as Mr. Hardwick and Mr. Brocklesby purportedly did, but this, too, is part of the normal operational discussion and give-and-take between employees and management. Ultimately, decisions on these types of issues are a matter of management discretion. [Ronny Escamilla](#), 26 DOE ¶ 87,508 (1996). Such discussions do not rise to the level of protected disclosures.

In sum, I believe that the May 17 memo referred to areas in which improvements and upgrades were made. I can accept that Mr. Hardwick, Ms. Jones and Mr. Gandhi previously discussed these areas as ones in which IT enhancements could be useful, and that these areas represented priorities for improvement. However, the fact that such discussions of legitimate areas for improvement took place does not mean that Mr. Hardwick had made a disclosure that the DOE or SAIC engaged in mismanagement, gross waste, fraud, or abuse.

My conclusions about the nature of the May 17 memorandum and the January discussion are supported by the testimony of the witnesses Ms. Jones, Mr. Gandhi and Mr. Wilson. Each individual was specifically asked whether he or she believed that SAIC's provision of IT services at YMSO in the relevant period amounted to gross waste, fraud, abuse or mismanagement. All the witnesses unequivocally stated that they did not believe that SAIC's oversight of the project raised concerns of that nature. Although they had an opportunity to do so, none of these three witnesses described any specific instance in which failure to provide IT services resulted in any significant problems for the YMSO. For example, no witness provided any support for Mr. Hardwick's broad, speculative claim in his deposition that "it [lack of IT services] could have to do with the integrity of the core samples," or that "all other activity at the test site [was] in jeopardy." Tr. at 115. Although these were among the most serious possible consequences cited by Mr. Hardwick, the witnesses provided no support for believing that effects of that nature were at all likely at the time, or even suggested by anyone. I simply cannot accept that Mr. Hardwick in good faith believed that the level of IT service provided at YMSO could jeopardize the entire activity at the site.

Further, all three witnesses firmly stated that they believed that in their January discussions and the January 18 memo, Mr. Hardwick did not intend to raise concerns regarding gross waste, fraud, abuse or mismanagement. They believed that the focus of their discussion was how to achieve an increase in

funding for IT at YMSO.

I also note that some testimony as to the seriousness of the IT problem at YMSO does not support Mr. Hardwick's contentions. Mr. Wilson indicated that computer repairs might take a day to accomplish. Ms. Jones testified that since she frequently visited the YMSO site, there was no repair backlog. Based on this testimony, Mr. Hardwick's assertion in his May 27 affidavit that "repairs took weeks" seems exaggerated, and causes me to question the good faith and overall truthfulness of his assertions.

Thus, Mr. Hardwick has presented no substantial evidence to support his position that the information he disclosed raised concerns that were protected under Part 708. Neither the documentary evidence nor the testimony of witnesses supports this claim. Given this fact, I expected Mr. Hardwick to explain and support how and why he in good faith held a belief that was so radically different from the testimonial evidence of the three other witnesses at the hearing. He did not provide such an explanation, although I alerted him to the opportunity to do so at the hearing. (10)

Finally, as a matter of law, I cannot conclude that the information disclosed here, that some reprioritization of the IT support at YMSO was necessary, rises to the level of a protected disclosure. I find that there is information to support that the Complainant genuinely, and with some legitimacy, believed that there were areas in which improvement was necessary. However, with nothing more, this certainly does not rise to the level of mismanagement, much less serious or gross mismanagement. (11) Mismanagement does not include a difference of opinion on decisions that are debatable. The mismanagement that is covered by Part 708 involves action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. See *Carolyn v. Dep't of the Interior*, 63 M.S.P.B. 684 (1994). The Complainant here cannot, through broad, speculative and unsupported assertions about possible ill-effects of limited IT services, bootstrap his discussion regarding IT improvements into a protected disclosure of serious mismanagement. There is no indication of mismanagement of any kind here.

Based on all the evidence, I believe that there were some differing views on the level of service necessary for the IT systems at the YMSO. Some areas needing improvement were identified and agreed upon. Several of these improvements were implemented. However, the fact that SAIC's prioritization scheme was subject to improvement or reevaluation does not in my view mean that SAIC was responsible for mismanagement of any kind. The speed at which the increased IT services could be implemented could well have been subject to budgetary constraints or other limitations. Informing DOE officials that SAIC should provide additional IT services at YMSO and that some IT services were not running as smoothly as Mr. Hardwick believed they should, does not in my view constitute a disclosure of gross waste, fraud, abuse, or serious mismanagement, as contemplated by the Deputy Secretary in *Mehta and Holsinger*.

V. CONCLUSION

I have therefore concluded that Mr. Hardwick has failed to show by a preponderance of evidence that he revealed information that he in good faith believed disclosed gross waste, fraud, abuse or serious mismanagement. Accordingly, his request for relief under 10 C.F.R. Part 708 will be denied.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Roger Hardwick 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 15 days of its receipt, a Notice of Appeal is filed with the OHA Director, requesting review of the initial agency decision.

