# Case No. VWA-0034

September 27, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Frank E. Isbill

Date of Filing: March 29, 1999

Case Number: VWA-0034

This Decision concerns a whistleblower complaint filed by Frank E. Isbill (the complainant), a former employee of NCI Communications, Inc. (the contractor) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. For almost two years, the complainant was employed by the contractor at DOE's Oak Ridge, Tennessee site (Oak Ridge). The complainant alleges that while employed by the contractor, he made protected disclosures concerning a potential abuse of authority by a DOE employee whose wife worked for a rival contractor.(1) The complainant contends that his subsequent demotion and lay off were retaliatory acts, but the contractor disagrees. (2) In this Decision, I find that the complainant made protected disclosures and that these contributed to the lay off and the demotion. Although I find that the complainant would have been laid off despite his disclosures, I also find that the contractor failed to prove clearly and convincingly that it would have demoted him even had he not made disclosures. I therefore find that the complainant prevailed on that issue and order appropriate relief accordingly.

# 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 they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequent 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 DOE recently issued revised Part 708 regulations that were published in the Federal Register on March 15, 1999. See 64 Fed. Reg. 12,862 (March 15, 1999) and by their terms, apply to all cases which were pending as of the date they became effective, April 14, 1999, including the instant case. 10 C.F.R. § 708.8. The regulations provide, in pertinent part, that a DOE contractor may not retaliate 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 to evidence, among other things, an abuse of authority. See 10 C.F.R. §§ 708.5(a)(1) and (3).(3) Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower complaint with the

DOE. The regulations entitle these employees to independent fact-finding and a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer.

### B. Factual Background

In 1987, the complainant began working at the Oak Ridge site doing abstracting and indexing tasks. In July 1995, the contractor took over the information technology contract at that site and hired the complainant. During his employment with the contractor, the complainant made alleged protected disclosures concerning the potential abuse of authority by a DOE task monitor whose wife worked for another contractor performing the same work. The complainant contends that his disclosures were contributing factors to his demotion and eventual lay off.

### C. Procedural History

The complainant filed his whistleblower complaint on March 17, 1997, which he amended following his lay off about two months later. The Office of Inspector General (OIG) conducted an investigation into the allegations contained in the complaint and issued a Report of Inquiry and Recommendations on March 2, 1999. The OIG concluded that the complainant was not entitled to any relief.(4)

On March 22, 1999, the complainant submitted his request for a hearing under 10 C.F.R. § 708.9 (1998) to the OIG. The OIG transmitted that request to OHA on March 29, 1999 and I was appointed Hearing Officer in this case on March 30, 1999. On June 16, 1999, I held the hearing in this case in Oak Ridge, Tennessee. The complainant testified on his own behalf and he called as witnesses two of his supervisors, the contractor's Program Director Hunter Foreman and the contractor's Deputy Program Director Shirley Hembree. The complainant also called the following DOE employees: the task monitor, the Information Security Specialist Russ Morel, and Ken Williams. The contractor called as witnesses DOE supervisory information management specialist Judy Gilmore and DOE Contracting Officer's Representative Brian Hitson. I permitted the parties to submit post-hearing briefs. The complainant submitted the latter of these briefs on August 5, 1999. With that filing, I closed the record in this case. (5)

## 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.

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 10 C.F.R. § 708.5, and that such act was a contributing factor in a retaliatory action taken against the complainant. 10 C.F.R. § 708.29. 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).

In the present case, the complainant must make two showings. First, he must demonstrate that he disclosed information to an official of DOE or to the contractor that he believed in good faith evidenced one of the items enumerated in 10 C.F.R. § 708.5. If the complainant meets this burden, he must next demonstrate that his disclosure was a contributing factor to his termination. 10 C.F.R. § 708.29; see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994) (Oglesbee).

If the complainant meets his burden as set forth above, the burden then shifts to the contractor. The

regulations require the contractor to prove by "clear and convincing" evidence that the contractor would have taken the retaliatory action even if the complainant had not made the disclosure. "Clear and convincing" evidence is a much more stringent standard than "a preponderance of the evidence"; 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

The parties contest many of the facts in this case. My findings of fact set forth below are based on (1) the entire record developed in the case, including the OIG investigative file, all documents submitted by the parties and the transcript of the June 16, 1999 hearing and (2) my observations of the witnesses' demeanor at the hearing and my determinations regarding those witnesses' credibility.

