

# Case No. VWA-0037

September 27, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Ann Johndro-Collins

Date of Filing: April 27, 1999

Case Number: VWA-0037

This Decision considers a complaint of retaliation and request for relief filed by Ann Johndro-Collins (the Complainant) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The Complainant alleged that her employer, Fluor Daniel Hanford (FDH), retaliated against her for making a protected disclosure as defined in the Part 708 regulations. As explained below, I have concluded that the Complainant's request for relief should be denied.

## BACKGROUND

### Procedural Background

The Complainant filed a complaint with the DOE's Office of Inspections, Office of the Inspector General, in July 1997. In the complaint, she alleged that FDH retaliated against her for disclosing "a conflict of interest, waste, fraud, and abuse" by her team leader at FDH. The Office of Inspections conducted an investigation and issued a report on March 30, 1999. In the report, the Office of Inspections found that the Complainant had established by a preponderance of evidence that she made protected disclosures to FDH management.

The Office of Inspections further found, however, that in six of seven alleged retaliatory acts, the Complainant failed to establish by a preponderance of the evidence either that the alleged retaliatory acts constituted adverse actions, or that her

protected disclosures were a contributing factor to the actions.(1) In regard to one alleged retaliatory act - the Complainant's transfer from the Strategic Planning team to the Reporting team - the Office of Inspections found that the Complainant's protected disclosures were a contributing factor, but that FDH had provided clear and convincing evidence that the reassignment would have taken place absent the disclosures. On April 20, 1999, the Complainant submitted a request for a hearing, which was received on April 27, 1999 by the Office of Hearings and Appeals. The hearing was held on July 13, 1999, at which the Complainant and six witnesses testified.

Before the hearing, the Complainant and FDH stipulated that the Complainant made a protected disclosure as defined at 10 C.F.R. § 708.5. As stipulated by the parties, the Complainant disclosed to the management of FDH alleged acts of abuse of authority by her team leader. *See* 10 C.F.R. § 708.5(a)(3). Although FDH did not concede that the Complainant's allegations were true, it did acknowledge that she made the

disclosures reasonably and in good faith.(2) *Id.*

The Complainant alleged that FDH committed retaliatory acts, as defined at 10 C.F.R. § 708.2, after her protected disclosure. Before the hearing, the parties stipulated that three acts alleged to have occurred by the Complainant could be remedied under the Part 708 regulations. These alleged acts are listed below.

1. In October 1997, the Complainant received an annual performance assessment that, she alleged, did not accurately reflect her performance. The complainant claims that the assessment evaluated her work at a lower level than it should have. As a result, the Complainant alleged that she was excluded from a cash bonus program that rewarded employees for high achievement.
2. The Complainant alleged that in January 1998, she received a promotion from Project Controls Associate Grade I (pay grade 14) to Project Controls Associate Grade II (pay grade 16) without a corresponding pay raise.
3. The Complainant also alleged that in January 1998, she was assigned to a position where she performed duties at a level expected of employees in pay grade 18, while she was compensated at pay grade 16.

### **The Complainant's work assignments**

The Complainant began working for Westinghouse Hanford Company, a contractor at the Department's Richland Operations Office, in 1989. She was initially hired as a records management specialist. She attained the position of Project Control Analyst I in August 1994. On October 1, 1996, FDH took over Westinghouse Hanford's contract at the Richland Operations Office. The Complainant's duties and chain of supervisors remained essentially unchanged when FDH took over the contract.

At the time the Complainant made her protected disclosures, she worked on the Strategic Planning team. Her team leader in that group was XXXXX, the subject of her protected disclosures, and her supervisor was Larry Hafer. In July 1997, the Complainant was transferred to the Reporting team, where her team leader was Eileen Murphy-Fitch and her supervisor was Gordon McCleary. The transfer was made because Murphy-Fitch needed additional personnel and had requested the Complainant, and because management was aware that the Complainant and XXXXX, her team leader, were not getting along.

In January 1998, the Complainant was transferred back to the Strategic Planning team. The transfer was made because she had requested reassignment to the group and there was an opening caused by the departure of another employee, Dave Eder.(3) Her supervisor was again Larry Hafer, but her previous team leader had moved to another group. Her new team leader was Bill Ritter. In March 1998, McCleary was promoted to the position of Director of Reporting, where he had supervision over Hafer's Strategic Planning team.

