

July 11, 2003

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Gary S. Vander Boegh

Date of Filing: November 20, 2002

Case Number: TBH-0007

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Gary S. Vander Boegh (also referred to as the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Vander Boegh holds the position of Landfill Manager at the C-746-U Landfill for the DOE's Paducah Gaseous Diffusion Plant (the "Paducah Plant") located outside of Paducah, Kentucky. He is an employee of WESKEM, LLC (WESKEM), a subcontractor for Bechtel Jacobs Company, LLC (BJC). BJC is the management and integration (M&I) contractor for the Paducah Plant, and WESKEM is the subcontractor charged with operating the C-746-U Landfill. In his complaint, Mr. Vander Boegh contends that reprisals were taken against him after he made certain disclosures of safety violations to officials of WESKEM, BJC and the DOE. Mr. Vander Boegh contends that WESKEM and BJC retaliated against him in response to these disclosures.

I. Summary of Determination

In this Decision, I first provide background information concerning the Part 708 program, discuss the Complainant's employment situation and the nature of his complaint, and summarize the OHA Investigator's findings and preliminary determinations made by me to frame issues for the hearing. I then present the legal standards governing this case. Next is my analysis of this complaint. In that analysis, I first find that Mr. Vander Boegh made at least three protected disclosures that are proximate in time to several personnel actions that he contends were taken by WESKEM and BJC. I find that additional personnel actions were

taken after Mr. Vander Boegh initiated his Part 708 complaint, and are also proximate in time to his protected activity. I then find that with respect to all but one of these personnel actions, Mr. Vander Boegh has shown by a preponderance of the evidence that they constitute retaliations against him under Part 708. Under these circumstances, the DOE's strong commitment to defending whistleblowers and Part 708 impose the significant requirement that WESKEM or BJC show by clear and convincing evidence that, in the absence of these protected disclosures, it would have taken the same adverse personnel actions against Mr. Vander Boegh. Next I analyze the evidence and argument presented by the contractors. Ultimately, I find that in five instances, BJC or WESKEM failed to establish by clear and convincing evidence that it would have taken the adverse personnel action in the absence of Mr. Vander Boegh's protected disclosures. In one other instance, I find that BJC has shown by clear and convincing evidence that no Part 708 relief is required.

Accordingly, I find that WESKEM and BJC committed reprisals against Mr. Vander Boegh, and that they should be required to take restitutionary action.

II. Background

A. The DOE Contractor Employee Protection Program

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

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise take any adverse personnel action against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority.

See 10 C.F.R. § 708.5(a)(1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations are entitled to receive protections. They may file a whistleblower complaint with the DOE. As part of the proceeding, they are entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they are entitled to an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. History: Mr. Vander Boegh's Complaint and Relevant Events Concerning his Employment at WESKEM

Mr. Vander Boegh filed his Part 708 complaint with the Oak Ridge Operations Diversity Programs and Employee Concerns Office on January 4, 2002. On April 29, 2002, that Office informed him that a preliminary determination had been made by the DOE to accept jurisdiction over the complaint. Further processing of the complaint was suspended while Mr. Vander Boegh, WESKEM and BJC attempted to resolve his complaint through mediation. When this effort failed, the complaint was forwarded to the DOE Office of Hearings and Appeals (OHA) on August 15, 2002, and on that date the OHA Director George B. Breznay appointed an OHA Investigator to conduct an investigation of Mr. Vander Boegh's complaint. On November 20, 2002, the OHA Investigator issued his Report of Investigation (the ROI).

Mr. Vander Boegh's employment history at BJC and WESKEM may be summarized in the following manner. Mr. Vander Boegh has been a landfill manager since 1992, and is currently the manager of the C-746-U Landfill (U Landfill) located three miles from the Paducah Plant. The U Landfill is a sanitary/industrial landfill that was constructed from 1995 to 1997 by DOE for disposal of solid wastes generated at the Paducah Plant that are not regulated as hazardous waste under federal regulation. Construction of the U Landfill was needed to continue on-site disposal of this type of waste generated at the Paducah Plant after an older landfill was filled to capacity and closed by the Commonwealth of Kentucky regulatory authority, the Kentucky Division of Waste Management (KDWM). Mr. Vander Boegh has been the landfill manager of the U Landfill since it began operations. In 1998, DOE contracted with BJC, making the firm its management and integration (M&I) contractor responsible both for the Paducah site's

nuclear enrichment program and for the site's environmental management. At that time, Mr. Vander Boegh became a BJC employee. In February 2000, BJC subcontracted the operation of the U Landfill to WESKEM, and Mr. Vander Boegh became an employee of WESKEM. ROI at 2-3.

The events relevant to Mr. Vander Boegh's Part 708 complaint began in early 2001. Acceptance of waste into the U Landfill had been suspended in November 1999 pending an environmental assessment when it was discovered that some waste materials disposed of at the landfill contained small quantities of residual radioactive materials. On February 1, 2001, KDWM issued DOE a new operating permit (Feb. 2001 Permit) for the U Landfill, which specified a number of conditions that must be satisfied in order for the landfill to begin receiving waste again. In response, BJC and WESKEM management initiated a series of meetings, discussions and exchanges of information during February 2001, addressing the conditions necessary to begin operating the U Landfill under the Feb. 2001 Permit. A tentative target date of July 2001 was set to begin full operation of the Landfill. One of the conditions (#9) of the Feb. 2001 Permit concerns the adequacy of the leachate storage capacity at the landfill.^{1/}

^{1/} As discussed in detail in the ROI at 2-3, the U Landfill has an underdrain system to collect leachate (groundwater) generated from the landfill. The amount of leachate wastewater is dependent upon a number of factors including rainfall, groundwater runoff, and levels of evaporation. Leachate collection lines transport leachate to a below ground wet well pumping facility that pumps the leachate into two 30,000 gallon leachate storage tanks (Tanks F-001 and F-002) located above ground. At this point, two leachate disposal options are allowed by the Feb. 2001 Permit. The primary disposal option is the recirculation of landfill leachate to the working phase of the U Landfill. The second option is the disposal of the leachate at the Paducah site's wastewater treatment plant. Leachate is required to be sampled for contamination and characterized prior to disposal at the Paducah site's treatment plant. Under the terms of the Feb. 2001 Permit, the leachate tanks must have enough space to store leachate for 15 days at peak production rates. In addition, enough leachate must be continually removed from the tanks to maintain enough vertical space above the level of leachate already contained in the tanks to cover eight days of
(continued...)

The ROI finds that it was known to individuals who had been working at the U Landfill since 1998 that there was a potential difficulty with inadequate storage capacity of the leachate tanks, specifically the regulatory requirement that enough reserve space be maintained in the leachate storage tanks to cover eight days of additional leachate collection (the 8-day reserve requirement). The ROI finds that in 1998, an unusually heavy rainfall caused an apparent violation of the 8-day reserve requirement. Again in February and March 2001, the regulatory 8-day reserve requirement was not available for a 21 day period. ROI at 3-4.

Beginning on February 2, 2001, Mr. Vander Boegh sent several e-mails to officials at BJC and WESKEM identifying the lack of reserve tank space as a potential liability for the operation of the landfill. ROI at 3-4. Then, on March 4, 2001, he sent an e-mail to Jan Buckmaster of WESKEM, with a copy to WESKEM Project Manager Dan Watson, captioned "C-746-U Leachate Issues" in which he identified the inadequacies of the leachate storage tanks, the lack of leachate transport equipment to rectify the problem and the potential risk to the Feb. 2001 Permit for the landfill. ROI at 4.

In his complaint and subsequent filings, Mr. Vander Boegh contends that these disclosures of potential environmental regulatory violations resulted in retaliatory actions from officials at WESKEM and BJC. These alleged retaliations include:

- (1) a disciplinary memorandum, dated March 5, 2001 to him from Mr. Watson of WESKEM (March 5 Memo);
- (2) WESKEM and/or BJC's decision in 2001 not to provide additional office space for Mr. Vander Boegh and his support staff at the U Landfill;
- (3) a proposal in August 2001, by Mr. Jeff Fletcher (WESKEM Operations Manager) to relocate the complainant's office from the U Landfill to the Paducah Plant site;
- (4) a change by BJC of the final version of a July 2001 white paper on waste acceptance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);
- (5) a memorandum dated August 1, 2001 from BJC manager Stephen Davis that directed Mr. Vander Boegh not to make protected disclosures to the DOE;

1/ (...continued)
additional leachate collection. This is known as the "8-day free board reserve" (8-day reserve) requirement.

- (6) a reduction in the complainant's support staff in October 2001;
- (7) a proposed subcontract change notice considered in March 2002, that would have affected the Complainant's position as landfill manager;
- (8) ongoing acts of harassment and intimidation by BJC personnel, particularly Mr. Kevin Barber (BJC's Subcontractor Technical Representative);
- (9) an annual performance evaluation in 2001; and
- (10) a low salary for the Complainant in comparison to other WESKEM managers and landfill managers.

C. The ROI's Findings and the Hearing Officer's Preliminary Determinations.

The ROI finds that Mr. Vander Boegh warned WESKEM and BJC management in February and March 2001 about excessive accumulations of leachate in the storage tanks at the U Landfill, that had reached and surpassed maximum levels that could be maintained under the reserve capacity requirements of the Feb. 2001 Permit. Specifically, it finds that the warnings contained in two emails from the Complainant to WESKEM and BJC officials dated February 16 and March 4, 2001 constituted protected disclosures under section 708.5(a)(1) of the whistleblower regulations. ROI at 10-11.

With respect to Mr. Vander Boegh's claims of retaliations, the ROI determined that only the March 5 Memo and the alleged incidents of harassment and intimidation of Mr. Vander Boegh by BJC personnel during the late summer and autumn of 2001 constitute possible retaliations under Part 708. The ROI also finds that the knowledge element and proximity in time exist between these retaliations and the protected disclosures made by Mr. Vander Boegh in February and March 2001, making them contributing factors to the retaliations. ROI at 14. The ROI further concluded that WESKEM and BJC had not provided the OHA Investigator clear and convincing evidence that those retaliations would have occurred in the absence of the complainant's protected disclosure. ROI at 15.