After reviewing the entire record in this case, and considering the credibility of the witnesses who testified at the hearing, I conclude that the complainant has shown by a preponderance of evidence that he disclosed information that he believed in good faith evidenced an abuse of authority. I also find that these disclosures contributed to retaliatory actions taken by the contractor. I further conclude, however, that the contractor has proven by clear and convincing evidence that it would have laid off the complainant even if the complainant had not made protected disclosures. I also find that the contractor has failed to show by clear and convincing evidence that it would have removed the complainant's supervisory duties had he not made disclosures. Accordingly, I find that the complainant is entitled to relief under 10 C.F.R. Part 708.

## A. Alleged Disclosures

The hearing focused on the complainant's disclosures that the DOE employee who was the task monitor for the complainant's abstracting and indexing (A and I) group was married to an employee of another contractor receiving A and I work.(6) Tr. at 43. The complainant saw two primary problems with this situation. First, he believed that the task monitor was steering work to his wife's company. Second, the complainant believed that the task monitor was treating the contractor's A and I group unfairly, in an effort to help his wife's company, e.g., by informing DOE about the contractor's allegedly poor productivity. See Tr. at 49-50, 194. Two supervisors, Ms. Hembree and Mr. Foreman, conceded that he had made a disclosure of his beliefs to each of them. Tr. at 82, 89, 111-112, 116-117. These disclosures appear to have been made during November 1996. Tr. at 43, 82; see Tr. at 112, 160; see also Ex. A-6 at 2 (supervisor Hembree thought the disclosure had been in January 1997).

These disclosures provide evidence of a potential abuse of authority. An abuse of authority occurs when there is an "arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." D'Elia v. Department of the Treasury, 60 M.S.P.R. 226, 232 (1993) (interpreting Whistleblower Protection Act). Certainly if the DOE task monitor either improperly directed additional work to his wife's company or harmed the contractor's interests with DOE to benefit his wife's company, those acts would be considered an abuse of authority.

Next, the complainant must show that he reasonably and in good faith believed his disclosures revealed an abuse of authority. A good faith standard is a subjective one, referring to what the individual himself honestly believed. Roger W. Hardwick, 27 DOE ¶ 87,517 at n. 9 (1999). Both of the witnesses who testified that the complainant had made these disclosures to them testified that they thought that the complainant honestly believed that the facts he relayed to them were true. Tr. at 89, 124. However, the contractor argued that if the complainant was truly making good faith disclosures of wrongdoing, he would have made the conflict of interest disclosure much earlier, when the DOE task monitor's wife previously worked for NCI. Thus, the contractor contended that the complainant was more concerned with his company's interest than in stopping conflicts of interest and therefore, his disclosures were not in good faith. Tr. at 34-36, 196, 199.

Good faith does not require either the absence of self-interest in making a disclosure or that a complainant make a disclosure as soon as he or she is aware of a problem. Cf. Frederick v. Dept. of Justice, 65 M.S.P.R. 517, 531, rev'd on other grounds 73 F.3rd 349 (Fed. Cir. 1996) (holding under the Whistleblower Protection Act that personal motivation to blow whistle does not make belief non-genuine). As explained above, both supervisors indicated that the complainant believed that a true conflict of interest existed. I therefore believe that the complainant has sufficiently demonstrated that these disclosures were made in good faith.(7)

The complainant must also show that he reasonably believed his disclosures to reveal an abuse of authority. In contrast to good faith, reasonability is assessed objectively. In this case, the complainant must show that the matter described was one that a reasonable person in his position with his level of experience could believe evidenced an abuse of authority. There was some dispute at the hearing as to whether the complainant's disclosures met this requirement. The NCI Program Director, Hunter Foreman, thought that the disclosures were reasonable. Tr. at 89. However, the NCI Deputy Program Director Shirley Hembree did not think that the disclosures were reasonable, since to her knowledge, the task monitor was not sending additional work to his wife's company and his wife did not perform A and I work. Tr. at 124-26; see also Tr. at 97-98, 159-161, 192.