## **FINDINGS AND ANALYSIS**

The Part 708 regulations require that the employee who files a complaint must establish by a preponderance of the evidence that (1) he or she made a disclosure, and that (2) the disclosure was a contributing factor to one or more acts of retaliation. 10 C.F.R. § 708.29. The regulations define retaliation as "an action ... taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other *negative* action with respect to the employee's compensation, terms, conditions, or privileges of employment....)" 10 C.F.R. § 708.2 (emphasis added). Once a complainant has made this showing, the burden shifts to the contractor to show by clear and convincing evidence that it would have taken the same action without the complainant's protected disclosure. 10 C.F.R. § 708.29.

As discussed below, with respect to two of the alleged retaliatory acts, I find that the Complainant was unable to establish the acts had negative consequences with respect to her employment and that she has therefore failed to meet her burden of proof. With respect to the third alleged retaliatory act, I find that

FDH has provided clear and convincing evidence to show that it would have taken the steps it did absent the Complainant's protected disclosures. Consequently, I find that the Complainant's request for relief should be denied.

## **The Complainant's FY 1997 performance assessment**

In October 1997, the Complainant received her performance assessment for Fiscal Year 1997 (FY 1997), which began on October 1, 1996. McCleary was the principal FDH official involved in the Complainant's FY 1997 performance assessment.(4) As noted above, the Complainant transferred to the Reporting team about nine months into FY 1997. The gist of her complaint is that the FY 1997 assessment takes insufficient account of her work on the Strategic Planning team. The Complainant states that:

On October 31, 1997, I received a performance appraisal that covered the Fiscal Year 1997 time period. However, I do not believe that this document is an accurate reflection of my performance. Specifically, the first nine months of the rating period was spent performing Integrated Site Baseline (ISB) functions, that included significant, complex deliverables, which my management at the time rated as an excellent effort. However, the majority of this performance evaluation was devoted to measuring my job performance for the tasks that I was reassigned to during the last three months of the rating period. Further, the evaluation did not give me credit for the many months that I performed as a Team Lead in support of ISB tasks. In summary, I believe that my overall FY 97 rating of "acceptable" is not reflective of my performance.(5)

## **The Complainant prepared a written response to her assessment, in which she contends that it:**

significantly misses the mark on assessing my performance over the past year. Addresses less than three months of performance (fails to address performance from 10/1/96 through 7/9/97).

An indication of the quality of my performance from 10/1/96 through 7/9/97 is documented in a written response from my management team regarding the preparation and delivery of the Fiscal Year 1997 Site Summary Baseline ... a major deliverable to the customer:

Thanks for the excellent product. Puts us in a good position for the Integrated Site Baseline in July. L.R. Hafer - Manager - FDH Baseline Management.

Great job and many thanks . . . - XXXXX, Team Lead.(6)

The Complainant's written response also provides details of her work on the Integrated Site Baseline that she feels was excluded from the assessment. The response was placed in her personnel file.(7)

As a remedy, the Complainant asks that FDH "amend FY 1997 Performance Assessment to include appraisal for Integrated Site Baseline work completed during the first nine months of the rating period."

As an initial matter, the Complainant's assertion that the assessment does not accurately reflect her performance is highly speculative and unsupported by the evidence. In addition, it is not true that the assessment "fails to address performance" between October 1996 and July 1997, as the Complainant asserted. Both McCleary, who wrote and signed the assessment, and Hafer, who was the Complainant's supervisor for the first part of the fiscal year, deny that the assessment ignores the Complainant's work during the first nine months of FY 1997.(8)

An examination of the assessment corroborates the testimony of Hafer and McCleary. The Complainant's FY 1997 assessment consists of several parts. Part A of the assessment, titled "Culture Values," is the only part that contains general evaluations of performance. The part contains four generic sections, called "expectations" - "accountable," "client focused," "cost effective," and "empowering." The expectations are defined in such a way that they would refer equally well to either of the positions the Complainant held

during FY 1997. For each expectation, the employee can receive one of three ratings: "outstanding contribution," "acceptable contribution," and "needs improvement." The Complainant received a rating of "acceptable contribution" for each of these expectations.