With respect to Mr. Vander Boegh's other claims of adverse personnel actions, the ROI noted that his allegations concerning his compensation compared to other landfill managers could warrant greater examination in the context of a hearing. ROI at 12. The ROI also found "insufficient basis" for Mr. Vander Boegh's claim that WESKEM's refusal to increase his office space at the landfill and its proposal to relocate his office to the Paducah Plant site were retaliatory. ROI at 12, n. 4.

In a November 27, 2002 letter to the parties, I established a briefing schedule for the parties. I also asked Mr. Vander Boegh to "indicate specifically the remedy that he is requesting for the March 5 memo and the alleged acts of harassment and intimidation by BJC personnel." November 27, 2002 letter at 3. Counsel for Mr. Vander Boegh responded on December 23, 2002. In a January 7, 2003 letter, I addressed issues raised by this response and by discovery requests made by BJC, and made preliminary rulings concerning the Complainant's allegations.

Specifically, I noted that the remedies available under Part 708 are aimed at restoring employees to the employment position and situation that they occupied had the retaliations not occurred. In fact, the definition of the term "retaliation" in the regulations clearly requires that the employer's action must have had a tangible effect on the employee's terms and conditions of employment in order to constitute a retaliation covered by Part 708.

Retaliation means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee *with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment)* as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart.

January 7, 2003 letter to the parties at 1-2, *citing* 10 C.F.R. § 708.2 [emphasis added]. Accordingly, I rejected Mr. Vander Boegh's contention that he be awarded an equitable salary relative to other similarly situated employees, and stated that Part 708 did not provide a remedy for longstanding salary differences that predated an individual's protected disclosures. I ruled that any remedy concerning Mr. Vander Boegh's salary from WESKEM would be limited to relief for specific retaliatory actions found to have been taken by WESKEM following his protected disclosures. January 7, 2003 letter at 2-3.

Further, I found that certain relief requested by Mr. Vander Boegh concerning his working conditions and support staff was outside the scope of Part 708. Specifically, his requests for "adequate office facilities" to allow him to perform his functional

responsibilities, and "adequate support staff" for his position of landfill manager could not be provided as Part 708 relief. With respect to the individual's office space, I noted that any alleged deficiencies that existed prior to the individual's protected disclosures are outside my remedial authority in this proceeding, and that for me to consider a possible remedy concerning office space, Mr. Vander Boegh must establish that the current alleged deficiencies are the result of specific adverse personnel decisions taken by WESKEM or BJC following his alleged protected disclosures. *Id.*

With respect to correcting the alleged inadequacy of his support staff, I stated that I would not consider that issue in this proceeding. I stated that I could find no grounds under Part 708 for granting relief concerning an individual's support staff. Part 708 relief is limited to restoring an individual's position, salary and related benefits to remedy specific adverse actions by an employer. I found that the issue of support staff implicates larger questions involving the adequacy of management discretion to achieve program objectives that are beyond the scope of this proceeding. January 7, 2003 letter at 3. Only a showing that a staff reduction affected the Complainant's ability to perform his job functions would convince me that a Part 708 issue has been raised. In the present case, such a showing clearly is not possible because the proposed staff reduction was never implemented. Accordingly, I will not consider Complainant's alleged retaliation (6) listed above.

The parties exchanged and submitted responses to the findings of the ROI in January 2003. In these briefs, both parties objected to findings made in the ROI. 2/ The parties also exchanged and

2/ In a submission dated January 10, 2003, BJC moved to dismiss Mr. Vander Boegh's Part 708 complaint on the grounds that adequate relief is not available under Part 708 to remedy the alleged retaliations claimed by Mr. Vander Boegh. BJC further contended that Mr. Vander Boegh had failed to meet his initial burden under Part 708, and that, to the extent this burden had been met, the claim itself is now moot, because Mr. Vander Boegh had developed a good working relationship with BJC employees. I reviewed Mr. Vander Boegh's submissions and found that they contained claims of protected disclosures and claims of related adverse personnel actions by WESKEM and BJC that were sufficient to support a hearing. Accordingly, I denied the Motion to Dismiss. See February 3, 2003 letter to the parties at 3.

submitted extensive documentary evidence, reply briefs, and witness lists. On March 4, 5 and 6, 2003, I convened an evidentiary hearing (the Hearing) at which a total of seventeen witnesses presented testimony.

Following the Hearing, I permitted the parties to submit their final arguments through post-hearing briefs and reply briefs. Upon receipt of reply briefs on May 12, 2003, I closed the record of the proceeding.

III. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish

by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal.

10 C.F.R. § 708.29.

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both Mr. Vander Boegh and by WESKEM and BJC. "Preponderance of the evidence" is 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).

B. The Contractor's Burden

If I find that Mr. Vander Boegh has met his threshold burden, the burden of proof shifts to the contractors. WESKEM and BJC each must prove by "clear and convincing" evidence that it would have taken the same personnel actions regarding Mr. Vander Boegh absent the protected disclosure. "Clear and convincing" evidence is a more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". See *Hopkins*, 737 F. Supp. at 1204 n.3. Thus if Mr. Vander Boegh has established that it is more likely than not that he made a protected disclosure that was a contributing factor to an adverse personnel action taken by WESKEM or BJC, the contractor must convince me that it clearly would have taken this adverse action had Mr. Vander Boegh never this protected disclosure.

IV. Analysis

A. Mr. Vander Boegh Made Protected Disclosures

As discussed above, the ROI finds that Mr. Vander Boegh warned managers at WESKEM and BJC in February and March 2001 about excessive accumulations of leachate in storage tanks at the U Landfill, that had reached excessive levels, causing the freeboard reserve (8-day reserve) to shrink below the minimum capacities required under the Feb. 2001 Permit. The ROI finds that these disclosures are documented in e-mail messages to WESKEM and BJC managers dated February 16 and March 4, 2001. A. Record at 172-173 and 181-182. The ROI concludes that these warnings constituted protected disclosures under both Section 708.5(a)(1), which involves a believed substantial violation of law, rule or regulation, and Section 708.5(a)(2), which involves a believed substantial or specific danger to public health and safety. ROI at 11. In their filings in this proceeding, neither WESKEM nor BJC dispute that these two communications from Mr. Vander Boegh constituted protected disclosures under Part 708. Accordingly, I concur with the ROI's conclusion in this regard.

In addition, I find that an earlier E-mail communication discussed in the ROI constituted a protected disclosure. That E-mail, dated February 2, 2001, was from Mr. Vander Boegh to Stephen Davis, BJC's Paducah Project Manager, with a copy to WESKEM manager Dan Watson. It also reported a potential environmental concern regarding the U-Landfill's leachate. As noted above, the Feb. 2001 Permit specified a number of qualifying requirements, including a specific

reference to adequate leachate storage capacity. ROI at 3. In commenting on this document in his E-mail to Mr. Davis, Mr. Vander Boegh stated in part:

It is interesting that [KDWM] emphasized leachate storage capacity in condition #9 (in the Technical Application also) of the new operating permit. I've always interpreted this as a potential liability, especially since 28,000 gallons of leachate were recorded in the Quarterly Report after a heavy rainfall event over 2 years ago. At that time, KDWM inquired about this event and log entry.

February 2, 2001 E-mail from Mr. Vander Boegh to Mr. Davis with a copy to Dan Watson of WESKEM. A. Record at p. 146. In this communication, Mr. Vander Boegh clearly identified the U Landfill's limited storage tank capacity for leachate as a "potential liability" that could keep the landfill from qualifying for the Feb. 2001 Permit. He also provided Mr. Davis and Mr. Watson with information concerning a specific instance where KDWM previously expressed concern about leachate capacity. The KDWM operating permit requirements concerning leachate storage capacity clearly are intended to protect the public from the potentially serious environmental hazards posed by the danger of leachate contamination of groundwater. Accordingly, I find that the February 2, 2001 E-mail from Mr. Vander Boegh to Mr. Davis makes a protected disclosure involving "a substantial or specific danger to public health and safety." 10 C.F.R. § 708.5(a)(2).

B. None of Mr. Vander Boegh's Allegations of Retaliation Are Barred for Lack of Timeliness

As an initial matter, I must determine whether the first three of Mr. Vander Boegh's alleged retaliations can properly be considered in this proceeding. 10 C.F.R. § 708.14(a) requires that complainants file their complaint "by the 90th day after the date you knew, or should have known, of the alleged retaliation." WESKEM and BJC both contend that because Mr. Vander Boegh did not file his complaint until January 4, 2002, this provision bars any consideration of the complaints relative to the March 5, 2001 memorandum of Dan Watson and to the decisions of BJC and WESKEM not to provide Mr. Vander Boegh with an office trailer at the U Landfill. WESKEM Post Hearing Brief at 11-12. BJC Post Hearing Brief at 9-10. BJC also contends that this provision bars consideration of Mr. Vander Boegh's claim that BJC employee Steve Davis' August 1, 2001 memorandum regarding permit modification

roles and responsibilities was an adverse personnel action. BJC Post Hearing Brief at 10. Applying the logic of this argument would also bar my consideration of Mr. Vander Boegh's claim that WESKEM's August 2001 proposal to move the Complainant's office was a Part 708 retaliation.

I reject these arguments. In a recent Part 708 decision, the Hearing Officer discussed the relevant regulatory language, and whether and under what circumstances actions more than ninety days old can be considered as retaliations if the complainant only came to regard them as such at a later date. He found that the complainant should be allowed some time to recognize a retaliatory action for what it is. *Steven F. Collier (Case No. VBH-0084)*, 28 DOE ¶ 87,036 at 89,257 (2003) (*Collier*).