However, whether the complainant's disclosures turned out to be true is irrelevant to the question of whether they are protected.(8) See META, Inc., 26 DOE ¶ 87,504 at 89,015 (1999) (actual health risk unimportant to determining whether disclosure is protected); cf. Rogers v. McCall, 488 F. Supp. 689, 697 (D.D.C. 1980) (civil rights case).(9) I find that a reasonable person in the complainant's position could have found the facts he understood to constitute a potential abuse of authority. For these reasons, I conclude that the complainant has shown by a preponderance of the evidence that he had a reasonable belief his disclosures evidenced an abuse of authority. Therefore, the complainant has shown that he made protected disclosures.

## B. Contributing Factor

One way to show that a protected disclosure was a contributing factor in a personnel action is to show "temporal proximity" between a protected disclosure and an alleged reprisal. In this case, there is temporal proximity between the complainant's disclosures regarding the DOE task monitor and his termination. Since the disclosures occurred six months or less before the allegedly retaliatory actions, I believe that the complainant has met his burden to show that his disclosures were a contributing factor to the allegedly retaliatory actions. Barbara Nabb, 27 DOE ¶ 87,519 (1999) (eight months found to be proximate).

## C. Justification for the Complainant's Lay off

The contractor presented evidence at the hearing that it would have laid off the complainant even had he not made disclosures, because the DOE had decided to no longer fund the contractor's performance of the A and I task. Tr. at 69-70(10) DOE officials had decided to proactively take steps to cut the Office of Scientific and Technical Information (OSTI) budget, since they anticipated a shortfall of approximately $800,000 in the coming fiscal year. Tr. at 139, 164. OSTI officials met in April 1997 to decide how to make up this shortfall. Tr. at 163-164. The officials made eighteen decisions, one of them being to no longer fund the contractor's performance of the A and I task, and to direct the A and I work to other contractors. See Tr. at 164; Ex. B-39 at 4.

OSTI notified the contractor verbally of its decision and then cut the money from the contractor's budget. Tr. at 178-79; Contractor's Ex. C-21. When the contractor received this news, it determined that it had no other work for these three remaining employees of the A and I group, which included the complainant, to perform, and therefore decided to lay them off in May 1997. Tr. at 63, 81. Evidence indicates that the complainant was not treated differently from other similarly situated employees. Between September 1995 and the remaining A and I group's lay off in May 1997, the contractor laid off 55 employees out of the

original 82 employees working on the contract due to DOE cuts. Tr. at 73, 182; Ex. A-6 at 3; Ex. A-7 at 1. The prior lay offs included A and I employees.(11) There was evidence confirming that when DOE told NCI to cut an entire task, as occurred in this case, all the NCI employees performing that task were laid off. Tr. at 92.(12)

Notwithstanding the contractor's arguments, the complainant states that his lay off would not have happened except for his disclosures. The complainant believes that because of his disclosures, the contractor refused to accept his suggestions in February 1997 as to how the A and I group could become more cost-competitive, which caused DOE to cut the contractor's funding for this task. See Tr. at 50-51, 114. However, this chain of events is extremely speculative. Moreover, even if the contractor had immediately implemented the complainant's suggestions, they would have been too late to affect DOE's decision-making since DOE started analyzing the contractor's cost- competitiveness that same month. Tr. at 138.

In addition, the complainant argues that one particular document is a "smoking gun" which proves, in his view, the retaliatory nature of the contractor's actions. This document states that a DOE employee reported to the OIG in April 1997 a rumor he had heard that the complainant was going to be fired because he had filed complaints with the OIG. See Ex. FI-6 at 2. Further, this DOE employee believed that DOE employee Williams had been meeting with the contractor's management to arrange for the complainant's termination. Id.

However, not only are these assertions unsupported by any evidence, they are irrelevant. (13)Even if the management contractor disliked the complainant intensely and wanted to fire him because of his disclosures, that scenario would not alone overcome the other evidence that the contractor would have fired him anyway. Once the contractor received notice that its A and I work would no longer be funded, it had no other work for him to do, and the decision to lay him off was unavoidable. The complainant has not suggested that there was other work for him to perform for the contractor at the time of the lay off. I am therefore satisfied that the complainant was not differentially treated by the contractor, and that the contractor has presented clear and convincing evidence that the complainant would have been terminated even if he had not made protected disclosures.(14)

## D. Demotion

The complainant maintains that the removal of his supervisory duties in February 1997 was another retaliatory act.(15)This occurred less than three months after the complainant's disclosures, and therefore I find that the disclosures were a contributing factor to the personnel action. Thus, the burden shifts to the contractor to demonstrate that it would have demoted the complainant even in the absence of disclosures.