Part B of the assessment, titled "Outcomes Expected," contains four boxes. In each box there is a brief, one-sentence description of a task that the Complainant performed, and a one- or two-sentence evaluation of her performance. As Hafer and McCleary pointed out at the hearing, and the Complainant herself acknowledged, one of the boxes deals with her work on the Integrated Site Baseline report while she worked on the Strategic Planning team.(9) Consequently, the Complainant's assertion that the assessment ignores her work during the first nine months of FY 1997 is clearly not accurate.

The Complainant has established, however, that the majority of the assessment addresses the last three months of FY 1997. Both Hafer and McCleary acknowledged this point.(10) McCleary explained why he wrote the assessment this way. He testified that the input he had received indicated that some of the people involved in supervising the Complainant thought her performance had been unsatisfactory, and he "wanted to give her a fresh start" and to "focus on the positive, not the negative aspects of the review."(11)

Evidence in the record supports McCleary's position. Although the Complainant says that management considered her performance during the first nine months an "outstanding effort," she has provided no corroboration for this assertion.

On the contrary, comments from two co-workers indicate that the Complainant's work was not considered generally outstanding. Murphy-Fitch testified that she received a comment from a person involved with the Integrated Site Baseline report suggesting that there had been problems with the report, and somebody had to "come to the rescue" of the Complainant to get the report out.(12) In addition, a comment submitted by E.A. Schultz, who worked in internal planning for FDH, stated that the Complainant had failed to participate in meetings and was uncooperative in communicating significant matters to FDH management. She said that she "could not rely on [the Complainant] to not 'drop the ball.'"

McCleary, discussing the two positive comments about the Complainant's work on the Integrated Site Baseline report, testified that "on balance with other comments I had, [the positive comments] would not have offset or changed the conclusion that I had already reached about acceptable performance."(13) In support of McCleary's view, Hafer, the Complainant's manager during the first nine months of the rating period, testified she worked at an acceptable level during that period.(14)

Furthermore, FDH provided evidence that the acceptable ratings received by the Complainant were typical for employees in her group. A chart of the ratings received by the eighteen employees on the Reporting team in October 1997 shows that they received a total of thirty-one "outstanding" ratings, thirty-eight "acceptable" ratings, and three "needs improvement" ratings.

I find the Complainant's previous performance assessment provides corroboration for McCleary's and Hafer's statements that her work is at an acceptable level. The previous assessment was completed in February 1995, before the Complainant made her protected disclosure. At the time the assessment was signed, the Complainant's employer was Westinghouse Hanford Company, and the manager who signed the form was R. B. Agee. The form, which differs from the FY 1997 form, contains blocks for rating the employee in fifteen areas. The possible ratings were "Exceeds," "Met," and "Not Met." In addition, there was a block provided for an overall rating. Of the fifteen areas in which the Complainant was rated, she received three ratings of "Exceeded," nine ratings of "Met," one rating of "Not Met," and two blocks indicated she was too new at the given task to be rated. The overall rating was "Met."(15) Thus, her ratings are essentially the same on the two assessments.

The Complainant alleged that her acceptable rating excluded her from a cash bonus program for employees. The program, called the "MVP" program, provides a cash payment for employees whose achievements and contributions "support the company's efforts in exceeding strategies, goals, and objectives." Documents submitted by FDH show that the MVP program was not based on performance

assessments, but on nominations submitted by the employee's manager, co-workers, or the employee himself.(16) An employee could receive an MVP bonus without having received an "Exceeds" rating in any area.(17) The Complainant's performance assessment thus had no bearing on whether she received an "MVP" bonus.

I find that FDH has given credible and convincing explanations for why the assessment emphasizes the last three months of the rating period, and that the assessment would have been written in this way absent the Complainant's protected disclosure. On the other hand, the Complainant's assertion that her work was outstanding is purely speculative and lacks any corroboration. In addition, she has not brought forth any rebuttal evidence to suggest that the decision to emphasize the last three months had any negative impact on her assessment. I therefore find that the Complainant's request for relief relating to her FY 1997 assessment should be denied.