In the present case, the personnel actions at issue - rejecting as "too expensive" plans to improve the individual's office space, a proposal to relocate his office, and memoranda allegedly imposing restrictions on the individual's activities - certainly were not viewed as neutral or innocent employment actions by Mr. Vander Boegh at the time that they occurred. However, these personnel actions are not so overtly punitive in nature that I find that a reasonable person "should have known" that they were Part 708 retaliations at the time that they took place. Additional analysis is therefore necessary. I believe that Section 708.14(a) of the regulation requires me to consider the evidence in the record, especially evidence as to Mr. Vander Boegh's state of mind, in order to determine when he knew or should have known that these were possible Part 708 retaliations, and to measure the ninety day filing requirement from that time.

I have examined the record, and conclude that there is no evidence indicating that Mr. Vander Boegh identified these four personnel actions as Part 708 retaliations prior to the filing of his whistleblower complaint in January 2002. With respect to the March 5, 2001 Watson memorandum, Mr. Vander Boegh's March 27, 2001 response to Mr. Watson makes no reference to the memorandum as the kind of personnel action adverse to him and in response to protected activity that would constitute a Part 708 retaliation. Rather, Mr. Vander Boegh seems to consider the memorandum part of an ongoing dialogue and he focuses on responding to the "many inaccuracies and innuendo" that he sees in the memorandum. Nor can I find any instance prior to his January 2002 complaint where Mr. Vander Boegh characterized the BJC/WESKEM decision to halt construction on his new office space as a Part 708 retaliation. In an email responding to WESKEM's proposal to relocate his office,

Mr. Vander Boegh states that such a move would negatively affect his ability to perform his duties as a landfill manager, but he does not characterize the move as a penalty or accuse WESKEM of retaliatory activity. Nor is there any contemporaneous evidence that he viewed the August 1, 2001 memorandum of Steven Davis as a retaliation. At the hearing, Mr. Vander Boegh testified that when he read this memorandum, he viewed the protocols set forth therein as an attempt by BJC to prevent him from reporting landfill problems directly to the DOE. TR at 726-728. He did not testify that he immediately viewed these protocols as a retaliation for protected disclosures that he had made earlier that year. By contrast, in his January 4, 2002 Part 708 Complaint, Mr. Vander Boegh clearly acknowledges his belief that he has experienced numerous retaliations for his protected activities:

This Employee Concerns [Form] is filed, due to numerous attempts to conceal program deficiencies by the M&I Contractor BJC. It has also become necessary to further document numerous attempts to retaliate against the Landfill Manager for exposing Landfill issues of risk through the chain of command. Most notably were actions by my employer and BJC after regulatory deficiencies were presented to DOE on February 6, 2001. WESKEM disciplined the Landfill Manager on March 6, 2001.

Employee Concerns Reporting Form, p. 2, Vander Boegh Hearing Exhibit X.3/ Accordingly, the weight of the evidence indicates that Mr. Vander Boegh did not actually recognize adverse personnel actions as retaliations for protected activity until shortly before he submitted his complaint. Nor do I find that a reasonable person necessarily would have recognized these adverse actions as Part 708 retaliations prior to December 2001. I therefore find that my consideration of these alleged retaliations is not barred by the ninety day limitation of 10 C.F.R. § 708.14(a), and will proceed with my analysis.

3/ As indicated below, the factual record indicates that the Complainant was disciplined at a meeting on March 5, 2001, not March 6, 2001.

C. Mr. Vander Boegh's Protected Disclosures Were a Contributing Factor to Alleged Acts of Retaliation Found in the ROI

Under 10 C.F.R. § 708.29, Mr. Vander Boegh must also show that his protected disclosures were a *contributing factor* with respect to a particular adverse personnel action taken against him. See *Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994). A protected disclosure may be a contributing factor to an adverse personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) *citing* *McDaid v. Dep't of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990). See also *Russell P. Marler, Sr.*, 27 DOE ¶ 87,506 at 89,056 (1998).

I conclude that Mr. Vander Boegh has established by a preponderance of the evidence that his protected disclosures were contributing factors to the retaliations he alleges. I base this conclusion on a finding that there is both constructive knowledge and proximity in time between the protected disclosures made by Mr. Vander Boegh and his allegations of retaliation. With respect to constructive knowledge of the disclosures, Mr. Vander Boegh made his February 2, 2001 disclosure to Mr. Davis, the BJC's Project Manager for Waste Disposition. His February 16 and March 4, 2001 disclosures were to WESKEM and BJC managers concerned with waste disposition. ROI at 10. Clearly, the WESKEM and BJC managers and employees who allegedly retaliated against Mr. Vander Boegh can be presumed to have had actual or constructive knowledge of these disclosures in the absence of a clear and convincing evidentiary showing to the contrary. With regard to timing, the disclosures took place in February and March 2001, and the alleged retaliations taken against Mr. Vander Boegh by WESKEM and/or BJC officials prior to the filing of his Part 708 complaint took place during the period March 5, 2001 through December 8, 2001. This is a period of approximately nine months between Mr. Vander Boegh's most recent protected disclosure and the latest alleged retaliation that occurred prior to the filing of his Part 708 complaint. A nine month period, especially where there are allegations of persistent retaliatory activity, is certainly a reasonable period of time within which to presume that the disclosures were a contributing factor to alleged retaliations. See *Luis P. Silva*, 27 DOE ¶ 87,550 (2000) (nine months between disclosure and alleged retaliatory action); *Barbara Nabb*, 27 DOE ¶ 87,519 (1999), *aff'd in relevant part*, 27 DOE

¶ 87,555 (2000) (more than seven months between alleged disclosures and alleged retaliatory actions).

The alleged retaliations that occurred subsequent to January 4, 2002, are proximate in time to Mr. Vander Boegh's pending Part 708 action filed on that date. This Part 708 action is protected activity, and I deem it to be a contributing factor under Part 708 to personnel actions adverse to him that occurred in 2002.

Accordingly, with respect to each of the personnel actions discussed below, I will first determine whether Mr. Vander Boegh has shown by a preponderance of the evidence that the personnel action took place and meets the criteria for a Part 708 retaliation. If I make this finding in the affirmative, I will then determine whether WESKEM or BJC has shown, or together have shown, by clear and convincing evidence, that the protected disclosures were not a contributing factor to the adverse personnel action or that they would have taken the same action in the absence of the protected disclosure.

D. Mr. Watson's March 5, 2001 Memo was a Retaliation

Mr. Vander Boegh contends that Mr. Watson's March 5 Memo was intended to discipline him and to restrict his protected activity at a time when he had been tasked with developing a list of landfill deficiencies. Post Hearing Brief at 3. In the days proceeding the issuance of the memo, Mr. Watson was aware that Mr. Vander Boegh was developing such a list. Vander Boegh Hearing Exhibit E consists of a March 1, 2001 email exchange between Gregory Shaia, a BJC deputy waste project manager, and Mr. Vander Boegh. Mr. Watson and Mr. Fletcher of WESKEM also were recipients of these emails. In the initial e-mail, Mr. Shaia requests that

WESKEM develop a comprehensive list of landfill deficiencies. This list should include permit or other regulatory or agreement citations indicating why said item is a deficiency or has non-compliance vulnerability. I further request that this list include a proposed solution for each item listed.

In his response, Mr. Vander Boegh indicates that he will prepare a detailed response by March 6.

Your action item is noted and appreciated. However, this will require a more detailed response than an e-mail. I will provide by COB Tuesday, bullets to address the

obvious deficiencies. A word of caution, these involve programmatic deficiencies that go back to the permit process in 1992.

Vander Boegh Hearing Exhibit E. On Sunday, March 4, 2001, Mr. Watson emailed the Complainant the following message:

I just finished reading the request from Greg Shaia for the list of landfill concerns. I want a concise list and path forward on each item by COB Tuesday, March 6, 2001. Please list the items in a table format and keep the problems and path forward to less than 40 words each. We will discuss at length on Monday, between you and I. Please be available to meet in my office at 9 am. Until then, please focus on this list and refrain from lengthy discourse by e-mail to anyone. WESKEM has to focus on the problems and provide a path forward.

March 4 Email from Watson to Vander Boegh, Vander Boegh Hearing Exhibit I. At the Monday meeting, Mr. Watson presented the Complainant with the March 5 Memo and read it to him. Entitled "Expectations of WESKEM's Landfill Manager", the stated objective of the memo is to assign priorities to Mr. Vander Boegh's activities as landfill manager. Three sections of priorities are listed in three paragraphs: (1) the priority to operate the landfill in regulatory compliance; (2) the priority to "keep WESKEM's interest at heart when operating the landfill, working with subordinates and superiors, and procuring needed supplies for the landfill"; and (3) the priority to WESKEM's client, BJC. In these paragraphs, Mr. Watson gives a number of instructions to Mr. Vander Boegh. In paragraph (1), he is told that his priority to operate the landfill in full regulatory compliance "does not allow the use of regulatory leverage against WESKEM, LLC, its employees or customers." He is directed to "contact regulatory agencies only as is required to fulfill your position as landfill manager and only with the foreknowledge of Bechtel Jacobs Company's environmental compliance group and [WESKEM's Subcontractor Technical Representative]." Under paragraph (2), he is instructed that "[a]ll communication from you to other WESKEM operations should be through your organization to me or other managers reporting to me" He is told to avoid overtime and that

The time you spend issuing email is excessive. Please utilize e-mail communication judiciously. I expect a list of landfill issues that is concise, to the point, and

timely to be updated weekly and provided to me every Monday morning.

In paragraph (3), he is instructed that "[a]ny action on your part that undermines our client [BJC] is wrong." Ad. Record, pp. 14-15. The Complainant characterizes this document as a "reprimand memo for protected activity" and asks that it be "expunged from the Complainant's personnel file." Complainant's Post Hearing Brief at 11.

WESKEM argues that the March 5 Memo cannot be viewed as a adverse personnel action because it is not disciplinary in nature. According to WESKEM, the memo's entire purpose was to get the Complainant to focus on his job so that work could be performed in a timely fashion and the landfill could receive a permit to reopen. It cites the March 4, 2001 email from Mr. Watson to Mr. Vander Boegh urging him to focus on creating a concise list of landfill issues requested by BJC manager Gregory Shaia, and asserts that the March 5 Memo was a further effort in that area.