Virginia A. Lipton

Hearing Officer

Office of Hearings and Appeals

Date: July 6, 1999

(1) On March 15, 1999, the DOE published as an Interim Final Rule a revised regulation governing the Contractor Employee Protection Program. 64 Fed. Reg. 12862 (March 15, 1999). It became effective on April 14, 1999. Section 708.8 of the new rule provides that the new procedures “apply prospectively in any complaint proceeding pending on the effective date of this part.” Thus, the Interim Final Rule is generally applicable to the instant case.

(2) In their briefs the contractors argued that Mr. Hardwick’s Complaint was not filed with the appropriate DOE Field Office within the 60 day regulatory filing period set forth in the prior regulations. 10 C.F.R. §708.6. They also raised several other procedural defects in the Complaint. In view of my ultimate conclusion that Mr. Hardwick has not shown that he made a protected disclosure, I will not rule on the merits of the procedural challenges.

(3) If Hardwick meets this burden, he must next prove that his disclosure was a contributing factor to his being discharged. 10 C.F.R. § 708.29; see [Helen Gaidine Oglesbee](#), 24 DOE ¶ 87,507 (1994). If Hardwick meets the regulatory burden as set forth above, the burden then shifts to SAIC and KenRob. The regulations require the contractor to prove by “clear and convincing” evidence that it would have taken the same action against the complainant even if he had not made a protected disclosure. 10 C.F.R. § 708.29. In view of the fact that I find no protected disclosure in this case, I will give these additional requirements no further consideration.

(4) The Interim Rule covers disclosures of “gross mismanagement,” whereas the prior regulation referred to a disclosure involving “mismanagement.” Mr. Hardwick’s attorney takes the position that Mr. Hardwick need only show that there was “mismanagement,” and not “gross mismanagement.” He contends that it would be unfair to retroactively apply the new Interim Rule, which he claims adopts a more rigorous standard. I do not agree with this contention. I indicated during our May 19 prehearing telephone conference and in my May 20 letter to all parties that the Interim Rule did not adopt a totally new standard with respect to “mismanagement.” I stated that under well- established case law, the standard requires that the alleged mismanagement involve serious matters, and not just disagreements between managers and employees. [Holsinger v. K-Ray, Inc.](#), 26 DOE ¶ 87,506 (1996)(Holsinger); [Mehta v. Universities Research Assoc.](#), 24 DOE ¶ 87,514 (1995) (Mehta). Accordingly, I believe that I must consider whether allegations of mismanagement raised by Mr. Hardwick rise to the higher level set forth by the Deputy Secretary in Mehta. Since the Deputy Secretary did not actually use the term “gross mismanagement,” in this Decision, I will refer to that level as “serious mismanagement.”

(5) In a letter of June 15, I informed all the parties that I had learned that the court reporter’s car was burglarized, and all the tapes made of the hearing were stolen. These tapes recorded testimony, comments of counsel and my comments at the hearing. No transcript of the hearing exists, nor can one be made. Accordingly, as I stated in my June 15 letter, my discussion of the hearing in this Initial Agency Decision will be based on my best recollection of the testimony. I have also referred to some notes that I made during the hearing.

(6) Mr. Hardwick testified that Ms. Jones was not present at the January meeting. Ms. Jones had no doubt that she was present. Given Ms. Jones’ detailed and specific recollections of the discussion that took place, I believe that she was present at the meeting, and I found her testimony to be wholly credible.

(7) Mr. Wilson did not believe that the May 17 memo was written as a reply to the January 18 memo. Since he did not participate in the discussion that took place between Mr. Gandhi, Ms. Jones and Mr. Hardwick, he could not testify as to whether Mr. Hardwick had raised any of the points in the May 17 memo during the January discussion.

(8)See e.g., Complaint, Opposition to Motion for Summary Judgment and Transcript of June 1, 1999 deposition.

(9)I recognize that the current regulations require that a complainant establish that he disclosed information that he “reasonably and in good faith” reveals gross waste, fraud, abuse or gross mismanagement, whereas the prior regulation required only that the employee disclose information that he “in good faith” believes evidences those types of concerns. 10 C.F.R. § 708.5. Reasonability is assessed objectively. The employee must show that the matter described was one that a reasonable person in his position with his level of experience would believe evidenced gross waste, fraud, abuse or gross mismanagement. *Berkley v. Dept. of the Army*, 71 M.S.P.R. 341, 347 (1996). A good faith standard is a subjective one, referring to what the individual himself honestly believed. In the present case, the Complainant argues that the more stringent standard of the Interim Final Rule, requiring a reasonable belief, should not be used. He asserts that this would be a retroactive application of the stricter standard and would be unfair. He asks me to judge his disclosure using only the good faith standard of the prior regulation. Even if I do so, I cannot find that Mr. Hardwick has met his burden of proof.

(10)Each time a witness stated that he or she did not believe that Mr. Hardwick intended to raise concerns of gross waste, fraud, abuse or serious mismanagement, I indicated to Mr. Hardwick that he would have an opportunity to challenge that testimony. At the end of the hearing I asked Mr. Hardwick specifically if he wished to enter any further testimony into the record. He declined to do so.

(11)In his testimony at the deposition and at the hearing, Mr. Hardwick virtually admitted that he had no support whatsoever for his claims of gross waste, and fraud. E.g., Tr. at 43-49. His claim of abuse is frivolous on its face. The only claim that might have some validity is that of mismanagement.