Mr. Foreman explained that DOE employee Hitson had told him earlier that month that according to the DOE statistics, it appeared that the other contractors were more cost-competitive than NCI. The contractor was not producing enough reports to make it cost-competitive, and further was charging a great deal of time in the "other" category used to account for supervisor's time spent doing supervisory tasks, among other things. Tr. at 51-52. In addition, the "other" category included such things as time taken for breaks, training, meetings, and computer down time. Tr. at 53. Mr. Foreman testified that to improve productivity and reduce the charges in the "other" category, he decided to have the complainant concentrate exclusively on abstracting and indexing, and not supervisory tasks. Tr. at 84-85. Following this action, NCI's time charged in the "other" category decreased from an average of 28 percent to sixteen percent of its total bills. Tr. at 86-87.

In response, the complainant has charged that the "other" category decreased at that time for reasons other than his demotion. First, the A and I group received a new DOE project to work on (causing its non-"other" hours to increase), second, the group had settled into its new location after two moves and third, the A and I group had completed their training on new computers. See Tr. at 54; Complainant's Post-Hearing Brief at 4 (August 5, 1999). It appears clear that there were many sources of the time spent in the

“other” category and there were therefore many different ways to decrease this time. In view of the number of ways to decrease the “other” time, the contractor appears to have had many other options aside from taking away the complainant’s supervisory duties. I therefore find that the contractor has failed to prove clearly and convincingly that it would have taken this action even in the absence of the complainant’s disclosures.

# IV. Remedy

Section 708.36 provides that if the initial agency decision determines that an act of retaliation has occurred, the Hearing Officer may order: (1) reinstatement; (2) transfer preference; (3) back pay; (4) reimbursement of reasonable costs and expenses; and (5) such other remedies as are deemed necessary to abate the violation and provide relief to the complainant. Although no loss of pay resulted from the complainant’s demotion, I will order the contractor to pay the complainant’s reasonable costs and expenses incurred in bringing this Part 708 complaint. These costs would include the complainant’s costs for photocopies, faxes, postage, telephone bills, transportation costs to and from the hearing, service of subpoenas, and any professional services retained.

# V. Conclusion

As set forth above, I have determined that the complainant made protected disclosures regarding a potential abuse of authority. Further, the complainant has shown that the disclosures were a contributing factor to his lay off. I have also found, however, that the contractor has proven by clear and convincing evidence that it would have laid off the complainant absent his disclosures. Nevertheless, the contractor failed to prove by clear and convincing evidence that it would have demoted the complainant even in the absence of his disclosures. Accordingly, I conclude that there has been a violation of the DOE’s Contractor Employee Protection Program for which relief is warranted under § 708.30 (d).

It Is Therefore Ordered That:

(1) The Request for Relief filed by Frank E. Isbill, Case No. VWA-0034, under 10 C.F.R. Part 708 is hereby granted to the extent set forth in paragraph (2) below and is denied in all other respects.

(2) NCI shall pay to Mr. Isbill an amount to be determined based on the information provided pursuant to Paragraph (3) in compensation for all costs and expenses reasonably incurred by Mr. Isbill in bringing his complaint under Part 708.

(3) Mr. Isbill shall, no later than 30 days after receipt of this Decision, submit to the undersigned Hearing Officer and to counsel for NCI a detailed and itemized list of each and every direct and reasonable expense incurred in bringing the complaint, the dates incurred and the provider of the good and service provided.

(4) Counsel for NCI shall, no later than fourteen days after receipt of a copy of the submission referred to in Paragraph (3), either submit to Mr. Isbill payment in the amount requested (and notify the Hearing Officer that they have done so) or submit to Mr. Isbill and the Hearing Officer an objection to that amount based on either reasonableness or accuracy.

(5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting in part the complaint unless, within 15 days of its receipt, a Notice of Appeal is filed requesting review of the initial agency decision by the Director of the Office of Hearings and Appeals with the Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0107, telephone number (202) 426-1566, fax number, (202) 426-1415.

Dawn L. Goldstein

Hearing Officer

Office of Hearings and Appeals

Date: September 27, 1999

(1)

(2)

(3)The complainant alleged other retaliatory acts as well. Since I have decided that the complainant has prevailed regarding the demotion (and as a result will recover his litigation costs), and because the complainant has requested no remedy for these other retaliations, see Email from Complainant to Hearing Officer (April 21, 1999), nor can I think of a likely one, it is not necessary to address these other retaliations. See Barbara Nabb, 27 DOE ¶ 87,519 (1999).