Greg Shaia's request ultimately led to the delivery of the March 5 memorandum. What must be abundantly clear is that the memorandum was written not in response to any protected disclosure made by complainant Vander Boegh, but directly related to the ongoing work of WESKEM. WESKEM was trying to service the needs of its customer, Bechtel Jacobs. Dan Watson was charged with that obligation. Dan Watson was trying to get his employee and landfill manager to concentrate and focus on the issues. Accordingly, it is submitted that a legitimate business interest existed for the authorship of the memorandum and that interest is a complete defense to any allegation of retaliation by complainant Vander Boegh.

WESKEM Post Hearing Brief at 16. I cannot accept the assertion that the March 5 Memo was issued solely for the purpose of offering guidance and encouragement to Mr. Vander Boegh in responding to Mr. Shaia's request. Mr. Watson's March 4 email to the Complainant had already provided detailed instructions and a deadline for this project. In addition, the factual record of this proceeding contradicts WESKEM's assertion. The ROI reports that Mr. Watson told Mr. Fred Brown, the Complaint Investigator, that the March 5 memo stemmed from an ongoing request by the complainant for additional office space, and that he wrote the memo to direct the Complainant to focus on his duties as Landfill Manager, and also to remind the complainant that he must keep WESKEM and BJC informed

when he was meeting with or providing information concerning the Landfill to DOE or the Kentucky regulatory authorities. ROI at 14-15. The March 5 Memo itself, with its specific prohibition against the Complainant's use of "regulatory leverage", its directive that he contact regulatory agencies only with the "foreknowledge" of BJC and WESKEM, and its admonition for him to "limit your communication" with WESKEM's client BJC, reveals that its purpose was to restrain the Complainant's communications with BJC and Kentucky officials rather than to focus his attention on a specific assignment, as WESKEM contends.

WESKEM also asserts that the March 5 Memo cannot be viewed as retaliatory because its statements concerning the Complainant's duties and responsibilities are "accurate and truthful." It contends that at the Hearing, the Complainant essentially agreed with all of the memo's statements in this regard. WESKEM Post Hearing Brief at 16-20, citing TR at 180-186. I disagree. While the Complainant agreed with the memo's general statements concerning his duties, he specifically disagreed with the memo's statement that "the time you spend issuing e-mail is excessive." TR at 184. Moreover, he found the content and tone of the letter to be threatening.

I took it as a threatening . . . letter due to the fact that everything in this letter is what's in the contract that we are obligated to follow. And it's in the regulations. So, there's only one reason I understood this letter was written, and that is to start discipline action against me.

TR at 187. I agree that the memorandum was disciplinary in nature and effectively warned the Complainant that he was violating duties if he communicated excessively with BJC officials or had contacts with state regulators without the foreknowledge of WESKEM and BJC managers. I therefore am not convinced by WESKEM's arguments that this memo is not an adverse personnel action.

For the reasons stated above, I find that the Complainant has met his evidentiary burden of showing that the March 5 Memo constituted a Part 708 retaliation. I concur with the ROI's preliminary finding that this memo is clearly disciplinary in its tone and directs the Complainant to refrain from certain conduct, notably excessive e-mail messages and unnecessary communications with KDWM and BJC, in order to fulfill his proper role as a landfill manager employed by WESKEM. See ROI at 12-13.

Nor has WESKEM shown by clear and convincing evidence that it would have issued this memo in the absence of those disclosures. In its Post Hearing Brief, WESKEM contends that Mr. Watson could not have been motivated by the Complainant's protected activity when he issued this memo because he was as yet unaware of the leachate issues raised by Mr. Vander Boegh. I do not find that Mr. Watson's testimony is particularly persuasive concerning this alleged lack of knowledge. Although he testified that he did not know of the Complainant's protected disclosures concerning leachate storage issues at the time that he wrote the memo [TR at p. 488], his subsequent testimony greatly qualifies this denial. Rather than testifying that he never heard of leachate storage issues at that time, he stated that he had not "focused on it". TR at p. 488.

There were so many blooming lists of problems at the landfill, that this is just one of several. And it just didn't appear to be -- I never took it to be a problem.

TR at 488. Under cross examination, Mr. Watson acknowledged having read his copy of the March 4 email from Mr. Vander Boegh to Mr. Buckmaster on leachate issues. He acknowledged that he was working that Sunday and may have read it on that date, prior to writing the March 5 Memo to the Complainant. TR at 505. He continued to maintain at the Hearing that he did not fully understand the issue:

I knew that there were a list of problems and leachate problems were on that list of problems. But I didn't know about the seriousness or what exactly was associated with [the] leachate problem.

. . . At the time I understood that we had a [leachate] capacity problem. I didn't understand that it was a permit issue.

TR at 506. In addition to the March 4 email from the Complainant, Mr. Watson also had been copied on the earlier February 16, 2001 email warning that a critical amount of leachate had accumulated, and on the February 2, 2001 email that identified leachate storage capacity as a critical issue in obtaining the Feb. 2001 Permit. Accordingly, I conclude that WESKEM has not rebutted the assumption that Mr. Watson was aware of or affected by Mr. Vander Boegh's protected disclosures concerning leachate storage problems at the time that he wrote his March 5 memo.

Accordingly, I will provide the Complainant with relief from this retaliation. Based on the testimony of Mr. Watson at the Hearing, WESKEM asserts that the March 5 Memo is not in Mr. Vander Boegh's personnel file. WESKEM Post Hearing Brief at 20. Nevertheless, I will direct WESKEM to review the Complainant's personnel file, and to remove the March 5 Memo if they find it there. I will also direct WESKEM to issue a written statement to the Complainant declaring that the March 5 Memo has been rescinded.

E. The WESKEM/BJC Decision to Halt Construction of an Office Trailer for the Complainant was a Retaliation

The Complainant contends that during March 2001, BJC canceled plans to build an office/document center trailer (hereafter the "office trailer") at the site of the Complainant's landfill. At the Hearing, he testified that the proposal to modify the U Landfill by constructing the office trailer and other buildings had been developed by BJC when he was a BJC employee [TR at 61], and the permit for these proposed improvements allowed construction to begin on February 1, 2001. He estimated that BJC completed the construction of a storm shelter and a shower trailer by April 1, 2001. TR at 50. At the Hearing, the Complainant testified that the office trailer would have increased his office space significantly. TR at 52. He stated that BJC developed the proposal because they were aware of a deficiency in office space at the U Landfill. TR at 61-62. He testified that he was not informed of any reason why the office trailer was not constructed. TR at 51.

In support of these assertions, the Complainant introduced a copy of the Modification proposal submitted by the DOE to the KDWM. Vander Boegh Hearing Exhibit D. The copy indicates that the Modification proposal was received by the KDWM on August 7, 2000. It provides for the construction of "an office/document center trailer" to be located east of the existing personnel building and "approximately 12' x 40' for future offices, conference room, and document storage." Modification proposal at 1. The document includes a drawing indicating the location of the proposed trailer. On the last page, the document is stamped "as approved February 1, 2001." *Id.* The complainant also introduced the testimony of Mr. Roger Alcock, a union worker at the U Landfill. He confirmed that there were plans to build an office trailer at the U Landfill. He testified a pad for this trailer was constructed. TR at 446. He stated that he had spoken to Mr. Watson and was told that the office trailer was not being built because it would cost too much

money. He testified that Mr. Watson gave him an inflated estimate for the cost of the office trailer. TR at 447.4/

I find that the Complainant has met his evidentiary burden of showing by a preponderance of the evidence that BJC and/or WESKEM took adverse personnel action when they canceled their plan to construct the office trailer at the U landfill. The evidence indicates that the plans to construct the office trailer did exist, and that preliminary site work for the office trailer was completed. The project was abandoned by BJC and/or WESKEM in February and March 2001, just after Mr. Vander Boegh made protected disclosures. The decision not to build the office trailer clearly is adverse to Mr. Vander Boegh, as it would have increased his office space. Not implementing an approved plan that would improve an employee's working conditions clearly is an adverse personnel action as defined in Part 708. Accordingly, the burden shifts to BJC and WESKEM to show by clear and convincing evidence that they would have canceled the construction in the absence of Mr. Vander Boegh's protected disclosures.

During the investigation and at the Hearing, BJC and WESKEM both attempted to show that their actions in this matter were not retaliations under Part 708. BJC contends that it did not retaliate against Mr. Vander Boegh because it made a decision prior to February 1, 2001 to let WESKEM provide the office trailer to be built at the U Landfill. At the Hearing, Mr. Stephen Davis, BJC's Project Manager for Waste Disposition, testified concerning this matter. He acknowledged that BJC prepared the Modification proposal, including the office trailer and other structures, that

4/ The available evidence indicates that sometime in late February 2001, Mr. Watson stated to Mr. Vander Boegh that the proposed costs for constructing the office trailer were too high. ROI at 14. This statement appears to have been made before the Complainant's March 4, 2001 protected disclosure, but there is no indication that it occurred prior to his February 2 and February 16, 2001 disclosures. However, Mr. Watson apparently did not inform the Complainant at that time that the trailer would not be built. A contemporaneous email and telephone memorandum by WESKEM employee Cindi Wahl indicates that on March 21, 2001, the Complainant informed Ms. Wahl that WESKEM was installing a new trailer at the U Landfill "in the near future," and that he had spoken to Mr. Watson on March 20, 2001 about installing a bathroom in the trailer. A. Record at 00603-00604.

the DOE then submitted to the KDWM for approval. He also acknowledged that BJC built a shower and change trailer for union workers, and a storm shelter at the U Landfill, both of which were included in the Modification proposal. TR at 633-636.