## **The Complainant's promotion without a raise**

The second item for which the Complainant requests relief is an alleged promotion that she received without a corresponding increase in her salary. In her complaint, the Complainant describes this incident as follows:

On February 3, 1998, I was summoned to Mr. Hafer's office where Mr. Hafer presented me with an Employee Status Change Authorization document dated January 21, 1998. Mr. Hafer explained that Mr. Brobst wanted me to have the document, and offered no additional discussion. After leaving the office, I reviewed the document and found that I had been promoted from a Grade 14 to a Grade 16, effective October 6, 1997. I also noted that this document was a correction to a previous Employee Status Change Authorization dated October 5, 1997, where a merit increase of 4% was awarded to me, but that the salary did not change between the merit increase amount and the promotion document.(18)

As a remedy for this alleged retaliatory act, the Complainant asks for "compensation equivalent to other team members."(19)

Before considering the merits of the Complainant's claim, reviewing some aspects of the FDH's pay scale will be helpful. The pay scale for non-union employees goes from grade 13 to 27.(20) Each grade represents a broad salary range. There is considerable overlap in the grades, so that an employee earning the maximum salary under grade 13 makes more than an employee earning the median salary under grade 15. In the Complainant's career field, the normal progression is from grade 13 to 14, 16, and then 18.(21)

The process by which an employee is advanced in pay grade while not simultaneously receiving an increase in salary is colloquially referred to as a "dry promotion." Becky Andersen, an FDH human resources specialist, estimated that there are about five dry promotions a year at FDH.(22)

Harold Lacher, the manager of Human Relations for FDH, testified that there were two benefits to receiving a dry promotion. First, the employee receives a potential for greater future pay increases. Second, the employee accumulates time in the new grade, which is a consideration when the employee is being considered for future promotions.(23) He explained that an employee typically remains in a pay grade for a minimum of two to three years before advancing to the next pay grade.(24) In addition, Lacher noted that he himself, as well as the attorney representing FDH at the hearing, had received dry promotions during their careers at the Hanford site.(25)

Shortly before receiving the dry promotion, the Complainant filed an EEO complaint, alleging gender discrimination.(26) According to both Hafer and McCleary, the EEO complaint elicited a review of the Complainant's work, which in turn led to the dry promotion. Both Hafer and McCleary stated that the Complainant did not receive the dry promotion merely because she filed an EEO complaint, but that the complaint caused management to review her performance and consider whether she was qualified for grade 16.(27) McCleary testified that the Complainant's EEO complaint resulted in "bringing forward

certain evidence that maybe we had overlooked her unfairly and should go back and take another look."(28)

Hafer testified that, after the Complainant filed her EEO complaint, "we went back and re-looked at the whole organization."(29) As a result of this review, one other female on the Strategic Planning team received the same dry promotion.(30) The Complainant and the other female who received a dry promotion were the only employees in the group at that time in grade 14.(31) After the two dry promotions, the group of approximately 40 employees consisted predominantly of grade 18's, with five grade 16's and no grade 14's.

Robert Gates was the Director of Planning for FDH at the time of the Complainant's promotion to grade 16. He stated in an interview with an investigator that a promotion from grade 14 to grade 16 would typically involve a raise of two to three percent, less than the Complainant received. He also stated that the promotion did not involve any additional duties for the Complainant.(32)

Although the Complainant has characterized her advancement to grade 16 as a promotion without a raise, this characterization is not accurate. The general procedure at FDH is for salary changes to occur once a year, in October. The ceiling for pay increases in FY 1997 was 5%. Approximately 80% of FDH employees received some increase, with most increases in the 3-4% range.(33) The Complainant received a 4% merit raise in October 1997. The following January, the merit raise was re-coded as a promotion, made retroactive to October 1997.(34) Consequently, it is accurate to say that the Complainant received a promotion to grade 16 with a 4% raise, effective in October 1997.

I find that the Complainant's dry promotion does not constitute a retaliatory act. The regulations define retaliation as "an action ... taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other *negative* action with respect to the employee's compensation, terms, conditions, or privileges of employment...." 10 C.F.R. § 708.2 (emphasis added). The Complainant has not shown any negative aspects to the promotion. I therefore find that her request for relief with respect to the promotion should be denied.