(4)This standard now specifies in its text that the employee must have reasonably believed that his disclosures revealed one of a list of enumerated items, including an abuse of authority. Compare 10 C.F.R. § 708.5(a)(1)(1998) with 10 C.F.R. § 708.5. I had informed the parties prior to the hearing that I believed it would be unfair to apply the new definition to a complaint filed under the old regulations. However, upon further reflection since the hearing, I do not believe that a substantive change has taken place in this standard since it is highly unlikely that this Office would have found a disclosure that was unreasonably believed by the complainant to reveal one of the items described in 10 C.F.R. § 708.5 to be protected. Therefore, I have used the new standard to evaluate the instant case. I note that the issue of the reasonableness of the complainant's belief was fully explored at the hearing. See infra.

(5)Specifically, OIG assumed that the complainant had made protected disclosures, but found that he had failed to show that those disclosures were a contributing factor to any adverse personnel action taken against him by the contractor. It further found that there was clear and convincing evidence that, even in the absence of the disclosures, the contractor would have taken the same allegedly retaliatory acts, including the lay off.

(6)The citations to exhibits in this Report are based on the list of documents compiled by the OIG. The exhibits submitted by the complainant are cited as "FI-" and the contractor's exhibits utilized the OIG's numbering system. The transcript of this case is cited as "Tr."

(7)The task monitor would, among other duties, inform the contractor of the tasks that DOE wished to have the contractor perform. Tr. at 187.

(8)The contractor also argued that the disclosures were in bad faith because the complainant failed to sufficiently investigate the subject matter of his disclosures prior to making them. Tr. at 201-202. As indicated above, no one has doubted that the complainant believed the facts he relayed to his supervisors and that these facts created a possible abuse of authority. Part 708 does not require that whistleblowers conduct full-scale factual and legal investigations prior to making their disclosures. In this case, the complainant meets the requirement of the regulations by reporting the facts as he understood them.

(9)With the obvious exception that if the complainant knew the disclosures to be false at the time he made them, the disclosures would not have been made in good faith.

(10)For the same reason, evidence that the contractor presented regarding whether the task monitor had met the legal requirement to disclose his wife's employer is irrelevant.

(11)The complainant believes that DOE and the contractor entered into a "conspiracy" to lay him off. However, I informed the parties at the hearing that Part 708 only covers retaliation by contractors, not DOE. I stated that only evidence relating to a judgment by the contractor to take a retaliatory action would

be considered relevant to this hearing and conversely, evidence relating to DOE motivation would not be considered relevant. See Tr. at 22-23, 177; 10 C.F.R. § 708.1 (referring to the regulation's goal as preventing retaliation by complainants' employers, DOE contractors); see also Decision by Deputy Secretary Affirming Summary Dismissal of Complaint of George E. Parris, Ph.D., IG Complaint No. HQ97-0006 (October 15, 1998, unpublished) ("Part 708 is specifically limited to covered contractor employees and nowhere extends to DOE or DOE officials. Part 708 . . . plainly does not encompass decisions within the legitimate discretion of DOE officials to reduce or stop funding for a project.").

(12)After earlier DOE cuts, the contractor had earlier laid off two A and I group employees in September 1995 and May 1996, and one A and I employee left the contractor's employment after being told she would be laid off in April 1996. Tr. at 73, 99.

(13)In some cases where the entire task was not cut, the contractor was able to hire back five employees in low paying, low-skilled jobs (unlike the complainant's position). Tr. at 90-91; Ex. A-6 at 3-4. Other employees were brought back if DOE added some funds back in, but that did not happen with the A and I task. Tr. at 108.

(14)The DOE employee who came forward to the OIG was not a witness at the hearing.

(15)The complainant has claimed that openings existed prior to the lay offs which were filled with retired DOE employees. Complainant's Post-Hearing Brief at 5 (August 5, 1999). However, the complainant has made no showing that he was qualified for such openings, that such openings existed during the lay off, or that the workload at the time of the lay offs justified retaining the A and I employees.

(16)Although the complainant received no loss of pay with this demotion, I believe this action affected the complainant's terms and conditions of employment. See 10 C.F.R. § 708.2.