Mr. Davis testified that BJC submitted the construction proposal for the office trailer to the DOE with the understanding that WESKEM would finance its construction. He testified that WESKEM indicated to him that it would pay for construction of the office trailer at some point in time between its receipt of the subcontract to manage the U Landfill and the Modification proposal being submitted to the DOE in August 2000. TR at 639.

I recall it was prior to this letter going in. Again, I can not remember the exact date, but the fact that there is a dimension here for that office trailer must have indicated at some point, they decided on that size trailer.

TR at p. 639. In his testimony, WESKEM manager Dan Watson confirmed this account, stating that he knew "we were going to do it out of the monies with WESKEM, but it became way to expensive." TR at 500. Based on this testimony, I conclude that prior to the Complainant's protected disclosures, WESKEM and BJC had an agreement whereby WESKEM had agreed to finance and construct the proposed office trailer at the U Landfill. Accordingly, BJC has shown by clear and convincing evidence that WESKEM rather than BJC planned to construct the office trailer.

WESKEM contends that its decision not to construct the proposed office trailer was based entirely on cost, and therefore its decision not to construct the trailer would have been the same if there had been no protected disclosures. Mr. Watson testified that WESKEM purchased an inexpensive, used trailer with the intention of remodeling it as an office/document center trailer for the U Landfill.

We inspected [the trailer], we looked at it, thought about some of the modifications associated with it. And we purchased it for 2,000 dollars.

TR at 478-479. However, Mr. Watson testified that "I could not come to terms under working with [the Complainant] on the issue of the office trailer as to what the trailer would be." He stated that Mr. Kerry Stone, an employee at the U Landfill supervised by the Complainant, sent him a memo outlining several different

improvements. Mr. Watson stated that he authorized Mr. Stone to get estimates for these improvements, which "were in the neighborhood of twenty thousand dollars or so." TR at 479. Mr. Watson testified that WESKEM then abandoned the project of converting the trailer to office space because these estimated expenses were deemed to be "very, very expensive." He explained that WESKEM was not to be reimbursed by BJC or the DOE for these expenses, and twenty thousand dollars would amount to half of WESKEM's annual profits on its operation at the U Landfill. TR at 480.^{5/} He said that WESKEM then decided to use the unrenovated trailer to keep industrial hygiene equipment in an air conditioned environment so it would not expire. At that time they moved it to the Paducah Plant, where it continues to be used for storage purposes. TR at 481.

WESKEM has not shown by clear and convincing evidence that it would have made the decision to abandon the construction of an office trailer at the U Landfill in the absence of the Complainant's protected disclosures. WESKEM acknowledges that it intended to pay for the construction of the office trailer at the time that the proposal was first submitted by the DOE to the KDWM. WESKEM has not shown why or to what extent the cost estimates provided by Mr. Stone were out of line with its previously approved projected costs for the proposed office trailer. It therefore has not shown convincingly that its decision to abandon reconstruction of the trailer was based on unexpectedly high costs for the project. Under the standards of proof set forth in Part 708, I conclude that WESKEM has not demonstrated by clear and convincing evidence that its decision to abandon construction of the office trailer would have occurred in the absence of the Complainant's protected disclosures.

Accordingly, I will provide relief to the Complainant for this retaliation. I will direct WESKEM to proceed with this renovation based on the projected costs provided by Mr. Stone.

F. WESKEM retaliated against the Complainant when it proposed to Relocate his Office to the Paducah Plant Site

The Complainant contends that following his protected disclosures, a WESKEM official proposed that his office be relocated to the Paducah Plant, a distance of three miles from the U Landfill. He

^{5/} In later testimony, he refers to this \$20,000 as thirty to forty percent of the profit from the landfill. TR at 496.

contends that this proposed relocation would have made the performance of his duties as Landfill Manager more difficult, negatively affecting the terms and conditions of his employment. Vander Boegh Post Hearing Brief at 4.

The record indicates that in early August 2001, WESKEM Operations Manager Jeff Fletcher orally informed the Complainant that WESKEM was proposing to relocate his office to the Paducah Plant. In an August 2, 2001 email to Mr. Fletcher, the Complainant indicated that this move would seriously affect his ability to manage the U Landfill. Vander Boegh Hearing Exhibit J. In an August 3, 2001 email to Mr. Don Seaborg of the DOE, he repeated these objections to the move.

I have been asked to vacate the landfill office and I have asked Jeff Fletcher for an explanation. His supervisor is requesting this move. I have no problem with a secondary in plant satellite office, but a land fill manager can't manage a contained landfill from the plant.

My goals have always been to resolve conflicts not be the center of conflicts and my record over the past few months especially should account for that. I feel I am being attacked on all fronts, due to a lack of understanding of others (not DOE).

Vander Boegh Hearing Exhibit K. At the Hearing, the Complainant described how the proposed relocation would have affected his ability to perform his duties as a Landfill Manager. He stated that as one of two employees licensed to monitor access to the U Landfill, it would have been very difficult to perform his supervisory responsibilities at the new location. He testified that he would have to spend a great deal of time traveling back and forth between the U Landfill and the Paducah Plant. TR at 92.

Although this relocation proposal was later withdrawn by WESKEM, the Complainant asserts that a threatened action to adversely affect working conditions is by itself an actionable retaliation. He argues that

the job detriment need not be actual but may be potential and threatened. The threats themselves operated as a restraint on the Complainant's ability to perform his job duties and serve as further evidence of the hostility

that the Respondents bore to the Complainant for his protected activity.

Vander Boegh Post Hearing Brief at 11.

Part 708 specifically defines "retaliation" to include intimidation, threats or "similar action" concerning conditions of employment. 10 C.F.R. § 708.2(2). I conclude that anyone familiar with Mr. Vander Boegh's job duties would have understood that relocating his office away from the U Landfill would interfere with his day-to-day management and make his conduct of those duties more time consuming and difficult. Accordingly, I find that the Complainant has met his evidentiary burden of showing by a preponderance of the evidence that when WESKEM announced its intention to relocate his office to the Paducah Plant, it committed a Part 708 retaliation against him.

In response, WESKEM argues that its proposal to relocate Mr. Vander Boegh to the Paducah Plant was based on legitimate business interests. It contends that Mr. Fletcher requested the move shortly after he became General Manager for WESKEM, and that he had a legitimate interest in having his front line managers easily accessible to him. At the Hearing, Mr. Fletcher testified that all of his other front line managers were at the Paducah Plant and "I was just wanting him to be closer to me so that I would have access when I needed him." TR at 537. He denies that there was any retaliatory motivation for his action. TR at 538.

WESKEM's explanations do not establish by clear and convincing evidence that Mr. Fletcher would have directed the Complainant to relocate his office in the absence of the Complainant's protected activity. WESKEM has not explained why Mr. Fletcher's legitimate business interest in having the Complainant easily accessible to him would override Mr. Fletcher's business interest in having the Complainant, a landfill manager, based primarily at the site that he is managing. Nor am I convinced that Mr. Fletcher's inexperience as WESKEM's General Manager is a convincing explanation for his relocation directive to the Complainant. Although Mr. Fletcher was appointed Operations Manager shortly before he directed the Complainant to relocate, he had been employed by WESKEM as Operations Manager since February 2001, and had interacted with Mr. Watson and Mr. Vander Boegh during the intervening period. Nor am I convinced by Mr. Fletcher's claim that his relocation directive was entirely untainted by retaliatory intent toward the Complainant. In fact, Mr. Fletcher reviewed Mr. Watson's earlier March 5 Memo to the Complainant prior to its

being given to him. TR at 535-536. I therefore find that Mr. Fletcher was either aware of or negatively influenced by WESKEM or BJC officials who were aware of the Complainant's protected disclosures. I also am unconvinced that he was unaware of the adverse impact on the Complainant that his proposed relocation would cause, and that this was not a factor in his decision to make the proposal.

Finally, WESKEM argues that it was not unreasonable for Mr. Fletcher to request this relocation because in 1997, while employed by another contractor, Mr. Vander Boegh had managed the U Landfill successfully from an even more remote location than the Paducah Plant. See Complainant's testimony, TR at 166-67. This assertion is beside the point. The issue is not whether the Complainant *could* manage the U Landfill from a remote location, but whether the conditions of his employment would be adversely affected by moving his office away from the landfill.

Accordingly, I will provide relief to the Complainant for this adverse proposal concerning his working conditions. I will direct that WESKEM shall not relocate the Complainant's primary office to a location outside the U Landfill without the Complainant's express consent for one year from the date of this Decision.

G. BJC's Change to the CERCLA White Paper Was Not Retaliatory

Mr. Vander Boegh contends that in July 2001, BJC changed some key language in the final version of a white paper on CERCLA waste acceptance. The Complainant states that he and three other individuals who had co-authored the white paper had no opportunity to review this change before the white paper was issued, even though BJC continued to list them as the authors of the white paper. At the Hearing, co-author Randall Russell, vice president of an environmental engineering firm, testified that he also was upset by BJC's failure to consult the authors concerning this change. TR at 459. I conclude that the Complainant has shown by a preponderance of the evidence that BJC adversely affected the conditions of his employment when it made this change without consulting him.

BJC contends that its action had nothing to do with Mr. Vander Boegh's protected activity. In a contemporaneous email to Ms. Forsee, another co-author, BJC Project Manager Stephen Davis stated:

I agree with the comment [that the final draft of the white paper] as authored should not have been further revised by legal without the authors approval. Unfortunately, we have little influence on how a document is written after it has legal review. Additionally, I was not aware of this final change. Bottom line it should have received concurrence from the authors.

August 2, 2001 email from Mr. Davis to Ms. Forsee, BJC Hearing Exhibit 5.

As the above circumstances indicate, it appears that the legal division of BJC made a revision to the white paper prior to its issuance without consulting the document's four authors. I cannot see in these circumstances any indication of a specific intent to retaliate against Mr. Vander Boegh. Accordingly, I find that BJC has met its burden of showing by clear and convincing evidence that its legal department would have modified the same language in the report in the absence of the Complainant's protected disclosures.