### **The Complainant's assignment to a position formerly held by an employee in pay grade 18.**

#### **The Complainant described the situation in her complaint as follows.**

On January 7, 1998, Mr. Brobst [Philip Brobst, at that time FDH Director of Planning] communicated with me via return e-mail, and stated that ... Mr. Dave Eder's position was now vacant in Strategic Planning, and was available at a Grade 16 level.... I felt that the position offered was an excellent opportunity given that all other opportunities no longer existed according to Mr. Brobst. I noted that there was a significant disparity between the job requirements, the grade level and rate of pay for this position. I went to Mr. Brobst's office and told him I would accept the position in Strategic Planning.(35)

In support of her claim that she should be paid at grade 18, the Complainant stated that Dave Eder was a grade 18 employee. She argues that she works on the same projects as Dave Eder and other grade 18 employees.(36)

Hafer, however, testified that the Complainant performed the same functions as Eder had. He stated that Eder had been a manager before this assignment, and while on the team had much more of a lead role than the Complainant. When the Complainant came to the team, they "re-scoped" the work they had to do. The Complainant had more of a liaison role.(37) Hafer testified he does not think that the Complainant, in her current assignment, has the same level of responsibility for projects as a grade 18.(38)

I do not find that the assignment of the Complainant to the Strategic Planning team at pay grade 16 was a retaliatory act. The position was offered to her at pay grade 16, and she accepted it on those terms. There

is no evidence that she is performing work at a pay grade 18 level. On the contrary, Hafer has credibly testified that she does not bear the responsibility that grade 18 employees do. I therefore conclude that her request for relief with respect to this claim should be denied.

## CONCLUSION

The Complainant has not prevailed on any of the three allegations of retaliatory acts. With regard to the allegation that her FY 1997 performance assessment was inaccurate, FDH has shown by clear and convincing evidence that it would have prepared the assessment as it did absent the Complainant's protected disclosures. With respect to the allegations that the Complainant was given a promotion without a raise and given a work assignment above the level of her pay, the Complainant has failed to show that these acts occurred. I will therefore deny her request for relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Ann Johndro-Collins under 10 C.F.R. Part 708, Case No. VWA-0037, 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 Director of the Office of Hearings and Appeals requesting review of the initial agency decision.

Warren M. Gray

Hearing Officer

Office of Hearings and Appeals

Date: September 27, 1999

(1) In view of the parties' stipulations, described below, some of these alleged retaliatory acts are no longer relevant.

(2) FDH conducted an internal investigation and cleared the team leader of the charge of wrongdoing that was the basis of the Complainant's disclosure.

(3) Tr. 125.

(4) Tr. 148.

(5) Exhibit 2, Complaint at 8.

(6) Exhibit 24, FY 1997 Performance Assessment. The name of the Team Lead, who was the subject of the Complainant's disclosures, has been withheld.

(7) Exh. 2, Complaint, 8.

(8) Tr. 115; 136; 149.

(9) Tr. 26; 136; 149-50.

(10) Tr. 136-37.

(11) Tr. 150.

(12) Tr. 22. Murphy-Fitch was not involved in work on the Integrated Site Baseline Report and could not testify as to whether this comment was accurate. Tr. 30.

(13) Tr. 154.

(14) Tr. 115; 136.

(15) Hearing Exhibit 2.

(16) Hearing Exhibit 4. The documents also note that "there is no significance to the initials MVP."

(17) Tr. 103.

(18) Exh. 2, 9.

(19) Exh. 2, 11.

(20) Tr. 88.

(21) Exh. 30, Fluor Daniel Hanford Salary Structure; Tr. 64.

(22) Tr. 77.

(23) Tr. 91.

(24) Tr. 92.

(25) Tr. 93.

(26) Tr. 71, 73.

(27) Tr. 137-38; 157.

(28) Tr. 154.

(29) Tr. 134.

(30) Tr. 62, 138, 157.

(31) Tr. 158. The other female employee had apparently not filed an EEO complaint. Tr. 75.

(32) Exh. 22, Memorandum of Interview by Office of Inspector General.

(33) Eh

(34) Tr. 60-61.

(35) Exh. 2, 9.

(36) Tr. 130-32.

(37) Tr. 123-25.

(38) Tr. 130-131.