H. BJC Manager Stephen Davis' August 1, 2001 Memo Was Not Retaliatory

In his filings in this proceeding, the Complainant refers to a memorandum dated August 1, 2001 from BJC manager Stephen Davis regarding permit modification roles and responsibilities (the Davis Memo). In his Pre-Hearing Brief, he contends that the March 5 Memo prohibited him from reporting any safety violations "except through certain stifling procedures" and "some of these obligatory procedures" were repeated in the Davis Memo. Vander Boegh Pre-Hearing Brief at 2. In his Post-Hearing Brief, the Complainant states that the Davis Memo delineates a "protocol, which required Bechtel Jacobs participation in reports to the DOE or the state." The Complainant contends that Mr. Davis stated at the Hearing that this protocol was mostly his own "philosophy." Vander Boegh Post Hearing Brief at 9.

The Complainant appears to be arguing that the Davis Memo is an attempt to impose arbitrary and "stifling" procedural restrictions on his contacts with state authorities and the DOE. At the Hearing, he testified that he read the Davis Memo as discouraging him from going directly to the DOE with reports of regulatory or environmental violations at the landfill. TR at 728.

My review of the Davis Memo is that it is almost solely a statement of company procedures and policy. Entitled "Landfill Permit R&R

[Roles and Responsibilities]" and addressed to the Complainant and Rebecca Ann Forsee, a WESKEM employee, it states in pertinent part:

Let me reiterate the statements I made in our status meeting yesterday about the Landfill permit roles and responsibilities. Permit interpretations, updates, revisions, verbal discussions and written correspondence with the state regulators, and other subjects concerning the permit requires the involvement of STR [the BJC subcontractor technical representative], regulatory compliance, and the landfill operator.

A. Record at p. 819 (emphasis in original). The Davis Memo states that it "reiterates" a previous oral statement and emphatically "requires" the memo's recipients to "involve" BJC and WESKEM officials in any of their contacts with state regulators. As one of those recipients, the memo is clearly seeking to discourage Mr. Vander Boegh and Ms. Forsee from any private contacts with state regulators. However, to the extent that established company policy prohibits such contacts, a memorandum restating that policy cannot be seen as an adverse personnel action. Under Part 708, a DOE contractor certainly is permitted to state its official policies in neutral terms, and without threats, to its employees or subcontractor employees.

As discussed above with regard to the March 5 Memo, Mr. Vander Boegh acknowledges that he must report his contacts with the state regulators to WESKEM and BJC officials. Unlike the March 5 Memo, the Davis Memo contains no implied criticism of the Complainant's "regulatory leveraging" and "excessive" use of emails. The Complainant has not established that any of the requirements stated in the Davis Memo go beyond previous statements of BJC or WESKEM policy, while BJC has presented testimony indicating that this memorandum merely restates the company's policies and does not impose additional restrictions on the Complainant. Accordingly, I conclude that the Complainant has not met his burden of showing that the Davis Memo constituted an adverse personnel action against him.

I. Actions by BJC Employee Kevin Barber Toward the Complainant and the Response of BJC Management Are Not Retaliations that Require Relief

The Complainant contends that following his protected disclosures he was repeatedly confronted by threats and intimidation from BJC and WESKEM employees. In addition to the allegations discussed

above, Mr. Vander Boegh contends that on two specific occasions he was confronted by threats and intimidation from Mr. Kevin Barber, BJC's Subcontractor Technical Representative for its mixed waste treatment project. He states that the first occasion was at a regular weekly meeting on October 16, 2001, when Mr. Barber suggested that he would no longer be recognized as the landfill manager and accused the Complainant of not getting work done. Vander Boegh Post Hearing Brief at 4-5. The Complainant contends that he delivered a memorandum documenting the alleged harassment and intimidation to BJC Project Manager Steve Davis the following day. TR at 126. This memorandum describes the incident as follows:

Mr. Barber intimated that I had apparently incorrectly prepared the WESKEM disclosure statements prior to the contract date of 2/28/01. He further insisted that BJC legal counsel would be correcting my error. . . . There was an inference that [the Complainant] would no longer be recognized as "key personnel" as required by KDWM. During later discussions regarding leachate disposal arrangements . . . , Mr. Barber interrupted and proceeded to make the statements that "if [the Complainant] could not begin work by Friday, that wouldn't be anything new since I was noted for not getting any work done anyway."

Vander Boegh Hearing Exhibit T.

A second instance of aggressive behavior by Mr. Barber toward the Complainant was documented at the Hearing. DOE employee Mr. Mitch Hicks, the PDGP's health physicist, testified that he was asked by the Complainant to attend a weekly landfill meeting for BJC and its subcontractors on March 5, 2002. He said that an altercation began after Mr. Vander Boegh complained that he had not been kept in the loop on documents that were being circulated that would require his review. He then recounted the following:

The response was [BJC Project Manager Steve Davis] said that [he] thought we had this problem solved. [The Complainant's] supposed to be kept in the loop on the documents that are going forward. He then turned to Mr. Kevin Barber . . . and berated him a little bit about it, that, I thought we had this problem solved. And Kevin got a little bit upset about that. As a matter of fact, he kind of blew his stack with [the Complainant] while we were there. And later on, Steve asked Gary and Kevin Barber to please leave the meeting.

TR at 312-313.

The Complainant contends that a third incident involving Mr. Barber occurred on March 13, 2002, when several parties, including the Complainant and Mr. Barber, participated in a conference about landfill issues. During this discussion, the Complainant contends that Mr. Barber suggested that the Complainant leave the conference, saying "there's the door." He asserts that Mr. Fletcher of WESKEM reported this incident to Mr. Davis of BJC, but that BJC took no corrective action. Complainant's Response to Hearing Officer's January 6, 2003 Order of Discovery at 3. At the Hearing, Mr. Barber confirmed that he made this statement to the Complainant at that meeting. TR at 603.

These three incidents, as documented by the Complainant, establish conduct by one BJC employee, Mr. Barber, that certainly was aggressively hostile towards the Complainant on three specific occasions. I find that such actions reasonably may be deemed to constitute harassment and intimidation of the Complainant for his protected activity under Part 708. Accordingly, I find that Mr. Vander Boegh has met his evidentiary burden on this issue.

However, in this instance it is not necessary for me to analyze whether BJC has shown, by clear and convincing evidence, that Mr. Barber would have taken these actions against Mr. Vander Boegh in the absence of his protected disclosures. As discussed below, based on extensive testimony and other evidence presented by BJC at the Hearing, I find that BJC has established that it has aggressively counseled Mr. Barber concerning the inappropriateness of his actions toward the Complainant, and has ensured that this type of behavior has not recurred since March 2002. Accordingly, there is no present need for me to provide Part 708 relief to the Complainant concerning this issue.

Determining appropriate Part 708 relief for Mr. Barber's actions requires me to consider to what extent BJC management was aware of that conduct and whether they effectively intervened to ameliorate it. In this regard, the Complaint Investigator stated that he found no indication that there was any attempt by BJC management in October 2001 to rectify the complainant's perception that he was being harassed by Mr. Barber. ROI at 13. However, through testimony at the Hearing and by its exhibits, BJC has established that it did make ongoing efforts to resolve what it believed to be an ongoing personality conflict between Mr. Barber and Mr. Vander Boegh.

The record now indicates that immediately following receipt of the Complainant's October 17, 2001 memorandum by BJC management, WESKEM General Manager Jeffrey Fletcher and Mr. Davis of BJC agreed to hold a coaching and counseling session with Mr. Vander Boegh and Mr. Barber. The Complainant testified that this meeting lasted more than one and one half hours, and that "Jeff Fletcher interceded on a couple of heated discussions." TR at 128. He also stated that he and Mr. Barber were told to work on their relationship, and that he interpreted statements made by Mr. Davis to Mr. Barber as a disciplinary counseling of Mr. Barber. TR at 260.

As noted above, at the March 5, 2002 meeting where Mr. Barber "blew his stack" at the Complainant, Mr. Davis asked both individuals to leave the meeting. There is not enough evidence of the Complainant's conduct at this meeting to ascertain whether Mr. Davis acted fairly in asking both individuals to leave, but he clearly did not tolerate Mr. Barber's outburst. Mr. Hicks further testified that after the Complainant and Mr. Barber left the meeting, Mr. Davis indicated to those remaining that there was a personality conflict between Gary Vander Boegh and Kevin Barber. TR at 313.

With respect to the March 13, 2002 meeting, Mr. Barber testified that he was upset with the Complainant because he was not sticking to the agenda of the meeting. TR at 603. Mr. Cliff Blanchard, a consulting engineer with Tetrattech, Inc., confirmed this account (TR at 439) although he also testified that he thought that asking the Complainant to leave the meeting was unjustified. TR at 434. After Mr. Barber reported to Mr. Davis that he may have made an inappropriate remark to the Complainant, Mr. Davis asked Mr. Barber to send him an email message summarizing the meeting. TR at 607, 662; BJC Hearing Exhibit 4. Mr. Davis testified that after receiving this message, he and Mr. Barber's functional manager at BJC held a second coaching and counseling session with Mr. Barber, who was told to improve his working relationship with Mr. Vander Boegh. TR at 663-664. Mr. Davis stated that he believes there has been a significant improvement in Mr. Barber's relationship with the Complainant since that time. 664-665.

In light of BJC's efforts to intervene on behalf of the Complainant, I agree with BJC's assertion that Mr. Barber's instances of aggressive conduct toward the Complainant have been remedied. BJC Post Hearing Brief at 21. I also note that Mr. Barber is no longer employed by BJC. *Id.* at n. 5.

J. BJC's Presentation to the DOE of a Proposed Subcontract Change Affecting the Complainant Was a Retaliation

The Complainant contends that in March 2002, the DOE adopted a proposal that would have changed his job position or resulted a demotion. Although the DOE later abandoned the proposal prior to implementing it, the Complainant asserts that BJC's role in developing and recommending the proposal constituted a retaliation. At the Hearing, the Complainant testified that in March 2002, he spoke by telephone with Mr. Harvey Rice, the program manager for the DOE's Oak Ridge environmental management division. He testified that during this conversation, Mr. Rice stated that BJC was proposing contract changes to the DOE that would effectively remove the Complainant's position of Landfill Operator from WESKEM and transfer it to BJC. The Complainant stated that since Mr. Barber was a BJC employee, he believed that Mr. Barber would replace him as Landfill Manager of the U Landfill. He memorialized his conversation with Mr. Rice in an email to his attorney. Vander Boegh Hearing Exhibit V. TR at 135-139. In his testimony at the Hearing, Mr. Rice confirmed that at a March 2002 meeting, BJC presented a proposal to the DOE that involved changing the Complainant's job position at the U Landfill. TR at 373-374. On March 26, 2002, BJC manager Steve Davis sent an email to the DOE's Paducah site manager Don Seaborg summarizing this meeting. He stated that the meeting had been attended by himself, WESKEM manager Jeff Fletcher, Mr. Rice, Mr. Seaborg, and others. Mr. Davis summarized the options presented by BJC and the decision reached by BJC and the DOE, as follows:

A discussion was conducted concerning the landfill management and operations protocol. The current protocol and three options were discussed. It was stated the current protocol is not working very well. The options discussed include: a) BJC as manager with licensed landfill managers assigned to the Waste Project with support by WESKEM as field operator, b) WESKEM performing full management and operation with BJC providing baseline controls and reporting, and c) BJC self-performing all work. DOE decided to implement Option a) above. ACTION: BJC will work with DOE and WESKEM to facilitate the change over as soon as possible. Davis has the responsibility to lead the effort.

Email submitted by Complainant's Hearing witness Mitch Hicks, identified as "Hicks Exhibit A". DOE employee Mitch Hicks also testified that Mr. Rice informed him of this proposal. TR at 314-

15. In a March 28, 2002 email to Rufus Smith, Employee Concerns Manager for the DOE's Oak Ridge Operations Office, Mr. Hicks presented the following description of Option (a) and its effect on Mr. Vander Boegh, as related to him by Mr. Rice:

DOE legal has stated to Harvey Rice (DOE Waste Management), that the subcontractor, WESKEM (Vander Boegh's employer), should not be acting as the landfill manager. The position of the landfill manager under Kentucky law requires the ability to redirect resources, which is the function of BJC, according to DOE legal.

This was considered during the landfill meeting, and DOE Paducah site manager Don Seaborg . . . decided to authorize BJC to become the official landfill manager, with WESKEM remaining as the operator of the facility.

Mr. Vander Boegh (according to Harvey Rice) is to be offered another position within WESKEM at the same pay and benefits that he is currently receiving. Or, he can stay at the landfill as an Operator (not as landfill Manager) at less pay. I'm sure that Mr. Vander Boegh will not like either option.

Hicks Hearing Exhibit A. In his filings in this proceeding, the Complainant contends that these actions constituted a threat by BJC to demote and replace the Complainant from his position as Landfill Manager. Complainant's Post Hearing Brief at 13.

I agree that BJC's actions in this proposed subcontract change appear to constitute a Part 708 retaliation. By presenting a recommendation to the DOE that would result in Mr. Vander Boegh losing his job title and authority, and having to choose between a job transfer and a pay reduction, BJC certainly took an adverse action against the individual that threatened the conditions of his employment. 10 C.F.R. § 708.2. Although the Davis email indicates that other options were presented to the DOE at this meeting, the DOE site manager's decision to select option (a), with its negative impact on the Complainant, relied on the knowledge and experience of the contractors and was influenced by the presentation and discussion of each option by Mr. Davis and Mr. Fletcher. Accordingly, I conclude that the Complainant has met his evidentiary burden of showing by a preponderance of the evidence that BJC took retaliatory action against him in its communications with the DOE regarding changing the Complainant's position at the U Landfill.

I find that BJC has not established by clear and convincing evidence that it would have provided the same advice to the DOE on this subject in the absence of the Complainant's protected disclosures. BJC contends that the option that it presented at the March 26, 2002 meeting that was adopted by the DOE was not detrimental to Mr. Vander Boegh. At the Hearing, Mr. Davis testified that if that option had been implemented with a licensed Landfill Manager employed by BJC, he expected that the Complainant would continue to be the landfill manager because of his rights under the workforce transition roles. TR at 670-671. It contends that this view of the Complainant's rights was confirmed by WESKEM's Preventive Maintenance Manager, Mr. George Johnson (TR at 580) and by the Complainant (TR at 237). I cannot accept this contention. Although BJC has shown that it is likely that the Complainant would have transitioned back to BJC if his job title had been transferred there, it has not been established that BJC and WESKEM officials were aware of this outcome at the time of the March 26, 2002 meeting. Mr. Rice, who attended the meeting by telephone was quite specific when he contemporaneously informed Mr. Hicks that under the adopted proposal Mr. Vander Boegh would be offered another position within WESKEM at the same pay and benefits that he is currently receiving, or could stay at the landfill as an Operator (not as landfill Manager) at less pay. March 28, 2002 email from Mr. Hicks to Rufus Smith. At the Hearing, Mr. Rice testified that he had no knowledge whether BJC ever considered the option of transferring the Complainant back to BJC.

I think one possible solution to the modifying of the contract and getting the title to match the regulations was to move [the Complainant] back to Bechtel Jacobs as a Bechtel Jacobs employee. But I don't know if Bechtel Jacobs really seriously considered that or not.

TR at 375. Accordingly, I find that BJC has not shown by clear and convincing evidence that it made its proposal to the DOE in March 2002 with the understanding that it would have no negative impact on the terms and conditions of the Complainant's position of Landfill Manager. I conclude that its proposal was a Part 708 retaliation.

I will therefore direct BJC to refrain from recommending any changes with respect to the Complainant's job position for a period of one year from the date of this Decision without the express consent of the Complainant.

K. WESKEM's Below Average Rating of Mr. Vander Boegh in Certain Categories of his 2001 Performance Review Was a Retaliation

The Complainant disagrees with the performance review that he received from WESKEM after his protected activity in February and March 2001. Specifically, he objects to low ratings in certain categories such as teamwork and creativity and to the overall review of "Fully Satisfactory", which he refers to as "average". Vander Boegh Post Hearing Brief at 5, referring to WESKEM Performance Appraisal for Gary Vander Boegh covering the period 01/01 through 12/01 (hereafter referred to as the "WESKEM Appraisal"). He asserts that his immediately preceding performance appraisals were more favorable. As support for this assertion, he has submitted two performance appraisals conducted by BJC for the years 1998 and 1999.^{6/} The Complainant concludes that he has suffered an adverse action because his personnel file now contains a performance appraisal that is unduly critical of him. Vander Boegh Post Hearing Brief at 11.

My review of these performance appraisals indicate that the Complainant's factual assertions are accurate. While neither of the BJC appraisals gives the Complainant an overall rating, both are complimentary of him. The 1998 BJC Appraisal notes under the heading "Strengths" that "Gary produces quality work. He is a team player. He provides initiative and leadership to perform work." The 1999 BJC Appraisal states that the Complainant has "met his goals over the past year." It states that

Gary's strengths are his understanding of the regulations and his permit conditions. He understands what it takes to accomplish work safely and in a timely manner.

1999 BJC Appraisal at 3. Neither of these appraisals identifies any weaknesses or deficiencies concerning the Complainant's abilities. Under the heading "Actions for Performance Enhancement," both of the BJC appraisals repeat the Complainant's concern that his office space at the landfill is congested. The 1999 BJC Appraisal also notes that the Complainant will assume a new responsibility with WESKEM to manage wastewater, and that he "will need mentoring/training by WESKEM in order to properly manage wastewater." 1999 BJC Appraisal at 3.

^{6/} WESKEM was the Complainant's employer in 2000, but it did not issue an evaluation of his performance for that year. See Testimony of WESKEM Project Manager Dan Watson, TR at 490.

By contrast the WESKEM Appraisal contains ratings that are critical of the Complainant's abilities. The appraisal was completed by Mr. Fletcher, and contains numerical scores for statements about the Complainant's performance. The following statements were assigned a numerical score of three by Mr. Fletcher, indicating that the Complainant "needs improvement."

Foresees needs and takes action to fulfill them.
Demonstrates ability to make decision with minimal direction.
Ability to base decisions on fact rather than emotion.
Willingness to work harmoniously with others in getting job done.
Knows how to express opinions and ideas in ways that are respectful of others.
Builds on others ideas and doesn't shoot them down.
Accepts constructive criticism.
Actively listens, asks open-ended questions and genuinely hears what the other person is saying.
Ask questions to see if others understand what he/she says.

WESKEM Appraisal at 2. Under managerial comments, Mr. Fletcher included the following critical analysis and suggestions:

Areas for improvement include ownership of issues and taking actions to resolution, developing relationships and working with others harmoniously, and actively listening to the ideas of others. Seek out training seminars and read books to develop these leadership skills.

WESKEM Appraisal at 4.

The low numerical scores and the written criticism contained in the WESKEM Appraisal clearly constitute an adverse action by WESKEM affecting the Complainant's employment. Mr. Vander Boegh's protected disclosures occurred near the beginning of the evaluation period covered by the WESKEM Appraisal, and the appraisal itself was written during the pendency of the Complainant's Part 708 complaint. I therefore conclude that the Complainant has met his burden of showing by a preponderance of the evidence that the WESKEM Appraisal is an adverse personnel action that constitutes a Part 708 retaliation.

WESKEM asserts that its overall rating of the Complainant as "fully satisfactory" cannot be regarded as a retaliation. It also contends that the WESKEM and BJC appraisals cannot be compared because BJC used an "entirely different form and procedure for its evaluation of employees." WESKEM Post Hearing Reply Brief at 5-6. It refers to the testimony of its general manager, Mr. Watson, who stated that he hates "grade inflation" and that he told everybody at the site that a numerical score of five was a person doing their job in a fully satisfactory manner. TR at 491. With respect to the Complainant's appraisal he stated that he would not be surprised if there were scores of three on the appraisals for performance relating to cooperation and teamwork. *Id.* Mr. Fletcher, the supervisor who conducted the WESKEM Appraisal, testified that his appraisal of the Complainant was "about an average review overall." TR at 542. He also testified that in his opinion, "a couple of [the Complainant's] weaknesses are in personal skills and communication skills." TR at 540.

I find that WESKEM has not met Part 708's clear and convincing evidentiary standard with regard to the below average ratings and written criticisms contained in the WESKEM Appraisal. Under the evidentiary standard set forth at Section 708.29, WESKEM must show by clear and convincing evidence that the WESKEM Appraisal would have been the same in the absence of his protected activity. It is therefore crucial for WESKEM to show both that the ratings and statements were accurate, and that the Complainant was treated similarly to other employees with similar performance problems. That full consideration of WESKEM's general employment practices is required is fully consistent with OHA precedent in this area. See Thomas Dwyer, 27 DOE ¶ 87,560 at 89,337 (2000); Roy Leonard Moxley, 27 DOE ¶ 87,546 at 89,241 (1999); and Morris J. Osborne, 27 DOE ¶ 87,542 at 89,209 (1999). As indicated in those determinations, the standard in the clear and convincing area is not whether it was reasonable for WESKEM to have taken its adverse personnel actions regarding the Complainant. The standard is whether WESKEM *actually would have taken* these actions absent his protected disclosures.

As a preliminary matter, WESKEM has not shown by clear and convincing evidence that the WESKEM Appraisal's criticism of the Complainant was accurate. The two BJC appraisals received by Mr. Vander Boegh in 1999 and 1998 do not indicate any previous problems by the Complainant's employer with his job performance, and especially not in the areas identified by the WESKEM Appraisal. The 1998 BJC Appraisal actually commends the Complainant for being a "team player" and for providing "initiative to perform work".

Both of these areas are rated as needing improvement in the WESKEM Appraisal. WESKEM has provided no evidence indicating that the Complainant's job performance deteriorated significantly in these areas following his transition to WESKEM, and little specific evidence to support the testimony of Mr. Watson and Mr. Davis that they believed that the Complainant needed to increase his ability to cooperate with others in performing his job duties.

Nor has WESKEM met its evidentiary burden of showing that other WESKEM employees with similar performance problems received similar ratings and criticism in their appraisals. Mr. Watson's general statements about discouraging grade inflation in employee evaluations are insufficient in this regard.

In light of the failure to provide convincing evidence indicating that the Complainant's ratings were accurate, and in the absence of specific evidence concerning WESKEM's practices for evaluating other employees, I conclude that WESKEM has not met its evidentiary burden concerning this issue. Accordingly, I will direct WESKEM to remove the WESKEM Appraisal from Mr. Vander Boegh's personnel file.

L. Complainant's Allegation that He Continues to be Underpaid in Comparison to other WESKEM Managers or Landfill Managers is not a Retaliation

The Complainant contends that he has suffered from an "inequitable salary" from before the time of his protected activity until the present. He states that organizational charts show that the Complainant was considered the equivalent of a project manager from the time that he was transitioned from BJC to WESKEM, and that project managers receive significantly greater compensation than does the Complainant. Vander Boegh Post Hearing Brief at 3, 10. Vander Boegh Hearing Exhibits A and B. He argues that an organizational chart issued after his protected disclosures put another employee between himself and his previous immediate supervisor, effectively demoting him "at least two levels from the project manager status." *Id.*, Vander Boegh Hearing Exhibit C. He states that this reorganization is a reason why he currently is being paid less than employees with similar duties. He also asserts that testimony at the Hearing proves that he was paid significantly less than the landfill manager at the Oak Ridge site. He argues that the increased disparity in total salary between the Complainant's salary and those of similarly-situated employees caused by identical percentage salary increases is also an adverse action. *Id.* He contends that WESKEM has not shown that employees

with similar duties and responsibilities are paid at the low salary level of the Complainant. *Id.* at 14.

WESKEM asserts that it agreed to pay the Complainant the same salary for the same job classification and duties as he was paid by BJC before the Complainant accepted employment with WESKEM. WESKEM also states that since his employment with WESKEM, the Complainant has received two substantial pay increases. WESKEM asserts that the Complainant is WESKEM's only Landfill Manager. Rebuttal Brief of WESKEM at 1-4.

The Complainant has not raised issues concerning his salary that are appropriate for remedial action in this proceeding. As noted above, in a January 7, 2003 letter to the parties, I stated that the remedies available under Part 708 are aimed at restoring employees to the employment position and situation that they occupied before Part 708 retaliations took place. At that time, I

rejected Mr. Vander Boegh's contention that he be awarded an equitable salary, and stated that Part 708 did not provide a remedy for longstanding salary differences that predated an individual's protected disclosures. Mr. Vander Boegh's contention that there is an "increased discrepancy" between his salary and that of other managers that can be addressed in this proceeding is another attempt to redress these longstanding differences. Mr. Vander Boegh does not contend that the raises he has received from WESKEM are smaller percentage raises than those received by other WESKEM employees. Rather, he argues that his base salary is lower, so that his raises are not keeping pace with those of higher paid employees. I find that WESKEM's decision to raise his salary and the salaries of his co-workers by a certain percentage of base pay is not a retaliatory action for his protected disclosures.

V. Conclusion

Based on the analysis presented above, I find that Mr. Vander Boegh made three disclosures protected under Part 708, and that one or more of these protected disclosures were contributing factors to adverse personnel actions taken by WESKEM and BJC against him. However, I find that Mr. Vander Boegh has not met his evidentiary burden of showing that WESKEM's salary determinations regarding the Complainant constitute Part 708 retaliations. Furthermore, I find that WESKEM has not shown by clear and convincing evidence that it would have issued the March 5 Memo, halted the construction of an office trailer at the U Landfill, proposed to relocate the Complainant's office, or issued the WESKEM Appraisal to the Complainant in the absence of his protected activity.

I find that BJC has shown by clear and convincing evidence that it would have revised the CERCLA white paper and issued the Davis Memo in the absence of Mr. Vander Boegh's protected disclosures. BJC also has established that no Part 708 relief is necessary for BJC employee Kevin Barber's actions toward the Complainant. However, BJC has not shown by clear and convincing evidence that it would have proposed a subcontract change notice to the DOE negatively affecting the Complainant's position as landfill manager in the absence of his protected activity.

Accordingly, Mr. Vander Boegh is entitled to the remedial action ordered below.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Mr. Gary S. Vander Boegh (the Complainant) under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) WESKEM, LLC (WESKEM) immediately shall review the Complainant's personnel file, and shall remove from it the March 5, 2001 Memorandum to the Complainant from Dan Watson, WESKEM Paducah Project Manager entitled "Expectations of WESKEM's Landfill Manager" (the March 5 Memo), if it is found there. WESKEM also shall issue immediately a written statement to the Complainant declaring that the March 5 Memo is rescinded.

(3) WESKEM immediately shall proceed with the construction of an office/document center trailer at the C-746-U Landfill. It shall use either the trailer that it purchased for that purpose or its equivalent, and renovate that trailer in a manner consistent with the proposals and cost estimates provided to Paducah Project Manager Dan Watson by WESKEM employee Kerry Stone in early 2001.

(4) WESKEM shall not relocate the Complainant's primary office to any location outside the C-746-U Landfill without the Complainant's express consent for one year from the date of this Decision and Order.

(5) Bechtel Jacobs Company, LLC (BJC) shall refrain from recommending any changes with respect to the Complainant's job position for a period of one year from the date of this Decision without the express consent of the Complainant.

(6) WESKEM immediately shall remove from the Complainant's personnel file its Performance Appraisal for the Complainant covering the period 01/01 through 12/01.

(7) The Complainant shall produce a report that provides information on his litigation expenses. The Complainant's report shall be calculated in accordance with the Appendix.

(8) WESKEM and BJC shall pay the Complainant's litigation expenses. The amount of this payment shall be in accordance with the report specified in paragraph (7) above.

(9) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the Complainant relief unless, within 15 days of receiving this decision, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: July 11, 2003

APPENDIX

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order: reinstatement; transfer preference; back pay; and reimbursement of reasonable costs and expenses; and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36.

As discussed in my initial agency decision in this matter, Mr. Vander Boegh is entitled to remedial action from the WESKEM, LLC (WESKEM) and Bechtel Jacobs Company, LLC (BJC). A portion of this remedial action consists of reimbursing Mr. Vander Boegh for litigation expenses that he incurred. Accordingly, in order to implement this remedy, I have here provided clarifications concerning the nature and extent of certain benefits that Mr. Vander Boegh is entitled to received. I direct Mr. Vander Boegh to make certain calculations and provide them to the other parties within 30 days of the date of this order. Finally, I have provided for a negotiation period between the parties and a final report on remedial calculations. In the event of an appeal, the parties shall follow the negotiating and reporting steps set forth below unless those requirements are specifically stayed by an appropriate official.

A. Mr. Vander Boegh's Calculations

Within 30 days of this order Mr. Vander Boegh shall provide WESKEM and BJC with the following information,

A calculation of attorney fees and out of pocket litigation expenses incurred by Mr. Vander Boegh with respect to this Part 708 complaint. Mr. Vander Boegh and his legal counsel shall provide reasonable information supporting their claims for fees and out of pocket litigation expenses.

B. Negotiation Period

The parties will have ample time up to sixty days from the date of this order to discuss and negotiate any disputes regarding the calculations. During that period I expect that both parties will

provide reasonable information to facilitate the other party's understanding of calculations.

C. Final Report

Seventy days from the date of this order Mr. Vander Boegh shall provide a report to WESKEM, BJC, and the Office of Hearings and Appeals with a summary calculation. Mr. Vander Boegh shall describe in detail any matters that remain in dispute. WESKEM and BJC will have 15 days from the date of that report to provide a response.

